

A hand holding a magnifying glass over two small house models. The background is blurred greenery. The image is overlaid with a diagonal orange and blue graphic.

# B10: Building Safety

14.40 – 15.40

# The Building Safety Act

Changes that came into force on 28 June 2022

- Building Remediation Orders (“BLOs”)
- Remediation Contribution Orders (“RCOs”)
- Building Liability Orders (“BLOs”)
- Retrospective extension of liability under the Defective Premises Act to 30 years

The draft Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations 2021.

# The Government's underlying position: -

- The Government and by implication ordinary taxpayers should not bear the primary burden of remediating buildings suffering from fire and related structural defects. The purpose of the late introduction of ROs, RCOs and BLOs is to create a framework in which landlords and developers have primary responsibility for meeting the cost of remedial work, but are able to seek contributions to those costs from other responsible parties.

## Furthermore: -

- Landlords and developers should not be able to escape responsibility for meeting these costs because they are small entities with no capital, non-trading or otherwise insolvent. Any corporate entity that is associated with such Landlords and/or Developers may also be liable.

# The Building Remediation Order Regime

Some background: -

- The First Tier Tribunal (“FTT”) of the County Court is the battleground where ROs will be fought out;
- The Government sees ROs as being a tool primarily for the use of leaseholders to compel landlords who are dragging their heels to remediate buildings;
- If a RO is obtained, the Landlord will be compelled to undertake the remedial work directed by the FTT within the time frame ordered.

# The Building Remediation Order Regime

The legal niceties: -

- An **interested person** can apply to the FTT requiring a **relevant landlord** to remedy specified **relevant defects** in a **relevant building** within a specified time.
- The definition of an **interested person** includes anyone with a legal or equitable interest in a **relevant building** or any part of it.
- Leaseholders and tenants, whether singularly or as a class, are therefore **interested persons**. Others include the Building Safety Regulator, the Fire Brigade and Local Authority Building Control.

# The Building Remediation Order Regime

- A **relevant landlord** means a landlord **under a lease** who has an obligation to repair or maintain anything relating to a **relevant defect**. It is not clear whether the leasehold relationship has to be a direct one or whether the leaseholders can jump to the head-leasee. Given that there is nothing here to suggest it needs to be a direct relationship, it is probably the case that a leaseholder or class of leaseholders can 'jump' to the landlord that has the obligation to maintain that part of the building that contains the **relevant defect**.
- **Relevant defects** are defects that give rise to a **building safety risk** which includes the spread of fire or the collapse of the building or any part of it. So, combustible insulation, defective/missing cavity barriers, the use of combustible cladding and defects in compartmentation and firestopping would all fit within the definition of **relevant defects**.
- A **relevant building** is one that is at least 11m in height or more than five stories.

# The Building Remediation Order Regime

RP's position: -

- Where it is relevant landlord of a relevant building to which there are relevant defects, an interested person may apply to the FTT for an order that the RP remediate the building;
- In all likelihood this will be used by organised groups of leaseholders in respect of buildings that are not remediated and where they have information demonstrating the presence of relevant defects;
- The use of the RO regime could be a tidal wave or a trickle – we simply do not know.
- But what if the Landlord is a JV with no assets, a small company with little cash, not trading or insolvent? What then?
- Behold the **Remediation Contribution Order!**

# Remediation Contribution Orders

Some background: -

- The Government wants to give interested persons more targets than just the landlord. They also want interested persons to be able to seek financial contributions from other parties associated with the landlord, a developer or anyone associated with a developer.
- The liability net is cast extremely wide, in essence it is this: -
  - Primary Liability – The Landlord (Building Remediation Order)
  - Secondary Liability – A party associated with the landlord, a developer, or a party associated with a developer

# Remediation Contribution Orders

- Perhaps unsurprisingly, the Government hasn't exactly set the bar high in the definition of **associated**...
- Even if the RP is not the relevant landlord it will in many cases be caught by the definition of **developer** which is: -

*“In relation to a relevant building, means a person who undertook or commissioned the construction or conversion of the building (or part of the building) with a view to granting or disposing of interests in the building or parts of it.”*

- Wide is an understatement.

# Remediation Contribution Orders

The legal niceties: -

- An **interested person** (such as a group of leaseholders) may apply for a RCO which is an order requiring a **specified body corporate** to make payments to a **specified person** for the purposes of meeting the costs of remediating the relevant defects.
- A **specified person** is not defined, but will almost certainly be the party who will be physically undertaking or arranging the completion of the remediation works. It could conceivably be the interested person themselves.

