Building Safety F(ACT)s

Summer 2026

SQUIRE PATTON BOGGS

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Welcome to the summer edition of our Building Safety F(ACT)s newsletter, where we provide you with bite-sized updates on fire and building safety issues.

This summer edition includes:

Please feel free to share with your contacts – we welcome feedback and suggestions for other topics that you would like to see covered in future editions.

Mulalley & Co. Ltd v. Sto Ltd and Sto SE & Co. KGaA [2026] EWHC 1552 (TCC)

Illustrates the potential for a building liability order to be used further down the construction supply chain, after a contractor has settled an upstream building safety claim and the directly liable supplier has entered administration.

Background

Chelmer Housing Partnership Ltd appointed Mulalley under a 2006 design and build contract for refurbishment works at Parkside Court, a residential tower block in Chelmsford. The works included the design and installation of external cladding. Mulalley subcontracted the cladding works and specified the StoTherm Classic System supplied by Sto Ltd.

Following the Grenfell Tower fire, Chelmer identified defects in the cladding system. In December 2022, Mulalley agreed to remove and replace the defective cladding and to make certain payments to Chelmer. It then pursued Sto Ltd for a contribution towards the cost of the remedial works and the sums paid under the settlement.

The contribution claim was based on Sto Ltd having its own liability to Chelmer under Section 149 of the Building Safety Act 2022. Sto Ltd entered administration in January 2025, and proceedings against it became subject to the statutory moratorium. Mulalley also pursued Sto Ltd's German parent company, Sto SE & Co. KGaA, seeking a building liability order under Section 130.

Sto Germany did not defend the proceedings. Waksman J entered judgment in default against it on 8 December 2025, with damages to be assessed. Pepperall J's judgment concerns that assessment.

How the statutory routes fitted together

Three separate legal mechanisms were involved. Section 149 supplied the alleged underlying liability of Sto Ltd as the supplier of the cladding system. The Civil Liability (Contribution) Act 1978 allowed Mulalley to seek an appropriate contribution after resolving Chelmer's claim. Section 130 provided the route by which Sto Ltd's relevant liability could be extended to its associated German parent.

Section 149 is retrospective. It applies to certain past defaults involving cladding products and carries a 30-year limitation period for claims accruing before the provision came into force.

Liability can arise from a failure to comply with an applicable cladding product requirement, a misleading statement about the product or the manufacture of an inherently defective product, provided the default caused or contributed to the building or a dwelling being unfit for habitation.

The phrase "the cause, or one of the causes" is important where product defects sit alongside defects in design, workmanship or installation. The wording indicates that a product default need not be the only cause of unfitness.

Those points were not determined after contested argument in Mulalley v Sto. The default judgment established the relevant liability findings. They included that Sto had supplied a product that failed to comply with Functional Requirement B4(1) and Regulation 7 of the Building Regulations, had made misleading statements about the StoTherm Classic System and had supplied an inherently defective product. The misleading statements and the defective nature of the system were also treated as causes of the apartments being unfit for habitation.

The route to the German parent

Section 130 allows the High Court to make a building liability order where it considers it just and equitable to do so. The order may provide that a relevant liability of one body corporate is also the liability of an associated body corporate, or that the companies are jointly and severally liable. Association is determined under Section 131 by reference to corporate control.

The associated company does not need to have committed the underlying breach itself. The order extends an existing relevant liability beyond the company that originally incurred it. Here, the administration of Sto Ltd did not extinguish the alleged liability, but it prevented the claim against the company from continuing without the necessary consent or permission. The default judgment against Sto Germany allowed the assessment to proceed against the parent company.

The overseas location of the parent did not prevent judgment being entered in England. Enforcement in Germany, and any jurisdictional arguments that may arise at that stage, are separate matters. The judgment is nonetheless a warning to international product groups that historic UK liabilities may not remain confined to the subsidiary that supplied the product.

The contribution

The 87.5% contribution figure awarded was assessed under Section 2(1) of the Civil Liability (Contribution) Act 1978, not under the "just and equitable" test for making a building liability order under Section 130. Section 2 requires the court to award such contribution as is just and equitable having regard to the extent of the contributing party's responsibility for the damage. The assessment takes account of both the seriousness of the parties' respective faults and their causative importance.

