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Building Safety F(ACT)s

UK – July 2025

It's All Change at the Building Safety Regulator

A major revamp of the Building Safety Regulator (BSR) has been announced by the government with the goal of reducing delays and increasing the number of new houses delivered. Reforms include hiring more than 100 new employees, implementing a new gateway application fast track process and moving supervision from the health and safety executive to a new board headed by Andy Roe and Charlie Pugsley, former heads of the London Fire Brigade.

While many in the industry have welcomed this change in leadership, others have raised concerns that the appointments may signal too narrow a focus on fire risk, potentially overlooking the broader systems and processing expertise needed to manage complex regulatory functions at scale.

Meanwhile, the House of Lords Industry and Regulators Committee has launched a formal inquiry into the BSR's performance. The committee is examining whether the BSR has improved the safety of the buildings it oversees, whether its regulatory framework is proportionate and comprehensible and whether the current model is contributing to or obstructing the Government's housing targets. Specific areas of focus include:

- Whether the BSR has improved the safety of higher-risk buildings in practice
- How the regulatory framework is affecting the delivery of new homes and remediation of existing buildings
- Whether the BSR's approach strikes the right balance between outcome-based regulation and clear guidance for duty holders
- To what extent regulatory delays are a result of BSR processes, resource limitations or developer understanding
- Whether the BSR has sufficient skilled staff to carry out its work
- How the BSR interacts with building control bodies and its role in construction products oversight
- Whether a move to organisation-level regulation (rather than building-by-building) would be beneficial

The timing is notable. The government's reforms have been announced while the House of Lords inquiry is ongoing, with submissions open until 31 August and a report expected in the autumn. It remains to be seen whether the newly announced fast track process will take the committee's findings into account or pre-empt them, raising questions about whether the government is trying to get ahead of criticism rather than responding to it.

Clients engaged in higher-risk residential development should keep a close eye on both the reforms and the Lords' conclusions, as the regulatory framework may yet shift again.

We will be canvassing views from clients and contacts as we prepare our own submission to the House of Lords inquiry. If you would like to share your experience of the gateway process, raise concerns or propose practical improvements, please get in touch by emailing Charlotte Higham and Paul O'Kane. We would be pleased to reflect your views in our response.

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Construction Products Reform Green Paper

In response to the Grenfell Tower tragedy Inquiry Phase 2 Report, which revealed deep flaws in the construction products regulatory system, the UK government has launched the Construction Products Reform green paper consultation. Despite reforms already underway, the government acknowledges ongoing gaps and proposes ambitious changes to enhance safety, accountability and innovation in the construction sector. The green paper outlines reforms aligned with the Grenfell Inquiry's recommendations, two independent reviews and the official response to the Morrell-Day Review on product testing and certification, published in April 2023.

Key proposals include expanding regulatory coverage to all construction products, strengthening testing and certification systems, as well as equipping regulators with greater powers and resources, and increasing penalties, with the possibility of unlimited fines and prison sentences for directors. The aim is to build a safer, more trusted construction sector capable of supporting infrastructure goals. Alignment with EU regulatory standards is also considered to ensure consistency and confidence. The consultation closed on 21 May 2025, and we are expecting the Government Response.

The proposal will likely increase the costs of compliance within the construction sector but also create innovation in the construction products market and new opportunities in the sector.

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Uncertainty in the Courts: Do Terraces Count as a Storey?

It is well known by now that the building safety regime applies to any higher-risk building (HRB), but it is less well known that there has been uncertainty over aspects of the definition of a HRB and the overall definition is likely to change in the future due to a recommendation by the Grenfell Inquiry.

Uncertainty in the Courts

Currently, a HRB is a building in England that is at least 18 metres in height, or has at least seven storeys (including the ground floor) and that contains at least two residential units (or is constructed to be a care home or hospital). This is subject to certain uses being excepted, such as hotels.

The government published guidance in June 2023 and October 2023, on the legal definition of a HRB (the "Guidance").[1] On the issue of counting storeys, the Guidance states "A storey must be fully enclosed to be considered a storey. The roof of a building should not be counted as a storey. Open rooftops such as rooftop gardens… should not be counted."

However, the legislation does not say this. The only excluding provisions about rooftops in the legislation relate to storeys that are a rooftop machinery or rooftop plant area, or rooftops exclusively consisting of machinery or plant. It is otherwise silent on rooftops and does not provide a definition of a "storey".

