trowers & hamlins

BUILDING SAFETY BILL UPDATE

April 2022

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Introduction

A revised version of the Building Safety Bill was published in Hansard on 5 April 2022, following its Second Reading in the House of Lords and the completion of the Report Stage.

The amended Bill features major changes to the proposed regulatory regime for building safety, as well as incorporating Housing Secretary Michael Gove's announcements in February 2022 to make developers responsible for funding remediation costs to defective buildings.

The Bill has had its Third Reading in the House of Lords and is scheduled to be considered by the House of Commons on 20 April 2022. The House of Commons may accept the amendments proposed by the House of Lords or propose further amendments. The Bill is expected to receive Royal Assent by May-June 2022.

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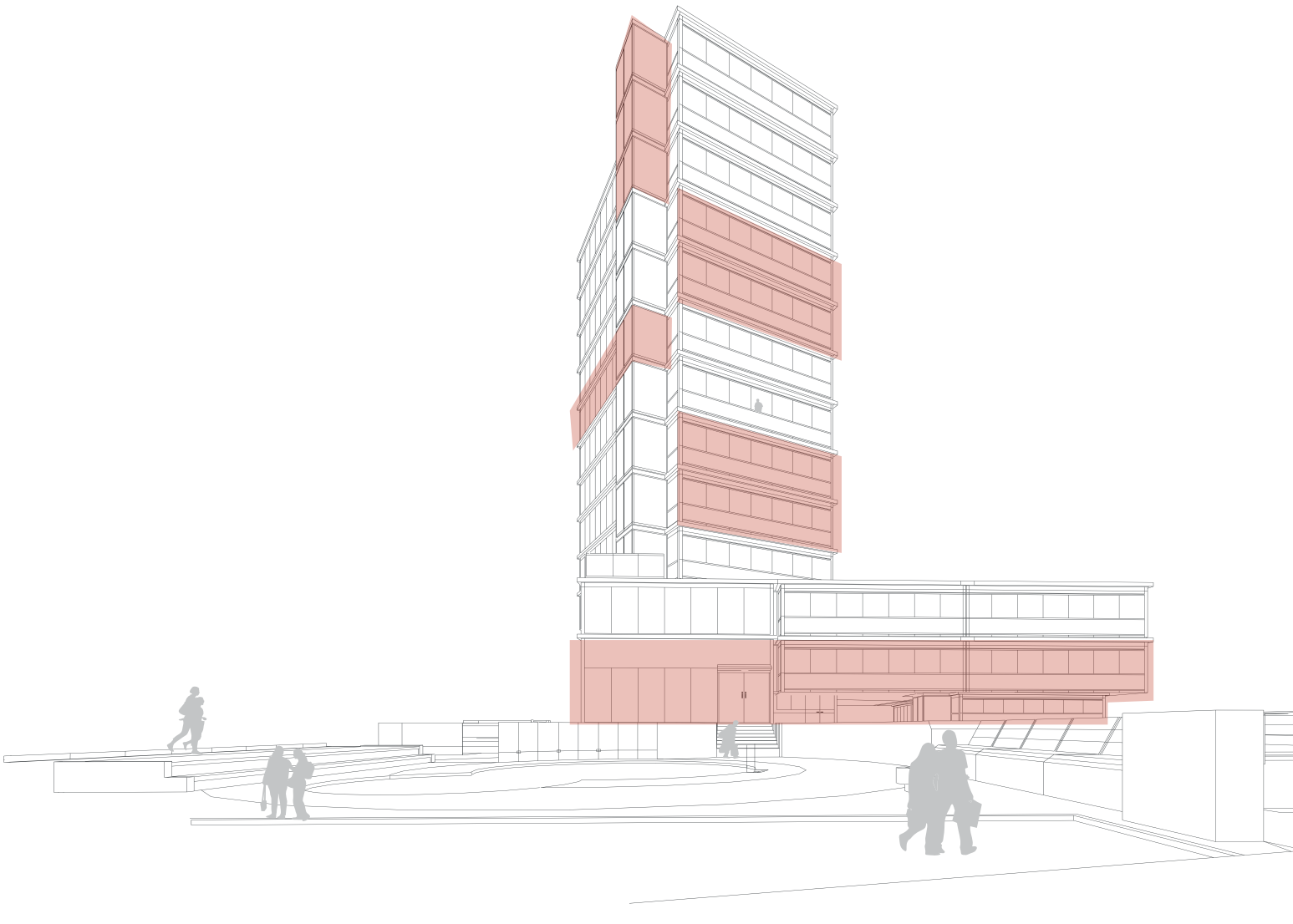

