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WHITE PAPER

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Guide to the UK Building Safety Act 2022

The United Kingdom's Building Safety Act 2022 introduces a new regulatory regime affecting higher-risk buildings. Developers, owners, landlords and contractors of high-rise buildings are among those to be affected by changes already in force as well as awaited secondary legislation. The deadline for registering existing higher-risk buildings with the new regulator is fast approaching—the principal accountable person must do this by 30 September 2023. The new regulatory regime introduces a number of fundamental changes to how buildings within scope must be built, occupied and maintained including, in certain situations, the potential for the corporate veil to be pierced.

Our guide provides a summary of the key provisions of the Act and its practical implications.

NEW OBLIGATIONS DURING DESIGN AND CONSTRUCTION

What Is Considered a Higher-Risk Building During Design and Construction?

There are two definitions of higher-risk buildings under the Act which apply depending on the stage of the building's life cycle. During the design and construction phases, a higher-risk building is defined as a building that is:

- At least 18m in height *or* has at least seven storeys; *and*
- Contains at least two residential units,[1] is a care home, or is a hospital.

The following are excluded from this definition: a building that comprises entirely of a secure residential institution, a hotel or military barracks; or a building containing living accommodation provided by the Ministry of Defence; or a building containing living accommodation for His Majesty's forces or any visiting forces.

The Gateway Regime

The Act provides for a "gateway" regime to be introduced by secondary legislation. The latest government proposal suggests that there will be three approval points ("gateways") during the design and construction process of high-risk buildings. At each gateway, the approval of the Building Safety Regulator ("BSR") will need to be obtained in order to progress to the next stage of work.

THREE GATEWAYS

PLANNING (already in force)

This gateway applies at the planning stage. The developer (of a relevant building[9]) must submit a fire statement with an application for full planning permission which sets out the fire safety considerations specific to that development. The fire statement must be submitted in the prescribed government form. The Health and Safety Executive ("HSE"), which is the nationa l regulator for workplace health and safety, will act as the statutory consultee on fire safety for planning applications.

PRE-CONSTRUCTION

Gateway two applies before construction of a higher-risk building begins (or work begins to convert a lower-risk building into a higher-risk building). The client (or another dutyholder on the client's behalf) must submit a building control application to the BSR in an electronic format. There are a number of prescribed documents that must be provided as part of the application.

The gateway is a "hard stop", and construction works cannot commence until the BSR has approved the application. The BSR has a 12-week statutory period to review the application. The government suggests that dutyholders should provide two weeks' notice to the government before submitting an application to ensure prompt review. Changes to approved building works durin g construction will also need the approval of the BSR.

COMPLETION

A higher-risk building cannot be occupied unless a "Completion Certificate" has been obtained from the BSR and the building has been registered. Once higher-risk building work has been completed, the client should apply to the BSR for a certificate. This involves handing over information to the BSR, including: a confirmation that the golden thread information has been provided to the relevant person; updated prescribed documents; relevant plans; and a description of higher-risk building work that has been carried out.

The BSR has a 12-week statutory period to review the application, and the BSR will consult with the relevant fire and rescue authority during this process.

PLEASE NOTE: This guide is intended as a concise practical tool for those beginning to consider their obligations under the Building Safety Act 2022. It is an abbreviated guide to the Act only and is not an exhaustive summary of all the provisions of the Act or supporting legislation. Further advice should be sought in relation to specific situations. Please note that various parts of the Act envisage secondary legislation to accompany the main provisions and not all of these have yet been published at the time of this guidance (the transition plan can be viewed here. Where secondary legislation is still awaited, the information in this guidance is based on the latest government consultation or guidance published at the time. This guide is accurate as of May 2023.

