The Building Safety Act: May 2022

The Building Safety Act 2022 ("the Act") was introduced to Parliament in July 2021 and received Royal Assent on 28 April 2022. The Act introduces a regime for ensuring the safety of buildings, in particular "higher-risk buildings" (as defined within the Act).

The Act is split into 5 sections:

1. Overview – this summarises what the Act does.
2. Building Safety Regulator ("the Regulator") – this sets out the role of the Regulator and how that role will be fulfilled (by the Health and Safety Executive ("the HSE")).
3. This section deals with amendments made to the Building Act 1984 and introduces one of two definitions used within the Act for "Higher-Risk Buildings" ("HRBs").
4. This part re-frames the Building Control process and sets out the "gateways". This section also introduces a new role of Accountable Persons.
5. This is a catch all part of the Act dealing with issues such as remedial works and redress, the new homes ombudsman scheme and further fire safety provisions.

The Act deals with monitoring and recording the inception of a building, through the construction phase and assists in the ongoing management of a building after occupation.

The Act also seeks to redress the balance of where the cost of any remedial works should sit by extending the limitation period for certain types of claim (namely the Defective Premises Act 1972), reducing leaseholders' liability for the cost of remedial work and amending the rules governing architects' competence – this is all geared to offering more recourse to owners of buildings with fire safety defects.

This briefing note is designed to deal with the key changes introduced by the Act and provide a summary of the potential impact.

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1. The Regulator and its Powers

What is its aim and what are its powers?

In order to implement the new regime set out under the Act, there is a new Building Safety Regulator ("the Regulator") which is housed within the Health and Safety Executive under the Health and Safety at Work etc. Act 1974. In summary, the Regulator is responsible for implementing and enforcing the new regime under the Act and will monitor the safety and performance of all buildings. Its aims are to secure the safety of people in or about buildings and improve the standards of buildings. Its functions are incredibly broad and include the following:

HRBs:

- Under the Act there are certain classified HRBs. The Regulator has an obligation to provide the appropriate advice to the Secretary of State for the purposes of identifying a building as being "higher-risk" and also whether a building should cease to be classed as "higher-risk".
- The Regulator has additional powers in relation to HRBs. Namely, they will now act as the building control authority under the Building Act 1984, including enforcing Building Regulations in respect of these "higher-risk" buildings.
- It should be noted that there is one category of HRBs for the purposes of Part 3 of the Act (Building Act 1984) (i.e. the design and construction phase) and another for the purposes of Part 4 of the Act (Higher-Risk Buildings) (i.e. the occupation phase). A notable difference being that Higher-Risk Buildings for the occupation phase does not include care home or hospitals.

Enforcement:

- The Regulator has far-reaching investigatory powers to ensure that the regulations are met and any requirements under the Building Act 1984 are also being complied with.
- The Regulator will appoint "authorised officers" who will carry out those investigations, document their findings with photographs and removing samples of materials, and report back to the Regulator. These "authorised officers" are able to obtain a warrant to gain entry to both domestic and non-domestic premises where they have been refused entry or cannot locate the appropriate person from whom to obtain permission to enter the premises.
- In carrying out their investigations, the "authorised officers" can request information from any relevant person and it is a criminal offence, with a potential prison sentence, if that person fails to provide the information requested without a reasonable excuse.

Information Sharing:

- The Regulator and local authorities and the fire and rescue authorities must work together to assist each of them in exercising their building-related functions and this will include sharing all relevant information (noting that the information sharing must not breach any data protection legislation).

2. Changes to the Building Control Processes

By Part 3 of the Act (which is not yet in force), the existing building control regime will be overhauled as follows:

- The building control profession shall be subject to greater regulation. This will include the creation of new roles of "building inspector" and "building control approver".
- Only the Regulator shall have jurisdiction over HRBs.
- Various amendments shall be introduced to the Building Act 1984 and the Building Regulations.
- Breaches of Building Regulations may be triable in the Crown Court and time-limits for the rectification of contraventions of the Building Regulations shall be extended.
- Liability shall be extended to officers of a body corporate who consent to an offence, or to whom an offence can be attributed on account of neglect.

Regulation of Building Control Profession (section 42)

Part II of the Building Act 1984 shall be supplemented by a new Part 2A entitled "*Regulation of Building Control Profession*". Part 2A includes new sections, numbered 58A to 58Z10 which provide for:

- The registration of individuals as "building inspector" shall be introduced. The "building inspectors" shall advise others involved in building control in relation to the exercise of its building control function.
- The registration of individuals and organisations as "building control approver" shall also be introduced.

Before exercising specified and restricted building control functions, "building control approvers" will be required to obtain and consider advice from registered "building inspectors". This is to ensure that important building control decisions are made on the advice of individuals who have demonstrated relevant competence. A "building control approver" may also act as a "building inspector" and be able to rely on their own expert advice as "building inspector" before exercising a prescribed function as "building control approver".

The "building control approver" shall replace the "approved inspector" as we know it. Consequential amendments will be made to the Building Act 1984 so that references to "approved inspector" are changed to "building control approver".

The new sections will provide for operational standards. These measures are designed to improve competence levels and accountability in the building control sector by the introduction of a professional and regulatory structure.

For the purposes of the new roles, the Regulator:

- must establish and maintain a register in relation to each role;
- must prepare and publish (in the case of registered "building inspectors") a code of conduct setting out standards of professional conduct and practice or (in the case of registered "building control approvers") professional conduct rules; and
- may investigate any instance of professional misconduct or contravention of professional conduct rules (as applicable to the respective roles). In relation to:
    - registered "building inspectors", this includes conduct that: (1) falls short of the standards of conduct and practice expected of registered "building inspectors"; or (2) is likely to bring the profession of registered "building inspectors" into disrepute; and
    - each role, disciplinary orders may be imposed including: (1) financial penalty; (2) variation of a registration; (3) suspension of a registration; or (4) cancellation of a registration.

