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Leasehold Dwellings Update in Light of Recent Statutory Changes

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ABOUT RICHARD SNAPE

Richard has been the Head of Legal Training at Davitt Jones Bould (DJB) since 2002. He speaks at numerous courses for law societies all over the country, various public courses, in-house seminars within solicitors' firms and has also talked extensively to local authorities and central government bodies. His areas of specialism include both commercial and residential property, in particular in relation to local government law, conveyancing issues, development land, commercial property and incumbrances in relation to land.

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BUILDING REGULATIONS AND GRENFELL

Prior to the Grenfell Tower disaster the Welsh Government had already introduced a requirement for sprinkler systems in new residential buildings. In December 2018 similar requirements were introduced in England but only for residential buildings of 30 metres or more in height.

Building (Amendment) Regulations 2018

Building (Amendment) (Wales) Regulations 2019

There is also a ban on various types of combustible cladding in relation to buildings more than 18 metres or more in height. This is not retrospective but is under review. The provisions came into force on 28 November 2018 in England and 10 January 2020 in Wales.

The provisions apply when the building contains one or more dwellings including student accommodation, care homes, sheltered housing, hospitals and dormitories, but excluding hostels, hotels and boarding houses.

The regulations apply to external walls and specified attachments although in ***R (on the application of the British Blind and Shutter Association) v The Secretary of State for Housing, Communities and Local Government [2019] EWHC 3162*** judicial review was successful against the Secretary of State in removing blinds, shutters, awnings and canopies from the regulations. Attached solar panels and balconies still come within the regulations.

The **Building (Amendment) (England) Regulations 2022** were laid before Parliament on 1 June 2022 and will come into force on 1 December 2022.

They will:

- Include hotels, hostels and boarding houses within the cladding ban.
- Ban the type of metal composite material used at Grenfell in external walls of all new buildings and buildings undergoing works regardless of height or use.
- Bring curtains and slats of solar shading devices within the ban with a limited exemption for ground floor awnings.

There are also amendments to Approved Document B adding guidance for external walls and balconies for residential buildings between 11 and 18 metres.

REGULATORY REFORM (FIRE SAFETY) ORDER 2005

On 1 October 2006 the **Fire Precautions Act 1971** and a whole raft of employment protection fire safety legislation was repealed and replaced by the responsible person in non-domestic premises requiring a fire safety risk assessment under the **Regulatory Reform (Fire Safety) Order 2005**.

The fire authority is responsible for enforcement and may also serve improvement, alteration and prohibition notices. They will not, however, carry out the risk assessment. At least as frightening as the threat of prosecution, non-compliance with the legislation may well vitiate insurance the next time a policy is up for renewal. Presumably, insurers will require such an assessment before they commit themselves to reinstatement after fire. The prospect of not having insurance will no doubt spur lenders into also requiring such a risk assessment.

Who is responsible?

The person responsible for such an assessment will vary depending on the circumstances, but one thing is abundantly clear, the obligations go far beyond any previous requirement for a fire certificate and are not dependant on size of the enterprise or number of staff. The Office of the Deputy Prime Minister (ODPM) stated that the only non-domestic premises which would not require such an assessment is probably where someone works from home, either self-employed or as an employee and, for good measure, buried in the middle of one hundred and twelve pages of Regulations, the common parts of blocks of flats are (as with the **Control of Asbestos Regulations 2012**) defined as being non-domestic premises. Purchasers must ask for, and landlords provide, a fire safety risk assessment. The prospect of vitiating insurance policies will presumably mean that where no assessment is available, the mortgage lender must be notified and will withdraw any mortgage offer. The fact that a purchasing residential long-leaseholder, who will become a director of a residents management company after completion, will instantly become a criminal might also exercise the mind of the domestic conveyancer and managing agent. In relation to business premises, if an employer is in control of premises occupied by his or her staff, then that will trigger the need for a risk assessment which must assess the risk, including necessary remedial work, not merely for the workforce but any relevant persons, including visitors and neighbouring land owners, who may be affected. A tenant in control of their premises (as will almost certainly be the case) must also have an assessment whether or not they are also an employee, and a landlord who retains control of the common parts will require a quite separate assessment. As the costs of the assessment will inevitably be added to the service charge (as also will the cost of any remedial work provided that the landlords may charge for the carrying out of statutory works), then the tenant must fully enquire as to the landlord's assessment.

