

KEATING FLAGSHIP LECTURE

**FROM RONAN POINT TO GRENFELL:
THE DECLINE AND FALL OF BUILDING SAFETY**

The Rt Hon Sir Peter Coulson

28 March 2023

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In memory of Donald Keating

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1. Introduction

1. This lecture has been a long time in the making. I first discussed it, chose the title and mapped out its structure in discussion with Adam Constable just before the start of the Pandemic. A good deal has happened since,

including Adam's well-deserved elevation to the High Court Bench. But I have never wavered from my view that building safety would make a good subject for this lecture. Why?

2. There are three reasons. First, because I knew that Donald was involved in this story, so I thought it was a fitting subject for a lecture in his memory. Second, because it is an interesting and contemporary subject: indeed, since I chose the topic, the Government has devoted 265 pages to the Building Safety Act 2022 ("BSA"). But third, and most important of all, I consider that the tragedy at Grenfell Tower in 2017, which showed just how low building safety standards have fallen in the last 40 years, was not only avoidable, but was an event which – despite the BSA - is all too likely to recur. It is therefore a subject of critical importance.
3. I should like to thank Sam Grimley, the legal assistant at Keating Chambers, and my Judicial Assistant Will Haslam, for all their help and enthusiasm in putting this lecture together. Thanks to them, the lecture tonight will be an abridged version of the paper that will be published with the same name. I am afraid I have much too much material for recitation in a single evening.
4. It is inevitable that some of this lecture will address matters that are the subject of the ongoing Inquiry into the tragedy at Grenfell Tower. Of course, what will ultimately matter are the views which the Inquiry Panel express in their Part 2 Report, not anything which I may say tonight. I have deliberately refrained from commenting on any of the extensive oral evidence given to the Inquiry, confining myself to some limited comments on the contemporaneous material the Inquiry was shown.

5. Finally by way of introduction, I should like to recommend “Show Me The Bodies: How We Let Grenfell Happen”, published last year by Oneworld. It was written by Peter Apps, who writes for a magazine, *Inside Housing*, which is mainly devoted to social housing. I do not agree with all the points Mr Apps makes in his book. But it is a thoughtful and often troubling read. And I wholeheartedly agree with his basic premise: that 72 people died in June 2017 because the regulatory regime was loosened, and everyone took advantage.

2. A Short History of Building Safety

6. Building control is one of the oldest forms of local government responsibility. In England, it stretches back to the 12th Century, although modern building regulation emerged after the Great Fire of London.¹ The fire began in the early hours of the morning on Sunday 2 September 1666 when a spark shot out from the oven of the King’s Baker, Thomas Farriner, and ignited fuel lying nearby. It was windy, dry, and hot: ideal conditions for fire to spread.
7. The fire burned for almost five days. It incinerated 13,000 wooden houses, 87 churches and St Paul’s Cathedral. 85% of London was destroyed. Local residents escaped to the countryside and remained there for months – sometimes even years – before they considered it safe to return. If the Great Fire of London was caused by a spark, it was spread by chaos. London at that time was a sprawl of tightly packed wooden buildings. Once the fire started, it was unstoppable.

¹ Anthony J. Ley, “*Building Control UK - An Historical Review*”, CIB T5 Performance Based Buildings and Regulatory Systems.

8. Parliament decided to act. In 1667, it passed The London Building Act. The Act required all houses to be built from brick or stone²; it meticulously specified the number of stories, and the width of the walls. Streets had to be widened. The Act regulated foundations, load-bearing and party walls, beams, joists, roofing, gutters, and down-pipes. The Act provided for surveyors to enforce its regulations. Anyone erecting a building in contravention of the regulations was guilty of a criminal offence; the building would be condemned and destroyed.
9. Ultimately, however, the provisions of the Act proved to be weak. When the three surveyors, tasked with overseeing the implementation, died or resigned, they were not replaced. Eventually, the 1667 Act was replaced by Acts of 1772 and 1774. It was hoped that the legislature had learned a key lesson: if building regulations were to be effective, they had to be adequately enforced.
10. Following the London Building Acts, building regulations started to spring up around the country: notably in Bristol and Liverpool. By the mid-19th century, a patchwork of local byelaws had emerged across England and Wales. However, provision was inconsistent; many local authorities made no attempt to regulate building safety. Two factors held back the introduction of building regulations: cost (they were too expensive to comply with), and control (they stifled autonomy).
11. Following a cholera outbreak that killed over 50,000 people in the 1830's, which spread because of poor quality housing, many now considered

² Many commentators believe that the only reason why, 300 years later, London was not completely destroyed in the Blitz was because it was still mainly built of brick and stone. Not any more.

building regulation a national problem demanding a national solution. In 1841, a Bill was placed before Parliament designed to replicate the provisions of the London and Bristol Building Acts on a national scale. The provisions of the Act could be adopted by all city districts and major towns. But the Bill failed. Two countervailing forces appear to have led to its demise: cost and control. On the one hand, it was resisted by builders, who saw it as a threat to their profits. On the other hand, it was viewed as unwelcome interference with regional autonomy by local authorities.

12. So the complex patchwork of local byelaws was retained and, by 1936, as many as 60 local authorities still had no building regulation at all.
13. The first concerted attempt to introduce a nationwide system of building regulation was attempted by the **Public Health Act 1936**. The Act obliged all local authorities to adopt building byelaws by 1939. However, when 1939 finally arrived, the Government had become preoccupied with another, far more ominous, threat to public safety. After the war, many feared that the introduction of building regulations would impede urgent rebuilding and re-housing programs. The scheme was revisited in 1953, but its adoption by local authorities remained discretionary. There were, however, what were called 'model byelaws' which set out guidance prepared by construction professionals.
14. During the mid-20th century, some nationwide building safety legislation was introduced. However, these regulations affected only particular types of buildings, or guarded against specific dangers. So, for example, in 1937, the Factories Act included requirements for fire escape routes in premises where more than 40 people were employed. After a fire at Eastwood Mills in Keighley in February 1956, which resulted in eight fatalities, the

Factory Inspectorate carried out a survey of 40,000 to 50,000 premises. This led to the 1961 Factories Act. The new Act included rules governing the installation of fire alarms, and enhanced requirements for providing adequate means of escape.

15. In June 1960, a major fire broke out at William Henderson & Sons department store in Liverpool. Ten people died after becoming trapped on the fourth floor, despite the fire brigade arriving within minutes. A man tragically fell to his death while trying to rescue those caught in the blaze. A subsequent report concluded that the rapid spread of the fire was caused by suspended ceilings and un-enclosed escalators. In the wake of this tragedy, the 1963 Offices, Shops and Railway Premises Act was amended to include new fire safety measures. The provisions were largely derivative of the 1961 Factories Act.
16. On Boxing Day 1969, a fire broke out at the Rose and Crown Hotel in Saffron Walden, resulting in the deaths of 11 people. The hotel lacked proper safety measures, including fire alarms, doors, and emergency exits. Ladders were used to rescue 17 people. This disaster, along with others like it, prompted the enactment of the Fire Precautions Act in 1971, which made it mandatory for hotels and boarding houses to obtain a fire certificate under the Act in 1972.
17. So what does that early history teach us? Sadly, the principal lesson appears to be that people have to die, often in large numbers, for building safety legislation to be considered by Parliament.

