THE BUILDING SAFETY ACT 2022: Key Provisions

1. Introduction

1.1 The Building Safety Act was granted Royal Assent and passed into law at 1.38pm on 28 April 2022. The Act which was first introduced as a Bill to Parliament on 5 July 2021, is a central element of the Government's response to the Grenfell disaster of 14 June 2017. It is divided into 6 Parts, with the major substantive reforms set out in Parts 2 to 5, and contains (as section 1(1) announces) '*provisions intended to secure the safety of people in or about buildings and to improve the standard of buildings.'*

1.2 The Bill was the subject of extensive debate and amendment in the course of its passage through Parliament, particularly in the House of Lords, and as a result has been through a number of significant mutations. The final document is a lengthy Act running to in excess of 260 pages (published on 13 May 2022), that returns very much to the form promoted by the Government but with a few notable exceptions as highlighted below. Whilst the Act no doubt repays close reading, by way of an overview you will want to be aware of the following provisions.

1.3 Firstly, in terms of commencement, various general provisions (e.g. definitions, fees, interpretation etc.) came into force immediately together with powers to make regulations under Parts 2 and 4, other sections including significantly sections 116 to 125 and Schedule 8 will come into force two months thereafter (28 June 2022) and the remainder of the Act on such day/s as the Secretary of State may by regulations appoint. Turning then to the substantive Parts of the Act.

2. Part 2: The Building Safety Regulator

2.1 This Part creates a new Building Safety Regulator ('BSR'), charged with certain specific objectives, guided by given regulatory principles, and subject to a series of duties with regard to building safety. Those objectives are (a) to secure the safety of people in and around buildings and (b) to improve the standard of buildings. As for the governing principles, in the exercise of its regulatory activities the BSR must act in a way which is transparent, accountable, proportionate and consistent, and target its regulatory activities only at cases where action is needed.

2.2 Consistent with these objectives and principles the BSR's primary duty (under section 4) is to facilitate building safety in higher-risk buildings.' Under this duty, the BSR '*must provide such assistance and encouragement to relevant persons as it considers appropriate with a view to*

facilitating their securing the safety of people in or about higher-risk buildings in relation to building safety risks as regards those buildings'. Each phrase is subject to separate definition.

2.3 Thus, 'relevant persons' comprise (see Section 4) residents of higher-risk buildings, owners of residential units in such buildings, persons who are accountable persons within the meaning of Part 4 (notably, proposals for the appointment of a 'building safety manager' in various versions of the Bill were dropped in favour of 'accountable persons') and persons on whom duties are imposed under paragraph 5B of (new) Schedule 1 to the Building Act (see section 34). Whilst 'higher risk buildings' in this context are both those as defined under Part 4, section 65 of the BSA (i.e. 18m or more in height or having at least 7 storeys and containing at least 2 residential units) and as defined for the purposes of the Building Act 1984 (i.e. 18m or more in height or having at least 7 storeys, see section 31).

2.4 In addition, the BSR is subject to duties to keep the safety and standard of buildings under review (under section 5), will be required (under section 6), again in somewhat amorphous terms, '*to provide such assistance and encouragement as it considers appropriate to (a) persons in the built environment industry (as defined at section 30) and (b) registered building inspectors, with a view to facilitating their improving the competence of persons in that industry or members of that profession (as the case may be).*'

2.5 The BSR is also required to work with the Secretary of State over the making of regulations (section 7), to establish a system (the so-called 'voluntary occurrence reporting system') for collecting, as well as disseminating, information about building safety (section 8); to make a 3-year strategic plan setting out how it proposes to carry out its building functions (section 17); and to make an annual statement about its engagement with the Resident's Panel, residents and owners of HRBs and their representative bodies (section 20); every 3-years to report on safety-related matters (section 21) and to make recommendations and, if asked by the SoS, to give advice about those buildings to be classed as HRBs (see section 31, Part 3).

2.6 Further, the BSR is under various duties to establish and maintain a number of new committees and forum. Namely, a new Building Advisory Committee (see section 9), to replace the existing Building Regulations Advisory Committee for England which is to be abolished, a new Committee on Industry Competence (see section 10), to monitor and advise on built environment industry competence, and a new 'Residents Panel' (see section 11) intended to give residents 'a voice' in the new system of consultation, strategic plans, revised strategic plans, information, guidance and regulation.

2.7 In terms of its powers, the BSR is given powers (a) with the consent of the Secretary of State, to direct any local authority or fire and rescue authority to do anything to assist the BSR in the exercise of its functions (see section 13) (b) to request any Regulatory Reform (Fire Safety) Order 2005 ('FSO') authorized persons to do anything to assist the BSR in its regulatory function (see section 14) (c) to issue guidance to local authorities and any FSO authorized person about their functions (see section 16).

