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"Cladding: An end to the crisis?"

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An introduction

1. Just after midnight on 14 June 2017, a fridge-freezer in a North Kensington apartment block malfunctioned. 250 firefighters - equipped with 70 fire engines - took just over 60 hours to extinguish the fire. When they finished, 72 people were dead. 70 were injured. 223 had run for their lives. And all had fallen victim to the deadliest structural fire since Piper Alpha (1988).

2. But Grenfell Tower was just one of 441 tall buildings adorned with a decorative sandwich accelerant. It is produced when two coil-coated aluminium sheets are fused with a polyethylene core. It is known as ACM: aluminium composite material.

3. The offending ACM panels must now be replaced. The focus has now shifted to identifying how the considerable costs of that exercise should be apportioned.[1]

The legislation

4. How buildings came to be constructed with ACM panels stems from the building regulations in force at the time.

5. Paragraph B4(1) of Schedule 1 to the Building Regulations 2010 stated that *"[t]he external walls of the building shall* ***adequately*** *resist the spread of fire over the walls … having regard to the height, use and position of the building."*

6. Guidance for compliance with paragraph B4(1) of Schedule 1 to the Building Regulations was provided by Approved Document B, Fire Safety 2006,2 which stated that *"[t]he external envelope of a building should not provide a medium for fire spread if it is likely to be a risk to health or safety. The use of combustible materials in the cladding system and extensive cavities may present such a risk in tall buildings."*

7. In relation to the suitability of insulation materials, the regulations provided that *"[i]n a building with a storey 18m or more above ground level any insulation product, filler material (not including gaskets, sealants and similar) etc. used in the external wall*

[1] All thoughts are my own. No specific advice is given, nor are the contents of this paper to be relied upon.

construction should be of limited combustibility (see Appendix A)"

8. The problem was, as identified by Sir Martin Moore-Bick during the subsequent enquiry, that Regulation B4(1) had not been complied with:

> *"26.4 … there is compelling evidence that requirement B4(1) was not met in this case. It would be an affront to common sense to hold otherwise. Although in another context there might be room for argument about the precise scope of the word* ***"adequately"****, it* ***inevitably contemplates that the exterior must resist the spread of fire to some significant degree appropriate to the height, use and position of the building****. In this case … it is clear that the walls did not resist the spread of fire. On the contrary, they promoted it …"*

9. A large number of parties are affected by that seismic decision.[2] The most immediate impact has been on the freehold/lessor owners, who have tended to recover the costs by enforcing the terms of the long residential leases, or asking the state.

The leases

10. The content and form of leases vary widely. A lessee's primary liability to contribute towards the costs of cladding works depends on the construction of the particular lease in question. Typically, lessees have covenanted with their landlord to observe and perform the tenant covenants, as defined by a schedule, which usually include the costs incurred in repairing the building, complying with notices served by local authorities, and so forth.

11. Typical examples are:

> *"renewing and otherwise treating as necessary … the Building and every part thereof in good and substantial repair, order and condition"*

> *"executing such works as may be necessary for complying with any notice*

[2] building owners, leaseholders, freeholders, building companies, contractors, sub-contractors, architects, façade consultants, building inspectors, management companies, insurers: warranty providers, professional indemnity insurers.

served by the Local Authority in connection with the Estate or any part thereof as the same are not the liability of or attributable to the tenant of any Apartment"

"complying with the requirements and directions of any competent authority and with the provisions of all statutes and all regulations … relating to the Estate in so far as such compliance is not the responsibility of the Lessee of any of the Apartments"

"the maintenance and proper and convenient management and running of the Estate including … any expenses incurred in rectifying or making good any inherent structural defect in the Buildings or any part of the Estate"

12. Unsurprisingly, the considerable demands made under such covenants have been the subject of proceedings in the F-tT. While not binding authority, it is useful to consider how similar applications have been treated.

13. In *Citiscape*,[3] the F-tT considered an application by a management company under s.27A of the Landlord and Tenant Act 1985 for determination of the leaseholders' liability to contribute towards the costs of replacement cladding and cost of waking watch.

14. The leaseholders had covenanted to pay proportion of the "Maintenance Expense". That was defined as "the moneys actually expended or reserved for periodical expenditure by or on behalf of the Manager or the Lessor at all times during the Term in carrying out the obligations specified in the Sixth Schedule". The Sixth Schedule included sweeping up clauses designed to capture any items not specifically dealt with in the lease. The obligations in Sixth Schedule included (in Part A) "Inspecting rebuilding cleaning renewing or otherwise treating as necessary and keeping the Maintained Property comprised in the Block and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts therefore."