3. The First Building Regulations

18. The first national system of building control arrived with the **Public Health Act 1961**. For the first time, the Act gave the Minister for Housing and Local Government the power to make national regulations. The Act repealed the power of local authorities to make local building byelaws. The first national **Building Regulations** (“BR”) were issued in 1965³. They were reissued in 1976⁴. They were prescriptive—they contained rules and standards that had to be followed.
19. So, by way of example, the BR relevant to fire safety were set out in sections E1 – E23. In the 1976 iteration of the BR, this ran for over 43 pages. By comparison, the 2010 BR dealt with fire safety in just one page. The BR of 1976 contained detailed provisions relating to cavity barriers and fire stopping, with specified distances and the like. They gave minimum thicknesses for cavity walls. In some instances, they specified the use of non-combustible materials.
20. It should also be noted that, following on from their introduction in the earlier model by-laws, the BR did contain what were called “deemed to satisfy” provisions. But these were not loose, or open-ended. They were almost as prescriptive as the BR themselves. Again, by way of example: in relation to fire resistance, the BR said “walls, beams, columns, stanchions or floors would be deemed to have the requisite fire resistance if they were constructed in accordance with one of the specifications set out in the Schedule to the Building Regulations, and the notional period of fire resistance given in that Schedule is appropriate to that type of construction and...is not less than the specified period.” In other words,

³ SI No 1373

⁴ SI No 1676

whilst there was some latitude in design, configuration and materials, it was still a relatively rigorous standard.

4. The Ronan Point Disaster

21. In 1959, the committee responsible for the model byelaws was asked to consider the applicability of the byelaws to very high buildings. They concluded that special regulation was *not* needed for such structures, a decision that perhaps reflected the lack of professional experience with such buildings and the unique risks they presented. The error became apparent less than 10 years later.

22. Ronan Point was a 22-storey tower block in Canning Town, Newham which had been built in accordance with the local building byelaws. On May 16, 1968, just two months after it opened, Ronan Point partially collapsed. A gas explosion in a flat on the 18th floor at 5:45am blew out some load-bearing walls, causing the collapse of one entire corner of the building. Four people died and 17 were injured. Had the explosion happened an hour later, the death toll would have been much higher, because the room that was destroyed, up and down that corner of the block, was the kitchen. An Inquiry was set up to report on the cause of the disaster (“**the Report**”) was led by Hugh Griffiths QC. Donald Keating appeared as Counsel for the Ministry of Housing. A copy of the Final report, with Donald’s scribbled manuscript notes on it, is in the Keating Chambers Archive.

23. The block was constructed using a system-build method which comprised pre-fabricated concrete panels delivered on site to form load-bearing walls and floors. This building method was chosen by the London

Borough of Newham for multiple reasons. First, it was cheap and quick to install at a time when, during the post-war years, there was a huge demand for new houses. But, as the Inquiry Report highlighted, the decisive factor for Newham Council was the fact that a system-build tower block could be constructed with limited skilled labour during a period of severe skilled labour shortages in the construction industry.

24. Ronan Point was the tallest building constructed using the Larsen-Nielson System. Unlike a traditional frame-built high-rise building, system build requires weight to be carried through the loadbearing walls, so it is therefore crucial for the building's structural integrity that the joints between adjacent concrete panels are secure. As the Report put it: "*without adequate connections [between adjoined concrete panels] it will be realised that the structure is essentially just like a tower built from a pack of stiff cards*" (at [109]).

25. The Report found that the horizontal flank wall joints were defectively designed (mortar could only be applied from the inside of the building and it was impossible to say whether the mortar was well packed) and defectively installed (tie plates connecting adjacent panels were not properly tightened). With no alternative structural routes of load bearing, this created the possibility of a chain reaction of progressive collapse.

26. What the Report described as "*a particularly disturbing feature*" (at [128]) of Ronan Point was the fact that there was no evidence to suggest the building did not comply with the new Building Regulations and Codes of Practice. Hence, most of the Report's criticism is directed towards the bodies responsible for updating the Building Regulations and Codes of

Practice which failed to address the unique risks of high-rise system build tower blocks. At [194]:

“We do not consider that in its present form Ronan Point is an acceptable build, and yet it was designed to comply with the statutory standards contained in the Newham byelaws, which are in all material respects identical with current Building Regulations. This is so manifestly an unsatisfactory state of affairs that it is necessary to enquire how it came about and to consider remedies for the future” (emphasis added).

27. The Report considered that the various bodies responsible for these statutory protections paid insufficient attention to the different risks that system-builds bring, namely the risk of ‘progressive collapse’. These included the National Building Agency (“NBA”), which was an independent advisory body set up in 1964 by the Minister of Housing and Local Government to advise Local Authorities on the use of industrialised building methods; and the Building Research Station (another government organisation responsible for reviewing new building methods) which had not followed up on the emerging research from the continent about the risk of progressive collapse in system-builds.

28. At [183], the Report concluded:

“In the broadest sense, it could be argued that the two major professions – architects and structural engineers – have been found wanting, the former for their failure to call adequately on the latter, and the latter for failing to take much interest in system building generally”

In a similar vein, the Report describes engineers at the time as “*largely lukewarm or uninformed*” on matters of system-build and recounts how there was next to no expertise in this area in the committees responsible for

updating the model byelaws. The Report noted that the Building Regulations relied heavily on the standards set by the British Standards Institution which had not yet developed a code to deal with new forms of construction.

29. However, the Report was not critical of the general model of Building Regulations (or the use of “deemed to satisfy” provisions) which, it said, were designed to strike a balance between ensuring public health and safety whilst giving freedom for the development and use of new techniques and designs (at [208]).

30. Overall, the Ronan Point disaster is an early example of the failure of construction professionals and the BR to adapt to new methods of construction. The Report drew attention to an over-reliance on statutory regulation without any consideration of whether the functional criteria now contained in the model byelaws was suitable for a radically different model of high-rise construction. It is interesting that the Report does not place blame on the system of construction itself, but principally on the regulatory framework in which Ronan Point was allowed to be approved.

31. Perhaps unsurprisingly, there were many other cases of buildings constructed using ‘system-build’ methods resulting in defects. One such reported case is that of *Gray and others (The Special Trustees of the London Hospital) v T P Bennett & Son (a firm) and Others*⁵. Construction of the work was completed in 1963, and a final certificate of completion was issued in 1965. Defects began to emerge sometime later, when bulging of the brickwork cladding revealed that 90% of the concrete nibs used to support the brickwork above it had been “hacked back”. Consequently,

⁵ (1989) 43 BLR 63

with the defectively installed nibs, the brickwork was not properly supported. Substantial remedial works had to be undertaken.

32. Proceedings were issued in 1983. The Judge (Sir William Stabb QC) gave judgment against the contractors (D4) who he found were responsible for deliberately concealing their defective work in relation to the 'hacking back' of the concrete nibs. Sir William said:

“In some instances, the butchering was so severe that the nib was hacked right back leaving the steel reinforcements sitting out. All the experts were agreed that they had never seen such butchering of concrete nibs on such a scale, and epithets such as appalling, destructive and mindless vandalism were applied to what the contractors had done”

33. As the Judge found that the nibs had been deliberately damaged by the contractors (in order to make the concrete panels fit), the limitation period did not run until 1979 when the damage could reasonably have been discovered. Indeed, he found that there was deliberate concealment. What he called *“destruction on a massive scale”*. *Approximately 80 nibs were either hacked back to some extent or hacked right back, leaving the reinforcement exposed”* (at p.83).