Overview of the updates

Removal of requirement to appoint a Building Safety Manager

The most high-profile change is the proposed removal of the requirement to appoint a Building Safety Manager for higher-risk buildings. The Building Safety Manager role was meant to have been a critical component in ensuring the safety of higher-risk buildings during their occupation stage. Accountable Persons and Principal Accountable Persons will continue to be responsible for the safety of higher-risk buildings, so it is possible that building safety managers will continue to be appointed, though there will no longer be a legal requirement to do so.

Amendments to service charge provisions

The Bill also removes the proposed building safety charge regime that would allow landlords to recharge building safety costs (such as the appointment of the Building Safety Manager) to its tenants. In its place, section 111 of the Bill amends the Landlord & Tenant Act 1985 to allow landlords to recover costs for a specified list of "building safety measures" and defines "excluded costs" for higher-risk buildings that may not be recharged to tenants.

Building safety measures comprise costs incurred by an Accountable Person or relevant person applying to register a higher-risk building or for a building assessment certificate; assessing and taking reasonable steps to manage building safety risks; preparing and revising safety case reports; establishing and operating mandatory occurrence reporting systems; keeping and circulating information and documents in accordance with the Act; complying with duties under a residents' engagement strategy; and issuing contravention notices to and taking legal action against residents in respect of breaches to tenants' building safety obligations. Building safety measures are also deemed to include fees payable to the Regulator, management costs and legal and other professional fees related to building safety measures.

Excluded costs for higher-risk buildings comprise costs relating to a fine imposed by the Regulator; legal costs incurred in connection with a special measures order; costs incurred by reason of any negligence, breach of contract or unlawful act by the landlord or their appointee; or costs prescribed by regulations to be incurred in connection with taking building safety measures.

Section 112 of the Bill requires landlords to serve a prescribed form of building safety information, confirming the identity of the Principal Accountable Person and any special measures manager for the building.

Remediation of defects in "relevant buildings"

In line with Michael Gove's February announcement, Part 5 of the Bill imports a number of statutory powers to require landlords and associated persons to undertake and pay for remediation works for defects in "relevant buildings" where there is a "qualifying lease".

"Relevant buildings" are defined in section 116 as self-contained buildings containing at least two dwellings, so may also include higher-risk buildings. Section 118 defines "qualifying lease" as a long lease of a single dwelling in a relevant building granted before 14 February 2022 for which the tenant is liable to pay a service charge, and where the dwelling was the tenant's only or principal home and the tenant owned no more than two dwellings in the UK apart from their interest under that lease.

"Relevant defects" are defined in section 119 to include anything giving rise to a 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, and will also include anything done or not done during the 30 year period preceding the commencement this section of the Act.

Restrictions on service charges and provision of remediation costs under qualifying leases

Section 121 and Schedule 8 of the Bill sets out a number of financial caps and exclusions on service charge payments for defects in relevant buildings. These provisions were significantly amended in the House of Lords and the final form will be settled following the House of Commons' consideration of those amendments later in April.

Following the Lords' amendments, no service charge will be payable under a qualifying lease in respect of a relevant measure relating to a relevant defect where the landlord is responsible for the defect or is "associated" with a person who is "responsible" for the defect. A person is responsible when they undertook or commissioned works relating to the defect, or was in a joint venture with a developer who undertook or commissioned the construction or conversion of the building. Accordingly, no service charge will be payable where the landlord meets a defined "contribution condition", based on a calculation of the landlord group's net worth, or where the value of the qualifying lease was less than £325,000 in Greater London or £175,000 in any other case, as of 14 February 2022.

