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The Impact of the Building Safety Act 2022 on UK Restructuring

August 2026

The Building Safety Act 2022 (BSA) continues to reshape the risk landscape far beyond the construction and residential development sectors. While originally introduced in response to concerns regarding building safety and cladding defects, there are a number of areas where the effects of the legislation go much further than that, which can extend liability across corporate groups and associated companies, in circumstances where those other entities may not have been involved in construction or cladding in any way.

The BSA has therefore (whether intentionally or otherwise) created material risk for certain entities and is therefore something that insolvency practitioners (IPs), lenders, private equity sponsors and purchasers need to be alive to.

Claims under the BSA

Although public discussion around the BSA has mainly focused on cladding remediation for high-rise residential buildings, the actual scope of the BSA is significantly broader. Liability under the BSA can, in certain cases, capture building safety issues where the relevant property in question is commercial or mixed-use. In addition to cladding issues, the BSA also extends limitation periods for claims relating fire risk and other structural defects.

So, what additional tools does the BSA make available to claimants?

Remedies under the BSA are aimed at facilitating remediation works, and enabling parties to recover the costs of those works from a wider group of parties than the law previously enabled. The additional tools include:

- **Remediation orders** – Requiring specified remedial works to be carried out within a prescribed timeframe. These orders are intended to ensure that identified building safety risks are addressed promptly.
- **Remediation contribution orders (RCO)** – Requiring a party to contribute towards remediation costs.
- **Building liability orders** – Enabling claimants to pierce the corporate veil and obtain orders that make entities "associated" with the original contracting entity liable for the relevant liabilities (e.g. the costs of remediation works). Risks that would have previously been considered to be ring-fenced within a specific legal entity could now therefore contaminate the wider group (and beyond).
- **Extension of limitation periods** – Limitation periods for claims under the Defective Premises Act 1972 (DPA) have been significantly extended: 30 years for certain works completed before 28 June 2022, and a 15-year period for works completed after that date. This may revive claims that would have previously considered to be time-barred.

The legislation is therefore a potent combination giving claimants the ability to pursue more claims (e.g. those that may have been time barred) against more parties (e.g. against "associated" entities). In reality, claimants will focus their efforts on parties that are considered to be "good for the money", even if those parties were not directly involved in the original construction project, but the contagion risk of these claims into wider group structures or corporates that share common directors (they do not need to be part of the same group) are highly relevant when considering a restructure, obtaining finance or when buying a corporate entity, so as not to introduce liability.

Why the BSA matters beyond the construction sector: Liability by association

Aside from creating obvious challenges for those in the construction sector, the reach of the BSA also goes well beyond this sector, due to the ability under the BSA for claimants to pursue "associated" entities. Associated entities may never have had anything to do with the original construction, but the BSA contains separate mechanisms that can expose certain associated entities to liability or remediation costs. The test for association differs depending on the particular BSA remedy and association does not, by itself, transfer the underlying liability from one company to another.

Broadly speaking, a body corporate or partnership may be treated as associated where:

- One company controls another
- Two companies are under common control
- Two companies share a common director
- A person is, or was a director of the company
- A person is, or was a partner in the partnership
- Persons are connected through certain trust arrangements relating to the building

A company can also be connected through voting rights, entitlement to share capital. The definition is wide and we have seen the courts take a robust approach when deciding who is liable (see Recent Cases below).

The key concepts are "control" and "common directorship", but the type of claim will dictate whether it is control or common directorship that will assign liability.

Importantly, in some instances it does not matter if the relevant company is no longer associated, it could still be liable for claims under the BSA if it was associated during the relevant period. This means, for example, that a company cannot escape liability under the BSA by restructuring or selling its shares. This was a deliberate consideration when the BSA was introduced to avoid businesses reorganising to avoid paying remediation costs.

However, it is not easy to summarise who is an associate and what is or is not the relevant time, particularly because the BSA uses similar language but in different contexts. We have set out a very high-level overview below, but the detail is in the legislation and will require the specific facts to be taken into account.

Type of claim	Responsibility	Relevant period
Remediation order	Current or former landlord/developer **Any** corporate/partnership **associated** with either the landlord/developer through control or common directorship	None
RCO	Current or former landlord/developer **Any** corporate/partnership **associated** with either the landlord/developer through control or common directorship	Association is determined principally by reference to the qualifying time of 14 February 2022. For common directorship and certain partnership relationships, the relevant period is the five years ending on 14 February 2022. Corporate control is tested at the qualifying time.
Building liability order	Current or former landlord/developer **Any** corporate/partnership **associated** with either the landlord/developer through **control**, but **NOT** common directorship **BUT** later acquisitions can create group exposure	A body corporate may be specified if it is or has, at any time during the relevant period, been associated with the original body. The relevant period runs from the commencement of the works giving rise to the relevant liability until the date the building liability order is made.
DPA	A body corporate or partnership which is: • A current landlord of the relevant building or any part of it • A person who was a landlord of the relevant building or any part of it on 14 February 2022 • A developer in relation to the relevant building • A person associated with any of the above	

DPA liability should be distinguished from the BSA association remedies described above. A developer, contractor, consultant or other person may owe a direct duty under the DPA. An associated company does not itself become liable under the DPA merely because of its association with that person. However, where the underlying DPA liability constitutes a "relevant liability" for Section 130 purposes, a building liability order may potentially extend that liability to an associated body corporate.

Example

The below examples help illustrate the difficulties the BSA creates in identifying whether an entity could be liable for BSA claims. The position is far from straightforward:

Example one

Company B would be an "associate" of Company A if, at any point during the "relevant period"

- Company B controlled, or was controlled by, Company A
- Both Company A and Company B were under common control
- Company B and Company A share a common director

It will be seen from the above that the concept of "associate" is not therefore limited to entities that are in the same group structure. The risk of exposure to BSA claims from a single development project therefore goes significantly further than entities within discrete group structures.

