Falcon Chambers

THE BUILDING SAFETY ACT: UPDATE OCTOBER 2024

Welcome to our latest post on the BSA 2022, covering some of the current talking points in this area, from the amendments to the BSA made by the Leasehold and Freehold Reform Act 2024, various of which will commence this week on 31 October 2024, to a selection of the issues arising in the recent cases.

(1) LFRA 2024

1.1 First, therefore, to the LFRA 2024. It will be recalled that with the unexpected announcement of the General Election on 22 May 2024, Parliament quickly went into 'wash up' mode to save something of the (then) Government's legislative program. The Leasehold and Freehold Reform Act 2024 (LFRA) was the last statute to be passed, receiving Royal Assent on 24 May 2024 at 8.32pm (fourteen minutes before Parliament was prorogued); albeit the final form of Act was only first published a few days later.

1.2 The LFRA includes important amendments to the Building Safety Act 2022 (BSA). Some of those amendments were commenced 2 months from the enactment of LFRA. But further significant amendments will be coming into force later this week, Commencement Order No.1 dated 7/10/24 providing that sections 114-116 and 120 of LFRA will commence on 31 October 2024.

The 24/7/24 Changes

1.3 As for the changes that happened on 24 July 2024 (two months from commencement). Firstly, section 117 of the LFRA amends Schedule 8 to the BSA 2022 (remediation costs under qualifying leases etc.) by introducing an exception to the existing paragraph 9 leaseholder protection from legal and professional services costs relating to the liability of any person incurred as a result of a relevant defect, to enable a resident management company (defined as a body corporate limited by guarantee whose members are leaseholders or where the majority of shares are held by leaseholders) or an RTM company (within the meaning of Chapter 1 of Part 2 of CLRA 2002) to recover L&P costs incurred after 24/7/24 in connection with an application or possible application by the company for a remediation contribution order (RCO) under section 124.

1.4 This is a significant change, which has been welcomed by hard pressed RMCs and RTMs that need the funds to apply for RCOS. To be clear though section 117 does not create any new right, it will only apply where the lease already permits legal and professional costs incurred in connection with an application or possible application for an RCO to be recovered. Section 117 is also not retrospective and does not disapply paragraph 9 in respect of any such costs incurred before its commencement. It may be observed that the amendment appears also to reinforce the arguments that such costs are not within the scope of 'relevant measures' or costs incurred 'in remedying relevant defects' for the purposes of section 124 (as to which see below).

1.5 In addition, sections 118 (repeal of section 125 of the BSA 2022) and section 119 (higher-risk and relevant buildings: notifications in connection with insolvency) also came into force on 24 July 2024. No explanation was given in the Explanatory Notes to the Bill as to why DLUHC has seen fit to abolish section 125; which enables a court, on the application of an insolvency practitioner to make in effect a RCO against any company or partnership associated with a company which is a landlord of a relevant building, where during the course of the winding up of the landlord it appears to be under an obligation to remedy or to pay the costs of remedying any relevant defects in the building. It presumably was thought to be duplicative of Building Liability Orders (section 130) or otherwise redundant or of limited utility at best.

1.6 Instead, but not actually by way of substitution for section 125, section 119 introduces new section 125A to the BSA 2022. This is aimed at improving local authority and regulator awareness of buildings where the person with repairing obligations in relation to higher risk or relevant building is insolvent. Thus, it imposes new duties on insolvency practitioners who are appointed in relation to a responsible person for a higher-risk building (18m or 7 storeys) or relevant building to give specified information (name of the insolvent party, address of the building, details of the insolvency practitioner etc.) within 14 days of their appointment to the local authority and the fire and rescue authority for the area in which the building is situated, or if the insolvency practitioner is appointed in relation to an accountable person to give the required information to the Building Safety Regulator. Where 'insolvency practitioner' means any administrator, administrative receiver, receiver, liquidator or trustee in bankruptcy and a responsible person is the accountable person for the HRB or the person who would be the accountable person if the building was an HRB.

