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Property Law UK

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Building Safety Act 2022 Special Edition

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Following on from the success of The Building Safety Act 2022 Acting for Buyers Training Flowcharts for Conveyancers, Chambers is delighted to be able to offer a series of flowcharts to assist conveyancers, solicitors and other property professionals when acting for landlords in leasehold transactions. These flowcharts are a training aid and provide a guide to assist busy practitioners in navigating relevant sections of the Building Safety Act 2022 and relevant regulations.

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EDITOR'S LETTER

The Building Safety Act 2022 has been at the forefront of the minds of transactional property lawyers and litigators alike to such an extent that we have developed an additional edition of Property Law UK for June which is dedicated to the Act.

Given the extent of the Act, the problems with drafting and interpretation of some sections of the Act, and the fact that not all of the Act is as yet in force, it is easy to see why it is so troublesome.

The Act was designed to promote building safety (obviously), it is directly generating security for potential buyers of flats and apartments in connection with personal safety following Grenfell and attempting to generate security for the same buyers and their lenders in connection with the risk of facing huge service charge costs going forward due to remediation costs being transmitted to leaseholders within the service charge.

Unfortunately, at present, the Act and relevant regulations have provided the potential for security and protection for leaseholders and lenders but have created such confusion and fear from practitioners, lenders, and professional indemnity insurers that inadvertently the legislation has had a contrary effect and currently the reluctance of conveyancers to act has stalled any resurgence in the market for flats and apartments in high rise buildings.

I am delighted that with the cooperation of a number of members of Tanfield Chambers including Andrew Butler KC, we are able to provide you with a considered view of the application of parts of the Act that impact on transactional property lawyers. In addition, we have an article from Zahrah Aullybocus a solicitor who encounters the practical problems the Act creates for busy practitioners on a daily basis, and James Brook of Novello Surveyors who

explores some of the Act from the perspective of a surveyor.

My opinion, for what it is worth, is that it is still possible for conveyancers to act in leasehold transactions to which the Building Safety Act potentially applies provided:

1. The retainer is carefully and explicitly scoped to limit potential liability if the explanation and or advice is wrong.
2. Clients are made aware in general terms of the problems in applying the Act, the deficiencies in the Act commonly rendering it is impossible to ascertain whether Schedule 8 of the Act affords protection to leaseholders or not, and the likelihood that relevant legislation and regulations will be subject to reform.
3. Clients are aware of the potential for the Act (beyond Schedule 8) to increase management burdens on landlords which could lead to an increase in service charges and management fees.
4. If acting for lenders' instructions are not onerous requiring conveyancers to go beyond what is reasonable given the problems with the Act.
5. Professional Indemnity Insurers permit you to act.

Turning to some of the wider issues concerning the Act I am confident that given the problems with the legislation, there is huge potential for litigation. On that note, given the amount of time and careful consideration given by members of Tanfield Chambers to this publication and their extensive knowledge of the subject matter, I wholeheartedly recommend any of the contributors from that set to assist litigators and transactional property lawyers alike.

I hope you find this publication useful and its guidance helpful. The articles contained within this edition of Property Law UK are intended to provide an overview of certain parts of the Building Safety Act 2022 and relevant regulations. They provide guidance for practitioners and do not constitute legal advice.

Best wishes,

Ian Quayle

Managing Editor


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BSA '22 Special

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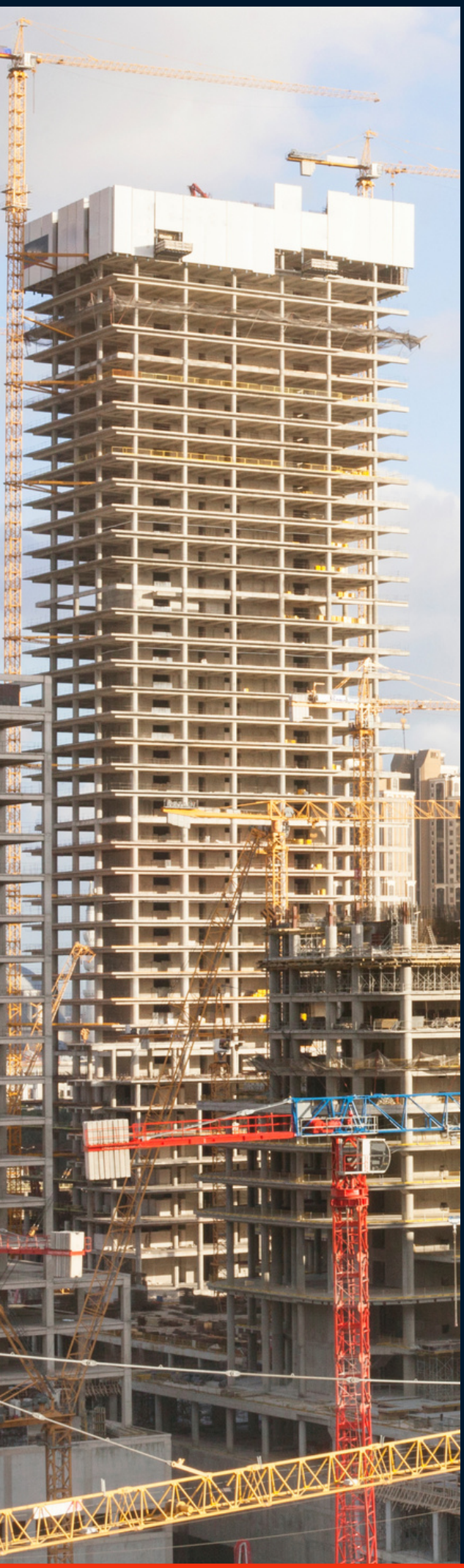
BSA SPECIAL FEATURE

CERTIFICATION REQUIREMENTS AND CONVEYANCING: DEALING WITH THE BLUNT END OF THE BUILDING SAFETY ACT

It is fast approaching the first anniversary of Part 5 and Schedule 8 to the Building Safety Act 2022 (referred to throughout this article as the "BSA" or simply as the "Act") coming into force. Part 5 extends liability for historic building defects through significant reforms to existing legislation. Schedule 8, together with regulations enacted thereunder, imposes substantial restrictions upon the ability of landlords to pass on the costs of remedying historic defects to tenants via the service charge provisions in their leases, and confers new powers upon the First Tier Tribunal to make remediation orders and remediation



contribution orders. Unsurprisingly, the past 10 months have witnessed a flurry of activity behind the scenes, as landlords and tenants of affected buildings, and their professional advisors alike, have grappled with the practical and legal implications of the Act.

It is fair to say that it has not been entirely plain sailing. Under significant pressure to implement the recommendations of the Hackett Report, the Government's drafters produced the BSA (Building Safety Act) in haste over Easter 2022. In turn, the BSA made it into the Queen's speech and onto the statute books by July 2022; however, this required significant provisions to be implemented by statutory instrument at the cost of proper time for parliamentary scrutiny. Frankly, it shows, as the old idiom goes, 'the devil is in the detail' and this is particularly true of the provisions relating to recovery of remediation costs through service charges. In particular, the prescribed requirements relating to the provision and content of landlord certificates and leaseholder deeds of certificate are now notorious for the burden they place on landlords and the complexity they add to the operation of Schedule 8, rather unhelpfully implemented by two separate regulations - the Building Safety (Leaseholder Protections) (England) Regulations 2022 SI 2022/711 (the "711 Regulations") and The Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 SI 2022/859 (the "859 Regulations").

One key group amongst whom the BSA has caused particular consternation is residential conveyancers. Indeed, such was the level of concern, that there have been reports of increasing numbers of conveyancers declining to act in relation to sales of flats in flats situated in relevant buildings. This article considers a key issue at the heart of the furore; namely, the inherent in navigating certification requirements and the consequences that flow from non-compliance in the context of Schedule 8.

Putting certification into context: the basic scheme in Schedule 8

As explained by s.122 BSA, "Schedule 8... provides

that certain service charge amounts relating to relevant defects in a relevant building are not payable" (i.e., regardless as to what would otherwise be the contractual position between the parties to the lease). It is important always to keep in mind that Schedule 8 is only relevant at all where a premises is situated within a "relevant building" (defined in s.117) and is concerned only with "relevant defects" (defined in s.120), in particular, the costs of "relevant measures" (i.e. a measure taken to remedy the relevant defect or to prevent/reduce or ameliorate the risk of one arising - as defined in para 1(1) of Sch. 8).

The basic scheme as expressed by Schedule 8 is that where the "relevant landlord" (in this context meaning the landlord or any superior landlord at the qualifying time i.e. 14 February 2022) was either **"responsible"** for the relevant defect (i.e. because they were the developer or in a joint venture with the developer or otherwise, undertook or commissioned works relating to the defect) or was **"associated with a person responsible"** for it, no service charge is payable under the lease of any premises in a building in respect of a relevant measure (para 2(1), Sch. 8). But (subject to regulation 6(7) of the 711 Regulations) in any other case, landlords are prevented from recovering the costs of relevant measures through service charge provisions only if the lease meets the definition of a qualifying lease in s.119(2) of the Act and certain specific conditions are met.

To fall within the definition of a "qualifying lease" under s.119(2) BSA, the

lease must have been granted before 14 February 20221, be more than 21 years in duration, contain an obligation to pay a service charge ("Conditions (a)-(c)") and, as at 14 February 2022, it must have been the only or principal home of a leaseholder, not owning more than two other dwellings in the UK (whether freehold or long lease) apart from their interest under the lease ("Condition (d)"). Pursuant to paragraphs 3 to 7 of Schedule 8, no service charge is payable under a qualifying lease in respect of relevant measures relating to a relevant defect where:

- The relevant landlord (here meaning the landlord under the lease at the qualifying time) met the "contribution condition" (para 3(1), Sch. 8). This means that the landlord group (defined at para 3(4), Sch.8) had a net worth at the qualifying time of more than N (being the number of relevant buildings in respect of which (or any part of which) a member of the landlord group was a landlord under a lease) x £2m.
- The qualifying lease had a value of less than £325,000 (if in Greater London) or £175,000 in any other case (para 4, Sch. 8) at the qualifying time.
- The charges are in respect of either cladding remediation (para 8, Sch.8); and/or legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect (including obtaining legal advice, any proceedings before a court or tribunal, arbitration, or mediation) (para 9, Sch. 8).