[3] LON/00AH/LSC/2017/0435

15. Additionally, there were more general provisions (in Part D) including a further sweeping up clause in which provided for "[a]ll other and reasonable property expenses (if any) incurred by the Manager in and about the maintenance and proper and convenient management and running of the Development including in particular and without prejudice to the generality of the foregoing any expenses incurred in rectifying or making good any inherent structural defect in the Building(s) or any other part of the Development..."

16. On the cladding costs, the F-tT held:

> *"[58] ...The words "renewing or otherwise treating as necessary" go beyond simple repair. Equally the words "in good and substantial repair order and condition" indicate an obligation that goes well beyond simple repair: if it did not the words "order and condition" in the phrase would be superfluous. We do not see how the two blocks can be said to be "in good and substantial repair order and condition" whilst the cladding remains a fire risk. Finally, and subject to Mr Ede's point considered below, the reference to "rectifying or making good any inherent structural defects" in paragraph 15 appears to us to encompass the removal of the defective cladding and its replacement with fire resistant cladding and as we pointed out at paragraph 44 if the manager is obliged to do the work the tenants are obliged to contribute to the cost."*

17. As to the waking watch, the F-tT held that the costs were recoverable in various ways:
    a) under Part D of Sixth Schedule *("complying with the requirements and directions of any competent authority...."*);
    b) because the Fire Safety Guidance Note issued by the London fire Brigade fell within the ambit of *"the requirements and directions of any competent authority"*;
    c) because the waking watch cost was a *"reasonable and proper expense ... incurred by the manager in and about the maintenance and proper and convenient management and running of the Development"*, and, had it been necessary; and,

d) the F-tT would have held that the waking watch cost were properly incurred in *"providing and paying such persons as may be necessary in connection with the upkeep of the property"*.

18. In the subsequent "Green Quarter" case,[4] the F-tT concluded that cladding replacement and waking watch costs were recoverable under the 'sweeping up' clause for works of *"general benefit of the apartments in the building"* and works or services deemed necessary by the landlord in accordance with *"the principles of good estate management"*.

19. It seems, therefore, that opposing the landlord's right to recover the cost may be an uphill struggle.

20. *Exceptions?* While seldom done, it is worth reading the lease from cover-to-cover(!):

a) Express or implied exclusions:

"It is agreed and accepted by the Landlord that the Building and Estate Service Charge shall not include any costs arising out of agreements entered into pursuant to section 106 of the Town and Country Planning Act 1990 or other similar statutory agreements, or obligations and conditions contained in planning permissions or otherwise relating to the construction of the Estate and such charges shall not be passed on to or payable by the Tenant."

Compliance with the Building Regulations is inextricably linked to the construction and, as such, a very compelling argument can be made against recoverability by the landlord.

b) Contingent obligations:

"the maintenance and proper and convenient management and running of the Estate including … any expenses incurred in rectifying or making good any inherent structural defect in the Buildings or any part of the Estate except and

[4] MAN/OOBR/LSC/2018/0016

so far as the costs thereof is recoverable under any insurance policy for the time being enforced or from a third party who is or who may be liable therefor"

- this is unlikely to prevent interim demands being raised, so wont present an immediate benefit;
- viewed in pure contractual terms, the landlord is entitled to raise a demand for whatever sum is necessary to meet the improvements, provided that the expenditure in issue is reasonably and properly incurred by the landlord in connection with the proposed works: *Knapper v Francis* [2017] UKUT 3 (LC), [2017] L. & T.R. 20.
- that right is subject to the statutory limitations contained in s.19(2) of the Landlord and Tenant Act 1985 which provides that "[w]here a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."
- whether an amount is reasonable as an advance payment under s.19(2) must be assessed in the light of the specific facts of each case. It encompasses any number of circumstances: *Parker v Parham* [2003] 1 WLUK 36. Considerations to be taken into account are the time at which the Landlord is likely to become liable for the costs and how certain the amount of costs is.
- the words "may be" may operate as a bar;
- however, if the lessees can show that there was a perfectly good cause of action that wasn't pursued when it ought to have been, that may be sufficient reasons to argue the costs were not reasonably incurred: s.18 LTA 1985.

21. In general, the prospects for leaseholders escaping their contractual liabilities for costs look grim. Inevitably, attention has turned to the liability of third parties.

Liability of third parties

22. There are many potential defendants. Building owners, developers, contractors, sub-contractors, architects, façade consultants, building inspectors, management companies. Each will turn on its own facts.