2.8 In addition, a new jurisdiction is introduced to enable any 'prescribed decision' of the BSR to be reviewed and then appealed to the First-tier Tribunal (although rather unsatisfactorily what is prescribed will be a matter for regulations to be made by the SoS). Indeed, the Act provides for the creation of multiple new jurisdictions in the FtT, to determine appeals and applications related to building safety, again in many instances leaving the details to be worked out by subsequent regulation.

2.9 Notably, and no doubt to give the scheme 'teeth', Part 2 also creates an either-way offence of providing false or misleading information to the BSR (section 24), with conviction on indictment being punishable by up to 2 years imprisonment or a fine (or both). Finally, it may be noted that Part 2 makes Provision (section 25) for regular independent reviews of the effectiveness of the BSR in exercising its building functions and delivering its objectives; the period within which such reviews are to take place is now to be prescribed by regulations, but was originally intended to be every 5 years.

3. Part 3: A New Building Control Regime under the Building Act 1984

3.1 This is perhaps the most densely drafted Part of the Act and contains a raft of provisions to amend the Building Act 1984 (BA 1984), including its own definition of Higher-Risk Buildings (as a building at least 18m in height or having at least 7 storeys) to enable a new building control regime dedicated to such buildings as well as a new system of registration and supervision of building inspectors and 'approvers'.

3.2 Firstly, proposed new section 120D to be inserted into the BA 1984 not only defines HRBs (as above) but allows the SoS to make regulations actually to define a 'Higher-risk building', after consultation and the receipt of recommendations or advice from the BSR regarding the types of building that should be HRB's (new sections 120). Further, section 91 of the BA 1984 is to be amended to make the BSR the building control authority for all works to HRB's (see section 91ZA) and to enable it by notice (section 91ZB) to become the building control authority for works with a prescribed connection with HRB works.

3.3 Extensive amendments are also proposed (see section 33) to Schedule 1 of the BA 1984, to provide new powers for Building Regulations to set (a) procedural requirements relating to building control and issue of notices and certificates (b) procedures relating to applications for building control approval and to impose requirements on approvals (c) requirements on giving, obtaining and keeping of information and documents in relation to work covered by Building Regulations and (d) to establish a system of mandatory occurrence reporting e.g. to enable on-site workers to report occurrence.

3.4 The stated aim of these provisions is to allow for the new Gateway regime (this is Gateway 2) to ensure building safety is considered at each stage of a buildings design and construction, and to create 'a golden thread' of information, as it was referred to during the Committee stages in Parliament, about the design and construction process to ensure buildings are safe and building safety risks managed throughout the building's lifecycle.

3.5 Further, there is a widely drawn power (see section 34), also introduced into Schedule 1 of the BA 1984, to make Building Regulations to enable prescribed or other appointments to be made under in relation to any works and to impose duties on appointed and relevant persons (together 'dutyholders') to ensure compliance with Building Regulations. The 'skills, knowledge, experience and behaviours' of any appointee or prescribed person and the indeed the scope of their obligations to be defined, as in so many other instances under the Act, by further regulations.

3.6 But the intention it seems is that the appointees will include the client, principal designer and principal contractor and that they will thereby have 'formal responsibilities for compliance with Building Regs.' Further, the Act introduces (see section 38) relevant enforcement powers into the Building Act 1984 in the form of 'compliance notices' and 'stop notices', subject to a right of appeal but otherwise with criminal sanctions for contravention.

3.7 Indeed, one of the more striking provisions of the Act (see section 39) is perhaps new section 35 (to be introduced into the BA 1984) which will make it a criminal offence (triable either-way) for '*a person to contravene a provision of building regulations, or a requirement imposed by virtue of any such provision.'* On the face of it this would appear to extend to all persons involved in the construction process, from design to execution, relating to any non-compliant work and put them at risk of criminal prosecution for what appears to be a strict liability offence.

3.8 The reach of this, however, is uncertain given that it is proposed (per section 35(2) to the BA 1984) that Building Regulations may provide that the offence does not apply in relation to a prescribed provision of the regulations. This will presumably enable significant parts of Building Regulations

to be removed from the ambit of the offence. However, to the extent that this does not happen, it seems liability would also extend to any company officer (see section 40) where the offence is committed with their consent or connivance or as a result of neglect on the part of any such person. The potential exposure to criminal prosecution is, therefore, notably wide-ranging.

3.9 In addition, Part 3 contains extensive provisions (see section 42) for the regulation of the building control profession. Introducing (into the Building Act 1984 by inserting sections 58A to 58Z10) new and largely equivalent regimes for the registration of all building inspectors and, the newly constituted building control approvers (to replace approved inspectors under the existing system, see section 43). These provide that the regulatory authority (the BSR or its delegate) must establish a register for each, the form of application and registration and the duration of registration.