In all other cases, the costs of relevant

measures may be passed on but subject to a statutory cap - the "permitted maximum" (paras 5 and 6, Sch. 8) as well as annual cap (para 7, Sch. 8).

The advantage of the provisions which apply only to qualifying leases (i.e., those in paras 3 to 9, Sch.8) is that they do not require the leaseholder to establish who was responsible for the particular defect or their relationship with the relevant landlord. If met, the contribution condition also creates certainty for leaseholders (as well as anyone purchasing the lease under them) by removing the need for a case-by-case assessment of the defect in question. It therefore makes sense that Schedule 8 and the regulations enacted thereunder ought to create a straightforward mechanism for determining the qualifying status of a lease as well as whether the contribution condition is met. However, the prescribed certification and information requirements (and the consequences that flow from non-compliance) go much further.

The certification requirements and consequences in default

The certification requirements (i.e. the requirement upon the tenant to provide a leaseholder deed of certificate and upon the landlord to provide a landlord's certificate) were borne out of the obligation in paragraph 13 of Schedule 8 for the leaseholder to provide proof of their qualifying status and in paragraph 14(1), to provide a means for the landlord to establish that the relevant landlord did not meet the contribution condition. However, owing to the broad powers given to the Secretary of State in Schedule 8 to create regulations for the provision of

certification and information (and absent the parliamentary scrutiny as the Act), the landlord certificate in particular, has been enlarged to include information and evidence going far beyond the purpose for which the certificate was ostensibly introduced.

The Government has been extensively criticised for prescribing information that is difficult to obtain, incapable of independent verification and is unnecessary in any case in which the contribution condition is admitted as being met. For example, where the relevant landlord is part of a group, regulation 6(3) of the 711 Regulations requires the landlord to provide extensive structural and financial information, much of which may be sensitive and not be available publicly. This includes extensive details of the group structure, the beneficial ownership of each company in the group, trust and tax arrangements, the names of every director of each company in the group (including shadow, nominee and person fulfilling the role of director by whatever name they are called) as well as the names of persons exercising significant control or influence over the group, whether directly or indirectly. Regulation 6(4) of the 711 Regulations, then goes on to require the provision of audited accounts confirming the net worth (according to the definition in regulation 5 of the 711 Regulations and paragraph 3 of Schedule 8 to the Act) of each company in the group.

One might be forgiven for concluding that the requirements were intended to be unnecessarily onerous, to disincentivise landlords from complying with the certification and evidence requirements, particularly in circumstances where the relevant landlord is part of a large group structure (where the disclosure requirements provide a greater burden). In consequence, the prohibitions on recovery of the cost of relevant measures through the service charges is extended from the basic position under Schedule 8, because where the landlord under the lease is also the relevant landlord (within the meaning of paragraph 2 of Schedule 8), in consequence of default, it is not only presumed that the relevant landlord under paragraph 3(1) of Schedule 8 to the Act met the contribution condition (as per para 14,

Sch. 8) but the relevant landlord is treated as being responsible for the relevant defect under paragraph 2(2) of Schedule 8. As a consequence, no service charge is payable under **any lease** of a premises in a relevant building (regulation 6(7) of the 711 Regulations).

This appears to be an unforeseen consequence of paragraph 14(2) of Schedule 8; according to The Explanatory Note to the Act, paragraph 14(2) was intended to, "allow regulations to be made setting out that the landlord is treated as being responsible for identified relevant defects according to paragraph 2 unless they have provided a certificate demonstrating that they were not responsible for the defects". Regulation 6(7) of the 711 Regulations appears to be much broader than this in its application.

Other features of the overall scheme of the Schedule/711 Regulations which appear to favour default over and above compliance are the limited powers conferred upon the Tribunal to order compliance and/or to extend the tight deadlines applying to the landlord so as to avoid the consequences of non-compliance. The landlord's short and strict deadlines under the Regulations stands in stark contrast to the position vis a vis leaseholders un the 859 Regulations. Further, where the landlord is not the relevant landlord and lacks the relevant information to complete the landlord certificate, the 711 Regulations creates a very half-hearted mechanism to enable it to obtain this information from the relevant landlord; notably, it confers no power upon the

Tribunal to order the relevant landlord to comply with a request under Regulation 6(6) or to extend the current landlord's 4-week deadline in regulation 6(1) to enable it to obtain the missing information and complete the landlord certificate within time. Finally, the tribunal has no power (under Sch.8, para.16(5) and 711 Reg, reg.11) to order the production of a certificate where one is not given, in contrast to the position where it is shown that the landlord has made a false claim in the certificate (specifically including a false claim not to be the developer or that the contribution condition is not met); this was confirmed by the decision of the FTT in Flat 16 Grove House, 76 Sidmouth Avenue, Isleworth, Middlesex, TW7 4FQ (LON/00AT/HYI/2022/0003).

Overall, the prescribed requirements in relation to the landlord certificate create a rather blunt tool, and whether aimed towards capturing as much information as possible or more cynically, disincentivising as many landlords as possible from providing a certificate at all (so as to engage the presumptions in paragraphs 14(2) of Schedule 8 and regulation 6(7) of the 711 regulations), the Government appears to have given little thought as to how the information can be verified where the landlord does attempt to comply. This in turn creates difficulty for anyone seeking to provide advice in relation to the applicable rules in circumstances where it is either suggested that the contribution condition is not met – or perhaps more likely, where a lease is not a qualifying lease.

The leaseholder deed of certificate improves this position somewhat. Its' function is to demonstrate that a lease which satisfies the conditions (a)-(c) of s.119(2) of the BSA 2022 also satisfies condition (d) as at 14 February 2022 and to improve the position of leaseholders, creates a raft of requirements that the landlord has to satisfy in order to avoid a presumption that condition d is presumed met (as per paragraph 13(2) of Schedule 8). The obligation upon the leaseholder to provide a deed of certificate is required only upon receipt of a notice by the landlord (also in a prescribed form), within a generous 8-week timeframe and with provisions for follow up notices and extensions on demand given by the landlord and no comparable presumption in the event of late compliance complying.

The requirement for the landlord to send the initial notice to the leaseholder and start the cascade of reminders is triggered by the landlord either becoming aware that the lease is "to be sold" or that there is a relevant defect in the building in question (Reg 6(11). There is no guidance as to what 'to be sold" means - and what stage this requirement will bite (for example, when it is sufficient for an offer to have been accepted or necessary for contracts to have been exchanged) or what is required in order for the landlord to become aware (for example, whether actual or constructive knowledge will suffice). Here too, the Regulations suffer from imprecise drafting, creating uncertainty. Further uncertainty is introduced into the effect of paragraph 13(2) of Schedule 8, by the inclusion of the requirement for the landlord to take "all reasonable steps" in addition to any prescribed steps. For a full breakdown of the extensive requirements imposed on the landlord to avoid the presumption in paragraph 13(1) of Schedule 8 to the Act, reference ought to be made to Regulations 6 and 7 of the 859 Regulations themselves. These provisions stand in stark contrast to the strict deadlines applying to a landlord in respect of their provision of a landlord's certificate, the requirements include the provision of further reminder notices by the landlord, as well as telephone calls, and the grant of mandatory extensions upon request).

Conclusions and practical suggestions for conveyancers

The Government does not appear to have anticipated the pressure that would be applied to conveyancers to validate the information contained within and/or provided with the certificates by cautious mortgage lenders, or the practical difficulty of assessing whether the presumptions under Schedule 8 are engaged in these circumstances. Indeed, the way in which the requirements would impact upon the conveyancing process does not appear to have been given thought at all, notwithstanding the landlord's knowledge of the sale of a lease triggering landlord's obligations to give a landlord certificate under the 711 Regulations as well as a notice in relation to the leaseholder deed of certificate under the 859 Regulations.

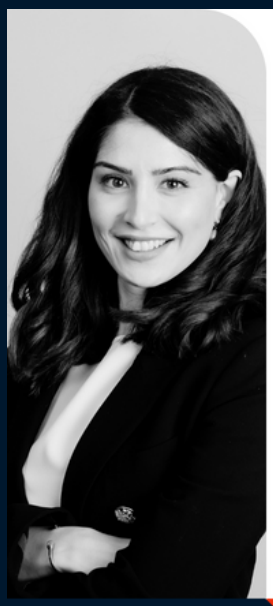
So where does this all leave conveyancers? In a recent update to the Mortgage Lenders' Handbook many of the initial requirements to verify information in the leaseholders' deed of certificate and landlords' certificates appear to have been watered down. This may in turn, relieve the pressure on conveyancers (both from leaseholders and lenders alike) so that they are encouraged to resume dealings with sales of premises in relevant buildings under the Act. However, conveyancers acting for leaseholders and buyers remain well advised to make it clear to clients and their lenders, that investigations as to the accuracy of factual information contained in the certificates (outside of what is confirmed by publicly available documents) will not be undertaken as part of the usual conveyancing process and to be wary of giving advice as to the accuracy of information provided in the certificates or advice which assumes the information therein to be accurate.

Where conveyancers can however add value, without increasing costs out of all proportion, is by focusing on the prescribed procedural requirements under regulation 6 of the 711 Regulations and regulations 6 and 7 of the 859 Regulations, the identification of any obvious omissions and/or instances of non-compliance in respect of each. This will enable conveyancers to spot if any presumptions apply on account of a party's default and narrow the scope of uncertainty.

Landlord Certificate: It will be helpful to diarise the key deadlines applying to the landlord (both under the 711 Regulation and the 859 Regulation) and retain (or advise the leaseholder to retain) proof of delivery of any notification of sale triggering the running of time thereunder. If 4 weeks pass and no landlord certificate has been provided to the leaseholder, or a certificate has been complied which does not comply with the prescribed requirements in Schedule 6 of the 711 Regulations, where the current landlord is the same as the relevant landlord, regulation 6(7) of the 711 regulations will apply and no service charges will be payable under a lease of premises in a relevant building, regardless of the qualifying status of the leaseholder. Alternatively, if the current landlord is not the relevant landlord, then

where the tenant has a qualifying lease (or has been deemed to by qualifying by virtue of Reg 6 of the 859 Regulations) then the contribution condition will be deemed met and no service charges will be payable in relation to a relevant defect/relevant measures.

