Fire Safety in Residential Blocks

Where are we now, and what are the emerging issues we will be litigating over the next 12 months?

Depressingly, more than 3 years after the devastating wake-up call of Grenfell, large numbers of high-rise blocks in England and Wales still contain combustible materials on their facades and or continue to fail to secure proper compartmentation between flats[1]. I have been advising with respect to various issues arising out of this at a large number of developments, and it is fair to say that some common themes arise. In the hope it will assist others, I wanted to share some of that experience.

Reasons for delay in remediation

There are many (often complex) reasons why many affected blocks - probably a majority - still haven't been remediated. They include:

- The complex, intrusive and expensive investigatory work required to establish the shortcomings with a particular block. As a rule of thumb, the works required are almost always more extensive than hoped; indeed, one does wonder sometimes whether building inspectors were ever attending site when many residential blocks were constructed over the past 15-20 years[2].

- The need to liaise with a number of different bodies (fire service, local authority, residents, landlords, fire consultants etc.) to agree what remedial work is required.

- Difficulties in funding works, particularly where blocks are lessee owned with no access to external funding.

- Internal paralysis on the board of management companies (where lessee owned / controlled) – directors (being also lessees) being conflicted in the face of committing to works likely to cost tens of thousands of pounds per lessee.

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[1] Compartmentation: Ensuring that fire and smoke does not pass from one flat to another (or to / from common parts) in the event of a fire is fundamental to modern building standards, and facilitates the fact that blocks are designed for a 'stay put' policy in the event of fire. Where compartmentation is breached, remaining in your flat in the event of a fire is generally no longer appropriate, meaning some blocks will temporarily require a full or partial evacuation in the event of fire; in order to do this, temporary fire alarms suited to this purpose must sometimes be installed, and / or 'fire marshals' must be employed to manually oversee evacuation (known / referred to as 'mitigating measures').

[2] Unfortunately, claims against building inspectors are exceptionally difficult to bring – whether in negligence or under the Defective Premises Act 1972 (see, for instance, Herons Court v Heronslea Ltd / NHBC [2019] EWCA Civ 1423). Even where fraud can be shown, a claim will be difficult: Zagora Management Ltd v Zurich Insurance Plc [2019] EWHC 140 (TCC).

- Confusing and evolving commitment from central government to funding works – the government eventually committing to funding the removal of one particular type of cladding (the more dangerous form of ACM cladding, *per* Grenfell), then earlier this year, introducing a new fund for removal of other combustible materials (limited to £1bn, which will almost certainly be insufficient) – resulting in people holding off from undertaking works.

- A supply issue, in that there are only so many contractors and consultants with appropriate experience to undertake the necessary surveys and works.

- The complexities of pursuing third parties, such as warranty companies and building contractors involved in the original construction of blocks[3] – and a desire to exhaust those routes before incurring costs to the service charge fund.

- General burying of heads in sand!

Who is to pay?

Whilst the government has been attempting to pass the buck for remedial costs on to private landlords, the reality is that the landlord is almost never any more culpable for the defects than the leaseholder (having acquired the reversion after construction) and has a much smaller financial interest in the block. The reality also is that in the vast majority of instances, leases place responsibility for addressing fire safety related issues (including interim measures) on to the landlord, but subject to an obligation on the part of leaseholders to pay a proportion of the cost of the same via their service charge[4].

This, of course, has become an understandable battle ground – who is to pay. As I say, between landlord and tenant, the answer will usually be 'the tenant' – but that will not always be the case.

Litigation trends in fire safety for 2020/2021

So, as property litigators, what of those battles? What are the key legal issues in this area likely to be over the next twelve months? Based on what I am seeing, and the general progress of works, here is my prediction:

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[3] These claims are also often very difficult to bring save where blocks are recently constructed, as (i) claims under the DPA72 are often statute barred (a 6 year period applying), (ii) developments are often constructed by SPVs, (iii) the landlord may not have the benefit of any collateral warranty, and (iv) leaseholders are often not original owners of properties, so do not have any contractual relationship with developers. Sometimes, the most effective way to get developers to pay for remedial work is through adverse publicity rather than reliance on the law.

