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# THE BUILDING SAFETY ACT AND OTHER POST-GRENFELL LEGISLATION FOR COMMERCIAL PROPERTY LAWYERS

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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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**Satisfying Competency Statement Section:** B – Technical Legal Practice

For further information please see http://www.sra.org.uk/competence

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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 came 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.

It is also intended to introduce building regulations requirements that new buildings with a residential element of 18 metres or more in height should have at least two staircases but it has been announced that this will not come into force until 2026.

**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** came into force in England and Wales on October 1st 2023. Whenever there are two or more sets of dwellings in a building the residents of any domestic premises must be notified of any risks and any preventative and protective measures, the names and addresses in the UK of and responsible person and the identity of anyone appointed by the responsible person. They must also take such steps as are reasonably practicable to ascertain whether any other responsible person has duties and share information with them. Separately, any person who is employed by the responsible person must be competent and have sufficient training and experience or knowledge. Implementation of this provision has been delayed.

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.

**THE FIRE SAFETY ACT 2021**

The Act finally received the Royal Assent on 29 April 2021. 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 sets of 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.

Note: it is unclear, but the new legislation refers to two sets of domestic premises which seems to imply that buildings without common parts will require a fire safety risk assessment.

Consider Enquiry 11 of CPSE 1 enquiries:

"11 ***FIRE SAFETY AND MEANS OF ESCAPE***

*In this enquiry,* ***Fire Safety Order 2005*** *means the Regulatory Reform (Fire Safety) Order 2005 and any regulations made under it.*

*11.1 Please advise us where we may inspect any records in relation to the Property, made for the purposes of complying with the Fire Safety Order 2005, including any records of findings following a fire risk assessment of the Property.*

*11.2 Please advise us where we may inspect any records in relation to any premises within any building of which the Property comprises part, made for the purposes of complying with the Fire Safety Order 2005, including any records of findings following a fire risk assessment of any such premises.*

*11.3 Please provide details of any steps taken in relation to the Property to co-operate with any other people and to co-ordinate measures to comply with the Fire Safety Order 2005.*

*11.4 What are the current means of escape from the Property in case of emergency?*

*11.5 If any current means of emergency escape from the Property passes over any land other than the Property or a public highway please:*

*a) provide copies of any agreements that authorise such use;*
*b) confirm that all conditions in any such agreements have been complied with; and*
**c)** *provide details of anything that has occurred that may lead to any agreement for means of escape being revoked, terminated or not renewed."*

**Fire Safety (England) Regulations 2022**

These came into force in England on January 23rd 2023.

In multi occupied residential buildings of at least 18 meters or 7 or more storeys in height the responsible person must:

- Share electronically with the fire and rescue services details of external wall systems, floor plan and building plan
- Keep hard copies of the floor plan and details of the responsible person in a secure information box
- Have low visibility wayfinding signage
- Inform the fire and rescue service if any fire fighting equipment is out of action for at least 24 hours

For multi occupied residential buildings of 11 or more meters there must be quarterly checks for fire doors and annual checks of flat entrance doors.

**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 will include refurbishment and rectification work. Previously, there was 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. These provisions came into force on 28 June 2022. In the case of ***URS Corporation v BDW Trading Limited [2023] EWCA 772*** the Court of Appeal heard three appeals from cases decided prior to the legislation coming into force**.** It concerned high-rise blocks of flats in London and Leicester where practical completion had occurred between 2005 and 2012. BDW had transferred the blocks in 2015 and no longer had any proprietary interest. In 2019 BDW inspected the premises and although there were no visible defects they found major design problems and sued the designer, URS under **S.1.** The Court confirmed that builders would have both rights and obligations under the Act and moreover a proprietary interest in the property was not required as the design work was executed to the order of BDW. The 30 year limitation period was also available even though the action commenced prior to the legislation coming into force. There could also be a claim by BDW under the **Civil Liability (Contribution) Act 1978** even though BDW had not been sued by any of the residents.