Leaseholder Deed of Certificate: Whether acting for a buyer or a seller, it is useful to keep in mind that where the lease does not meet the qualifying condition d, there is a benefit in not providing a leaseholder deed of certificate and where applicable, requesting extensions so as to benefit from the presumptions in paragraph 13(1) of Schedule 8 in the event that the landlord fails to comply with any of the strict requirements under regulations 6 and 7 of the 859 Regulations. This stands in contrast to the position where the lease is a qualifying lease, in which case it is in the interest of the leaseholder to establish their qualifying status without delay. Where the landlord complies with the prescribed steps, and condition (d) is not met, it is useful to consider whether there are any other reasonable steps that could practically have been taken to have obtained the leaseholder deed of certificate. If not, the prospects of benefiting from the restrictions in Schedule 8 look likely to be limited to cases when the relevant defect was the responsibility of the relevant landlord (under paragraph 2(2) of Schedule 8), which must be assessed on a case-by-case basis.



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Sara has a busy practice spanning all areas of property and landlord and tenant matters. She has a particular interest in rights affecting land, and the development of land for mixed commercial and residential use. She has acted in relation to disputes involving issues around restrictive covenants, adverse possession, the construction of leases, leasehold enfranchisement and lease extensions, rights of first refusal, service charges and rights to manage; often in relation to large-scale mixed-use developments and residential schemes.

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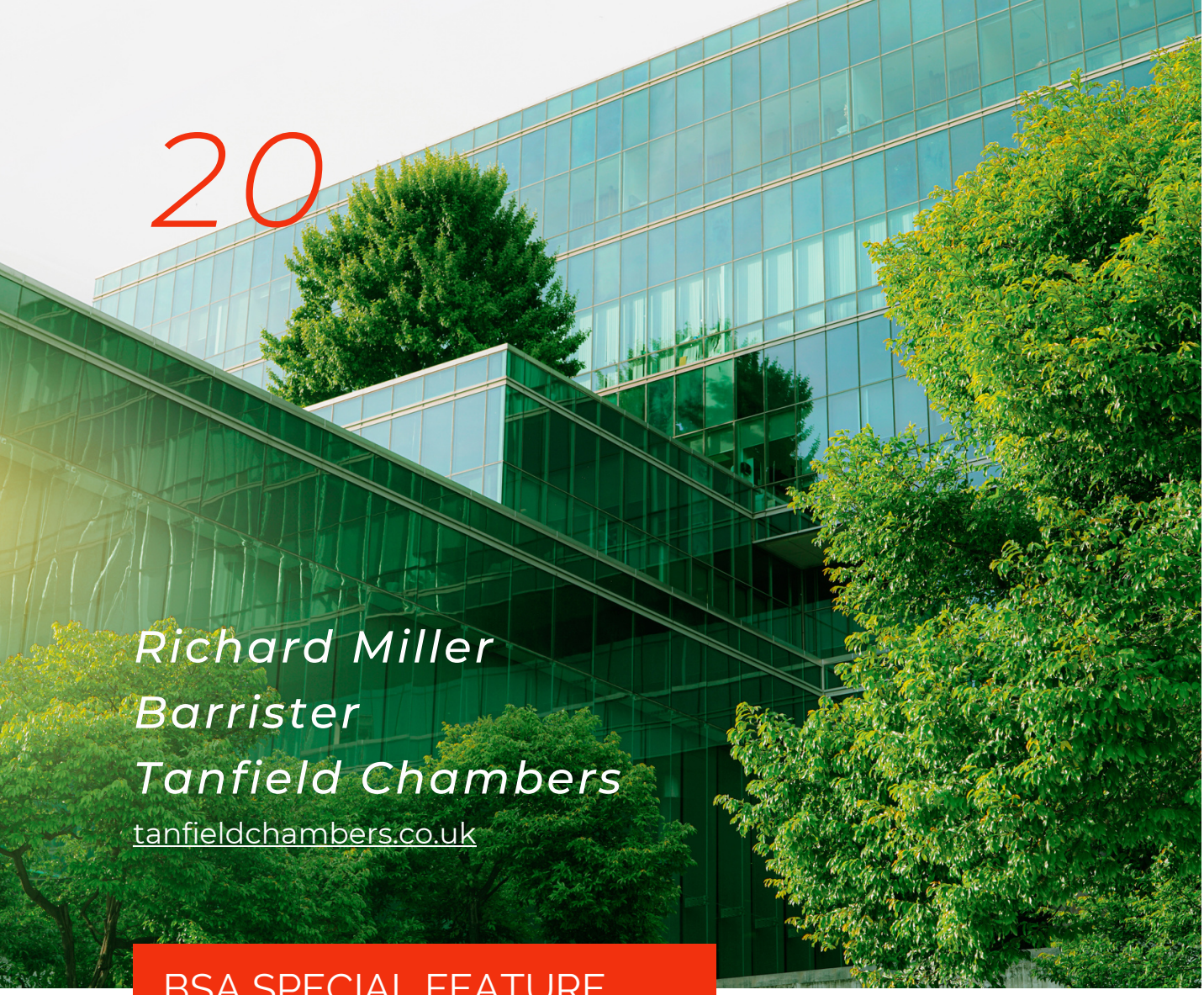

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BSA SPECIAL FEATURE

QUALIFYING LEASES: BEFORE YOU BUY

Most of the protections for leaseholders of flats in relevant buildings in Part 5 and Schedule 8 of the Building Safety Act 2022 ("the BSA") are predicated upon the lease being a "qualifying lease"; that is, a lease which satisfies the conditions of section 119. Unfortunately, the definition of "qualifying lease" interacts poorly with other laws regulating landlord and tenant relationships and has the potential to create disputes which are evidentially difficult to resolve.

In particular, leaseholders thinking of obtaining a new lease under Part I, Chapter II of the Leasehold Reform,

Housing and Urban Development Act 1993 ("the 1993 Act") and prospective purchasers of long leases in relevant dwellings should consider the provisions of section 119 to ensure that their lease qualifies for protection.

Section 119(2) states:

"A lease is a "qualifying lease" if-

(a) it is a long lease of a single dwelling in a relevant building,

(b) the tenant under the lease is liable to pay a service charge,

(c) the lease was granted before 14 February 2022 **["Condition C"]**, and

(d) at the beginning of 14 February 2022 ("the qualifying time")—

(i) the dwelling was a relevant tenant's only or principal home,

(ii) a relevant tenant did not own any other dwelling in the United Kingdom, or

(iii) a relevant tenant owned no more than two dwellings in the United Kingdom apart from their interest under the lease **["Condition D"]**"

Condition C

The Government decided to fix the "qualifying time" at 14 February 2022 to give certainty to parties and prevent unscrupulous landlords from avoiding the provisions of the BSA. To quote the Explanatory Note, §948, "the choice of qualifying time means that the provisions could not be manipulated or preemptively avoided". This has had unintended consequences.

The procedure for obtaining a new lease pursuant to Part I, Chapter II of the 1993 Act involves surrender of the existing lease and the grant of a new. Accordingly, exercising the right to obtain a new lease after 14 February 2022 will deprive the

leaseholder of the protections in the Act.

The Government has accepted that this is a problem and has promised to legislate. In the meantime, according to Guidance: Qualifying Date, Qualifying Lease and Extent, last updated 21 April 2023, they expect landlords and tenants to reach an agreement about the applicability of the BSA to new leases.

While such an agreement may be possible under section 57(6), there is no reason why a landlord would submit to Schedule 8 for nothing in return. If their landlord does not agree, the lessee's options seem to be limited. Under section 57(6), a lessee may unilaterally request that an existing term may be "excluded or modified". Case law is not currently clear whether this is wide enough to permit the addition of a term, such that Schedule 8 of the BSA could be incorporated.

Condition D

The subcondition likely to cause the most difficulty is **"(i) the dwelling was a relevant tenant's only or principal home."**

In Schedule 8, Paragraph 13 of the BSA, landlords are required to take all reasonable steps to obtain a qualifying lease certificate from the lessee, failing which the lease will be deemed to be qualifying. It is likely that, if they do obtain such a certificate, the landlord would be able to challenge an assertion of occupation as only or principal home. This is because, if the certificate were conclusive proof, the landlord would be in no better position having taken the steps than if they had not taken them.

Thus, it is to be expected that there will be disputes about whether a lessee occupied a flat as their only or principal home. The phrase is a familiar one to landlord and tenant lawyers,

having featured in section 81 of the Housing Act 1985 and section 1(1)(b) of the Housing Act 1988. Case law on those provisions will assist.

The test is objective. Continuous physical presence is not necessary, but the person must have an outward intention to return (Crawley B.C. v Sawyer (1987) 20 H.L.R. 98). Where a person has been absent for some time, they must prove that they continue to occupy as their only or principal home. Relevant factors include the length of, reason for, and anticipated duration of the absence and the conduct of the lessee (Islington London Borough Council v Boyle [2011] EWCA Civ 1450).

The difficulty with Condition D is that, were a person to purchase a lease where subcondition (i) were in doubt, a future dispute arising potentially years later would have to be resolved on the evidence of the predecessor-in-title as at 14 February 2022. It is an obliging predecessor-in-title who would give evidence for the pure financial benefit of their successor, and that is assuming they could be traced. Conveyancers may be encouraged to obtain statements before purchase which clarify the quality of the current occupation in order to minimise the chance of a potential dispute years later.

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TANFIELD

Tanfield is a specialist property set and a 'force to be reckoned with' in Real Estate and Property Law. Regarded, by peers, clients and the wider property sector as unrivalled on the subject of Enfranchisement and Right to Manage, the set has related expertise in areas such as Property Damage, Commercial Disputes, Banking & Mortgages, and Professional Negligence.

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Tanfield Chambers Specialism: Real property; Residential landlord and tenant; Service Charge and Property Management; Enfranchisement; Commercial landlord and tenant Mattie is a specialist in property litigation. Her practice covers all areas of residential and commercial landlord and tenant, including, service charges, enfranchisement, forfeiture, and LTA 1954 claims. Mattie also practises in all areas of real property, including neighbourly disputes, mortgage litigation and trusts of land. Mattie also has experience in professional negligence claims involving high-value development projects.