# Remediation Contribution Orders

- A **specified body corporate** includes a landlord and a developer or a person associated with either. A person is associated with a landlord or developer where: -
  - If at any time in the **relevant period** (30 years ending at the time the section comes into force) a person was a director of both of them; or
  - At the **qualifying time** (at 14 February 2022), one of them *controlled* the other.

# Remediation Contribution Orders

- In the most common example one body corporate [x] controls the other [y] if [x]: -
  - owns or is entitled to acquire at least half the issued share capital in [y]; and
  - [x] is entitled to at least half the votes exercisable in general meetings of [y];

# Remediation Contribution Orders

A typical RP's position

- In most cases the RP (or a Group entity) will either be a landlord or a developer
- Where the RP group entity is either, the RP will almost certainly be an associated entity
- Where the RP or a group entity is part of a corporate JV that is either the landlord or developer, the RP may be associated with the corporate JV for either purpose if it has control over the JV.
- Where the RP is a relevant landlord and the subject of a RO (although it does not have to be) it may seek a contribution under a CRO against a developer (i.e. a contractor who carried out the work).

# Building Remediation Orders and Building Contribution Orders

The knowns

- We can anticipate firms of solicitors or surveyors seeking to mobilise groups of tenants for the purpose of obtaining a RO/CRO.
- We are already seeing signs of this and have received letters on behalf of clients warning of such action in July.
- We can expect increased demand by organised groups of leaseholders to carry out inspections.
- RPs can anticipate that they will be dragged into FTT proceedings as either a landlord or a developer, or an entity associated with either.
- What steps that can be taken to lessen the possibility?

# Building Remediation Orders and Building Contribution Orders

## The unknowns

- We have no idea how the FTT will cope with often complex construction and engineering disputes.
- We have no idea how rigorous the FTT will be in considering evidence, particularly that which challenges the interested person's position on the extent and nature of the relevant defects.
- The procedural steps for this remedy have not been developed in consultation with the legal profession and the Government is seemingly willing to just let the FTT get on with it.

# Building Liability Orders

Some background: -

- The Government are well aware that Group Companies who act as developers will often set up an SPV for a specific project, which SPV will then be left to wither on the vine once the project is completed. The idea being to ring-fence liabilities so the wider group is not exposed if anything goes pear-shaped.
- Similarly, it is entirely typical in the construction market for groups to kick all the liability into one entity and then place that entity into administration or liquidation, where the liabilities will cease.
- The Government want to ensure that such practices do not prevent recovery and so have come up with the BLO, which in very basic terms is a sort of retrospective statutory parent company guarantee.
- It is, without a hint of exaggeration, a remarkable piece of legislation.

# Building Liability Orders

The legal niceties.

- There really is little detail in the Act. But here it is.
- A BLO can be made by the High Court (the TCC) on application if it considers it just and equitable to do so.
- A BLO is an order providing that any **relevant liability** of a specified description that an original body corporate may have in relation to a specified building is also (a) a liability of a specified body or (b) a joint and several liability of two or more specified body corporates.

## Building Liability Orders

- A **relevant liability** means liability under the **DPA** or **section 38 of the Building Act** (breach of building Regs) or as a result of a **building safety risk**. There does not have to be an existing contractual or tortious relationship in place between the person applying for a BLO and the party obliged to comply with it. So, if the RP or a group entity is fixed with a liability as a developer under the DPA (the most likely scenario) then a person (it does not specify whom but let's assume leaseholders) can apply for a BLO against the entity associated with the RP.
- The circumstances under which a body corporate [x] is associated with body corporate [y] are not as wide as those for a BCO.

## Building Liability Orders

- In the most common example one body corporate [x] controls the other [y] if [x]: -
  - owns or is entitled to acquire half the issued share capital in [y]; and
  - [x] is entitled to at least half the votes exercisable in general meetings of [y].

## Building Liability Orders

- Where the RP has been unable to bring claims because the contractor is insolvent then the BLO enables it to pursue an associated entity (assuming there is one).

## Extension of the DPA

- Section 1 DPA 1972: a statutory duty on the part of those who “*take on work*” to provide new dwellings or arrange for others to take on work in the course of a business – contractors, consultants, developer.
- Dwellings must be “*fit for habitation*” at completion so far as the works taken on.
- Duty owed to the party who arranged the works (RP if Employer under construction contract) and everyone with a legal or equitable interest in the dwelling – including building owner, leaseholders, tenants.
- Both a **benefit** and a **risk** for the RP. The RP can bring DPA claims against contractors, consultant team; but may be defendant to DPA claims by residents and where it has transferred stock to another RP, or building sold.
- Limitation period was historically six years from practical completion – shorter than 12 years for construction contracts executed as deeds.