This apparent disharmony between the legislation and the Guidance came before the First-Tier Tribunal (FTT) in 2024.[2] The case concerned an application for a remediation order in relation to cladding, walkways, a courtyard and a roof garden. Neither party to the proceedings argued that the building was a HRB. However, the FTT considered the conflict between the legislation and the Guidance in detail, nonetheless. It concluded that the Guidance appeared "to not only add to the statutory provisions, but also to contradict them". The FTT made a remediation order against the freeholder and commented that a roof garden counted as a storey, and the building was therefore a HRB. This clear conflict between the government's position and the FTT's initially caused confusion in the industry, however the FTT's decision was appealed to the Upper Tribunal (UT) and the UT upheld the appeal.[3] Commenting on the FTT's opinion that the building was a HRB, the UT stated that it was "impossible to understand" why the FTT did not remove its commentary about HRBs from its decision and noted the confusion and damage caused.

1 Collection: Guidance on the criteria for being a higher-risk building

2 *Smoke House & Curing House, 18 Remus Road, London E3 2NF: LON/00BG/HYI/2023/0024*

3 *Monier Road Limited v Nicholas Alexander Blomfield and Other Leaseholders [2025] UKUT 157 (LC)*

Future Changes to the Definition of HRBs

On the same day as the UT's decision, the government added a note to the Guidance stating that the government was considering a proposal to amend the legislation to provide clarity on the roof garden issue, but that in the meantime, the government's view remained that roof gardens are not storeys.

It now seems highly likely that there will be an amendment to the legislation on this issue, but also the definition of a HRB more broadly. One of the key recommendations of the Grenfell Inquiry was that the definition of a HRB should be reviewed because the definition being based on height is, in its view, "arbitrary in nature", and that HRB status should instead relate to the nature of a building's use and the likely presence of vulnerable people who may have difficulty evacuating.[1]

Although the Grenfell Inquiry was critical of the height threshold in the definition, the current technical guidance relies on height as a risk factor when determining the fire safety solutions required for a particular building during its construction. For example, Approved Document B currently sets what level of fire separation is needed based on height thresholds. It seems unlikely that building regulations requirements or Approved Document B would be watered down, and it may be difficult to predict what degree of vulnerability the future occupiers of a building may possess during the construction of that building. Furthermore, the Grenfell Inquiry did not expressly recommend a specific alternative definition of a HRB, nor a specific alternative methodology to use if the law and guidance should move away from using height thresholds to determine the fire safety solutions required for a particular building during its construction. This may suggest that a future change to the definition of a HRB is more likely to relate to the occupation phase rules than the construction phase rules, since the use of the building and the degree of vulnerability of its users could be better understood during occupation.

It may be that the duties will be refocused and strengthened, so that accountable persons and principal accountable persons for buildings with vulnerable occupiers must do more to protect those users, for example by making an express legal requirement to assess the vulnerability of occupiers and put in place personal emergency evacuation plans for those meeting a vulnerability threshold, or having certain characteristics which indicate a higher level of vulnerability (such as mobility limitations).

There may also be a reduction in the height threshold for a HRB, possibly even for the construction phase. There were calls, most notably from fire chiefs, for the height threshold for the mandatory installation of sprinklers in new buildings to be reduced to 11 metres (it was previously 30 metres), and this resulted in a change to Approved Document B accordingly. An 11 metre height threshold for HRBs during the construction phase would perhaps be more in line with current technical guidance, and it would certainly be in line with the current definition of a "relevant building" under the Building Safety Act 2022 (BSA) (which relates to the remediation of defects).

Time will tell. The government's response to the Grenfell Tower Inquiry[2] states that it will set out plans for the "ongoing review" of the definition of a HRB in summer 2025. We will provide further updates as they become available.

1 Grenfell Tower Inquiry - Phase 2 report Executive Summary

2 Policy paper Grenfell Tower Inquiry Phase 2 Report: Government response

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Who Pays? The Recovery of Remediation Costs (URS v BDW)

The Supreme Court's decision essentially gives effect to the policy intent that the parties at fault will be held responsible. As a result, professionals (e.g. contractors and engineers) and potentially those further down the chain, may not be able to escape liability.

Professionals who have taken on work in providing "dwellings" do not only owe a duty to the homeowners, but also to the developers, which opens a further avenue for developers to seek to recover costs from those professionals.