As well as the responsible person, there will also be duty holders such as fire assessors, managing agents and fire alarm engineers who may be subjected to criminal offences.

Who carries out the assessment?

The risk assessment is personal to the responsible person and criminal liability cannot be delegated. The assessment must be a satisfactory one and the Government recommend it be done professionally by an expert. The **Building Safety Act 2022** requires the assessment to be done by a competent person. Unless the landlord qualifies a third party must be appointed. There are also requirements to keep records and provide information. The assessment must be a risk based one. Guidance states that if there is a change of circumstances, eg. a fire, more people occupying or building works then there should be another risk assessment.

Note: Strictly speaking, newbuild properties should have fire safety risk assessments although they should of course comply with building regulations. If NHBC are responsible for building control, they should have a separate fire safety assessment.

Note: If the flat is in mixed business residential premises, then each of the commercial units should have a separate fire safety assessment, the CPSE enquiries seem to envisage that the purchaser should see all of these and how the parties have cooperated.

Note: The LPE1 forms ask the landlord to provide the fire safety risk assessment, to confirm that any recommendations have been carried out and if not the insurers have been told.

THE FIRE SAFETY ACT 2021

The Act finally received the Royal Assent on 29 April 2021. It will not come into force until detailed guidance has been provided. The Act clarifies the **Regulatory Reform (Fire Safety) Order 2005** and makes clear that a fire safety risk assessment where there are at least two dwellings in a building must include the exterior, structure, external doors and windows, internal doors which open into the common parts, balconies and other external fixtures. Non-compliance may result in prosecution of the responsible person, ie. the landlord, and buildings insurance may be vitiated. The House of Commons successfully rejected a House of Lords amendment whereby the cost of the assessment and any works would not be added to service charge.

The Act came into force in Wales on 1 October 2021 and in England 16 May 2022. On 22 November 2021, the LPE 1 forms changed, partly to reflect this.

BUILDING SAFETY ACT 2022

This was introduced into Parliament on 5 May 2021 as a consequence of the Hackitt Report on Building a Safer Future after Grenfell. It passed through Parliament 26 April 2022 and received the Royal Assent on 28 April 2022. Much of it is not expected to come into force for 12 to 18 months. It is 262 pages long and this is a summary.

Currently, **S.1** of the **Defective Premises Act 1972** provides that there is a claim against the person responsible for defects in a new dwelling. In the case of ***Jenson v Faux [2011] EWCA 423*** this was held not to include refurbishments. See also ***Sportcity v Countryside [2020] EWHC 1591*** where rectification works were outside the six year period. Here there was no claim. The new provisions will include refurbishment and rectification work. Currently, there is a six year limitation period in relation to such work. The new provisions will provide for a 30 year limitation period for works completed before the commencement date. This will be retrospective subject to human rights claims. For example, if a defect occurred in 2010 remedial work could be required until 2040. For work after commencement date of the new provisions there will be a 15 year limitation. If the company responsible for the defect no longer exists then the High Court can provide for a Building Liability Order whereby companies within the group may be liable. We do not know the detail of this yet. The rest of these provisions will come into force on 28 June 2022. In addition, **S.38** of the **Building Act 1984** will finally be implemented. This allows anyone suffering loss as a consequence of building regulations breaches to claim damages for personal injury, including mental distress, or damage to property. This will not be retrospective. It comes into force on 28 June 2022. There will be a 15 year limitation period. There is also provision whereby enforcement periods for building regulations breaches may be increased from 1 year to 10 years.

The Act will also introduce the Building Safety Regulator who will be a part of the Health and Safety Executive. They will have a general role in relation to building safety, but will also be responsible for building control in high risk residential buildings. A high risk residential building is one with at least one dwelling which is at 18 metres or more in height or, if less than 18 metres, which has 7 or more storeys. Such a building will have an accountable person who has a legal state in possession in the common parts or is responsible for repair of the common parts. If there is more than one accountable person then there will be a principal accountable person. A residents' panel must be constituted and the accountable person must listen to health and safety complaints. They will have to produce reports to the Regulator and keep records in relation to health and safety and report any fire safety or structural safety problems that have occurred. Originally, there was meant to be a Building Safety Manager who would be an intermediary between the building safety regulator and the accountable person. This was dropped due to cost. Also, the original Bill provided for a building safety charge whereby any costs could be charged to the long leaseholders. This was also dropped and any charges will now be covered by the service charge.