**Building Regulations**

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. **S.38** of the **Building Safety Act** also has provision for the service of compliance notices and stop notices in relation to Building Regulations breaches. There are criminal offences attached to non-compliance. This came into force in England on October 1st 2023.

The Building Safety Regulator (see below) is as of October 1st 2023 the regulatory body for higher-risk buildings and responsible for building control. If the building had progressed adequately prior to October 1st so the Local Authority would accept an initial notice or deposit of plans then the local authority will be responsible if by April 6th 2024 the building is sufficiently progressed. For non higher-risk buildings, as of April 6th 2024 then the roll of approved inspectors will be transferred to registered building control approvers. A person carrying out work must give an initial notice to the approver at least two days prior to the start of work and within five days of the start a commencement notice. The approver may give a rejection notice within four weeks of the commencement notice. At the end, a completion notice must be given that to the best of their

knowledge the work complied with building regulations. The approver cannot give a final certificate without this.

**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 1st 2023. Guidance suggests that the registration must be approved by the Regulator and key building information provided by this date. The Regulator will then have to approve the registration.

Safety case report summarising major fire and structural hazards and risk management is mandatory for higher-risk buildings. Organisations must also establish a mandatory occurrence reporting system detailing communications with other accountable persons, arrangements for reporting to the Regulator and summaries of incidents.

The register of higher-risk buildings is currently not a public document.

In England, the provisions 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 to the finished floor of the top floor. A mezzanine floor will be ignored if it is less than 50% in size of the largest storey vertically above or below it. A separate structure will be treated as being the same building if it can be accessed to another part which has a residential unit. This will not apply if the access is only intended for exceptional use for emergencies or maintenance.

There are also **Building Safety Act 2022 (Consequential Amendments etc) Regulations 2023** which intend to pass building control in higher-risk buildings to the building safety regulator.

Five further sets of regulations came into force in England on October 1st 2023. These mainly affect construction law and not conveyancing but the regulator is now the primary body in relation to building control of higher-risk. If the building work was commenced prior to October 1st the developer has six months to complete and will be in the old regime as long as they do so.

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.

The CPSE 1 enquiries now have questions in relation to higher-risk buildings (see below). One problem is that registration of a higher-risk building does not seem to be possible after October 1st 2023 and the fact of registration is not available from a public document. It is suggested that enquiry must be made as to whether registration has occurred for an existing building and whether the Regulator has accepted the application whenever purchasing the reversion of an existing higher-risk building. It is also suggested that there should be an enquiry for new higher-risk buildings as to whether anybody has been allowed into residential occupation prior to the provision of a building control certificate. Enquiry should also be made as to the height of the building and when the building was completed.

Separately, although there are provisions that leaseholders of residential units must on 48 hours notice allow accountable persons to inspect the premises, there is no such provision in relation to commercial units. It is suggested that in future commercial leases include clauses allowing the accountable person to inspect premises on giving notice, to inspect documents related to health and safety and requiring the leaseholder to notify the accountable person of any health and safety issues. This would include leases, for instance, of roof space to communications operators. It is suggested that terms might be included in leases by reference to the implied terms in residential units contained within **S.112 Building Safety Act 2022**.

**CPSE 1 Enquiries Version 4.0 Enquiry 15**

**15.1** Is the Building (or will it be, when fully built and occupied) a "higher-risk" building as defined by section 65 of the BSA?

If the answer is yes, then please answer enquiries 15.2 to 15.7. If the answer is no, then please go to enquiry 16.1 below.

**15.2** Who is or are accountable person(s) in relation to the common parts of the Building? Which one of them is the principal accountable person?

**15.3** Are you aware of any breach of, alleged breach of or any claim under the BSA, or any regulations made under it, in relation to the Building?