The 31/10/24 Changes

1.7 Turning then to the changes which will come into force on 31 October 2024. Section 114 of Part 8 of the LFRA amends Part 5 of the BSA 2022 by introducing (into section 120 of the BSA) a definition of 'relevant steps' in relation to the remediation of relevant defects. These are essentially preventative or mitigating steps that can be taken to reduce the risk, severity or harm of or from any incident resulting from a relevant defect. More precisely, relevant steps are defined to mean steps which have as their purpose (a) preventing or reducing the likelihood of a fire or collapse of the building (or any part of it) occurring as a result of the relevant defect (b) reducing the severity of any such incident, or (c) preventing or reducing harm to people in or about the building that could result from such an incident.

1.8 It will be recalled that in *Triathlon* v *SVDP & Get Living*, it was argued by the respondents before the FtT (as now before the Court of Appeal) that section 124, referring as it does to the costs incurred or to be incurred in remedying relevant defects, does not extend to the costs of installing an alarm system or engaging a waking watch and that a cornerstone of that argument was the difference in wording between section 124 and Schedule 8 which defines 'relevant measure' (at paragraph 1) as a measure taken (a) to remedy a relevant defect, or (b) for the purpose of (i) preventing a relevant risk from materialising, or (ii) reducing the severity of any incident resulting from a relevant risk materialising.

1.9 Section 114 of LFRA amends Schedule 8 and section 124 so as to remove the alleged point of distinction relied upon by the Appellants in *Triathlon*. Thus, by virtue of section 114, the definitions of 'building safety risk' and 'relevant risk' are omitted (they only repeat earlier definitions) and the definition of 'relevant measure' substituted with a new paragraph re-defining it to mean both (a) a measure taken to remedy a relevant defect and (b) a relevant step taken in relation to a relevant defect. Similarly, section 124(2) is amended by section 116 so as to cover costs incurred or to be incurred in remedying '*… or otherwise in connection with*' relevant defects, with section 116 inserting new subsection (2A) into section 124 to include (a) costs incurred or to be incurred in taking relevant steps in relation to a relevant defect in the relevant building.

1.10 In addition, subsection (2A) enlarges the footprint of section 124 by adding that the amended words of sub-section (2) also cover; (b) costs incurred or to be incurred in obtaining an expert report relating to the relevant building, and (c) temporary accommodation costs incurred or to be incurred in connection with a

decant from the relevant building (or part of it) for reasons connected with relevant defects as specified therein or as may be prescribed in due course by regulations.

1.11 Further, these changes are accompanied by a Henry VIII clause, in the form of new sub-section (2B) to section 124, that allows the Secretary of State by regulations to specify descriptions of costs that are, or are not, to be regarded as falling within subsection (2). Notably, also section 116 provides at sub-section (7) that the amendments made by the section are fully retrospective, applying in relation to proceedings under section 124 that are pending when the amendments come into force, proceedings commenced after that day and in relation to costs incurred before as well as after the amendments come into force.

1.12 Both sides in the *Triathlon* appeal have put in skeleton arguments in relation to these amendments to LFRA. The Appellants argue in essence that the proposed amendments indicate that the decision in *Triathlon* both as to retrospectivity and with regard to the scope of section 124 was wrong. As regards retrospectivity they say that the amendments could have been expressed to apply to costs incurred before the commencement of the BSA 2022, rather than refer simply to costs incurred before the amendments, and that this reinforces their argument against retrospectivity.

1.13 The Respondent says, there is no ambiguity over the meaning of 'incurred' so that no reliance can be placed on this subsequent legislation at all. Alternatively, the Respondents point out that LFRA uses the same language '*incurred or to be incurred*' already deployed in existing section 124(2), so that the amendments are actually neutral as to the meaning of 'incurred.' Rather, the Respondents contend simply that the UT/ FtT were right to decide what they did, that in accordance with the unqualified use of 'incurred' and the Explanatory Notes to the BSA, the section covers costs whenever incurred (subject only to the relevant period constraint where applicable).

1.14 In terms of scope, the Appellants argue that these new changes to remove the differences between section 124 (remedying relevant defects) and Schedule 8 (with its inclusion of relevant measures) would be superfluous if *Triathlon* was correct. However, the Respondents contend that given the amendments actually broaden the scope of section 124(2) to include consequential costs, such as expert report costs and temporary accommodation costs, there is nothing in the Appellants' arguments. In short, the justification for the amendments, including the new

definition of '*relevant steps*', should be seen in this context, reinforcing the decision in *Triathlon* whilst extending the scope of recoverable costs.