## Extension of the DPA

- Effective 28 June 2022, the limitation period was extended to 30 years.
- New freestanding statutory duty (S2A DPA 1972) covering repairs and maintenance, not just provision of new dwellings.
- Does not affect pre-existing settlements – claims settled within that period may not be resurrected against the settling parties, but claims against other parties may be possible.
- Re **benefit** and a **risk** for the RP – difficulty of evidencing condition of property at completion, maintenance and any remedial works carried out over 30 years – a difficulty in bringing and defending very old claims.

# The draft Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations 2021.

- The “Dutyholder regulations”.
- Impose duties on the client, the principal designer and principal contractor.
- All projects - not just those involving the design and construction of a higher risk building.
- Dutyholders must make sure that the relevant requirements are met, includes the functional requirements of the Building Regulations.
- The obligations are not tempered with the qualification of reasonable practicability.

# The draft Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations 2021

How do building owners/developer ensure compliance?

- a) Make sure **everyone appointed is competent to work** on the project (whether a HRB or not). Competence is defined at paragraph 8(1)(a) and (b) and means having *“the skills, knowledge experience and behaviour necessary (where an individual) or having the organisation ability (if a corporate entity) to carry out the design and building work so that it complies with all relevant requirements.”*
- b) Make sure its **construction contracts** contain detailed provisions to ensure that Building Regulations compliance (both in relation to design and building work) are checked and fully recorded through the design and construction phases.
- c) Use **additional quality control resources** to assist with compliance. Consider using checking engineers (whether fire engineers, structural engineers or general surveyors to ensure those health and safety critical elements of the construction (particularly Part B compliance) are being met.

## Fire Safety and Building Safety Act

1. The Fire Safety (England Regulations) 2022
2. The RP's occupation duties under the BSA in relation to higher-risk buildings ("HRBs"), over 18m or 7-storeys that contain at least 2 residential units
3. Director Liability and Insurance Issues

## The Fire Safety (England) Regulations 2022

1. Brings into law a number of the recommendations from the Phase 1 report of the Grenfell Inquiry.
2. Notably excludes personal emergency evacuation plans (“PEEPs”) for high-rise residential buildings (a new consultation has just started).
3. Designed to enhance duties already contained in the Regulatory Reform (Fire Safety) Order 2005 (“RRFO”) and the FSA 2021 by creating a series of new obligations.
4. The ultimate aim of which are to: -
  - a. provide FRS with up to date information concerning the status and location of key fire-fighting equipment;
  - b. to ensure the FRS are able to easily identify where they are in the building and where residents are located; and
  - c. to ensure that residents are able to find their way out of the building in the event of fire.
5. Will be supported by (as yet unpublished) guidance.

## The Fire Safety (England) Regulations 2022

Creates three regimes: -

1. For high-rise residential buildings (HRRBs) – **not to be confused with BSA higher-risk buildings/HRBs**;
2. For buildings over 11m and below 18m in height; and
3. For all other buildings that have two or more residential dwellings within them.

## The Fire Safety (England) Regulations 2022

### HRRBs

1. The RP must install a secure information box that is easily accessible to FRS.
  
2. That information box must contain: -
  - (i) Contact details of the RP and anyone who manages the building and has access to it;
  - (ii) Details of the design and construction of the external wall system (“EWS”) including accurate records of the materials used;
  - (iii) Copies of any fire risk assessments undertaken for the purposes of the RRFO and FSA 2021. Risk mitigation must be identified;

- IV. A detailed floor plan showing the location of all passenger and fire-fighting lifts along with the location of all fire-fighting equipment within the building (wet and dry risers, sprinkler and smoke control systems);
  
- V. A single page building plan identifying: -
  - a) the environs of the building
  - b) details of the use of the building, for example for commercial or residential purposes;
  - c) access for fire and rescue appliances;
  - d) the dimensions of the building;
  - e) information on the number of storeys of the building and the number of basement levels (if any);
  - f) information regarding the presence of maisonettes or scissor section flats;
  - g) inlets for dry-rising mains;

- h) inlets for wet-rising mains;
  - i) the location of shut-off controls for any sprinklers;
  - j) access points for the building;
  - k) the location of the secure information box;
  - l) the location of the controls for any smoke control system;
  - m) the location of any firefighting shaft;
  - n) the location of main stairways in the building;
  - o) the location of the controls for any evacuation alert system.
- Note this information must be provided electronically and directly to the FRS in addition to being contained in the information box.