3.10 There is also provision for the publication of a new code or rules of conduct, information gathering powers, professional misconduct investigations, sanctions for professional misconduct, as well as new offences that may be committed by inspectors or approvers of carrying out work outside the scope of their registration. In addition, the Act institutes new offences of a registered building control, with reasonable excuse, acting outside the scope of his registration, or acting deceitfully in this regard, as well as rather curious new offences of 'impersonating' a registered building inspector/approver or a person doing anything which implies that they are a registered building inspector/approver when they are not (see new Building Act sections 58W and 58X).

3.11 Further, to govern the professional work of both local authorities and building control approvers, the regulatory authority is to be empowered to make 'operational standards rules' (see section 58Z) and to police these by requiring the provision of reports and information and by the giving of (i) Improvement notices (ii) Serious Contravention notices (iii) by cancellation of an approver's registration or (iv) in the case of a local authority recommending to the Secretary of State that a transfer of functions order is made (see sections 58Z1 to 58Z10). The recipient in each case having a right of appeal to the appropriate court or tribunal against the action taken.

3.12 Finally, detailed amendments are also made to the existing building control system to confirm the removal of HRB work from the control of building control approvers altogether (see section 46), so as to ensure it will only be the BSR that would henceforth enforce Building Regulations in respect of such work.

3.13 In summary, therefore, Part 3 means substantial changes to Building Regs and a new system of Building control for HRBs.

4. Part 4: Management of Safety in Higher Risk Buildings

I Assessment and Management of Risks

4.1 This Part of the Act, as section 61 heralds, contains 'provisions about the management of building safety risks as regards *occupied* [HRBs].' A building safety risk is, as you might expect, a risk to the safety of people in or about a building arising from spread of fire, structural failure or any other prescribed matter (section 62), with an HRB in this context being a building that is at least 18m in height or has at least 7 storeys and contains at least 2 residential units or as otherwise as may be prescribed (section 65).

4.2 Notably, in relation to the meaning of building safety risk and definition of HRB, whilst the Secretary of State is given the power to make regulations varying these (see sections 62 to 64 and 65 to 70 respectively), he is under an obligation to consult with the BSR amongst others and may seek the regulators advice (in which case the BSR is bound to give it). Also, the BSR may itself make recommendations about these matters; in the case of a building safety risk in an HRB, to avert any 'major incident' defined as an incident resulting in a significant number of deaths or serious injury to a significant number of people, and in relation to the definition of an HRB where there is an increased level of risk and if it materialised it would have the potential to cause a major incident (see sections 67 and 70).

4.3 In terms of Safety Management Duties, Part 4 establishes a duty for HRBs to be registered (section 78) and, if directed by the BSR to apply for (sections 79 and 80) and display (section 82) a building safety certificate (section 81). It also creates a series of 'relevant duties', amongst other duties, under, or under prescribed regulations made under, any of the following:

(a) section 83, a duty to assess building safety risks,
(b) section 84, a duty to take relevant steps to manage building safety risks,
(c) sections 85 and 86, a duty to prepare and provide to the BSR a 'safety case report',
(d) section 87(5), duties relating to mandatory occurrence reporting, with criminal sanction for non-compliance,
(e) sections 89, to provide information to the regulator and others including residents, in effect to achieve 'the golden thread' of information, and
(f) section 91, a duty to produce a residents' engagement strategy to promote participation in making building safety decisions – perhaps the most striking of these many new obligations.

4.4 These relevant duties are imposed upon the 'principal accountable person' for the occupied HRB, being the person who holds the legal estate in possession in the relevant (common) parts of the structure and exterior of the building or is subject to the relevant repairing obligation (see sections 72 to 74 and 81(5)). Further, the FtT is given a new jurisdiction to determine who the accountable persons are and for which part of the building they are responsible, and who the principal accountable person should be, based upon who would be most 'appropriate' in cases where there is more than one candidate (section 75).

4.5 In terms of enforcement of these relevant (building safety management) duties, as well as complaints procedures operated by the principal accountable person and in turn the regulator (see sections 93 and 94), the regulator also has a number of direct powers of enforcement against the relevant accountable person and other responsible parties. Firstly, by means of 'compliance notices', where again failure to comply, without reasonable excuse, will be a criminal offence (sections 98 to 100); any such notice being appealable to the FtT (section 103).

4.6 Secondly, by criminal sanction, where any contravention of a relevant requirement under this Part, without reasonable excuse, '*that places one or more people in or about the building at critical risk'* will also constitute a criminal offence (section 101). In addition, that is, to the criminal offences for non-compliance with the various relevant duties under sections 76, 77, 87 and 90 (already just referred to).