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BSA SPECIAL FEATURE

LIMITATIONS ON RECOVERY OF REMEDIATION COSTS THROUGH THE SERVICE CHARGE: SCHEDULE 8

Introduction

The BSA (Building Safety Act) both compels landlords to remediate through implied lease terms (new s.30C, Landlord and Tenant Act 1985) and remediation orders (s.123, BSA). It also deals with who bears the cost of such works: through implied terms (new s.30D, 1985 Act); Remediation Contribution Orders (s.124); and through limitations on service charges under Schedule 8.

Schedule 8 sets out circumstances in which limits are imposed on the ability to recover the cost of remediation work

through the service charge from the residential leaseholders. It provides a number of different scenarios where cost recovery is either outright prohibited or limited. In broad terms these divide the focus onto: a.) landlord; b.) tenant and c.) works. There is also a cap placed on the amount that can be charged in any one year.

In outline they are where:

1. The Landlord has responsibility for the defect in the first place
2. The Landlord and associated companies have a net worth in excess of a certain sum;
3. An individual leasehold interest is of low value;
4. They relate to specific types of defect.

Part 5 of the Act contains definitions which apply to Schedule 8, and this Schedule starts with a paragraph dedicated to definitions, with references back to other parts of the Act for definitions, and new ones.

Certification

The process of Landlord and Qualifying Lease Certification is labyrinthine and is deserving of an article in its own right, but for now, it is important to note that it is highly material to the operation of Schedule 8.

Apart from paragraph 2, most of the Schedule applies only to Qualifying Leases. They are defined as:

1. the most inferior lease of 21 years or more, liable to pay a service charge, granted prior to 14th February 2022,
2. being the only or principal home of the leaseholder, who does not own more than two other dwellings in the UK.

If the obligation for a landlord to provide certification is not complied with, that will preclude them from claiming any service charge under any lease for the costs of a Relevant Defect; it also gives rise to a presumption that the Contribution Condition is met.

No service charge payable

Paragraph 2: Responsibility: Landlord focus

This applies where the landlord (or associated person) is responsible for the Relevant Defect. This is a wide paragraph, and unlike the others, it is not limited to Qualifying Leases, **it applies to a lease of any premises in a Relevant Building**. It is absolute in its limitation: no service charge is payable for a Relevant Measure.

Two further definitions are provided for:

1. Responsible: i.e., if the landlord was the developer or was in a joint venture with the developer or they commissioned the works;
2. Relevant Landlord: a landlord under the lease at the Qualifying Time [14th February 2022] or any superior landlord at that time.

Paragraph 3: Contribution Condition: Landlord focus

This paragraph measures the depth of the landlord's pocket and only applies to a **Qualifying Lease**. There is a presumption that this condition is met unless the landlord provides a certificate proving otherwise (paragraph 14).

No service charge is payable for a Relevant Measure relating to a Relevant Defect if the Landlord Group at the Qualifying Time has a net worth in excess of N x £2mn. N is the number of relevant buildings that the Landlord Group was a landlord of at the qualifying time.

There are two further definitions:

1. Landlord Group - the relevant landlord and any person associated;
2. Net worth – valued as per regulations made by Sec of State.

Paragraph 4: Low value leases: Tenant focus

No service charge for the cost of a Relevant Measure relating to a Relevant Defect if the

value of the Qualifying Lease is at the Qualifying Time in Greater London: <£325,000, or <£175,000 elsewhere.

Paragraph 8: Removal or replacement of any part of a cladding system: Work focus

No service charge is payable under a Qualifying Lease for cladding remediation, being the removal or replacement of a cladding system that both forms the outer wall of an external wall system and is unsafe.

This will require an analysis of both the make-up of the cladding system, whether it forms the outer wall and whether it is unsafe. As to the meaning of 'unsafe,' that will tie in with the various assessments of risk undertaken (i.e., under Parts IV and V and the building safety risk).

Paragraph 9: Legal or Professional Service: Work focus

No service charge under a Qualifying Lease for legal or professional costs incurred relating to liability as a result of a Relevant Defect.

Limitation on amount payable

Paragraphs 5 to 7: Other limitations: Tenant focus

There is a Permitted Maximum for a service charge under a Qualifying Lease for the cost of a Relevant Measure relating to a Relevant Defect. This is both backward and forward looking as to what service charges are caught. It starts '5 years before' the provision comes into force. The amount will vary according to the value of the lease, it is then subject to a further reduction in that under paragraph 7, **only 1/10th of that maximum can be charged in any one year**.

The Permitted Maximum is in Greater London £15,000, elsewhere £10,000, save where the value is above £1mn, where the cap increases.

The value is to be measured in accordance with

regulations made by Sec of State (para 6).

Additional points

Paragraph 10 prohibits sums being taken from the reserves or being levied where no service charge is payable.

Paragraph 11 prevents a landlord topping up any under recovery from a leaseholder who does not qualify for a reduction.

Paragraph 16 precludes a landlord from charging the costs to the leaseholders where prescribed information or documentation is not handed over to the leaseholders.

Paragraph 18 voids any attempt to avoid the Schedule.

Recourse to other landlords

Where a landlord is prohibited from recovering all or part of their costs from leaseholders by reason of Schedule 8, they may have recourse to other landlords for a contribution to those costs under the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022/859, regs 3 to 5.

Conclusion

Schedule 8 provides cascading scenarios for when limitations on the recovery of remediation costs will bite. It is rife with defined terms and contains some ambiguities in application. This short article can only give an introduction to its full application, which will require more detailed consideration.

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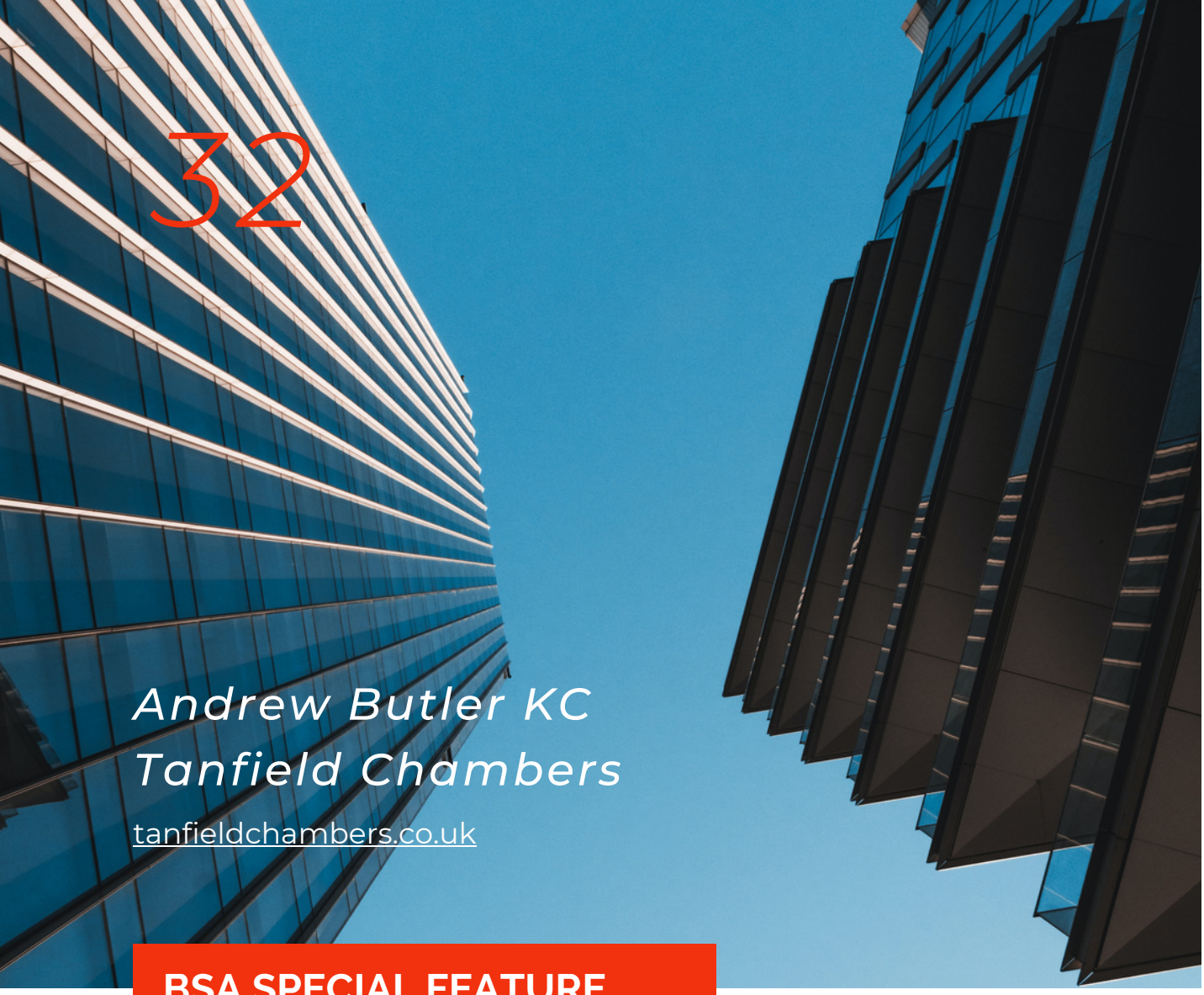

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BSA SPECIAL FEATURE

ALL CHANGE! LANDLORD CERTIFICATE AND LEASEHOLDER DEED OF CERTIFICATE

In this article:

- **"the 711 Regs"** means the Building Safety (Leaseholder Protections) (England) Regulations 2022 (SI 2022/711)
- **"the 859 Regs"** means the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 (SI 2022/859);
- **"LC"** means the Landlord's Certificate;
- **"LDoC"** means the Leaseholder Deed of Certificate;
- **"the Amendment Regs"** means the new draft Building Safety

(Leaseholder Protections etc.) (England) (Amendment) Regulations 2023;

- **"the Act"** means the Building Safety Act 2022.

