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The Building Safety Act Revisited

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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. It is 262 pages long and this is a summary. The legislation applies to England and Wales but the Welsh Government were given powers, most notably to decide on the height of a higher-risk building and for the leaseholder protections (see below).

Previously, **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 include refurbishment and rectification work. Previously, there is a six year limitation period in relation to such work. The new provisions 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. The rest of these provisions came into force on 28 June 2022. In addition, **S.38** of the **Building Act 1984** was finally 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 came 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.

Higher-Risk Residential Buildings

The Act has also introduced 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. In England a high risk residential building is one with at least two dwellings 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 estate in possession in the common parts or is responsible for repair of the common parts. This will include any Right to Manage Company and any Residents Management Company 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. If there is more than one accountable person, there will be a principal accountable person. They will have an interest in possession of the structure and exterior or be responsible for repair and maintenance of the structure or exterior of the building. 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. This came into force in England on April 6th 2023 and the principal accountable person will have to register the building with the Regulator by October 2023.

In England, the Act came into force on April 6th 2023**. The Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations** were introduced into parliament on March 9th 2023. There will be a registration fee of £251 which must be paid on the application. For new builds then the accountable person will commit a criminal offence if they allow anyone into residential occupation before completion certificates are available. This will include adding new residential units and doing work that results in the building becoming Higher-Risk. The principal accountable person will have to register the building with the Regulator within six months otherwise they will commit a criminal offence.

There are also **Higher-Risk Buildings (Key Building Information) (England) Regulations 2023**. Within 28 days of an application the principal accountable person must provide details as to use of the occupied building, any attachments or outbuildings, details of materials used, information about structure, storeys and staircases, energy supply and storage and emergency evacuation plans.

There are also **Higher-Risk Buildings (Descriptions and Supplementary Provisions) (England) Regulations 2023** which were laid in front of Parliament on March 6th 2023. A Higher-Risk Building is one which is 18 metres or more in height or has seven or more storeys. Any floor where the ceiling is below ground level will not be included, nor will any top floor which only includes rooftop plant and machinery. The measurement will be from the lowest part of the ground floor.

Although the legislation will apply to Wales, the ability to decide on the height of the building has been delegated to the Welsh Government where the consultation came to an end on May 12th 2023. The proposal is that a higher-risk building will have the same definition as in England but may only need to include one dwelling.

Safety Work and Service Charge Caps (Sections 116-125 and Schedule 8)

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. Forty nine builders in England have now agreed to sign a developer remediation contract whereby they will remedy critical fire safety risks. We are still awaiting any information from the Welsh Government. In Wales there is a Welsh building safety fund whereby the Welsh Government will pay for a building safety survey. There is also a Welsh Government Developer Pact whereby nine large developers have agreed to pay for remediation work.

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 and any associated company will be responsible if they have a net worth of £2 million or more per affected building. This provision does not apply to local authorities, private registered providers of social housing or other prescribed organisations. 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. These provisions came into force on June 28th 2022.

To be a qualifying long leaseholder everything will be decided on February 14th 2022. The lease must be in existence prior to this date and the value will be that of the flat on this date. Information must be provided by the leaseholder as to the prove when the property was last sold.

Qualifying Leaseholders

To qualify the following requirements must be met on February the 14th 2022:

1. The lease must be of a flat in a block which is at least 11 metres or five storeys in height.
2. The lease must be in existence prior to February the 14th 2022. This causes problems in relation to lease extensions which constitute a surrender and regrant on a new post February 14th 2022 Lease.
3. The leaseholder at the beginning of February 14th 2022 can always claim for their principal home. They can claim for other properties but only if they own three or less dwellings anywhere in the UK. The Act refers to the relevant tenant at the qualifying time or any other tenants.
4. The value of the property is determined on February 14th 2022. If the flat has been sold since December 31st 2020 then if the sale was on the open market the sale price will be deemed to be the price of the flat. If prior to this date then there is a statutory formula for determining the price.
5. A service charge must be payable.

If a Lease is not in existence on February 13th 2022 then the leaseholder protections will not apply. This has the unforeseen consequence of taking away leaseholder protections on a lease extension as this amount to a surrender and regrant. On April 21st 2023, the Government changed their guidance on both Remediation Costs and Qualifying Date, Qualifying Lease and Extent. They aim to legislate when Parliamentary time permits. In the meantime conveyancers should attempt to include contractual terms on a extension giving the same rights as if the leaseholder protections still applied. If the Landlord does not agree then leaseholders are encouraged to report them to the Department of Levelling-Up.