4.7 Thirdly, by way of a 'special measures order' appointing a 'special measures manager' (see section 102 and Schedule 7); where following an 'initial notice' and 'final notice' procedure, such an order may be obtained on application to the FtT to appoint a 'special measures manager' for the building to carry out the functions of all accountable persons for the building under, or under regulations made under, Part 4.

4.8 Further, in support of the overall building safety strategy under Part 4, complementary duties are also placed upon residents (aged 16 and over) and owners in occupied HRBs (see section 95), not to act in a way that creates a significant risk of a building safety risk materialising, not to interfere with a relevant safety item and to comply with any request from an appropriate accountable person for information reasonably required for the purposes of the assessment and management of building safety risks (per sections 83 and 84).

4.9 The latter duties reinforced by the powers granted to the appropriate accountable person to give any relevant person a contravention notice when it appears they have contravened or are contravening

any of these duties. The county court having powers to enforce a contravention notice by order, where it is satisfied that such a notice was given, the contravention alleged in the notice occurred and it is necessary to make the order. No doubt a court order being necessary, where the evidence shows that unless the order is made the relevant person will continue to fail to comply with the requirements of the notice.

4.10 Finally, again in terms of the overall structure for the management of building safety risks, it should be noted that where a resident management company is an accountable person for an HRB, it will be incumbent upon the Manco to appoint a building safety director, in accordance with regulations to be made by the Secretary of State (see section 111).

II Amendments to the Landlord and Tenant Act 1985 Etc.

4.11 The other main features of Part 4 are the proposed amendments to the Landlord and Tenant Act 1985 (see section 112) and Landlord and Tenant Act 1987 (see section 113).

4.12 Pursuant to section 112, terms relating to building safety are to be implied into the lease of any dwelling in an HRB. Under these landlords will be obliged to comply with their building safety duties, cooperate with any relevant person fulfilling like duties and comply with any special measures order. Whilst tenants will be obliged to allow access for these purposes, comply with their own duties under ss94 and 96 of the Act (not to act in a way that creates a significant risk of a building safety risk materialising etc.) and likewise to comply with any special measures order so far as it relates to them as tenant (new section 30C refers).

4.13 Further, the Bill effectively implies terms into relevant leases relating to the collection of building safety charges (section 30D). Thereby enabling recovery in the same way as any other service charge under any relevant lease the costs of taking building safety measures, i.e. the costs of complying with the various building safety duties imposed on the accountable person or principal accountable person, as the case may be, under sections 78 to 92 of the Act. Likewise, the final version of the Act introduces new Section 30E (into the 1985 Act), that provides for the remuneration of the building safety director of a resident management company also to be treated as one of the matters for which the service charge is payable.

4.14 However, contrariwise, new section 20F of the 1985 Act, now seeks to protect lessees of HRB's by ensuring certain building safety costs are 'excluded costs' not to be taken into account in determining the amount of service charge payable by a tenant under the lease. Importantly,

'excluded costs' means any of the following incurred in connection with Part 4 of the BSA or regulations made under that Part-

(a) costs incurred or to be incurred by or on behalf of a relevant person (landlord or superior landlord) solely as a result of any penalty imposed or enforcement action taken by the regulator;
(b) legal costs incurred or to be incurred by or on behalf of any such relevant person in connection with special measures proceedings;
(c) costs incurred or to be incurred by or on behalf of a relevant person by reason of any negligence, breach of contract or unlawful act on the part of that relevant person or a person acting on their behalf;
(d) costs of a description prescribed by regulations made by the Secretary of State that are incurred or to be incurred by or on behalf of an accountable person or special measures manager for the building in connection with the taking of building safety measures (as defined under section 30D).

4.15 Of these, (c) is the most widely drawn. However, it is no doubt arguable that the negligence, breach of contract or duty should have some direct connection to an obligation or duty under Part 4, rather than extend more widely to breaches connected simply with building safety. This would certainly seem to be consistent with rather narrow ambit of the other sub-paragraphs; (d) simply enabling regulations to exclude costs that would otherwise come with the scope of the payable service charge pursuant to section 30D.

4.16 As for the Landlord and Tenant Act 1987, new sections 47A and 49A are inserted (by section 113) requiring, respectively, that where premises are contained in an HRB, building safety information shall be contained in demands for rent and that notice shall be given to the tenant/s containing the relevant safety information (as defined in section 49A(1)). In default any part of the amount demanded that consists of a service charge or administration charge or any rent, service charge or administration charge is treated for all purposes as not being due at any time before the landlord gives, as the case may be, the information or notice to the tenant.

5. Part 5: Other provision about safety, standards etc.

5.1 Turning to Part 5, this is the Part of the proposed Act that is the most news-worthy, containing now a raft of new provisions directed at protecting leaseholders. In particular introducing the so-called 'waterfall' (or cascade) principle of liability pursuant to which developers and cladding manufacturers are expected to pay first, followed by freeholders, with leaseholders the very last

payees, rather than the first, and with each payee having fully to fund their contributions before liability moves to next.