1.15 The amendments to section 124 (discussed above) are naturally carried through into section 123 (remediation orders), by virtue of section 115. This amends section 123 to provide expressly that the FtT may order a relevant landlord to '*do one or both of the following by a specified time (a) remedy specified relevant defects in a specified relevant building, (b) take specified relevant steps in relation to a specified relevant defect in a specified relevant building*'; the current form of section 123 referring only to (a), with no (b).

1.16 Usefully, section 115 also amends section 123 to provide that the FtT may order, and enforce, the production of an expert report by a relevant landlord in relation to relevant defects or potential relevant defects to identify what steps are required, as experience indicates is often necessary. Any such direction is enforceable in the County Court pursuant to existing subsection 124(7). Again, these amendments apply both to pending and future proceedings (see section 115(5)).

LFRA: Summary

1.17 In summary, therefore, as from 24/7/24 RCMs and RTMs may recover in service charges legal and professional costs in connection with any RCO application and insolvent landlord contribution orders under section 125 are abolished. Whilst the key takeaways so far as ss.123 and/or 124 are concerned are, with my Respondent's hat on, (a) statutory confirmation that ROs and RCOs apply to preventative or mitigating steps such as waking watch or other interim measures and (b) that section 124 is fully retrospective in effect. Although, it should of course be added that these latter points remain to be determined by the Court of Appeal in the *Triathlon* appeal (to be heard in the New Year along with Adriatic's appeal in *Hippersley Point*).

(2) Other Current BSA Issues

2.1 Another major current issue in this field and the cause of much dispute between interested parties including insurers, is whether remediation works should be carried out to a PAS 9980 standard or some higher standard requiring the removal of all combustible materials from the façade of higher-risk buildings. The issue turns on the definition of 'relevant defect' under section 120 for the purposes of Part 5 (reflecting the like definition at section 62 for the purposes of Part 4) and

more specifically what is a 'building safety risk.' how this is to be assessed and what standard should apply.

2.2 In ***Waite and others v Kedai Limited*** (LON/00AY/HYI/2022/0005 & 0016), which it will be recalled was a remediation order case, the First-tier Tribunal said this:

> *'77. There is no guidance in the BSA about how the Tribunal should assess the risk to the safety of people in or about the building, or the scope of the works that may be required "to remedy" the relevant defects, or the standard to which any remedial works must be carried out. The wording of this Part of the BSA is in deliberately broad terms, to enable the Tribunal to find the best and most practical, outcomes-focussed solutions to myriad circumstances that will inevitably present themselves in applications such as this.*
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> *78. The Tribunal has been given a very wide power. As mentioned above, in exercising that power, the Tribunal will have regard to all of the tests and standards in related areas that are brought to its attention, and will give due weight to them where appropriate, without being bound by them.'*

2.3 However, it is being argued in a number of current applications, that the correct standard to apply is PAS 9980 and that very little assistance can be gained from an enquiry into whether the works in question were or were not in compliance with Building Regulations (regulations 7 and 8) and Approved Document B. It is suggested, however, that this is mistaken and the tribunal in *Kedai* was correct. Breach of the Building Regulations is surely a key indicator of the existence or otherwise of a building safety risk and PAS 9980 ought not to become a vehicle to circumvent, or perhaps more accurately subvert, the Building Regulations.

2.4 This appears to be consistent too with Annex C of PAS 9980 which states, amongst other things, as follows:

> *'Reference is made extensively in this PAS to the Building Regulations and various versions of ADB. ADB is highly relevant in that, from the functional Requirement B4(1) in the current Building Regulation], and the relevant clauses of the current version of ADB setting out recommendations for meeting B4(1), it is possible to gain an understanding of the underlying issues in relation to fire spread over the external walls of a building and the measures considered to be necessary to mitigate this.'*

2.5 It is consistent also with the conclusions of GTI.2, which in its Overview and more particularly in Chapter 111, stated amongst other things as follows:

> *'.. Critically, an external wall system that met the criteria in BR 135 could still allow fire to spread through it and beyond the compartment of origin at a rate that was incompatible with a stay put strategy. Accordingly, although failure to meet the performance criteria in BR 135 would demonstrate that a system was unlikely to comply with functional requirement B4(1) of the Building Regulations, the converse was not necessarily true. A system might meet the performance criteria of BR 135 and yet fail to comply with the functional requirement.'*

2.6 That is not to say that where any external wall system or other element of a building was built in breach of applicable Building Regulations there is necessarily a building safety risk, but it does seem that it would be the exceptional case where there was not.