Mulalley invited the court to draw an analogy with contribution claims against architects responsible for defective design. Pepperall J accepted that an architect's contribution in such circumstances might commonly fall between 67 and 80%.

The findings against Sto justified a higher allocation. The principal cause of the remedial works was found to be Sto's marketing and supply of an inherently defective product. Its standard detail included combustible insulation over the face of the fire barriers, the same type of detail described in *Martlet Homes Ltd v. Mulalley & Co Ltd* [2022] EWHC 1813 (TCC) at Paragraph 188 as fundamentally deficient. Taking the seriousness and causative effect of Sto's conduct into account, the court fixed its contribution at 87.5%.

Proving the recoverable expenditure

The default judgment did not entitle Mulalley to recover the pleaded amount without evidence. It still had to establish what expenditure had been incurred, whether the expenditure related to the pleaded defects, whether it was reasonable and what contribution Sto should bear.

Mulalley's gross claim included costs of approximately £3.73 million. Its quantity surveying expert reviewed the underlying records and assessed the total costs actually incurred at approximately £3.43 million, making reductions to preliminaries, subcontractor costs, consultancy fees and legal expenses.

The remedial works extended beyond the defects attributed to the Sto system. The expert apportioned the costs to remove expenditure relating to other elements of the works, reducing the relevant amount to approximately £2.09 million. Mulalley accepted a further reduction to exclude the legal costs of negotiating the settlement with Chelmer. The reasonably incurred remedial costs attributable to the defective Sto system were assessed at £2,025,499.62.

Pepperall J referred to Martlet Homes at Paragraph 422, where HHJ Stephen Davies observed that courts are generally reluctant to criticise with hindsight the reasonableness of expenditure on remedial works. Even so, the costs were examined against the available evidence. The expert found no cheaper technical solution and considered the preliminaries, scaffolding and subcontractor costs to be within the expected range.

The court also accepted that Mulalley had no commercial incentive to overdesign the remedial scheme. As the contractor funding the works following its settlement, it had a direct interest in keeping the expenditure under control. Applying the 87.5% contribution produced judgment against Sto Germany for £1,772,312.17, together with interest.

Implications for suppliers, contractors and corporate groups

Mulalley had resolved the claim made against it by the building owner and then sought recovery further down the supply chain. This is different from the more familiar building liability order claim brought by an owner or leaseholder against a developer and its associated companies.

The combination of Section 149 and the Contribution Act gives contractors and developers a possible route against cladding product suppliers after an upstream claim has been settled or remedial work has been undertaken. Concurrent faults will remain common. An inherently defective product may also have been poorly specified or installed. Statutory wording allows a product default to be one of several causes of unfitness, although the eventual contribution between responsible parties will depend on the seriousness and causative effect of their respective conduct.

A settlement with the building owner does not establish the amount recoverable from another party. Detailed records remain essential. Expenditure attributable to other defects, improvements, legal work or broader refurbishment may need to be removed or separately justified. The judgment provides a useful example of the court starting with the actual costs, testing them for reasonableness and then stripping out expenditure not caused by the relevant product default.

For manufacturers and suppliers, claims under Section 149 may concern projects completed decades ago. Product specifications, test evidence, marketing statements, standard details and documents explaining the intended use of the system may all become important. Poor historic record keeping will make defending those claims considerably harder.

Corporate groups should also reconsider the assumption that liability can be contained within the trading subsidiary. A building liability order does not require the parent or sister company to have manufactured, marketed or supplied the product. Once the original company has incurred a relevant liability, Section 130 can place that liability on an associated company if the statutory test is met.

Conclusion

Mulalley v. Sto shows how a historic cladding product claim, a contribution claim and a building liability order may operate together after a contractor has resolved an upstream building safety dispute.

Its practical significance is narrower than a fully contested decision, but still substantial. A contractor that has funded remediation may seek contribution from a product supplier, and the administration of that supplier may not prevent recovery where an associated company falls within Section 130. Product manufacturers, suppliers and their wider corporate groups can no longer assume that liability will remain confined to the UK entity that supplied the product.

