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Building

Balancing building safety and project viability



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Methodology

This research, conducted by Building in conjunction with Fenwick Elliott, was carried out via group and individual interviews with experts in the field from across the sector and the answers to a selection of qualitative questions. The research was conducted in spring and summer of 2024, prior to the publication of the Grenfell Inquiry findings.

Interviews were conducted by Building special projects editor Jordan Marshall, and the report was produced by Daniel Gayne.

The feedback from interviews and surveys all contributed to the conclusions and recommendations. However, the views expressed in the report are those of the Building the Future Think Tank, and participants cannot be assumed to have endorsed the final findings.



After the success of the Building the Future Commission in 2023, Building established its own editorial research hub, known as the Building the Future Think Tank, dedicated to producing more in-depth research and reports on behalf of the industry.

This year the think tank's programme has produced four reports: on immigration, net zero, building safety and workplace and people.

Acknowledgments

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Participants cannot be assumed to have endorsed the final findings.

Executive summary

On 14 June 2017, an electrical fire broke out on the fourth floor of a residential high-rise in west London. The resulting blaze at Grenfell Tower took the lives of 72 people and revealed a litany of failings by government and industry stretching back years. Landmark reports followed, setting out in detail exactly what went wrong and suggesting ways to fix the system, and these formed the basis of a wholesale reworking of the UK's building safety regime.

While the many lives lost remain the most important and devastating consequence of events that day, the aftermath of the tragedy at Grenfell Tower has led to some of the most consequential changes for the British built environment this century. It has taken more than five years for firms within the UK's construction and development sector to begin to get a sense of the new system in action, but a clearer picture is slowly beginning to emerge.

The purpose of this report is to provide an overview of the impacts of the new safety regime on the built environment sector, including emerging legal issues, insurance ramifications, effects on product and labour availability and, significantly, the impact of all of this on project viability.

On the back of its findings in each of these areas, this review has set out recommendations for ways in which stakeholders, both public and private, can work to mitigate the impact of the new building safety regime on project viability without compromising its aims.

While industry lawyers expect it to take five years or so of disputes before a full picture of how cases related to the new legislation will be argued and judged, there is a near-universal expectation that the regime will result in more frequent and more serious claims.

On insurance, the effect of the new safety legislation is that policies have become more restrictive, costlier, and are requiring more numerous and more rigorous risk assessments. Firms working in the built environment are attempting to mitigate the impact, but it is expected to be another few years before the insurance industry adjusts to the new situation and premiums begin to come back down.

Many fear that the UK lacks the testing capacity to meet the increased requirements for product testing and that a rush towards

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tried-and-tested construction methodologies could see prices for some product types spike.

Meanwhile, on the skilled labour side, there are serious concerns about supply at almost every level of the industry. Some firms are likely to drop out of the market for higher-risk buildings, creating new constraints. There is also a general feeling that the Building Safety Regulator is seriously under-resourced in both the quality and quantity of its staff, while in building control, both private and public, too few people are qualifying at the higher levels.

The recommendations of this report focus, in the short term, on measures the industry can implement to mitigate disruptions related to the new safety regime, minimise the impact of legal complications, and ensure that firms are prepared to meet the new requirements.

In the longer term, the focus is on identifying ways the government and industry can work together to fine-tune the new regime in order to avoid unnecessary damage to project viability while maintaining robust safety protections, and on finding a sustainable solution to concerns around the supply of skilled labour.



Part 1: Legal claims and disputes



The transitional period has passed and the built environment sector is now facing the reality of putting into practice the Building Safety Act and its higher-risk residential building regime.

This more stringent regulatory framework is expected to significantly increase the severity and frequency of legal disputes between parties as well as the scale of state enforcement through the Building Safety Regulator, which will be looking to demonstrate its ability to hold non-compliant corporates and individuals to account. Meeting the challenges of compliance is therefore paramount.

Several factors are anticipated to drive the rise in claims. The first is enhanced compliance requirements, which will mean that minor deviations from building standards are more likely than before to result in legal action.