Further, for this purpose, offences punishable by a fine on summary conviction, will be created of: (1) a registered "building inspector"/"building control approver" (as applicable) acting outside the scope of their registration; and (2) pretending to be a registered "building inspector"/"building control approver" (as applicable).

The Regulator may additionally make operational standards rules applicable to local authorities and registered "building control approvers" in relation to their exercise of building control functions. The rules may make provision about standards to be met and practices, procedures or methods to be adopted. Under the rules, the Regulator may:

- direct the provision of reports, returns and other information;
- give improvement notices where it appears that the rules have been contravened;
- give serious contravention notices if it appears that: (1) the authority or approver has contravened the rules; and (2) as a result, the safety of persons in or about buildings has been, or may be put at risk. Such a notice may require the authority or approver to remedy the contravention by doing or refraining to do anything specified in the notice. Contravention of a notice, without reasonable cause, will be an offence punishable by a fine or summary conviction;
- carry out an inspection to ascertain the efficiency and

effectiveness of a local authority or "building control approver" or to verify any information provided by a local authority or "building control approver".

Building Control Authority (section 32)

The Regulator and local authorities shall become collectively known as "building control authorities" (further defined by the insertion of a new Section 121A in the Building Act 1984).

By new sections 91ZA and 91ZB of the Building Act 1984, the Regulator shall act as "building control authority" for HRBs or proposed HRBs. This will apply to all Building Regulations matters; not just fire and structural safety. As such, the ability for those carrying out building work in respect of HRBs to choose their own building control body will be removed. Further, those wishing to carry out such work may not use a registered "building control approver" or a local authority to supervise that work. In addition, it will become an offence for developers to build "at risk", without building control approval.

In all other cases, the "building control authority" shall be the relevant local authority. Under the new regime:

- If, after an initial notice is in force, it appears that the building work has become higher-risk, the registered "building control approver", the person carrying out the work and the local authority are each under an obligation to cancel an initial notice. The Regulator will then step-in and enforce Building Regulations.
- A failure, without reasonable excuse, by the registered "building control approver" or the person carrying out the work, to give notice to a local authority of cancelation of an initial notice, shall constitute an offence, punishable by a fine on summary conviction.

Building Regulations (section 33)

Schedule 1 to the Building Act 1984 (Building Regulations) will be amended. By supplemental paragraphs 1A to 1I, there are powers for Building Regulations to set:

- procedures in relation to building control and the issue of notices and certificates (paragraph 1A);
- procedures in relation to applications for building control approval and requirements to be imposed on approvals (paragraph 1B);
- approval of schemes whose members can issue certificates including provisions about such schemes and certificates, including insurance (paragraph 1C);
- requirements on obtaining information or documents, creating documents, keeping information or documents and giving information or documents (paragraph 1D). For this purpose, the Building Regulations may:
    - require the establishment and operation of a system for the giving of information (paragraph 1E); and
    - make provision about the form and content of documents (paragraph 1F);
- provisions for the inspection and testing of work, buildings and the taking of samples (paragraph 1G);
- provision for the extension by agreement of any prescribed period for the doing of a thing by a "building control authority" in connection with an application (paragraph 1H); and
- rights to appeal decisions made under, or under an instrument made under, Parts 1, 2 or 2A of the Building Act 1984 (paragraph 1I).

Dutyholders and general duties (section 34)

A supplemental paragraph 5A to Schedule 1 to the Building Act 1984 shall be introduced. This will provide a power for prescribed appointments to be made in relation to any work or other matters to which Building Regulations are applicable. Such person shall be known as an "appointed person".

Further, by supplemental paragraph 5B, for the purpose of facilitating compliance with any requirement of the Building Regulations, the regulations may, in relation to an appointed person or prescribed person ("relevant persons"):

- impose duties in connection with the planning or management of the work or other matter; and
- require their co-operation with other relevant persons.

Dutyholders under paragraph 5B shall include those commissioning or undertaking work as well as those appointed, controlling or managing the work.

In summary, these provisions are designed to create a bridge between the obligations of dutyholders under the Construction (Design and Management) Regulations 2015 and the Building Regulations. They will ensure that dutyholders also have obligations under Building Regulations.

By supplemental paragraph 5C, the Building Regulations may impose competence requirements on relevant persons in relation to:

- the skills, knowledge, experience and behaviours of an individual; and
- the capacity of a person other than an individual to perform its functions under the Building Regulations.

This is intended to ensure that those undertaking design or building work are competent to do their work in accordance with Building Regulations. Statutory guidance, to support these requirements, in the form of an Approved Document is

intended to be provided by the Government.

A draft statutory instrument in the form of The Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations [2021] was previously prepared (July 2021) in relation to these supplemental paragraphs (5A, 5B and 5C of Schedule 1 to the Building Act 1984). It is anticipated that an updated draft shall be prepared during the transition period.

Compliance notices & stop notices (section 38)

New sections 35B to 35D to the Building Act 1984, shall provide a regime of compliance notices and stop notices in respect of contravention of the Building Regulations.

A compliance notice may be issued in relation to non-safety related items. In contrast, a stop notice may be issued where a compliance notice has been contravened or the work, in contravention of the Building Regulations, would present a serious risk of serious harm to people in or about the building if the building were used without the contravention being remedied.

