

# Cladding claims: how to bring / defend them

## Introduction

1. Brief background and history [Saleem]
2. Common issues in the lifeline of a cladding claim [Saleem]:
3. The Defective Premises Act 1972 [Henk]
4. The Building Safety Act 2022 [Henk]

## Background

### The regulatory backdrop:

1. B4(1) of Sch. 1 to the Building Regulations 2010: *“the external walls of the building shall adequately resist the spread of fire over the walls having regard to the height, use and position of the building.”*
2. Guidance in Approved Document B, Fire Safety 2006, para 12.5 and 12.7. In brief: *“the external envelope of a building should not provide a medium for fire spread if it is likely to be a risk to health or safety...”*.

### The problem emerges:

1. 14 June 2017 - the Grenfell tragedy. Aluminium Composite Material (“ACM”) panels installed with two coil-coated aluminium sheets fusion bonded to the two sides of a polyethylene core. Highly flammable. More than 50 buildings still have not had ACM cladding removed...
2. At least 6,220 to 8,890 mid-rise residential buildings (11m - 18m in height) require remediation, partial remediation or mitigation works due to dangerous cladding... Number of low-rise residential buildings at risk is unknown, but figure is expected to be high...

## Basic legal background

The legal backdrop to cladding disputes:

1. Sometimes no contract between the building owners and the contractor employed to install the cladding materials.
2. Most, if not all, design and build contracts exclude third party rights.
3. The rule against recovery for pure economic loss in negligence (*Murphy v Brentwood* [1991] 1 AC 398).
4. Inbuilt problems with the DPA 1972.
5. Late discovery of fire safety defects and limitation.

In short - these claims pose very real legal difficulties for building owners or lessees who discover serious fire safety defects.

# Common issues in practice: pre-action

## Key points Pre-Action

1. Documents: original contracts?!
2. Opening up and inspections of external walls. Link to CPR 25(1)(c)(ii): *Naylor & 10 Ors v Roamquest Ltd* [2021] EWHC 2353 TCC at [21]-[25] for a summary of the relevant considerations on launching a cladding claim.
3. Testing: BS8414, BRE 135, PAS9980.
4. Experts: Get them ASAP! Fire engineers are in short supply.

# Common issues in practice: parties to cladding disputes

1. Claimants and defendants: who are the correct parties?  
*Croydon Citiscape* (tribunal case on leaseholder liability via service charge)  
NB. Part 20 claims for supply chain. Careful of “same damage” in Contribution claims.
2. Insurers: see *Zagora Management Ltd v Zurich Insurance Plc* [2019] EWHC 257 (TCC).
3. Limitation: 12 years for a deed. BSA will extend for Defective Premises Act claims.
4. Standstill agreements.
5. Stays: issuing a claim but not serving - applying for a stay to complete Protocol pursuant to the TCC Guide: *Grant v Dawn Meats*

# Common issues in practice: statements of case

## Key considerations in relation to:

1. Particulars of Claim - categories of defects, contractual provisions, and ADB
2. Defence - attack remedial scheme on causation and mitigation.
3. Replies - *Mullalley* (don't be tempted to plead wholly new claims!)
4. RFIs - excellent weapon for Defendants in particular.
5. Scott Schedules - help to set out case for all parties and those behind the scenes e.g. before a mediation.
6. First CMC & Applications - preliminary issues

# Common issues in practice: disclosure

## Key points on procedure (Disclosure & Costs):

1. CPR PD51U - another opportunity or potential pitfall. DRDs stating Issues for Disclosure (not the case) and Models of Disclosure and s.2 on specific search mechanisms particularly how electronic disclosure will be conducted.
2. Costs budgets: see *GSK Project Management Ltd v QPR Holdings Ltd* [2015] EWHC 2274 (TCC).  
Broad brush approach unless obviously exceptional budget looking at value and complexity of case.  
Applications to vary at a later date are not guaranteed to succeed.
3. Witness Statements: PD57AC in the TCC.