23. For example, where a lessee purchased off-plan, their contract may have warranted that the developer would comply with building regulations. In response to the allegation of breach, the developers may then turn and sue the architect, who may turn and sue the contractors, and so on and so forth.

24. It is almost inevitable that the next few years will be dominated by multi-party litigation as the courts attempt to settle questions of limitation, liability, causation and so forth. It remains to be seen how many claims the Fund and the New Homes warranties will satisfy. Lessees would do well take the low-hanging fruit or a point under their leases if they can.

Warranties

25. Flats in "new" developments (i.e. redeveloped/constructed in the last 10 years) were invariably sold with the benefit of a 'New Home Warranty'. They are typically provided by one of three entities:
    a) National House-Building Council;
    b) Local Authority Building Control Warranty; and,
    c) Premier Guarantee.

26. Only leasehold owners have both the benefit of the policy and the basis for a claim. It is essential that leaseholders check the availability of cover, particularly as:
    a) The policies usually run for 8 - 10 years;
    b) There is no need for a contractual relationship with the developer, as they are assigned to successors in title;
    c) It is only the *post*-14 June 2017 policies that have tended to treat cladding defects as a distinct class of risk; those granted prior to the Grenfell fire simply rolled cladding in as part of the general cover against structural defects; and,
    d) They represent the most fertile and cost-effective way of meeting large service charge demands.

27. There is some anecdotal evidence to suggest that solicitors have experienced mixed success. Some have experienced little resistance, whereas others have had claims rejected because of the way "damage" has been defined. An analysis of such claims will form the basis of a future webinar.

Architects and Building Inspectors

28. The Defective Premises Act 1972 is likely to be a prominent feature of any litigation. A claim may, in principle, be made against the architect. Section 1 of the Defective Premises Act 1972 provides as follows:

> *"(1) A person taking on work for or* ***in connection with the provision of a dwelling*** *(whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—*
>
> *(a) if the dwelling is provided to the order of any person, to that person; and*
>
> *(b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling; to see that the work which he takes on is done* ***in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation*** *when completed."*
>
> *"(2) A person who takes on any such work for another on terms that he is to do it in accordance with instructions given by or on behalf of that other shall, to the extent to which he does it properly in accordance with those instructions, be treated for the purposes of this section as discharging the duty imposed on him by subsection (1) above except where he owes a duty to that other to warn him of any defects in the instructions and fails to discharge that duty."*
>
> "..."
>
> *"(4) "A person who—*
>
> *(c) in the course of a business which consists of or includes*

providing or arranging for the provision of dwellings or installations in dwellings; or

(d) in the exercise of a power of making such provision or arrangements conferred by or by virtue of any enactment;

arranges for another to take on work for or in connection with the provision of a dwelling shall be treated for the purposes of this section as included among the persons who have taken on the work."

29. An architect is unlikely to fall within the s.1(2) exception; (s)he is the person with the final say in creating the Building as one "unfit for human habitation", assuming that is a conclusion supported by expert evidence.

30. By contrast, a building inspector (or one so approved) cannot be pursued under the DPA 1972. In *Lessees and Management Company of Herons Court v Heronslea Ltd and others* [2019] 1 WLR 5849; [2019] EWCA Civ 1423 the Court of Appeal held that the inspector did not make a positive contribution to the creation of the dwelling for the purposes of the Act.

31. The building inspectors (and possibly the architects) *may* be liable in <u>negligence</u> to third parties. Much depends on the facts, the damage, and the responsibility assumed.

32. Of the two, the building inspector is perhaps more vulnerable to a claim based on an assumption of responsibility. Arguably a duty of care arose in circumstances where the purchasing lessees relied on the building control certificate of completion when electing to commit to the purchase of their flat. The inspector might be said to have failed to act with reasonable skill, care and diligence, particularly if the duties were to be performed in line with Code of Conduct for Approved Inspectors.

33. <u>Defences?</u> Allegations of negligence are normally met with a defence which seeks to argue that the defendant acted in accordance with a practice that was accepted as proper by a responsible body of persons skilled in that area: *Bolam v Friern Barnett Hospital Management Committee* [1957] 1 WLR 582.

34. One particular problem for claimants stems from the unfortunate fact that almost every professional had misapplied the Building Regulations. However, arguably the inspector cannot deploy the *Bolam* test shield where it can be shown that the professional opinion reached was not capable of withstanding logical analysis: *Bolitho v City and Hackney Health Authority* [1998] AC 232. In other words, where it was not reasonable and responsible to follow the herd.