34. There is a fascinating coda to the Ronan Point story. Its collapsed corner was rebuilt and the residents were told to return to their homes. It was not until the mid-1980's, when residents became concerned at the appearance of large cracks in the building, that more detailed checks were carried out. One architect, who had long been concerned about the building, was invited to inspect. He tore off a piece of wallpaper and dropped it through one of the cracks. The paper disappeared down the long hole in the building. One of the tenants asked: “What have you just

done?”. The architect replied: “I have just killed Ronan Point”. The block was evacuated and demolished, and the same architect found defective workmanship on an overwhelming scale. He said “not a single joint was correct”⁶.

5. The Defective Premises Act 1972

35. The Defective Premises Act 1972 (“DPA”) sets out the duties owed by those constructing new ‘dwellings’ to occupiers of the property and also establishes a duty of care landlords hold towards their tenants who might be injured by their failure to maintain or repair property. It should be noted that the DPA has been substantially altered following the new Building Safety Act 2022 which became law on 28 April 2022. This will be discussed in more detail below.

36. The DPA gave effect to the recommendations of the Law Commission (*The Civil Liability of Vendors and Lessors for Defective Premises (No. 40) 1970*). The Bill began life as a private member’s bill and did not receive any debate in the House of Commons.

37. Section 1 DPA imposed a duty on those working “*in connection with a dwelling house*” to ensure work was done (i) in a workmanlike/professional manner, (ii) with proper materials and (iii) so that the dwelling will be fit for habitation when completed (“**s.1 Duty**”). As P.M. North points out⁷, s.1 went no further than the standard of care already implied at common law.⁸ However the breadth of s.1 meant this duty was owed not just by

⁶ ‘Show Me The Bodies’, page 30

⁷ P.M North, ‘Defective Premises Act 1972’ [1973] 36(6) MLR 628

⁸ Ibid

the builders, but also by any subcontractors, architects, engineers etc involved in the project. This statutory duty therefore went well beyond a contractual relationship because the purchaser of the property would not have a direct contract with the sub-contractor.

38. As a means of restricting liability on such contractors, the DPA indicated that the 6 year limitation period was deemed to start at the time of completion of the property: section 1(5).⁹ Some academics criticised this approach, given that it may be many years before a building defect is discovered,¹⁰ so the enormous extensions of time allowed by the Building Safety Act 2022 – limitation periods of up to 30 years – may have appealed them, if not the contractors' accountants.

39. The recent case of *Sportcity 4 Management Ltd v Countryside Properties (UK) Ltd*¹¹ shows this 6-year limitation period in action. The building (a residential block with defective cladding) was completed in 2010, but the developer attended to carry out repairs in 2014 and 2017. At the hearing in 2020, HHJ Eyre QC (as he then was) allowed the defendant's summary judgment application on the basis that this was beyond the 6-year limitation period. He went on to hold that subsequent repair works may give rise to a separate cause of action in relation to the extent of the works carried out after the date of project completion (i.e. the 2014 and 2017) works, but that s.1(5) does not operate to revive existing time-barred causes of action. However, as will be discussed below, this case is very likely to be decided differently in light of the Building Safety Act 2022.

⁹ Note the exception: where further work is done to rectify the initially (defective) work, any such cause of action in respect of the further work shall be deemed to have accrued at the time when the further work finished.

¹⁰ J.R Spencer 'The Defective Premises Act 1972: Defective Law and Defective Law Reform' 34(1) CLJ

¹¹ [2020] EWHC 1591 (TCC)

40. One other key development of the DPA was to remove the common law immunity for the builder of a defective house once they have sold or leased it. Section 3 allows the s.1 Duty to survive any disposals after the Act came into force. It means that a building owner who would otherwise owe a duty of care cannot escape this duty by disposing of the property.

41. Evaluating the Act in 1973, it was North's view that the DPA "*provided statutory duties grafted onto the common law*", which left much undefined (such as the definition of 'dwelling' under the Act¹²). He concluded that it will "*still be for the common law to provide the flesh and blood*" in relation to liability for defective premises. So, in applying the DPA, as the case law shows, the Courts have had to reach their own definitions of terms not covered in the text of the Act. For example, what is the test for whether the building is 'fit for human habitation'? This was considered in the case of *Bole v Huntsbuild Ltd*¹³ where HHJ Toulmin CMG QC undertook a detailed analysis of the case law, the Law Commission's report which led to the DPA and, by analogy, with the s.604 Housing Act 1985. The judge concluded (at [38]) that unfitness for habitation extends to both 'dangerous defects' and 'defects of quality'. A dwelling can still be rendered unsuitable even where the defects apply only to one part of the house and even if the defects were not discovered until after the date of completion. These findings were upheld by the Court of Appeal.¹⁴

¹² This was left to the courts: see *Catlin Estates Ltd and another v Carter Jonas (a firm)* [2005] EWHC 2315 (TCC)

¹³ [2014] 1 WLR 3663

¹⁴ [2009] EWCA Civ 1146.

42. In reality, the DPA was not as transformative as the Law Commission might have hoped. In my time in practice, between 1982 and 2004, it was largely irrelevant. And of course, what I have called the Tort Yo-Yo, dealt with next, was at the fullest extent during that same period. There are no cases in which significant safety issues were addressed under the DPA. Perhaps that is a further sign that, until now, it has not been regarded as being in the forefront of the armoury available to owners and occupiers of dangerous dwellings. However, as we shall see, the draftsmen of the BSA had other ideas.

6. The Tort ‘Yo-Yo’

43. Alongside the developments in statute and Building Regulations, no history of building safety is complete without considering the development of tort law in relation to defective premises over the last 60 years. The Tort ‘Yo-Yo’ reflects the court’s vacillating approach to the extent of recovery for defective buildings, beginning with the Court of Appeal in *Dutton v Bognor Regis UDC*¹⁵ and ending with *Murphy v Brentwood DC*.¹⁶

44. Like many of the cases in this area, *Dutton* was a case about defective foundations. The Claimant, Mrs Dutton, purchased the house as the second purchaser. The Defendant council had negligently approved defective foundations which did not comply with the bye-laws. These defects were unknown at the time of Mrs Dutton’s purchase. The building deteriorated and Mrs Dutton brought a claim against the council and the

¹⁵ [1972] 1 QB 373

¹⁶ [1991] 1 AC 398

builders. The claim against the builders settled, and Mrs Dutton succeeded at first instance in obtaining damages of £2,115 from the council. This finding was upheld in the Court of Appeal before Lord Denning MR, Sachs and Stamp LJJ.

45. The striking feature of this case was the extension of Mrs Dutton's right to claim against the council even though she was a second purchaser. This vastly expanded the scope of liability for councils. Lord Denning reasoned that the council's statutory duty to inspect foundations was for the protection of future owners and occupiers, not just the present, and that the defective approval caused the property to be put on the market with an undiscovered defect that would injure the later purchaser. Second, applying Lord Atkin's 'neighbour' principle, the Court held that Mrs Dutton was a person so closely connected to the inspector's (defective) act that the council ought to have her in mind as likely to be injured if they were negligent. Finally, the court recognised this was a novel application of the law of negligence but was content that it was fair and just that a local authority should be liable for its surveyor's negligence in securing sound foundations. Lord Denning considered that there would not be a 'flood gates' of claims against councils as, in most cases, liability would fall on the builder who is likely to be backed by insurance.