The Dutyholder Regime

The proposed dutyholder regime under the Act extends the role of existing dutyholders under the Construction (Design and Management) Regulations 2015. The dutyholders include the client, designer, the principal designer, the contractor and the principal contractor (whether individuals or organisations). The dutyholders will have specific legal obligations and general responsibilities under the Act to ensure compliance with building regulations and to share information with other dutyholders (i.e. contributing to the golden thread of information). The client should be prepared to confirm the steps taken to evaluate the competence of each dutyholder as part of the Gateway 2 building control application.

The "Golden Thread" of Information

The dutyholders are responsible for communicating with one another and their successors in order to maintain a "golden thread" of information throughout the life cycle of a building's design, construction and occupation. This information should be digitally stored and kept up-to-date such that information and documents can be used as proof of compliance with regulations and management of building safety risks at any time. Dutyholders should pass such information to the accountable person once a building is occupied (but remain responsible to the extent that they do any further works to the property).

NEW OBLIGATIONS FOR OCCUPIED HIGHER-RISK BUILDINGS

What Is Considered a Higher-Risk Building During Occupation?

During occupation, a higher-risk building is defined as a building which is:

- At least 18m in height *or* has at least seven storeys; *and*
- Contains at least two residential units.

The following are excluded from this definition: care homes, hospitals, secure residential institutions, hotels, military barracks and living accommodation for Ministry of Defence or His Majesty's forces or visiting forces.

Accountable Persons

The Act prescribes that "accountable person(s)" must be identified in respect of each building. The accountable person is either the person(s) who holds a "legal estate in possession" of the common parts of the building (e.g. freehold owner or landlord who has prescribed repairing obligations under a lease) or the person(s) under a "relevant repairing obligation" in relation to any parts of the common parts (e.g. certain management companies).There may be more than one accountable person for a building, and they can be an individual, partnership or company.

A single "Principal Accountable Person" ("PAP") must also be identified for each building. Where there is only one accountable person, they will also be the PAP. Where there is more than one accountable person, the PAP will be the person who either owns or is legally obliged to repair the *structure and exterior* of the building.

The Responsibilities of the Accountable Person

Managing Building Safety Risks

The accountable person has an ongoing responsibility to assess and manage building safety risks and ensure compliance with building safety regulations. The accountable person must act in accordance with "prescribed principles" (as prescribed by secondary legislation and which the BSR has power under the Act to prescribe). The accountable person also has specific responsibilities under the Act including:

- Ensuring that a building regulations certificate is obtained before a building is occupied (see Gateway 3, "Completion");
- Co-ordinating the golden thread of information for the occupied building (see page two);
- Registering a building with the BSR within the permitted timeline (see relevant section, page four);
- Applying for a building assessment certificate (see next column); and
- Preparing the safety case report (see next column).

Definition of "Building Safety Risks" Under the Act

Building safety risks are defined in the Act as risks to the safety of persons in or about the building arising from the occurrence of:

- Fire spread;
- Structural failure; and/or
- Any other prescribed matter.

Building Assessment Certificates

The BSR will periodically assess (and re-assess) whether the accountable persons are complying with their responsibilities by requesting that a certificate is applied for in respect of a particular building. The PAP is responsible for applying to the BSR for a building assessment certificate within 28 days of the request. The BSR will issue a certificate if it considers that the relevant duties are being complied with. Once issued, the certificate must be displayed in a prominent position in the building.

Reporting

Safety Case Reports. The PAP is responsible for preparing a Safety Case Report for the relevant building. The report should contain records of any assessments and risk-management steps taken by the accountable persons in carrying out their duties under the Act. As soon as practicable after completing or revising a Safety Case Report, the PAP should notify the BSR and provide a copy on request. Specific requirements for the report are to be prescribed by secondary legislation. Whilst other accountable persons do not have to prepare the Safety Case Report, they must still carry out their own assessment of the building safety risks for the parts of the building for which they are responsible and manage those risks. The Act envisages co-operation between accountable persons in the preparation of the Safety Case Report (amongst other things).

