

REGULATING BUILDING SAFETY: A REVIEW OF THE BUILDING SAFETY ACT 2022

INTRODUCTION

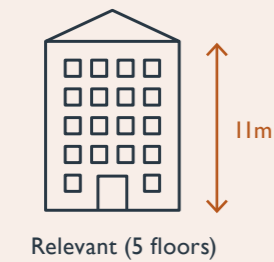
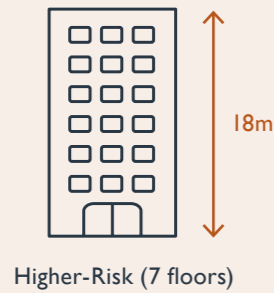
Almost five years after the Grenfell Tower tragedy the Building Safety Act 2022 introduced an extensive and complex new regime for building safety. The Act itself runs to 333 pages and provides for a substantial amount of secondary legislation, some of which has yet to be introduced, not to mention the accompanying government guidance. Perhaps not surprisingly, it has created some confusion and continues to throw up the odd curveball. As the first cases considering the effect of the new regime emerge, it is worth another look at its key provisions.

Although the market focus is on existing fire and other safety defects in tall residential buildings, aspects of the new regime apply to the standard and safety of all buildings in

England and, in much the same way, Wales. The Act is of particular significance to those owning or considering acquiring an interest in high-rise residential or mixed-use buildings. The new regime imposes new duties and restricts the ability to recover the cost of remedying certain historical defects from tenants through the service charge.

It is worth noting that the duties and obligations introduced by the Act are backed by a formidable enforcement regime. Failure to comply may amount to a criminal offence and developers may be prevented from carrying out future development projects. Exclusions are limited but in respect of higher-risk buildings include hotels and, once the construction has completed, hospitals and care homes.

TWO RESIDENTIAL UNITS



WHO IS RESPONSIBLE?

Any person with a legal estate in possession in any common parts of a higher-risk building or any person who does not hold a legal estate but who is under a repairing obligation in relation to the common parts is an accountable person with responsibility for ongoing safety issues in relation to that building. If there is more than one, the person with a legal estate in possession of the structure and exterior of the building or the person responsible for the repair of the structure and exterior of the building will be the principal accountable person. An accountable person's ongoing duties include assessing risks relating to the spread of fire or the structural integrity of the building, actively managing those risks, engaging with residents, maintaining the "golden thread" of information in connection with the safety of the building and providing that information to residents and other interested parties. The principal accountable person can also be required to apply for a building assessment certificate requiring the provision of building safety information to the Building Safety Regulator. These new obligations need to be considered in conjunction with existing duties relating to fire safety risk assessments and other health and safety regimes.

Accountable Person Duties

- registration
- golden thread of information
- building safety assessment
- tenant engagement
- landlord and leasehold certificates



WHO PAYS?

The relevant building regime focuses on attributing responsibility to who should pay for the remediation of historical issues such as defective cladding arising from construction or refurbishment work carried out since 28 June 1992. The cost of carrying out remediation works is likely to be the responsibility of the developer, the landlord or persons associated with them. Significantly, various tenant protections prevent or restrict the recovery of the costs of remediating relevant defects, such as unsafe cladding systems, through the service charge. These range from a blanket ban on recovery through to a cap on recovery spread over a ten-year period. Cost recovery will depend on identifying whether



REGISTRATION AND BEYOND

All occupied higher-risk buildings were required to be registered with the Building Safety Regulator by 30 September 2023. New higher-risk buildings will also need to be registered and transitional provisions apply to those in the course of construction. A 'higher risk building' is a building of at least 18m in height or with at least seven floors, and which has at least two residential units. Smaller residential or mixed-use buildings will be 'relevant buildings' if they are of at least 11m in height or have at least five floors. Higher-risk buildings will generally also be relevant buildings and different regimes apply to each. The first challenge is identifying whether you are dealing with a higher-risk building or a relevant building. This is not necessarily straight forward and technical guidance on how to measure the building is available.

Building Safety Regulator

The Building Safety Regulator is a new office created to oversee the safety and standards of all buildings and is tasked with implementing the new regulatory framework for higher-risk buildings.

there are any qualifying leases and qualifying tenants, as well as the value of the relevant dwellings and the net worth of the landlord's group. Qualifying leases will generally be those long leases of a single dwelling in a relevant building which have a service charge, were entered into before 14 February 2022 and which, as at that date, were of the only or principal home of the tenant or the tenant owned no more than two other dwellings in the UK. Landlords and managing agents should be aware that a full recovery of service charge costs for residential or mixed-use high-rise buildings may not be possible. The existence of various new categories of residential lease can only further complicate a difficult area and will affect the residential leasehold market. The requirement for new landlord and leaseholder certificates may help clarify the picture in respect of each building and its residential leases.



THE CORPORATE VEIL

Many development projects are structured using special purpose vehicles. The Act confers powers on the court to extend the liability of an entity to its associates by making building liability and remediation contribution orders. Accordingly, the Act has arguably extended the limited circumstances in which the rule against piercing the corporate veil is disapplied and created contingent liability in respect of relevant fire safety or structural integrity defects. This will be an issue on corporate transactions involving a group structure with an involvement in development or refurbishment projects. The first remediation order was made against the landlord of a mixed-use development in Streatham where the associated developer entity had been dissolved. The landlord was required to carry out a scheme of works in relation to defects in the external wall systems of the building, including defective cladding.



LIMITATION

The Act extends limitation periods for claims in respect of relevant liabilities arising under the Defective Premises Act 1972, Section 38 of the Act or resulting from a building safety risk. Claims can now go back as far as 1992 in respect of relevant defects in existing buildings in some circumstances and, going forward, the limitation period has been extended to 15 years. Consistent with this, a new home build warranty for 15 years will need to be issued to buyers of new dwellings. Extended limitation periods also apply to the construction products regime.



GATEWAYS

The Act introduces new regulatory steps known as gateways to help ensure that new higher-risk buildings meet required standards. The new gateways may be significant when considering project timeframes. Gateway One applies at the planning application stage, Gateway Two applies before building work commences and Gateway Three arises at the completion stage. The Gateways are designed to strengthen regulatory oversight of the design and construction of new developments by the Building Safety Regulator and those involved in the process will need to demonstrate the necessary skills and competence. Significantly, Gateway Three requires the registration of the building and issue of building control approval before the new building can be occupied. This new milestone will be a key commercial point when drafting agreements for lease and development agreements.



RESPONSIBLE ACTORS

The Responsible Actors Scheme was launched in July 2023 and required eligible housebuilders and other large developers involved in the development or refurbishment of relevant buildings since 5 April 1992 to join and comply with the conditions of the Scheme, including entering into a developer remediation contract with the government. Members of the Scheme are responsible for the remediation of existing life-critical fire safety defects in certain buildings. In addition to the financial burden of carrying out the works, failure to join or comply with the membership conditions will mean that the developer, and entities controlled by it, will be prohibited from carrying out any major new development.



CONCLUSION

The new building safety regime is relevant to all persons involved in the design, construction and occupation of buildings, as well as investors, funders and insurers. The identification and remediation of dangerous cladding and other fire risk and structural defects in existing high-rise buildings has received the most attention but aspects of the new regime will apply to all buildings. It will be of particular interest for investors and funders in the attractive build to rent and purpose-built student accommodation sectors.

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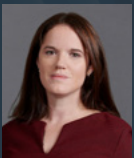
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