**15.4** Please provide a copy of the entry relating to the Building in the register kept under section 78 of the BSA.

**15.5** Please provide a copy of the most recent building assessment certificate (if any) relating to the Building.

**15.6** Please (a) confirm that the following documents have been compiled and kept up to date; (b) advise where and when they can be inspected; and (c) (where the Buyer will become an accountable person in respect of the Building) confirm that the originals will be handed over on completion:

(i) all safety case reports (section 85)
(ii) all prescribed information (section 88(1))
(iii) all prescribed documents (section 88(2))
(iv) the residents' engagement strategy (section 91)
(v) any request made under section 92, and any information provided in response to such request
(vi) any relevant complaints (section 93)
(vii) any contravention notices (section 96)
(viii) any outstanding requests to enter (section 97).

Note: section references above are to the BSA.

**15.7** Please give the name and contact details of a senior individual within the Seller who deals with BSA issues in relation to the Building; and confirm that the Buyer may make contact with that person in order to obtain information about BSA issues in relation to the Building.

**LEASEHOLDER PROTECTIONS**

**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. The **Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023** came into force on July 4th 2023. Developers must enter into a developer remediation scheme and a developer remediation contract within 60 days. It will be required if they have developed or refurbished residential blocks of 11 metres or more within the 30 years from April 4th 2022. Their principal business must be residential developments and their profits must be at least £10 million per annum for the year ends 2017, 2018 and 2019. If they do not sign the contract they cannot obtain planning permission for 10 or more residential units or 0.5 of a hectare in any development. If they have already obtained planning permission they cannot obtain building control approval unless innocent third parties are adversely affected, for instance the contracts have already been exchanged.

For other safety work on residential buildings 11 metres or more or five storeys in height (excluding anything beneath ground level and any top floor for equipment or machinery. Measurement is from the ground floor to the floor of the top floor), the starting point is that the developer should pay. If the landlord is also the developer they cannot charge for safety work. If the developer can't be found then the building owner and any associated company will be responsible if they have a combined net worth of more than £2 million per affected building. This provision does not apply to local authorities, private registered providers of social housing, The Crown, Government departments and NHS Foundations. 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. In addition, the Landlord cannot charge more than £1000 in any one year. 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. Likewise, the net worth of the landlord 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. On October 26th 2023 the **Levelling-Up and Regeneration Act 2023** received the Royal Assent. There is provision that on a Lease extension this will give rise to a connected replacement lease. This will apply to an extension of the lease, a variation of the lease, a surrender and regrant, and a surrender and grant of a totally new lease. It will apply if the premises are the same both before and after the extension but also if part is added or removed. Implementation is backdated to June 28th 2022 and the Provisions will be retrospective to February 14th 2022.

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. Under the **Building Safety (Leaseholder Protections etc) (England) (Amendment) Regulations 2023,** as of August 5th 2023 Homes England are also an interested person. ***Waite v Kedai Ltd (2023)*** was the first case to be heard on Remediation orders. It stated that the applicant must establish a prima facie case and that remedial work must be at least to the standard of a pass EWS1 certificate and comply with building regulations at the time. The Landlord was given 26.5 months to carry out remediation work and not 18 months as the leaseholder requested.

**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.

The people who may apply are the Regulator, a Local Authority, a Fire Authority or person with a legal or equitable interest in the property. Since August 5th 2023 Homes England, a residents management company, a Right to Manage company and a named manager can apply. A named manager is someone who is not the freeholder or landlord but is responsible for repair and maintenance.

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) (Information) (England) Regulations 2023** and 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 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. Under the Amendment Regulations 2023, since August 5th 2023 a landlord must also produce a new Landlord's Certificate if they receive a new Leaseholder Deed of Certificate containing information that was not in the original Landlord's Certificate. Also under the Amendment Regulations they must pass on a copy of the Landlord's Certificate to any residents management company, RTM company and named manager within a week. Likewise, they must pass on to such persons a copy of a Leaseholder Deed of Certificate within a week. Failure to comply will result in them not being able to charge any leaseholder, including non-qualifying leaseholders, for safety work.

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.