Mandatory Occurrence Reporting. In certain circumstances, the accountable person will be required to provide information about building safety risks to the BSR in a manner specified by the BSR. These "mandatory occurrences" will be prescribed by regulations and are likely to consist of structural and fire safety issues posing a significant risk to life. The PAP is responsible for establishing a "mandatory occurrence reporting system" which will enable the accountable person to have access to the information they need in order to report to the BSR.

A NEW REGULATORY REGIME FOR HIGHER-RISK BUILDINGS

The New Regulator

The Act establishes a new BSR, which will be part of the HSE. The BSR will be headed (in the first instance) by Peter Baker, who will hold the role of Chief Inspector of Buildings. The functions of the BSR include:

- Overseeing the safety and performance of all buildings;
- Improving competence within the sector; and
- Implementing the new regime for higher-risk buildings.

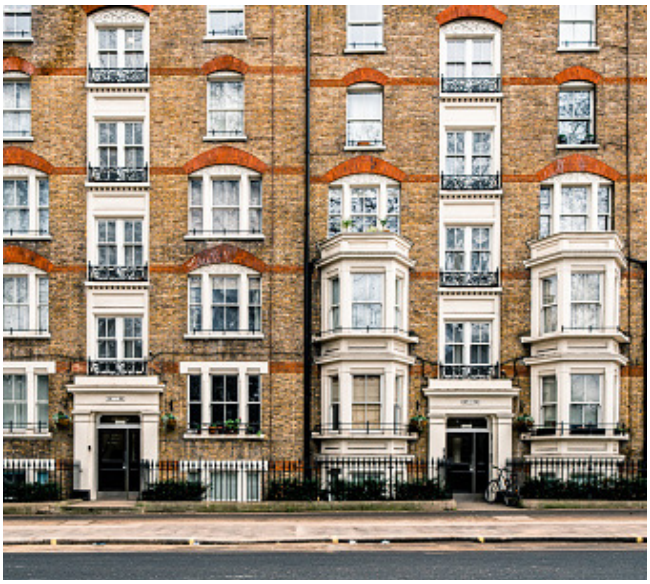
Registration with the BSR

The Act required that all higher-risk buildings be registered with the BSR. Registration takes place via an online service with a fee of £251 per building. Registration must be done by the PAP or a person authorised on the PAP's behalf (e.g. managing agent or legal representative). The following information will need to accompany the application: names of accountable person(s) and the PAP (where the PAP is an organisation, a single person will need to identified as the point of contact); information about the building including height, number of storeys, year of completion, number of units; and the building control certificate. Within 28 days from the date of the application or by 30 September 2023 (whichever is longest), the PAP must submit structural and safety information about the building (including information about the material used in the external walls, evacuation routes, fire safety equipment, etc).

The Deadline to Register

Applications for existing higher-risk buildings must be completed by 30 September 2023.

Buildings completed from 1 October 2023 onwards must be registered before the building can be occupied. Failure by a PAP to register by 30 September 2023 will constitute a criminal offence if a higher-risk building is occupied but not registered without reasonable excuse (with sanctions including an unlimited fine and/or up to two years' imprisonment).



RECOVERY OF REMEDIAL COSTS FOR HISTORIC DEFECTS AND LEASEHOLDER PROTECTIONS

Recovery of Remedial Costs for Historic Defects through Service Charge

The Act introduces a number of leaseholder protections which shift the financial burden of remedying historic safety defects onto building owners and developers by limiting their ability to recover remediation costs from qualifying leaseholders[2] through the service charge. These new rules apply to buildings in England only and override any repair obligations in respect of historical safety defects on the leaseholder. They also cannot be avoided or amended by contractual agreement.

Generally, a landlord *cannot* recover the costs of rectifying relevant defects[3] in a relevant building[4] from qualifying leaseholders through the service charge in the following circumstances:

- The landlord or its associated person (i.e. sister and parent companies) is responsible for the fire safety/structural defects (for example, if the landlord or its associated company was the developer);
- The landlord and its associated persons meet the contribution condition (net worth exceeding £2 million multiplied by the number of affected buildings). This does not apply to landlords of social housing, local authorities or a "prescribed person" (still to be defined);
- The value of the lease was below £325,000 in Greater London, or £175,000 anywhere else in the country; or
- The historic defects relate to cladding remediation.