5.2 The main proposals are set out below. In its final form, some (but not all) of the more expansive amendments introduced by the House of Lords have been reversed; for example, their attempt to apply the provisions to any self-contained building or self-contained part of a building that contains at least 2 dwellings has been reversed. Thus, the Act now accords with the Government proposals for the purposes of the cladding and other cost protections afforded by sections 119 to 125 and Schedule 8, by defining a relevant building as a building that contains at least two dwellings and is at least 11m high or 5 storeys, subject to exclusions in the case of leaseholder owned buildings (see section 117(3)).

5.3 The definition of qualifying lease introduced by the House of Lords, however, has survived, covering any tenant of a long lease (more than 21 years) of a dwelling within a relevant building that was granted before 14 February 2022, provided at the beginning of 14 February 2022 the dwelling was the relevant tenant's only or principal home and the tenant did not own any other or more than two other dwellings (rather than one other dwelling as originally proposed by the Government) apart from their interest under the lease (see section 119). The change from one to two other properties extending the help given to buy-to-let landlords, many of whom as was pointed out in the House of Lords debates are heavily leveraged and cannot realistically be described as wealthy.

5.4 Further, for the purposes of these new protections, a relevant defect means (see section 120) a defect as regards the building that arises as a result of anything done (or not done), or anything used (or not used) in connection with relevant works and that causes a building safety risk i.e. a risk to the safety of people arising from the spread of fire or the collapse of the building or any part of it. Where relevant works, are works relating to the construction or conversion of the building or works undertaken or commissioned by a relevant landlord or management company and completed in the last 30 years or works undertaken after that period to remedy a relevant defect.

(i) Remediation Costs & Service Charges (section 122)

5.5 Under section 122 and Schedule 8, as explained by the Minister in the course of the House of Lords debates, new protections are introduced for certain leaseholders and others, relating to certain remediation costs, and imposing corresponding liabilities on certain landlords.

5.6 It is now clear at least that no tenant of a qualifying lease (see section 119 and paragraphs 8 and 13 of Schedule 8) will be liable to pay a service charge in respect of cladding remediation, nor in respect of legal or other professional services relating to the liability (or potential liability) of any of any person incurred as a result of a relevant defect (see paragraph 9). Thus, in broad terms meeting the commitment made by the Secretary of State (the Rt. Hon. Michael Gove MP) on 10 January 2022, that tenants in buildings over 11m or 5 storeys high (see 5.2 above) should not be worse off as a result of unsafe cladding fitted to the exterior of their flats.

5.7 Otherwise, the Act provides that no service charge will be payable in respect of a relevant measure relating to a relevant defect in a number of different instances. These provisions covering not just the costs to remedy the relevant defect, but all costs incurred for the purpose of preventing a relevant risk from materialising, or reducing the severity of an incident resulting from a relevant risk materialising (see paragraph 1 of Schedule 8), which is clearly intended to include consequential costs such as waking watch and temporary alarm costs and the like.

5.8 Firstly, (under paragraph 2 of Schedule 8) no service charge will be payable under a qualifying lease in respect of a relevant measure relating to a relevant defect where the relevant defect is one for which their landlord is responsible or for which an associate of the landlord (i.e. broadly a developer associated with the landlord) is responsible. Section 121 containing a new standalone definition of an associate, piercing the corporate vale in it seems new ways (although the wisdom of using an untried formula, different from that in the Companies Acts, has been questioned).

5.9 Secondly, (under paragraph 3 of Schedule 8) no service charge will be payable under a qualifying lease in respect of a relevant measure relating to a relevant defect if at the qualifying time (14/2/22) the landlord's group's net worth was more than N x £2mn, where N is the number of relevant buildings owned by the group. Thirdly, (see paragraph 4 of Schedule 8) no service charge will be payable in any event under a qualifying lease in respect of a relevant measure relating to a relevant defect if the value of the lease is less than £325,000 in London and £175,000 elsewhere.

5.10 Further, where otherwise a service charge would be payable under a qualifying lease in respect of a relevant measure relating to any relevant defect, the Act also imposes a cap (see paragraphs 5 and 6 of Schedule 8). The permitted maximum being £15,000 in London and £10,000 elsewhere, increasing to £50,000 for premises valued between £1mn and £2mn, and to £100,000 for those above £2mn. Notably, contributions by the same tenant in the 5-years before commencement (of paragraph 5 of Schedule 8) count towards these totals and provision is made for an annual cap on recovery going forward of one tenth of the permitted maximums (see paragraph 7). (Reversing the Lords' amendment in the version of the Bill published on 29 March 2022, that set the permitted

maximum at £zero for lower value leases, but retaining the limit on annual recovery of one tenth rather than the one fifth originally proposed by the Government).