46. Perhaps crucial to Lord Denning's analysis was to categorise the loss suffered to Mrs Dutton as physical loss (in the form of the defective premise). In fact, the preferred analysis today is that a second purchaser of a defective premise will only suffer pure economic loss in the reduced value of the property once the defect is discovered.

47. The House of Lords later approved the *Dutton* approach in *Anns v Merton LBC*.¹⁷ This was another case about defective foundations of a block of flats which were wrongly approved by the local authority's negligent building inspector. The House of Lords held that the Council owed a duty to take reasonable care to ensure that a builder complied with building bye-laws, including owing that duty to the later purchaser of that house which was later discovered to be defective.

48. *Anns* was significant as it meant that a local authority could be liable for an omission: for a failure to ensure a builder complied with the relevant bye-laws. Moreover, it allowed for recovery for pure-economic loss as this was the loss suffered by the subsequent purchaser. Lord Wilberforce's judgment in *Anns* became the authority for the 'two-stage' test to establish a duty of care in negligence. The two stages were: first, whether there was a sufficient relationship of proximity between the parties; and second, whether there were considerations which ought to negative, or limit the scope of the duty.

49. The effect of *Anns* was considerable: Lord Wilberforce's two stage test justified the expansion of liability for recovery of pure economic loss and psychiatric loss. At the same time, a body of case law developed around the uncertainties as to the limits of the duty owed by local authorities in respect of their exercise or non-exercise of building control powers.

50. In *Governors of Peabody Donation Fund v Sir Lindsay Parkinson*¹⁸ the House of Lords rejected policy arguments based on *Anns* and found that a local authority did not owe a duty to a building owner for a failure to compel a

¹⁷ [1978] AC 728.

¹⁸ [1985] AC 210

builder to correct defective works (in that case, defective drains). Doubt about *Anns* continued to grow in *Leigh & Sullivan v Aliakmon Shipping*¹⁹, where Lord Brandon suggested that Lord Wilberforce had not created a universally applicable test.

51. The real turn in the *Anns* tide began with *D&F Estate Ltd v Church Commissioners*²⁰. This was a claim concerning defective plasterwork which had caused damage to the flooring below. The House of Lords allowed recovery of losses for the damaged floor but not for the cost of replastering it, as this loss had not yet been incurred. In effect, the court was beginning to reclassify *future* building loss as pure economic loss and therefore irrecoverable. Donald Keating appeared for the successful respondents. Good to see a case about defective plasterwork reaching the House of Lords.

52. The final nail in the *Anns/Dutton* coffin came in 1991 in the case of *Murphy v Brentwood DC*²¹. This case held that a local authority does not owe a duty to a subsequent purchaser for defective foundations which were negligently approved by that local authority. The key points in *Murphy* were three-fold:

- a. A builder who constructs a building owes a duty of care in respect of injuries to persons or damage to other property, arising from a latent defect. But they do not normally owe a duty of care in tort to a person who acquires an interest in the building and suffers pure economic loss because of the defect.

¹⁹ [1986] 2 WLR 902

²⁰ [1989] AC 177

²¹ [1991] 1 AC 398

- b. Where a defect is discovered before it causes injury or damage it is to be regarded as a defect in quality. The building is capable of repair or abandonment, and in either case this should properly be analysed as pure economic loss. These cannot be recovered in tort: *Hedley Byrne & Co Ltd v Heller & Partners*²².
- c. A local authority does not owe a duty of care to protect building owners from such economic losses. Their duty of care can be no wider than that of the builder.

53. Although *Anns* was overruled, the policy arguments to protect individual residential homeowners were clear to see. Houses and buildings are an important investment for members of the public. Yet the nature of building construction means that the discovery of latent defects on a subsequent inspection may take place many years after practical completion is achieved. As a plain matter of policy, it may seem illogical for the law to deny a remedy to a responsible owner who, on the discovery of defects, would be bound to incur expense to remove the risk of physical injury or property damaged for which the defendant (i.e. contractor or engineer) would undoubtedly be liable if and when it occurred.²³

54. On the other hand, it must be remembered that local authority building inspectors are public authorities who, under *Anns*, would be liable for pure economic loss, even where nothing is done by the council themselves to create or exacerbate the damage complained of. So, the position today therefore remains (subject to the Building Safety Act 2022) that later

²² [1964] AC 465

²³ See discussion at para. 1-200 in *Hudson's Building and Engineering Contracts 14th Edn.*

purchasers will not be able to recover for pure economic loss for building defects discovered.

55. So, the DPA did not really address building safety, and the Tort Yo-Yo has now been wound back so tightly that it is never going to be of much help to anyone. That left safety issues primarily a matter for the Building Regulations. At least they were prescriptive. Oh, hang on a moment...

7. The Building Act 1984, The Building Regulations 1985 and Approved Document B

56. In December 1979, the then Secretary of State for the Environment, Michael Heseltine, gave a speech to the National House Building Council. He began:

“I want to speak to you about a field in which we can take constructive action. It is important for this industry, and it needs attention. I am speaking about the system of Building Control; does it serve us well enough; does it address itself to the right objectives, and if not, how can it be improved?”

57. Heseltine argued that a new system of building regulation was required. One that was characterised by “maximum self-regulation, minimum government interference”. He said that the new regulations should be totally self-financing, and simple in operation. The new scheme should have two main consequences: slashing cost to government, and decentralising control.²⁴

²⁴ Anthony J. Ley, *“Building Control UK - An Historical Review”*, CIB T5 Performance Based Buildings and Regulatory Systems.

58. The speech was to mark a watershed in the history of building regulation. The changes that followed were radical and far-reaching. In 1981, Heseltine introduced the White Paper "The Future of Building Control in England and Wales" to Parliament. Subsequently, a Bill was introduced that provided for the partial privatisation of building control, transferring some authority to private certifiers. The Building Act, enacted in 1984, was the first comprehensive primary legislation for building regulation in England and Wales.

59. The **Building Regulations 1985** were introduced under the Act in the following year. The new BR were designed around a "performance-based" system, using what were called Approved Documents. The 1965 Building Regulations had laid out technical standards, prescriptive rules, and lists of prohibited materials, but the new regulations (BR) took a different approach. Instead of these specific requirements, the BR established general objectives that buildings were expected to fulfil. It was largely left to industry to work out how these standards might be met. Existing regulatory guidance was cut down from 306 pages to just 24. Fire safety, as we have seen, came down from 43 pages to one by 2010. The monitoring and implementation of building safety standards was taken out of the hands of local government, and given over to private certifiers.

60. This eventually decimated the work of the Building Research Establishment ("BRE"), which was privatised in 1997. It now charged manufacturers £15,000 to carry out fire safety tests at its laboratory in Watford – the only suitably equipped facilities in the UK. It could no longer simply carry out tests on new materials on its own initiative and publish the results. Instead, it had to wait to be asked to do so by a manufacturer, and the results were only disclosed if the manufacturer

agreed. Arguably, the BRE's dual roles of providing expert advice to ministers and conducting tests for manufacturers created a conflict of interest.

61. In the new regulatory scheme, if the standards in the Approved Documents were met, no one could be held legally liable for problems that might ensue. But these standards were uncertain because they were not technical, but “performance-based”. A paragraph at the beginning of each of the Approved Documents explained their purpose:

"The Approved Documents are intended to provide guidance for some of the more common building situations. However, there may well be alternative ways of achieving compliance with the requirements. Thus there is no obligation to adopt any particular solution contained in an Approved Document if you prefer to meet the relevant requirement in some other way" (emphasis added).