Note: The Act does not relieve developer entities of their responsibilities upon a change of control. Care should be taken in a corporate acquisition of a company that is associated with a group that owns property with building safety defects. Attention should be given to both the possible liability that might attach but also to prohibitions on charging tenants service charges in relation to the rectification of relevant defects.

Capped Leaseholder Contribution

Where the above restrictions do not apply and the landlord is able to recover the costs of rectifying historic defects through the service charge, the amount recoverable will be subject to maximum caps,[5] which apply to the overall amount that can be levied from qualifying leaseholders toward the cost of non-cladding remedial works. Where landlords wish to recoup costs, they are required to provide the tenant with a certificate demonstrating that they are not (and are not associated with) the original developer and are not required to meet the costs of rectification by the Act. Past service charge payments can count toward these caps, and landlords must deduct any amount the tenant has paid toward remediation of a relevant defect since 28 June 2017 from the maximum capped amount. This is subject to a further annual limit to service charge levied, which cannot exceed one tenth of the overall cap over a period of 12 months.

Note: Building owners and landlords may seek to recover costs through the service charge only once they have pursued and exhausted all other avenues of potential funding.

Remediation Orders and Remediation Contribution Orders

The Act introduced two new types of court orders which allow recovery of contributions from landlords or original developers to remedy relevant defects in relevant buildings:

- **Remediation orders** require a relevant landlord[6] to remedy relevant defects within a certain time frame. While the scope of the defects covered by a remediation order is sufficiently wide to capture any defects arising from construction or conservation works in the last 30 years which have caused building safety risks, a remediation order does not offer a right of recovery against a contractor, designer or developer who has disposed of the property.
- **Remediation contribution orders** require a body corporate or partnership to contribute to the costs of remedying relevant defects. The order can be made against bodies corporate or partnerships that are a landlord of the building (whether at the time of the order or at 14 February 2022), a developer of the building or a person associated with the landlord or developer.

Both types of orders may be issued by the Property Chamber of the First-tier Tribunal upon application from an "interested person".[7]

Piercing the Corporate Veil

In the context of remediation contribution orders, a company is considered "associated" with another company if at a relevant time, a person was a director of both, one company controlled the other or a third company controlled both. Further, "control" also includes circumstances where a company has the power, directly or indirectly, to secure that the affairs of another company are conducted in accordance with its wishes.

This has significant implications. In short, the courts can compel a wide-ranging group of entities beyond the current and previous landlords, including building owners, developers and other companies linked with those entities to pay for the remediation costs. Remediation contribution orders are specifically designed to extend liability beyond those with direct contractual or statutory responsibility. It allows the corporate veil to be pierced (in accordance with the provisions of the Act), so that certain landlords, developers and building owners who are considered responsible for the construction of properties with safety issues, as well as any related entities (even if, in some circumstances, they have disposed of the properties) could find themselves held liable. Note that the Act also allows orders to be made against associated companies to contribute to the remediation cost liabilities of insolvent landlords (*see* "Meeting Remediation Costs Liabilities of an Insolvent Landlord" *on the next page*).

NEW/RENEWED CAUSES OF ACTION

Extended Limitation Period and Widened Scope Under the Defective Premises Act 1972 ("DPA")

Section 1 of the DPA imposes duties on those working on, or in connection with, the provision of a dwelling to work in a professional or workmanlike manner, to use proper materials and to see that the dwelling is fit for habitation when completed—in short, a duty to build new dwellings properly. As such, if a dwelling has not been built in a workmanlike or professional manner, with proper materials that make it fit for habitation, those who "took on work" (for example, developers and contractors) will be potentially liable to claims from homeowners.

The Act does two things in respect of the DPA. First, it extends the limitation period for claims brought under section 1 of the DPA (as detailed below).