The second factor, which is clearer lines of accountability, stems from efforts to ensure that safety responsibilities are more explicitly defined in the new regulations. While this increase in accountability is likely to result in more frequent actions when safety breaches do occur, it may also lead to a move away from the multi-party litigation seen historically in fire safety defect claims - as it should now be much clearer which specific party is responsible for an actionable breach.

Thirdly, the requirement for mandatory reporting and documentation means any lapses are more easily traceable, and as a consequence they can be more easily documented and pursued in court.

Finally, there is likely to be an increase in contractual obligations aligned to competency

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requirements which form part of the new regulatory requirements, for example, warranting that all staff be competent, which will give potential grounds for clients to say contracted firms have made a breach.

In addition, some anticipate an increase in claims stemming from new recovery routes for a wide range of claimants, who can take advantage of new causes of action – for example, by using the Building Safety Act’s section 130 building liability orders (BLOs) on the premise that it is just and equitable for liability to be passed on to other companies within a corporate group.

BLOs are a novel remedy, and there is very little guidance about how the courts will apply the “just and equitable” test.

The scale and frequency of legal claims is also likely to increase, as a result of stricter penalties for non-compliance, the increased potential for class action suits, and the introduction of criminal liability for severe breaches of building safety regulations.

The absence of established case law in relation to the statute and the regulations means firms are, to a degree, flying blind with regard to their legal obligations. Many of the principles upon which company lawyers are now arguing in the Property Chamber (Residential Property) First-tier Tribunal and the Technology and Construction Court (TCC) are essentially being examined for the first time.

While there have been moves to set up a working group to monitor the law being created through decisions in the First-tier Tribunal (often by non-specialist construction judges), it could take some years of jurisprudence and decisions before the legal picture fully matures.

In the meantime, judges have publicly indicated they intend to apply this legislation “very purposefully” and try to implement it “in a positive way”, according to one panellist, which could be a source of concern for architects, contractors and developers.

First-tier Tribunal and TCC decisions have so far tended to make it easier for parties such as leaseholders to bring claims, increasing pressure on developers and contractors either to defend claims or to get proactively involved and remedy defects as soon as they have been notified of them.

Yet as we saw at the end of August 2024 with the fire in Freshwater Road, Dagenham, the property was undergoing remedial work to replace non-compliant cladding, yet it is seven years beyond Grenfell, so things are not moving

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fast enough in many such tall buildings. As Dame Judith Hackitt recently said: “This is really about people passing the buck, passing it up the chain, a lack of ownership, and actually pinning people down to do the right thing that they know they need to do.”

These sentiments have been echoed by the government, so it is feasible that government may legislate to speed up remedial works if these are seen to be progressing too slowly.

Impact of regulations on allocation of responsibility and liability within projects

There are serious concerns about the length of delays at each of the three so-called gateways, in particular Gateways 2 and 3 – the key stages in the design, construction and occupation of higher-risk buildings as set out in the Building Safety Act. Questions have also been raised over whether the client or the contractor should take the lion’s share of the risk in relation to such delays.

The last two years have seen a steady push by developers for contractors to agree to stricter clauses on extensions of time and related loss and expense. While some larger firms may be willing to take on higher levels of risk in this way, there is concern that if tier-one and

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tier-two businesses given in to developer demands, it could create a problem for smaller contractors which lack the stomach for such levels of risk.

So far, the picture is mixed. There are reports that contractors are unwilling to take on the risk of promising they will definitely get to Gateway 3 - but this might change as firms get more comfortable with the process. As the balance of risk contractually shifts away from the client over the long term, more disputes are likely to come out of this process.

Panellists raised concerns over the potential impact for housebuilders, whose route to efficiency traditionally has been to own a lot of the risk and manage it out, particularly those trading with much smaller “man-in-a-van” businesses. For small businesses like these, access to insurance at the right price on an issue like this is out of their reach, leaving housebuilders with even greater risk to take on in this manner than in the past. This will be less of an issue for large developers using big contractors, which are able to secure insurance more easily.

