Devonshires

The Building Safety Bill: the Amendments

In this article we provide an overview of the newly proposed amendments to the Building Safety Bill ("the Bill") introduced by Lord Greenhalgh.

The proposed amendments, with Government sponsorship and support, were issued on 14 February 2022 and, as recognised within the sector, they have some potentially wide reaching consequences for landlords generally and particularly those who are registered providers of social housing ("RPs"). They are in many ways complex, lengthy and far reaching in their legal scope.

The overarching aims of the proposals are to force those who are considered responsible for (or who have profited from) the "cladding crisis" to bear the costs to put things right, to protect leaseholders and to stop those who are seen as unwilling to "do the right thing" from developing further.

We issued an e-flash here on the key proposed changes and in this article we analyse the main proposed amendments and their practical implications.

This note is divided into the following sections:

Click below to view the relevant section.

1. Building Liability Orders

What is it?

The proposed amendments introduce 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, including repair costs and consequential losses (such as waking watch costs, the installation of alarm systems, etc).

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 duty-holders). 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 1972 ("DPA"), along with (2) anything that may have been by 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 draft amendment is silent about the consequences of a BLO being made, and the court's jurisdiction to deal with those consequences.

The proposed amendments to the Building Safety Bill (**BSB**) make provision for an interested person to apply to the First Tier Tribunal for a Remediation Order (**RO**) or a Remediation Contribution Order (RCO). As with many other things, the devil is in the detail and we currently have no guidance on how this would work in practice.

2. Remediation Orders

The proposed amendments make provision for an interested person to apply to the First Tier Tribunal for a Remediation Order (RO) or a Remediation Contribution Order (RCO). As with many other things, the devil is in the detail and we currently have no guidance on how this would work in practice.

What is it?

An RO is defined in the proposed amendments as *"an order, made by the First-tier Tribunal 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 in the drafting 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, or is so prescribed by regulations made by the Secretary of State. 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 proposals are prescriptive as to who may apply to the First Tier Tribunal for an RO. This remedy is open to the building safety regulator, local authority and fire and rescue authority for the area in which the building is located and any other person prescribed by law. Interestingly, leaseholders are absent from the specified list of persons who may apply for an RO, however, the amendment does allow for "any other person as specified" to apply. This leaves room for leaseholders to be permitted in due course to make such applications.

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 current proposals do not outline any sanction for not complying with the RO. It may therefore be a remedy with no teeth, so to speak.

3. Remediation Contribution Orders

What is it?

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.

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 can also apply. This is therefore a remedy which is also available to leaseholders.

Who can an RCO be made against?

An RCO may be made against a corporate entity only if it is associated with a landlord under a lease of the relevant building. This provision is, however, deceptively simple, as "associated" is given special meaning in the proposed legislation. The following entities would all be associated with a landlord:

- An individual who has been a director of the landlord within 5 years ending on 14 February 2022;
- A company is associated with the landlord if at any time over the last 5 years (ending 14 February 2022) they shared a director; and
- A company is associated with the landlord if as at 14 February 2022, it controlled the landlord, was controlled by the landlord, or a third corporate body controlled both the company in question and the landlord.

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"**, 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.

*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

4. Prohibition on Development

The amendments have set out two new clauses which will be inserted into the Building Safety Bill – effectively enabling restrictions on new developments, planning and progressing building works by those who are considered "not to be doing the right thing" in resolving historic issues or causing present and future problems.

Prohibition on Development for Prescribed Persons

What is it?

The first of the two new clauses is entitled *"Prohibition on development for prescribed persons"*. Under this clause, the Secretary of State will be able to prohibit certain persons from carrying out "development of land".

The reasons behind such a prohibition will be for the following reasons:

1. To secure the safety of people in relation to risks arising from a building; or
2. To improve the standard of buildings.

This new clause will prevent certain identified persons from obtaining planning permission (or any other required certificates) under the Town and Country Planning Act 1990. It could also require those persons to have to give notification of any proposed development.