Section 135 of the BSA came into force on 28 June 2022, and retrospectively extends the limitation period for certain claims under section 1 of the Defective Premises Act 1972 (DPA) from six years to 30 years from when the right to bring an action accrued.

As a result of this retrospective extension, claimants (for example, homeowners) who had a previously time-barred claim under section 1 of the DPA, prior to the commencement date, are now able to bring a claim against developers and contractors etc. For works carried out after the commencement date, it is accepted that developers can pursue contractors (including architects, engineers and designers), including for a claim in contribution under the Civil Liability (Contribution) Act 1978 (Contribution Act).

However, what about those developers who carried out repairs prior to 28 June 2022, and at a time when a claim from homeowners under section 1 of the DPA was time-barred? Would they, as a result of section 135, now be able to bring an onward claim to recover the costs from the contractors, architects, engineers or designers? This was the primary issue in *URS Corporation Ltd v BDW Trading Ltd*.[1]

The Supreme Court has now provided a welcome clarification as to the scope and effect of section 135 of the BSA, as well as whether:

(a) Developers can be owed a duty under section 1 of the DPA

(b) An actual claim from the homeowners is required before developers can bring a claim in contribution

1 [2025] UKSC 2

A Brief Recap

BDW is a developer, who had appointed URS to provide structural design services on several developments. This included Capital East (in London) and Freemens Meadow (in Leicester) (together the "Developments"). Capital East is said to have been completed in 2008, and Freemens Meadow between 2005 and 2012. BDW subsequently entered contracts for the sale of the apartments to individual purchasers.

In 2019, BDW discovered that the structural design by URS had been negligently performed, such that the existing structures of the Developments were dangerous. However, no claims had been made or intimated by the homeowners against BDW.

BDW incurred costs in carrying out investigations, temporary works and permanent remedial works during 2020 and 2021. It took the stance that the defects, if left unremedied, presented a danger to the occupants.

While at the time of construction BDW owned and held a proprietary interest in the Developments, by the time the defects had been discovered and the costs in carrying out remedial works incurred, it had divested itself of any proprietary interest.

BDW issued proceedings against URS on 6 March 2020, in the tort of negligence – limitation having expired for a claim under the contract and (at this point) under the DPA and more specifically, a claim for pure economic loss as the Developments had not suffered any physical damage.

Following the enactment of the BSA in 2022, BDW also sought and was granted leave to amend its claim to:

1. Include a claim under section 1(1) of the DPA, following the retrospective extension of the limitation period from six to 30 years by section 135 of the BSA

2. Amend its contingent future claim to a claim for a contribution under the Contribution Act

The technology and construction court (TCC) issued decisions in 2021 and 2022 concerning the amendments and various preliminary issues, in favour of BDW.

URS sought and was granted permission to appeal the decisions, in February 2023. In July 2023, the Court of Appeal dismissed the appeal. URS appealed to the Supreme Court.

Supreme Court Decision

Ground 1 – Are Costs "Voluntarily" Incurred Recoverable?

URS did not dispute that it had assumed a responsibility to BDW (having contracted with BDW to undertake professional services) that it would take reasonable care in providing structural designs to BDW, such that the buildings constructed based on its designs would not be defective, and thereby not cause BDW pure economic loss. Nor did it dispute that it had breached its duty of care by providing negligent designs and that BDW had incurred significant costs to carry out repair works caused by URS's defective designs. It also accepted that had BDW carried out the repairs prior to the sale of the Developments, the cost of the repairs would have been pure economic loss that was recoverable in the tort of negligence.

However, URS maintained its position that the costs incurred by BDW fell outside the scope of its duty of care, by reference to a "voluntariness principle" – a principle it did not argue before the Court of Appeal. It argued that the costs were incurred voluntarily, because the repairs were carried at a point when BDW no longer held a proprietary interest in the Developments and BDW had no statutory duty to rectify the defects, as any claim from the homeowners (under the DPA) would have been time-barred (at that point). Those voluntarily incurred losses (it argued) were not recoverable because there is a "bright-line rule of law explaining why the loss in this case was outside the scope of the duty and/or was too remote".

The Supreme Court held that there is no such voluntariness principle in law, such that the carrying out of repairs by BDW rendered the repair costs too remote or outside the scope of the duty of care in the tort of negligence.