Impact of legal issues on project planning and mitigation strategies

Fears of falling foul of the new regime, combined with delays in the gateway system, are having a major impact on how developers approach their projects.

Unanswered questions about the exact

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The gateway system is having an impact on how clients approach contracting, with a growing sense that design-and-build models do not work for the higher-risk building regime

application of the rules are creating uncertainty, for instance on large, multi-phase schemes. If such a development has a large common basement with several buildings sitting on top, the letter of the law means a project team would have to take the penthouse design for the top floor of the residential tower element to RIBA Stage 4 before it could get Gateway 2 approval for the basement, even though the penthouse was not due to be built for three or four years.

There is hope in the industry that in time there will be ways to split elements out and have them as separate projects so that approvals can

be given for discrete elements and/or a phased approach be adopted. Clarity from the regulator on these points would be welcome.

It remains to be seen exactly how the changes to viability will wash through the system. There is speculation about whether developers will come to terms with a lower rate of return or whether local authority planning departments might instead come forward with softened community infrastructure levies or section 106 commitments.

The gateway system is also having an impact on how clients approach contracting, with a growing sense that design-and-build models do not work for the higher-risk building regime. There has been a move towards two-stage procurement routes and pre-construction service agreements, driven by the early input needed to work up a detailed and fully developed design in time for Gateway 2 submission.

Clients would still like to have a traditional tender process, with a number of contractors competing for construction work, but increasingly they have to make decisions earlier on less developed information, which diminishes commercial certainty and in turn has an impact on funding.

Gateway 2 requires a contractor to be named, which means clients are wedded to their pick at submission - or else must later find another firm ready to take the risk on work others have prepared. There was initial confusion about whether the firm that does the pre-construction services agreement (PCSA) work could be replaced after Gateway 2 approval. It is now clear that it can, but there is still an assumption among clients that they are better off sticking with the PCSA firm to maintain clearer lines of liability, given the legal ramifications of the gateway process.

Given the wider industry trend towards early engagement, the requirements of the new regime for higher-risk buildings presents an opportunity for firms to institute strong practices to make such an approach successful.

Stakeholders who proactively adapt to the new regime are likely to better manage its associated legal risks. Mitigation strategies might include improved training or education; more robust quality control mechanisms, implemented both internally and across the supply chain; increased legal preparedness, achieved through close work with legal and compliance teams; and adjustments to insurance policy to better cover the risks of non-compliance.



Part 2: Insurance ramifications



Safety concerns that have emerged since the Grenfell tragedy in 2017 have greatly affected insurance policy terms, with most insurers now refusing to cover consequential costs on claims – a state of play expected to continue for the time being. The legislative and regulatory changes in the wake of Grenfell have resulted in higher compliance costs, which has also driven up insurance premiums.

Underwriting has become more stringent too, with insurers more selective in offering coverage, and employing more rigorous risk assessments – particularly on professional indemnity insurance for designers and fire engineers. They might also ask for an increased number of inspections such as fire risk audits.

While some insurers are offering more restrictive policies, others have exited the market entirely, exacerbating premium costs.

As mentioned above in relation to the housebuilding sector, smaller construction firms are likely to struggle to obtain affordable insurance as a result of all these change.

While there is optimism among stakeholders that increased scrutiny from insurers will drive the industry to raise its game – ostensibly the purpose of much of the regulatory change since Grenfell – it also means legal claims are likely to take longer and need more evidence to succeed.

Stakeholder strategies

As the regulatory regime beds in, requirements and guidance are likely to evolve and insurers will adapt and eventually settle down. However, stakeholders predict that this will take a number of years.

In the meantime, there is hope the insurance sector will take steps to minimise disruption to construction. Stakeholders are asking insurers to ensure that underwriting practices align with the new regulations and to adapt processes for handling a potential increase in claims related to non-compliance.

They also hope for collaboration from insurers to develop risk mitigation measures, including requiring firms involved in a project to implement specific safety measures, and want them to provide education and training that will help policy-holders understand and comply with the new regulations. On the government side, insurers are being asked to work with regulators in order to develop best practice.