The accountable person will have access rights to individual flats on giving at least 48 hours' notice. There are also offences if anyone removes or disturbs a relevant safety item. Any high risk buildings must be registered with the Building Safety Regulator. The intention is that this will come into force in April 2023 for new builds which will require to be registered before occupancy can occur. The intention is that non new builds will have to be registered between April and October 2023.

In relation to removal of cladding on buildings 18 metres of more in height, this should be covered by the Government's Building Safety Fund. For cladding removal on buildings of 11 metres or more in height, the Government has reached agreement with the construction industry that the

developers will pay for the removal. If the developer is no longer in existence then a Government "orphan" fund is available.

For other safety work on residential buildings 11 metres or more in height (excluding anything beneath ground level and any top floor for equipment or machinery), the starting point is that the developer should pay. If the developer can't be found then the building owner will be responsible if they have a net worth of £2 million or more per affected building. There will be a cap on service charge for long leaseholders (of more than 21 years duration) for safety work on 11 metres (or 5 storeys) or more high buildings of £10,000 (or £15,000 in London) in any 10 year period. If the property is valued at between £1 million and £2 million the cap will be £50,000. If over £2 million it will be £100,000. The cap will include legal and professional costs, the cost of any waking watch and arbitration and mediation costs. Any charges which have been made in the previous five years can be taken into account. There cannot be a service charge for liability for safety work if the flat is worth less than £175,000 or £325,000 in London. For the cap to apply the long leaseholder can own up to three properties.

There is also provision whereby if a landlord does not claim off building guarantees then they cannot collect via service charge. This is probably the case already: see ***Avon Ground Rents v Cowley (2019)*** (see later). New build guarantees will have to last up to 15 years.

THE EWS1 FORM AND EXTERNAL CLADDING

Following the Grenfell Tower disaster in June 2017, mortgage companies naturally became reluctant to lend on flats in blocks which might have combustible cladding. On occasion, valuers were valuing such flats at £0. There was, moreover, no standardisation between the lenders.

The industry's response was the EWS1 (external wall systems) certificate which was introduced in December 2019 after discussion between UK Finance and the Royal Institution of Chartered Surveyors. A recognised property professional with the requisite qualification would carry out an inspection where deemed appropriate and would produce an EWS1 certificate which would be required by the mortgage company. The certificate would last for five years and would only be required for multi-let residential properties of more than 18 metres (c. six storeys) in height. If the cladding was deemed safe then the mortgage company would proceed, it would require the cladding to be replaced, a process which can take a significant amount of time.

Unfortunately, in January 2020, the Ministry of Housing Communities and Local Government muddied the waters somewhat when it produced **Advice for Building Owners of Multi-Storey, Multi-Occupied Residential Buildings**. This suggested that the EWS1 may be appropriate in some multi-let premises of less than 18 metres in height and which do not have external cladding, the issue apparently being high pressure laminate which is causing some concern. This concern increased after it was found to contribute to a fire in a block of halls of residence in Bolton in November 2019. As a consequence of this, some mortgage companies have required the EWS1 on buildings with three storeys and where brick is the building material. This is surely not what was intended.

The real problem is that in early 2020 there were roughly only 300 qualified fire safety inspectors in the country and insurers are not prepared to allow other property professionals to carry out the assessments due to the potential level of liability where there is a claim. Estimates vary but at the higher end there could be up to 3 million flats which may be affected. The certificates can cost upwards of £50,000 and there are examples of landlords or agents (who commission the assessments) being quoted of up to the 10 years for one to become available.

On 28 November 2018 in England (January 2020 in Wales), cladding was finally banned in multi-let residential properties of more than 18 metres in height. If the building was completed under the **2018 Building Regulations** the mortgage company should not require the certificate.

The EWS1 is undergoing review and this cannot come too soon for many, especially at the current time when many are unable to relocate to the countryside from their small city-centre dwellings. If changes are not made soon, some estimate that the level of negative equity in such premises will be greater than during the credit crunch of 2008-2011.

