



ePaper:

Construction Product Regulations



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Introduction

It was the early hours of 14 June 2017 when a fire broke-out in a 24-storey high-rise building known as the Grenfell Tower in North Kensington, London, causing the death of 72 people. Echoes of the disaster can still be heard in the construction sector today.

Two independent reports have instructed government to undertake fundamental reform to construction product regulation. But nothing has changed. And the longer the status quo remains, the more likely it is that we will see another disaster like Grenfell.

This ePaper will look at those reports, the impact of the Building Safety Act 2022 (“BSA”) on construction product regulation and the (in)action at Westminster.

This ePaper should not be considered legal advice and is for information purposes only. If you have a legal issue that relates to this content then you should take independent legal advice.



Hackett Report – A Direction of Travel

The government's immediate response to Grenfell was to commission Dame Judith Hackett to produce the [Independent Review of Building Regulations and Fire Safety: Final Report](#) ("the Hackett Report"), which was published in May 2018. Although a wider ranging report, Dame Hackett's report provides clear recommendations in respect of the construction product regime.

Chapter 7 of the Hackett Report is devoted to the subject of 'construction products'. Dame Hackett avers that construction products play a critical role in a building's safety and identified a "direction of travel" towards more effective regulation, commenting that significant further work was needed to create a comprehensive regime that would ensure that all construction products are properly tested, certified, labelled and marketed.

The Hackett Report's recommendations in respect of construction products were:

- 7.1 *A clearer, more transparent and more effective specification and testing regime of construction products must be developed. This should include products as they are put together as part of a system. Clear statements on what systems products can and cannot be used for should be developed and their use made essential. This should ensure significantly reduced scope for substitution of any products used in a system without further full testing. Until such time, manufacturers should ensure that they adhere to the current limitations set out in classification reports in the current regime. The scope of testing, the application of products in systems, and the resulting implications must be more clearly communicated in plain, consistent, nontechnical language.*
- 7.2 *Manufacturers must retest products that are critical to the safety of HRRBs (Higher Risk Residential Buildings) at least every three years. Manufacturers should consider the need to test more frequently, focusing especially on the testing of products as they operate in systems rather than individual elements. The testing of products that are critical to the safety of HRRBs should be subject to independent third party certification. The introduction of the JCA should drive the introduction of reactive testing when particular issues of concern arise regarding products installed that are critical to the safety of HRRBs. Additional test houses should be established and certified. e. All test houses should produce an annual report providing summary details of tests carried out and the number of passes and failures reported.*
- 7.3 *A simpler, more streamlined set of standards relating to the testing of products used in HRRBs, and the health and safety of people in and around those buildings, needs to be developed. This should ensure that where new standards are required, these are identified quickly and in the case of conflicting standards, that these are identified and reviewed.*
- 7.4 *Test methods and standards should be maintained under a periodic review process in order to drive continuous improvement and higher performance through the development of new test methods, and encourage innovative product and system design under better quality control.*
- 7.5 *The construction products industry should work together to develop and agree a consistent labelling and traceability system, making use of the digital technologies that are already available and learning from other sectors. The duty holder for any given HRRB should ensure that the documentation that supports the performance claims for products and systems incorporated within the HRRB should be maintained throughout the life cycle of a building through the golden thread of building information.*

- 7.6 *Government should ensure that there is a more effective enforcement, complaint investigation and market surveillance regime with national oversight to cover construction product safety. Government should consider whether this could be achieved by extending the remit of the Office for Product Safety and Standards. c. The introduction of national level market surveillance should drive the introduction of risk-based testing of products that are critical to the safety of HRRBs.*

In response to the Hackett Report, the government launched its "[Building a Safer Future](#)" ("BSF") policy, presented to Parliament in December 2018. The policy document agreed with the findings of the Hackett Report in respect of construction products and recognised that construction product regulation needed to be strengthened at a national level.

The BSF policy document recognised a need for national regulatory oversight of construction products to ensure safety, alongside the sharing of knowledge and best practice, the provision of information to building owners as to how to maintain the performance of products installed within buildings and the development of a framework for establishing minimum standards for third party schemes, including manufacturing, installation and inspection.

Building Safety Act – Laying the Foundations for the New Regime

The Building Safety Act ("BSA") was enacted in April 2022 providing wide ranging building safety reforms, focusing on fire safety in respect of high-rise buildings. To enable the reform anticipated by Chapter 7 of the Hackett Report, the BSA empowered the Secretary of State to make new regulations, ban unsafe products from the market and establish causes of action for parties to sue for losses arising out of unsafe products.