It is difficult to think of a less rigorous way of ensuring that buildings were properly designed and built. But that, apparently, was the point.

62. I shall take as an example of this fundamental change of approach Approved Document B (“ADB”), which was concerned with Fire. It contained far fewer references to British Standards than before, and the applicable criteria were described in much vaguer terms. Furthermore, there were some specific and significant instances of watering down what had been there before.

63. ADB 1985 stipulated that external cladding products should be of “*limited combustibility*”. Section A13 and table A6 of Schedule A said that “Class 0” materials met this standard. But this was a measure of the spread of flame. It was not a measure of the combustibility of the materials themselves, let

alone a measure applicable to a product which was made up of different materials. These differences only became apparent to a wider audience following Grenfell. However, it should have been obvious to construction professionals, because the Fire Brigades Union said at the time:

“Class 0 material is not equivalent to a material of limited combustibility. A material of limited combustibility is usually a material that is either totally non-combustible or one that contains a small amount of combustible material. Combustible materials, such as plastics, are not materials of limited combustibility. They can achieve Class 0 performance by adding fire retardants or covering them with metal foil. A combustible material can therefore achieve a Class 0 rating as defined by the regulations, yet still be added to a building while being a fire hazard.”

64. And they should know. In April 1991, a fire tore up the building of an 11-floor tower block at Knowsley Heights in Merseyside. The cladding panels had a fire rating of Class 0 so it allegedly complied with the standards in the new Approved Document B. And yet it was described as “the most frightening thing any of us had ever seen as fire fighters”. Little is known about the incident because the relevant Government Department asked everyone to “play down the issue of the fire”. It appears that it had attained the Class 0 rating because of the nature of the cladding that had been tested, not the cladding that had actually been put on the walls. The incident was put down to missing fire barriers, not the need to avoid combustible cladding²⁵. Evidence to the Grenfell enquiry suggested that many thought it was impossible to overstate the importance of what was missed at Knowsley Heights.

65. Slowly but surely, the UK became known as a “low regulation” country, a place where materials, which were banned in other countries, were in

²⁵ ‘Show Me The Bodies’, pages 34-37

regular use. It is easy to see why ADB started what Dame Judith Hackitt in her report following the Grenfell tragedy, called “a race to the bottom”.

66. ADB was revised in 1992, 2000, and 2006. With each iteration, the safety standards governing external fire spread became progressively weaker, not stronger. So:

a) ADB 1992: Extension to insulation

67. In 1992, the “limited combustibility” standard was applied to insulation too. But since the cladding panel that enclosed the insulation was required only to be a Class 0 cladding panel (which, as we have seen, could be achieved by adding fire-retardant chemicals, or in many other ways) this made little difference to the quality of the materials being used.

b) ADB 2000: New tests for fire safety compliance

68. In 1999, there was a fatal fire at Garnock Court in Irvine, Scotland. This ought to have been a warning of the dangers posed by combustible cladding systems. The fire ravaged nine floors of the 14-storey building, resulting in the death of a 55-year-old disabled man and injuries to five other individuals, among them a 15-month-old child. The fire spread through the structure via composite panels, reaching the top of the building in approximately 10 minutes. A committee of MPs set up to investigate the issue following the fire at Garnock Court issued a report in December 1999, telling Ministers to scrap the Class 0 standard and require all cladding systems to be either entirely non-combustible or able to pass one of the BRE’s new large scale tests.

69. In England, Class 0 was not scrapped and cladding systems were not required to be non-combustible. Scotland took a different approach. From 2005 onward, the Scottish Building Regulations have mandated that, for high-rise residential buildings, cladding and insulation materials must be entirely non-combustible, or the entire system should undergo a full-scale fire test. Following Grenfell, it was discovered that around 300 social housing towers across England had potentially dangerous cladding. None were found in Scotland.
70. A new “test path” to compliance was set out in ADB 2000. But it still did not make mandatory tests of complete systems, and because the results of tests were regarded as confidential, no-one was sure what had passed, what had failed, or why. All UKAS-accredited test laboratories were required to maintain confidentiality, which meant that manufacturers were responsible for releasing their own test results.
71. To be fair to them, the BRE had developed a new test: one that allowed much better large-scale testing of external cladding products, and this became an alternative path to compliance: see Fire Note 9 (later BS 8414). But one particular test undertaken in July 2001 again featured in the Grenfell evidence: it involved the building of a nine-metre wall in a ‘burn hall’ and lighting a fire underneath it. The cladding had a polyethylene core for insulation purposes. If flames reached the top within 30 minutes or if the temperature level exceeded 600°C for 30 seconds within the first 15 minutes, the cladding would fail. In the result the cladding, which had obtained Class 0 classification in compliance with ADB, failed within 3 minutes. After 6 minutes, the flames from the burning cladding extended 20 metres into the air. Yet still Class 0 was retained.

72. ADB 2000 also narrowed the scope of the “limited combustibility” requirement for insulation by limiting it to *ventilated cavities* only. There was evidence at the Grenfell Inquiry that this was a further source of confusion.

c) ADB 2006

73. Although the 2000 edition of ADB remained in force for six years, discussions about revising it started as early as 2003. Climate change was rising up the political agenda: under the 1997 Kyoto Agreement, the UK committed itself to lowering carbon dioxide emissions. In the wake of the Kyoto Agreement, the European Union introduced a new European Directive on Energy Performance of Buildings in 2002²⁶. The Directive obliged Member States to enhance the energy efficiency of both new and existing buildings, mainly by increasing the use of insulation. Due to the substantial expense associated with insulating millions of homes using costlier non-combustible materials, the building regulations once more relaxed both testing and insulation requirements. Accordingly, the new ADB made two key changes.

74. First, although it expanded the use of the alternative “test route” to compliance for insulation as well as external surfaces, it said that limited combustibility was no longer a requirement, even for insulation in ventilated cavities. Developers would now be able to use flammable insulation on exterior walls, for the first time since 1991. Second, it made a subtle change to the wording of the “test route” requirement: “large-

²⁶ Directive 2002/91/EC

scale test” was replaced with “full-scale test data”. This change appears to have opened the door to the use of “desktop study” tests.

75. The implementation of desktop studies was connected to a private industry consultation conducted by the BRE. The consultation included delegates from the combustible insulation sector, which had previously been barred from providing materials for high-rise construction projects. Cladding and insulation manufacturers had argued that it would be practically unworkable to require all possible material combinations to be tested. A desktop study, therefore, would involve analysing data from earlier tests to evaluate whether a new combination of materials *would pass if* it were tested.

76. What is even more astonishing about this further relaxation in 2006 was that it was promulgated despite the fact that the BRE had reported to the Government, after the 2001 tests noted above, that the composite cladding panel (which had apparently satisfied Class 0) had “proved to be one of the worst performing products” in the test. Industry pressure not to impose tougher standards again won out. Class 0 remained, despite the fact that other countries had adopted a different approach. In Europe, they introduced Euroclass B. The UK ought to have adopted that too, but the Government chose to use Euroclass B as an alternative to Class 0. It was not an alternative: Class 0 was a much lower standard.