However, the Supreme Court considered that the principle of voluntariness is relevant to whether the chain of causation from URS's breach of duty to loss has been broken by BDW's own voluntary conduct, or whether BDW has failed to mitigate its loss. It will be a matter for the trial judge (in due course, in the main trial if that ever happens) to evaluate whether in all the circumstances the action of BDW in remedying the defects in the Developments is to be regarded as voluntary, and whether the action taken by BDW was one which BDW would reasonably be expected to take. The court would also need to consider the harm that BDW would have been exposed if it had not remedied the defects. That is a fact specific enquiry.

The Supreme Court considered that BDW had "no realistic alternative", and that it is strongly arguable that the following features of the assumed facts indicated that BDW was not truly acting voluntarily:

- If BDW had not carried out the repairs, there was a risk that the defects in the Developments would cause personal injury to, or the death of, homeowners that BDW might be legally liable under the DPA or in contract
- BDW had a legal liability to the homeowners under the DPA or in contract to incur the cost of repairs
- There would be reputational damage to BDW if BDW did nothing once it knew of the dangers to the homeowners, and there was a general public interest, which included moral pressure on BDW to procure the repairs, to avoid danger to the homeowners

Ground 2 – What Is the Scope and Effect of Section 135(3) of the BSA?

Section 135(1) of the BSA amends the Limitation Act 1980 to introduce a 30-year retrospective limitation period for accrued claims under section 1 of the DPA. Importantly, section 135(3) provides that that amendment is to be treated as always having been in force. There are two exceptions to the application of section 135(3):

- It is not to be applied if to do so would involve a breach of a defendant's rights under the European Convention of Human Rights
- It is not to be applied in relation to a claim that has been settled by agreement between the parties or finally determined by a court or arbitration before 28 June 2022

Both parties accepted that section 135 applies to a claim brought under section 1 of the DPA, so that homeowners would now have a 30-year limitation period to bring a DPA claim (for claims accruing before 28 June 2022).

Under section 1 of the DPA, the homeowners' cause of action would arise on the date of practical completion (section 1(5) DPA) – for example from 2008, until 2038. In other words, the 30-year retrospective extension is calculated from the date of practical completion and not retrospective from the date of commencement of section 135 of the BSA.

The issue before the Supreme Court was whether section 135 also applies to "onward" claims against the contractor responsible for the defect, for contribution or negligence and it is argued that the repair costs were voluntarily incurred, or that there was no liability for the same damage, because a DPA claim from a third-party was time-barred.

The Supreme Court held that if section 135(3) did not extend to BDW's claim in the tort of negligence and contribution claim, there would be a contradiction in relation to limitation. On the one hand in 2020, you would have a 30-year limitation period for claims by the homeowners against BDW under the DPA (by reason of the retrospective extension). However, in BDW's claim against URS in the tort of negligence and claim for contribution, the homeowners' claim against BDW under the DPA would have been time-barred. This would undermine the purpose of the Contribution Act and the purpose of the BSA in seeking to ensure that those responsible for building safety defects are held accountable.

Therefore, section 135 does make it possible for BDW to bring proceedings against URS for damages for a breach of the duty owed by URS to BDW under section 1 of the DPA, and for a contribution from URS. However, in respect of BDW's claim for damages in the tort of negligence, for works carried out prior to 28 June 2022, it does not retrospectively impact the questions of causation, mitigation and remoteness, which will determine whether BDW can recover damages from URS in respect of the cost of remedial works carried out before 28 June 2022.

At the time of the remedial works, the homeowners' claim was time-barred. BDW could not argue that in carrying out the remedial works it was discharging its legal liability to the homeowners. It would have to rely on other reasons to justify its conduct and whether the decision to carry out the remedial works should be regarded as voluntary is a fact-sensitive question for the trial judge (at the main trial) to decide, having regard to the circumstances in which BDW found itself at the relevant time. That position is not changed by section 135 of the BSA coming into force. Section 135 has altered the law with retrospective effect, but it cannot be treated as having altered the facts at the time the remedial works were carried out: "The fact that the time limit for claims under section 1 of the DPA has changed retrospectively does not retrospectively change what a reasonable and prudent person in the position of BDW would have done".

Ground 3 – Are Developers Owed a Duty Under Section 1 of the DPA?

There has been legal debate as to whether developers are owed a duty under section 1 of the DPA. Section 1 of the DPA states:

"(1) 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 –

(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.

