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Fire Safety, Building Regulations and Empowering Residents

By Ed Kirton-Darling and Helen Carr¹

The terrible tragedies of the fires at Lakanal House and Grenfell Tower demonstrate the critical importance of empowering tenants and other occupiers. We have previously argued² that, in addition to the Homes (Fitness for Human Habitation) Act, more routes for redress for residents are urgently needed, alongside a broader culture change. In the meantime, we have worked with the Tower Blocks Network and others, including independent environmental health expert Dr Stephen Battersby and fire safety expert Phil Murphy, to develop the Fire Safety Checklist. This article briefly describes the Checklist, and then explores empowerment in aspects of the proposals contained in the Building a Safer Future³ consultation document.

The checklist – available here from the Tower Blocks UK website⁴ – is designed to help tower block residents identify and highlight fire safety issues in their buildings and/or individual flats, and to provide guidance on what might be done about them. It is explicitly designed for tenants, whether their landlord is a local authority or not, and includes a flowchart which helps residents work out routes to resolve their problem.

It can be used to gather information, and when completed, tenants can use it to support a request for an assessment under the Housing Health and Safety Rating System (known as the HHSRS and contained in Part 1 of the Housing Act 2004), which should be undertaken by the local authority to identify the seriousness of the risks. Leaseholders may also find the checklist a useful source of reference on fire safety (although leaseholders will not be able to seek assistance from the local authority for issues which are demised to them under the terms of the lease). As well as the questions themselves, the checklist includes illustrations of what to look out for, sources of further information, and tips for how to deal with the local authority environmental health officer. The checklist is for all to use, and we are keen to gather feedback on it, so that we can continually improve it.

Fire literacy is important, as are tools to navigate the complexity of housing law. The checklist is another piece of the jigsaw, but it is just a start. The best way to empower occupiers of poor-quality housing is enforceable rights to get remedial works done speedily, and it is critical that this message continues to be repeated, so that those in power cannot continue to ignore it. In this context, the latest proposals from government are contained in a consultation, Building a Safer Future, which sets out plans to implement many of the recommendations of the Hackitt Report. The proposals include the emphasis on resident responsibility which Carr has previously critiqued in this journal,⁵ but contains few details about how these responsibilities would be imposed. How would responsibilities be enforced if there was no contractual relationship between the person with the duty to keep the building safe and the resident (a private tenant of a leaseholder for example)?

¹ Thanks to Kirsty Horsey for review of this piece.

² See our report, alongside Dave Cowan and Edward Burtonshaw Gunn, available here: https://england.shelter.org.uk/data/assets/pdf_file/0010/1457551/2017_11_14_Closing_the_Gaps_-_Health_and_Safety_at_Home.pdf

³ Available here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806892/BSP_consultation.pdf

⁴ <https://www.towerblocksuk.com/firesafetychecklist>

⁵ Carr, H. Engineers don't make the world! Reflections on Building a Safer Future: Independent Review of Building Regulations and Fire Safety Final Report. J.H.L. 2018, 21(6), 110-118

The consultation also proposes that the chief route of redress would be through the regulator, and proposes a 'no wrong door' policy, in which all those in the system would be required to actively refer complainants. The principle is to be welcomed, but it will be the practical application of this which will be critical if the system is to operate properly.

Intriguingly the consultation opens a door which appeared closed by the Hackitt report. Buried on the last page of the consultation, just before the Annexes, and without a specific question for consultees to respond to, are three paragraphs about the Building Act 1984. Paragraphs 370-372 ask whether the private right of action contained in s.38 of the Building Act 1984 ought to be brought into force. S.38 provides that a breach of a duty imposed by building regulations is actionable, so far as it causes damage, which includes the death of, or injury to, any person. It is notable that the original version of the Homes (Fitness for Human Habitation) Act 2018 proposed to commence the section.

