

Keating Chambers BSA Update

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Welcome

to the second edition of the Keating Chambers BSA Update

The Building Safety Act 2022 (“BSA”) has fundamentally reshaped the legal landscape for building safety in the UK, following the Grenfell Tower tragedy and Dame Judith Hackitt’s review. The Act introduces new responsibilities, remedies, and extended limitation periods, aiming to ensure higher standards and accountability across the construction sector.

This Issue of the Keating Chambers BSA Update includes a comment on the BSA Explanatory Notes from the Department for Levelling Up, Housing and Communities (Jonathan Selby KC); consideration of corporate liability and the “just and equitable” test (Sean Wilken KC & Sarah Williams); a note on Building Liability Orders and limitation periods (Lucy Garrett KC); and discussion about construction product and cladding product claims (James Frampton).

Our contributors to this Update have also considered recent case law, including a commentary on *Triathlon Homes LLP v Stratford Village Development Partnership* (Isobel Kamber & Courtney Burrell-Eade) and summary of *Almacantar Centre Point Nominee No.1 Ltd v Penelope De Valk* (Courtney Burrell-Eade). Finally, we have also included an updated summary of legislative and other relevant developments (James Frampton) and an updated A-Z of all decisions BSA-related (Jennie Wild).

In parallel to the BSA Update, Keating Chambers has organised the Keating BSA Symposium which is to be held in London on 4 November 2025. We have also initiated a series of talks, round table seminars and podcasts which can be made available to all our clients and contacts. Anyone interested in attending the Symposium or having us organise a bespoke talk or seminar with your firm or clients, please contact our knowledgeable Practice Management team who would be more than happy to assist:

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We hope you find this edition of the BSA Update, the talks, round table seminars, podcasts and forthcoming Symposium of use and of interest.

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Use the BSA Explanatory Notes with Care!



Jonathan Selby KC

The BSA is not just a new piece of legislation; it is also novel. As a result, practitioners look for whatever guidance is available to help them understand its scope, meaning and application. The most well-known guidance is contained in the 408-page, official Explanatory Notes prepared by the Department for Levelling Up, Housing and Communities, the first page of which contains the following about “What these notes do”:

- “These Explanatory Notes have been prepared ... in order to assist the reader of the Act and to help inform debate on it. They do not form part of the Act and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Act will mean in practice; provide background information on the development of policy; and provide additional information on how the Act will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Act. They are not, and are not intended to be, a comprehensive description of the Act.”

This statement suggests that the Explanatory Notes should be used with care. Recent cases suggest that they should be deployed with an even greater health warning.

The General Principle

In *O (a minor), R (on the application of) v Secretary of State for the Home Department* [2022] UKSC 3, at [29], Lord Hodge emphasised that the words which Parliament has chosen to enact as an expression of the purpose of a piece of legislation are the primary source by which the meaning of the legislation is to be ascertained. Explanatory notes are external aids which can play only a secondary role in a statute’s interpretation.

As Lord Hodge stated at [30], explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions and may be used to understand the background to and context of a statute and the mischief at which it is aimed. Nevertheless, also at [30], Lord Hodge emphasised that explanatory notes do not displace the meanings conveyed by the words of a statute that, after consideration of that

context, are clear and unambiguous and which do not produce absurdity.

Accordingly, in *Triathlon Homes LLP v SVDP & Others* [2024] UKFTT 26 (PC), the FTT accepted that the Explanatory Notes to the BSA could not properly be used to identify any presumption about how a tribunal should exercise its discretion when determining whether it is just and equitable to make a Remediation Contribution Order (“RCO”) (this point was not challenged before the Court of Appeal).

BDW v Ardmore

In *BDW Trading Limited v Ardmore Construction Limited* [2025] 1 WLR 3101, HHJ Keyser KC had to consider an application for an information order under section 132 of the BSA. An issue arose as to whether the order could be made against associates, in addition to the company which owed the underlying liability: the Explanatory Notes to the BSA suggested that it could be but HHJ Keyser considered that the language of section 132 did not permit such a construction. As he stated at [18]:

“although the Explanatory Notes are an admissible guide to the interpretation of a statute, what matters is the interpretation of the statute, not that of the Explanatory Notes. The Explanatory Notes cannot override the statute. [...] It cannot be assumed that the Explanatory Notes correctly state the effect of the statute. In this instance, in my view, they do not.”

Thus BDW demonstrates that the Explanatory Notes to the BSA are not guaranteed to correctly state the law.

Adriatic Land

It will be remembered that the Explanatory Notes to the BSA expressly state that they have not been endorsed by Parliament, a point which was made abundantly clear in *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point* [2025] EWCA Civ 856, where the Court of Appeal had to consider the proper interpretation of paragraph 9 of Schedule 8 to the BSA: in particular whether the provision prevented a landlord from recovering service charges in respect of costs incurred before the BSA came into force. The relevant provisions of the Explanatory Notes suggested that such costs could not be.

At [31] to [34], Newey LJ considered the history of the Explanatory Notes and identified that none of the Notes that apply to sections 116 to 125 and Schedule 8 of the BSA were available during the passage of the Building Safety Bill (as the BSA then was) through Parliament: those Notes featured only in the version of the explanatory notes published after the BSA had already been enacted.

Accordingly, Newey LJ stated at [67]:

“Where explanatory notes have “accompanied a Bill in its passage through Parliament”, there is sense in regarding

them as capable of shedding light on what Parliament intended. Where, on the other hand, explanatory notes in respect of a statute did not exist when it was being passed, there is less reason to see them as a guide to Parliament’s intentions. They may, of course, show what the Department which promoted the Act understands it to mean, and possibly what it wished it to mean, but the materials plainly cannot have informed Parliamentary decision-making.”

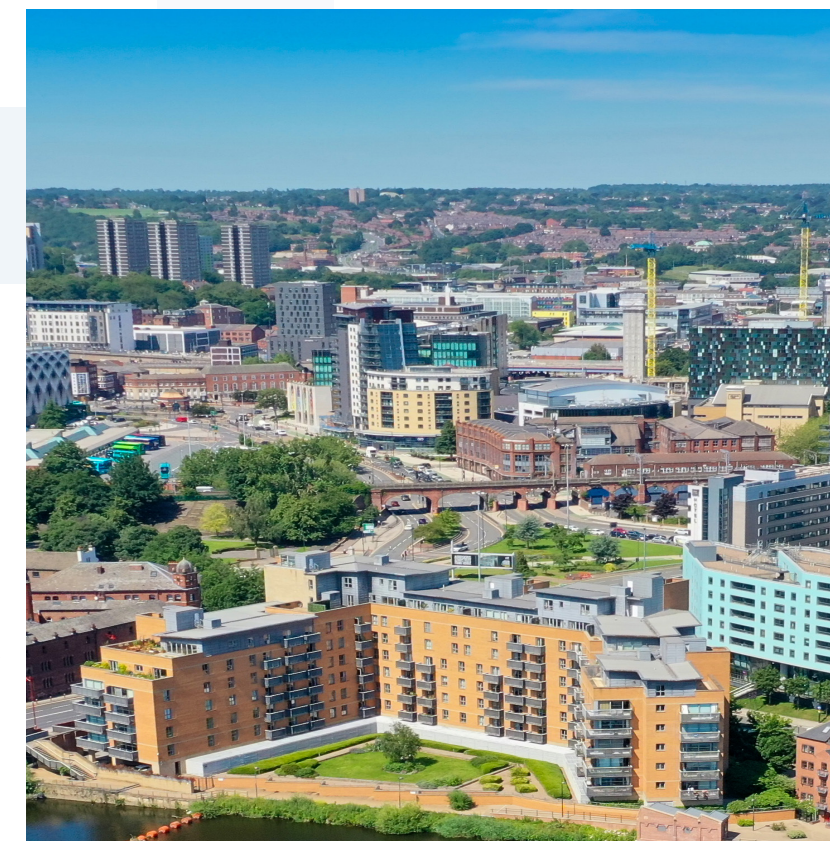
Thus, he concluded at [70] to [72] that the Explanatory Notes to the BSA “may be of persuasive authority, but they do not enjoy any particular legal status and can be compared with academic writings”: the weight to be given to them should depend on the cogency of their reasoning.

Accordingly, because the relevant explanatory notes purported to state the position, and did not provide cogent reasoning for it, he considered at [76] that they could not be taken to provide a reliable guide to Parliament’s intentions.

He also stated at [77] that despite the fact that, in *URS v BDW* [2025] 2 WLR 1095, the Supreme Court attached significance to the Explanatory Notes to the BSA, they did so on the basis of a “misconception” and so the decision of the Supreme Court did not affect his approach.

Conclusion

Use the Explanatory Notes with care. Although they may be of some assistance when working with the BSA, it is clear that they cannot be taken as gospel. Rather, they should be treated like an academic commentary.