It will be recalled that the 711 Regs and the 859 Regs introduced the controversial regimes for the LC and LDoC respectively. To say that these instruments have met with a mixed response would be charitable; criticism has been levelled both at the quality of the drafting, and the impracticality of the regimes they introduce.

The Amendment Regs are draft forthcoming secondary legislation being introduced to make amendments to both the 711 Regs and the 859 Regs. It appears that the government has tightened up on the drafting, but there is not much respite in terms of the regimes themselves.

Focusing first on the 859 Regs, the Amendment Regs begin by adding certain new definitions ("current landlord", "named manager" and "shared ownership lease") and then add new "interested persons" for the purpose of seeking Remediation Orders and Remediation Contribution Orders under ss.123 and 124 of the Act.

Then, paragraphs 5 to 7 effect broadly similar changes to the provisions of the 859 Regs which govern the landlord recovery provisions under the various leaseholder protections of Schedule 8 to the Act. Amongst other things, they:

- provide that where a landlord (L) has been unable to recover a service charge because of a defect for which more than one predecessor landlord is responsible, those predecessors are jointly and severally liable (as opposed to being liable for equal shares, as the 859 Regs had provided);
- enact requirements for the content of notices which, the 859 Regs provide, L needs to serve on its predecessors in order to recover;
- contain further provision about the appeal procedure which those who receive such notices are able to invoke;
- introduce provisions aimed at preventing double recovery; and
- confer on L the right to recover amounts

payable from predecessors as a civil debt.

So far as LDoCs are concerned, the changes are limited. However:

- somewhat curiously, Reg 6(1) of the 859 Regs, which expressly enabled a tenant to send his or her landlord an LDoC, is omitted;
- a lacuna in Reg 6(4)(c) is filled; this provided that a landlord's notice should spell out to a tenant the consequences of a failure to complete an LDoC when requested but said nothing about the need to provide supporting evidence. The Amendment Regs make clear that these consequences extend to a failure to serve such evidence too;
- the Amendment Regs also introduce provisions whereby a landlord must send an LDoC to any manager at the building within a week of receiving it; a failure to do so means that the costs of a relevant measure must neither be included in any calculation of service change nor met from a reserve fund.

These changes are, however, the warm-up to the main event. Most interest has focused on what changes are being made to the 711 Regs.

The changes are quite radical. After some tinkering with the definitions, the first substantive change is the introduction of a fifth set of circumstances in which an LC must be served: that is, within four weeks of a landlord becoming aware of a new LDoC containing information not included in a previous LC.

Thereafter, the Amendment Regs introduce several new provisions which make changes to the information which is required to be included in an LC, and also seek to tailor the information and evidence needed to various different situations in which an LC must be served.

As regards the information to be provided, there is one wholly new requirement (the percentage of the storeys in the relevant building which each relevant landlord was landlord at the qualifying time). The remaining information is comparable to the previous requirements, seeking as it does to extract detailed exposition of any group of which

the landlord is part; but it differs from the current regime in that it is now broken down into two paragraphs, with one set of information referable to the condition in para.2 of Schedule 8 (landlord responsibility) and one set referable to para.3 (contribution condition). The basic scheme is to relieve landlords of having to include in the LC information which is not relevant; if, for example, the landlord accepts that it meets the contribution condition, it does not have to include in the LC information relating to that.

As with the new rules regarding the LDoC, the Amendment Regs also provide that an LC must be provided to a relevant manager within a week of being given to a tenant, with the same consequence (irrecoverability of costs) if it is not. A new form of LC is also provided.

Those who hoped that the Amendment Regs would simplify the tortuous requirements of the 711 Regs may be disappointed. The best that can be said is that they streamline them, so that what is required by the LC is responsive to what it is seeking to prove. The amendments do not go much further than that.

Meet the editor

Andrew Butler KC

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Andrew Butler KC practises in the areas of Property and Business & Commercial, and is Head of Chambers' Business & Commercial Group. While he accepts instructions across the full spectrum of commercial and property work, he particularly specialises in development disputes and professional negligence matters, with company law issues also forming an increasing part of his caseload. Andrew is a qualified mediator and a member of both the Chartered Institute of Arbitrators and the London Court of International Arbitration. He is an adjudicator on the panel of the Professional Negligence Bar Association. He was appointed Queen's Counsel in 2018 and his silk practice has gone from strength to strength, involving an appearance in the Supreme Court, and regular appearances in the Court of Appeal, as well as the Commercial and Business and Property Courts.

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LEASEHOLD FLATS - THE 11M HEIGHT RULE

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BSA SPECIAL FEATURE

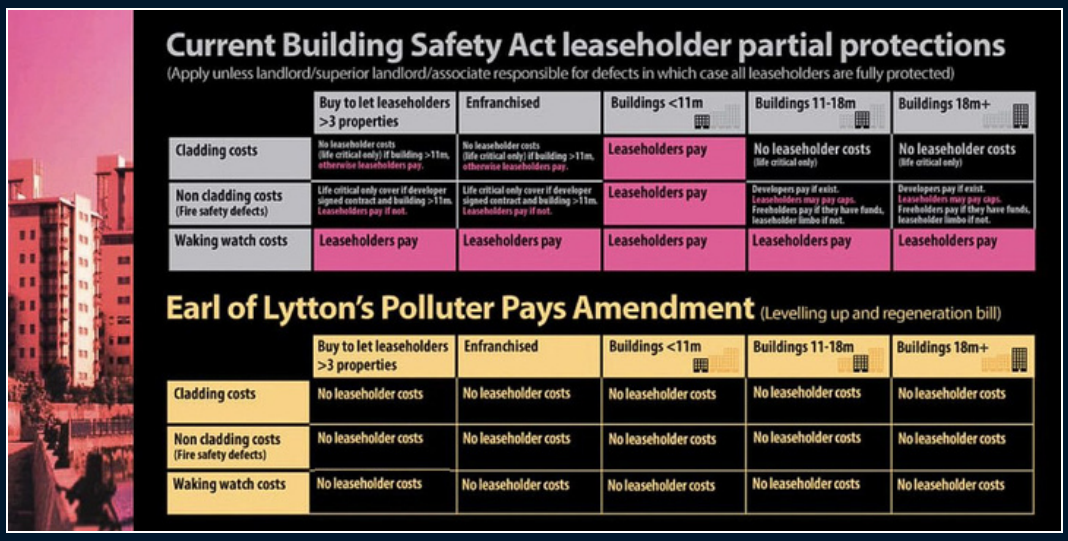
Buildings under the 11m height: What are the considerations and risks?

The Building Safety Act 2022 ('BSA') has created a minefield for conveyancers to navigate through in relation to flats located in buildings above 11m. However, where does this leave the flats under the 11m height, and do you think you are safe?

We can safely establish that there are no Leaseholder protections given under the BSA for any remediation work required, whether it is cladding or anything else for flats situated in a building under the 11m height.

The BSA Certificates do not apply to these blocks and a lot of these are 'leaseholder owned' so the residents-run management companies are going to be clueless as to how to apply the new legislation. I downloaded a useful little table for the Polluter Pays campaign which shows the current position at the top against what they are hoping to achieve – this would certainly make life easier from a conveyancing point of view! The top half of the table sets out the "Current Building Safety Act leaseholder 'partial' protections"

(where there is Leaseholder liability, it is highlighted in pink). The bottom half contains proposed reforms which aim to protect all leaseholders). You can see clearly there is no salvation in terms of costs for leaseholders who have bought in the lower-rise flats, or where the building is leaseholder owned.



Current Building Safety Act leaseholder partial protections

(Apply unless landlord/superior landlord/associate responsible for defects in which case all leaseholders are fully protected)

	Buy to let leaseholders >3 properties	Enfranchised	Buildings <11m	Buildings 11-18m	Buildings 18m+
Cladding costs	No leaseholder costs (life critical only) if building >11m, otherwise leaseholders pay.	No leaseholder costs (life critical only) if building >11m, otherwise leaseholders pay.	Leaseholders pay	No leaseholder costs (life critical only)	No leaseholder costs (life critical only)
Non cladding costs (Fire safety defects)	Life critical only cover if developer signed contract and building >11m. Leaseholders pay if not.	Life critical only cover if developer signed contract and building >11m. Leaseholders pay if not.	Leaseholders pay	Developers pay if exist. Leaseholders may pay caps. Freeholders pay if they have funds, leaseholder limbo if not.	Developers pay if exist. Leaseholders may pay caps. Freeholders pay if they have funds, leaseholder limbo if not.
Waking watch costs	Leaseholders pay	Leaseholders pay	Leaseholders pay	Leaseholders pay	Leaseholders pay

Earl of Lytton's Polluter Pays Amendment (Levelling up and regeneration bill)

	Buy to let leaseholders >3 properties	Enfranchised	Buildings <11m	Buildings 11-18m	Buildings 18m+
Cladding costs	No leaseholder costs	No leaseholder costs	No leaseholder costs	No leaseholder costs	No leaseholder costs
Non cladding costs (Fire safety defects)	No leaseholder costs	No leaseholder costs	No leaseholder costs	No leaseholder costs	No leaseholder costs
Waking watch costs	No leaseholder costs	No leaseholder costs	No leaseholder costs	No leaseholder costs	No leaseholder costs

Be careful when checking 'height' – just because a building is 4 storeys, does not mean it is not 11m and therefore it is important to have the building measured. A 4-storey building could be 11m in height (especially if they are one of those buildings with higher ceilings).

Fire Safety

The Fire Safety (England) Regulations 2022 will apply to any building containing 2 or more domestic premises.

Clients must be advised to get surveys and check the front door to their flats. Fact sheet: Fire doors (regulation 10) - GOV.UK (www.gov.uk) Their front doors must include some fire resistance (especially where the door opens onto a communal area). We are not going to know if there are any fire resistance measures between ceilings and floors above.

We should also be asking for copies of the "Instructions to Residents" – previously we have just relied on this being done directly between the Managing Agent/Landlord and the Leaseholder.

However, due to the risks of invalidating insurance (or perhaps a

covenant in the lease not to do anything which may invalidate the building insurance), it may be prudent to ensure the incoming buyer knows what to do/what not to do. (I have had some pretenders in the past try to do their own FRAs, especially where the building is residents-run).