(ii) Remediation Orders (section 123)

5.11 Significant new powers are also now granted by the Act to compel landlords to take action (see also (iii) and (iv) below). Firstly, the Remediation Order. This is a new regulatory order that may be made by the First-tier Tribunal on the application of an interested party (the BSR, a local authority, the fire authority, any owner etc), requiring a relevant landlord to remedy specified relevant defects in a specified relevant building by a specified time.

5.12 The decision of the FtT or Upper Tribunal made in connection with section 123 (other than one ordering the payment of a sum) being enforceable with the permission of the county court in the same way as an order of that court (see section 123(7)).

(iii) Remediation Contribution Orders (section 124)

5.13 Another new form of order that may made by the First-tier Tribunal on the application of an interested party (the BSR, a local authority, the fire authority, any owner etc), this time requiring payment of a contribution towards the costs of remedying relevant defects. The order can be made against the landlord, the developer or again a person associated with either of them (see section 121 for 'associated'). Section 124 providing that the FtT may make such an order 'if it considers it just and equitable to do so.'

(iv) Insolvent Landlord: Remediation Costs orders (section 125)

5.14 In addition to the ability to pursue landlords through Remediation Orders and Remediation Contribution Orders, the Act amends the law so that if in the course of the winding up of a company which is a landlord, it appears it is under an obligation to remedy any relevant defects or liable to make a payment relating to the costs of remedying the same, then on the application of an insolvency practitioner in relation to the company, the court (having jurisdiction to wind up the company) can make an order requiring an associated company to make such contributions to that liability as the court 'considers to be just and equitable.'

5.15 The aim is of course to increase the size of the pot available to distribute to creditors, though its efficacy will again largely depend on how robust the new 'associated persons' definition (section 121) proves to be.

(v) Building Industry Schemes (sections 126-129)

5.16 Under this proposed scheme (the detail of which has yet to be defined by regulations) the legislative intention is to target developers by linking future development and building control approvals to their conduct in relation to defects. Developers that do not agree to carry out remediation works to their buildings or contribute to the associated costs will not be permitted to become members of a new Building Industry Scheme. Those that are not members of the Scheme are very likely then to find themselves subject to regulations prohibiting them from carrying out development (see section 128) and/or other regulations barring them from obtaining building control approval for any development (see section 129).

5.17 It is perhaps this scheme that the Secretary of State had in mind, when in February of this year he threatened to 'shut down' developers if they failed to agree to the Government's 'new plan' to make the industry pay; the recent 'Pledge Letter' dated 13 April 2022 sent out to developers refers.

(vi) Building Liability Orders (sections 130-132)

5.18 This is a further significant measure amongst the provisions targeting developers. This is a new civil claim, by which the High Court is empowered to make an order (a building liability order) against a company associated with the developer who has failed to meet a relevant liability, wherever the court thinks it just and equitable to do so. In this context a 'relevant liability' means a liability under the DPA 1972 or section 38 of the Building Act or as a result of a building safety risk (a risk to safety from the spread of fire or structural collapse). The High Court also has the power to make an 'information order' in support of BLO's, for the purposes of enabling a potential applicant to make, or consider making, an application for a BLO (see section 132).

5.19 For the purposes of such orders, 'associates' are given their own new, standalone definition (see section 131). This is plainly designed to avoid the kind of corporate structures, use of SPV's etc., employed by developers to distance themselves from liabilities for completed developments. Thus, companies A and B are associates if one of them controls the other or both are controlled by a third company. It is though the definition of control that is broadly defined. Indeed, section 131(4) appears to cast the net very wide; 'A body corporate (X) controls another body corporate (Y) if X has the power, directly or indirectly, to secure that the affairs of Y are conducted in accordance with X's wishes. However, the definition used is again bespoke and untested and it remains to be seen whether it will be construed narrowly or otherwise.

(vii) Further Service Charge provisions

5.20 Under section 133 provision is made for a new section 20D 'Limitation of service charges: remediation works' in the Landlord & Tenant Act 1985. This section when commenced will impose on landlords an obligation to take reasonable steps to ascertain whether any grant is payable in respect of remediation works and, if so, to obtain the grants. Likewise, to take reasonable steps to ascertain whether monies may be obtained from a third party in connection with such works and, if so, obtain those monies from the third party. Finally, to take prescribed steps relating to any other prescribed kind of funding – though presently, absent the expected regulations, it remains unclear to what this will extend.

5.21 Nonetheless, any funding of the kind mentioned will have to be deducted from the recoverable remediation costs, and any failure to take these steps will entitle a tenant to apply for an order that all or any of the remediation costs should be disallowed. These express terms thereby providing an answer to the issues left unresolved by *Oliver v Sheffield City Council* [2017] EWCA Civ 225 and *Avon Ground Rents v Cowley* [2019] 1 WLR 1337.