Sean Wilken KC



Sarah Williams

“Words Mean What I Say They Mean”: The Building Safety Act, Just and Equitable and Corporate Law

Ask any lawyer (civil or common), and especially any corporate lawyer, and they will tell you that a corporation has its own legal persona which, absent some breach in its incorporation,¹ remains sacrosanct. Company A is not to be treated as Company B nor is A to be liable per se for anything B does. This concept was known in theory in Roman law, can be seen in the existence of guilds on medieval England and was occasionally recognised in relation to debt as early as 1680.²

¹ See eg *Salomon v Saloman* [1897] AC 22.

² *City of London* (1680) 1 Ventr. 351. Though formal recognition had to await the Joint Stock Companies Registration and Regulation Act 1844.

The traditional means of bypassing that separate legal persona were either piercing the corporate veil or attribution of B's defaults to A.³ The latter is, for present purposes, uncontroversial. On the former, in *Prest*,⁴ Lord Sumption said:

“35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil. Like Munby J in *Ben Hashem*, I consider that if

³ A distinction made clear by Lord Sumption in *Petrodel Resources Ltd v Prest* [2013] UKSC 34; [2013] 2 A.C. 415; [2013] B.C.C. 571 at [16].

⁴ *Op cit.*

it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course. I therefore disagree with the Court of Appeal in *VTB Capital* who suggested otherwise at para 79. For all of these reasons, the principle has been recognised far more often than it has been applied. But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy.

Just and equitable

The legal test of “just and equitable” arises regularly across the breadth of our legislation. Although the context of the particular instrument plays a role in the proper construction of the phrase, broadly the test of “just and equitable” offers the court a discretionary power by which it can weigh the competing needs, faults and interests of the parties in order to achieve a fair result. Indeed, in relatively recent legislation, the term “fair” has sometimes been used to replace “just and equitable” on the express basis that the latter is considered by some to be “somewhat antiquated”.⁵ Nonetheless, “just and equitable” remains a mainstay of English and Welsh legislation.⁶

A commonplace example of the phrase is found in section 122(1)(g) of the Insolvency Act 1986, by which a company may be wound up if the court considers it to be “just and equitable”. The application of the phrase was explained by the Privy Council in *Lau*, and includes circumstances that the court weighs in determining whether the applicant has established a just and equitable winding up.⁷ In other words, a just and equitable assessment is not just a nod-through.

The BSA

The bill that led to the BSA was proposed in order to learn lessons from the Grenfell Tower Fire⁸ and to remedy systemic issues identified in the Hackitt independent review.⁹ The BSA’s expressed intention is to make provision about the safety of people in or about buildings and the standard of buildings.

The BSA is divided into a number of parts that variously introduce a new building safety regulator (Part 2), introduce amendments to the Building Act 1984 (Part 3), and introduce considerations in respect of “higher risk buildings” (Part 4).¹⁰

Most interesting for present purposes is the novel liability introduced by section 130, in Part 5 of the BSA. Section 130 gives the court power to make a Building Liability Order (“BLO”). The BLO takes a pre-existing liability (from the Defective Premises Act 1972, section 38 of the Building Act or any other risk to the safety of people in and about the building arising from the spread of fire or structural failure) and applies it to other associated entities who would not, prior to the coming into force of section 130, have been caught by those liabilities. It is therefore, manifestly, an anti-avoidance provision to ensure that companies associated with the wrong-doer also foot the bill.

The important caveat is that the BLO is made at the discretion of the court, and may be made if the court considers it “just and equitable” to do so: section 130(1) BSA.

The paradox arises: how can it be said to be just and equitable to impose liability on a body which is otherwise blameless?

Recent caselaw

There is very limited commentary on the meaning and application of “just and equitable” for the purposes of section 130 BSA.

In *Willmott Dixon Construction Limited v Prater*,¹¹ defendants to an additional claim under section 130 applied for a stay of that claim. Mrs Justice Jefford commented that, although the main claim and additional claim did not strictly have to be dealt with together, it was sensible if they were. Amongst other reasons, this was stated to be because although the associated company could not challenge a finding, or even an agreement, establishing liability of the original entity in separate proceedings, the Defendant could still argue that the circumstances in which that liability was established mean that it is not “just and equitable” to make a BLO.¹² Mrs Justice Jefford held that such arguments are avoided if the associated company is party to the main proceedings. The court did not, however, consider further the circumstances that could contribute to the consideration whether “just and equitable”.

The explanatory notes to the 2022 Act propose that one consideration in the question whether it is just and

equitable to order a BLO is whether the associated company can receive a fair trial. This argument was considered in the unopposed application for a section 130 BLO in the case of *381 Southwark Park Road RTM Company Limited*.¹³ Since the defendant had participated in the trial, it was considered that a BLO should be made.¹⁴ It was material to the court’s decision to order a section 130 BLO that the company to whom the relevant liability applied was a special purpose vehicle, whose sole existence was to acquire the freehold of the relevant property in order to develop it and then divest of it. As such the company was inevitably thinly capitalised and dependent on inter-company or inter-group loans for its financial wellbeing.¹⁵

The remaining source of judicial discussion of the meaning of “just and equitable” in section 130 derives by analogy with the judicial treatment of the phrase in other parts of the BSA. In particular, “just and equitable” is part of the test for an order under section 124 (the Remediation Contribution Order, RCO). RCOs are the province, in the first instance, of the First Tier Tribunal (Property Chamber) (“FTT”).

In *Triathlon*,¹⁶ the FTT considered it just and equitable to make RCOs against the developer, on the basis that the “policy of the 2022 Act is that primary responsibility for the cost of remediation should fall on the original developer,

and that others who have a liability to contribute may pass on the costs they incur to the developer” and that “it is difficult to see how it could ever be just and equitable for a party falling within the terms of section 124(3) and well able to fund the relevant remediation works to be able to claim that the works should instead be funded by the public purse.”¹⁷

On appeal, the argument presented by the appellant in *Triathlon*, that the FTT wrongly applied a presumption that it was “just and equitable” in circumstances where the developer could fund the work, was rejected.¹⁸ The Court of Appeal commented that “there may indeed be cases where it would not be just and equitable to make an RCO against those within section 124(3), even if the result was to leave the costs to be funded by the public” but it did not offer guidance on when that might occur.¹⁹ Thus, although the “just and equitable” test still remains on paper, it is unclear on what basis a party would be successful in arguing that is not just and equitable to make a section 124 order, particularly if they are able to fund the work.²⁰

If that approach were taken in applications for BLOs under section 130,²¹ the scope for an associate company to argue against a finding of “just and equitable” would (contrary to the paradox identified above) be narrowed against the associate company.

Separately, the FTT may also be asked to consider making an order under section 123 (the Remediation Order, or “RO”). Unlike sections 124 and 130, there is no just and equitable test in section 123. Decisions on section 123, such as *Secretary of State for Levelling up, Housing and Communities* (commonly referred to as “Vista Tower” after the property),²² indicate a not-dissimilar approach to that in *Triathlon* where the net for potential, corporate payors is cast wide.²³

⁵ Explanatory Notes to the Banking Act 2009, at paragraph 247.

⁶ These include examples as wide and varied as s. 859M Companies Act 2006 (rectification of the register); s. 22E Water Industry Act 1991 (interest on penalties); and s. 10 of the Severn Bridge Tolls Act 1965 (extinguishment of ferry franchises).

⁷ *Lau v Chu* [2020] UKPC 24; [2020] 1 W.L.R. 4656. For a recent example of this process, see *Khan v Miah* [2025] EWHC 635 (Ch); [2025] B.C.C. 675.

⁸ The fire at Grenfell Tower in west London broke out on 14 June 2017. It claimed the lives of 71 people.

⁹ <https://www.gov.uk/government/publications/independent-review-of-building-regulations-and-fire-safety-final-report>

¹⁰ Defined as a building in England that is at least 18 m in height/at least 7 storeys, and contains at least 2 residential units: s. 65 BSA.

¹¹ [2024] EWHC 1190 (TCC).

¹² Op cit at [18].

¹³ *381 Southwark Park Road RTM Company Limited v Click St Andrews Limited (In Liquidation)* [2024] EWHC 3569 (TCC); (2024) 219 Con. L.R. 29.

¹⁴ Op cit at [19] and [20].

¹⁵ Op cit at [12].

¹⁶ *Triathlon Homes LLP v Stratford Village Development Partnership* [2024] UKFTT 26 (PC); (2024) 212 Con. L. R. 1.

¹⁷ Op cit at [265] and [278].

¹⁸ *Triathlon Homes LLP v Stratford Village Development Partnership* [2025] EWCA Civ 846 at [61]-[64].