# The Fire Safety (England) Regulations 2022

## HRRBs Continued

3. Every month the RP must undertake a check of: -
  - a. The firefighting lift;
  - b. Wet and dry risers;
  - c. The sprinkler and smoke control systems; and
  - d. Common alarms and door closers linked to them.
  
4. Where a fault is identified that cannot be rectified within 24 hours the RP must send an email to FRS informing them of the fault. Once rectified the FRS must again be notified.
  
5. Each floor number and residential dwelling must be clearly identified and visible in low light condition.

## The Fire Safety (England) Regulations 2022

All buildings above 11m in height

1. The RP must undertake an annual check of all front entrance fire doors to domestic premises;
2. Where access cannot be obtained the RP must document what steps have been taken to gain access; and
3. The RP must inspect every fire door between communal compartments every three months.

For all categories of building

1. The RP must provide residents with relevant fire safety instructions (i.e. not to disturb self-closers etc., or to prop open communal fire doors) along with information about the importance of fire doors.

## The RP's Occupation Duties under the BSA for HRBs.

1. An HRB is occupied if more than one residential unit has people living in it;
  
2. The overriding function of the occupation duties imposed on the RP are to: -
  - a. Ensure that all reasonably identifiable risks in relation to fire and structural safety are identified and dealt with;
  - b. That the BSR along with all persons who may acquire the building or a legal interest in it have access to all relevant information concerning its design and construction; and
  - c. That as a result of knowing everything about the building's fire and structural performance, and reducing and mitigating any reasonably identifiable risk, residents are safe.

## Occupation Duties under the BSA for HRBs.

The Dutyholders.

1. The accountable person (“AP”)
2. The principal accountable person (“PAP”)

## Occupation Duties under the BSA for HRBs

The Dutyholders continued.

The AP – who are they?

1. The RP will be an AP where: -
  - a) It has a legal estate in possession of any of the common parts or it owes a contractual obligation to another to manage any of the common parts;
2. The RP will not be an AP where
  - a) Despite having a legal estate in possession it has passed on the obligation to manage the common parts to a particular person under a lease or otherwise or the repairing obligations that the RP might otherwise have are passed to a Right to Manage (RTM) Company.
3. If you're not sure whether you are an AP or not, you can apply to the FTT for a declaration.

## Occupation Duties under the BSA for HRBs.

The Dutyholders continued.

The AP – what do they have to do?

1. Make sure they do not occupy any part of the building before the issue of a completion certificate unless they have a reasonable excuse for doing so;
2. Following occupation to assess as soon as reasonably practicable (and then at regular intervals) the building safety risks of the part of the building for which they are responsible;

## Occupation Duties under the BSA for HRBs.

3. To manage that part of the building for which they are responsible in accordance with those risk assessments;
4. To prevent a building safety risk from materialising or mitigating its effect should it arise;
5. To promptly carry out any works necessary to comply with (4) above;
6. To effectively plan and manage these arrangements;
7. To keep any prescribed information in accordance with the prescribed standards; and
8. To comply with any mandatory reporting requirements.

## Occupation Duties under the BSA for HRBs.

The Dutyholders continued.

The AP – how do they interact with others?

1. Regulations will be published setting out how, in what format and when information gathered by the RP as an AP is shared with other duty holders in particular the PAP.
2. It will be mandatory under these Regulations for the AP to provide certain prescribed information at certain times to both the PAP, other APs, the BSR and residents.

## Occupation Duties under the BSA for HRBs.

The Dutyholders continued.

The AP – how will they interact with residents?

1. A resident over the age of 16 may request certain prescribed information from the AP (FRAs etc);
2. The AP then has to provide it as soon as reasonably practicable;
3. May issue a PAP, another AP or indeed a resident with a contravention notice if act in a way that creates or risks creating a building safety risk;
4. If no steps are taken to deal with any issue raised in the contravention notice then the AP can apply to the county court for an order enforcing its terms;
5. APs are given an enhanced rights of access to an individual domestic premise.

## Occupation Duties under the BSA for HRBs.

The Dutyholders continued.

The AP – Compliance and Offences

1. The BSR may issue a compliance notice against an AP where it appears the AP is in breach of any of its obligations;
2. A failure to comply with a compliance notice without reasonable excuse that puts people in imminent danger is a criminal offence;
3. An AP commits an offence generally (prosecuted by the BSR) where the AP contravenes a requirement that gives rise to a critical risk (note there is no requirement for a compliance notice here).

## Occupation Duties under the BSA for HRBs.

The Dutyholders continued.

The PAP

1. The RP will be the PAP where: -

- a. It is the only accountable person in a building; or
- b. It holds the legal estate in the relevant parts of the structure and exterior of the building.