Each notice is designed to provide "building control authorities" with the ability to address non-compliances without resorting to criminal prosecution.

Where either notice is given and a person breaches the notice, the "building control authority" will be able to prosecute the breach. The offence will be triable on summary conviction (carrying a maximum penalty of an unlimited fine and/or 12 months' imprisonment (six months until the commencement of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020) or on indictment (carrying an unlimited fine and/or two years' imprisonment).

Breach of Building Regulations (section 39)

A new Section 35 to the Building Act 1984 shall:

- extend the existing offence of contravening Building Regulations to include a requirement imposed by Building Regulations; and
- replace an existing summary-only and fine-only offence (penalty for contravening Building Regulations). The offence will now be triable either way with imprisonment as a sentencing option. In the Magistrates' Court, sentences up to 12 months may be imposed (six months until the commencement of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020). In the Crown Court, sentences could be up to two years. In either Court, there is also the possibility of an unlimited fine.

Further, the time limits, under section 36, for bringing prosecutions for the removal or alteration of non-compliant work (currently twelve months), shall be extended to ten years.

Liability of Officers (section 40)

A new section 112A of the Building Act 1984 shall provide that if an offence is committed by a body corporate and is:

- committed with the consent or connivance of any director, manager, secretary or similar officer, or a person purporting to act in such capacity, including a partner in the case of a partnership or a member of an unincorporated body; or
- is attributable to any neglect on the part of such person;
- that person (as well as the body corporate) shall commit an offence and be liable to prosecution. This is a response to the fact that while an offence may be committed by a body corporate, such offence will have occurred on account of personal failure by an individual(s).

Other Provisions of Interest

By an amendment to section 116 of the Building Act 1984, the Secretary of State (in England) and Welsh Minister in Wales may make an order:

- declaring a local authority to be in default; and
- instructing the local authority to discharge its functions in a specific way and within a specific timeframe;
- if they are satisfied that a local authority has failed to perform its functions (see section 45 of the Act). Further, the Secretary of State may make a transfer order which assigns the building control functions of the authority in default either to himself or another local authority.

By an amendment to section 53 of the Building Act 1984, a local authority may seek information from a registered "building control approver" where it has ceased to supervise a project (see section 52 of the Act). The information must be provided to the local authority and the person carrying out the work.

This is understood to fill a void in the Building Act 1984 which enabled the administrators of approved inspectors that went into administration post-Grenfell to refuse to provide information to local authorities and the clients of the approved inspectors.

By a new section 56A of the Building Act 1984, the Regulator must establish and maintain a facility to take the form of a national electronic register/portal for a specified person such as the registered "building control approver", the person carrying out the work or the local authority to submit information (see Section 53 of the Act).

Further, by new section 56B, the Regulator must keep a

register of specified information to be maintained in electronic form with specific parts available for inspection by the public.

In Part 5 of the Act, there are two other prohibitions in relation to development and building control.
By section 128, the Secretary of State may prohibit a person from carrying out a development of land in England by regulations. This may be imposed for securing the safety of people in or about buildings in relation to risks arising from buildings, or improving the standard of buildings. It includes securing that persons in the building industry remedy defects or contribute to remedial costs.

The same objectives may be fulfilled by section 130 which provides that the Secretary of State may impose, by regulations, a building control prohibition.

3. Gateways

The three "gateways" can be summarised as follows:

- Gateway one (Planning): applicants must demonstrate that the planning application incorporates a strategy on fire safety (where it relates to land use planning). Specialist fire safety expertise will be provided to local planning authorities on a statutory basis.
- Gateway two (technical design and construction phase) bolsters the current building control deposit of plans stage, where the application will be made to the Regulator. The Regulator is the regulating body for in-scope buildings. A building control application will be required. Importantly, this gateway provides a 'hard stop' where construction will not be allowed to commence until the Regulator has approved the building control application.
- Gateway three: (building control completion) will provide a 'hard stop' at which the Regulator undertakes final inspections and issues a completion certificate for in-scope buildings. Prescribed documents and as built information will be required. The information must then be handed over to the person(s) responsible for the building once in use (the accountable person during occupation).

Which buildings?

All three gateways will apply to multi-occupied residential buildings of 18 metres or more in height or 7 or more storeys.

Gateway 1 – Planning

This gateway has been enacted via changes to the Town and Country Planning (Development Management Procedure and Section 62A Applications) (England) (Amendment) Order 2021. These changes introduced new fire safety requirements into the planning system from 1 August 2021.

Gateway 1 Actions

A fire statement setting out fire safety considerations will need to be included in the planning application: Developers need to submit a fire statement setting out fire safety considerations specific to the development with an application for planning permission for development which involves one or more relevant buildings. Fire statements should include as much information as is relevant regarding fire safety. It is generally recommended that the form is completed by a suitably qualified fire engineer.

If the Regulator becomes aware of relevant buildings that have not been through gateway one, it has the power to issue stop notices and force construction to stop until the requirements of gateway one have been met.

Gateway 2 – Construction

This construction gateway must be passed in order for works to start on site. Although similar to the current process, in that an application is made to the building control authority for approval, under the Act the building control authority for HRBs is going to be the Regulator.

Part 3 of the Act makes significant amendments to the Building Act 1984. Those changes will allow the Regulator, acting as the building control authority, to ask for revised versions of any relevant documents and to prevent work from proceeding beyond a certain stage or at all.

There is a real concern within the industry that this gateway, and the approval process by the Regulator, will cause significant delays to projects, and this risk will need to be considered by parties entering into contracts going forward.