Note also the status of an executor holding the lease may cause problems. A company can not hold the lease as their principal home and the status of flats which are held on trust is unclear.

Examples

These are examples from the government guidance.

Example 1:

- You own a long lease which has been granted before 14 February 2022 within a relevant building in England.
- This is your only or main home.
- You qualify for the leaseholder protections.

Example 2:

- You own 4 flats in England within relevant buildings.
- You do not own any other property. You live (and lived on 14 February 2022) in one of these flats.
- Only the flat lease you live in qualifies for the leaseholder protections.
- The other flat leases do not qualify as you own more than three properties in the United Kingdom.

Example 3:

- You own 2 flats within relevant buildings in England and 2 houses in Wales. You live (and lived on 14 February 2022) in one of the flats.
- Only the flat lease you live in qualifies for the leaseholder protections.
- The other flat lease does not qualify for the leaseholder protections as you own more than three properties in the United Kingdom.

Example 4:

- You own 2 flats within relevant buildings in England and 2 houses in Wales.
- You live in one of the houses in Wales.
- Neither flat lease qualifies for the leaseholder protections, as you own more than 3 properties in the United Kingdom in total, and neither of the flats was your main home on 14 February 2022.

Example 5:

- You own 2 flats within relevant buildings in England and 1 flat in Scotland.
- You live in a flat in France.
- Both flat leases in England qualify for the leaseholder protections as you do not own more than three properties in the United Kingdom.

Example 6:

- You own a flat within a relevant building which was your main home on 14 February 2022.
- Your flat lease qualifies for the leaseholder protections. You sell your flat to a new owner.
- The leaseholder protections automatically transfer to the future buyer.
- It does not matter whether the new buyer lives in the property or how many other properties they own, as the lease's status was determined on 14 February 2022.

Example 7:

- You own a flat within a relevant building which was not your main home on 14 February 2022, and you own more than 3 properties in total.
- Your lease does not qualify for the leaseholder protections.
- You sell your flat.
- Although the future buyer is intending for the flat to be their only and main home, the lease remains non-qualifying as the lease's qualifying status was determined on 14 February 2022.

Example 8:

- You jointly own (and owned on 14 February 2022) 3 flats in England within relevant buildings. You do not own any other property.
- You are considered to own 3 properties for the purpose of the protections.
- All three flat leases qualify for the leaseholder protections.

Example 9:

- You own (and owned on 14 February 2022) 3 flats in England within relevant buildings, one of which is furnished holiday rental.
- You also own one commercial premise.
- You are considered to own 3 properties for the purpose of the protections.
- All 3 flat leases qualify for the leaseholder protections.

Relevant Buildings (England only)

To qualify the building must be at least 11 metres or five storeys in height and have at least two dwellings. This will apply to a self-contained building or part of a building which would be able to be developed separately. Mezzanine floor will only count as a storey if it is at least half the size of the largest storey. The legislation does not apply to enfranchised buildings or Resident Management Companies who own the freehold. The proposal from the Welsh Government is that this provision will not be introduced and leaseholders will rely on remediation orders and remediation contribution orders in relation to defects. This is problematic as the rest of the provisions came into force in Wales on June 28th 2022.

Relevant Defects

The legislation applies if a persons safety is at risk from fire or structural collapse and arises from work done to a building including inappropriate or defective products during construction or later work. The defect in construction work must have occurred in the thirty years prior to June 28th 2022 or the remedial work before or after June 28th 2022. It does not apply to wear or tear or routine maintenance. Defects in relation to professional services are covered, for example where the designer specified flammable materials.

Remediation Order (S.123)

Where a landlord who is required by the lease or an enactment to repair or maintain anything relating to a relevant defect any interested person may apply to the tribunal for an order requiring the work to be done. An interested person is the Regulator, a local authority, a fire authority or a person with a legal or equitable interest in the property.

Remediation Contribution Order (S.124)

This is '*an order requiring a specified body corporate or partnership to make payments to a specified person for the purpose of meeting costs incurred or to be incurred in remedying relevant defects'.* The tribunal can make such an order if it considers its just and equitable.