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A new stage in Gateway 2: Gateway 2 applications and the potential shift to staged approvals

The Building Safety Regulator (BSR) has continued to make steady progress in reducing delays in the Gateway 2 approval process. In the 12-week period to 28 June 2026, the BSR made 368 Gateway 2 decisions across all application categories, of which 284 were approved, giving an approval rate of 77%. This continues the improvement seen during the first half of 2026, although substantial numbers of applications remain in progress. This represents a marked improvement on the position a year earlier, when applications were taking anywhere between 25 and 40 weeks, particularly for London developments, which still account for the majority of applications but are now moving through the system more predictably.

The BSR's strategic plan for the period 1 April 2026 to 31 March 2027 confirms its intention to reduce Gateway 2 approval times further. For noncomplex new-build higher-risk buildings (HRBs), the BSR aims to reach an average processing time of around 18 weeks by March 2027. This remains outside the statutory 12-week period but a significant improvement on earlier performance. For noncomplex remediation applications, the BSR aims to respond within the 12 weeks by the end of March 2027. These improvements will be welcome news for stakeholders involved in fire-safety remediation, where delays in Gateway 2 approval have often prevented life-critical works from commencing.

Staged applications

A further development has been the BSR's acceptance of staged Gateway 2 applications, following updated guidance issued jointly with the Construction Leadership Council on 18 December 2025. Staged applications allow an approved initial substructure stage to commence while the detailed design of later stages is completed. For a typical single-tower development, the BSR expects the first stage to include the foundations and structure up to the ground floor slab or plinth. Each stage must still be fully detailed and demonstrate compliance with the Building Regulations 2010, supported by a summary of the plans and standards to be adopted for subsequent stages.

For a first stage of work, the application must include all information required for a single stage application, together with a staged work statement, plans demonstrating compliance for that stage, a summary of plans for later stages, and a Building Regulations compliance statement and certificate that also address the design principles and standards to be applied beyond that stage. Subsequent stages must again include the full suite of documents required for a single stage HRB application, supplemented by a subsequent stages statement, plans demonstrating compliance for that stage, and updated summaries of design principles and standards.

In essence, the BSR must be satisfied, when assessing the first stage, that the building as a whole will be capable of achieving compliance on completion in accordance with the relevant design principles and standards.

The guidance provides examples of how staging may be used; for instance, dividing a single block development into two stages (substructure/foundation and all remaining works), or, for more complex schemes, separating the substructure from the superstructure and then dividing the superstructure into individual blocks. However, the BSR is clear that staged applications should not be used to mirror works packages, as this risks undermining the rigour of the regulatory review. Early indications suggest that the availability of staged applications has contributed to the recent reduction in Gateway 2 delays.

Contractual considerations and risk allocation

How has the introduction of staged Gateway 2 approvals influenced how risk is allocated under building contracts?

Gateway 2 approval is a statutory prerequisite to commencing the higher risk building work covered by the application. Where the application is staged, work on each stage cannot commence until approval for that stage has been obtained. Once a contractor has mobilised, each subsequent stage introduces a fresh point of risk to the programme. A delay at any one of those stages can disrupt progress at a time when the contractor may already have committed to labour, plant, long-lead items or subcontract packages.

There is a discernible trend towards employers accepting the time risk associated with pure regulatory delay at Gateway 2 on the basis that the contractor has limited influence over the BSR's review process (although the position may start to change with the benefit of greater visibility and consistency over the process and with contractors, often the primary point of contact with the regulator). The contract should nevertheless distinguish genuine regulatory delay from delay caused by an incomplete application, defective design information or a failure to respond promptly to the BSR. Staged approvals amplify this exposure: in effect, staging multiplies the number of regulatory hold points, and with them potential liability for delay – and that may be a risk that developers are simply unable to take.

Staged applications also introduce financial risk. Where progress is delayed once the contractor has mobilised, the financial consequences can be significant. Prolonged preliminaries, standing time for labour and plant, storage or reprocurement of long lead items, and the knock on effects of subcontractor remobilisation, can all generate additional cost.

If the design principles, assumptions or interfaces supporting an approved early stage subsequently change, the change control process may result in redesign, delay or rework.

Conclusion

The staged Gateway 2 process offers clear practical advantages, particularly the ability to progress early works while later stage design continues to develop. For many projects, this flexibility has the potential to unlock earlier mobilisation and reduce the overall impact of the regulatory approval process. This new approach appears to have supported the reduction in the Gateway 2 backlog.