Gateway 3 – Occupation

Before the building is occupied, the Principal Accountable Person must apply to the Regulator to register the building. Should the Regulator refuse to register the building then the building cannot be occupied. If the building is occupied without registration, the Principal Accountable Person may be found guilty of a criminal offence. This gateway is therefore another absolute requirement, or a 'hard stop' stage, for the progression of the use of the building.

4. The Accountable Person

The Accountable Person and Principal Accountable Person – who are they?

The Accountable Person is the entity that must ultimately discharge the duties in occupation for a HRB, and with whom the buck stops if there are any breaches of those duties.

The Accountable Person is defined as the individual or entity (and it will in the vast majority of cases be a corporate entity) that has a legal estate in possession of any part of the structure and exterior of the HRB or any part of the HRB provided for the use, benefit and enjoyment of the residents (defined in the Act as the common parts). This may be as a freeholder or long leaseholder. The definition also extends to a person who does not have a legal estate, but is nevertheless under a repairing obligation in relation to any of the common parts. This may, for example, be due to contractual obligations owed by that person under a licence or management agreement (for example) to someone such as the freeholder or leaseholder.

There may of course be a number of Accountable Persons in any one HRB. The freeholder may retain a legal estate in possession over the structure and exterior of the HRB, while imposing on the leaseholder an obligation to repair other elements of the common parts. Similarly, there may be a number of parties contracted to either the freeholder or leaseholder who have repair obligations in connection with one or more elements of the common parts.

Who then is responsible for discharging the obligations of the Accountable Person? The Act has tried to deal with the problem of there being more than one Accountable Person by introducing the concept of a Principal Accountable Person (**"the PAP"**). The Accountable Person will be the PAP where it is the only Accountable Person.

Where there is more than one Accountable Person, then the PAP will be that Accountable Person who holds a legal estate in possession of the relevant parts of the structure and exterior of the building. In the vast majority of cases where the HRB is the subject of a long lease it will either be the freeholder or the head leaseholder who will be the PAP, as they are more likely to have retained a legal estate in possession over the structure and exterior of the HRB.

It follows from this that the PAP cannot be a leaseholder whose repairing obligations do not extend to the structure or exterior of the HRB. Nor will it be a party who does not have a legal estate in the building, but is under a relevant repairing obligation pursuant to a bare agreement to carry out repairs to the common parts.

While this clarification is to be welcomed, there still remains the scope for argument and confusion. In an effort to deal with this, the Act grants a right to the Regulator and any person who holds a legal estate in any part of the building to seek a declaration as to who is either an Accountable Person or the PAP.

It is entirely conceivable that there may be more than one Accountable Person who has responsibility over different elements of the structure and exterior of the HRB. In those circumstances the tribunal will make a determination as to which Accountable Person is the most "appropriate" PAP. Quite how appropriateness is to be measured and determined remains to be seen.

Determining who is or is not the PAP is of significant importance, as it is the PAP that has the obligation to comply with the numerous occupation phase obligations contained within the Act.

The PAP's Duties

The PAP has a number of relevant duties. The primary ones are:

- to ensure the building is registered with the Regulator before occupation. A failure to do so is a criminal offence;
- to apply for, within 28 days of being directed to do so by the Regulator, a building assessment certificate. A failure to do so is a criminal offence;
- to apply to the Regulator for a building safety certificate every five years following occupation. A failure to do so is a criminal offence;
- to carry out an ongoing assessment of the building safety risks within the HRB and to include those risks and their mitigation into the safety case. Building safety risks are currently limited to fire safety and structural failure, but may include any other category of risk prescribed by the Secretary of State in due course. Any risk assessment undertaken must be suitable and sufficient. A failure to comply with this duty may result in enforcement action through a compliance notice, or where the failure gives rise to a significant risk of injury or death, to a criminal prosecution;
- to promptly take all reasonable steps to prevent or reduce the severity of a major incident. A major incident is one where significant number of people might be killed or seriously injured. Enforcement of this duty is the same

as above;
- to keep all prescribed information in accordance with the prescribed standards (all of which have yet to be prescribed); and
- to prepare a resident engagement strategy that promotes the participation of residents (among others) in the management of the building, and any decisions that flow from it.

It is worth noting that the Act in its final form removes the role of the Building Safety Manager which had been included in the earlier versions of the Bill. The primary role of the Building Safety Manager was to manage the building in accordance with the safety case report that follows a risk assessment of the building safety risks.

Where that safety report requires work to be done, or measures to be put in place, it would have been the Building Safety Manager's responsibility to do this. The change indicates the belief that the provisions of the Regulator and the Accountable Persons will be sufficient.

5. Resident Engagement Strategies

The sections of Part 4 of the Act which relate to a resident engagement strategy remain unchanged from the draft Bill. This puts on a statutory footing the requirement upon Principal Accountable Persons to prepare a resident engagement strategy that promotes the participation of residents (among others) in the management of higher-risk buildings and any decisions that flow from such.

The provisions relating to resident engagement appear at section 91 of the Act and provide as follows:

1. the principal accountable person ('PAP') for an occupied higher-risk building must prepare a resident engagement strategy ('RES');
2. the primary function of the RES is to promote participation of residents in making building safety decisions; and
3. a building safety decision is a decision by an Accountable Person ('AP') about the management of the building and which is in connection with the duties of an AP under the Act.

The RES must include information about:

1. the information which will be provided to residents about decisions relating to the management of the building;
2. when residents can be expect to be consulted about those decisions;
3. arrangements for consultation and obtaining views from residents; and
4. means for measuring and keeping under review appropriateness of methods used by the AP.