Note: On 22 November 2020 the Ministry of Housing announced that they have reached agreement with the RICS and UK Finance whereby an EWS1 certificate will not be required for buildings without cladding. Many mortgage lenders are saying that they know nothing about this. They are also pointing out that many brick buildings may have cladding behind the brickwork.

On 8 March 2021, the Royal Institution of Chartered Surveyors produced its new guidance note on the valuation of properties in multi-storey multi-occupied residential buildings with cladding. The guidance comes into effect on 5 April 2021, but it is expected that valuers will take it into account immediately.

The guidance is as follows:

- The certificate should be required for buildings over six storeys in height where there is cladding or curtain wall glazing or where there are balconies vertically above one another and both the balustrades and decking are constructed where combustible material such as timber, or where the decking is constructed of combustible material and the balconies are directly linked by combustible material.

- If the building is of five or six storeys in height then a certificate will be required if approximately one quarter of the whole elevation estimated from a viewing at ground level is comprised of cladding, or there is aluminium or metal composite material or high pressure laminate panels on the building or fire risk in relation to balconies as above

- If the building has fewer than five storeys a certificate will be required if there are aluminium or metal composite or high pressure laminate panels on the building

The guidance also makes clear that if the building complies with the **Building (Amendment) Regulations 2018 (or 2020 in Wales)** an EWS1 certificate should not be required.

At first glance this alleviates many of the problems, in particular there are examples of EWS1 certificates being required for three or four storey buildings with brick facades. Hopefully, this will be a thing of the past. However, the original purpose of the EWS1 certificates has been expanded to include high pressure laminate and balconies and not merely combustible cladding. Buildings of less than 18 metres in height may also still require the certificates which was not what was intended when the EWS1 was introduced.

Although a step in the right direction and the guidance has solved the problems for some, do not assume that the issue has gone away.

Note: On 11 May 2020 the Government announced a Building Safety Fund. Aluminium composite material may be replaced by separate Government funding. The end date for application for the Building Safety Fund was 30 June 2021 and work must have started by 30 September 2021. It is understood that only 22% of applicants were successful. There are also waking watch fund applications which ended on 24 June 2021. This was meant to cater for 400 blocks. Unfortunately, there are 600 blocks of flats in London alone with problems. The average cost of a waking watch to be done privately is £11,000 per week. In the Budget of 27 October 2021 the Government announced that it would provide a further £5 billion to the Building Safety Fund. Unfortunately, as previously, this will only apply to buildings of 18 metres or more in height.

Note: On 21 July 2021 the Ministry of Housing announced they had reached agreements with some mortgage companies that EWS1 certificates will not be required for buildings of less than 18 metres. The RICS promptly denied that there was any such agreement and the mortgage companies say that they will be guided by the valuers.

Note: On 21 November 2020 the Government announced that they would provide £700,000 to train fire safety inspectors under the auspices of the RICS. On 21 July 2021 they announced a Government backed PI insurance scheme for qualified professionals.

Note: In addition to the above, several local authorities are either serving or looking at serving improvement notices on landlords in relation to cladding under Part 8 of the **Housing Act 2004** and the Housing Health and Safety Rating System.

Note: On 10 December 2021 the RICS announced that they would not be changing their guidance on buildings of less than 18 metres in height, inspite of Government intending to withdraw their guidance of January 2020.

Note: On 10 January 2022 the Department of Levelling Up withdrew the January 2020 guidance and also announced that for buildings between 11 metres and 18 metres in height they expect the building industry to draw up plans for remedial work. They have until Easter to do this, otherwise they may be faced with legislation. They also announced that they expect such buildings will not be required to have an EWS1 certificate save in exceptional circumstances.

On 16 March 2022 the RICS announced that although the forms were changing their guidance would remain in place. However, they would see a diminishing need for the EWS1 when the Fire Safety Act risk assessments conducted under the **Fire Safety Act 2021** together with any works required have been carried out.

SERVICE CHARGE LIABILITY

Both residential and commercial service charges are likely to be greatly affected by cladding problems, especially, where is usually the case, service charge allows recovery of payments for improvements and statutory works. In ***Finchbourne v Rodrigues [1976] All E.R 581*** it was held that there would be an implied term that the work must be reasonably incurred. In council house right to buys, the purchaser will be given an estimate of future works within the next five years from purchase but after this time the service charge may increase greatly. Due to the so called 'Florrie's Law', the liability of former council tenants cannot exceed £10,000 (or £15,000 in London) in any five year period. However, this will only apply in relation to works funded by Central Government.