However, staging also introduces additional contractual risk. Each stage creates a new approval point, and once a contractor is on site, any delay at a later stage can have real programme and cost consequences. It remains very early days, and it is not yet clear whether employers or contractors will have the appetite to adopt staged applications widely – and if so, how that risk will be allocated. For some, the opportunity to accelerate works will be attractive; for others, the multiplication of regulatory hold points and the associated time and financial exposure may reduce the willingness of parties to embrace the change. As the regime matures, the market will need to balance these competing considerations carefully.

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Into Nominee and the elusive doctrine of lease frustration

Background

The Technology and Construction Court (TCC) has delivered an important judgment on the doctrine of frustration in the context of long commercial leases, holding that the discovery of serious fire safety defects did not bring a 25-year lease to an end. The decision will be of particular interest to landlords, tenants and property professionals dealing with buildings affected by cladding and other building safety issues following the Grenfell Tower tragedy.

In *Into Nominee One Ltd* and another *v Study Group UK Ltd* and another [2026] EWHC 1201 (TCC), the TCC granted summary judgment for the landlords, rejecting the tenant's argument that the lease had been frustrated because the premises had become unsafe and unusable as a residential training school.

In 2007, Study Group UK Limited (SGUK) entered into a 25-year lease of Voyager House, a purpose-built residential educational facility. The lease was due to expire in September 2032, with Daily Mail and General Trust plc acting as surety for the tenant's obligations.

In 2022, investigations identified extensive fire safety defects throughout the building, including combustible cladding and missing cavity barriers. Expert evidence established that the premises were unsafe to occupy, and that extensive remedial works would be required over several years. It was considered unlikely that the building could be used again for its intended educational purpose before the lease expired.

The landlords sought to recover unpaid rent. SGUK resisted the claim, arguing that the lease had been automatically discharged under the doctrine of frustration because the premises could no longer lawfully or safely be used for their intended purpose.

The tenant's arguments

SGUK advanced two principal arguments:

1. Frustration by reason of fire safety defects

The tenant argued that the common commercial purpose of the lease was the operation of a residential educational facility. Once the building became permanently unusable due to life-critical fire safety defects, the lease had been fundamentally transformed into something radically different from what the parties had contemplated.

2. Frustration by legislative change

Alternatively, SGUK argued that legislation introduced following the Grenfell Tower fire, including the Fire Safety Act 2021 and the Building Safety Act 2022, had fundamentally altered the legal landscape and rendered performance of the lease impossible.

The legal principles

The court considered the well-established doctrine of frustration, applying the multifactorial approach endorsed by the *Court of Appeal in Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, together with the High Court's reasoning in *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch). Frustration is only established where a supervening event, occurring without the fault of either party, renders contractual performance impossible or transforms the obligations into something radically different from those originally undertaken.

In the context of leases, the doctrine is applied particularly narrowly because leases allocate risks between landlord and tenant over long periods.

The court's decision

The TCC rejected both frustration arguments and granted summary judgment in favour of the landlords.

Risk had already been allocated by the lease

- A central feature of the judgment was the court's analysis of the contractual allocation of risk.
- The agreement for lease anticipated the possibility that construction defects might emerge by providing for:
  - A defects liability period
  - Collateral warranties
  - Deeds of warranty
- These provisions demonstrated that the parties had recognised the possibility of latent defects from the outset.
- More importantly, the lease itself imposed exceptionally broad repairing obligations upon the tenant.
- Clause 3.7 required SGUK to rebuild, reconstruct, renew or replace the whole of the premises whenever necessary, subject only to an exception for insured risks.
- The court held that this obligation was sufficiently wide enough to include rebuilding required because of latent construction defects.

No warranty that the premises were suitable

- The lease also expressly excluded any landlord warranty that the premises would be suitable for the tenant's intended use.
- Accordingly, the tenant had assumed the risk that the building might later prove unsuitable, even where the reason was the discovery of previously unknown defects.