# Common issues in practice: legal issues

## Substantive arguments for Cs and Ds:

1. The status of ADB and precise allegations on non-compliance.
2. Causation, Mitigation/betterment: remediation caused by specific breaches alleged? Contemporaneous standard or current Building Regs. standards. Associated Approved Documents e.g. on thermal insulation standards. Increases sums claimed.
3. Quantum / recoverable losses: loss of rent/profits, remoteness, waking watches. Declarations as to coverage in building warranty cases. Diminution in value. Evidence before any settlement. Part 36 Offers.
4. The new 'remedy'? The BSA 2002...

THE DEFECTIVE PREMISES ACT 1972  
AND  
THE BUILDING SAFETY ACT 2022

## DPA 1972: the duty

Section 1(1) imposes a “duty to build dwelling properly”:

*“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.”*

The duty owed by (e.g.,) sub-contractors who act in compliance with the designs of an architect and/or main contractor is subject to additional qualifications: s. 1(2).

The duty is extended to developers subject to additional qualifications: s. 1(4).

## DPA 1972: the duty unpacked (I)

The Act only applies to **new dwellings** (“...*the provision of a dwelling*”) or existing dwellings which have undergone substantial alterations such that they have a different identity from before: see, e.g., Jenson v Faux [2011] EWCA Civ 423.

In Jenson, C instructed D to undertake works to their property, including remodelling the loft, introducing skylights, remodelling the first-floor, gutting the ground floor, removing the internal partition and replacing a coal cellar. The works were defective and C sued for breach of s.1 of the DPA 1972. D sought summary judgment on the basis that the DPA 1972 only applies to new dwellings. Longmore LJ held at [17]-[18]:

*“...There is no doubt a grey area within which it would genuinely be arguable that a dwelling had so changed that it had a different identity from before but works of extension or refurbishment would, to my mind, have to be much more substantial than they were in this case before such a grey area was reached... Here there were undoubted changes to the existing loft and the existing cellar to create considerably more space than existed before, but the ground floor and the first floor were approximately the same in area and had much the same use as before. Even if a whole new floor had been added (which it was not) it could not be said that (for that reason alone) a “new dwelling” had been provided. The extent and cost of the works (we were told that they cost £400,000 in 2007) will not, in any event, be decisive. There may be cases in which a small amount of work might be needed to create a separate one-floor dwelling which would thus fall within [section 1](#) of the 1972 Act; but there can be very extensive works to a house or dwelling which will not make it a dwelling whose identity is “wholly different” from before.”*

## DPA 1972: the duty unpacked (II)

S.1(1) applies to work done “for...the provision of a dwelling” and work done “in connection with the provision of a dwelling”.

Leading authority: *Rendlesham Estates Plc & Ors v Barr Ltd* [2014] EWHC 3968 (TCC). That case involved a block of 120 flats which shared common parts. The 120 flats were based in two blocks but were built as part of the same development. See:

- [46]: *“the dwelling for the purposes of section 1 of the Act is the individual apartment as described in the lease together with, possibly, those parts of the building to which the occupiers of a particular apartment have in practice exclusive access for living - such as their balcony. I therefore reject the submission that the common parts form part of any dwelling, still less the whole block.”*

- [51]: *“In the ordinary course of events I would have thought that a structure would have to be either physically or functionally connected with the relevant dwelling before it could be said that it had been constructed “in connection with” the provision of that dwelling. For example, the construction of a separate structure, comprising, say, an electrical substation or an effluent treatment plant, serving apartments in a building would in my view amount to work done in connection with the provision of an apartment in that building.”*

- [54]: *“On the facts of this case it seems to me to be an inescapable conclusion that the work to the structural and common parts of both blocks was work done in connection with the provision of each of the apartments in the two blocks, since the owner of every apartment has an interest in and a financial responsibility for the maintenance and repair of the structural and common parts of both blocks. Further, each leaseholder has a right of access to the common parts of the other block.”*

## DPA 1972: breach of duty

In order to satisfy the duty, the dwelling must be capable of occupation for a reasonable time without risk to the health or safety of the occupants: Rendlesham Estates Plc at [68].