(4) A person who –

(a) in the course of a business which consists of or includes providing or arranging for the provision of dwellings or installations in dwellings; or

(b) in the exercise of a power of making such provision or arrangements conferred by or by virtue of any enactment;

Arranges for another to take on work for or in connection with the provision of a dwelling shall be treated for the purposes of this section as included among the persons who have taken on the work…"

It is clear that BDW owes the homeowners a duty under section 1 of the DPA. However, is a developer (such as BDW) in turn, owed a duty by those taking on the work (such as URS)?

BDW argued that it is owed a duty by URS, because the dwellings were provided "to the order" of BDW (as per section 1(1)(a) of the DPA).

URS argued that developers (who themselves owe a duty under section 1 of the DPA) do not fall within section 1(1) as being owed a duty and that "the purpose of the DPA was to address unfairness suffered by purchasers of new dwellings, not to protect developers who do not inhabit dwellings. Developers would be owed contractual duties and duties in tort by those they engage, suffer no inequality of bargaining power and are well able to look after their own interests. There is no warrant in the background to the DPA or in its terms for treating developers as being in a privileged position with regard to all contractors or to interfere with freedom of contract and party autonomy by prohibiting any exclusion or restriction of a duty owed to developers by other commercial parties".

URS also argued that that the DPA distinguishes between two categories – those who owe duties and those who are owed duties. They are mutually exclusive. A party cannot both owe and be owed a duty.

The Supreme Court held that section 1(1)(b) covers purchasers of the dwelling. Therefore, section 1(1)(a) must be directed at persons other than purchasers of the dwelling. It applies to those who "order" a dwelling i.e. those for whose benefit the dwelling is being erected, converted or enlarged – that would be the owner of the dwelling from the outset, i.e. its first owners who order the work. That includes developers who order relevant work and are first owners.

Ground 4 – When Does the Right to Recover a Contribution Arise?

BDW's claim against URS included a claim in contribution under the Contribution Act, on the basis that BDW and URS were each liable to the homeowners in respect of the damage.

The dispute between the parties was whether BDW was entitled to bring a claim against URS under section 1 of the Contribution Act, notwithstanding that there had been no judgment or settlement between BDW and any third-party, and no third-party had ever asserted a claim against BDW. The Supreme Court was required to consider when the right to recover a contribution arises.

BDW argued that the three necessary elements of a claim to recover contribution under section 1(1) of the Contribution Act are as follows:

1. A person (C) must have suffered damage

2. Another person (D1) must be liable in respect of that damage

3. A third person (D2) must be liable in respect of the same damage

BDW contended that when those conditions are met, D1 has a right to recover contribution from D2 and proceedings claiming contribution may therefore be brought.

It further argued that the right to recover a contribution from D2 arises as soon as the damage is suffered by C, which both D1 and D2 are each liable, even if C has not claimed compensation from D1 or D2 for the damage. BDW argued that, in this case, the homeowners suffered damage at the time of completion of the Developments and that is when BDW's right to recover a contribution from URS arose.

URS, on the other hand, argued that the right to recover a contribution does not arise (for the purposes of obtaining an order for contribution or for the purpose of calculating the limitation period) unless and until D1's liability to C, and the amount, has been ascertained by a judgment against D1, or D1 has admitted liability or there has been a settlement between C and D1.

The Supreme Court held that both BDW and URS were wrong as to when the right to recover a contribution arose and "on the correct interpretation of the Contribution Act" the right of D1 (in this case BDW) to recover a contribution from D2 (in this case URS) arises when:

1. Damage has been suffered by C for which both D1 and D2 are each liable

2. D1 has paid, been ordered or agreed to pay compensation in respect of the damage to C

It is not necessary for D1's liability and the amount of compensation to be paid by D1 to have been established either by a judgment against D1, an admission of liability by D1 or a settlement agreement between D1 and C, before an action can be brought for a contribution.

The Supreme Court confirmed that, therefore, BDW is not prevented from bringing a claim for contribution against URS by the fact that there has been no judgment against BDW or settlement between BDW and any third-party, and that no third-party has ever asserted any claim against BDW. It is sufficient that BDW has made a payment in kind (by performing the remedial works) in compensation for the damage suffered by the homeowners.

Comment

The Supreme Court's ruling opens the door for developers to pursue contractors for costs incurred in carrying out remedial works. The judgment also highlights that the courts are willing to give effect to the policy intent of the BSA. However, this is a ruling on preliminary issues and the dispute between the parties is yet to be determined at trial (if that takes place). This is an evolving area of law, and each case turns on its facts. However, we have an experienced team on hand to provide advice and guidance.

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