Insured risks demonstrated deliberate risk allocation

- The court also considered the lease's insurance provisions. Certain catastrophic events, such as insured damage, were expressly allocated between the parties.
- By carving out insured risks but saying nothing about latent construction defects, the parties had implicitly allocated the latter risk to the tenant.
- This contractual allocation was inconsistent with an argument that the lease should simply come to an end through frustration.

Post-Grenfell Legislation Did Not Frustrate the Lease:

- The tenant's alternative argument based on changes in fire safety legislation also failed.
- The court observed that the building already required extensive remediation before the Fire Safety Act 2021 and the Building Safety Act 2022 came into force.
- The legislation had not created the defects or fundamentally altered the parties' contractual obligations. Rather, it reinforced the need for works that were already necessary.
- Accordingly, the legislative changes did not amount to a supervening event capable of frustrating the lease.

Why the case matters

The judgment provides one of the clearest post-Grenfell authorities on frustration and building safety defects.

It confirms that:

- Serious latent fire safety defects will not automatically bring a lease to an end;
- Courts will closely examine the lease to determine how risks have been allocated;
- Extensive repairing obligations can require tenants to bear the consequences of latent construction defects, even where rebuilding is required;
- Express exclusions of warranties as to fitness for purpose may significantly weaken frustration arguments;
- Changes in building safety legislation are unlikely, without more, to frustrate an existing lease.

The decision also reinforces the principle established in the European Medicines Agency litigation that frustration remains an exceptional doctrine in leasehold cases.

Practical implications for landlords and tenants

- For landlords, the decision underlines the importance of carefully drafted repairing covenants, insurance provisions and exclusions of warranty. Where risks have been clearly allocated within the lease, courts will generally uphold that allocation even where unforeseen building safety issues arise.
- For tenants, the judgment serves as a reminder that entering into a long lease may involve assuming significant property-related risks. Before taking a lease of specialist premises, tenants should carefully review repairing obligations, seek appropriate technical due diligence and consider whether contractual protections against latent defects or major remediation costs are required.
- The case is also likely to influence future disputes concerning cladding, structural defects and the allocation of building safety responsibilities under long commercial leases.

Key takeaways

- The High Court confirmed that serious fire safety defects do not automatically frustrate a commercial lease.
- Frustration will only arise in exceptional circumstances where contractual obligations have been fundamentally transformed. As expected, this is very challenging to assert under a lease.
- The court will examine the lease as a whole to determine whether the relevant risk has already been allocated between the parties.
- Broad repairing obligations may extend to rebuilding or replacing premises affected by latent construction defects.
- Express exclusions of landlord warranties regarding suitability for purpose can significantly undermine frustration arguments.
- Post-Grenfell fire safety legislation will not frustrate a lease where remediation was already required before the legislative changes.
- The decision reinforces the courts' reluctance to allow parties to escape long-term lease obligations through the doctrine of frustration.

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Thanks to Amrit Natt, trainee solicitor in the Real Estate Litigation team in our Birmingham office, for his contribution to this article.

Proposals To Simplify Procedures For Telecommunications Infrastructure Works

Current position

Following the Grenfell Tower fire, the UK introduced a significantly strengthened regulatory framework for higher-risk buildings (HRBs) under the Building Safety Act 2022 and related regulations.

HRBs are defined as buildings at least 18 metres in height, or seven storeys with at least two residential dwellings. The Building Safety Regulator (BSR) oversees compliance in relation to HRBs.

The more stringent regulatory regime for HRBs includes a new gateway regime that applies to construction works before, during and on completion of building work to ensure that compliance with building regulations is considered fully. The gateway regime includes three gateways:

- **Gateway one** – Planning application stage, which is to ensure that fire safety is incorporated and considered at the planning stage.
- **Gateway two** – Building control approval must be obtained before construction work can commence.
- **Gateway Three** – Final approval is required before occupation, confirming that the completed building complies with building regulations and is safe to occupy.

The introduction of HRBs and the BSR have improved building safety and compliance culture. However, the regime has also created unintended burdens for telecommunications operators by requiring BSR approval for routine, but essential works. Industry feedback suggests these processes can be slow, costly and disproportionate to the relatively low risk posed by such works, potentially delaying critical infrastructure delivery. The government therefore considers that some current application requirements, particularly for fibre optic installations, may be unreasonable and in need of reform.