[4] Whilst there are a good number of examples of this now, see for instance the first instance decisions with respect to Cityscape (https://decisions.lease-advice.org/app/uploads/decisions/act85/12001-13000/12667.pdf), Fresh Apartments (https://www.lease-advice.org/files/2018/01/DOC019.pdf), and Green Quarter (https://www.lease-advice.org/wp-content/blogs.dir/4/files/2018/08/greenquarter_july2018_tribunal_dec.pdf)

- Some of the more poorly drafted leases are yet to be litigated over – landlords having focussed on the 'easy wins' to get works going where they can.
    - Whilst most fire defective buildings have been constructed since 2000, some older blocks (and thus older leases) are also affected – particularly where improvement / conversion works have been undertaken to older blocks e.g. over-cladding projects.
    - In older leases, service charge and repair provisions are often simple. This means there is often no reference to statutory compliance, and no provision for rebuilding / renewing / improving blocks; sometimes, the landlord's obligation is simply to repair. We are likely, therefore, to see some interesting attempts to re-open the often-vexed question of what is a 'repair'[5].
    - Again, in older leases, one must often fall back on either 'sweeper clauses' (historically not favoured by the Tribunal, but in the context of fire safety and unforeseen costs, appear to cover fire safety costs in the right circumstances), or even simply on an obligation to 'insure *and keep insured* the block'[6].
    - Some leases specifically provide that the cost of remediating construction defects, or the cost of the 'initial construction', cannot form part of the service charge. The bounds of such exclusions is yet to be found.
- There will be a substantial increase in applications for dispensation[7] from the need to consult, given the government's likely requirement (as a condition of any funding it provides) that works are commenced or completed by a set time.
    - In particular, the fact that there is a limited number of companies with the capability to do the required works means that landlords may need to be ready to commit to a contract quickly.
    - Thought will need to be given to what form of truncated consultation might be appropriate where the inability to properly consult is foreseen in advance of works.

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[5] A real issue with cladding is that it may not have deteriorated from some earlier state; it was always defective. The same issue arises with compartmentation issues – if there has always been a gaping hole around all the services running through a block, is the block 'out of repair'? See Quick v Taff Ely BC [1986] QB 809, Holding and Management Ltd v Property Holding and Investment Trust Plc [1990] 1 All ER 938, Ravenseft Properties Ltd v Davstone [1980] QB 12 and Welsh v Greenwich LBC (2001) 33 HLR 40 as a starting point in this context.

[6] As I have argued, with success, in several cases e.g. Fresh Apartments at [63-65] (https://www.lease-advice.org/files/2018/01/DOC019.pdf).

[7] See s.20ZA Landlord and Tenant Act 1985 and Daejan v Benson [2013] UKSC 14. Whilst Daejan is very favourable to landlords, with a near presumption in favour of dispensation in most instances, complacency is to be avoided. Dispensation can always be made subject to conditions, at the expense of the landlord – for a recent example, see Aster Communities v Chapman [2020] UKUT 177 (LC) (https://www.bailii.org/uk/cases/UKUT/LC/2020/177.html).

- As works come to be completed, applications by both landlords and leaseholders for a determination of the final sums to be paid by leaseholders will come to be made. These applications are likely to be complex.

    - Disputes as to whether or not landlords have adequately pursued recourse against third parties or other funding sources will be common.

    - Failure to consult will be a common issue.

    - Works may be complex, with challenges requiring expert input.

    - Where expensive mitigating measures have been put in place (such as fire marshals), arguments will arise as to whether remedial work should have commenced sooner so that such costs would have been incurred for a shorter period of time.

Beyond 2021 – what is on the horizon?

A few weeks ago, the government published its Building Safety Bill[8]. As drafted, the provisions of the Bill will apply to a large number of buildings with 6 storeys or more (or a storey with a floor slab over 18m from ground level – 'higher risk buildings').

Whilst in its current form it does nothing to protect leaseholders from further costs – indeed, it will firmly increase the costs of managing buildings[9] and thus costs for leaseholders, albeit in the interests of ensuring residents are safe – it does address some shortcomings. This will particularly be so where older leases are in place. Sometimes, leases can stand in the way of landlords 'doing the right thing'[10] for leaseholders.

I will watch the progress of the Bill with interest. So should you.

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[8] https://www.gov.uk/government/publications/draft-building-safety-bill

[9] Production of a 'safety case report' and appointment of a 'Building Safety Manager' being examples of new costs to be incurred.

[10] A common issue is the lack of any right for a landlord to enter demised parts to install a common fire alarm – often much cheaper than incurring the costs of fire marshals for many months or years. Providing express rights of access to undertake such building safety works is to be welcomed, if it makes the final cut.