## Occupation Duties under the BSA for HRBs.

The Dutyholders continued.

The PAP - what do they have to do?

Remember, a PAP has the same basic obligations as the AP, but there are some additional ones. The PAP:

1. Must register the building with the BSR prior to occupation;
2. Must as soon as reasonably practicable after occupation prepare a safety case report (“SCR”). The SCR must record the risk assessments carried out by any AP and a “brief description” of the steps taken to manage or reduce any risks identified. Prescribed information also to be included;

## Occupation Duties under the BSA for HRBs.

3. As soon as the SCR is prepared (or revised) the PAP must notify the BSR;
4. Must, within 28 days of being directed to do so by the BSR, provide a building assessment certificate (which includes the most recent SCR, along with any prescribed and mandatory reporting information);
5. Promptly deal with any deficiencies in the information provided as notified by the BSR, and when granted, to display the building assessment certificate in a conspicuous location;
6. Complete and manage a residents engagement strategy; and
7. Operate a complaints procedure – the scope of which will be set out in regulation yet to be published.

## Occupation Duties under the BSA for HRBs.

The Dutyholders continued.

The AP and PAP – some general observations

1. The first step is to identify in relation to each HRB whether the RP is the PAP or an AP. Remember, the RP will be the PAP if it is the only AP;
2. Where the RP is not the PAP but one of a number of APs, how will it manage this? For the BSA to work as intended, there needs to be real collaboration between the PAP and APs;
3. Still a great deal to come in yet unpublished regulation; and
4. The RP must carefully consider how all the duties it currently owes and will owe coalesce within a single HRB. It needs to have a clear understanding for each.

## Director Liability and Insurance Issues

1. In addition to the responsibilities placed on duty holders, such as the principal accountable person, section 161 of the BSA extends responsibility to individuals at director and management level who consent or connive in, or whose neglect causes, a breach of certain obligations within the BSA. Section 40 introduces provisions that create similar personal liability for certain breaches of the Building Act 1984.
2. Although the relevant sections of the Act are not yet in force, they have potentially far-reaching consequences for individuals at director and management level within an organisation, who may face fines or even imprisonment if found guilty.
3. Section 161 of the BSA provides personal liability if an officer (a director, manager, or company secretary) consents or connives in the commission of an offence by that organisation under Parts 2 and 4 of the BSA.

## Director Liability and Insurance Issues

1. Offences under Part 2 include behaviour which constitutes intentional obstruction of someone who is “exercising a relevant building function” (section 23) or where false or misleading information is provided to the Building Safety Regulator (section 24).

## Director Liability and Insurance Issues

5. There is also a host of responsibilities in respect of Higher Risk Buildings (HRBs), set out in Part 4 of the Act , that could lead to personal liability under section 161, including:
- allowing occupation of a HRB without the relevant completion certificate (section 76);
  - allowing occupation of a HRB without registration (section 77);
  - failure to action or comply with a Compliance Notice (section 99);
  - failure to apply for a Building Assessment Certificate when directed to do so (section 79);
  - failure to display various notices and certificates in the building (section 82);
  - failure to operate a mandatory reporting system (where required) related to the safety of an occupied building (section 87);
  - where there is a change in accountable persons and the previous accountable person fails to provide prescribed information and documents to the new accountable person (section 90); and
  - where an accountable person breaches a relevant requirement that places people in or around the building at critical risk (section 110).

## Director Liability and Insurance Issues

5. The scope of section 161 is drafted widely. Should one of the offences listed in the previous slide be committed by the relevant corporate holder, a director, manager or company secretary could have personal liability if the offence committed by the body corporate was either:
  - committed with the “*consent or connivance*” of that individual (these thresholds focus on knowledge); or
  - attributable to (i.e. caused by) any neglect on the part of that individual – neglect can take the form of an act or omission (a focus on acts, as opposed to knowledge).

## Director Liability and Insurance Issues

1. The clear aim of potential personal liability of officers for these offences is to seek to ensure that the new key responsibilities within the BSA are addressed diligently and effectively by all building owner who are body corporates.
2. It is of paramount importance that organisations introduce processes which secure compliance with the BSA (and the Building Act) and actively manage those processes and timelines for achieving such compliance.
3. It should be noted that Parts 2 and 4 are not yet in force, but organisations should take this time to implement strategic measures to protect the organisation and its officers from this potential liability.
4. In terms of taking protective measures, an important action for organisations will be to investigate and procure insurance cover available for such liabilities. It remains unclear how the insurance market will react to providing cover for such risks.