¹⁹ Op Cit at [65].

²⁰ See also *Grey GR Limited Partnership v Edgewater (Stevenage) Limited* a decision of the FTT on 24 January 2025 in respect of property “Vista Tower”, in which extensive section 124 RCOs were made.

²¹ And, indeed, a comparison between the two sections was made in *381 Southwark Park Road*.

²² *The Secretary of State for Levelling Up Housing and Communities v Grey GR Limited Partnership* 216 Con. L.R. 1.

²³ In the case of Vista Tower – very wide.





The problems

The BSA therefore poses two conundrums:

1. How do its provisions sit with company law as traditionally understood?
2. What are the parameters to the operation of section 130?

As to the first, there is a simple answer and a less simple answer. The simple answer is the BSA does not sit with company law as understood. Section 130 was intended and was expressed to remove the corporate veil and to ignore separate corporate personality. The less simple answer involves the evasion of corporate responsibility. It is often said that section 130 exists to prevent companies using shell companies deliberately to avoid responsibility. If that be the case, why does not the passage from Prest apply? That would mean there was already a common law right to recover and the vice at which section 130 was aimed was covered. If that is right, then either section 130 is otiose or there must be strict parameters on its operation.

The question of parameters is therefore critical – and the only ones are that it must be “*just and equitable*” to make the order. Thus, one returns to what is meant by just and equitable. After all in both *Triathlon* and *Adriatic*,²⁴ the Court of Appeal made clear that the parameter on the operation of the BSA was what was just and equitable. At the same time, however, the Court in effect held that the parameter imposed by what is “*just and equitable*” (i.e. where it would not be just and equitable to make the order) was exceptionally narrow.²⁵

²⁴ *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point* [2025] EWCA Civ 856.

²⁵ See *Triathlon* at [65]

Possible answers

Manifestly the easiest answer is to adopt that which was suggested at [65] in *Triathlon*:

“Suppose a case where a director of a landlord was also a director of other companies which have no other connection with the landlord or its group; such companies might have had nothing to do with the development and be engaged in entirely different businesses, or might include a charitable company to which the director had given his time voluntarily. It is not obvious that it would always be just and equitable to make RCOs against such associated companies even if the effect of refusing to do so was to leave the costs to be borne by the public.

That, we suspect, however, will not be open to many. The use of cladding was widespread and there were many in the manufacture, supply, delivery and installation supply chain – quite apart from the landlord, the developer and the main contractor. Thus, the BSA will probably capture a considerable number of companies – in theory.

There are therefore five routes open.

First, to a non-England & Wales entity it is possible that it could object to jurisdiction. Absent the facts, it is difficult to be definitive on this issue – but it is reasonable to assume that an entity that manufactured and/or supplied and/or installed and/or advised on defective cladding will not be able successfully to resist jurisdiction.

Second, to argue that either the product was not defective or it was only defective due to installation or on site design (for which the entity was not responsible). Thus, the argument would be that as the entity did not cause the defect it would not be just and equitable to impose liability.

Third, to try to expand [65] of *Triathlon* to contend that the supposed parameter of “*just and equitable*” is too narrowly drawn on the facts of the particular case. If *Vista Tower* survives appeal this may be difficult.

Fourth, an attack on the very limited application of “*just and equitable*” as a matter of law. This would contend that there are two conflicting principles at work here: the expressed intention behind the BSA and very long standing company law. The former has been entirely focussed upon and the latter ignored in the judgments handed down. Allied to this is the fact that on the current case law it is very difficult to see what – if any – parameter “*just and equitable*” sets. All of that said, this argument would not succeed below the Court of Appeal.

Fifth, again for a non-England & Wales entity, to resist enforcement in their own country. We can see two grounds for this: retrospectivity and arguments based on Article 1 Protocol 1 of the European Convention on Human Rights. Both are live arguments in England and Wales and may find traction elsewhere.

Building Liability Orders and Limitation: Navigating Uncharted Waters

The BSA introduced several new remedies to address fire safety defects in buildings, including in particular BLOs under section 130. The BSA does not expressly provide for the limitation period applicable to a BLO, the Guidance Notes are silent and there is as yet no authority on point. This article considers when, if at all, time might expire.



Lucy Garrett KC

The Limitation Act 1980

The Limitation Act governs the time within which “actions” must be brought. If a particular claim is not covered by the Limitation Act, it is in principle not subject to any time bar: limitation is a creature of statute. Different causes of action have, of course, different prescribed periods.

For each of these, the Limitation Act refers to the relevant type of “action” and provides that time starts to run on the date on which the cause of action accrues. An “action” is defined in section 38(1) of the Limitation Act as “any proceeding in a court of law...”. The effect of the Limitation Act is prevent the action, i.e. to bar the claim. It does not extinguish the underlying liability for breach of contract, etc.¹ This is usually referred as limitation barring the remedy (e.g. for damages), not the right.

A cause of action accrues when all the elements legally necessary for that particular claim are present. The elements of the cause of action are of course different for different claims and therefore the cause of action accrues at different times. For causes of action under a statute, the statute itself often specifically prescribes a date (as the DPA does).

The Nature of BLOs

The BSA does not include any such express provision regarding the accrual of the cause of action in relation to BLOs nor does it for Building Information Orders (“BIOs”) under s.132 (which of course relate to information needed for a BLO), ROs or RCOs under ss. 123 to 124.

On the other hand, the BSA does make express provision in sections 148(8) and 149(8) for the date on which the cause of action accrues “for the purposes of section [10B(1)] [10B(2)] [as applicable] of the Limitation Act 1980...” for the new liability relating to construction products in section 148 and the new liability for past defaults relating to cladding in section 149.

This distinction is made, it is suggested, because the new rights to obtain a BLO, a BIO, an RO and an RCO do not in fact involve the creation of a new cause of action. They certainly involve the creation of a new remedy, but the remedy in each case is based on the existence of a separate cause of action:

- For BLOs, the new remedy is that any “relevant liability... of a body corporate” is also the liability of an associated (as defined) body corporate. The “relevant liability” is defined in section 130(3) as either a liability incurred pursuant to the DPA or section 38 of the Building Act 1984 or “as a result of a building safety risk,” which is (in summary) a fire-related risk affecting people’s safety. The BSA does not create any new liability for such a risk so this involves a liability for breach of contract or in tort or under another statute not the DPA or the Building Act 1984 (such as the Civil Liability (Contribution) Act 1978); that is, it involves a liability pursuant to an existing cause of action. A BIO

¹ Save for certain causes of action relating primarily to the recovery of land, where the Limitation Act 1980 provides expressly that the right is extinguished.



is similarly available if the body corporate “is subject to a relevant liability (within the meaning of section 130).”

- ROs (requiring the remediation of defects) are available against “relevant landlords.” This is defined in section 123(3) as, “in relation to a defect in a relevant building, means a landlord under a lease of the building or any part of it who is required, under the lease or by virtue of an enactment, to repair or maintain anything relating to the relevant defect” [emphasis added]. Again, the remedy is new, but the availability of the remedy depends on the landlord’s existing liability, and thus the cause of action, to repair or maintain under a lease or an enactment.
- RCOs are of course the BLO equivalent in relation to ROs. Similarly, it makes specified entities liable to contribute to the cost of remedying defects in what is referred to in the cases as a hierarchy or cascade of responsibility,² starting with the landlord and the developer and finishing with persons associated with the landlord or the developer.

As above, there is no authority directly on point, but this analysis is consistent with the approach of the TCC in the decided cases so far, which proceed on the basis that the “relevant liability” has to be established separately and that the BLO or BIO is a separate remedy which is contingent on this liability.³ All the key FTT decisions so far dealing with the grant of ROs or RCOs also treat them as additional remedies rather than a freestanding cause of action.⁴

Two Competing Approaches to Limitation

Given this analysis, two possibilities emerge regarding limitation periods for BLOs:

- Time-Barred with Underlying Liability:** BLOs are subject to the limitation period of the underlying “relevant liability.” If a claim under the DPA or for a building safety risk is time-barred, the BLO application would also be barred.
- No Limitation Period:** BLOs are not subject to statutory limitation periods, and the limitation status of the underlying liability is merely a factor in the “just and equitable” test for granting a BLO.

The first possibility aligns with traditional limitation principles. The BSA’s detailed amendments to the Limitation Act, including retrospective extensions for existing causes of action, suggest no intent to allow BLOs to bypass time bars. Public policy favours certainty,

enabling defendants to assess their commercial exposure.

However, it is suggested that the second possibility is likely the correct one. The BSA refers to a “relevant liability.” As set out above, the Limitation Act 1980 does not extinguish liability for any such claim, it merely provides a defence to it; a defence moreover on which a given defendant can decide not to rely. It is difficult to read the phrase “relevant liability” under the BSA as meaning “relevant liability subject to any limitation defence which may apply.” That is simply not what the words say.