Meaning of “fit for habitation”: *“In my judgment, for a dwelling to be fit for habitation within the meaning of the Act, it must, on completion (without any remedial works being carried out) (a) be capable of occupation for a reasonable time without risk to the health or safety of the occupants: where a dwelling is or is part of a newly constructed building, what is a reasonable time will be a question of fact (it may or may not be as long as the design life of the building); and (b) be capable of occupation for a reasonable time without undue inconvenience or discomfort to the occupants.”* (*Rendlesham Estates Ltd* at [53]).

A person who owes a duty under the 1972 Act can breach that duty by both misfeasance and nonfeasance: Andrews v Schooling [1991] 1 WLR 783.

Note: *“If, at the time of completion, the state of an apartment is such that a local authority with knowledge of its condition would not approve it as fit for occupation under the Building Regulations (for example, for lack of suitable means of escape in the case of fire), it is probably unfit for habitation”* (Rendlesham Estates at [82(ix)]).

## DPA 1972: limitation (I)

Section 1(5):

*"(5) Any cause of action in respect of a breach of the duty imposed by this section shall be deemed, for the purposes of the Limitation Act 1939 , the Law Reform (Limitation of Actions, &c.) Act 1954 and the Limitation Act 1963 , to have accrued at the time when the dwelling was completed, but if after that time a person who has done work for or in connection with the provision of the dwelling does further work to rectify the work he has already done, any such cause of action in respect of that further work shall be deemed for those purposes to have accrued at the time when the further work was finished."*

Two key points:

1. 6 years from date the dwelling was completed;
1. Alternatively, if further works are done to remedy issue, 6 years from the date of this further works, but only in respect of a cause of action brought in relation to those further works: *Alderson v Beetham Organisation Ltd* [2003] EWCA Civ 408.

## DPA 1972: limitation (II)

“...limitation arguments such as these are particularly fact sensitive. The cladding and fire issues such as the ones that arise in this case are very factually complex.” (RG Securities v R Maskell [2020] EWHC 1646 (TCC)).

Sportcity v Countryside Properties [2020] EWHC 1591 (TCC)

C, management companies of the blocks forming a large development, sued D, property developed and building company, under leases, the DPA 1972 and in negligence due to fire-safety defects in the development. D pleaded a limitation defence in response to the DPA 1972 claim. The works began in 2002 and there was a dispute about whether the works were completed in 2007 or 2010. Issues with cladding were raised in late 2013 and, whilst D did not accept there were problems with cladding, works were undertaken in mid-2014 and the summer of 2017.

At [30]: “I am satisfied that each member of the court in Alderson v Beetham Organisation expressly, and with consideration, proceeded on the footing that the effect of section 1 (5) was that the potential consequence of further remedial works was to give rise to a new cause of action with time running from the date of those further works or omission rather than to restart the limitation clock in respect of the original works.”

# The Building Safety Act 2022: Background

BSA 2022 received royal assent on 28 April 2022 and is split up into 6 parts, with 171 sections, and 11 schedules.

The Government's Explanatory Notes state: *“The objectives of the Bill are to learn the lessons from the Grenfell Tower fire and to remedy the systemic issues identified by Dame Judith Hackitt by strengthening the whole regulatory system for building safety.”* (para 3).

## Key changes:

- establishing a new Building Safety Regulator in England to oversee a new, more stringent regime for higher-risk buildings and drive improvements in building safety and performance standards in all buildings;
- ensuring residents have a stronger voice in the system, and establishing additional protections for leaseholders in relation to financing remediation works;
- increasing access to redress through the Defective Premises Act 1972;
- driving industry culture change and incentivising compliance;
- strengthening the Fire Safety Order; and
- Providing a stronger and clearer framework for national oversight of construction products.

