New building safety requirements

RPC explores the Building Safety Act 2022 and the key considerations of service charge recovery.

The Building Safety Act 2022 (the Act) is the central plank in the government's response to the Grenfell Tower disaster. The Act was enacted with the aim of improving the standard of buildings in England and securing the safety of people in or about those buildings, with a particular focus on fire safety.

The provisions of the Act largely came into force on 28 June and have huge implications for those in the property industry; placing new duties on those who design, construct and manage buildings.

The Act also controls what costs can be recouped from tenants in relation to building safety measures and remediation works via the service charge, and we focus on the key considerations of service charge recovery below.

Active building safety management

The duty

The Act places particular emphasis on higher risk buildings (for the purpose of Part 4 of the Act which deals with building safety measures, higher risk buildings are buildings that are at least 18 metres or seven storeys high and contain at least two residential units). These buildings now require an 'accountable person' to undertake an assessment of the building safety risks at regular intervals and, if so directed, at the direction of the newly-formed building safety regulator. The accountable person must actively manage building safety risks, by taking reasonable steps to prevent risks from materialising and reducing the severity of any incidents that do occur.

The accountable person is the owner of the legal estate in possession of any common parts of a building (i.e. the structure, exterior or any part of the building provided for the benefit and use of the occupiers of the building) or a person who is under a repairing obligation in relation to any of the common parts. This is usually the landlord, and some buildings will have more than one accountable person.

Sounds sensible – but who pays?

The Act introduces a new section 30D to the Landlord and Tenant Act 1985 (LTA 1985), which specifically provides that building safety measures should be treated as a service that can be recovered from tenants under the service charge of a relevant lease (being a lease that is granted for a term of seven years or more of or including a dwelling in a higher-risk building and under which the tenant is liable to pay a service charge). Where the lease contains different measures for apportioning costs between tenants, the costs relating to building safety measures are to follow the apportionment method relating to the costs of insuring the building.

In general, a building safety measure would include:

- applying for the registration of a higher-risk building;
- applying for and displaying a building assessment certificate;
- preparing a safety case report and providing it to the regulator;
- establishing and operating a mandatory occurrence reporting system and providing that information to the regulator;
- establishing and operating a system for the investigation of complaints; and
- legal and professional fees, fees payable to the regulator and management costs in connection with taking a building safety measure.

However, costs incurred as a result of any penalty imposed or enforcement action taken by the regulator due to negligence, breach

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of contract, an unlawful act or in relation to special measures order proceedings are specifically stated to be non-recoverable.

The implied provisions in section 30D of the LTA 1985 cannot be contracted out of and any provision in a lease purporting to exclude, limit or modify those provisions will be treated as void.

Remediation of building safety risks

The duty

Under the Act, developers or landlords of relevant buildings may also be required to fund the remediation of what are termed 'relevant defects'.

A relevant defect under the Act is a defect in relation to a building arising as a result of anything done or not done, or anything used or not used, in connection with works which causes a building safety risk, being a risk to the safety of people in or about the building arising from the spread of fire or the collapse of all or any part of the building. Further, the Act specifies that the relevant defect can date back to 28 June 1992, which effectively retrospectively extends the limitation period for past defects to 30 years. Going forward, the limitation period under the Act will be 15 years from completion of the construction.

A relevant building is a self-contained building, or self-contained part of a building, that contains at least two dwellings of medium height or above (that is, at least 11 metres or five storeys high). A building is self-contained if it is structurally detached and part of a building is considered self-contained if:

- the part constitutes a vertical division of the building;
- the part could be redeveloped independently of the remainder of the building; and
- the relevant services provided to occupiers of that part are provided independently from the services to the remainder of the building or could be provided without carrying out any works likely to cause significant interruption in the provision of services to the remainder of the building.

A covenant or agreement is void insofar as it purports to exclude or avoid these provisions.

Sounds sensible – but who pays?

The Act specifically provides that the cost of remediation works which relate to relevant defects for which the landlord or an associate is responsible are not recoverable from tenants. A landlord or associate is responsible for a relevant defect if, in the case of an initial defect, they were, or were in a joint venture with, the developer or undertook or commissioned works relating to the defect, or in relation to any other relevant defect, they undertook or commissioned the works relating to the defect.

Recovery limitations and caps for qualifying leases

There are further limitations on the recovery of costs through a service charge for 'qualifying leases'. A qualifying lease is a long lease of a single dwelling in a relevant building under which the tenant is liable to pay a service charge. The lease must have been granted prior to 14 February 2022 and, at that date, the dwelling must have been the tenant's only or principal home and either the tenant did not own any other dwelling in the United Kingdom or the tenant owned no more than two dwellings in the United Kingdom, excluding the lease.

Any costs relating to cladding remediation will not be recoverable via the service charge under a qualifying lease. Furthermore, costs will not be recoverable as a service charge where the value of the qualifying lease

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on 14 February 2022 was less than £325,000 if the premises are in Greater London, or less than £175,000, if the premises are situated anywhere else.

Costs incurred in taking measures to remedy a relevant defect will also not be recoverable via the service charge under a qualifying lease where the landlord meets the contribution condition. The contribution condition is met if the landlord group's net worth as at 14 February 2022 was more than the number of buildings owned by the landlord's group at the qualifying time, multiplied by £2,000,000. This condition does not apply however to a local authority.

Finally, the Act also provides for caps on the maximum amount of costs recoverable via a service charge in circumstances that are not specifically carved out (as set out above). The maximum value permitted to be recovered will depend on the value of the qualifying lease and certain annual limits will also apply to help spread the costs. The effect being that recoverability is stepped, with greater recoverability possible for higher-value properties.

Landlord's duty to seek costs from elsewhere

In further support of tenants, the Act also extends the landlord's duty to take reasonable steps to obtain monies from third parties, such as under a policy of insurance, a guarantee or indemnity, or pursuant to a claim made against a developer or person involved in the design of the building or carrying out works to the building. The landlord's duty extends to a requirement to take reasonable steps to ascertain whether any grant is payable in respect of the remediation works and if so, obtain the grant as well as to take prescribed steps relating to any other prescribed kind of funding. Where any grant, funding or monies from third parties is obtained, the amount is to be deducted from the remediation costs and any service charge payable reduced accordingly.

Take-aways for in-house counsel at developers and landlords

The Act brings about the biggest change in building safety for 40 years.

The new requirements are expected to engender a culture of safer buildings, which is to be broadly welcomed. However, it should not be overlooked that the retrospective liability changes and restrictions on cost recovery for building safety measures and remediation works, in particular, will bring significant challenges for some developers and landlords. This is not only in terms of potential liability to meet costs or shortfalls in remediation funds themselves, but also in securing finance on buildings awaiting remediation. Not to mention the increased management burdens placed upon landlords by the Act.

Secondary legislation and guidance is awaited which may assist in understanding the full extent and application of the Act. For now, developers and landlords may wish to seek advice on residual liabilities in respect of developments completed since June 1992, and should be more careful than ever to keep full records of construction and safety data for the buildings they have developed or own. ■

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