Second, the Act inserts a new section 2A into the DPA which widens the scope of the duty in section 1 to include work done on an already-existing dwelling.

The duties under both sections 1 and 2 are owed to the original client for whom the work was done and each person who holds or acquires an interest in a dwelling in the building.

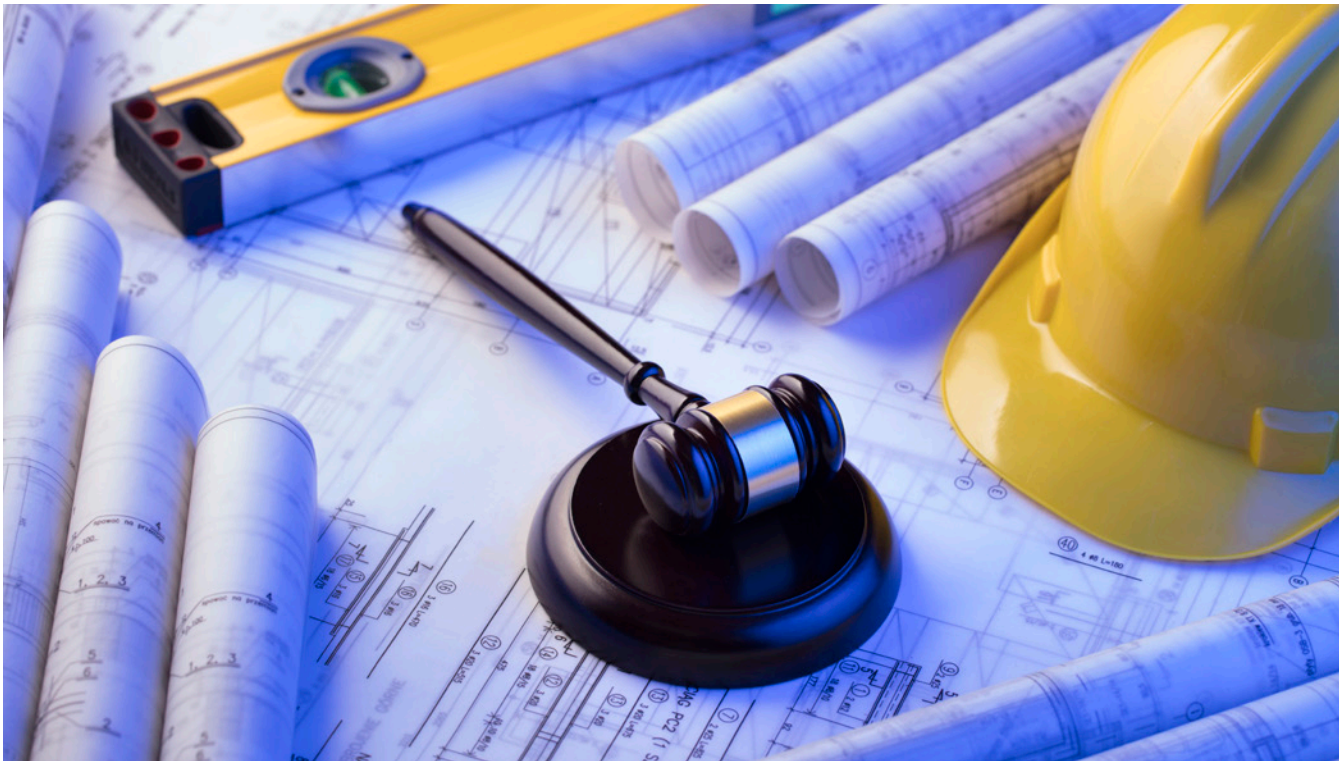
The new limitation periods for claims brought under both sections 1 and the new 2A (as of June 2022) are:

- Thirty years (from the date on which the right of action accrued) for claims relating to works completed before 28 June 2022; and
- Fifteen years for claims relating to works completed after 28 June 2022. All claims with a limitation period due to expire between 28 June 2022 and 28 June 2023 will have a limitation period extended to 28 June 2023.