The government consultation is proposing to relax building control requirements for certain telecommunications work, including drilling small holes through internal fire-resisting walls to install fibre optic cabling and work related to mobile communication masts.

Key to the rationale for the government consultation is the 10-year strategy for UK infrastructure, which aims to drive sustainable growth and secure critical digital network infrastructure in the UK. Relaxing requirements for operators would reduce delays in telecommunications infrastructure delivery.

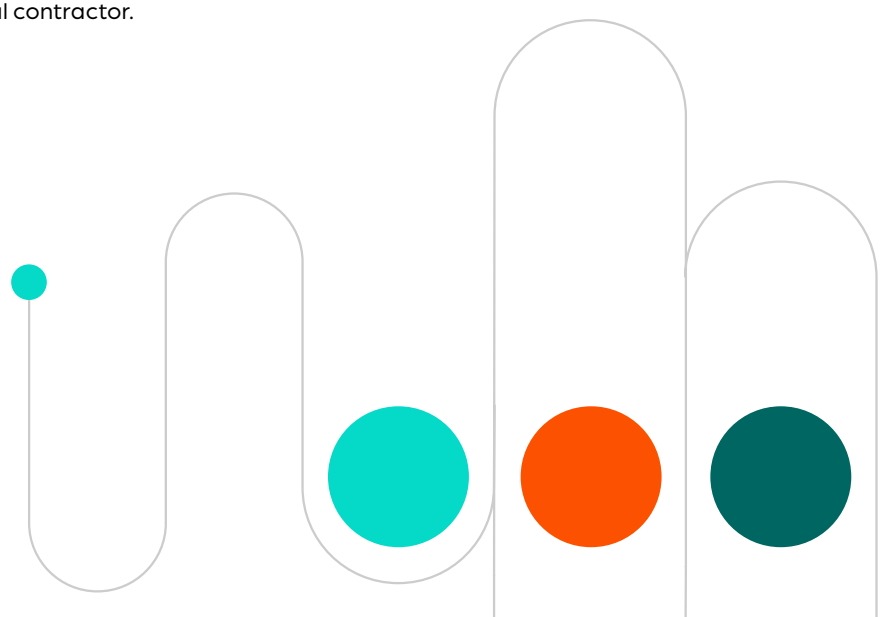
The proposals

Installation of fibre optic cabling

In short, for HRBs the need for BSR approvals would be removed, while for non-HRBs the need to submit building control applications or notices would be removed. In both cases, the exemptions would be subject to safeguards such as competent installation, appropriate fire-stopping, record-keeping and completion notifications to maintain fire safety and compliance.

Buildings work to communication masts

In short, it is proposed that most pre-approval and construction-stage building control requirements for installing and repairing mobile masts on existing HRBs would be removed, allowing work to start without prior BSR approval. A completion certificate and safety checks would still be required. Key safety conditions would be retained including contractor qualifications, product standards and digital records, with responsibility on the principal contractor.



Enforcement

Even where dispensations are introduced, all remaining requirements of the Building Regulations 2010 continue to apply in full, and compliance remains enforceable through the standard enforcement mechanisms.

Work is only considered compliant where it satisfies all functional and duty holder obligations, and any specific conditions attached to the relevant dispensation.

Failure to comply with any condition, or permitting a condition to be breached, may result in prosecution and financial penalties. This can include fines, currently not exceeding (£200), with additional daily penalties applicable for each day the offence continues after conviction.

Dispensations apply strictly to clearly defined categories of work. Any party relying on them must ensure that their work falls entirely within the specified scope and meets all associated requirements.

Takeaways

- The interplay between the Building Safety Act regime and telecommunications infrastructure delivery is becoming increasingly significant, and the current consultation process appears to be seeking to rebalance regulatory requirements in favour of operators where works are routine and low risk.
- For operators, this is a broadly positive development, indicating a potential move towards reduced procedural burden and improved efficiency, although the final impact will depend on the detail of consultation outcomes and any subsequent legislative changes introduced by government.
- For institutional landlords and developers, the proposed direction of travel may reduce reliance on building control processes as a means of regulating operator activity, potentially shifting greater emphasis onto contractual controls and internal governance arrangements to manage risk and ensure compliance.