Once produced, a copy of the RES must be given to each resident aged 16 or over (where the AP is aware of the resident and has taken all reasonable steps to be aware of the residents in the building), each owner of a residential unit and any other prescribed person. The Secretary of State may make regulations about the content of a RES and the way in which an RES is to be given to residents.

Sections 92 – 94 of the Act do not directly relate to the RES but might be usefully and properly included in an effective RES.

They provide for:

- the right of residents to request prescribed information from an AP; and
- the PAP must establish a complaints system to deal with complaints relating to building safety risks or compliance of any AP with their duties.

The Secretary of State can issue Regulations in connection with the establishment and operation of complaints systems which may take into account:

- how to make a complaint;
- timescales for dealing with complaints; and
- when a complaint must be referred to the Regulator.

6. Residents' Duties

The sections of Part 4 of the Act which relate to residents' duties also remain unchanged from the draft Bill. Although the vast majority of the Part 4 of the Act focuses on the duties of the Accountable Person, there is also a recognition that residents of HRBs have their part to play in relation to helping to keep their building safe. This flows directly from the recommendation in Dame Hackitt's review, that residents of such buildings should have a clear understanding of their responsibilities.

Sections 95, 96 and 97 of the Act introduce the following new statutory duties upon residents of HRBs, together with the process the appropriate accountable person ("Appropriate Accountable Person") can follow to enforce those duties if not complied with.

Duties on residents

Section 95 provides that residents (or owners) of HRBs over the age of 16 must:

- not act in a way that creates a significant risk of a building safety risk materialising;
- must not interfere with a relevant safety item. A 'relevant safety item' means anything in the common parts of a building that is intended to improve the safety of anyone in the building; and
- comply with a request from an Appropriate Accountable Person to provide information reasonably required for the Appropriate Accountable Person to perform their duties to carry out an assessment of building safety risks and take steps to reduce those risks.

Section 96 provides that, if the Appropriate Accountable Person suspects that a resident has contravened one of these duties, they are entitled to serve them with a contravention notice which specifies:

- what the resident is supposed to have done and why this is a breach of one or more of their duties;
- what action the resident should take so that they are no longer in breach, and the deadline for doing so;
- anything the resident should not do to avoid further breaches of the duty; and
- what may happen next if the resident fails to comply with the notice.

Following service of a notice on the resident, the Appropriate Accountable Person may request that the County Court make an order requiring a person to do a specified thing or provide specified information within a certain timescale or, alternatively, not to do a specified thing. As such, the order acts as a form of injunction.

There are also additional provisions which cater for the recovery of any sum specified in the notice where it has been necessary to repair or replace the relevant safety item as a result of the contravention (so long as the sum does not exceed the reasonable cost of repairing or replacing that item).

Access to dwellings

Section 97 provides that, upon an application by the Accountable Person, the County Court may make an order:

- requiring the resident of premises in a HRB to allow the Accountable Person, or a person authorised by them, access to the dwelling at a reasonable time on a specified date or within a specified period; and
- may, if it appears to the court necessary, permit the taking of measurements, photographs, recordings or samples.

It is worth bearing in mind that any request for access as a precursor to such an application should be made in writing and in accordance with the technical requirements of Section 97. Further, the request for access must be made in connection with either facilitating the performance of the Accountable Person's duties under section 83 or 84 (assessment of building safety risk etc.), or determining whether a duty under section 95 (duties on residents and owners) has been contravened.

This power has been introduced in recognition of the fact that the Accountable Person may need access to one or more dwellings in the building, so that they can satisfy themselves that the resident is complying with a specified duty, or in order to perform their own duties to assess building safety risks and take reasonable steps to minimise them. As such, it provides a specific statutory power under which an Accountable Person can apply to ensure they can lawfully obtain access to any dwelling. The court's order will again act as a form of injunction.

Lastly, it also worth noting that section 112 of the Act has the effect of implying into the lease of any premises which consist of or include a dwelling in a HRB a covenant on the part of the tenant to comply with their duties under Sections 95 and 97 of the Act.

7. Restrictions on Recovery of Service Charges for Cladding Remediation

The provisions of Schedule 8 were some of the most politically debated provisions and are designed to afford leaseholders quite significant protection from service charges relating to cladding and other costs for non-cladding related building safety defects.

Section 8 of Schedule 8 provides an absolute prohibition on service charges being payable in relation to cladding remediation for leaseholders who have a 'qualifying lease' (see below for the definition of a qualifying lease). The term 'cladding remediation' means the removal or replacement of any part of a cladding system that a) forms the outer wall of an external wall system and b) is unsafe. This means that no leaseholder (who holds a qualifying lease) living in a building more than 11 metres (or 5 storeys high) will have to pay anything for remediating unsafe cladding. These provisions are due to come into force on 28 June 2022.

Restrictions on recovery of service charges for non-cladding related building safety defects

Aside from the absolute prohibition on service charges being payable in relation to cladding remediation, the Act also places significant restrictions on the ability of landlords of qualifying leases to recover service charges in respect to the costs of 'relevant measures relating to any relevant defect' irrespective of what the terms of the relevant lease provide.

In this context:

i. A '*qualifying lease*' is a lease of a single dwelling in a building at least 11 metres or 5 storeys high which was granted before 14 February 2022 and, prior to that date, the tenant occupied the property as their only or principal home and did not own more than one other dwelling in the UK
ii. A '*relevant defect*' is a defect that gives rise to a building safety risk, which is defined as the spread of fire and/or structural collapse.
iii. A '*relevant measure*' is a measure taken to remedy, prevent or reduce the severity of an incident arising from a building safety risk.