Building Liability Orders

The Act gives the High Court the power to make a building liability order where it considers it "just and equitable" to do so. A building liability order is an order that a relevant liability[8] is also a liability of another (or a number of other) corporate entities which are, or have been, associated with the original body during the relevant period (being the period beginning when the works began and the making of the order). Where such an order is made, the claimant will be able to bring a claim against all parties subject to the order in joint and several liability to the original liable entity.

A company is considered "associated" with another if one company controls the other, a third company controls both or



one company has the power, directly or indirectly, to secure the affairs of another company in accordance with its wishes. Essentially, a building liability order allows the court to hold the parent or sister companies in a developer defendant's group, including those domiciled overseas, joint and severally liable.

This could have far-reaching implications for the construction industry, where it is common practice to use a subsidiary or a shell company, or a special purpose vehicle, and where companies subsequently undergo restructuring or collapse following the completion of a project. A building liability order changes the existing framework entirely by largely disregarding the separate legal personalities involved—associated companies can now be subject to a building liability order in circumstances where the High Court considers the result to be "just and equitable". At this stage, it is not yet clear in what circumstances such an order would be considered "just and equitable"; this is likely to be fact-specific, and how wide (or narrow) a building liability order will be applicable will need to be developed through case law.

Meeting Remediation Costs Liabilities of an Insolvent Landlord

The Act also provides means for meeting the remediation costs of an insolvent landlord. If, in the process of a landlord company being wound up, it becomes apparent that there are relevant historical or new defects to the building, and the company is under an obligation to remedy these defects or to make payments toward remediation costs, the court may make an order requiring a company or a partnership associated with the company to make a contribution to the company's assets, or to make payments toward costs for remediation. This provision can be retrospectively applied, and therefore can be used in situations where the winding-up of the company was commenced before the Act came into effect. Again, "associated" companies and their purchasers will become vulnerable to claims against the insolvent landlord company.

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ENDNOTES

1 A "residential unit" is a dwelling or any other unit of living accommodation.

2 A "qualifying lease" means a lease that was granted before 14 February 2022 (the "Qualifying Date") that is longer than 21 years of a single dwelling within a relevant building, under which the leaseholder is liable to pay a service charge. As of the Qualifying Date, the dwelling must have been the tenant's principal home, and the tenant did not own more than two dwellings in the UK. Superior leases are excluded from "qualifying lease".

3 A "relevant defect" is building defect which: (i) puts people's safety at risk from spread of fire or structural collapse; (ii) has arisen from work done to a building, including the use of inappropriate or defective products; (iii) has been created in the 30 years prior to the leaseholder protections coming into force (meaning the defect had to be created from 28 June 1992 to 27 June 2022); and (iv) relates to the following types of work: initial construction, converting a non-residential building into a residential building, and any other works undertaken by or on behalf of the building owner or management company.

4 A "relevant building" is a self-contained building, or a self-contained part of a building that is at least 11 metres in height (or has over five storeys) and contains at least two dwellings.

5 The caps are £15,000 for leases in Greater London, or £10,000 elsewhere. If the value of the lease falls between £1 million and £2 million, the cap is £50,000, and if the value of the lease exceeds £2 million, the cap will be £100,000.

6 A "relevant landlord" is defined as a landlord under a lease of the building or any part of it, who is required, either under the lease or by an enactment, to repair or maintain anything related to a relevant defect (e.g. a management company who is a party to the lease).

7 An "interested person" includes the BSR, the Secretary of State, the local authority, the local fire and rescue authority, any person with a legal or equitable interest in the relevant building or any part of it, or any other person specified in regulations.

8 Under the Defective Premises Act 1972 or section 38 of the Building Act 1984 or as a result of a building safety risk.

9 A "relevant building" is a building which contains two or more dwellings or educational accommodation and is 18m or more in height or seven or more storeys high.