In ***Batish v Inspired Sutton (2023)*** the premises consisted of a high rise block of flats which had been converted from offices in 2017. The Landlord was also the developer. The Landlord carried out consultation prior to replacing potentially combustible balconies. The Tenants paid for the works via the service charge but subsequently obtained a remediation contribution order of £194,680. The directors were not liable however. The potential for such orders goes back to defective work from June 28th 1992 onwards.

Under the **Building Safety (Leaseholder Protections) (England) Regulations 2022** the leaseholder must provide a leaseholder deed of certificate in order to pass on any historical safety remediation costs and the building owner, who is usually the immediate landlord, must provide a landlords certificate. Section 5.14.17 (England only) of the UK Finance Mortgage Lenders Handbook now requires that the buyer's conveyancer must ask the seller's conveyancer if the flat is subject to a remediation scheme. If so, copies of the Leaseholder deed of certificate and the landlords certificate must be provided.

These provisions apply to England only. We are still awaiting details from the Welsh Government.

Leaseholder's Deed of Certificate

The leaseholder can send this at any time to the landlord. They must also provide it if the landlord notifies them. The certificate must be provided within eight weeks of request although there may be a request for a further four week extension. If the certificate is not provided then the caps on service charge will not apply.

In the certificates the Leaseholder must provide evidence that the property is their principal residence, such as a bank statement, council tax bill or utility bill, and official copies as evidence of the price. If the lease is shared ownership there must be evidence of the share on February 14th 2022.

A Landlord must request a leaseholder's Deed of Certificate within five days of finding a relevant defect of becoming aware that the Leaseholder intends to sell.

The Landlord's Certificate

This can be provided at any time but must be provided by the landlord if they intend to remedy defects, or within four weeks of becoming aware of the sale of the flat, or four weeks after request is made by the tenant. If the landlord becomes aware of further defects then they must notify the tenant within four weeks. If the landlord does not comply with this they will not be able to charge for relevant defects by way of service charge.

It must provide evidence of any group companies, and the net worth of any group companies on February 14th 2022. Accounts must be certified by a chartered accountant or finance director. There must also be details of any work to cure the relevant defects since June 28th 2017. This must include when the work was undertaken, when it was completed and what the cost was.

The LPE1 forms were changed on January 9th 2023. There are now enquiries as to whether a leaseholder deed of certificate has been served on the landlord and whether the landlord certificate has been served and information as to any outstanding enforcement action.

On January the 9th 2023 the TA 7 Leasehold Property Information form was also changed. It now has a section on service charge liability for safety work, Leaseholder deed of certificate and various other information in relation to the qualifying leaseholder. The TA 13 was also amended to include details of electronic passwords and codes.

Section 5. 14.17 (England only) of the Lenders Handbook states: Where the security will comprise a leasehold flat you must request the following information from the seller's conveyancer about the safety of the building in which the flat is situated:

- Confirmation as to whether the building has been or will be remediated under the Building Safety Act 2022.
- Copies of any Landlord's Certificates, signed by the Landlord in the form set out in the Building Safety (Leaseholder Protections) (England) Regulations 2022.
- Copies of any executed Leaseholder Deed of Certificate (in the form set out in the Building Safety (Leaseholder Protections) (England) Regulations 2022) and confirmation that they have been submitted by the relevant leaseholder to the landlord.

Barclays require confirmation that any safety work has or will be remedied later, copies of the LPE1 and 2, a copy of the lease which must be of more than 21 years, the name of the Leaseholder on February 14th 2022, the Landlord's Certificate and Leaseholder's Deed of Certificate. If the leaseholder states that they own no more than two dwellings then they require a search of the index of proprietors name. Barclays want the information on a remortgage and both Barclays and Nationwide require the information for any flat, not just in blocks of more than 11 metres.

On March 30th 2023 Barclays changed their instructions. The new requirements are almost as onerous. A search on the index of proprietors names is no longer required but the conveyancer must confirm that the borrower has fully understood the remediation schemes. It is submitted that this is not possible.

Guarantees

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)**. New build guarantees will have to last up to 15 years.

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. S.156 of **Building Safety Act 2022** requires the assessment to be done by a competent person. This will come into force in England on October 1st 2023. It is also proposed to come into force in Wales on October 1st 2023. 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.

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