This construction obviously does not provide the respondent to a BLO application with a bright line defence or certainty as to when/whether a time-barred relevant liability will mean it is not just and equitable to grant the order. However, the application of the just and equitable test will enable a court to protect a respondent in appropriate cases. Further, this construction serves the overall purpose of the BSA: to ensure that fire safety defects in buildings are rectified, and that money is available for that purpose from anyone sufficiently associated with the original contractor who has funds.

Application of the Just and Equitable Test

The application of the just and equitable test in a limitation context will be highly fact dependent. It is suggested that the fact that limitation has expired will be relevant but not determinative. It is relevant to note here that the passage of time could be very significant before any relevant liability was time barred. Under the just and equitable test, if a claimant waited 25 years to bring its DPA claim (well within time), a respondent to a BLO application could presumably rely on the prejudice caused to it by the lapse of time whether or not the underlying relevant liability claim was technically time-barred. It seems likely, however, that the respondent would need to point to some specific prejudice or change in the factual/commercial situation resulting from the delay.

As with many other aspects of the BSA, practitioners and industry will await the first decisions on these points with interest.

² See *Triathlon Homes LLP v Stratford Village Development Partnership & Others* [2024] UKFTT 26 (PC) at [11]. *Triathlon* was appealed to the Court of Appeal; the appeal was handed down in July 2025 and upheld the FTT decision: [2025] EWCA Civ 84. See the detailed discussions in Keating’s BSA Update 1 and latter in this Issue.

³ Jefford J in *Wilmott Dixon Construction Limited v Prater & Others* [2024] EWHC 1190 (TCC) and *381 Southwark Park Road RTM Company Limited v Click St Andrews Limited (in liquidation) & Others* [2024] EWHC 3179 (TCC) and HHJ Keyser KC in *BDW Trading Limited v Ardmore Construction Limited & others* [2025] EWHC 434 (TCC).

⁴ *Waite & others v Kedai Limited* [2023] LON/00AY/HYI/2022/0005 & 0016, *Triathlon and Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Others* [2025] CAM/26UH/HYI/2023/0003.

Almacantar Centre Point Nominee No.1 Ltd & Ors -V- Penelope De Valk & Ors [2025] UT 298 (LC)



Courtney Burrell-Eade

In this Judgment, the Upper Tribunal (“UT”) provided clarification on the meaning of the terms “cladding remediation”, “cladding” and “unsafe” in paragraph 8 of schedule 8 of the BSA (which sets out leaseholder protections from service charges). Most significantly, the UT upheld the FTT’s decision that “cladding remediation” is not limited to works that are a “relevant measure” relating to a “relevant defect”.

The Decision of the FTT

The freeholder had made an application under section 27A(3) of the Landlord and Tenant Act 1985 seeking a determination that a proposed scheme of works to the defective façade at Centre Point House (“CPH”) could be recovered from the respondent leaseholders under the service charge provisions in their leases.

The FTT held that no service charge would be payable by a number of Respondent lessees in respect of the Proposed Scheme as they were entitled to rely on paragraph 8 of Schedule 8 of the BSA which stated:

“(1) No service charge is payable under a qualifying lease in respect of cladding remediation.

(2) In this paragraph “cladding remediation” means the removal or replacement of any part of the cladding system that –

(a) forms the outer wall of an external wall system, and

(b) is unsafe.”

Arguments on Appeal

The arguments on appeal were as follows:

1. Whether paragraph 8 of Schedule 8 was limited to cladding remediation which was a relevant measure addressing a relevant defect?
2. Whether the external façade at CPH was “cladding” – i.e. an “outer skin”, or whether it formed the exterior of the building itself – or a “cladding system”?
3. Whether the term “unsafe” in paragraph 8 was limited to inherently unsafe cladding posing a fire risk?

The Decision of the UT

On the primary question, the UT upheld the FTT’s decision that the benefit of paragraph 8 of schedule 8 is not limited by reference to a “relevant defect” and no qualification is to be imported to that effect. This was for the following reasons:

1. Paragraph 8 is clear and unambiguous and accords with the underlying policy of the BSA and reflects the clear ministerial statement that “no leaseholder in their own flat ‘would pay a penny to fix dangerous cladding’”. [51]
2. This interpretation is not out of kilter with the structure of sections 116 to 124 of the BSA and the remainder of schedule 8. Paragraph 8 provides a different protection for a limited group of qualifying leaseholders where the relevant building has “unsafe cladding”. [52]
3. The defects to the façade at CPH originated from the original design and construction of the building, which occurred between 1963 and 1966 and therefore fell outside the scope of section 120. Accordingly, the Proposed Scheme was not a “relevant measure” to remedy a “relevant defect”. However, paragraph 8 does not fall foul of this bright line cut-off within the package of remediation offered by paragraphs 2 to 5. It is only concerned with making unsafe cladding safe. [53-55]
4. The definition of “relevant defect” has more than one component. This is very different from the criterion of “unsafe”. [58]

On the second question, the UT held that, where there was no definition of “cladding” in the BSA, the question of whether a building includes cladding is one of fact. The FTT had regard to the technical definitions and heard evidence, including from experts on the matter.

“RCOs are restricted to addressing “relevant defects”, whereas the UTT’s decision confirms that the cladding exemption under paragraph 8 of schedule 8 applies more broadly.

Accordingly, the UT found there was no justification to depart from the FTT’s findings: see [69-70].

As to whether there was a “cladding system”, the UT rejected the Appellants’ argument that a “cladding system” required two systems. The UT held that there was no justification for limiting paragraph 8 to a structure with two separate systems, it could therefore apply to the composite system at CPH: see [74].

As to whether the cladding system was “unsafe”, the UT rejected the Appellants’ argument that “unsafe” should be interpreted more narrowly than the wider “building safety risk” such that it should be limited to something posing a fire risk and excluded something which may become unsafe by reason of slow degradation. The UT upheld the FTT’s construction of “unsafe”, namely that it is something more than simply out of repair and is a sufficiently wide term to encompass a range of threats to the safety of the building or to its residents or nearby members of the public. The words are clear and unambiguous and there is no limitation to “fire risk”. [81]

Commentary

The UTT’s decision on the second and third question is straightforward and relatively unsurprising. However, the UTT’s determination of the first question is less so. Whilst the UTT may be correct that on a proper interpretation paragraph 8 of schedule 8 it is not limited to “relevant defects”, this interpretation may nonetheless give rise to practical problems that cast doubt on whether this is what parliament intended. In particular, the UTT’s interpretation introduces potential inconsistencies with other parts of the BSA, particularly in relation to RCOs. RCOs are designed to offer freeholders alternative mechanisms for financing remediation works that would otherwise be covered by service charges. However, RCOs are restricted to addressing “relevant defects”, whereas the UTT’s decision confirms that the cladding exemption under paragraph 8 of schedule 8 applies more broadly. Accordingly, RCOs would not be available for cladding remediation works under paragraph 8 of schedule 8. This may result in practical challenges for certain freeholders, who could face difficulties in securing funding for cladding remediation works.



James Frampton

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

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]).

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.

Deep Pockets, Deeper Duties?



Introduction

This article will assess the implications of the hierarchy of liability for the costs of remedying historical building safety defects which has been endorsed by the Court of Appeal in *Triathlon Homes LLP v Stratford Village Development Partnership & Others* [2025] EWCA Civ 846 in respect of the granting of an RCO.



Isobel Kamber



Courtney Burrell-Eade

A detailed overview of the decision can be found [here](#).

The facts are as follows:

- (1) The applications for RCOs concerned the cost of rectifying fire safety defects in five tower blocks in the former Olympic Village in Stratford, London ("the Blocks"), on application per Block.
- (2) The applications were made by Triathlon Homes LLP ("Triathlon"), who is a long leaseholder of all the social and affordable housing in the Blocks.
- (3) The Blocks had been developed by the First Respondent ("SVDP"), which is a limited partnership whose three partners ultimately owned through subsidiaries by the Second Respondent ("Get Living").
- (4) SVDP is also the beneficial owner of the freehold to the development.

(5) Get Living did not own SVDP at the time of the development of the Blocks. At that time, the development was owned by the Olympic Delivery Authority, a public body.

(6) Get Living also owns the long leases to all the private rented housing in the Blocks.

(7) The Government Building Safety Fund granted funding up to £24.5 million (later increased to £27.5 million) toward the remediation costs. By the time of the FTT hearing the funding had been dispersed.

Legal framework of associated persons

Section 124 of the BSA empowers the FTT to make RCOs. It provides as follow, *inter alia*:

- (1) The making of the order must be "*just and equitable*" in relation to a relevant building.

