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Forsters LLP



Ryan Didcock and **Sarah Heatley** are both senior associates in property litigation at **Forsters LLP**



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The recent fire at New Providence Wharf, only days after the government's enactment of the Fire Safety Act 2021, was a shocking reminder - if one was needed - that the cladding crisis is far from over, and that millions of lives across the country remain at risk due to fundamental fire safety defects in residential buildings. Perhaps the most significant issue to have affected the UK housing industry in a generation, it is only now that the implications are being fully realised by the property industry and the general public.

There has been extensive commentary from experts on the financial, legal and regulatory implications of the cladding crisis; yet frequently it is the practical steps for those directly affected which are overlooked and which are most immediately useful as properties remain to be remediated. Like many solicitors, we have been inundated with queries from concerned leaseholders, residents' associations, management companies, building owners and developers alike, all seeking to navigate their way through the confusion.

What should building owners or leaseholders do if they are alerted to potential fire safety defects?

1. It is vital that, wherever possible, leaseholders act together and/or with their landlord or building owner to seek to safeguard their position as quickly as possible

Leaseholders should enter into a form of participation agreement, or form (or join) a residents' association. Not only is this prudent to defray the cost of legal and professional advice, and to more readily secure third-party funding, a consolidated show of force is also more likely to encourage recalcitrant landlords and managing agents to take immediate action. To reiterate the title of this piece, time really is of the essence.

Now is a good time to check whether you have any legal expenses insurance, which might form part of your contents policy, and remind yourself of what surveying advice – if any – you received when the flat was purchased. In relation to relevant documentation, you should collate your sales contract and any new home warranty, or any other warranty, as well as any information received from your landlord and/or managing agents as to action that they might already be taking, or proposing to take, along with any indication of the likely costs and timeframes involved.

2. Obtain expert advice on the fire safety defects in the building and confirm whether any interim measures which might be recommended are really necessary

If it has not already been done, you should collate details of the defects and then take urgent advice from a lawyer and/or building surveyor with relevant experience.

Many leaseholders and building owners first became aware of potential fire safety defects in their properties as a result of the EWS1 process.

The process was implemented in December 2019 by the Royal Institute of Chartered Surveyors (RICS), UK Finance and the Building Societies Association (BSA), and was intended to end the crippling uncertainty about the method and outcome of the assessment of cladding and fire safety in high-rise residential buildings. The form was originally designed to apply to the external wall systems of buildings over 18m to ensure that they could be assessed to allow lenders to provide mortgages. Changes to government advice in January 2020 brought all residential buildings potentially within scope.

Problems with EWS1 certification

So far, so good. The difficulty, as is now well-known, is that the certification procedure itself is not uniformly followed by experts or by lenders. First, fire safety experts with adequate experience and appropriate professional indemnity insurance in this new field of assessment are few, and their interpretation of the regulations in assessing buildings is not always consistent. Second, some lenders may only be prepared to accept an 'A1' certificate (which means that no combustible materials are present) in order to lend, while others dealing with the same building might accept a 'B1' rating (which means that although combustible material is present, no remedial works are required). This leaves leaseholders waiting to sell in a difficult, stressful position. The only option for some, even where the fire risk is low according to the EWS1 certificate, is to wait until remedial works are completed so that any fire safety defects are removed and an 'A1' certificate is achieved. Third, we are aware of cases where EWS1 ratings have been given by fire engineers, but that rating has subsequently been downgraded when new evidence has come to light. There have also been reports of lenders insisting on EWS1 forms for buildings which, according to the RICS and government guidance on the subject, should not require an EWS1 form at all.

Reliance by building owners and leaseholders on EWS1 reports to inform the scope of remedial works required is inherently risky, as their sole purpose is to inform (typically risk-averse) lenders. Indeed, EWS1 forms and associated reports are often expressly stated not to form a 'risk assessment' as required by the main legislation governing fire safety in residential buildings, the Regulatory Reform (Fire Safety) Order 2005 as amended by the Fire Safety Act 2021 (RRO).

It is worth noting that the RRO now specifically includes the structure, external walls, common parts as well as the front doors of flats, and that these areas must now be included in a risk assessment carried out by a responsible person as defined by the legislation.

It is therefore important to take steps as soon as possible to have the building assessed by a competent fire safety expert, or to persuade one's landlord to arrange this as soon as possible after potential defects are discovered.

The demand for suitably qualified experts is such that this may take time. Once there is clarity as to the nature of any fire safety defects, the scope of the remedial works can more easily be ascertained, and it may also be possible to have the EWS1 rating amended.