# The Building Safety Act 2022: s.134 and the introduction of a new duty under the DPA 1972

## "2A Duties relating to work to dwellings etc

- (1) This section applies where a person, in the course of a business, takes on work in relation to any "*relevant building*" means a building consisting of or containing one or more dwellings: s.2A(2)).
- (3) The person owes a duty to—(a) the person for whom the work is done, and (b) each person who (whether legal or equitable) in a dwelling in the building, to see that the work is done in a workmanlike professional manner, with proper materials and so that as regards the work the dwelling is fit for
- (4) The duty under this section does not apply in relation to a dwelling if—(a) the work taken on is work provision of the dwelling (as to which see section 1), or (b) it is expected that, on completion of the dwelling or will otherwise have ceased to exist.
- (5) A person (A) who takes on any work to which this section applies for another (B) on terms that A is to instructions given by or on behalf of B is, to the extent to which A does it properly in accordance with the purposes of this section as discharging the duty imposed on A by this section except where A owes a defects in the instructions and fails to discharge that duty.
- (6) A person is not treated for the purposes of subsection (5) as having given instructions for the doing person has agreed to the work being done in a specified manner, with specified materials or to a
- (7) A person who, in the course of a business which consists of or includes carrying out or arranging for kind mentioned in subsection (1), arranges for another to take on work of that kind is treated for the among the persons who have taken on the work.

# The Building Safety Act 2022: s.135 and the new limitation period

## Key points:

1. If a person becomes entitled to bring an action against any other person under section 1 or 2A of the DPA 1972 or section 38 of the Building Act 1984, that person has 15 years from the date the right of action accrued to bring a claim: see s.4B(1) of the LA 1980 (as inserted by s. 135 of the BSA 2022).
2. If, before the date on which the BSA 2022 came into force, a person became entitled under section 1 of the DPA 1972 to bring a claim against another person, the limitation period for bringing a claim is extended from 15 to 30 years: s.4B(4) of the LA 1980 (as inserted by s. 135 of the BSA 2022).
3. If a limitation period has expired but is extended retrospectively by s.135(3), the court must dismiss the claim if it is satisfied that it is necessary to do so to avoid a breach of that defendant's convention rights: s. 135(5).
4. Further, nothing in s. 135 allows a claim to be revived which was settled by agreement between the parties or finally determined by a court or arbitration, whether by limitation or otherwise: s.135(6).

# The Building Safety Act 2022: s.38 of the Building Act 1984



## Section 38 of the Building Act 1984:

(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.

...

(4) In this section, “damage” includes the death of, or injury to, any person (including any disease and any impairment of a person's physical or mental condition).

Query - does “damage” include economic loss?

Government’s “Redress factsheet: Building Act 1984 (section 38): “Purely financial loss is not covered by section 38, although it is in scope of a Defective Premises Act claim.”

... we will have to wait and see !

# The Building Safety Act 2022: liability for past defaults relating to cladding products

## Section 149:

- (1) This section applies where Conditions A to D are met.
- (2) Condition A is that, at any time before the coming into force of this section—(a) a person fails to comply with a cladding product requirement in relation to a cladding product, (b) a person who markets or supplies a cladding product makes a misleading statement in relation to it, or (c) a person manufactures a cladding product that is inherently defective.
- (3) Condition B is that, after Condition A has been met, the cladding product is attached to, or included in, the external wall of a relevant building in the course of works carried out in the construction of, or otherwise in relation to, the building.
- (4) Condition C is that, when those works are completed—(a) in a case where the relevant building consists of a dwelling, the building is unfit for habitation, or (b) in a case where the relevant building contains one or more dwellings, a dwelling contained in the building is unfit for habitation.
- (5) Condition D is that the facts referred to in subsection (2)(a), (b) or (c) were the cause, or one of the causes, of the building or dwelling being unfit for habitation.
- (6) The person referred to in subsection (2)(a), (b) or (c) is liable to pay damages to a person with a relevant interest in relation to the relevant building for personal injury, damage to property or economic loss suffered by that person as a result of the facts referred to in subsection (4)(a) or (b).

# The Building Safety Act 2022: other changes



Further key changes to the cladding landscape include (but are not limited to):

1. Ss. 116 - 125: remediation of certain defects.
2. Ss. 130 - 132: building liability orders.
3. Ss. 144- 145: new build home warranties.
4. Ss. 147 - 151: new scheme for liability relating to construction products.

**Thank you for listening**

Please do email us with any questions!

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