Schedule 8 specifies permitted maximum sums that may be recovered from tenants in respect of defects, taking into account service charge payments made in the preceding five years, and also sets annual limits on service charge payments for defects. The permitted maximums have been significantly revised by the latest set of amendments in the House of Lords and – subject to Commons consideration - are set at zero for leases with a value of less than £1 million, £50,000 where the value of the lease is between £1 million-£2 million, and £100,000 where the value exceeds £2 million. A further annual limit has been introduced by the House of Lords of one tenth of the permitted maximum.

The House of Lords amendments also confirm that no service charges will be payable in respect of cladding remediation works, or for the legal or professional fees relating to the liability or potential liability of any person incurred as a result of a relevant defect.

The Secretary of State is empowered to allow recovery from landlords of any unrecoverable sum under a lease as a result of these provisions, and to allow applications to the First-Tier Tribunal to determine whether landlords have failed to comply with these provisions.

Remediation Orders

Section 122 of the Bill gives the First Tier Tribunal powers to issue Remediation Orders, made on the application of an "interested person", requiring landlords to remedy relevant defects within a prescribed period.

"Interested persons" who may apply to apply to the Tribunal for Remediation Orders are the Building Safety Regulator, the relevant local authority where the building is situated, a fire and rescue authority for that same area, and any other person prescribed by the Secretary of State in regulations.

Remediation Contribution Orders

Section 123 of the Bill gives the First-Tier Tribunal powers to issue Remediation Contribution Orders, made on the application of an "interested person", requiring a body corporate that is associated with a landlord (an "associated person") to make payments to specified persons in respect of relevant defects in relevant buildings, where the Tribunal considers it just and equitable to do so.

Section 120 provides that a body corporate will be an associated person where at any time between in the five years ending 14 February 2022, a person who was a director of the body corporate was also a director of the landlord, or where one of the body corporate or the landlord controlled the other, or where a third body controlled both the body corporate and the landlord.

"Interested persons" who may apply to the Tribunal for Remediation Contribution Orders are the Building Safety Regulator, the relevant local authority where the building is situated, a fire and rescue authority for that same area, any person with a legal or equitable interest in the building or any part of it, or any other person prescribed by the Secretary of State.

Remediation costs of insolvent landlords

Section 124 of the Bill provides that when a company that is a landlord of a relevant building is being wound up and the company is either under an obligation to remedy a relevant defect (as defined above), or liable to make a payment relating to costs incurred in remedying a relevant defect, then a court having jurisdiction to wind-up the company may order an "associated person" (as defined above) to make such contributions to the wound-up company's assets as are considered just and equitable. This provision will also apply to winding-up proceedings commenced before the Act comes into force.

Building industry schemes

Sections 125 and 126 of the Bill provide more detail about the Secretary of State's powers to establish building industry schemes, which can now include securing that persons in the building industry remedy defects in buildings or contribute to costs associated with remedying defects in buildings.

The Secretary of State can prescribe conditions for "eligible persons" who can join a scheme and different categories of membership of a scheme. Membership of a scheme may include conditions for an eligible person to remedy defects in buildings with which they have a connection of a prescribed kind; making financial contributions towards the costs of remedying defects (including buildings with which an eligible person has no connection), the use of construction products; and the competence or conduct of any individual connected with an eligible person, including conduct occurring before this provision comes into force.

Prohibition on development and building control

Section 127 allows the Secretary of State to prohibit "prescribed persons" from carrying out development of land in England, which may apply despite planning permission already having been granted. Section 128 also allows the Secretary of State to impose building control prohibitions as regards buildings or proposed buildings, which would prevent a prescribed person from applying for building control approval or the granting of a final certificate in relation to works carried out by that person.

Under these provisions, prescribed persons may include persons who are eligible to be members of a building industry scheme and those who are not members of a scheme.

These prohibitions may be imposed for any purpose connected with securing the safety of people in our about buildings in relation to risks arising from buildings; improving the standard of buildings, or ensuring that persons in the building industry remedy defects or contribute to costs associated with remedying defects.

Building Liability Orders

Section 129 of the Bill allows the High Court to make a Building Liability Order in respect of the liability of a body corporate in respect of a specified building under any of the Defective Premises Act 1972 or section 38 of the Building Act 1984 or as a result of a building safety risk. Building Liability Orders may be made about bodies corporate that have been dissolved, and may also identify joint and several liability for two or more organisations.