The Social Landlords Mandatory Reduction of Service Charges (England) Directions 2014 (Florrie's Law)

This applies to leaseholders of social landlords in England who are individuals and who occupy as their only or principal home. It applies to repair, maintenance or improvement but only in relation to funding from Central Government. Service charge liability is limited to £10,000 (or £15,000 in London) within any five-year period. The cap only applies to service charges payable by someone who is a qualifying leaseholder on the date on which the work commences. This is important in relation to subsequent purchasers of leasehold property.

There is also a **Social Landlord Discretionary Reduction of Service Charges Directions 2014** whereby service charge liability may be reduced in exceptional circumstances.

Under the **Service Charge Consultation Requirements (England) Regulations 2003** and the **Service Charge Consultation Requirements (Wales) Regulations 2004**, which came into force on 31 October 2003 and 1 March 2004 respectively, then if consultation does not occur between landlord and tenants in relation to service charges and dwellings, there will be a statutory cap of £250 for the works. Therefore, it is suggested that a management enquiry is made to the effect of, whether there has been any major works within the meaning of the Regulations and if so did consultation occur.

FirstPort Property Services Ltd v various long leaseholders of Citiscape LON/00AH/LSC/2017/0435

In March 2018 First Port obtained the tribunal rulings to the effect that tenants would be responsible for the replacement of aluminium cladding in a block of flats in Croydon. The cost is currently assessed at £2m including a bill of £4,000 per week to employ fire wardens. The maximum individual liability is £31,300.

In April 2018, the developer, Barratts, announced that they would voluntarily pay for the works.

In ***Zagora Management v Zurich Insurance Plc [2019] EWHC 140 (TCC)*** the cost of replacing the cladding was £10m. This was covered by a newbuild guarantee but the guarantee had a cap of £3.5m. This case has now been reversed by the Court of Appeal ***[2019] EWHC 257 (TCC)***

Blue Manchester Ltd v North West Ground Rents Ltd [2019] EWHC 142 (TCC) the case involves the Beetham Tower in Manchester. The tower consists of an hotel with residential properties above. It was found that the cladding was not sufficiently bound with the glasswork. The landlords were a ground rent management company with who held the freehold. They originally proposed *stitch plate* repairs but the tribunal held this as not satisfactory. The damage constituted disrepair and was thus within the landlords' liability and it seems that some of the cost cannot be recouped by service charge. It is unlikely that any of the parties foresaw such major works in the early years of the building. In October 2020 North West Ground Rents applied to Court arguing that they could not reasonably comply with the terms of the specific performance. They failed in this application.

Avon Ground Rents v Cowley [2019] EWCA 965. Under **S.19 Landlord and Tenant Act 1985** the work must be of a reasonable standard and reasonably incurred if it is to be collected via the service charge. Here the Court accepted that the landlord had not reasonably incurred works and could not collect via service charge as they probably had a claim against their building guarantee insurance.

THE LEASEHOLD REFORM (GROUND RENT) ACT 2022

This applies to England and Wales.

The Bill was announced in the Queen's Speech on 11 May 2021 it was published and introduced into the House of Lords on 12 May 2021 and received the Royal Assent on 8 February 2022. The provisions will come into force on 30 June 2022 with the exception of retirement homes where they will not come into force until 1 April 2023.

When it comes into force ground rents other than a peppercorn will be banned in leasehold dwellings of more than 21 years' duration although it will not be retrospective. Non-compliance may lead to a fine between £500 to £30,000 and the ground rent will not be able to be collected. Shared ownership leases are excluded and other exemptions apply in relation to community led housing projects, equity release schemes and Sharia mortgages.

The provisions will not apply if contracts have been exchanged prior to the commencement date, however, they will apply to voluntary leasehold extensions which give rise to a new lease post commencement date. However, it will only apply to any extension beyond the initial fixed term. In this event, from the date of the Royal Assent the leaseholder must be notified of the future change.

As of implementation, local authorities will no longer be required to charge £10 per annum on Right to Buy under the **Housing Act 1985**.