(viii) DPA & Limitation

5.22 Firstly, in this regard section 134 amends the DPA 1972 by inserting a new section 2A, which is drafted in materially wider terms that existing section 1, extending the existing duty which is limited by the opening words 'takes on work for and in connection with the provision of a dwelling' (see in this context the restrictive interpretation of section 1 in *Dunleavy & Others v NHBC Building Control Services Ltd*), by providing that the like duties to those existing apply to a person who '…in the course of a business, takes on work in relation to any part of relevant building' (i.e. in this context, one consisting of or containing one or more dwellings).

5.23 Secondly, section 135 contains one of the more striking provisions of the Act. Section 135 amends the Limitation Act 1980, by introducing new section 4B '*Special time limit for certain actions in respect of damage or defects in relation to buildings'* providing for a new limitation period for claims under section 1 and 2A (as referred to above) of the Defective Premises Act 1972 and (new) section 38 of the Building Act 1984, of 15 years from the date on which the right of action accrued. Albeit nothing in this section enables an action to be brought where it has been settled or finally determined (whether on the basis of limitation or otherwise) before this section came into force.

5.24 Further, and this is what caught the headlines when the Bill was introduced, the Act also provides that the amendment to the limitation period applicable to section 1 of the DPA 1972 should have retrospective effect. Section 135(3) providing that '*The amendment made by subsection (1) in relation to an action by virtue of section 1 of the Defective Premises Act 1972 is to be treated as always having been in force'*. Furthermore, the extent of the actions to be revived, has in accordance with amendments tabled to the Bill in the House of Lords, now been extended to cover claims dating back not just the 15 years initially proposed, but arising over a period dating back 30 years (see section 135(1) and the terms of section 4B(4)).

5.25 However, presumably to ensure the passing of the draft legislation into law, the Act makes specific provision (see section 135(5)) for any action brought in reliance on the retrospective operation of the 30 years (i.e. where the claim was already barred by limitation) to be dismissed if it is necessary to do so to avoid a breach of the relevant defendant's Convention rights (as defined under the Human Rights Act 1998). Potentially, therefore, what the Act gives with one hand, it takes away with the other. On the face of things lessees regaining a cause of action which they had lost, but then having potentially in every case to meet a challenge to their claim under the HRA.

5.26 That said, it must be noted that this is an unusual provision. Ordinarily, Convention rights would not have so-called 'horizontal effect' between individual parties in this way, but rather enable the legislation itself to be challenged. Further, it is not immediately obvious what the scope of this defence would be. However, the most likely Convention rights to be engaged are thought to be Article 6 'Right to a fair trial' and Article 1 of the First Protocol 'Protection of property.' In relation to Article 6, reliance may be placed upon the principle of 'equality of arms' to the extent that a defendant (be they house builder or construction professional) can show that in the circumstances of the case it is unfairly prejudiced in the presentation of its defence, because for example it no longer has available to it the documents or witnesses to deal with the allegations of breach.

5.27 As for Article 1 of the First Protocol given its terms ('*no one shall be deprived of his possessions except in the public interest ...*') this is a more difficult fit. Firstly, it is likely only to avail a developer who retains a proprietary interest in the development and who can argue that his interest having been free of any claim is now made subject to one by this retroactive provision. Otherwise, having regard to the party/party context in which this right is to be applied, again it seems likely to be the case that if the defendant can show some particular prejudice or hardship, over and above the 'general interest', resulting say from a change in position since the potential claim was previously statute barred, that this would be a basis for contending that to allow the claim to proceed would be a breach of its human rights.

(ix) Ombudsman

5.28 Another important initiative in this Part, not to be overlooked, is the proposal for the establishment of a new homes ombudsman scheme (sections 136 to 141). Open to all developers this scheme will enable qualifying complainants to have complaints against members of the scheme investigated and determined by an independent individual.

(x) New Build Home Warranties

5.29 Inserted also in the House of Lords (at sections 144 and 145) are new provisions compelling developers to provide to purchasers a new build home warranty for any new build home and to 'a prescribed person' a new build warranty for any common parts.'

5.30 These must provide cover for at least 15 years. They are also expected to keep developers on the hook for longer than is currently the case under most such warranties; though the exact circumstances in which they are to remain liable and the minimum applicable period are to be specified by the relevant regulations, yet to be promulgated.

(xi) Construction Product Liabilities

5.31 Last, but by no means least, Part 5 contains important and extensive provision for regulations relating to construction products, as set out in Schedule 11 to the Act. For example, the 'general safety requirements' therein provide that construction products regulations may (a) prohibit the marketing or supply of construction products which are not safe products (b) impose other requirements for the purpose of securing that construction products which are not safe products are not marketed or supplied (c) impose requirements in relation to the marketing or supply of construction products which are safe products.