Meanwhile, firms in the built environment would be well advised to make the best possible use of technology to monitor compliance and manage risks.

Part 3: Risks to supply



There have been mixed reports about changes to availability of basic building materials, with some saying it has not been a concern outside a few specific areas.

The problem has been framed more in terms of components than raw materials, with designers worried about being able to specify the correct products for given situations to meet the correct regulatory requirements. This is partly down to expectations of increased product testing requirements in the wake of last year's Morrell review, which proposed sweeping reforms including a new product regulatory regime.

Initiatives such as the Code for Construction Product Information have been welcomed, but they do not help designers to understand which standards are applicable to a particular scenario in order to be compliant, and many have had to look increasingly outside the UK for source-tested construction components.

Some fear there will be a negative impact on innovation within the industry, as firms retreat to traditional methodologies such as brick, brick slip and precast concrete facades, which are easier to get past regulators than more modern products. Such a trend could disrupt the products market - at least temporarily - with a small number of solutions being seized on and their prices consequently surging.

One stakeholder bemoaned the death of the Building Research Establishment as a state-funded body, suggesting that only an institution of its former scale could effectively ensure products are regularly tested in realistic mock-up scenarios.

In particular, two imminent pieces of regulation risk causing disruption to the supply

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New compliance requirements will push some architects and contractors out of the market, making the pool of capable firms shallower and driving up costs

of construction products – new construction product regulations and changes to Approved Document B that involve replacing British Standards with the European standard for related products.

The government is reportedly worried that product manufacturers are not going to be able to test their products fast enough, due to a shortage of testing facilities, and is now looking outside the UK for additional capacity. Indeed, the government very recently announced that it was withdrawing the national classes of fire testing standards in England and cancelling the June 2025 deadline for implementing the UKCA marking scheme, meaning the CE mark will continue to be available for construction products placed in the UK market beyond the 30 June 2025.

Impact on labour supply

Perhaps the greatest concerns about resourcing centre on the challenge of securing firms and people to do key jobs throughout the supply chain and as part of the regulatory system.

New compliance requirements will push some architects and contractors out of the market, making the pool of capable firms shallower and driving up costs. Some also expect that professional fees, which for now reportedly remain relatively stable, will rise when the market is more buoyant.

There is some concern about the ability of the privately registered building control sector to meet requirements, too. Many building inspectors are reportedly retiring or exiting the industry, while the collapse of building control approver AIS Surveyors Ltd in June will only have exacerbated supply issues in this area. The collapse of AIS, along with the failure of Assent Building Control to register in time, caused more than 50 higher-risk building projects to be paused.

After extending the deadline for building control professionals to register with the regulator until 6 July 2024, the BSR has since announced in early August that more than 4,000 had registered – so 4,049 of BSR’s estimated 4,500 practising building control professionals in England and Wales are therefore now registered.

However, worries remain that an insufficient number of them are accredited at the higher class-two and class-three levels, and that building control businesses will consequently struggle with the resulting supervision requirements, as those who have not yet

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completed their assessments will be able to work only under supervision.

Access to resources and skilled labour is already tight, with rates for most trades increasing due to scarcity of supply. This is requiring firms to do more planning in the procurement phase and much greater front-loading of design and specification details.

The new legal obligations are also beginning to have an impact on how project teams are organised, with an increased focus on having the right person in the approved inspector role.

Some stakeholders had been expecting to find a new face on projects, with a role something like a “golden thread officer” emerging. But despite some consultants, such as building safety solutions firm Altiresh, offering a comprehensive “golden thread management” service, take-up of this kind of service has reportedly been low, with architects typically picking up the new responsibilities.

Frustrations have been expressed about the levels of competency on the new building safety regime within client teams, with complaints that some project leaders are putting schemes at risk through their lack of understanding of the regime. The issue seems particularly noticeable with international developers.

