The concrete conundrum

What is it?

RAAC is a building material used in construction and most widely used between the 1950s and 1990s. It consists of concrete that has been exposed to extreme heat and pressure to create a 'bubbled' structure. This makes it considerably lighter than traditional concrete slabs, and it has proven useful for flat roofs and floors. A number of schools were built with this material, and have been forced to close buildings whilst surveying and remediation work is carried out.

What is the problem?

RAAC has a life span of approximately 30 years, so as it reaches the end of this period it can become a considerable safety concern. The failings of RAAC were first made apparent during the 1980s.

In addition, due to the porous nature of RAAC, it absorbs water when it comes into contact with it which gives rise to uneven strength properties. The water absorption can cause an uneven load distribution and weakening of the material with little to no warning, which can lead to crumbling, cracking and, in the worst cases, building collapse.

What is my responsibility as a building owner?

The extent of your obligations so far as they relate to the monitoring, maintaining and operating your building, so that it is safe to occupy, will often depend on the nature of the use to which the building is put and the purpose for which people are occupying it.

The fallback position is that the owner of a building owes a general duty to use reasonable skill and care so as not to cause death or personal injury. In addition, there are also extensive obligations imposed by statute on building owners. These include, amongst other obligations:

- the duty to exercise "the common duty of care" under the Occupier's Liability Act 1957 and 1984,
- in the case of landlords letting residential dwellings, "a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage" under the Defective Premises Act 1972, or
- in the case of a school, for example, a duty on the employer "to take reasonable steps to ensure that staff and pupils are not exposed to risks to their health and safety" under the Health and Safety at Work Act 1974.

The initial answer to addressing these responsibilities, applicable whatever the level of duty, is to carry out a review of your property records and a physical inspection of your property portfolio to identify where RAAC exists and its current condition. Once the extent of the problem is understood, follow the general government guidance issued by the Health & Safety Executive (HSE) and also the more detailed advice provided by the likes of the Institution of Structural Engineers (ISE) and the Construction Leadership Council (CLC), where applicable.

Generally speaking, it is unlikely that RAAC will be covered as an Insured Risk under your building insurance policy. Therefore the responsibility to remedy any defects will also depend on the repairing covenants contained within the lease. In most instances involving commercial property, the onus will be on the landlord to remediate any defects.

As a landlord, it is worth noting that your lease is likely to have provisions allowing you and your contractors to enter premises to survey and carry out remediation, and it is important to check the lease wording carefully for notice periods, and the like, should work become necessary. The costs pf RAAC remediation costs may be permitted under the terms of your lease, either as a service charge or as rent, but the exact terms of the lease will need to be checked carefully for any caps on costs or categories of works which are excluded.

What is my liability as a building owner?

Owners of commercial buildings will generally have an ongoing obligation to their tenants to keep their buildings in appropriate repair, although this depends on the wording of the lease.

Where there is a commercial lease for multi-occupied buildings, the landlord carries the responsibility to carry out any structural repairs which will include any RAAC defects. It is still nevertheless worth checking the terms of the lease, as the costs of RAAC remediation may be recoverable through any service charge provisions.

For a residential building, the terms of the lease are less relevant as under the Landlord and Tenant Act 1985: a landlord of a dwelling, that is not let on a long lease, is liable to maintain and repair the dwelling (including the building of which it is part if the landlord owns the said building). This obligation applies even if the landlord did not know about the defect, but should have known.

For both residential and commercial landlords, the consequences for failure to carry out their obligations will include the risk of potential damages claims for losses arising as a consequence of the defects including for death, personal injury, damage to property, breach any contract, and nuisance.

The HSE are the appointed regulator under the Building Safety Act 2022 and have alerted all building owners to the guidance from the ISE. Should the HSE believe that a duty under the BSA or relevant workplace safety legislation has been breached, it retains the right to bring criminal proceedings against a person or body in respect of failure to comply, but this will generally follow a warning notice.

Who else could be liable for RAAC defects?

RAAC defects could leave those responsible for the original design and construction of an affected building open to a potential claim for breach of the terms of their appointment, more particularly, for a failing to exercise the required standard of skill and care in the performance of their services. This could include claims against construction professionals such as building contractors, architects, and structural engineers as well as those subsequently appointed to repair, maintain and/or inspect the building.

Proving breach of contract or negligence on the part of a professional consultant or contractor may not prove easy. It is important to note that the ISE issued a report on RAAC recently, and recommended a new minimum width of 75mm for all RAAC panels. The previous limits were 45mm for roof panels and 60mm for floor panels. The specification of RAAC may not therefore have been necessarily incorrect at the time of specification and thus will not automatically lead to a presumption of fault. As such, it may be difficult for anyone trying to bring a claim for RAAC defects to rely on the updated guidance given contractors and consultants were following the correct guidance at the time.

It is also worth noting that the existence of RAAC will not automatically be considered a structural defect, it may simply be that RAAC has reached the end of its natural lifespan.

Even if the basis of a claim can be established, it may nevertheless be time-barred by virtue of the limitation period either expressed in the contract or implied by statute. Most building contracts and consultant appointments are either executed as simple contracts "under hand" or as a Deed and specify the period of the construction professionals' liability as being either 6 or 12 years from the date of practical completion of the Works. The specification of RAAC largely ended over 30 years ago.

In light of the difficulties in bringing a defects claim against those originally responsible for the design and construction of a building, RAAC defects claims are likely to centre around those engaged by building owners to monitor and repair RAAC-affected buildings. Construction works commissioned in the last 12 years designed to protect and preserve RAAC in situ, which subsequently fail, may prove to be a more fertile ground for defects claims.

The Building Safety Act 2022 and RAAC

The Building Safety Act ("BSA") largely only applies to "High Risk Buildings" (currently defined as those at least 18 metres / 7 stories in height) which contain 2 or more residential dwellings).

With respect to these "HRBs", the BSA extends the time period for bringing a claim in respect of building works completed before 22 June 2022 where defects arise resulting in the building being unfit for human habitation, from 6 years to 30 years. Bearing in mind construction professionals largely stopped using RAAC in the mid-1990s, even this extended limitation period is unlikely to assist a potential claimant.

In addition to an extended limitation period, the BSA also brought into force the remedy of a Buildings Liability Order (BLO) which can make parties associated with a building safety risk either jointly or jointly and severally liable with the original company responsible for the defect. If awarded, a BLO can apply to both residential and commercial property defects, as they can be made in respect of any "relevant liability" arising from one of the following:

- the Defective Premises Act 1972,
- section 38 of the Building Act 1984, or
- a "building safety risk" under section 130(6) of the BSA.

Whilst the Defective Premises Act only applies to residential dwellings, and s.38 of the Building Act 1984 is yet to be brought into force, s.130(6) applies to "building safety risks" but only if it arises in relation to fire or structural failure. The risks that RAAC poses to the structural failure of a building could potentially benefit from a BLO but in any event it will only be in relation to prospective claims from 22 June 2022 onwards. As previously discussed, given the specification of RAAC largely came to an end in the 1990s, it is highly unlikely a future claim for RAAC defects will arise affording the opportunity to utilise a BLO remedy.

What if I think I have a problem?

The first port of call should be checking your contracts and leases to determine your obligations to repair/remediate any structural defects.

If you suspect your building may have RAAC present, the best course of action would be to arrange a survey to carry out a risk assessment. The ISE maintain a record of persons who are equipped to survey and report on RAAC.

If you would like further advice or information on anything contained in this article, then we can help, **get in touch.**

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