5.32 The Schedule provides also that construction products regulations may make provision for and in relation to (a) designated standards for construction products and (b) technical assessments for construction products; proceeding then to set out through over twenty paragraphs and over 70 sub-paragraphs the scope of the construction product regulations that may be made, covering an extensive menu of provisions from technical assessments, marketing, information and documentation and the notification of risks, to the monitoring and enforcement of construction product requirements.

5.33 But here again, the amendments introduced in the House of Lords are profoundly significant, creating new causes of action for leaseholders. Firstly, providing new claims in damages for defective or mis-sold construction products. Secondly, by means of 'costs contribution orders.'

5.34 Thus, under section 148 liability in damages (for personal injury, damage to property or economic loss) for defective construction products is imposed on (a) any person who fails to comply with a construction product requirement in relation to a construction product (b) a person who markets or supplies a construction product and makes a misleading statement about it, or (c) a person manufactures a construction product that is inherently defective. Provided the product is installed, applied or attached in the course of works to a relevant building, the building is unfit for habitation when the works are completed and any of (a), (b) or (c) are the cause or one of the causes of any dwelling therein being unfit for habitation.

5.35 Similarly, under section 149 a like liability in damages for cladding products is imposed. Notably, new extended limitation periods are applied to these liabilities: 15 years for liability under section 148, and 30 years for liability under section 149 (reducing to 15 years if the right of action accrues on or after the commencement date). In each case subject also to sections 28, 32 and 35 of the Limitation Act 1980.

5.36 In addition, extensive provision is made (see sections 152-155) for 'costs contribution orders' to be made, requiring 'the defaulter' to pay an amount to a person with a prescribed interest in a relevant building or any dwelling contained in the building. The pre-conditions for such an order are that (A) the defaulter has been convicted of an offence in re a construction product requirement (B) the product was installed, applied or attached to a relevant building (C) any dwelling therein was unfit for habitation on completion (D) the failure to comply for which the defaulter was convicted was the cause or one of the causes of the building or dwelling being unfit for habitation. In such cases either the Court or the Secretary of State having the power to make a costs contribution order in such amount as they consider just and equitable. There being a further power for the Secretary of State to make regulations for the appointment of persons as assessors for the purposes of making such orders.

6. Part 6, General

6.1 Although this part does not contain the major reforms introduced by the Act outlined above, it includes some important provisions. Section 161 provides for the personal liability of officers of a body corporate (including partnerships and unincorporated associations) in relation to offences

under Part 2 or 4. Section 162 contains provisions for 5-yearly independent reviews of the new regulatory regime under the BSA, covering amongst other things, the effectiveness of the regulator, the adequacy and effectiveness of the provision made by Part 2 and 4 and of the effectiveness of the regulation of construction products in the UK.

6.2 Section 170 contains detailed commencement provisions; specifying those sections that came into force on the day the Act was passed including Parts 2 and 4 for the purposes of making regulations, those sections which come into force 2 months later (28 June 2022), with the remainder of the Act to come into force on such day as the Secretary of State may by regulations appoint (subject that is to separate provision for commencement in Wales).

7. Conclusions

7.1 Clearly, the Act contains extensive provisions aimed at improving building safety, with the establishment of the new Building Safety Regulator under Part 2, an enhanced Building Control regime under Part 3 and imposition of diverse duties aimed at improved safety management and accountability in Higher Risk Buildings under Part 4. The Act also now includes significant provision to protect some lessees (those in buildings at least 11m high or at least 5 storeys and containing at least 2 flats) from cladding remediation and other building safety costs (see in particular section 122 and Schedule 8), and by imposing on their landlord obligations to obtain grants or recover costs from third parties where possible, as well as retrospectively extending the limitation period for claims under the DPA to 30 years.

7.2 However, critics of the Act may be forgiven for saying that there is a risk that the straightforward requirement to ensure buildings are safe will be lost in a web of complex legislation and mired in a plethora of regulation. Those lobbying on behalf of lessees would no doubt have preferred a more direct approach to liability for current problems, to say nothing of increased funds to meet the bills for all lessees (as was attempted by amendments in the House of Lords).

7.3 Thus, whilst Lord Young was certainly right to concede that the new proposals on remediation put before the Lords Committee ‘moved the dial’, it remains to be seen whether the legislation now enacted really will deliver on the assurances that Ministers have given to leaseholders, ‘…who are the only innocent party in a scandal that has involved developers, contractors, local authorities and, indeed as is emerging from the Grenfell inquiry, the Government, who knew about the cladding problems 15 years before Grenfell – and did nothing.’

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