77. In case it should be thought that my comments about ADB and the inadequacy of the testing regime are unfair, I shall give you one other example of their lack of proper utility. Celotex RS5000 insulation, which was used on Grenfell Tower, apparently passed a test in 2014 when it was combined with cement fibre cladding – a material considerably less

combustible (and much less commonly used) than the cladding on Grenfell. That sort of questionable approach to the Building Regulations happened because the Building Regulations allowed it to happen. In January 2018 – after Grenfell - the manufacturer disclosed that they had "inaccurately described" the test in their product promotion, leading to the withdrawal of the test result. The specific nature of the inaccuracy is still unclear.

78. In addition, the relevant officials working on the new version of ADB in 2006 chose to address the concerns about composite cladding panels – that is to say, cladding made up of different materials, including insulation - by using opaque language (whether or not that was deliberate is again a matter for the Grenfell Inquiry). ADB 2006 said that any “filler material” had to meet the standard of limited combustibility. But the words “filler material” were not defined and ADB used a different expression, namely “insulation materials/products”, when talking about insulation. So it was by no means obvious that, if this was indeed the intention, “filler material” was the same as “insulation material”. Furthermore, this change was not identified in the accompanying explanation of the important changes brought in by ADB 2006. And it was such composite panels that were at the heart of the next tragedy.

8. The Lakanal House Disaster

79. On the afternoon of 3 July 2009, a fire began in a maisonette flat on the 9th floor of Lakanal House – a 14 storey tower block in Camberwell, built in 1959. The fire began with a faulty TV-set and spread very quickly up to the 10th, 11th and 12th floors. The fire tore up the outside of the building shortly after it reached an external cladding panel. Subsequent

investigation revealed that the window panels were not Class 0 compliant. Six people were killed by the fire and at least twenty were injured. Unusually, as reported in the London Fire Brigade Inquiry report (dated 7 August 2018²⁷), the fire also spread *down* the building to the 5th and 7th floors. The fire was fuelled by the cladding and of course there are striking similarities between the Lakanal House disaster and the tragedy at Grenfell.

80. The inquest was carried out by the coroner, Her Honour Judge Frances Kirkham (“the Coroner”). I hope she does not mind my saying that, when I first became a TCC judge in 2004, Frances, sitting in her home city of Birmingham, was simply the best TCC judge in the country. She was an ideal appointment as coroner for the Lakanal House inquest. But the way in which her findings and recommendations were comprehensively ignored was shameful; in the light of Grenfell, that should be a source of real anger.

81. Her findings included:

- a. The cladding panels under the bedroom windows were not Class 0, although they were required to be. This was due to a serious failure of Southwark Council (“SBDS”) and its contractors.
- b. The removal of a staircase wall in Flat 79 contributed to a fire risk. In 2006 SBDS were supposed to check the flat for fire safety but did not do so.
- c. In 2006, major refurbishments of the building provided numerous opportunities to consider whether the level of fire protection was adequate.

²⁷ This report was prepared for the Grenfell Tower Investigations and Review Team

- d. Asbestos removal and replacement with composite panels had a significant impact on the fire resistance of the external wall of Lakanal House
- e. London Borough of Southwark did not prioritise carrying out a full fire risk assessment of its properties. Consequently, Lakanal House was not assessed prior to the date of the fire.
- f. The training documents to call-handlers was contradictory and inconsistent, particularly in regard to the 'stay put' and 'get out' advice.

82. Under Rule 43 of the Coroners Rules, the Coroner wrote directly to the Secretary of State (then Eric Pickles MP, now Lord Pickles, whose graceless performance at the Grenfell Inquiry, and subsequent apology, were widely reported in the media) to say that there was a concern about the risk of further deaths in the future and action should be taken by the relevant minister to eliminate or reduce the risk of death. These recommendations included:

- a. First, the need for greater clarity about advice given to residents of high-rise residential buildings in case of fire within the building. The Coroner called for the Government to publish national guidance on the interaction between the 'stay put' and 'get out' policy with guidance on how this is to be disseminated to residents.
- b. Second, to remove uncertainty about the scope of inspection for risk assessment purposes in high-rise buildings. Further guidance was needed on the definition of 'common parts' of the buildings and when fire inspections should take place for flats which have been modified internally.

- c. Third, providers of high-rise housing should be encouraged by the Government to retro-fit sprinkler systems into high-rise residential buildings.
- d. Fourth, the Coroner considered the Building Regulations and Approved Document B. She was critical of the usability of the document (“*ADB is a most difficult document to use*”). She noted that it required referral to additional documents in order to find an answer to relatively straightforward questions concerning the fire protection properties of materials to be incorporated into the fabric of the building.
- e. Consequently, the Coroner recommended that the Government should provide clear guidance in relation to Regulation B4 – dealing with the spread of fire over the external envelope of the building and the circumstances in which attention should be paid to whether proposed work might reduce existing fire protection. This guidance should be expressed in language that can be accessed by a range of people and bodies engaged in construction, not just professionals already familiar with these areas.
- f. Finally, she recommended that the Government should produce guidance on those involved in the maintenance or refurbishment of older housing stock, not only those engaged in the construction of new buildings.

83. No action was taken on any of these findings or in consequence of the coroner’s letter. Ministers and officials seemed to be anxious to do as little

as they could get away with, saying in writing “We only have a duty to respond to the coroner, not kiss her backside”²⁸.

84. The Lakanal House fire should have precipitated a radical reappraisal of fire safety regulation, as the Coroner had recommended. The All Party Parliamentary Group on Fire Safety (led by the MP for Southend, Sir David Amess, who was murdered in 2021) wrote several letters to ministers urging them to review the regulations and reintroduce the requirement for external walls of buildings to have one-hour fire resistance. They expressly warned of the possibility of a major fire disaster in a high-rise building. They wanted clarification of ADB. All this was systematically ignored. In October 2016, Gavin Barwell, the housing minister, confirmed that the anticipated review of guidance had still not begun:

“We have not set out any formal plans to review the building regulations as a whole, but we have publicly committed ourselves to reviewing Part B following the Lakanal House fire.”

That review never took place.

9. Other Developments

85. Before coming to Grenfell itself, it is worth making some other points about deregulation, because the weak enforcement of building standards under the Building Act 1984, and subsequent BR, has been part of a broader trend towards deregulation. So, following the well-known drive to deregulate under the Thatcher governments of the 1980s, Labour enthusiastically continued this process after it came to power in 1997. Tony Blair founded the Better Regulation Task Force; giving it a mandate

²⁸ Show Me The Bodies, page 70.

to “*reduce unnecessary regulatory and administrative burdens*” on businesses. Government departments were urged to streamline or eliminate regulations in their areas of competence.²⁹

86. A key innovation, introduced by the Labour Government, was The Regulatory Reform (Fire Safety) Order 2005. The main purpose of the Order was to consolidate the current fire safety regime into a single piece of legislation. The Order brought about two key changes. First, fire certificates, which had provided fire authorities with significant leverage to encourage better safety standards, were scrapped. A new risk-assessment approach was adopted. Second, the responsibility for ensuring these risk-assessments took place was left in the hands of a “responsible person” – typically the person in control of the premises. The risk assessment had to be completed by a “competent person”, with the necessary “*training and experience or knowledge and other qualities.*” Fire safety assessments became poorly monitored, and no longer required the participation of properly trained fire safety professionals.

87. When the Coalition took power in 2010, the Cabinet Office instigated the Cutting Red Tape initiative. Vince Cable, then business secretary, became chair of the relevant committee. He proclaimed:

“This coalition has a clear new year's resolution: to kill off the health and safety culture for good.”