As such, it is almost certain that fire safety issues such as the use of combustible insulation and defective/missing cavity barriers within external wall systems would fit within the definition of relevant defects. Similarly, anything internal such as lack of fire-stopping or breaches in the compartmentation requirements would also likely be captured within the definition. Any measures taken to address these defects will therefore fall within the definition of a relevant measure.

Circumstances where no service charge is payable

Schedule 8 to the Act provides that no service charges will be recoverable in respect of a relevant measure relating to a relevant defect in the following circumstances:

(i). where the landlord is responsible for the defect or is associated with someone responsible for the defect;
(ii). where the landlord meets what is defined as 'the contribution condition'. This condition is that the landlord group's net worth on 14 February 2022 was more than N x £2,000,000 where N is the number of relevant buildings that a member of the landlord group was a landlord of on that date; or
(iii). where the value of the lease on 14 February 2022 was less than:
    a. £325,000 in Greater London
    b. £175,000 in any other lease.

Importantly, (ii) above does not apply where the landlord was a private registered provider of social housing or a local authority.

Circumstances where limited service charge is payable

Where none of the above circumstances apply, a landlord may be able to recover service charges from a leaseholder in respect of a relevant measure relating to a relevant defect. However, the amount recoverable for such costs cannot exceed the 'permitted maximum'.

The permitted maximum is £15,000 for premises in Greater London and £10,000 otherwise, albeit this increases to £50,000 and £100,000 respectively where the value of the relevant lease as of 14 February 2022 was more than £1,000,000 or £2,000,000.

It is important to note that the service charge costs which count towards the permitted maximum include any costs in respect of a relevant measure relating to a relevant defect which fell due in the 5 year period prior to 14 February 2022 together with any further relevant service charge costs.

It is clear from the above that the circumstances in which landlords will be able to legitimately recover the costs of remedying or otherwise addressing historic fire safety defects from leaseholders of an affected building will be extremely limited. Even where a landlord can seek to recover such costs, their ability to do so will be capped according to the value and location of the relevant property.

8. Removal of the Building Safety Charge and Building Safety Costs

It is fair to say that some of the most significant aspects of the Act were those brought in by the Government very late in the day (in some cases a mere matter of weeks before it received Royal Assent). One key aspect which formed part of those late changes was the removal of the building safety charge from the Bill. This does not form part of the final version of the Act.

You may recall that the concept of the building safety charge was a requirement upon certain leaseholders to pay for building safety costs (notably this was regardless of any provisions contained within their lease). It would have resulted in a service charge for the costs incurred as a result of the Building Safety Manager meeting the new and onerous safety framework outlined in the Act. Notably, the concept of the Building Safety Manager has also been removed from the Act.

Replacing the building safety charge, the Act sets out a more slimmed down covenant that is now implied into all leases of higher-risk buildings requiring leaseholders to pay a service charge relating to the costs of their landlord undertaking 'building safety measures'.

Section 112 of the Act sets out what a building safety measure will include:

a. applying for registration of a higher-risk building;
b. applying for a building assessment certificate;
c. displaying a building assessment certificate;
d. assessing building safety risks in accordance with the Act;
e. taking reasonable steps in accordance obligations relating to the management of building safety risks, other than steps involving the carrying out of works as referred to in Section 84 (2) of the Act;
f. preparing and revising a safety case report in accordance with the Act;
g. notifying the regulator of a safety case report, and giving a copy of a safety case report to the regulator;
h. establishing and operating a mandatory occurrence reporting system, and giving information to the regulator;
i. keeping information and documents in accordance with the Act;
j. giving information and documents to any person in accordance with Section 89, 90 or 92 of the Act;
k. complying with any duty relating to the residents' engagement strategy;
l. establishing and operating a system for the investigation of complaints in accordance with the Act;
m. giving a contravention notice to a resident, and making an application to the county court, in accordance with the Act; and
n. making a request to enter premises, or making an application to the county court, in accordance with the Act.

The section also allows any of the following costs (in connection with the taking of a 'building safety measure') to be recovered:

a. legal and other professional fees;
b. fees payable to the Regulator; and
c. management costs.

9. Changes to the Defective Premises Act 1972

Extension of Limitation Periods

Section 1 of the DPA imposes a duty on those involved in the provision of new dwellings. The duty requires the work done in providing such dwellings to be done in a professional or workmanlike manner, to use proper materials and to see that the completed dwelling is fit for habitation. The duty is owed to anyone who subsequently acquires an interest in the dwelling.

Prior to the introduction of the Act, claims under s.1 DPA had a 6 year limitation period meaning claims must have been brought within 6 years of the relevant works being completed. Section 135 of the Act (which is due to come into force on 28 June 2022) provides that a new section 4B is added to the Limitation Act 1980, which extends the limitation period for claims under s.1 or the new s.2A DPA (see below) from 6 years to:

- 15 years prospectively for claims under sections 1 and 2A of the DPA 1972 (that is, for claims that arise after s.135 of the Act takes effect);
- 30 years retrospectively for claims under section 1 only (that is, for claims that accrued before the BSA 2022 took effect as law) (section 4B(4), Limitation Act 1980).

When the Building Safety Bill was first introduced to Parliament, it proposed a 15 year retrospective limitation period for claims under s.1 DPA. However, that was amended to 30 years in January 2022 during the Act's progress through Parliament.

This means that, once s.135 is in effect, anyone who was owed the duty under s.1 DPA in the 30 year period prior to the date s.135 comes into effect (likely any time since 28 June 1992) will have a potential claim against those who owed them the duty for any breach of the duty. Such claims could include requiring those entities to carry out and/or fund works to remedy building safety defects.