35. Limitation. The damage arguably occurred when the building inspector issued the completion certificate, or when the architect signed off on the development.

36. That may have been many years ago. Until recently, pursuant to s.14A of the LA 1980, the limitation period was three years from date of knowledge. Given that the Grenfell Fire was on 14 June 2017, limitation period were due to expire shortly after 14 June 2020.

The remediation funds

37. There were two primary private sector options established:
    a) The Private Sector ACM Cladding Remediation Fund
    b) The Building Safety Fund for remediation of non-ACM cladding systems

    (there is also a Social Sector ACM Cladding Remediation Fund).

38. The deadlines for applications expired in December 2019 and July 2020 respectively. Most will now know if an application has been made. In respect of the ACM Fund, it excludes:
    a) non-residential buildings;
    b) buildings under 18m in height;
    c) non-ACM cladding systems or other structural works which are not directly related to the remediation of unsafe ACM cladding systems;
    d) buildings qualifying for by the Social Sector ACM Cladding Remediation Fund;
    e) buildings where a warranty claim for the full costs of remediation has been accepted;
    f) costs which would not otherwise be recovered from residential leaseholders through the service charge provisions in their leases.

Government Intervention

39. On 10 January 2022, the Secretary of State for Levelling Up, Housing and Communities, Michael Gove, wrote to the residential property developer industry requiring developers to agree a plan of action by early March 2022 so that they:
    a) Make financial contributions to a dedicated fund to cover the full outstanding cost of remediating unsafe cladding on 11-18 metre buildings, currently estimated to be £4 billion.
    b) Fund and undertake all necessary remediation of buildings over 11 metres that they have played a role in developing.
    c) Provide comprehensive information on all buildings over 11 metres that have historic safety defects and that they have played a part in constructing in the last 30 years.

    DLUHC: Government forces developers to fix cladding crisis (10 January 2022).

The Building Safety Act 2022

42 On 26 April the House of Lords passed the Common's further amendments to the Building Safety Bill, and made no further changes. The Bill received Royal Assent on 28 April 2022**.** The majority of the Act is not yet in force.

43 Some notable features of the Act are as follows:

<u>Consultation: remediation works</u>

44 The Landlord and Tenant Act 1985 has been ameneded to include a new s. 20D Limitation of service charges: remediation works

"(2) The landlord must—

(a) take reasonable steps to ascertain whether any grant is payable in respect of the remediation works and, if so, to obtain the grant;

(b) take reasonable steps to ascertain whether monies may be obtained from a third party in connection with the undertaking of the remediation works and, if so, to obtain monies from the third party;

(c) take prescribed steps relating to any other prescribed kind of funding.

(3) In subsection (2)(b) the reference to obtaining monies from a third party includes obtaining monies—

(a) under a policy of insurance;

(b) under a guarantee or indemnity;

(c) pursuant to a claim made against—

(i) a developer;

(ii) a person involved in the design of the building or of works to the building; or

(iii) a person involved in carrying out works in relation to the building.

(4) Where any funding of a kind mentioned in subsection (2) is obtained, the amount of the funding is to be deducted from the remediation costs (and the amount of any service charge is to be reduced accordingly).

(5) In the case of a failure to comply with subsection (2), a tenant may make an application for an order that all or any of remediation costs are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by—

(a) the tenant, or

(b) anyone else specified in the application.

Extension of limitation periods

45 Under the Act, the periods under the Limitation Act 1980 are extended to 15 years, in respect of claims for:

(i) dwellings unfit for habitation under section 1 of the Defective Premises Act 1972; and

(ii) breaches of the Buildings Regulations under section 38 of the Building Act 1984

New construction product cause of action

46 The BSA introduces a new cause of action that will enable claims to be brought against construction product manufacturers and suppliers where a product has been mis-sold; is found to be inherently defective; or there has been a breach of existing construction

product regulations. If this contributes to, or causes a dwelling to become 'unfit for habitation' under this new cause of action, a civil claim may be brought.

47 Significantly, this is subject to a *retrospective* 30-year limitation period, applicable to cladding products only, and a 15-year prospective period that will apply to all construction products.

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49 Again, this is subject to a *retrospective* 30-year limitation period, applicable to cladding products only, and a 15-year prospective period that will apply to all construction products.

Conclusion

50 While leaseholders' liability has not been extinguished – particularly in relation to buildings under 11m in height – the BSA appears to substantially shift the financial burden away from them.

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