Building safety: still under construction?

Douglas Maxwell looks to the year ahead & examines what more can be done to level up building safety

IN BRIEF

▶ As the government attempts to reset its approach to building safety, significant changes to the regulatory framework surrounding building and construction products are predicted in the months ahead.

On 10 January 2022, the government announced it was resetting its approach to building safety. Addressing the House of Commons, the Secretary of State for Levelling up, Housing and Communities, Michael Gove, stated: 'To those who mis-sold dangerous products, such as cladding or insulation, to those who cut corners to save cash as they developed or refurbished people's homes, and to those who sought to profiteer from the consequences of the Grenfell tragedy: we are coming for you' (HC Deb vol 706 col 283 (10 January 2022)).

The announcement came following a letter addressed to the 'Residential Property Development Industry' in which the Secretary of State offered a 'window of opportunity, between now and March', when the industry should:

- agree to make financial contributions this year and in subsequent years to a dedicated fund covering the full outstanding cost of remediating unsafe cladding on buildings between 11–18 m in height, estimated currently to be £4bn;
- fund and undertake all necessary remediation of buildings over 11 m that the industry has played a role in developing (ie both 11–18 m and 18 m+). Any work undertaken by developers themselves on 11–18 m buildings will reduce the total cost of cladding remediation that has to be paid for through the proposed 11–18 m fund; and
- provide comprehensive information on all buildings over 11 m which have historic fire safety defects and which the industry played a part in constructing in the last 30 years.

These threats were more or less repeated on 22 January 2022 when the Secretary of State wrote to the Construction Products Association.

The proposals were welcomed by many, including Dame Judith Hackitt, who chaired the Independent Review of Building Regulations and Fire Safety. Others have wondered whether they were merely high-level bluster designed to pressure companies to 'do the right thing' as the government seeks to quell disquiet. Susan Bright, Professor of Land Law, University of Oxford, has described the Secretary of State's new strategy as 'a version of the "carrot and stick" approach—wielding government power to incentivise the "right" behaviour'.

The question remains: what happens if the government's 'we are coming for you threat' turns out to be ineffective? By what other means can the cost of remediating unsafe buildings be shifted away from leaseholders? There are already signs that the Secretary of State's strategy will not achieve his desired outcome. Several prominent developers have emphasised that any further solutions to the building safety crisis must be proportionate, taking into account the significant commitments made by industry so far, and the involvement of other companies, sectors and organisations.

The polluter pays

Arguably the most significant amendment to the Building Safety Bill (the Bill) could be the application of the 'polluter pays' principle to fire safety defects. This would adapt the statutory framework in Part 2A of the Environmental Protection Act 1990 (EPA 1990). Section 78F, EPA 1990 gives enforcing authorities the power to identify 'contaminated land' and allocate responsibility for remediation to 'appropriate persons' who have 'caused or knowingly permitted' the substance(s) 'to be in, or under' the relevant land. If no person has, after reasonable inquiry, been found, the owner or occupier for the time being of the land in question is an appropriate person. To Lord Greenhalgh, the Government has 'effectively declared war on the polluters' who he defined as including developers and the manufacturers of flammable cladding and insulation (HL Deb vol 817 col 1039 (11 January 2022)).

However, the proposed 'polluter pays' amendment remains exceedingly light on technical detail. In theory, the amendment would set out a framework under which an 'assessor' would identify those who have breached building regulations at the time of construction. Where a breach is identified, those responsible would be considered the 'polluters' and therefore liable to pay for remediation.

The 'polluter pays' principle may offer new hope for leaseholders stuck in buildings with fire safety defects, but the proposals are subject to several significant limitations. Disputes will likely focus on the different interpretations of the building regulations held by industry and the government. Identifying and paying for suitable competent 'assessors' will be challenging. Building safety is complex, and it is not apparent whether there are enough suitably trained individuals with capacity who are free from conflicts of interest. As Giles Peaker of Anthony Gold noted, 'an assessor couldn't decide on a building they had previously been involved with, but they also couldn't decide on a building when they had previously been involved with a building with similar issues. This takes the available people down to a very small number indeed.'

The decisions of an assessor would, as a public body, be subject to judicial review. Many factors, including the difficulty of identifying a breach of building regulations, the need for expert evidence, and the significant amounts of money involved, means that it is highly probable that a large number (perhaps the majority)

of assessors' decisions would be challenged.

It has been proposed that the 'polluter pays' amendment should not be subject to a limitation period. This will certainly result in a challenge being brought under the right to property in Art 1 of Protocol No 1 (A1P1), as the building industry and insurers are subject to an effective retroactive interference.

The eventual scope of the 'polluter pays' amendment remains unclear. Further, the proposal does not adequately explain how companies will be traced and what procedure will be followed when companies have been dissolved. The threat of extending liability to parent companies, particularly companies based outside of the UK, will be challenged under company law, international investment treaties, and again, potentially, A1P1.

The biggest challenge for leaseholders is that, even if the 'polluter pays' principle is enacted, it will take years before it can offer any form of potential redress. Susan Bright has commented: 'My concern is that it is limited in scope as it applies to some (but not all) affected buildings, will delay remediation as polluters embrace a process they can game, and for many buildings there will still be no way forward. The appealing rhetoric may create a mirage of "job done", behind which the government can hide and it will take pressure off the government to come up with a scheme that will move at pace and be comprehensive.'