Further, the Act also recognises that some potential claimants may find themselves very close to the end of the 30 year retrospective limitation period when s.135 is enacted. To assist such claimants, the Act provides that the limitation period for such claims will not expire until one year after the new limitation period comes into force. This one-year buffer is known as the 'initial period'.

Introduction of new duty under Section 2A DPA

Section 134 of the Act introduces a new section 2A of the DPA, which is also due to come into force on 28 June 2022.

Section 2A DPA expands the right to claim under the DPA to any work undertaken on a "relevant building" (that is, a building consisting of one or more dwellings) provided that the work is done in the course of a business. In other words, the right to claim under the DPA now also applies to refurbishment work as opposed to work only done in the initial *provision* of a dwelling as per s.1 DPA.

The s.2A DPA duty will only apply to work completed after the date s.134 of the Act becomes effective and as laid out above will be subject to a 15 year limitation period from the date the work is completed.

10. Building Liability Orders

What is it?

Section 130 introduces a new cause of action allowing the High Court to make a 'Building Liability Order' ("BLO") where it considers it just and equitable to do so.

This means the High Court can find a corporate entity liable for defects and the loss and or damage occasioned, which appears broadly defined so should include repair costs and consequential losses (such as waking watch costs, the installation of alarm systems, etc). BLOs come into force on 28 June 2022.

While it is common place for parties to a construction contract to litigate, and for the court to make decisions on liability, a BLO provides a much more flexible remedy as it is not limited to the parties to a construction contract. In certain circumstances, a party seeking a BLO can pierce the corporate veil and pursue companies that were associated with the original contractor.

This represents a radical departure from the usual position. Ordinarily a building owner is restricted to a contractual claim against the corporate entity that entered into the construction contract with it (and/or tortious or collateral warranty claims against other dutyholders). If that entity has gone bust or is no longer trading, then the prospects of recovery are in most cases slim indeed. A BLO circumnavigates that difficulty and allows a building owner to pursue an 'associated' company either instead of or in addition to the original contractor.

A company will be associated with the original contractor where another company owns or controls the original contractor either through the extent of its shareholding, voting rights or the measure of control it has in organising the affairs of the original contractor.

What this means in practice is that companies who sit within a group will inevitably be controlled by a parent. Under the new BLO remedy, that parent could also be liable for the failures of the original contractor.

This means that companies within a group, or who are otherwise associated with another, who use insolvency in an attempt to escape liability will find themselves still on the hook with liability shifting to others in the group.

Areas of Liability

The parties who may be subject to a BLO is potentially much wider than simple liability between two contracting parties, but what is it designed to cover? There are only two areas of liability. It covers entities with either liability (1) under the Defective Premises Act 1974 ("DPA") or section 38 of the Building Act 1984, along with (2) anything that may have been the result of a building safety risk. As we have discussed elsewhere in this overview, a building safety risk is widely drawn and means a risk to the safety of people in or about the building arising from the spread of fire or the collapse of a building or any part of it.

The usual panoply of issues we see in buildings, from defective compartmentation internally, to the use of combustible materials in external wall systems and/or a failure to properly install cavity barriers, could render a building unfit for habitation for the purposes of the DPA, or give rise to a building safety risk. Ultimately whether the particular defects in any building fall within each category will be a matter for expert evidence.

Practical Considerations

This new cause of action will greatly assist building owners who, as a result of insolvency (in particular), are precluded from pursuing a corporate entity for damages or losses occasioned by building defects. The fact that it expressly includes the DPA, in respect of which the limitation period is to be retrospectively increased to thirty years, will provide building owners with a potential remedy against associated companies of the original contractor.

There is no suggestion that limitation for defects giving rise to a building safety risk will be similarly extended. The Government may have considered that a step too far, but it is curious nonetheless that one element of the BLO will have a greatly extended period of limitation and the other will not.

By introducing the BLO, the Government has given the clearest possible signal that putting a company into administration, or transferring is assets into another company will not allow it or any associated company to evade liability.

The downside for RPs is that a party applying for a BLO is not limited to the building owner or person responsible for undertaking the repairs. It could conceivably give rise to a cause of action on the part of anyone (including leaseholders) who wish to obtain a declaration from the High Court that a landlord or other party is liable under either the DPA, or for a building safety risk.

Moreover, it is unclear precisely what a BLO will entail in terms of consequences. If it is simply designed to allow a

court to declare the extent of a defendant's liability then that should not be controversial, but what about the cost of repair or other consequential losses including those for distress or inconvenience? Given that a BLO applies to claims under the DPA, then one might expect it to have consequences in damages, but the Act is silent about the consequences of a BLO being made, and the court's jurisdiction to deal with those consequences.

11. Building Remediation Orders

Section 123 introduces the concept of a Remediation Order ("RO"), which can be made by the First Tier Tribunal on the application of an "interested person" ROs come into force on 28 June 2022.

What is it?

An RO is defined as *"an order, made by the First-tier Tribunal on the application of an interested person, requiring a relevant landlord to remedy specified relevant defects in a specified relevant building by a specified time".*

There are a few terms that are defined to assist in unpacking the above definition.

A *"relevant landlord"* means, in simple terms, a landlord under a lease of the whole or part of the building who is required under the lease (or by law) to repair or maintain anything related to the relevant defect. This will cover most superior landlords and freeholders carrying out works to the structure and/or common parts of the building.

A *"relevant defect"* is broadly defined as a defect that arises as a result of anything done or not done in connection with relevant works and causes a risk to the safety of people in or about the building arising from either the spread of fire or the collapse of the building; in short it is a fire-safety related defect in the original construction works.