In the special edition of the JHL following the Grenfell Tower fire, Andrew Arden QC highlighted the importance of the failure to implement s.38, and responses to research we conducted for Shelter with Dave Cowan and Edward Burtonshaw-Gunn strongly supported the implementation of the provision, with one respondent summing up many responses by stating "It is clear that there is insufficient legislation concerning the enforceability of building regulations".⁶ It is also conceptually vital because, as we argued, 'outcomes based regulation is very difficult to 'map' onto legal duties and responsibilities. There is a need for legislative clarity about the responsibilities of landlords and managers in connection with the breach of regulations.'⁷ Fundamentally, it is part of the framework of the Act as constructed by Parliament – if, as many argue, the system has not been working properly, part of this might be laid at the door of the absence of this central piece of the superstructure.

What difference would s.38 make? It would bring building inspectors into the picture in relation to claims, as the court made clear in the 2018 Herons Court case.⁸ Arden argued that it would also make bringing claims simpler, noting that 'to prove a breach of building regulations is considerably easier than proving negligence, which introduces somewhat subjective or more open-textured criteria such as the parameters of contemporary professional judgment, behind which professional advisors may be expected to hide.'⁹

It would also mean it was possible to have a definitive answer to the question of whether the building regulations permitted flammable cladding or not, and decisions by courts in this area would provide much needed certainty.¹⁰

Does the section offer any possibilities for tenants or leaseholders stuck in blocks where cladding or other breaches of building regulations have caused untold distress?

As the law currently stands, claims might be available in negligence or under the Defective Premises Act 1972 (DPA), where a duty of care was breached by a builder or landlord, but there are significant limits here. Section 1 DPA – the duty on builders – only applies to new build or conversion into homes from other uses¹¹ and so would not apply to refurbishments, while s.4 only applies in practice

⁶ Note 1, pg 18

⁷ Note 1, pg 18

⁸ *The Lessees and Management Company of Herons Court v. Heronslea Limited, TNV Construction Limited, NHBC, and NHBC Building Control Services Limited* [2018] EWHC 3309 (TCC)

⁹ Arden, A. Grenfell Tower: the greatest failure (Editorial) J.H.L. 2017, 20(5), 97-102

¹⁰ And see Carr

¹¹ See *Jenson v Faux* [2011] EWCA Civ 423

to tenants and provides for duties of care linked to repairing obligations, so will not necessarily extend to making the property safe.¹² Critically, in addition, it would be necessary to establish injury or damage as a result of the breach, and this cannot simply include the loss suffered by a home becoming valueless due to the cladding affixed to the exterior of the building or the stress caused by living in such a home.

What might the implementation of s.38 change? If claimants can prove breach of building regulations and evidence disease or impairment of person's physical or mental condition, it would offer a route to claim, making possible some claims where it might be difficult to establish negligence. More significantly, it could make a significant difference if it opened the door to a claim in which damage was drawn more broadly. One possibility, highlighted by a close analysis of the decision of the court in *Warner v. Basildon Development Corporation* [1990] 7 Const LJ 146, is it might enable claims for the costs of putting right damage to the property itself, currently framed as unrecoverable pure economic loss.

Warner was a claim in negligence against the developer of a house who had built a home with inadequate underpinning. The house was built before the DPA, and in any event, the owners were not in any immediate danger of injury; they had sold their home, and were seeking to recover the economic loss they had suffered as a result of the negligent construction.

A critical part of the question in *Warner* was how to deal with the line of caselaw including *Anns v. Merton London Borough Council* [1978] AC 728, and how those decisions related to the decision of the House of Lords in *D&F Estates Ltd v Church Commissioners for England* [1989] A.C. 177. The difficulty for the court in *Warner* was that, while *D&F Estates* had provided that damage to a building caused by a negligent developer which had not caused injury to persons or other property was pure economic loss, *Anns* had provided that a claim was possible against a negligent local authority responsible for building control where repairs were necessary to remove a source of danger to health. Critically *Warner* was decided without the benefit of consideration of the House of Lords in *Murphy v. Brentwood District Council* [1991] 1 AC 398, which reversed *Anns* and which was being heard at exactly the same time, but by following *D&F Estates* and distinguishing *Anns*, the approach of the court in *Warner* clearly fits with the approach of the House of Lords in *Murphy*.