88. In keeping with this approach, the coalition introduced a ‘one in, one out’ rule – which required a regulation to be removed whenever a new one was introduced. As an approach to the safety of those living in high rise

²⁹ Peter Apps “The Paper Trail: the Failure of Building Regulations”, *Inside Housing* March 2018.

buildings, this has been likened to Russian roulette. While the renovation of Grenfell Tower was being finalised, in March 2016, the Government raised its target to "one in, three out", pledging to generate savings of up to £10bn.³⁰

89. The Building Regulation 2010 made few changes to the Building Regulations 2000. It also led to an update of our old friend, ADB, which was updated again in 2013. The updates were all one way: they removed references to the Construction Products Directive (which had sought to replace UK Standards with EU-wide standards), and removed all previous references to independence certification schemes and the need to establish in "advance of the work" that the scheme was the subject of an independent certification scheme.

90. Finally, in 2014, the use of 'desktop study reports' to approve cladding was formally accepted by the Building Control Alliance (BCA). The BCA issued guidance that advised that desktop studies should be conducted by UKAS-accredited laboratories. In less than a year, though, this recommendation was relaxed to permit "a suitably qualified fire specialist" to perform them. The guidance did not define "suitable qualification." At present, there is no restriction on who can do desktop studies, and there is no requirement that the reports or methodology are made public.³¹

9. The Grenfell Tower Tragedy

³⁰ Ibid.

³¹ Ibid.

91. The tragedy at Grenfell Tower on 14 June 2017 was the worst UK-residential disaster since World War II. At the time of writing, the Grenfell Tower Inquiry has published its Phase 1 report dealing with the events on the night of the fire and the hearings for Phase 2 have now concluded. The Report for Phase 2 of the Inquiry will examine the cause of the events leading up to the fire, including the factors that allowed the fire to spread in the manner identified in Phase 1.

92. In this way, most of the findings in relation to the construction, refurbishment and oversight of the building will be covered in the Phase 2 report. Nevertheless, the Inquiry Panel have already commented on whether the cladding at Grenfell was in breach of the Building Regulations 2010. Requirement B4(1) set out the functional requirement that:

“B4(1) The external walls of the building shall adequately resist the spread of fire over the walls and from one building to another, having regard to the height, use and position of the building”

93. Many of the experts unsurprisingly agreed that this B4(1) Requirement was clearly not met, as evidenced by the rapid spread of fire on the outside of the building. The Panel accepted that; they concluded that, although there may be some scope to argue about the exact legal definition of “adequately”³², it was so clear that the walls did not resist the spread of fire that it was not possible to argue that Regulation B4(1) was complied with. In fact, it was quite the opposite: “*the walls did not resist the spread of fire. On the contrary, they promoted it*” (at para. 26.4). Sir Martin Moore-Bick expressed this view in strong terms:

³² Grenfell Tower Inquiry, Phase 1 Report, para. [26.4].

“I accept that the construction of the Building Regulations is ultimately a question of law and there is compelling evidence that requirement B4(1) was not met in this case. It would be an affront to common sense to hold otherwise” (emphasis added).

94. This led to the final recommendation in the Panel’s Report at para. [33.6]:

“It is clear that the use of combustible materials in the external wall of Grenfell Tower, principally in the form of the ACM rainscreen cladding, but also in the form of combustible insulation, was the reason why the fire spread so quickly to the whole of the building”

I return to this issue in my conclusions. Yes, the building failed because, far from resisting the fire, the cladding promoted it. But that is of no comfort to the victims, their friends and families. Specific BR should have prevented the use of such cladding in the first place.

95. After the fire, the Government appointed an independent expert, Dame Judith Hackitt, to review Building Regulations and make recommendations for change. Her review, published in the Spring of 2018, was perhaps not as comprehensive as had been hoped. She accepted that combustible cladding was contrary to the Building Regulations, so that its presence must denote non-compliance. That was again due to the fact that, because the fire spread so easily and quickly, the cladding cannot have complied. She did not address in any detail the points about ADB, Class 0, combustible composite cladding, and the uncertainty over ‘filler’ material.

96. Surprisingly, at least to my eye, instead of recommending substantive changes to the BR, and ADB, Dame Judith was much more keen on new processes to allow information-sharing and determining more clearly at each stage who was responsible for safety. She said:

“I have been shocked by some of the practices I have heard about and I am convinced of the need for a new intelligent system of regulation and enforcement for high-rise and complex buildings which will encourage everyone to do the right thing and will hold to account those who try to cut corners... As the review has progressed, it has become clear that the whole system of regulation, covering what is written down and the way in which it is enacted is not fit for purpose, leaving room for those who want to take shortcuts to do so.”

However, her recommendations do not make fundamental changes to the regulatory regime. She said that the answer was to place those responsible for tower blocks “in a position of making intelligent decisions about the layers of protection required to make their particular building safe”. But I would respectfully suggest that, without regulation, without guidance, without reliable test data and certification, those responsible for tower blocks run the risk of being misled or mis-sold products, and have too much choice to make an informed decision.

97. Government consultation followed the Hackitt Report in 2019, and a further response in 2020. Finally, a new Building Safety Bill was introduced to Parliament in July 2021. The Bill received Royal Assent in April 2022. In the meantime, changes have been made to Approved Document B and there is no doubt that the specific requirements are, in some important respects, much tighter.

11. The Building Safety Act 2022

98. It would not be appropriate for me to say too much about the BSA. That is because, in my current job, I am likely to have to consider the workings

of the BSA in contested litigation: indeed, I have a three-day appeal concerned with the operation of the limitation provisions in the BSA after Easter. I therefore confine myself to more general comments.

99. The BSA creates a new cause of action that allows for claims to be made against manufacturers and suppliers of construction products. This is applicable where:

- a. a product was mis-sold;
- b. a product has a fundamental defect;
- c. the regulations have been breached.

A claim can be brought if any of these results in a dwelling becoming "unfit for habitation."

100. The BSA will bring into force Section 38 of the Building Act 1984. Section 38 provides a statutory right of action to any party that has suffered damage as a result of a breach of the Regulations. The idea is to allow compensation claims for physical damage or injury caused by a breach of the regulations. Section 38 applies to all breaches of the building regulations, and is not limited to dwellings.

101. In addition, the High Court can now issue building liability orders. These can apply to corporate bodies and *associated* corporate bodies. A corporate body is "associated" with another where one controls the other, or both are controlled by a third party. Corporate bodies can be both jointly and severally liable. Building Liability Orders relate to liability arising under the Defective Premises Act 1972, s. 38 of the Building Act 1984, or as a result of a building safety risk; that is, a risk to the safety of individuals from fire or structural failure.

102. This is a major change in the Act. Limitation periods will be extended to 15 years for:

- (i) dwellings unfit for habitation under section 1 of the Defective Premises Act 1972; and
- (ii) breaches of the Buildings Regulations under section 38 of the Building Act 1984

103. Very significantly (and unusually), the BSA retrospectively extends the limitation period applicable to a breach of section 1 of the Defective Premises Act 1972. Where a person was entitled to bring an action under section 1 of the Defective Premises Act 1972 before 28 June 2022, the limitation period is extended to 30 years. For those who will reach the 30-year mark between June 28, 2022, and June 28, 2023, the 30-year deadline will be June 28, 2023.

104. Thus far, it would be fair to say that these provisions enable better routes to compensation. They do not make buildings any safer.