Practical Considerations

This clause is subject to regulations and there is a large amount of detail which will need to be provided for in those regulations. It remains unclear which persons would be subject to these prohibitions, and in particular whether RPs would be caught by this amendment. It is also currently vague as to the basis that these prohibitions would be enacted – the two reasons set out in the clause itself are almost a catch all, and we do not know the actual process by which the prohibition would be ordered or enforced, or the length of any restrictions.

Building Control Prohibitions

What is it?

The second of these two new clauses is called "building control prohibitions". This would allow the Secretary of State to impose a prohibition on certain identified persons in relation to various building control permissions and requirements set out under the Building Act 1984, including stopping them from:

1. Applying for building control or depositing plans;
2. Obtaining building control approval; and
3. Obtaining a final certificate in relation to works that they have carried out.

Practical Considerations

As with the prohibition on development amendments, the reasons for such a prohibition being put in place are the same – to secure the safety of persons or to improve the standard of buildings. As with the development prohibition clause, this building control prohibition clause is currently unclear on various points and will require regulations to be drafted for us to truly understand the frameworks under which this type of prohibition would operate.

5. Service Charge Restrictions

The amendments introduce a whole raft of restrictions on landlords in relation to their ability to recover the costs of remedying fire safety defects from leaseholders under a service charge.

The restrictions essentially mean that no leaseholder (in relation to buildings more than 11 metres tall or with 5 storeys or more) will have to pay for remediation of flammable cladding. Further (again in relation to buildings more than 11 metres tall or with 5 storeys or more), a landlord will not be able to recover a service charge from leaseholders in the following cases:

- where the leaseholder is liable to pay a service charge and;
- where the lease was granted before 14 February 2022 and;
- where the property is the leaseholder's only or principal home and they do not own any more than one other property in the United Kingdom.

The restrictions stop any service charge in relation to any measure to remedy, prevent or reduce the severity of any incident arising from a building safety risk arising from anything done (or not done), including anything used (or not used), in connection with works relating to a building (including its initial construction) that were carried out either a) before completion, if completion was in the last 30 years, or b) by or on behalf of the landlord or management company, after completion and within the last 30 years which presents a building safety risk. A building safety risk means any risk to the safety of people in or about the building arising from the spread of fire, or the collapse of the building or any part of it. There is also a restriction on legal expenses associated with the same.

However, it is important to note that the above restriction will only apply where the landlord is either responsible for the relevant defect or where it is or has at any time been associated with a person responsible for the relevant defect.

A person is responsible for a relevant defect if:

- in the case of an initial defect, the person was the developer or carried out works relating to the defect; or
- in any other case, the person carried out works relating to the defect.

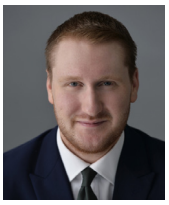
A developer means any person who undertakes or commissions the construction or conversion of a building (or part of a building) with a view to granting or disposing of interests in the building or parts of it. That definition is intentionally widely drafted and includes not just those who undertake construction but the person who commissions such too. That will invariably include RPs in many cases.

Where the conditions outlined above (i.e. a landlord being responsible) do not apply, landlords will still be able to recover a service charge but will be restricted in relation to the amount of such service charge they will be able to recover.

The amount will be restricted to £15,000 for properties in Greater London and £10,000 for properties elsewhere (or in the case of a shared ownership lease the amount will be restricted to the percentage share of those amounts). Where the property value is more than £1,000,000 the maximum will be £50,000 and where the property value is more than £2,000,000 the maximum will be £100,000. The restrictions apply to service charges spanning the last five years. Any capped amount has the ability to be paid over a period of five years.

6. Key Contacts at Devonshires

Mark London
Partner | Construction
020 7880 4271
mark.london@devonshires.co.uk



Lee Russell
Partner | Housing Management & Property Litigation
020 7880 4424
lee.russell@devonshires.co.uk

Michael Wharfe
Partner | Construction
020 7880 4359
michael.wharfe@devonshires.co.uk

Karen Morean
Solicitor | Construction
020 7880 4461
karen.morean@devonshires.co.uk

Rachel Jones
Solicitor | Construction
020 7880 4317
rachel.jones@devonshires.co.uk