While it looks likely that a 'polluter pays' amendment will be introduced in the House of Lords, nothing is certain.

The Defective Premises Act 1972

The Secretary of State has also announced that 'we will introduce immediate amendments to the Building Safety Bill to extend the right of leaseholders to challenge those who cause defects in premises for up to 30 years retrospectively' (HC Deb vol 706 col 285 (10 January 2022)).

The Defective Premises Act 1972 (DPA 1972) imposes a duty on a person taking on work for (or in connection) with the provision of a dwelling to see that work is done in a 'workmanlike' or 'professional manner' so that it is 'fit for habitation'. Provision of a dwelling denotes '[…] work which positively contributes to the creation of the dwelling. That may include architects and engineers who prescribe how the dwelling is to be created, not just those who physically create it'; however, it does not apply to those who inspect buildings for the purposes of building control (*Lessees and Management Company of Herons Court v Heronslea Ltd and others* [2019] EWCA Civ 1423, [2019] All ER (D) 73 (Aug), at [40]) This duty applies to construction, but not a renovation or other alteration.

The Bill will extend the limitation period in s 1, DPA 1972 from six to 30 years. Sir Peter Bottomley has argued that it should go further, and that 'there should be unlimited liability both in time and in money' (HC Deb vol 706 col 289 (10 January 2022)). If the Bill is adopted in mid-2022, work completed up to mid-1992 will potentially become subject to a DPA 1972 claim, while other common law and tort claims retain a qualified six-year limitation period. This amendment will not start time running afresh for leaseholders whose claims have already been struck out on limitations grounds (eg, *Sportcity 4 Management Ltd and other companies v Countryside Properties (UK) Ltd* [2020] EWHC 1591 (TCC), [2020] All ER (D) 05 (Jul)). Those whose claims have been struck out will have to seek permission to bring a second claim under CPR 38.7.

During the second reading of the Building Safety Bill, Justin Madders MP stated that the extension of the limitation period would be a 'field day for the lawyers' (HC Deb vol 699 col 1060, 21 July 2021)). That is certainly a possibility. Again, challenges could be brought under A1P1. Companies face (among other things): the potential cost of claims; difficulties due to the passage of time; increased problems with professional indemnity insurance; and difficulties pursuing contribution claims due to a new disparity between the six-year limitation period for contractor contracts and claims under DPA 1972. However, the finding of a breach of A1P1 remains relatively rare. While these impacts of extending the limitation period may be significant, insurers and companies involved in the construction industry will find it difficult to demonstrate that they have been subject to an individual and excessive burden: especially when balanced against the rights of leaseholders.

Other measures

The Secretary of State announced new funding for the installation of fire alarms in high-risk buildings to end the high costs associated with 'waking watch' measures. The much criticised 'Building safety advice for building owners' has been withdrawn, and the government has published 'Collaborative procurement guidance for design and construction to support building safety', written by David Mosey, Professor of Law, King's College London.

Many other related reforms remain on the horizon. For example, clause 57 of the Building Safety Bill seeks to impose a new levy on applications for building control approval in respect of higher-risk buildings, and a new 4% residential property developer tax will apply to the largest residential property developers on the profits they make. Other proposed measures include denying certain companies access to the Help to Buy scheme and other public procurements, and using unspecified 'planning powers'.

The government's role

The Secretary of State has asserted that: 'Those who knowingly put lives at risk should be held to account for their crimes', and that those who 'evade their responsibilities […] exhibit the unacceptable face of capitalism' (HC Deb vol 706 col 297 (10 January 2022)).

However, this rhetoric conveniently ignores the government's own hand in the building safety crisis. As construction lawyers and industry are well aware, the regulations were (and remain in places) unclear. There is too much room for doubt that building professionals can exploit or misunderstand. As Dame Judith Hackitt concluded in May 2018: 'The current system of building regulations and fire safety is not fit for purpose'. The Secretary of State is no doubt aware of, and seeks to detract from, the failures of successive governments which will likely be further illuminated at the Grenfell Tower inquiry in 2022.

Matthew Bell, an Associate Professor and Co-Director of Studies for Construction Law at Melbourne Law School, has stated that we do not need to wait for the Grenfell inquiry phase 2 report to state that the building safety regime has become incapable of preventing residential construction defects. In fact, Bell views the proposed reforms as recognition that 'effective regulation has never been a mission that can be achieved solely by government imposing onerous rules. Rather, government, industry and the broader community have always had a symbiotic relationship in construction procurement, made all the more complex by each party having diverse and often conflicting interests'.

To Bell, the government's 'exhortation towards a collaborative approach with industry is a justifiable regulatory lever to deploy in seeking to accelerate rectification measures'. However, the threats of intervention must be credible.

Conclusion

The regulatory framework relating to building and construction products remains subject to important change. It is essential to stay abreast of the most recent developments as the Secretary of State's proposals remain exceedingly light on detail: 2022 is going to be a significant, if challenging, year. NLJ

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