There are now **Building Safety (Leaseholder Protections) (England) (Amendment) Regulations 2023.** They came into force on August 5th 2023 and introduced a new Landlord's Certificate. The new Certificate must be used as of this date. They reduce the information which needs to be included in the Certificate in relation to certain transactions. Guidance was produced on August 10th 2023. The provisions are complicated and you should refer to the guidance. For instance, if on February 14th 2022 the landlord or an associate was responsible for the works or did not believe there was a relevant defect and they satisfy the contribution condition or the leaseholder is non-qualifying, they do not have to provide accompanying information. If they did not think there was a relevant defect but met the contribution condition on February 14th 2022 they have to provide some information such as evidence that there was no link to the developer. If the flat was worth less than £175,000 (or £325,000 in London) on February 14th 2022, they do not have to provide details of service charge going back to June 28th 2017. The registered providers of social housing and local authorities would not have to provide such information either.

In the case of ***Will and Koterba v G&O Properties Limited (2022*)** the first-tier tribunal stated that it had no jurisdiction to require the Landlord to provide a Landlord's certificate. Also known as Flat 16 Grove House 76 Sidmouth Avenue, Isleworth, the block was at five storeys in height and thus came within the leaseholder protections. Combustible materials had been found in the premises but in May 2021 remediation work was completed. In October 2021 the developer went into liquidation. Will and Koterba made several requests for a landlords certificate but the landlord refused. Will and Koterba went to the first tier tribunal for a declaration as they were concerned that without this they would have difficulty selling the flat. Regulation 11 (2) (a) of the information Regulations allow the tribunal to make a declaration if there has been a fraudulent statement by the landlord and regulation 11 (2) (b) allows a declaration if the landlord fails to give adequate time. The tribunal decided that there was no jurisdiction to require a landlord to provide a landlords certificate. This will be concerning where the landlord cannot charge for safety work, for instance if they are associated with the developer or if the flat is worth less than £175,000 or £325,000 in London on February 14th 2022.

**Changes to Enquiries**

**CPSE Enquiries and Leaseholder Protections**

The CPSE 6 version 1.6 (Properties Subject to Residential Tenancies) were amended on September 23rd 2023 as follows:

- **21.1**

  Is the Building a "relevant building" as defined in section 117 of the BSA?
  If yes then please answer enquiries 21.2 to 21.6 below. If no, please go to enquiry 21.7.
- **21.2**

  Please provide all the information necessary to complete the landlord's certificate and provide all the required supporting evidence as referred to in regulation 6 of the BS(LP) Regulations.
- **21.3**

  Is the Seller aware of any breach of any of the following:
  **(a)**regulation 6(1) of the BS(LP) Regulations (duty to provide landlord certificate to leaseholder);
  **(b)**regulation 6(9) of the BS(LP) Regulations (duty to provide copy landlord certificate to other landlords and certain third parties); or
  **(c)**regulation 6(10A) of the BS(LP)(I) Regulations (duty to provide copy leaseholder deed of certificate to certain third parties)?
- **21.4**

  If any of regulations 3, 4, or 5 of the BS(LP)(I) Regulations applies to the Seller, please confirm the Seller has served the relevant notices and provide copies (unless already supplied).
- **21.5**

  Unless already supplied, please provide copies of all notices sent to any leaseholder in the Building under regulation 6(2) and 6(8) of the BS(LP)(I) Regulations together with any written requests received from any leaseholders pursuant to regulation 6(9) of the BS(LP)(I) Regulations where a leaseholder deed of certificate has not yet been received by the Seller.

- **21.6**

  Unless already supplied, please provide copies of all leaseholder deeds of certificate (including all the supporting information as referred to in regulation 6(7) of the BS(LP)(I) Regulations) which have been received from leaseholders in relation to the Building and confirm that the originals will be handed over on completion.

The CPSE1 changed on September 27th 2023 (Version 4.0). New Enquiry 15 deals with the need to register higher-risk buildings of 18 metres or more in height or 7 or more storeys in England which contain 2 or more residential units.

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