105. Part 2 creates a new Building Safety Regulator, who will be responsible for overseeing improvements in the safety and performance of all buildings. They will also enforce a stricter regime for higher-risk buildings. The Regulator will be part of the Health and Safety Inspectorate, putting the Inspectorate in the forefront of managing skills for inspectors, building control, and high-risk buildings.

106. In addition, a new Homes Ombudsman scheme has been introduced to furnish new-build homebuyers with complaint procedures and dispute resolution mechanisms against developers. Developers will be obliged to join the scheme.
107. A significant change is the requirement to maintain a continuous "golden thread" of building information over the lifespan of a higher-risk building (over 18 m tall and with at least one dwelling). All duty-holders will be obliged to maintain current safety information regarding design, construction, and management. Accountable Persons will also be subject to this duty. There must be at least one easily identifiable Accountable Person responsible for managing the fire and structural safety of the entire building in all occupied higher-risk buildings. This is not quite the same as a "responsible person" under the previous regime.
108. The Accountable Person is defined under the Bill as the person who either has:
1. legal estate in possession of common parts of the building, or
 2. is under a relevant repairing obligation – such as where there is a lease which sets out repair and maintenance obligations on that management body.
109. The Accountable Person may be an individual, partnership or corporate body and there may be more than one Accountable Person for a building. A Responsible Person is a person who has control of the premises, which could include leaseholders, owners of the building or managers.

110. During the Bill's passage through Parliament, the Government published numerous factsheets. However, in July 2022 those factsheets were withdrawn, although they remain available for the time being. One of those factsheets set out the purpose of proposed secondary legislation governing duty holders. It states that:

Duty holders will be:

- Client
- Principal Designer
- Designers
- Principal Contractor
- Contractors

Duty holders will need to:

- work together to plan, manage and monitor the design work and the building work,
- ensure they cooperate and communicate with each other,
- coordinate their work and have systems in place to ensure that building work, including design work, complies with all relevant building regulations.

111. The legal status of this guidance is currently unclear.

112. Without wishing to be unfair, this all seems a bit 'processy' to me. It is again seeking to make certain people responsible for ensuring that nothing goes wrong, and liable in law if it does. Is that really the answer

to the consequences of 40 years of deregulation? Surely what is needed is prevention, not easier routes to compensation?

113. The BSA does establish a stricter regulatory framework for higher-risk structures; defined as residential buildings taller than 18 meters or exceeding six storeys. The new ADB contains details of the new requirements. But concerningly, perhaps, section 12.3 still allows for compliance to be achieved by way of “full-scale test data” and test BS-8414 (the successor to Fire Note 9). This means that, for many buildings, Desktop Studies may still provide a path for compliance, even if the use of Desktop Studies has been restricted.
114. Under Regulation 7(4), “higher-risk” buildings have been exempted from this compliance route. “Relevant buildings’ are at least 18 metres above ground level, containing:
 - (i) one or more dwellings;
 - (ii) an institution; or
 - (iii) a room for residential purposes.
115. Such buildings must meet Class A2-s1, d0 standards or better. In England and Wales, this means materials of limited combustibility that produce little or no smoke and no flaming droplets. In Scotland, on the other hand, the materials must be non-combustible. Further, metal composite materials that contain a layer of high-calorie material are prohibited in the external walls of buildings of any height. It has never been explained to me why Scotland should have a stricter, safer regime than England and Wales.

12. Conclusions

116. My conclusions, I regret to say, are rather gloomy. Almost six years after Grenfell, I see no imminent prospect of real change. There are a number of fundamental difficulties which remain embedded in the system of Building Regulation.
117. First, in amongst the deregulation and the weakening of standards, the flood of inferior products which could not be used in other countries, the disastrous test results which were not publicised, the evasions and greed, and the tragedies at Lakanal House and Grenfell, there remains, in my view, an overarching and fundamental flaw in the safety regime. On the one hand, the BR contain bits and bobs of technical guidance of the sort that used to be commonplace. There are, therefore, some standards that have to be met, even if the references are less clear and the standards less rigorous. But there are also the general requirements that say, for example, that the walls must adequately resist the spread of fire. Or, if I may paraphrase, “if the building burns down quickly, it is (or was) not in accordance with the Building Regulations”.
118. This leads to a double standard. The first part, which should be heavy on detail, as the old Building Regulations were, is now almost non-existent. But the second part, the provision which says, in the most general of terms, that a building must resist the spread of fire is, in one sense, meaningless because compliance (or otherwise) can never actually be shown unless and until the building has burned down. As a standard, it is therefore an exercise in closing the stable door long after the horse has bolted and settled into pastures new. It is that double standard which meant that, whilst on the one hand, Sir Martin Moore-Bick could say that it was an affront to common sense to suggest that the panels which burned so quickly and completely complied

with the Building Regulations, he will have to explain in Phase 2 why, on the other hand, such cladding has been in widespread use for 20 years and, pre-Grenfell, was never seriously questioned.

119. Secondly, the BR are not sufficiently clear and not sufficiently prescriptive. Before 1985, it was relatively easy to read the BR and see what was permitted and what was not. Even a technical amateur like me could plead defects cases with the BR open as you wrote. You cannot do that anymore: such clarity is simply not there. To paraphrase the Phase 1 Report, it is an affront to common sense to promulgate Building Regulations which are so complicated that they cannot be sensibly understood by a professional architect or engineer, much less the man on site actually carrying out the work.
120. I am aware that the arguments against prescription are that they are not needed in other industries, like oil and gas, or aviation, and therefore they should not be needed in construction. Leaving aside the unhappy shades of victim-blaming apparent in such a response, there are a number of answers to that bald proposition.
121. First, these allegedly comparable industries do not themselves have a spotless record on health and safety. But secondly, and much more importantly, they are not truly comparable. They are specialist, skilled industries in which the number of individual products being manufactured and used is a tiny fraction of the output of the construction industry. The construction industry operates on a huge scale and, because of the use of sub-contractors and sub-sub-contractors, lines of communication can be lost. It is critical therefore, that the underlying Building Regulations are clear to all involved in

design and construction, not just an Accountable Person or a Responsible Person, as so carefully defined in the BSA.

122. Thirdly, there is a complete and ongoing failure to require proper testing. Finished products used in the design and construction of buildings can be made up of an infinite variety of different materials. The failure to test the product actually being used, and indeed the failure to even consider that the product as a whole needed to be tested in the first place, gives rise to all sorts of problems. Not only was the particular product at Grenfell never itself tested but, on one view, it meant that the external walls were being covered in an oil-based plastic insulation which, in its ability to spread fire, has been likened to petroleum.

123. Apparently, 15/20 years ago, when those concerned with building safety endeavoured to put pressure on the Government to make the Building Regulations more prescriptive, they were dismissed as naysayers. It was alleged that, when told how weak the current regulatory system was, the relevant official said “Show me the bodies”: in other words, show me the evidence that the deregulated system of building regulation does not work³³. I would respectfully suggest that the dead at Lakanal House and Grenfell Tower have, tragically, proved just that. The present way of doing things, with the double standard and the repeated emphasis on deregulation, has manifestly not worked. It is time to go about things in a radically different way.

³³ Something the official denied in his evidence to the Inquiry, and which is obviously a matter for the Panel to decide. But it is the source for the title of the book by Peter Apps.

Sir Peter Coulson

28 March 2023