(2) The class of bodies who may be required to contribute is limited to a body corporate or partnership (if it is a landlord, a former landlord, a developer, or a person associated with any of those).

Section 121 of the BSA defines "*associated persons*" for the purposes of sections 122 to 124 and Schedule 8 of the BSA as a partnership or body corporate associated with another person in the following circumstances:

1. 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 the time.
2. 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 5 years ending at the qualifying time, 14 February 2022 ("the relevant period").
3. A body corporate is associated with any person who was a director of the body corporate at any time in the relevant period.
4. 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, one of them controlled the other or a third body corporate controlled both of them.

How Triathlon dealt with the issue

There was no dispute between the parties that the jurisdictional or gateway requirements had been satisfied. It was common ground that there were "*relevant defects*" in a "*relevant building*". That Triathlon was an "*interested person*" and both SVDP and Get Living can be a "*specified body corporate or partnership*" pursuant to section 121 ([266] FTT decision).

However, the Respondents argued that in circumstances where the works have already been commissioned and are fully funded and on target there was no reason to make an RCO.

In rejecting this submission, the FTT found that public funds are intended as a last resort, and the existence of a government grant does not excuse or eliminate the responsibility of developers or their associates. At [278] it said "*... it is difficult to see how it could ever be just and equitable for a party falling within the terms of section 124(3) and well able to fund the relevant remediation works to be able to claim that the works should instead be funded by the public purse*".

On appeal, the Respondent's took issue with this, contending that the FTT had "*created a presumption that an RCO should be made against a developer with means*" ([60] [2025] EWCA Civ 846).

The Court of Appeal rejected this submission and in doing so it said, in summary:

1. That, where possible, those connected to a building (like developers or landlords) who can afford to pay for remedial works should do so, rather than relying on public funding.
2. The purpose of these mechanisms (such as for an RCO) under the BSA are to pass costs onto developers or landlords, which the availability of public funds does not override.
3. The FTT was justified in concluding that it was unreasonable for the public to fund the remediation works in this case, given the developer and its associates could afford to pay.
4. While supporting the FTT's conclusion in this specific case, the judge cautioned against a blanket rule that it could *never* be just and equitable for public funds to cover costs, especially in situations involving loosely associated companies ([63] to [65] [2025] EWCA Civ 846).

The presumption

The judgment leaves no doubt in reinforcing the policy position that primary responsibility for the costs of addressing historic building safety issues lies with original developers and their related entities.

However, whilst the Court of Appeal rejected the submission that a presumption had been created, the Court's strong endorsement of the FTT's position that the BSA establishes a clear "*hierarchy*" of liability with developers at the top and that it saw no reason the public should fund the works when the developer and its wealthy associate could afford to do so, is in essence tantamount to enforcing a presumption that an RCO should be made against a developer with means. After all, who would pursue a developer with no means to fund the remedial works required?

Furthermore, this framework of liability applies even where the developer is a thinly capitalised special purpose vehicle (SPV) or has undergone structural or ownership changes. Under the BSA's broad definitions, parent companies and other affiliated organisations remain squarely within the potential reach of an RCO. The broad reach of this framework of liability further reinforces that there is a broad presumption, even if "*presumption*" is not the label that the Court of Appeal want to use.

The Court of Appeal dismissed arguments in regard to the developers shifting beneficial ownership and the historic public ownership of SVDP. In doing so it has reinforced the strict legal position that acquiring a development entity includes taking on its existing and future liabilities, whether known or unknown.

As a result, corporate transactions involving property development businesses are likely to face heightened legal and commercial scrutiny, with enhanced focus on legacy project liabilities.

Additionally, the Court of Appeal has made a clear statement that the financial burden of remedying building safety defects should not be placed on leaseholders and the Government Fund should be a last resort, instead placing liability on those responsible for the original construction of the development or those who have benefitted from its construction even when they were they did not benefit for decades after the build (i.e. “associates”). The presumption is clear; developers (or individual/entities acquiring them) are at the top of the liability list.

Practical benefits and implications

There are benefits to such a presumption and one can hope that the position will (a) drive a more proactive approach to defect management during the project and (b) ensure that building safety standards are taken more seriously from the outset of a project.

Furthermore, the clear statement that leaseholders should not face the financial burden of remedying these defects should alleviate the concern for prospective purchasers of leasehold flats. There is now less of a concern that the service charge could go through the roof as a result of defects discovered some decades after the developments completion.

However, there are some potential negative consequences, for example, in circumstances where the attribution of a developer entity happened some 20 years before the defects were noted, the “associated” entity and/or individual will often be unable to access documents relating to the works.

As has been noted in Simon Hargreave KC’s recent article - “[Could a Contribution Claim be Founded on an RCO?](#)” it is those “associated” with the developer who are likely to be in need of a contribution claim to recover losses paid out pursuant to an RCO.

However, these are precisely the individuals and/or entities who will likely find pleading and proving a claim difficult due to a lack of information and/or documents being available. This will especially be the case in circumstances where a development was completed some three decades ago in a time when RCO’s were not envisaged and the importance of keeping the documents for such a long time was not a reality.

Going forward, developers should make it a priority to save all relevant documentation throughout the lifecycle of their projects and retain these records for many years and potentially decades.

Failing to maintain proper records could seriously jeopardize future claims or the sale of development entities.

Prospective buyers, whether individuals or companies, should exercise caution when considering the acquisition of developer entities that cannot provide well-maintained records of their legacy projects. Legal advisors involved in such transactions must also recognise the critical importance of these historical records.

Does the presumption remain in the absence of public funding?

Finally, despite the Court of Appeal’s ruling that there are limits on when an associate should be subject to an RCO, no limit has been found in any authority thus far.

In *Helpfavour Limited & Others v (1) Rosco Ingo Limited & (2) Rosco & Perlini Limited* (Lon/00BH/BSB/2024/0500), the FTT considered whether to make an RCO against an “associate” of a developer. Here, the Second Respondent was associated by virtue of the fact that both companies shared the same director during the relevant period for the purposes of s.121(5) of the BSA. The Second Respondent argued that it was not just and equitable to make an RCO as the company’s business are not linked in any way.

This was not a case where the companies were part of the same corporate group, with the developer operating with minimal assets for the purpose of evading liability. The developer’s sole business was constructing the Building. The Second Respondent’s business was property maintenance unconnected with the development at issue. Further, the Second Respondent was incorporated less than 4 months before completion of the building.

Notwithstanding this, the FTT decided it was just and equitable to make an RCO against the Second Respondent. It had particular regard to the fact that:

- 1. the director was the majority shareholder for both the First and Second Respondent; and
- 2. both companies are in the property industry.

Whilst not identified as a significant factor by the FTT, it seems relevant that the developer had limited and/or minimal assets to fund any remediation works. This further reinforces the fact that a developers means is a factor to the Tribunals assessment as to whether a developer should pay. As above, the presumption is that developers with means should pay.

Although this decision pre-dates the Court of Appeal’s decision in *Triathlon*, it also indicates that being engaged in an entirely different business with no connection to the building at issue is not enough to prevent an RCO being made.

Legislative and other developments (from 1 January 2025 to 30 June 2025)



James Frampton

Click the links below to read the articles.

August 25 – Building Safety Remediation: monthly data release



(published 25 September 25)

- 5,554 residential buildings 11m or higher identified with unsafe cladding (340 increase from end of July 2025).
- 2,677 (48%) have started or completed remediation works (175 increase from end of July 2025).
- 1,927 (35%) have completed remediation works (173 increase from end of July 2025).

<https://www.gov.uk/government/publications/building-safety-remediation-monthly-data-release-august-2025/building-safety-remediation-monthly-data-release-august-2025>

31 July 25



Appointment of the first six members of the Fundamental Review of Building Regulations Guidance Panel was announced. The panel follows a recommendation by the Grenfell Tower Public Inquiry Phase 2 report. A final report is expected in Summer 2026. <https://www.gov.uk/government/news/membership-of-fundamental-review-of-building-regulations-guidance>

17 July 25



MHCLG published an update on the Remediation Acceleration Plan published in December 2024. <https://www.gov.uk/government/publications/remediation-acceleration-plan-update-july-2025/remediation-acceleration-plan-update-july-2025>

The update included announcing a new Remediation Bill which will require landlords of buildings 18m or more in height with unsafe cladding to complete remediation by the end of 2029, and landlords of buildings 11-18m in height to complete remediation by the end of 2031. <https://www.gov.uk/government/news/deadline-set-for-unsafe-cladding-removal>

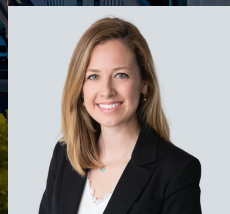
17 July 25



MHCLG published a Joint plan to accelerate remediation of social housing for social landlords, regulators and government. <https://www.gov.uk/government/publications/joint-plan-to-accelerate-social-housing-remediation-and-improve-resident-experience#full-publication-update-history>

Building Safety Act

A to Z



Jennie Wild

A

Accountable person (higher-risk building)

(UTT) *Unsdirfer v Octagon* [2024] UKUT 59 (LC): For the purpose of s72(1) of the BSA an “accountable person” for a higher-risk building did not include a manager appointed under section 24 of the Landlord and Tenant Act 1987. By virtue of s72(2) of the BSA, most RTM companies were an accountable person.