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Thanks to Amrit Natt, trainee solicitor in the Real Estate Litigation team in our Birmingham office, for his contribution to this article.

Expert Corner: Cladding Remediation: Contrasting Cost Assessments under the Building Safety Act and the Defective Premises Act

Squire Patton Boggs (SPB) are pleased to have SOCOTEC Forensics & Advisory (SOCOTEC) as guest editor to contribute to our newsletter. The views expressed in this article should not be construed as forming any advice or opinion (legal or otherwise) provided or endorsed by SPB.

Remediation of cladding arising from fire safety risks is a complex legal and technical exercise, and that complexity extends to the assessment of associated costs. From a quantum perspective, the statutory route relied upon can materially affect both what costs are recoverable and how rigorously those costs are scrutinised.

In broad terms, a key distinction emerges. Claims under the Building Safety Act 2022 (BSA) are primarily concerned with the allocation and funding of remediation, whereas claims under the Defective Premises Act 1972 (DPA) are compensatory in nature, applying conventional "damages" principles. This distinction has significant practical implications for the assessment and recovery of cladding remediation costs.

The Defective Premises Act: A Conventional Damages Framework

Claims under section 1 of the DPA are typically advanced in the Technology and Construction Court (TCC) although related contractual claims may be capable of adjudication. As such, they are subject to the established "damages" principles, including causation, reasonableness, and mitigation. Recoverable losses may include the reasonable cost of remedial works; diminution in value; and certain consequential losses, subject to remoteness.

Although the existence of remediation costs may be readily identifiable, evidencing those costs to a litigation standard is frequently challenging in practice. In many cases, because remediation works have been undertaken before litigation was contemplated, contemporaneous cost records may be incomplete or insufficiently detailed.

Claimants will often seek to recover a broad range of costs, including:

- investigative and intrusive survey works;
- technical advice and design development;
- the remediation works themselves; and
- post-contract professional services.

Each element must be properly evidenced and, where necessary, apportioned to isolate costs attributable to actionable defects. This is particularly important if a building contract includes works that go beyond what is strictly required to remedy the relevant defects.

The role of the quantum expert is therefore critical. Working alongside the technical expert, they must establish if the costs incurred were reasonable and proportionate. This may involve detailed analysis of procurement strategy and contractor pricing, including allocation of preliminaries (such as access systems and scaffolding), which form a significant proportion of the costs of a cladding remediation scheme often disproportionate to the costs of cladding itself.

Whilst industry cost data, including recent government studies on cladding remediation, can provide useful context, such data sets should not, in the writer's opinion, form the basis of the quantum expert's findings. Instead, those findings should be focussed on project specific factors such as location, complexity, access constraints and prevailing market conditions.

The Building Safety Act: A Funding and Allocation Regime

By contrast, claims under the BSA, pursued through Remediation Orders (ROs) and Remediation Contribution Orders (RCOs), operate within a different legal framework. They each have different remedies and the "just and equitable" test applies to an RCO under section 124, but not to an RO under section 123.

This legal framework is often forward-looking, focussing on who should bear the cost of making a building safe, rather than compensating for historic loss. Arguably, it is less concerned with the precise quantification of damages and more concerned with ensuring that remediation is funded and delivered.

In determining such applications, the First-tier Tribunal applies a "just and equitable" test, which introduces a broader and more policy-driven approach to cost allocation. In practice, this may result in:

- a less detailed examination of individual cost items; and
- a focus on ensuring that building safety risks are urgently addressed.

If costs have already been incurred, they must still be credible and supported by evidence, but the Tribunal's approach is likely to be more pragmatic than that adopted by the TCC in a DPA claim.

Key Differences in Practice

The practical effect of these differing frameworks is that identical remediation works may be subject to significantly different cost assessments, depending on the statutory route pursued.

Under the DPA:

- costs are assessed as recoverable loss;
- there is close scrutiny of necessity, proportionality, and reasonableness;
- alternative remedial schemes may be compared; and
- there is a strict focus on avoiding over-recovery.

Under the BSA:

- costs are assessed in the context of funding and responsibility;
- the Tribunal may take a broader, more pragmatic view of the appropriate scope of remediation;
- cost scrutiny may be less granular; and
- the emphasis is on delivering building safety outcomes, rather than perfecting cost analysis.