Be aware that some surveyors are saying that when they go to see flats, they are also checking the rest of the building, and if there is cladding or some material on the outside of the building (e.g., wooden decking balconies), they are recommending that these be removed/replaced – at cost to the leaseholder. The remediation work will need to be assessed, costed and of course the leaseholders of these flats have NO PROTECTION under the BSA as they are under the 11m height. Where this information is revealed, do ensure you flag it to your client and/or ensure it is raised with your mortgage lender.

I think the 'name of the game' is to hazard a guess with our crystal ball as to how much remediation costs will be. It appears lenders are basically weighing up whether or not the borrower will be able to afford remediation costs (great if we can establish there are 'leaseholder protections' for those flats 11m or above as there will be a cap on the 'other remediation costs' and a complete ban on cladding costs), but not so much on those blocks under the 11m height which have been built in the last 30 years (we all know that newbuilds have been put together with numerous 'corners cut', despite building regulations).

You also need to limit your liability in terms of the conclusions you have come to in that whilst you may be able to 'guesstimate' a figure at the point of purchase, the information may change at a future date and we cannot be held responsible for information/costs that comes to light after the transaction that has been concluded.

The issue is then this at part 1 of the Lender's Handbook:

"**5.14.17** This section applies only to leasehold property purchases in England. See Part 2s for our requirements on purchases and remortgages. Where the security will comprise a leasehold flat you must request the following information from the seller's conveyancer about the safety of the building in which the flat is situated:

- Confirmation as to whether the building has been or will be remediated under the Building Safety Act 2022.
- Copies of any Landlord's Certificates, signed by the Landlord in the form set out in the Building Safety (Leaseholder Protections) (England) Regulations 2022.
- Copies of any executed Leaseholder Deed of Certificate (in the form set out in the Building Safety (Leaseholder Protections) (England) Regulations 2022) and confirmation that they have been submitted by the relevant leaseholder to the landlord.

You may want to consider any guidance from your professional body and/or regulator about the information and advice you should provide to the home-buyer relating to building safety. You should also consider any implications for section 4.4 of the Handbook."

We are going to have to fight mortgage lenders every step of the way, as to whether or not the BSA applies as it appears they want to be able to establish if the leaseholders can pursue the original developers where the developer has put up a duff building (not just cladding, could be anything that makes the building unsafe whether it is a structural issue or fire safety issue).

Conveyancers you should be increasing

fees to cover additional work now required by leaseholds!

It is not going to be an easy task to provide effective warnings to clients (who probably do not read a thing we give them!) We will have less information where the flat is located in a building under the 11m height as the Landlord is not obliged to provide details of the developer, etc. as per the Landlord's Certificate on the higher rises.

We are also going to face issues where the building is residents-run and no one has kept information relating to the original construction of the property (for example, where the property has been built/converted and then handed to a residents-run management company to administer).

Conveyancers have not been fully informed yet as to the implications of the "Responsible Person" ('RP') which basically makes someone (a natural person, not a company) criminally responsible if the safety of the building is not looked after, and this could result in a prison term (e.g. if the building burns down and people die). There is a lot more record keeping that needs to be done and advice given to Landlords (whether they are professional Landlords or residents-run buildings). Many residents may not know that they have or will become a "Responsible Person" due to part ownership of the freehold.

A question asking who the Responsible Person is has not yet been put onto the LPE1 form. If there is a breach of the Fire Safety Order (2005), the building (and owner) may be subject to an enforcement notice or prosecution (thereby creating a personal liability for those buildings which are residents-run).

Local fire and rescue authorities may

inspect premises and can issue enforcement notices telling the owners about changes that need to be made.

Enforcement Notices – Question 8.21 on the LPE1 form

Q&A with Roy Carter, Consultant at Nexa Law and General Counsel and Specialist Regulatory Fire Partner.

My colleague Roy Carter who specialises in regulated fire safety and enforcement has kindly provided some general information about fire safety and enforcement regarding the "Enforcement Notices" question at 8.21 on the new LPE1 Form.

Below are simplified notes from my conversation.

The Regulatory Reform (Fire Safety) Order 2005 (the Fire Safety Order) provides for three types of statutory notices: Enforcement, Prohibition, and Alterations. These notices can result in prosecution if not obeyed.

Among them, the **Prohibition Notice** is the firmest, requiring compliance from everyone, not just the responsible person (RP). In conveyancing transactions, it is crucial to consider fire safety as it can significantly impact potential buyers. It may impose severe restrictions on the premises, even prohibiting entry to the entire building. Acquiring an unusable property would be impractical.

An **Enforcement Notice** allows fire authorities to request responsible persons to meet relevant fire safety standards under the Fire Safety Order and associated regulations. Compliance may involve costly remedial work, such as replacing fire doors or installing new fire alarm systems, which could burden the buyer with expenses.

An **Alteration Notice** applies to premises considered high risk or potentially become an increased risk if any changes are made. Its purpose is to inform the fire authority about possible issues and enable them to intervene before any modifications are made that could significantly raise the risk level.

When an alterations notice has been issued for a particular premises, the responsible person must inform the enforcing fire authority before proceeding with any of the following changes:

- Alterations to the premises
- Modifications to any services, fittings, or equipment within the premises
- An increase in the number of dangerous substances present on the premises
- Changes to the intended use of the premises

Under the Environment and Safety Information Act 1988, fire authorities are responsible for keeping records of notices issued under the Fire Safety Order. These records must be available for public inspection, without any cost, during reasonable hours. They are now available online.

To exercise due diligence and identify if any of these notices are current, and if there are doubts about information provided by the landlord or management company, you can undertake a search of the local fire authority's enforcement register, which can be carried out on the National Fire Chiefs Council online database accessible here. It is important to note that staff members responding to the LPE1 form may not have the required training or qualifications to address the raised questions, especially when purchasing from a social housing provider.

Occasionally, a fire authority may issue

a “notice of defects,” notifying the responsible person of fire safety defects within premises. However, these letters are not required to be recorded on a public register. If concerns continue, a conveyancer can ask the landlord or management company if there has been any contact from the fire authority regarding fire safety.

Moreover, it is now clear that Fire Risk Assessments (FRAs) should include External Wall surveys including balconies, regardless of building height. Additional information can be found in the Fire Safety Act 2021 factsheet issued by the Government accessible online here.

Regarding the frequency of FRAs, lease-advice.org suggests conducting them every 2-4 years. However, it is advisable not to rely solely on this recommendation. FRAs should be dynamic and completed as necessary, considering the building’s circumstances, especially when changes occur.

The Government has also published The Fire Risk Assessment Prioritisation Tool, which can be accessed here. This online tool allows RPs to prioritise how soon fire risk assessments should be updated. As well as a fact sheet which is accessible here.

Attention to the responses provided at 5.6.1 and 5.6.2 of the LPE1 form is essential.

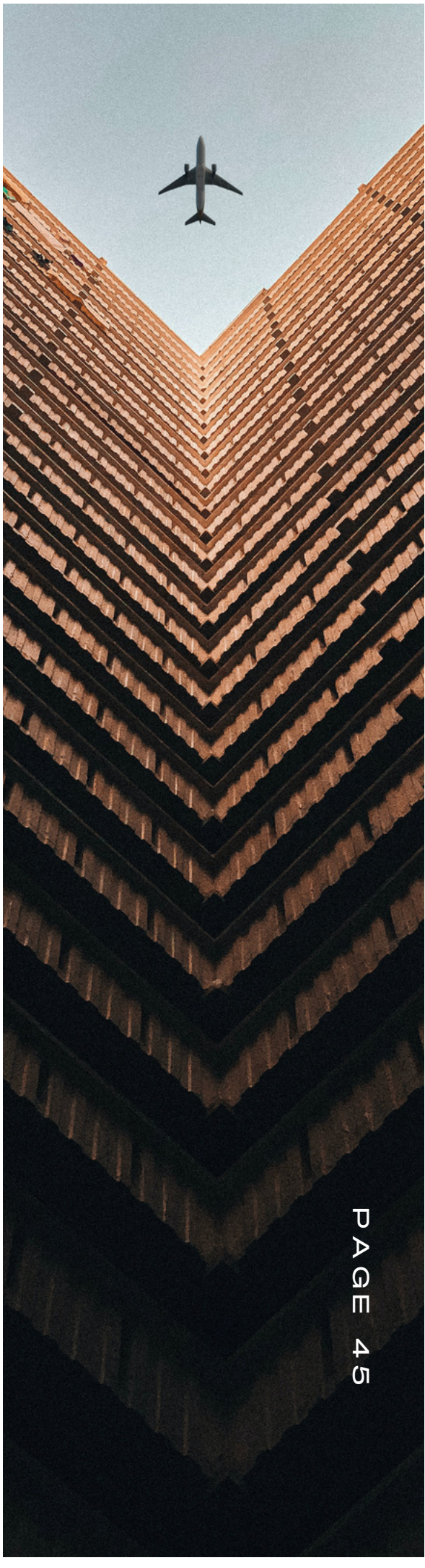
Clients should be informed that conveyancers are not fire safety experts,

and their scope is limited to confirming this fact. External resources can be provided to clients seeking fire safety advice, along with a warning that non-compliance could potentially invalidate the building's insurance.

Fire safety may seem insignificant to some buyers, but it is crucial for their safety and financial well-being. An adequate insurance policy is necessary to cover the costs of rebuilding the property in the event of a catastrophe. If the building's insurance is invalidated and there is an existing mortgage, the mortgage liability continues, even if the property becomes unusable.

Whilst beyond the scope of this note, conveyancers should also consider the matter of Remediation Orders under the Building Safety Act 2022. Building owners, along with management companies, freeholders, and superior landlords who have repairing obligations, can be subject to remediation orders. Where the order is breached the county court has the authority to enforce compliance. For further information see government guidance here.

Some simple tips from the government that can be provided to any purchaser are available here.