Ancillary orders

Lessees of flats at 419 High Road, Space Apartments, N22 8JS v Avon Ground Rents Ltd (FTT) (LON/00AP/HYI/2022/0017): Ancillary orders, necessary to make a s123 Remediation Order effective and workable, could be made by the Tribunal [74].

Associated (s124/125, s121)

Triathlon Homes LLP v Stratford Village Development Partnership & Ors (FTT) (LON/00BB/HYI/2022/0018-22): An associate might exist between beneficiaries of a trust and their trustees, between current and former partners and their partnerships, between directors and their companies, and between companies with common directors or controlling interests [38] (not overturned on appeal).

Associated (s130(4), s131)

381 Southwark Park Road RTM Company Limited & Ors v Click St Andrew Limited (In Liquidation) & Anor (2025) 219 Con LR 29: Click Group Holdings controlled or did control Click St Andrews within

the meaning of s131(4) of the BSA because Click Group Holdings held all the shares of Click Above Limited and Click St Andrews was a wholly owned subsidiary of Click Above Limited. Holdings controlled Click St Andrews indirectly in the sense that it was able, through the corporate structure, to secure that the affairs of Click St Andrews were conducted in accordance with its wishes [7]. *BDW Trading Ltd v Ardmore Construction Ltd & Ors* (2025) 219 ConLR 1: For the purpose of s131 BSA the precise and carefully confined definition of “associate” was relatively extensive on account of the definition of “the relevant period” [13, obiter].

B

Building Liability Order (Quantification)

381 Southwark Park Road RTM Company Limited & Ors v Click St Andrew Limited (In Liquidation) & Anor (2025) 219 Con LR 29: the Court was not required to quantify the relevant liability at the point of making a BLO, particularly in circumstances where the Court had no figures to enable it to do so [29].

Building Safety Fund (s123)

SoS v Grey GR Limited (Chocolate Box) (FTT) (CHI/00HN/HYI/2023/0008): The obligation on a landlord to undertake BSA works did not only arise on receipt of BSF funding. There was no hint in the statutory provisions that funding played any part. A failure to make progress on BSA works due to seeking funding weighed heavily when considering whether to make a Remediation Order [259].

Building Safety Fund (s124)

Triathlon Homes LLP v Stratford Village Development Partnership & Ors [2025] EWCA Civ 846: The FTT was justified in concluding that as between the parties listed in section 124 of the BSA and the public purse as potential contributors to the works, public funding was to be seen as a matter of last resort. There was no reason to think that the Building Safety Fund was intended to displace the provisions of the BSA. In practical terms, this meant that if it was prima facie just and equitable to grant an RCO, that works were funded was not a reason not to make an RCO. However, there may be cases where it would not be just and equitable to make an RCO against those in s124(3), even if the result was to leave the costs to be funded by the public [61 – 65, 88].

Building Safety Risk (s120(5))

Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Ors (Vista Towers) (2025) 218 ConLR 66 (FTT) (CAM/26UH/HYI/2023/0003): For the purpose of s120(5) of the BSA, any risk above “low” risk might be a “building safety risk”. A low risk was the ordinary unavoidable fire risks in residential buildings and/or, in relation to PAS 9980, was an assessment that fire spread would be within normal expectations [72].

Building Safety Risk (s130(3)(b))

381 Southwark Park Road RTM Co Ltd v Click St Andrews Ltd (2024) 218 Con LR 258: Breaches relating to fire and structure posed a building safety risk within the meaning of s130(3)(b) of the BSA [198], [219].

C

Cladding remediation (Schedule 8, paragraph 8)

Adriatic Land 5 Limited v The Long Leaseholders at Hippersley Point [2025] EWCA Civ 856: Leaseholders with qualifying leases do not have to pay any service charges in respect of cladding remediation by application of paragraph 8 of schedule 8. This applied even if the landlord did not meet the contribution condition. This implemented the Secretary of State’s announcement that no leaseholder living in their own flat “would pay a penny to fix dangerous cladding” [170]. *Almacantar Centre Point Nominee No 1 Ltd & Anor v Penelope de Valk & Ors* (UTT) [2025] UKUT 298 (LC): Paragraph 8 of Schedule 8 applied to defective cladding that was not also a “relevant defect” within the meaning of s120 BSA [50]. Whether a building included cladding was one of fact [69]. There was no justification for the

UTT departing from the FTT’s finding that the façade was “cladding” for the purpose of the BSA [70]. The “cladding system” was the outer wall of an external wall system. There was no justification for limiting paragraph 8 to structures with two separate systems and would be met if there had only been one composite wall [74 – 75]. The word “unsafe” meant something more than simply out of repair, and encompassed a range of threats to the safety of the building, or its residents or nearby members of the public. It was not limited to “fire risks” [81].

Corporate Veil

Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Ors (Vista Towers) (2025) 218 ConLR 66 (FTT) (CAM/26UH/HYI/2023/0003): The power to make RCOs against associated companies was a radical departure from normal company law, but it did not pierce the corporate veil because it did not expose the individual members to unlimited personal liability [351]; *Triathlon Homes LLP v Stratford Village Development Partnership & Ors* [2025] EWCA Civ 846: That the beneficial owners of the respondent companies had changed was not relevant: if you invested in a company, you took the risk of unforeseen liabilities attaching to that company [118].

Costs

Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Ors (Vista Towers) (2025) 218 ConLR 66 (FTT) (CAM/26UH/HYI/2023/0003): The tribunal was not generally a cost-shifting jurisdiction and should not be taken to be encouraging a costs application in the context of an RCO [389].

D

Developer

Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Ors (Vista Towers) (2025) 218 ConLR 66 (FTT) (CAM/26UH/HYI/2023/0003): The developer was a key target of an RCO, at the top of the hierarchy of liability [232, 350]. *Triathlon Homes LLP v Stratford Village Development Partnership [2025] EWCA Civ 846:* The policy of the BSA is that primary responsibility for the costs of rectification works should fall on the original developer [69]. A developer responsible for the defect who retains an interest in the building should stand at the top of the hierarchy or cascade of those who will pick up the costs [87].

I

Impecuniosity

Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Ors (Vista Towers) (2025) 218 ConLR 66 (FTT) (CAM/26UH/HYI/2023/0003): Impecuniosity was not a significant reason for or against making an RCO [352].

Information Order (Respondent)

BDW Trading Ltd v Ardmore Construction Ltd & Ors (2025) 219 ConLR 1: An IO can only be made against the “original body” which had a relevant liability, and not an associated company, which was contrary to the example in the BSA Explanatory Notes [17].

Information Order (Relevant Liability)

BDW Trading Ltd v Ardmore Construction Ltd & Ors (2025) 219 ConLR 1: Information Orders under s132 BSA may only be made where “it appears to the court... that the body corporate is subject to a relevant liability”. It was not necessary to have already established liability (albeit there was no difficulty if had been by judgment, award, adjudication decision or admission) but potential liability was not sufficient. There should be no question at all of adopting anything like trial procedures to determine the question – applications should be short and uncomplicated. IOs might be made sparingly where liability was in issue [25, 27, 29].

Information Order (Scope)

BDW Trading Ltd v Ardmore Construction Ltd & Ors (2025) 219 ConLR 1: Information and documents to enable the applicant to identify associates of the respondent. In appropriate cases, also matters concerning the financial position of the associate [40, obiter].

Insurance

Tobias & Ors v Grosvenor Freeholds Limited (The Central) (FTT) (LON/00AG/BSA/2024/0008): The potential availability of Premier Guarantee insurance in respect of “relevant defects” was not given significant weight by the FTT when exercising its discretion to make a remediation order.



J

Just and Equitable (s124)

Triathlon Homes LLP v Stratford Village Development Partnership & Ors [2025] EWCA Civ 846: It was a “generous ambit of discretion” entrusted to the FTT [121]. There may be cases where it would not be just and equitable to make an RCO against those falling within s124(3), even if the result was to leave the costs to be funded by the public [61 – 65]. The fact that costs could in principle be claimed under regulation 3 of the 2022 regulations (which was not a discretionary matter) was a factor of considerable weight in deciding whether it was just and equitable to make an RCO [71]. The motivation of the applicant was not relevant, so long as it was an “interested party” within the meaning of the BSA [78]. A developer responsible for the defect who retains an interest in the building should stand at the top of the hierarchy or cascade of those who will pick up the costs [87].

Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Ors (Vista Towers) (2025) 218 ConLR 66 (FTT) (CAM/26UH/HYI/2023/0003): The s124 BSA just and equitable test was deliberately wide so that money could be found. The jurisdiction may be protean. It was helpful to ask whether the relevant remedial works/ costs were within a reasonable range of responses [83, 349].

Just and Equitable (s130)

381 Southwark Park Road RTM Company Limited & Ors v Click St Andrew Limited (In Liquidation) & Anor (2025) 219 Con LR 29: FTT considerations in *Triathlon Homes LLP* considered [9 – 15]. The indicators were in favour of making an order in respect of the holding company, because it was the holding company and had a common directing mind

[15, 25]. However, a BLO must only relate to a relevant liability within the meaning of the BSA, and was not a “gateway” to the recovery of all losses [26 – 28].

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Landlord

Triathlon Homes LLP v Stratford Village Development Partnership & Ors [2025] EWCA Civ 846: The effect of paragraph 2 of Schedule 8 of the BSA and Regulation 3 of the 2022 Regulations taken together is that were the original developer (or its associate) retains (or retained as at 14 February 2022) an interest in the building in question, lessees do not have to pay the service charges, and any other landlord who ends up bearing the cost as a result can pass that liability to the landlord-developer or the landlord that is an associate of the developer. Unlike s124 of the BSA, regulation 3 is not a discretionary matter: regulation 3(2) provides that where the regulation applies, the responsible landlord “is liable to pay”. Recovery is triggered by the claiming landlord simply service a notice specifying the amount (regulation 3(3)). The recipient of a notice may appeal to the FTT but only on very limited grounds, namely that the remediation amount does not represent the cost of the relevant measure, or that the recipient is not a responsible landlord (regulations 3(5) and (6)) [69].

Landlord’s Certificate

Will & Anor v G&O Properties (FTT) (LON/00AT/HYI/2022/0003): The Tribunal had no jurisdiction to make an order determining whether a relevant landlord had failed to comply

with the requirement to provide a Landlord’s Certificate confirming whether or not the landlord met the contribution condition (ie a net worth of £2,000,000) and/or whether or not they (or an associate) were responsible for a relevant defect, as required by the Building Safety (Leaseholder Protections) (England) Regulations 2022.

Leaseholders

Adriatic Land 5 Limited v The Long Leaseholders at Hippersley Point [2025] EWCA Civ 856: The BSA remediation provisions amounted to a very significant intervention by Parliament in the typical and familiar contractual scheme applicable to a block of flats. By protecting leaseholders from the significant costs that they would otherwise have to bear, the remediation provisions undoubtedly cause very substantial disruption to the contractual allocation of risk. That costs which would otherwise have fallen on the leaseholders have to be borne by someone else (including landlords who may be as blameless for the original defects as the leaseholders) was a necessary consequence of Parliament’s decision to relieve leaseholders of such costs [163]. The focus of the protections was squarely on individual leaseholders living in their flats: leaseholders with larger portfolios were left to bear the costs as per the contractual provisions for service charges in their leases [167].

Legal and professional costs

Adriatic Land 5 Limited v The Long Leaseholders at Hippersley Point [2025] EWCA Civ 856: Paragraph 9 of Schedule 8 provided protection against service charges which would otherwise be payable in respect of legal or other professional services relating to the liability or potential liability of any person incurred as a

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result of a relevant defect, including the cost of obtaining legal advice, or in connection with proceedings before a court or tribunal, arbitration or mediation. Such protection extended to the costs of a dispensation application under section 20ZA of the Landlord and Tenant Act 1985 [44 – 47].

Legal and professional costs were a certain category of costs that Parliament decided should not be claimable at all from leaseholders with qualifying leases [172].

Limitation (s135)

BDW Trading Ltd v URS Corporation Ltd (2025) 220 Con LR 1 (SC): The retrospective limitation period established by section 135 of the BSA was not restricted to actions brought under s1 Defective Premises Act 1972, but could equally apply to actions merely dependent on s1, such as a claim for damages in negligence or for contribution [103, 113, 114, 163, 295, 297, 304]. (Obiter) The retrospective limitation period did not apply to s2A of the Defective Premises Act 1972 because it was not a “relevant provision” already in force [269].

Parties (to main claim, BLO)

Willmott Dixon Construction Ltd v Prater (2024) 214 Con LR 164: the BSA did not require a party against whom a Building Liability Order (s130) is sought to be made a party to the main claim/substantive claim, or to participate in those proceedings. However, if a BLO was contemplated it would generally be sensible and efficient for the party against whom the order was sought to be made a party and for the BLO application to be heard together with the main claim [17], [18], [21], [22], [24], [25]. In *381 Southwark Park Road RTM Co Ltd v Click St Andrews Ltd* (2024) 218 Con LR 258 the Court confirmed that there was no requirement on a party to claim a BLO within existing proceedings: “the circumstances in which it might be just and equitable to make the order may not arise until after proceedings to establish a relevant liability are concluded and a BLO could be sought against a corporate body that did not even exist at the time of those proceedings” [31].

Prejudice (s123)

Lessees of flats at 419 High Road, Space Apartments, N22 8JS v Avon Ground Rents Ltd (FTT) (LON/00AP/HYI/2022/0017): Where a respondent

to a claim for a Remediation Order pursuant to s123 BSA engaged with the process and was willing to complete works the Tribunal considered the balance of prejudice which would be caused by, on the one hand, making the order and, on the other hand, not making it. The Tribunal concluded that the greater prejudice would be caused to the lessees if no order were made [59 – 64].

Principal Accountable Person (ss73 and 75)

Brompton Estates Nominees No. 1 Limited & Anor v Wall Properties Limited (FTT) (LON/00AW/BSG/2024/0001): There was no guidance in the BSA as to how the Tribunal was to determine which accountable person was appropriate to be the principal accountable person. The parties had agreed that the respondent would be the most appropriate given it was under a repairing obligation in relation to the structure and exterior surfaces of the majority of the building and the common parts generally within related floors, which was consistent with the provisions and purpose of Part IV of the BSA [17 – 18].

Purpose

BDW Trading Ltd v URS Corporation Ltd (2025) 220 Con LR 1 (SC): A central purpose and policy of the BSA in general, and section 135 in particular, was to hold those responsible for building safety defects accountable [104, 106].



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Relevant Defect

Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Ors (Vista Towers) (2025) 218 ConLR 66 (FTT) (CAM/26UH/HYI/2023/0003): A “relevant defect” for the purpose of s120 of the BSA was not confined to cases of non-compliance with the Building Regulations [68]. *Barclays Nominees (George Yard) Ltd v LDC (Oxford Road Bournemouth) Ltd* (2025) 220 ConLR 105 (FTT): A cost-risk analysis was not relevant in determining whether or not there was a “relevant defect” [227].

Relevant Landlord

Mirchandani v Java Properties International LLP [2025] (FTT) (LON/00AE/BSA/2024/0007, 0500 and 0502): Under s123(3) of the BSA (for the purpose of an RO application), a “relevant landlord” was a “landlord under a lease of the building, who is required, under the lease or by virtue of an enactment, to repair or maintain anything relating to the relevant defect”. Section 123(3) required the landlord to have a repairing obligation, and a landlord had no such obligation where

management functions had been transferred to an RTM company by virtue of s96 of the Commonhold and Leasehold Reform Act 2002.

Adriatic Land 5 Limited v The Long Leaseholders at Hippersley Point [2025] EWCA Civ 856: If the person responsible for the defect (the developer or the person who commissioned the works), or someone associate with them, retained an interest in the building, they had to bear the costs of dealing with the defect by application of paragraph 2 of Schedule 8, which provided that if a relevant landlord was responsible for the defect, no service charge was payable in respect of a relevant measure. This applied whether or not the lease in question was a qualifying lease [165].

Relevant Liability (s130, BLO)

Willmott Dixon Construction Ltd v Prater (2024) 214 Con LR 164: Whether there was a “relevant liability” within the meaning of s130 of the BSA might not simply be a matter of law or one that flows inexorably from judgment in the main claim [18], [21], [22], [24], [25].

Remediation Contribution Order (s124)

Arjun Batish & Ors v Inspired Sutton Limited & Ors (FTT) (LON/00BF/HYI/2022/0002): It was just and equitable to make an RCO if the lessees paid for the cost of works which ought to have been met by the respondent. An RCO could be made in relation to service charge costs incurred and paid prior to s124 and Schedule 8 coming into force [48 – 50]. *Triathlon Homes LLP v Stratford Village Development Partnership & Ors* [2025] EWCA Civ 846: It was necessary to interpret s124 by reference to the purposes of Part 5 of the BSA, which included the protection of leaseholders from financial risk, or to ensure that risks from historical defects were remedied without the leaseholders having to bear the potentially very large costs [151]. An RCO could be made in respect of costs incurred before 28 June 2022 [155].

