The Building Safety Act: what does it mean for liability and indemnity insurance?

Stefan Harris-Wright summarises the liability implications for UK structural engineers of changes brought about by the Building Safety Act.

The Building Safety Act (the Act) came about as a result of the Grenfell Tower fire tragedy, which highlighted problems with the construction of, in particular, high-rise buildings. Its aim is to improve safety standards in building construction and management to reduce fire-safety risk to people.

The Act contains 171 provisions, and it works by amending provisions of existing legislation – the Defective Premises Act 1972 (DPA), which sets out standards for residential buildings, and the Buildings Act 1984 (BA), the source of Building Regulations. It also amends the Health and Safety at Work etc. Act 1974 in order to introduce new responsibilities for the Health and Safety Executive.

Not all of the Act is yet in force; it is coming into force in tranches through regulations introduced over time, and there is no certainty of what is coming in when. Clearly, such a significant act (both in terms of volume and impact) covers a wide range of obligations for many professionals, but there are some provisions already in force which will be of particular interest to structural engineers.

Limitation of liability

English law has had, for centuries, limits on how long a claimant has to make a claim. The basic position is that claims under contract have to be made within six years of the breach, or 12 years if the contract is executed as a deed. Structural engineers in private practice will be appointed on a project by way of a contract – albeit sometimes on less than formal terms – and so the ability of a client to make a claim is limited by the relevant limitation period. The lack of a formal appointment does not affect liability; it merely brings evidential difficulties.

The Act has changed that. From 28 June 2022, claims in contract under the DPA and BA have a limitation period of 15 years prospectively and 30 years retrospectively. The different timescale is decided by the date of the breach, so before or after 28 June 2022. The 30-year retrospective period is likely to result in a significant number of potential claims, although after all this time evidence is probably going to be a problem.

The new periods apply in three ways:

1) to claims under the DPA, which will simply have the new periods implied into them
2) to claims under the new head for defective construction products
3) theoretically, to claims under the BA.

The reason the periods are theoretical for BA claims is that the part of the BA that would give a claimant a statutory right to make a claim for failure to meet Building Regulations has never itself been brought into force. It was expected that this would be rectified by Parliament with the advent of the Act, but it was not, so it is still extremely difficult to bring a claim for such failure.

Although it is possible to sue, for example, an approved inspector under their appointment, in practice those who have suffered loss are not party to the appointment, and there is no tortious duty established that would enable a claim.

Defective construction products

The new ability to claim in respect of defective construction materials will be of interest to structural engineers

> **“STRUCTURAL ENGINEERS NEED TO BE LOOKING AT TWO THINGS: DOCUMENT ARCHIVING AND THE TERMS OF THEIR APPOINTMENTS**

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because it's not just manufacturers who are in the firing line. It covers those who mis-sell products, or fail to comply with manufacturers' requirements, and the biggest issue is that the claimant can claim for personal injury, property damage and economic loss. Clearly, this could give rise to claims for significant sums going back 30 years.

Insurance

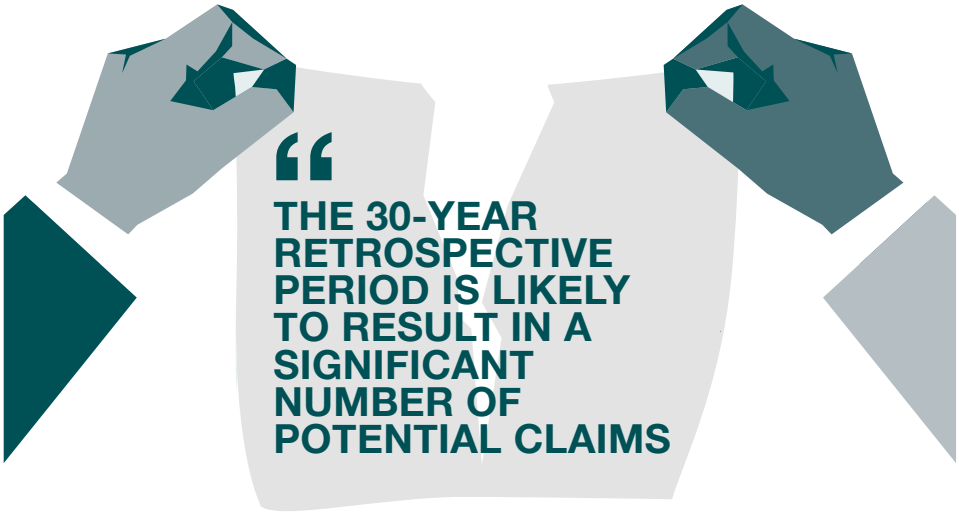
Professional indemnity insurance is going to have to change to cover the new 15-year prospective liability period. As a 'year of claim' type of insurance, any retrospective claims will already be covered. The additional three years of liability will undoubtedly increase costs, which will be in addition to the existing increases and hardening of the market.

The Birketts view

Structural engineers need to be looking at two things: document archiving, to allow for the increased limitation period (including retaining old documents that might have otherwise been disposed of); and the terms of their appointments.

With the insurance market being as it is, it is essential that contracts of engagement do not leave engineers unnecessarily open to claims, so limiting overall financial liability, being very specific about duties and reducing assignments are all key.

Stefan Harris-Wright is a Partner and Head of Construction & Engineering at Birketts LLP, dealing with all aspects of law impacting on the construction industry.
www.birketts.co.uk



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