Example two

Each of the following entities would also be "associated" for the purposes of the BSA in this scenario. Company A was a special purpose vehicle (SPV) that was part of the Family Co group. Company A developed one project. It had two directors, Director A and Director B. The following would be associated with Company A:

a. **Parent Co** – The immediate parent company of Company A.

b. **Sister Co** – Another SPV entity that was used to develop a separate project. Sister Co and Company A have the same parent and are part of the Family Co group structure.

c. **Family Co** – The ultimate parent company of the group

d. **Venture Co** – An investment vehicle that Family Co uses to invest in various nonconstruction related ventures, such as technology businesses. Venture Co is not part of the same legal group as Company A, but is a standalone entity controlled by Family Co.

e. **Property Co** – A property development company, not owned or controlled in any way by Family Co. However, Director A was one of the two directors of Property Co during the "relevant period".

f. **Manufacturer Co** – A manufacturer, with no involvement in the construction sector, and not owned or controlled in any way by Family Co. Director B was one of five directors of Manufacturer Co during the "relevant period".

When setting up these structures, Family Co would have expected that Parent Co, Sister Co, Family Co and Venture Co would be ringfenced from any direct liabilities relating to the project undertaken by Company A, unless they have specifically contracted to the contrary (e.g. by providing a parent company guarantee). The BSA has the potential to pierce that structure.

While many people may now understand that examples A–C above may fall within the scope of the BSA based upon the published aims of the legislation, many may not expect that the entities in examples D–F would face potential exposure.

For the purposes of our hypothetical scenarios, we have only given some examples of entities that could be associated with the main developer. The same test could also be applied against any entities associated with the various other parties that are involved in the development of a particular project e.g. subcontractors, consultants and professionals, to give a claimant a broad set of targets to potentially pursue.

Just and equitable requirement and RCOs

The BSA states that RCOs should only be made when the court considers that it is "just and equitable" to do so. Associated entities may therefore try to rely on this to resist such orders, by for example arguing that they did not receive any benefits from the project in question, or do not participate in the construction sector. However, initial indications are that the court will refuse an order on this basis in very limited circumstances.

We are only aware of one case where the court has refused a RCO on the basis that it would not be just or equitable to impose one, which was in respect of an associated entity that was a registered charity. While the case law will continue to evolve over time, the "just and equitable" requirement does not seem to offer much of a defence to an order being made.

Recent cases

Recent cases demonstrate the courts' willingness to interpret the BSA robustly.

In *Crest Nicholson v Ardmore*, a building liability order was pursued against associated companies based on an adjudication award, after the original contractor entered administration. The court accepted that a building liability application could be made based on the adjudication, notwithstanding that the adjudication award was capable of being challenged and therefore the underlying liability had not been finally determined.

In *Vista Tower*, a RCO was made against 76 associated entities on a joint-and-several basis. The decision confirmed that associated companies may be held liable despite having no direct involvement in the underlying development and shows how widely the reach of liability can extend.

The common theme is clear: where the primary development vehicle lacks covenant strength, claimants are increasingly seeking recovery elsewhere within the wider corporate group, and the court appears willing to interpret the BSA in a way that allows claimants to do that.

Implications for insolvency, lending and investment activity

Insolvency practitioners

The BSA presents new challenges in turnaround, formal insolvency and restructuring processes. Historic building safety liabilities may emerge years after completion of a project and can materially affect cashflows, recoveries, valuation assumptions and restructuring outcomes. Where associated-party liability is alleged, risks may extend well beyond the insolvent project vehicle itself. Given the extended limitation periods introduced by the BSA, where the company has suffered loss as a result of defective builds, certain claims that the company may have thought had lapsed may be able to be resuscitated, which could create additional recovery options for the IP to pursue.

Lenders

Lenders should carefully assess:

- Exposure to building safety claims within borrower groups
- The potential impact of remediation costs on cash flow and covenant compliance
- Whether security values have been affected by unresolved building safety issues
- The adequacy of insurance and disclosure arrangements

Corporates

Businesses with historic development, property ownership or construction involvement should review their exposure given the extended limitation periods for claims. The possibility of liabilities attaching to associated entities means that historic projects that were previously considered to be adequately ringfenced may now present liability and cashflow risks to current trading operations.

Companies should also evaluate whether they are "associated" with any entities that may face construction-related claims. This may include reviewing whether any directors simultaneously held directorships in nongroup entities during the period from February 2018 to February 2022.

Sponsors and investors

For sponsors and acquirers, BSA liability must now form part of transaction diligence.

Particular attention should be given to:

- Historic development activity
- Existing and former group structures
- Directorship overlap across portfolio companies
- Potential association under the BSA
- Adequacy of warranties, indemnities and insurance protections

In some cases, latent building safety exposure may significantly affect valuation, deal structuring and post-acquisition integration plans.

Key takeaways

The BSA has fundamentally altered the allocation of risk arising from building safety defects. What was once viewed as a project-level issue can now become a group-wide liability concern.

For insolvency practitioners, lenders, corporates and private equity investors, the principal lessons are:

- Building safety risk extends well beyond cladding issues
- Liability can arise in respect of historic projects through extended limitation periods
- Corporate association provisions may override traditional ring-fencing assumptions
- Acquisition activity can inadvertently create exposure to legacy liabilities
- Early diligence and risk assessment are increasingly critical

Organisations involved in transactions, restructurings or financing arrangements should ensure that building safety liabilities are considered alongside more traditional legal, financial and operational risks. The consequences of overlooking BSA exposure can be significant, particularly where liability may be transferred across a wider corporate group.

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