The local Fire and Rescue Authority should also be contacted at this stage, as they have the power to enforce the RRO and will assess whether interim measures (such as waking watches) are required until remedial works are completed.

3. Check liability to pay for works and interim measures

Lease

It is important to review who will be responsible for any immediate investigation and remedial works. In the absence of avenues of recourse against third parties or to the government funds (see further below), it is likely that building owners will approach leaseholders to cover the cost of the works.

It is therefore important for leaseholders and building owners alike to ascertain what is demised to the individual leaseholders and how, if at all, this affects their responsibility for the parts of the building which are unsafe. In almost all cases, the external walls and fire safety of the building will be the responsibility of the freeholder and/or a management company.

Service charge

In turn, the leases are likely to provide that the cost of managing, repairing and/or maintaining the building can be recovered through the service charge mechanism. In addition, and of note here, the draft Building Safety Bill published last year, which may yet change, included a new category of fire safety specific service charges that would be implied into residential long leases.

It will be important to clarify what the service charge provisions relating to necessary works and services are. Will the service charge mechanism cover the cost of remediation (almost certainly), and how are management expenses properly apportioned under the terms of the leases? How will such costs be apportioned between leaseholders themselves and any commercial units? Does the building owner need to consult the leaseholders before implementing the work or service?

Third-party claims

Depending on the age of the building, claims may be possible in contract, tort or statute against the original developer and their building contractors, the professional team and/or sub-contractors, and this should be assessed alongside the lease provisions.

In addition, most owners of newly built or converted residential buildings have new home warranties from the likes of NHBC, LABC or Premier Guarantee which may respond in relation to the structure and/or building regulation compliance.

4. Explore whether government funds are available

The government has made much of the fact that it has made £5bn available to deal with the cladding crisis via various funds. It has also made clear on numerous occasions that the costs of dealing with fundamental fire safety defects should not be laid at the door of individual leaseholders.

Notwithstanding the Ministry of Housing, Communities and Local Government (MHCLG)'s [statement](#) on 13 May 2021, made in response to reports that its investment will be insufficient to cover the total cost of remediating unsafe buildings, many leaseholders are extremely concerned that the funds made available by the government may be insufficient to cover all buildings which require remediation. Indeed, certain buildings and certain types of remedial works are currently excluded from government relief in their entirety.

The government announced a new £1bn non-ACM cladding systems remediation fund in the March 2020 budget. The Building Safety Fund for the remediation of non-ACM cladding systems opened for applications on 31 July 2020, and at the time of writing is due to close on 30 June 2021 (see [here](#)).

When is funding available through the Building Safety Fund?

The Building Safety Fund (BSF) is available in respect of 'high-rise residential buildings'; that is, buildings which are over 18 metres in height to the floor level of the top storey (17.7 metres, to be precise, when taking account of the permitted tolerance).

Although the BSF is only available where leaseholders are responsible through the service charge mechanism to pay the costs of remedial works, it is the building owner who must make the application to the BSF. However, MHCLG is clear that building owners must keep leaseholders and residents informed of certain key milestones throughout the funding application and the remedial works.

The BSF applies to costs associated with the remediation of non-ACM cladding systems. Crucially, it does not seek to cover all fire safety defects which may be identified by an EWS1 or other fire safety inspection, even where those works are to be undertaken at the same time as non-ACM cladding rectification works. This means that many leaseholders will be left to foot the costs associated with the rectification of balconies (where not integral to a cladding system) or for missing fire breaks and cavity barriers. The BSF also excludes costs such as waking watches and interim fire safety measures (although the government has since introduced separate funds to assist with these costs).

Funds will only be available where building owners are able to demonstrate to MHCLG's satisfaction that they have sought recovery of costs through other means, such as insurance or third-party claims as set out above.

What if the building doesn't meet the requirements of the BSF?

One of the main criticisms levied by leaseholders is that the BSF is only available for buildings over 18m. However, the lack of clarity around the EWS1 process and lenders' insistence on inspections for buildings under 18m, which then result in remedial work being identified, has left leaseholders of buildings of under 18m trapped and unable to sell or remortgage their homes until remedial works are undertaken, often at their own cost.

To address this criticism, the government has announced a financing scheme to fund the costs of cladding replacement for certain buildings where the BSF requirements are not met. Under the scheme, which would see the government front the costs of cladding remedial works, leaseholders will be asked to pay back up to £50 per month. Details of the scheme remain to be announced.

In next month's column from Forsters LLP, Emily Holdstock will explain the process of making a claim under the Building Safety Fund, and MHCLG's requirements in relation to the procurement and reporting of remedial works.

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