"Relevant building" is also defined, to mean a self-contained building or self-contained part of a building in England that contains at least two dwellings and is at least 11 meters in height, or has at least 5 storeys.. ROs can therefore only be sought in relation to medium-rise and tall-rise buildings which are currently considered by the Government to pose the greatest risk to resident safety.

Who can apply?

The "interested persons" who can apply to the First Tier Tribunal for an RO are the Regulator, local authority and fire and rescue authority for the area in which the building is located, a person with a legal or equitable interest in the relevant building or any part of it (i.e. leaseholders), and anyone prescribed by regulations), and any other person prescribed by law.

Practical Considerations

ROs appear to be a draconian measure: very much akin to specific performance or a mandatory injunction, both of which are remedies available to the court, but both of which are awarded in very limited and exceptional circumstances.

It is unclear whether a similar cautious approach will be adopted by the First Tier Tribunal in exercising its power to grant ROs.

There may be perfectly legitimate reasons why there is a delay on the part of the landlord in carrying out required remedial works. In most if not all cases, investigations into the issues need to take place and discussions with the original contractor then follow. Those contractors in turn often need to enter into discussions with its own supply chains and often its PI insurers.

In our experience, the scope of the necessary remedial works is a point of contention between landlords and contractors. This is in almost all cases the subject of complex technical and expert opinion, with conflicting expert evidence on both sides. The Technology & Construction Court (the specialist construction court) which would normally deal with these matters is well-versed in weighing up expert evidence and arriving at a considered view. On the other hand, this will largely be new territory for the First Tier Tribunal.
The RO will set a timescale for carrying out the specified remedial works. We are seeing an industry-wide shortage of contractors who are willing to carry out fire-safety works, not least because of high insurance premiums, and lead times are substantial. Presumably this will need to be taken into account in any RO.

Finally, the Act does not outline any sanction for not complying with the RO, save that it is *"enforceable with the permission of the county court in the same way as an order of that court".*

12. Remediation Contribution Orders

What is it?

Section 124 introduces Remediation Contribution Orders ("RCOs") An RCO is an order, made by the First Tier Tribunal, requiring a corporate entity to make payments to a specified person in order to meet costs incurred or to be incurred in remedying relevant defects to the relevant building.
The definitions of "relevant defect" and "relevant building" apply equally to RCOs as to ROs. RCOs can therefore be granted in relation to fire-safety related defects in medium-rise and tall-rise buildings.

An RCO can be made to require a specific amount or a reasonable amount to be paid to a specified person. The RCO can specify a time within which payment must be made, or alternatively may order the payment of an amount on demand following the occurrence of a specified event. RCOs come into force on 28 June 2022.

Who can apply?

All the persons who may apply for an RO can also apply for an RCO. In addition to those persons (the regulator, local authority and fire and rescue service, a person with a legal or equitable interest in the relevant building or any part of it (i.e. leaseholders), and anyone prescribed by regulations), the Secretary of State itself can also apply.

Who can an RCO be made against?

An RCO may be made against a corporate entity or partnership only if it:

- Is a landlord under a lease of the relevant building (defined above) or any part of it; or
- who was such a landlord at the qualifying time (14 February 2022), or
- was the developer (defined as person who undertook or commissioned the construction or conversion of the building (or part of the building) with a view to granting or disposing of interests in the building or parts of it) or
- is a person "associated" with any of the above.

"Associated" in this context means:

- if the interest in the building is held on trust, any beneficiary of the trust;
- where a partnership is involved, any partner (other than a limited partner) during the 5 year period up to 14 February 2022 (the "relevant period");
- any person who was a director of the body corporate at any time in the relevant period or
- in respect of two body corporates, they will be associated if:
    - at any time in the relevant period a person was a director of both of them; or
    - at the qualifying time, one of them controlled the other or a third body corporate controlled both of them ("control" being determined by reference to control of share capital, voting rights, entitlement to distributions or assets on winding up; in the case of partnerships based on voting rights, ability to appoint or remove members).

Practical Considerations

This remedy will presumably only really be applicable in circumstances where the original contractor is unwilling to carry out any of the required remedial works. In those circumstances, a third party will need to be engaged (and paid).

Given the Government's position that it wants to ensure that *"any repairs are proportionate and necessary"* (1), it will be interesting to see what checks and balances will be in place to accomplish this. Will leaseholders themselves be required to go out to the market and obtain three tenders for the proposed works? Will leaseholders need to engage their own experts to advise them as to which repairs are proportionate and necessary?

Notwithstanding that a landlord (or corporate entity associated with the landlord) is required to make payment under an RCO to a third party for the remedial works, there are a number of other practical considerations for the carrying out of those works such as access to the site, ensuring that sufficient and appropriate PI insurance is in place for the carrying out of the works, ensuring that remedial works contractors are themselves in good financial standing, ensuring that should the remedial works themselves be defective there is an avenue to rectify those defects.

None of those issues can be resolved by the mere payment of money awarded under an RCO.

(1) Press Release by the Department for Levelling Up, Housing and Communities and the Rt Hon Michael Grove MP dated 14 February 2022 Government to protect leaseholders with new laws to make industry pay for building safety - GOV.UK.

13. Implementation Dates

It is worth noting that the Act has received Royal Assent but there is going to be a phased introduction of each section, in particular to allow for supporting Regulations to be released to provide further understanding of how the Act will work on a practical level. S170 of the Act addresses when each section is expected to come into force.

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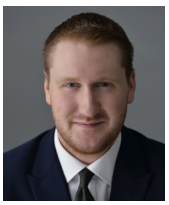

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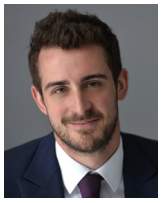

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