The crucial aspect of this for the current situation is that in negligence, builders (and those signing off the building as safe) owe no liability for economic loss to subsequent owners. With buildings, as with chattels, 'If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic.'¹³

The approach of the Court of Appeal in *Warner* was to follow *D&F Estates*, and then explore the extent of the decision in *Anns*. In this analysis, a distinction was drawn between breaches of statutory duty and negligence. For example, the court approvingly cited Lord Oliver's construction of the issue in *D&F Estates* which he stated the principle requiring actual damage applied 'in a case where no question of breach of statutory duty arises'¹⁴ and negligence by a builder could not extend to pure economic loss. Lord Bridge noted that the introduction of such a duty of care would amount to an 'indefinitely transmissible warranty of quality'¹⁵ and that such a decision is for Parliament to make, noting the provisions in the Defective Premises Act 1972. In relation to *Anns*, the decision in

¹² See eg *Alker v. Collingwood Housing Association* [2007] EWCA Civ 343

¹³ Lord Bridge, *D&F Estates*, p 206

¹⁴ Lord Oliver, *D&F Estates*, pg 214A

¹⁵ Lord Bridge, in *Murphy*, at 480G, discussing his decision in *D&F Estates*

both D&F Estates and Warner note that Lord Wilberforce had suggested that either negligence or statutory duty could form the basis of recovery, stating that, 'In the alternative, since it is the duty of the builder (owner or not) to comply with the bye laws, I would be of opinion that an action could be brought against him, in effect, for breach of statutory duty by any person for whose benefit or protection the bye law was made.'¹⁶

The Court in Warner expressed confusion with this, noting the difficulty with holding a builder liable without proof of negligence when s.38 of the 1984 Act had not been brought into force. It went on to suggest that the breach of statutory duty referred to in Anns must relate to negligence arising from such a breach. However, it is clear that if a statutory duty did exist, it would operate differently to the rules in negligence, which leads to the question of whether, if s.38 was to be introduced, the decision in Anns could support a claim for pure economic loss on the basis of a breach of statutory duty, not a breach in negligence. In Murphy, the leading judgment by Lord Keith holds that the extension of duties in this area is a decision for Parliament, and only explicitly holds that Anns was wrongly decided 'as regards the scope of any private law duty of care resting upon local authorities in relation to their function of taking steps to secure compliance with building byelaws or regulations and should be departed from.'¹⁷ If Anns remains otherwise existing authority despite the critique of it in the subsequent cases, and if, as the courts approach in D&F Estates and Warner might suggest, Anns does not apply to negligence but could apply to breach of statutory duty, Anns could provide the basis for an argument that where there is a breach of statutory duty by a developer or building control which gives rise to a present or imminent danger, a claim for pure economic loss is possible.

This is all too brief and necessarily tentative, and the endeavour here is to sketch out a possibility in the context of the question of what s.38 could mean. In any event, it would be possible for the Government and Parliament to act to ensure s.38 provided the protections originally envisaged, and it is not irrelevant that when s.38 was originally enacted, Anns remained good law, and so would have been in the mind of those drafting the legislation. At the same time, if Government wished to do so, other possible issues could be made explicit – for example, the question of retrospective application. We suggest that there is a strong argument for retrospective application in the event of s.38 being commenced. In effect, commencement would constitute a new route for enforcing pre-existing obligations, not a new set of obligations, and the argument against retrospectivity is weak, including a deeply unattractive argument that organisations found to have breached building regulations would have behaved differently if a claim was possible.

However, the insertion of s.38 as an apparent afterthought at the end of the consultation does not inspire confidence that Government is keen to pick up on these issues, and it might be that – as with the Fire Checklist – those keen to empower residents will need to rely on the current flawed legal context.

¹⁶ [1978] AC at 759D

¹⁷ Murphy at 472G.