Some have suggested that a well-qualified or experienced client representative, alongside



a clerk of works, might be a welcome addition to the team, while others have proposed the introduction of a recognised standard or qualification demonstrating a competent understanding of the Building Safety Act and secondary legislation.

Building Safety Regulator resources

On the public sector side, there is a big question mark over levels of skill and capacity within the Building Safety Regulator (BSR) itself.

Anecdotally, timescales for going through Gateway 2 are around 16 to 24 weeks - which essentially means an additional half-year lead-in time for projects. The timeline for Gateway 3 remains unknown, but worst-case scenarios being mooted within the industry suggest the total development lead-in time could ultimately rise to a year.

On top of the capacity issue, there are concerns about the calibre of regulatory staff at the BSR. Job openings at the regulator reportedly require only familiarity with the Building Safety Act, an understanding of the approved inspector process that previously operated in relation to the private sector, and some knowledge of building control at local authority level.

Moreover, only around 250 regulatory staff have been recruited out of a stated ambition of 1,500. This may not be enough if the industry enters a boom period, particularly in light of the new government's desire to massively ramp up housebuilding.

One solution is for the BSR to make the job more attractive, with higher wages to draw more qualified applicants. Taking a longer view, some also suggest it should be integrating with schools to ensure young people are aware of opportunities in the building safety sector, as well as working with universities to sponsor students or running its own apprenticeships to create a pipeline of labour into the sector.

Best practices for resource management

Successful mitigation of resource-related risks will be driven to a certain degree by professional relationships, with successful projects likely to lead to repeat work between clients and their supply chains.

There are various actions that project teams can take to ensure supply of resources. Sharper procurement practices, including buying essential materials early and in bulk to lock in prices and ensure availability, are one method. Firms may also look to establish relationships



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with a wider group of suppliers to ensure a robust supply, source materials locally whenever possible to reduce lead times and transportation costs, or bring parts of the supply chain entirely in-house to ensure greater control.

Businesses will also have to adopt better advance planning and scheduling, for instance developing comprehensive project plans that include detailed timelines, resource allocation and contingency plans. Earlier engagement with contractors at all levels, down through supply chains, will help with this. In addition, the use of just-in-time delivery methods could be used to reduce the need for large on-site lay-down areas and to minimise offsite storage costs, while phased scheduling to align project stages with resource availability could ensure smoother transitions and progress.

Enhanced workforce management will also help achieve effective resource management. Firms should invest in training programmes to upskill their existing staff and reduce their reliance on external skilled professionals, offer competitive benefits and career development opportunities to retain skilled professionals, and develop strong partnerships with subcontractors that can provide additional skilled labour as needed.

Recommendations



1. Learn to collaborate and engage early

Collaboration and early engagement have long been the buzzwords of discussions on best practice in the construction industry. The requirements of the Building Safety Act are already forcing clients to walk the walk on early engagement with contractors and the supply chain, and this trend is only likely to continue. Firms should develop strategies to ensure they are reaping the benefits of this and developing strong relationships with collaborators in order to avoid unnecessary legal disputes.

2. Boost resources for the regulator

The government should implement policies to address capacity issues for the Building Safety Regulator. In the short term, this should involve an immediate investment of additional resources into the BSR and a commitment to reducing the time taken to process Gateway 2 submissions.

3. Invest in future talent

In the longer term, the government should work with the regulator, the industry and educational organisations to develop a strategy for ensuring a consistent and adequate pipeline of skilled workers into building safety roles in both the private and public sectors.

4. Address rigidities in enforcement

Policy-makers should clarify how they intend to enforce the new building safety regime and work with the industry to find solutions where rules are holding back development with no clear benefit to public safety. This may include flexibility in how the regulator receives Gateway 2 submissions relating to large or multi-phased developments.

5. Ensure competency on client teams

Clients must reassure project teams by ensuring they are employing staff who are adequately versed in the UK's new building safety regime. Professional bodies representing the built environment should work to create a credible and recognised qualification that client representatives can take to give their peers confidence in their understanding of the Building Safety Act and attendant regulations.



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