

# BSA 2022: Do I need to change my construction contracts?

Helen Thompson

Anthony Collins  
solicitors



# Do I need to change my construction contracts?

BSA 2022 changes obligations on those involved in construction:

- repair / maintenance / refurbishment
- extensions / new build

Potential changes to:

- building contracts / sub-contracts
- professional appointment
- collateral warranties

# Limitation periods

BSA 2022 amends LA 1980 to extend limitation periods:

- Under the DPA 1972
- Under section 38 of the Building Act 1984 (not yet in force) - civil claim for breach of building regulations
- Against construction product manufacturers

# Is there a liability gap?



For future contracts:

- Employer / others may be liable for 15 years
- Contractor / designer / sub-contractor only liable under their contract with the Employer for 6 years or 12 years?

Where contract is silent:

- Civil Liability (Contribution) Act 1978 (the “CA”)

# Express limitation periods

Common to exclude claims under the contract beyond 12 years from PC:

- Check drafting: claims under BSA / CA are statutory, not contractual

Still do nothing?

- CA only provides for 'just and equitable' contribution
- May need to claim from multiple parties: they could be insolvent or uninsured

Likely result:

- Express limitations deleted or won't apply to claims under DPA / BA / CA
- Extension to liability periods: 15y for contract breaches causing DPA/BA claims
- Push-back on '15-years from PC' across the board
- Aligned insurance clauses

# Dutyholder obligations

- applies to all building work (save minor exceptions)
- more onerous for HRB work.
- classified as for CDM but obligations differ
- there will always be a Principal Designer & Principal Contractor for BSA purposes
- existing CDM clauses likely to be added to for HRB work:
  - competence / changes in competence
  - co-operation etc
- remember: changes are a matter of contract between the parties but don't of themselves discharge duties

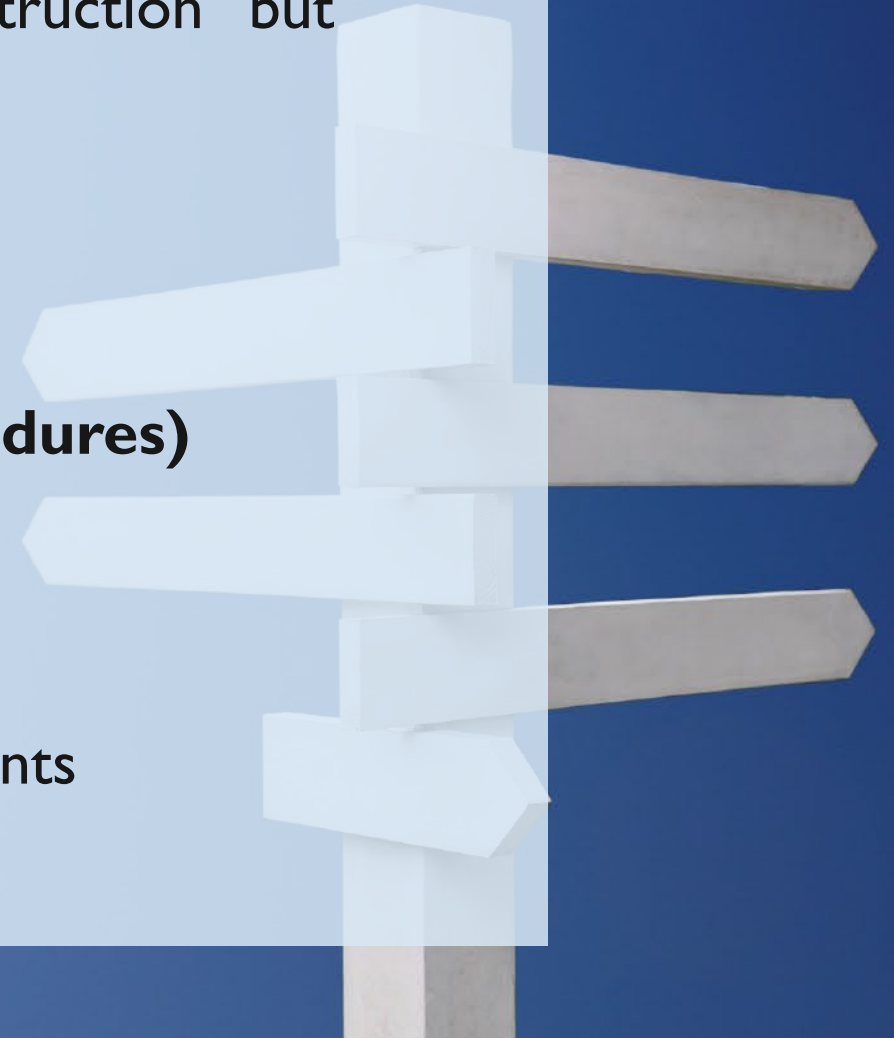


## Golden thread for HRBs

- Duty to create, collate and share prescribed documents
- Existing obligations to “comply with SRs” & “supply all information to allow Employer to comply” v specific lists
- Storage method / periods
- Sharing
- Breaches & delay