2.7 A further current topic arising in the cases is whether high-rise student accommodation qualifies as a relevant building; are study bedrooms dwellings for the purposes of the definition of a higher risk building in Part 5. It will be recalled that the definition of an HRB in Part 4 (section 65) is 18m/7 storeys and containing at least 2 residential units, whereas an HRB in Part 5 (section 117) is 11m/5 storeys and contains at least 2 dwellings. Clearly drawing a distinction between the residential unit and dwelling. A distinction confirmed in section 115 (and SI 275) which defines a residential unit as *'a dwelling or some other unit of residential accommodation.'*

2.8 The distinction between the two (dwelling versus residential unit) suggests that a dwelling is something more specific than merely a unit of residential accommodation. Resort can be had to some of the DPA authorities, such as *Catlin Estates v Carter Jonas* [2005] and *Rendlesham v Barr* [2014] or L&T authorities such as *Uratemp* (bed-sit a dwelling), *R (On the application of N) v Lewisham* (s.188 temporary accommodation not a dwelling), or *JLK v Ezekwe ('pods'* not occupied as a separate dwelling') amongst others.

2.9 Many of the L&T cases consider the question whether to be a dwelling the premises must be a home and the requisite extent of the premises and the degree of permanence with which they must be inhabited to constitute a home. Although even if this is a requirement there is a compelling argument that student accommodation is just that. Certainly, in the absence of any requirement for the premises to be let as a separate dwelling, there is clearly scope for the BSA to apply.

2.10 Yet another emerging issue is in relation to old unsafe cladding works and the conclusion in ***Almancantar v Ogilvie (Centre Point House)*** LON/00AG/LSC/2023/0012 (see paragraphs 220 to 222) that paragraph 8 of Schedule 8 is not contingent on there being a relevant defect, so that the relevant period of 30 years (before 28 June 2022) does not apply. The effect is that no landlord including any RMC or RTM may recover in service charges the costs of remediating unsafe cladding whenever this was installed, even before 28 June 1992.

2.11 However, in consequence the options then open to any such landlord to secure the necessary remedial works are carried out or to recover the costs are limited, given that any RO or RCO or claim under the LPI Regulations (SI 859) from other landlords is limited by reference to there being a relevant defect. It is not clear that the resulting difficulties were fully appreciated still less intended by Parliament, although depending on the facts of the case there may be other routes by which the funding gap can be overcome.

2.12 Lastly (for now) under this heading, there is continuing debate regarding the decision of the FtT earlier this year in the case of ***Blomfield v Monier Road Limited (Smoke House & Curing House, Remus Road)*** LON/00BG/HYI/2023/0024. From the outset the Respondent in that case did not contest in principle the making of an RO, but there were issues over the extent of the works and whether the original contractors should be entitled to carry out the works. However, there is ongoing debate over the FtT determination that the subject premises constituted a higher-risk building.

2.13 The FtT reached the conclusion that the premises amounted to an HRB, by counting a roof terrace containing a roof garden and plant and machinery as the seventh storey. In doing so the FtT departed from the Government guidance published on 21 June 2023 which stated, amongst other things, that 'a storey must be fully enclosed to be considered a storey.' In doing so the FtT concluded that the guidance appears not only to add to the statutory provisions, but to contradict them. Noting that the regulations appear to provide that a roof top can be a storey save for the one exception where the storey exclusively houses plant/machinery.

2.14 It is understood that the Ministry of Housing, Communities and Local Government is considering the implications of this decision and it may be that further regulations will be issued clarifying the position; presumably confirming the previously issued Government guidance by way of appropriate secondary

legislation under the BSA. Although it may be this will be addressed at the same time as amendments to give effect to some of the urgent recommendations of The Grenfell Tower Inquiry, Second Report; for example, by changing more fundamentally the basis of definition of HRBs for the purposes of the Parts 4 and/or 5 of the Act.

28 October 2024 PAUL LETMAN

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