Remediation Contribution Order (s27A Landlord and Tenant Act 1985)

St John Street Property Services Limited v Riverside Group Limited (FTT) (LON/00AU/LSC/2021/0255): The potential availability of an RCO was not taken into account when determining whether a social housing lessee was required to pay a service charge pursuant to s27A(1) of the Landlord and Tenant Act 1985 in respect of cladding remediation costs, even where there were strong grounds for such an application, in circumstances where an application had not yet been made. It could not be said that the prospect of an RCO being made meant that the service charges otherwise payable were not reasonable or should be reduced [161 – 165].





Remediation Order (s123)

Waite & Ors v Kedai Limited (FTT) (2024) 210 ConLR 166: The focus of the BSA was on building safety and the improvement of standards. There was no guidance in the BSA as to how the FTT should assess the risk to the safety of people in or about the building, or the scope of the works required to remedy relevant defects, or the standard to which remedial works should be carried out. The wording of the BSA was in deliberately broad terms, to enable the FTT to find the best and most practical, outcomes-focused solutions to myriad circumstances [66] [77]. It was an evidenced-based exercise, led predominantly by inspection reports and expert evidence, but also informed by the FTT's own experience and expertise. Once the FTT determined that relevant defects existed, it was for the Tribunal to make an order to remedy those defects within a specified time [81].

SoS v Grey GR Limited Partnership (Vista Tower) (FTT) (CAM/26UH/HYI/2022/0004): Remediation Order made even though works had started. The Tribunal had both the power and a discretion as to whether to make a Remediation Order [117]. It was not difficult to image circumstances in which experts and leaseholders agreed that some relevant defects remaining in a building represented a tolerable risk relative to the difficulty of remedying them [119]. A Remediation Order was a novel remedy. The focus was on remediation of life-threatening building safety defects in tall residential buildings rather than redress for non-compliance with a legal obligation. If the pre-qualification criteria were met and there were relevant defects, it was likely that the Tribunal would make an order, subject to the facts of each case. The facts of the case, the works required and the situation

of the parties were more relevant to the exercise of discretion than unreasonable delay or political motivation [121 – 122].

SoS v Grey GR Limited (Chocolate Box) (FTT) (CHI/00HN/HYI/2023/0008): The approach to the exercise of discretion cannot be far from “just and equitable”. Given that “equitable” essentially means fair, the test cannot be far from one of justice and fairness [255].

Li Jing v Avon Ground Rents Limited (FTT) (LON/00BK/BSA/2024/0004): If satisfied that the statutory criteria in s123 BSA are met, the Tribunal's starting point was that a Remediation Order should be made: other considerations were secondary [149 – 150].

Monier Road Limited (Smoke House) Blomfield & Ors (2025) 220 ConLR 86 (UTT): The Tribunal had no power under s123 to specify which materials or contractors were to be utilised in the remedial works [49] [55].

SoS v Grey GR Limited Partnership (Focus Apartments) (FTT) (CAN/42UD/HYI/2023/0007): A Remediation Order served as “a backstop”, reassuring the applicant and leaseholders that the remaining remedial works would be carried out within a reasonable time [18]. Given the inherent risks (or probabilities) of delay in construction projects it was unrealistic to place a deadline that was the same or shortly after the estimated completion date. A deadline of six months after the estimated completion date was imposed [26 – 28].

Barclays Nominees (George Yard) v LDC (Oxford Road Bournemouth) (2025) 220 ConLR 105 (FTT): An expert can and should offer opinion on whether or not something amounts to a relevant defect under the terms of the Act [211]. A Remediation Order was granted on the basis of evidence of defects requiring substantial remediation works, particularly in circumstances where the Respondent had been aware of the defects for 5 years but had not commenced works [239].

Responsible Actors Scheme

R (on the application of Rydon Group Holdings Limited) v Secretary of State for Levelling Up Housing and Communities [2025] EWHC 3234 (Admin): there was an arguable case

with a realistic prospect of success that decisions made by the SoS in relation to the Responsible Actors Scheme, established by Regulation 5 of the Building Safety (Responsible Actors Schemes and Prohibitions) Regulations 2023 (which were made in exercise of the powers conferred by ss126, 127, 128, 129 and 168 of the BSA), were amenable to judicial review [25] [62].

Responsible Landlord

Triathlon Homes LLP v Stratford Village Development Partnership & Ors (FTT) (LON/00BB/HYI/2022/0018-22): Any landlord (or any right to manage company or leaseholder owned management company) which paid or was liable to pay the costs of a relevant measure which would have been recoverable from leaseholders but for paragraph 2(2) of Schedule 8, had the right to pass those costs on to a “responsible landlord” pursuant to regulation 3 of The Building Safety (Leaseholder Protections) (Information etc) Regulations 2022w. The recipient of such a notice could appeal to the FTT, but only on the limited grounds that they were not a responsible landlord or that the sum claimed was more than the cost incurred. There was no right of appeal on the ground that it was not just and equitable for the responsible landlord to have to pay [39] (not overturned on appeal).



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Schedule 8

Lehner v Lant Street Management Company Limited (UT) [2024] UKTU 0135 (LC): A headline list of questions a decision maker should address when determining whether service charges were payable in respect of work to which the leaseholder provisions may apply were set out at [45]. On the facts, the lease was a qualifying lease and the leaseholder was not liable to pay the service charges as they related to cladding remediation.

Schedule 8 (legal or other professional services)

Adriatic Land 5 Limited v The Long Leaseholders at Hippersley Point [2025] EWCA Civ 856: Paragraph 9 of Schedule 8 provided protection against service charges which would otherwise be payable in respect of legal or other professional services relating to the liability or potential liability of any person incurred as a result of a relevant defect, including the cost of obtaining legal advice, or in connection with proceedings before a court or tribunal, arbitration or mediation. Such protection extended to the costs of a dispensation application under section 20ZA of the Landlord and Tenant Act 1985 [44 – 47].

Schedule 8 (retrospective effect)

Adriatic Land 5 Limited v The Long Leaseholders at Hippersley Point [2025] EWCA Civ 856 (by a majority of 2:1): The effect of paragraph 9 of Schedule 8, was that, from 28 June 2022, no further service charges of the relevant type were payable, whether the underlying costs had been incurred, or whether service charges had been demanded or fallen due 204, 206].

Specified Building

BDW Trading Ltd v Ardmore Construction Ltd & Ors (2025) 219 ConLR 1: A BLO concerned a relevant liability “relating to a specified building” (s130(2)). Therefore, a BLO could not make associated companies liable for the entire liability of the original body across a number of developments. Discrete orders would need to be made [13, obiter].

Storey

Blomfield & Ors v Monier Road Limited (Smoke House) (FTT) (LON/00BG/HYI/2023/0024): A rooftop garden was a “storey”, such that the building was a higher risk building under BSA Part IV [62]. Government guidance (which suggested a garden was not a storey) was not followed, and did not constitute a reliable method of interpretation of law [74]. (NB. The Government’s webpage states that the Ministry of Housing, Communities and Local Government is currently consulting relevant stakeholders on a proposal to amend the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations to make clear that roof gardens should not be considered a storey: <https://www.gov.uk/guidance/criteria-for-determining-whether-an-existing-building-is-a-higher-risk-building-during-building-work>).

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Timing (BLO application)

Nothing in s130 BSA made it a precondition to the making of a BLO that the relevant liability of the “original body” (s130(2) BSA) needed to already have been established. BLO applications could be made before the trial of the original body’s liability, could proceed in tandem with the litigation against the original body or, in a given case, be convenient to defer consideration until after trial against the original body (*BDW Trading Ltd v Ardmore Construction Ltd & Ors* (2025) 219 ConLR 1 [14, obiter]; *Willmott Dixon Construction Ltd v Prater* [2024] EWHC 1190 (TCC), 214 ConLR 164; *381 Southwark Park Road RTM Company Limited v Click St. Andrews Limited* [2024] EWHC 3179 (TCC)).

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Ultimate responsibility

Adriatic Land 5 Limited v The Long Leaseholders at Hippersley Point [2025] EWCA Civ 856: Whoever ends up bearing the costs (as a result of the leaseholder protections) is given new rights against those ultimately responsible by way of: (i) an extended limitation period under the DPA 1972 (s135 BSA); and (ii) a new cause of action against those manufacturing or mis-selling cladding protects (s149 BSA). In addition, the High Court is given power to make associated companies liable for breaches of the DPA 1972 (s130) [175].



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