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LEASEHOLDER CAUSES OF ACTION

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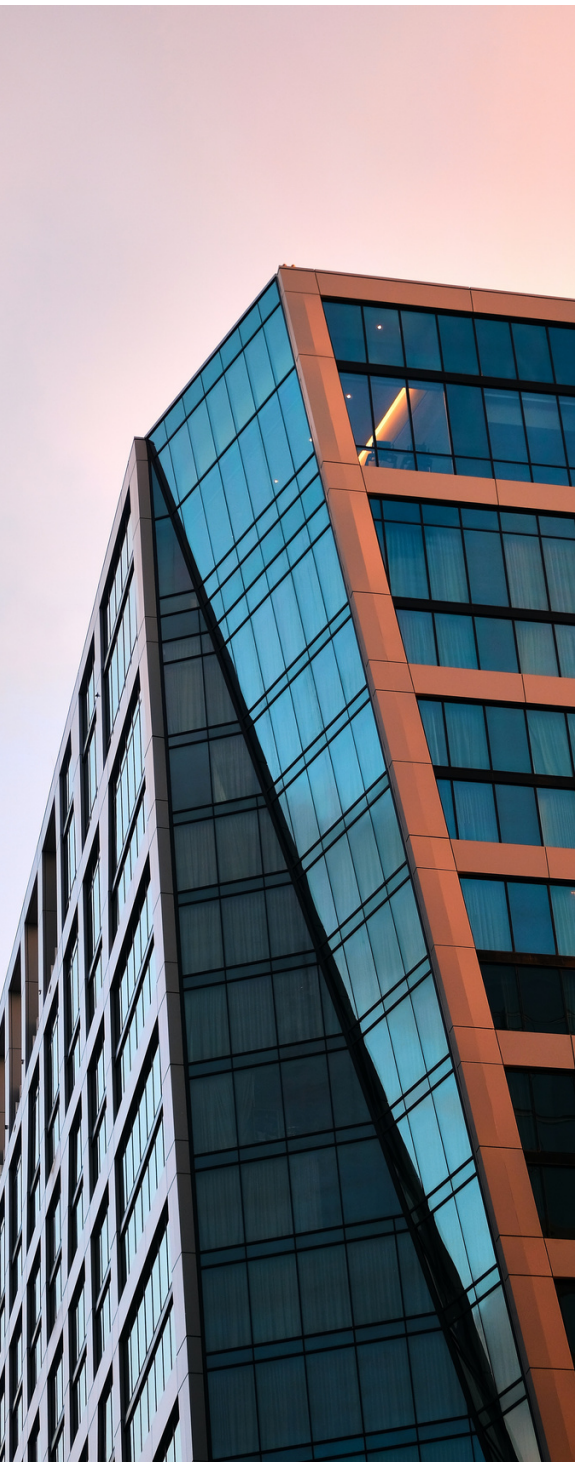

BSA SPECIAL FEATURE

In this article, Hugh Rowan discusses leaseholder causes of action and the key points for busy practitioners.

The Building Safety Act 2022 ('BSA') has fortified leaseholder's positions in a number of ways (albeit some are still pending). The three principle new causes of action (plus one old cause, anticipated to come into force soon) are the focus of this article.

1. The Defective Premises Act 1972 ('DPA')

The BSA has introduced a new s.2A to the DPA, which came into force on 28 June 2022. This applies to any person (in the course of business) who takes on work in relation to a building containing a dwelling. This person has a duty to ensure that the work is done in a professional manner and the dwelling is fit for habitation when the work is completed. The duty is owed to everyone holding or acquiring an interest in the dwelling (i.e., the freeholders as well occupational and intermediate leaseholders).

The key aspect of this new cause of action

to note is that, despite being introduced by the BSA, it is not limited to 'relevant buildings' as defined in the BSA but applies to all buildings containing or consisting of dwelling(s).

This acts as a major expansion to the present s.1 of the DPA which provides a similar duty but only in relation to work in connection with the 'provision' of a dwelling only.

However, the BSA also expands this old cause of action, by extending the limitation period for claims under s.1 from 6 to 15 years (the same limit applies for claims under s.2A). There is a curious additional limitation to s.1 in that for any cause of action which accrued prior to 28 June 2022, the limitation period is 30 years.

2. Construction and Cladding Product Claims

Broadly speaking, these claims arise where a faulty product is installed during the course of building works, and it renders all or some of the dwellings unfit for habitation. A construction product is something that is incorporated in a permanent manner in construction works. Claims can be brought by lessees or by landlords/building owners against the manufacturer or, if they have made a misleading statement, against the supplier.

In order for liability to arise the construction product or the cladding must fail to comply with regulations, or misleading statements must have been made by the marketer or supplier of the product, or the product must be inherently defective.

It should be noted that there is no definition of "unfit for habitation;" once litigation commences in the area it may be that the definition of "unfit for human habitation" in section 10 of the Landlord and Tenant Act 1985 will be relied upon moving forward.

Damages are payable in relation to personal injury, damage to property or economic loss.

3. S.38 of the Building Act 1984 ('BA 1984')

Strictly speaking, this is not a part of the BSA, it is a dormant provision of the BA 1984 which was never brought into force. However, until the 28 June 2022, it was part of the Government's transitional plan to bring this old cause of action into force, but it was quietly withdrawn in July 2022.

This section provides that a breach of duty imposed by Building Regulations will attract civil (and not merely criminal) liability. It applies to any building and is not restricted to dwellings only. However, 'damage' only includes death or injury (including any disease and any impairment of a person's physical or mental condition) and does not include economic damage (this was debated with the BSA but ultimately rejected).

For the moment, this cause of action still lies dormant, but it may be activated at any time by the Secretary of State. Notably, when it is activated then the BSA has provided that the limitation period is extended from 6 to 15 years alongside the DPA.

4. Building Liability Orders ('BLO')

Problems often arise in relation to practically bringing a claim against limited liability companies. To resolve this and

associated problems the BSA has introduced a new Building Liability Order. Where liability is incurred by a body corporate under the DPA or s.38 of the BA 1984, or as a result of a risk to the safety of persons from fire or structural failure, then the High Court can make a BLO, provided it is just and equitable to do so.

If made, a BLO can expand liability to any other 'associated' body corporate. For these purposes, two bodies corporate are associated if one controls the other or a third body controls both of them. This allows claimants whose claims would otherwise be thwarted by financially precarious defendants to pursue other corporate bodies within the same family and thus gives them much higher prospects of actual recovery.

Through these four routes, the BSA has strengthened the armoury of not just the leaseholder, but intermediate lessees and even freeholders who have fallen victim to rogue builders, developers, and other contractors. It will no doubt become a fertile area of litigation moving forward and practitioners will do well to follow the early developments in these areas.

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Designed by Andrew Butler KC, Annie Higgo, Tanfield Chambers and Ian Quayle, Managing Director, IQ Legal Training

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LITIGATING REMEDIATION CONTRIBUTION ORDERS

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BSA SPECIAL FEATURE

Disinterested persons? Who will apply and who will pay for remediation and remediation contribution orders under the Building Safety Act 2022?

Sections 123 and 124 of the Building Safety Act 2022 introduced remediation and remediation contribution orders respectively. Both are orders made by the First-tier Tribunal. By making a remediation order, the FTT will require a relevant landlord to remedy specified relevant defects in a specified relevant building by a specified time. A **remediation order** is effectively a form of mandatory injunction for works. A **remediation contribution order** in relation to a relevant building means an order by the FTT requiring a specified body corporate or partnership to make payments to a specified person for the purpose of meeting costs to be incurred in remedying relevant defects or specified relevant defects relating to the relevant building. It is effectively a form of money judgment for a designated purpose.

Both remedies are granted by the FTT on application by an interested person. In the case of remediation orders, the list of interested persons was supplemented by statutory instrument and the categories for

each remedy are now effectively the same. The applicant may be the Minster, regulator, local authority, fire and rescue authority, person with a legal or equitable interest in the building or other person subsequently prescribed by secondary legislation.

The case law on remediation orders and remediation contribution order has yet to develop . What is reasonably clear now is that where an application for either remedy is made but contested by the respondent, the FTT will make directions that follow the conventional pattern – statements of case, disclosure, evidence of fact, expert evidence and listing for final hearing. In the case of an application for a remediation contribution order, the statements of case will need to explain why it is alleged that it is just and equitable for the FTT to make the order. That will call for detailed pleading.

Of the many questions confronting property litigators deciding whether to apply to the FTT for either remedy, two are particularly vexing:

1. Who will pay for the proceedings?
2. Will the proceedings be funded by one of the interested persons such as the secretary of state, regulator, local authority or fire and rescue authority?

The two questions are obviously connected.

An insight into how remediation and remediation contribution orders were

intended to work can be found in the Explanatory Notes to the Building Safety Act 2022 that were published by DLUHC (Department of Levelling Up and Housing Communities) with the legislation.
The Notes are a substantial body of work. The PDF version runs to 418 pages. The introduction explains that the Notes have been prepared to assist the reader and **to help inform debate on it**[2]. They do not form part of the Act and have not been endorsed by Parliament. The Notes explain what each part of the Act will mean in practice, provide background information on the development of policy and provide additional information on how the Act will affect existing legislation in this area.

For example, and with the above objectives in mind, the Notes contain 33 paragraphs on remediation and remediation contribution orders alone including discussion on effect, background, and the Minister's proposed use of power. Each discussion includes a worked example intending to demonstrate how the particular remedy is intended to operate in practice.

In the worked example for remediation orders, the applicant to the FTT is the fire and rescue authority. In the case of remediation contribution orders, there are two worked examples. In the first example, the applicant to the FTT is the freeholder (applying against the developer). The second, the applicant is, again, the fire and rescue authority. In none of the three examples, is the applicant for remediation order or a remediation contribution order a

leaseholder or a group of leaseholders.

Although the Notes make it clear that leaseholders are, as a person with an interest in the building, intended to be potential applicants to the FTT, the three worked examples perhaps shed light on a fundamental obstacle, leaseholders' lack of funds, and reflect an understanding that other interested persons, those with the necessary resources available to them, will be far more likely to initiate and pay for litigation in the FTT.

When it comes to applications for remediation and remediation contribution orders, possibly requiring a significant financial commitment, it is unclear whether the Minister, regulator, local authority and fire and rescue service will be interested.

References / notes

[1] LON/00BF/HYI/2022/0002
[2] This article is intended to form part of that debate.