Implications for Quantum Strategy

These differences give rise to important strategic considerations for claimants, defendants, and their advisers.

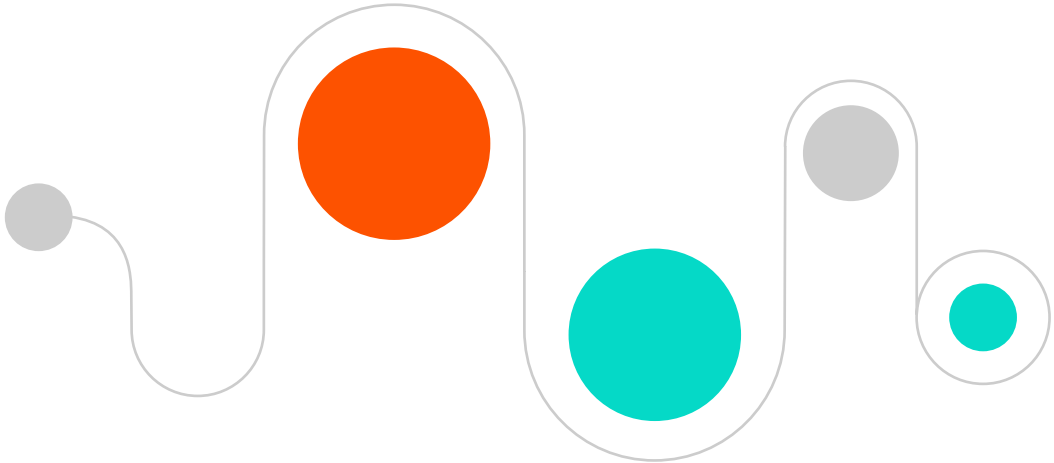
In particular, it may not be possible to adopt a fully "back-to-back" approach where a party seeks to recover, from its supply chain, sums that have been ordered under the BSA's RO or RCO procedures. The more stringent and forensic assessment of damages under the DPA may result in a mismatch between upstream liability and downstream recovery.

The mismatch may arise because an RCO is an independent statutory remedy, while downstream recovery may still depend on duty, breach, causation, limitation and any contractual caps or exclusions.

For quantum experts, this creates a challenging environment. Assessments must be carefully aligned not only with the technical scope of remediation, but also with the legal framework governing recovery. What may be sufficient to support an award under the BSA may not withstand the more detailed scrutiny applied to a DPA claim.

Conclusion

The expansion of remedies under the Building Safety Act has significantly altered the landscape for cladding remediation claims. Understanding this distinction is critical. The BSA and the DPA do not simply provide alternative routes to the same outcome; they reflect fundamentally different approaches to cost assessment and recovery. For those involved in cladding disputes, navigating that distinction is a central component of any effective quantum strategy.



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About Damian Waters

Damian is a legally qualified quantity surveyor with over 39 years of experience in the construction industry as a Commercial Director, Commercial Management, Quantity Surveyor and Contracts Consultant. He has worked on a broad range of projects for a varied UK and international client base in the building, civil engineering, infrastructure, oil and gas, power and utilities, marine and offshore renewable sectors.

Damian has provided commercial and contractual advice to contractors and employers on a number of major international projects and has significant experience in managing large multi-disciplinary teams both in pursuing and defending construction claims. He has strong commercial and contractual knowledge and has worked with a range of standard and bespoke forms of contract.

Damian has been appointed as an Expert Witness and Expert Advisor on quantum matters on numerous occasions and has extensive experience of dispute resolution. He has acted as client representative in adjudication, Dispute Adjudication Boards, arbitration and mediation hearings.

In addition to his industry expertise, Damian is an experienced lecturer, delivering workshops, in-house training and public seminars to employers, main contractors, subcontractors, suppliers, professional bodies and trade associations.

About SOCOTEC

SOCOTEC Forensics & Advisory is a chartered quantity surveying and expert witness consultancy, providing expert witness, dispute resolution, and quantity surveying services to the construction and engineering sectors across the UK and international markets. Our team provides expertise across quantum, delay, and technical matters in all major dispute resolution forums. We work closely with legal teams and clients to bring clarity to complex issues, supporting effective and efficient dispute resolution.

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