[Section 146](#) and [Schedule 11](#) of the BSA gave the Secretary of State the power to make regulations:

1. Prohibiting the marketing or supply of unsafe products
2. Imposing other requirements to ensure unsafe products are not marketed or supplied
3. Imposing further requirements in relation to the marketing or supply of products that are certified as being "safe"

A "safe" product is a product that "under normal or reasonably foreseeable conditions of use... does not present any risk to the health or safety of persons or, if it does, the risk is as low as it can be compatibility when using the product".

[Under section 148 \(2\) BSA](#) a person that:

1. Fails to comply with a construction product requirement, or
2. Makes a misleading statement in relation to the marketing or supply of that product, or
3. Who manufactures a product that is inherently defective

is liable to pay damages to a person with a legal or equitable interest in the building for any personal injury, damage to property or economic loss suffered by that person as a result of the dwelling(s) being unfit for inhabitation as a result of one of the failures set out at 1-3 above.

[Section 149 BSA](#) deals with liability for past defaults relating to cladding products.

A person that fails to:

1. Comply with a cladding product requirement in relation to a cladding product, or
2. Who markets or supplies a cladding product and makes a misleading statement in relation to it, or
3. Manufactures a cladding product that is inherently defective

will be liable to pay damages to a person with a legal or equitable interest in the building if that cladding is attached to or included in the external wall of a building and when the works were completed, the building was a dwelling(s) and is uninhabitable as a result of the failures set out at 1-3 above and a person suffers personal injury, damage to property or economic loss.

[Under section 150 BSA](#), and by way of an amendment to Limitation Act 1980, claims under section 148 are subject to a 15 year limitation period from the date of the right of action accruing i.e. when the works were completed.

A claim [under section 149 BSA](#) must be brought within 30 years from the date of the right of action accruing, where the right of action arose prior to the BSA coming into force, and 15 years if the right of action accrued on or after that date.

Testing for a Safer Future Report

In April 2021 and in response to widespread uproar following disclosure provided during the Grenfell Inquiry, Paul Morrell, the UK's former chief construction adviser, and Anneliese Day KC, a leading silk, were appointed as co-chairs of a government review into the testing of construction products.

Their "[Testing for a safer future](#)" report ("the TSF Report"), was published in April 2023, being the one year anniversary of the BSA. The TSF Report recommended that the government:

1. Strengthen and support the regulatory, surveillance and enforcement regime to ensure "*active and effective enforcement*"
2. Increase its resources and ensure that manufacturer's comply with the new regime

Controversially, the TSF Report concluded that Grenfell had led to the identification of cases where construction products were not tested, did not represent those on the market and where the combination of products were inaccurately described in a test report.

It also uncovered evidence of further testing irregularities relating to cladding and fire doors, in which products sold on the market were not those that were tested and certified. Finally, the TSF Report noted that the enforcement of historic construction product rules had been "*almost totally non-existent*", meaning that participants felt free to ignore the regulations, without consequence.

Conclusion

On 17 January 2024 Lee Rowley MP, Minister of State for Housing, Planning and Building Safety, Department for Levelling Up, Housing and Communities, gave evidence to the Levelling Up, Housing and Communities Select Committee in relation to fire safety. At committee, rather unconvincingly, Mr Rowley stated that the government's response to the TSF Report would come "*soon*".

On [5 February 2024](#) Labour MP, Clive Betts, Chair of the Levelling-Up, Housing and Communities Select Committee's fire-safety inquiry, wrote to Mr Rowley, asking when would the government respond to the issues raised and the recommendations of the TSF Report.

Mr Rowley responded by way of a three page [letter of 19 February 2024](#) effectively saying, "*soon*". At least they are consistent.

Despite the recency of Grenfell, there is no indication that the government is fast-tracking the recommendations of the TSF Report. It seems inevitable that homes and places of work across the country have been built with uncertified products. The risks associated with that are huge. The government must prioritise construction product regulation and move forward as quickly as possible with implementing the recommendations of the TSF Report. Otherwise, there will be blood on the government's hands in the event of another terrible disaster.

If you have any questions or need any advice please email John Wallace on johnwallace@ridgemont.co or call him on 0203 909 9593.



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Our offices

24 Greville Street, London, EC1N 8SS

St Nicholas House, 31-34 High St, Bristol, BS1 2AW (appointment only)

+44 (0) 203 909 9590

contactus@ridgemont.co

www.ridgemont.co



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