Associates of the original body corporate may also be identified, using similar tests to those described for Remediation Contribution Orders, and held liable under a Building Liability Order. Applicants seeking Building Liability Orders will be able to apply to the High Court for an "information order", requiring a specified body corporate to provide information and documents about any of its associates, to enable the applicant to make or consider making an application for a Building Liability Order.

New build home warranties

Sections 143 and 144 of the Bill now requires developers to provide purchasers of new build homes a new build home warranty, under which the developer agrees to remedy defects in the home within a specified period. The warranty must also provide for and give the purchaser or other prescribed persons the benefit of an insurance policy with a minimum of 15 years coverage. Any such warranties must be given before or at the time that the developer grants or disposes of a relevant interest in the home.

The Secretary of State is empowered to impose requirements about the kinds of defect a developer must agree to remedy and the agreed costs that the developer will cover to remedy any defects, the minimum duration of the warranty, the details of the insurances to be provided, and may impose financial penalties on developers who fail to comply with these provisions.

Liability for construction products

Following the publication of the draft Construction Products Regulations in 2021, sections 145 to 154 of the revised Bill contain detailed provisions about liability for failure to deal with those regulations, and specific liability relating to cladding products.

Section 147 creates a liability where a person (i) fails to comply with a legal requirement in relation to a construction product, or (ii) markets or supplies a construction product and makes a misleading statement in relation to it, or (iii) manufactures a construction product that is inherently defective, all of which are offences under the Construction Products Regulations. Where any offence results in a relevant construction product being installed in a building, which causes the building or a dwelling in the building being unfit for human habitation, the defaulting party will be liable to pay damages to a person with a "Relevant Interest" (i.e. a legal or equitable interest in a building or dwelling) for personal injury, damage to property or economic loss. The Bill imposes a 15 year limitation period from the date of the cause of action, but only covers offences committed after these provisions come into force.

Section 148 creates a similar liability in respect of any cladding products that are attached or included in the external wall of a building. However, this liability is both prospective and retrospective, covering offences committed up to 15 years before the provisions come into force, as well as 15 years from the date of the cause of action where the offence was committed after the provisions come into force.

The Secretary of State is empowered to make further regulations enabling courts to issue Cost Contribution Notices in respect of breaches of these provisions, requiring defaulting parties to pay prescribed costs to affected persons as a court considers to be just and equitable. The Secretary of State may also make regulations to allow it to make cost contribution orders directly.

Resident management companies

Sections 110 and 111 of the Bill also make express provision for resident management companies to be Accountable Persons for higher-risk buildings and to enforce payment of a service charge under a lease. Resident management companies may have building safety directors, and service charges will be deemed to include the remuneration of those directors. Accordingly, section 161 provides that any company appointed for a building safety purpose (including a resident management company) and their officers will also be liable for breaches of the Act.

Disabled residents

For the first time, the Bill places express requirements on the Building Safety Regulator to facilitate and secure the safety of disabled people in or about higher-risk buildings in relation to building safety risks (section 4). The Regulator must also ensure representation of disabled people and disabled interest groups on its Residents consultative panel (section 11) and must publish a statement each year about its engagement with disabled residents of higher-risk buildings (section 20).

Section 5 requires the Regulator to prepare a cost-benefit assessment of the use of fire suppression systems, the safety of stairways and ramps, certification of electrical equipment and systems and provision for people with disabilities, which must be published within two years of commencement of that part of the Act. The Regulator's assessment may make proposals to the Secretary of State for further regulation in these areas.

Removal of approved insurance requirements

A provision has been removed from the Bill requiring the Building Safety Regulator (or equivalent national body in other jurisdictions) to prepare guidance about adequate insurance cover or to approve schemes of insurance for works covered by the Building Act 1984. This amendment appears to confirm an industry-led approach to insurance in respect of building works required by the Act.

Agreement with developers over building repairs

On 13 April 2022, the Department for Levelling Up, Housing and Communities announced an agreement with over 35 of the UK's major developers who will contribute £5 billion to undertake remedial works to high-rise buildings. Participating developers will commit a minimum of £2 billion to repair their own buildings, and will pay a further £3 billion through an expansion to the Building Safety Levy. The developers have also pledged to make repairs to all buildings of 11 metres or more that they have played a role in developing over the last 30 years.

Contact us

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