# HRBs: Building control

- Includes care homes & hospitals / for HRBs “during construction” but not for HRBs “during occupation”
- Changes in requirements cover:
  - HRB Work: (new HRBs)
  - Work to Existing HRBs
- For both, the **Building (Higher-Risk Buildings Procedures) (England) Regulations 2023** cover:
  - Approval before starting work
  - Completion certificates
- All in force 1 / 10 / 2023 subject to transition arrangements





# Approvals & completion certificates: General points

## Who produces the documentation? Who will apply?

- Compliance with “Statutory Requirements” / obtain consents
- Specific lists of documents?
- Implied terms if contract is silent?

BUT: new terms likely where works may involve HRBs

1. adding clarity
2. beefing up terms
3. link to clauses on delay **if added**



# Approvals before starting work

If approval is required (new HRB work / work to an existing HRB) this **cannot commence** until BSR approval obtained.

Work on an **existing HRB** can be Category A or Category B

**Both** need approval unless

- outside regs / exempt
- scheme work (self-certification / third-party certification)
- emergency repairs

Emergency repairs

- necessary due to the risk to health, safety or welfare
- not practicable get approval before starting
- still need notices to BSR / regularisation certificate application as soon as reasonably practicable after the work has started

**Seek technical advice & consider outcomes for contracts....**

# Outcome for contracts (approvals before starting work)

1. Application to include **all information** set out in the regs
  - list is longer for Cat A & all likely to be produced by PC / PD.
- 2: PC / PD must be appointed:
  - for works to HRBs & where approval is req'd: **before application**
  - for other the work, before construction phase begins
- 3: Allow time for processing (12-weeks / 8-weeks)...**or more!**
- 4: Application could be **refused or delayed**: allow for this
- 5: Specify who will produce & submit documents (in PCSA or similar)
- 6: Check **contract terms**: delay in approvals & giving possession of site

# Completion certificates for HRBs

Applies to:

- new HRBs (“HRB Work” - Gateway 3)
- work on existing HRBs (Cat A or B) unless:
  - outside of regs/exempt,
  - scheme work or
  - emergency work

Requires

- application for a completion certificate (or part); or
- notices for scheme work / other formalities eg emergency work

# Completion certificates for HRBs (2)

## Occupied buildings: likely outcomes

- Bigger picture obligations:
  - compliance with mandatory occurrence reporting / complaint policies / resident engagement
  - duties to share information and report impact on Safety Case
- Specific obligations
  - “comply with law” / “issue all notices” / “apply for all certificates”
  - differing approaches to delay / failure to obtain certificates depending on type of contract.....
- Again: changes are a matter of contract between the parties but don't of themselves discharge duties



# Failure to obtain completion certificates & delay

## **New Build:**

- Completion conditional on passing gateway 3; or
- New mechanism after practical completion
- Rely on existing terms

## **Existing HRBs:**

- Major works: as above
- Minor works contracts: failure to get a certificate or give notifications = a defect
- Mixed contracts: cater for both

# Major works: works not “complete” until certificate rec’d

- Fits around common existing terms regarding completion
- Delays likely covered by existing terms:
  - employer default / contractor default / neutral events
- Drafting changes may be limited:
  - Contractor is to submit application
  - PC not achieved until completion certificate issued

## Issues

- 8 week wait for certificate (12 for New HRBs)
- Market position not yet clear

## Controlled changes for HRBs (Reg 18-25)

- Changes to original building control approval application for both HRB Work and work to an existing HRB
  - change control log
  - major changes v notifiable changes
- Who applies & produces associated documents?
- Risk of delay in receiving approval?
  - EOT for Employer Changes (not caused by C)
  - No EOT if delay caused by C's breach
- Compliance and stop notices
  - Is drafting regarding compliance necessary?



# Conclusions

- Consider the work in question
- **Think** about the impact on the whole building
- Check what is needed
- **Then** think about your contracts
- Get guidance from supply chain but don't ignore **your own duties**



**50** Anthony  
Collins

## QUESTIONS?

Anthony Collins  
134 Edmund Street  
Birmingham  
B3 2ES  
Tel: 0121 200 3242

Anthony Collins  
76 King Street  
Manchester  
M2 4NH  
Tel: 0161 470 0310

[info@anthonicollins.com](mailto:info@anthonicollins.com)  
[anthonicollins.com](http://anthonicollins.com)  
Twitter: @ACSLLP

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# Thank you!

Enjoy the  
conference!