Risk Management Briefing

The Building Safety Act 2022: liability implications

January 2023

The Building Safety Act 2022 (the Act) was given Royal Assent on 28 April 2022 and is being brought into force in stages. It impacts on consultants in a range of ways, altering the procurement landscape, and their liability.

The main aim of the Act is to strengthen the regulatory system for building safety by establishing a comprehensive new regime governing the design, construction and occupation of higher-risk buildings. A key means of achieving this is through greater accountability and responsibility for the design, construction and management of buildings, throughout their lifecycle.

Measures include: a Building Safety Regulator to oversee the regime, a new set of duty holders each with their own required competencies, the creation and maintenance of the "golden thread" of building information throughout the lifecycle of the building, and setting up 'gateway' points at design, construction and completion to ensure safety is considered at every stage. For example, there is a new requirement for a completion certificate before occupation, and if a residential unit is occupied before the certificate is issued 'the relevant accountable person commits an offence.'[1]

Many of the practical implications will only become apparent once the detailed secondary legislation is in place. At the time of publication some of the key regulations are in draft form and out for public consultation. This briefing note covers key principles of liability – specific aspects of the new roles and duties may be covered under future briefings.

[1] Section 76 of the Act

There are two key areas where the Act extends liability, which relate to the Defective Premises Act 1972 and Section 38 of the Building Act 1984.

The Defective Premises Act 1972 (DPA)

The DPA provides statutory rights to owners and leaseholders of dwellings which are "unfit for habitation", allowing them to sue anyone responsible for the design and construction of the dwelling that is not fit for habitation when completed.

Section 1 of the DPA states that:

> "A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—
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> (a) if the dwelling is provided to the order of any person, to that person; and
> (b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;
>
> to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed."

It enables subsequent tenants and owners and anyone else who has a legal or equitable interest in a property to bring a claim for defective work, where the work renders the dwelling unhabitable (interpreted by the courts to mean the dwelling must, on completion, have been capable of occupation for a reasonable time without risk to the health or safety of the occupants and without undue inconvenience or discomfort to the occupants.[2])

This duty applies to any consultant involved in the design or construction of a dwelling, as well as contractors and developers (but has been held by the Courts not to apply to Approved Inspectors[3]). The duty is owed not just to the owner/tenant at the time the dwelling was constructed, but also to any subsequent owners.

Prior to the Act, this obligation applied only to the creation of new dwellings, and the liability period was six years from completion of the construction of the dwelling.

The Act extends this liability in two ways. First, through the introduction of a new Section 2A into the DPA, the 'fit for habitation' obligation now applies also to repairs, extensions or refurbishment of dwellings (e.g. re-cladding a block of flats)[4]. Secondly, through the introduction of a new Section 4B in the Limitation Act 1980[5], the period of liability under the DPA is extended from six to 15 years from completion of the work for all work completed in the future, whether relating to new dwellings or to existing dwellings. In addition, for projects already completed that created new dwellings, the period is extended from six to 30 years (i.e. the liability period is extended retrospectively). All of these provisions came into force on 28 June, 2022.

[2] See e.g. *Rendlesham Estates Plc & Ors v Barr Ltd* (2014) EWHC 3968
[3] *Herons Court v Heronslea Ltd* [2019] EWCA Civ 1423
[4] Section 134 of the Act
[5] Section 135 of the Act

It should be noted that under the DPA, any term of an agreement which purports to exclude or restrict its operation would be void[6], therefore it appears it will not be possible to 'contract out' of this extended period by introducing a limitation within a consultant's terms of appointment.

Section 38 of the Building Act 1984

The Government also proposes to bring into force this pre-existing section which provides that:

'Civil liability.
(1) Subject to this section—
(a) breach of a duty imposed by building regulations, so far as it causes damage, is actionable, except in so far as the regulations provide otherwise, and
(b) as regards such a duty, building regulations may provide for a prescribed defence to be available in an action for breach of that duty brought by virtue of this subsection.'

Although the Building Act was passed in 1984, this particular provision has never been brought into force, but has sat on the statute books, waiting for the Government to press the 'start' button. It appears that it now intends to do this, as Paragraph 68, of Impact Assessment: factsheet, published 5 July 2021 states "We will be commencing section 38 of the Building Act 1984, which allows a claim for compensation to be brought for physical damage (whether injury or damage to property) caused by a breach of building regulations". The Building Safety Act also extends the limitation period of such actions to 15 years[7]. This change will only apply to future work.

Despite the Government's stated intention, at the time of writing s38 has still not been brought into force. Nevertheless, it is important to note that the implications are extensive. Until now, any claim for breach of building regulations, for example against a contractor or consultant, would need to be brought in contract (in relation to an express or implied duty to comply with the regulations) or under the tort of negligence (as evidence of a failure to use reasonable skill and care). The latter claims are difficult to bring.

Section 38 will create a new civil right of action and enable direct claims to be brought by anyone suffering losses, caused by a breach of building regulations. This right is not limited to fire safety aspects but would extend to any breach and (unless limits are included) would apply to any work covered by the regulations (i.e. not just residential buildings). It also does not appear to require any proof of failure to use reasonable skill and care, although this aspect may need to be clarified by the courts. However, the losses claimable are unlikely to extend to 'financial losses' that are unconnected to physical damage.

Implications of the changes.

Key points to note about the above are that:

- The liability in both cases appears to be strict,
- The limitation periods are significantly longer than is currently the case,
- For the DPA, for some work the new limitation period applies retrospectively

[6] DPA, section 6 (3).
[7] Section 135 (1) (3)b of the Act

- In both cases, unlike many of the Act's provisions, the effect is not limited to 'higher-risk' buildings, but in the case of the DPA applies to work to all dwellings, and for s38 applies to all work covered by building regulations.
- In the case of the DPA, it applies to all types of defects that render a dwelling 'unfit for habitation', not just those relating to fire safety (or safety generally). It could for example apply to issues with mould, ventilation, damp, etc
- In the case of the s38, as above, it will apply to all types of defects, and could potentially apply to minor breaches

Effect on PII insurance policies.

Until the Act receives judicial scrutiny, it is not possible to predict precisely what the impact will be on consultants.

However, the changes will undoubtedly have an impact on PII insurance policies. Evidently, construction consultants (and contractors) will be facing significantly more potential liability, which will inevitably push up still further construction insurance costs.

Consultants are advised to pay close attention to developing guidance and case law on this topic, and to liaise with their PII insurers.

This Risk Management Briefing is for information only, and insurance or legal advice should be taken to cover your particular circumstances.

This briefing was prepared the CIC Liability Panel, chaired by Professor Sarah Lupton.

This briefing is available at www.cic.org.uk