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BSA SPECIAL FEATURE

MAKING AN APPLICATION FOR A REMEDIATION CONTRIBUTION ORDER (RCO)

Overview

Section 124 BSA (Building Safety Act) 2022 gives to the First-tier Tribunal (Property Chamber) **(FTT)** the power to make an RCO. That is an order:

- made on the application of an interested person;
- requiring a specified body corporate or partnership;
- to make payments to specified persons;
- for the purpose of meeting costs incurred or to be incurred in remedying relevant defects (or specified relevant defects) relating to

a relevant building.

An order may be made when it is **just and equitable to do so**.

The application must relate to: (1) a relevant building, as to which see s.117 BSA and (2) costs incurred/to be incurred in remedying relevant defects, as to which see s.120 BSA.

The application must be made by an "interested person". That is a "person" within the list at s.124(5), which includes public bodies as well as persons with a legal or equitable interest in the relevant building.

The respondent to the application will be the body corporate or partnership against whom the order is sought. An order cannot be made against individuals.

The persons to whom any ordered payments are to be made do not have to be named as a party to the application, but necessarily they must be identified in the application.

It follows, that an applicant can make the application for the benefit of (1) themselves, (2) themselves and others, or (3) for others only. This enables a public body that is an "interested person" to make the application for the benefit of leaseholders.

Approach to the application

The FTT is perhaps a jurisdiction with which not all property litigators may be familiar. Importantly, it has its own procedure rules (SI 2013/1169) by which the tribunal is encouraged to avoid "unnecessary formality" and seek "flexibility in the proceedings" (r.3(2)). It follows that it is not uncommon for the FTT to take a less formal approach to "pleadings", or the evidence filed in support of a party's position. Litigators not familiar with the FTT's jurisdiction can often be taken by surprise by the informality of the proceedings.

Having said that, in the case of 9 Sutton Court Road (unreported) LON/00BF/HYI/2022/0002, which as of 23 June 2023 is the only published decision on a RCO, the FTT was firm in requiring

the exchange of comprehensive statements of case **(SoC)** before case management directions were given, even to the extent that the landlord respondent who failed to comply was in consequence debarred from participating in the application.

The importance of such a direction is obvious: (1) it provides transparency as to the case each party is required to meet; (2) it informs as to the evidence required to resolve the dispute (including what if any expert evidence) thereby assisting case management; and (3) it enables a more informed time estimate for the final hearing.

So, whilst there is the published Form BSA2 on which an application for a RCO can be made, it is recommended that applicants supplement the information required by the form with a SoC and invite the FTT to direct a comprehensive response and thereafter reply before listing the application for a case management hearing or otherwise moving on to give directions.

For the purposes of preparing their SoC, applicants and respondents alike may find it useful to consider the following questions:

Q1. what order am I asking the FTT to make?

Q2. what arguments will I need to make to persuade the FTT to make that order?

Q3. what evidence will I require to support those arguments?

As well as assisting in the preparation of an SoC, consideration of those questions will enable the parties and the FTT to identify the evidence (particularly expert evidence) that will need to be marshalled for the final hearing and thus, what case management directions will be required. (As with conventional court proceedings reliance on expert

evidence requires the FTTs' permission – r.19). So, for example, where costs have not yet been incurred, what are the relevant defects and what is the likely cost of carrying out the remedial work? Where the SoCs put those matters in issue, a direction for permission to rely on evidence from (as applicable) building surveyors, structural engineers, fire officers and quantity surveyors will be needed.

The test

In considering Q2, the focus of attention will be on the jurisdictional threshold for making a RCO: whether it is **just and equitable to do so**.

That is a broad test of an open-textured nature. It is unlikely that the FFT (or higher courts on appeal) will approach its application prescriptively. As has been said in connection with the similarly open-textured "reasonableness" test that applies to residential service charge recovery, "factual situations are almost infinitely variable, and different considerations will come into play in different circumstances." Nevertheless, the 9 Sutton Road case does provide some insight as to how the FTT may approach RCO applications (it being noted that the panel included the FTT's President).

The case concerned a claim by tenants for reimbursement of previously paid service charges. The payments were made before the coming into force of the BSA. Had they fallen due after the passing of the BSA, the service charges would not have been payable because the freeholder landlord was the developer of the property (see para.2, Sch.8 BSA).

As already mentioned, the freeholder was debarred from participating and so the application was effectively one-sided. It follows that the FTT's reasoning is limited. Nevertheless, notable reasons given for making the order include that the contribution (service charge repayments) "ought to

be paid" and there were no "mitigations or other matters" to be taken into account in the exercise of the FTT's discretion.

Use of the phrase "ought to be paid" is interesting. There was no conventional "cause of action" requiring payment: no contractual or tortious right to repayment. Rather, the FTT used the RCO jurisdiction to effectively give retrospective effect to the BSA; by ordering repayment of previously paid service charges, the FTT enabled the tenants to benefit from the BSA protections that were not in force at the time the payments were made. Thus, the repayments "ought to be paid" not with reference to a cause of action but with reference to the policy underlying the BSA; that is what the FTT felt justice and equity required.

From the perspective of an understanding of how the FTT will approach RCO applications, it is perhaps unfortunate that the landlord was debarred from defending. So, whilst the FTT recognised that there may be "mitigations or other matters" militating against the making of an RCO, it did not have the benefit of argument from the party affected by the order and there was no consideration of what "mitigations or other matters" might be relevant.

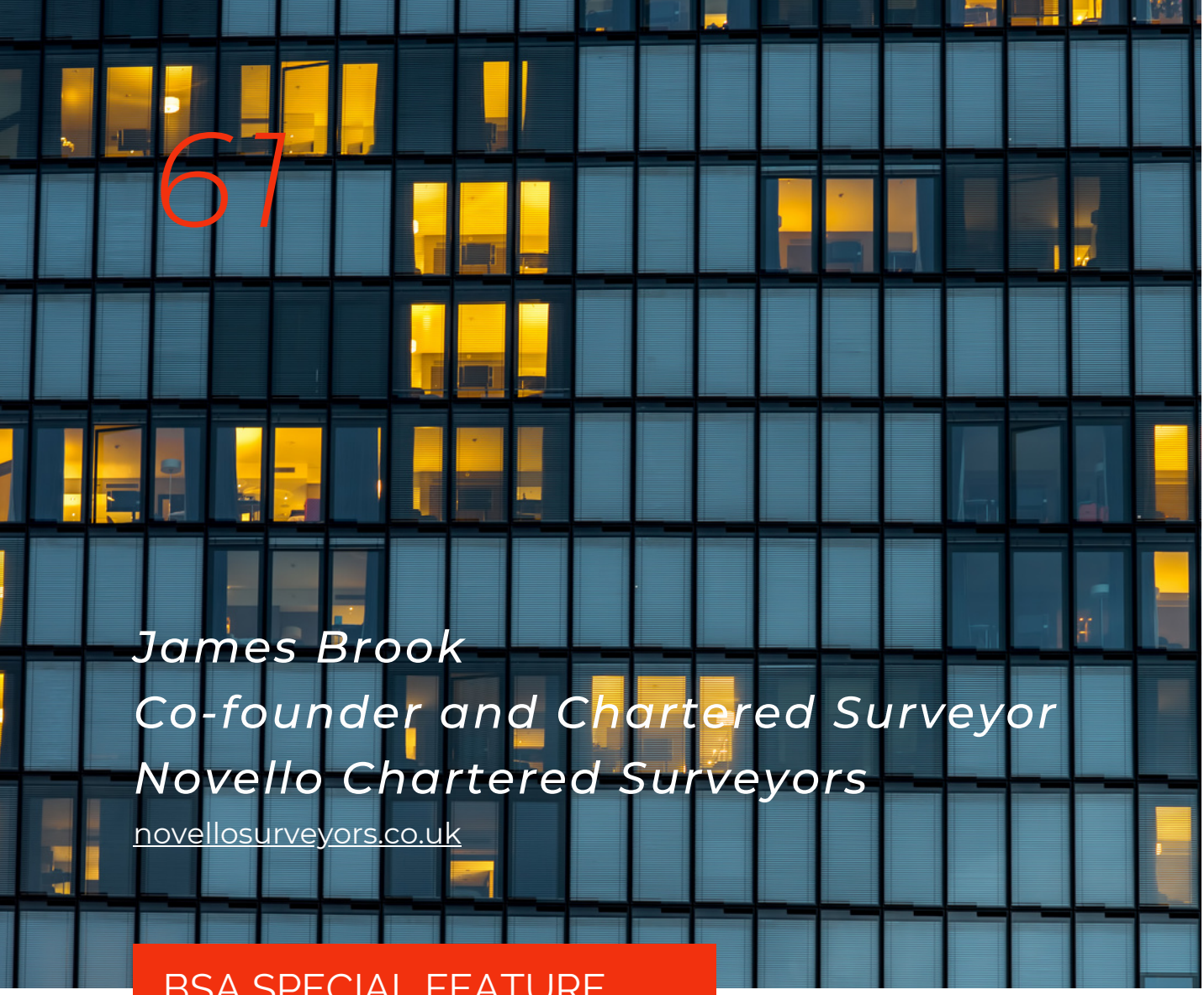
It therefore remains to be seen to what extent the FTT will weigh in the balance the practical and financial consequences to all affected by the order, or the existence of an otherwise cause of action under which a claim for payment might have been made but which is time barred under a statutory limitation defence.

Moreover, is not yet clear how "mitigations or other matters" may be reflected in the quantification of the contribution; it being

recalled that it is a contribution order not necessarily an indemnification against costs.

A further, and as yet unexplored question of interest in the application of the jurisdiction, is the scope of costs that the FTT may wrap-up in an order for compensation. The cost of remedying relevant defects will of course capture the cost of the works themselves. But what about consequential costs, e.g., (where required) of providing temporary alternative accommodation for the duration of the works. Here, a "necessity" test would appear to be appropriate: is it necessary to incur the costs to enable the remedying of the relevant defects?

A final point. There is currently a RCO application relating to the Olympic Park that is listed before the Upper Tribunal (Lands Chamber) to be heard as a first instance decision following transfer of the application from the FTT. The decision in that case is likely to provide greater insight into the correct approach to RCOs. Nevertheless, the fact sensitive nature of the just and equitable enquiry means that whilst broad guidance will naturally be useful, how it falls to be applied (both in terms of the required evidence and form of order) will vary from case to case.



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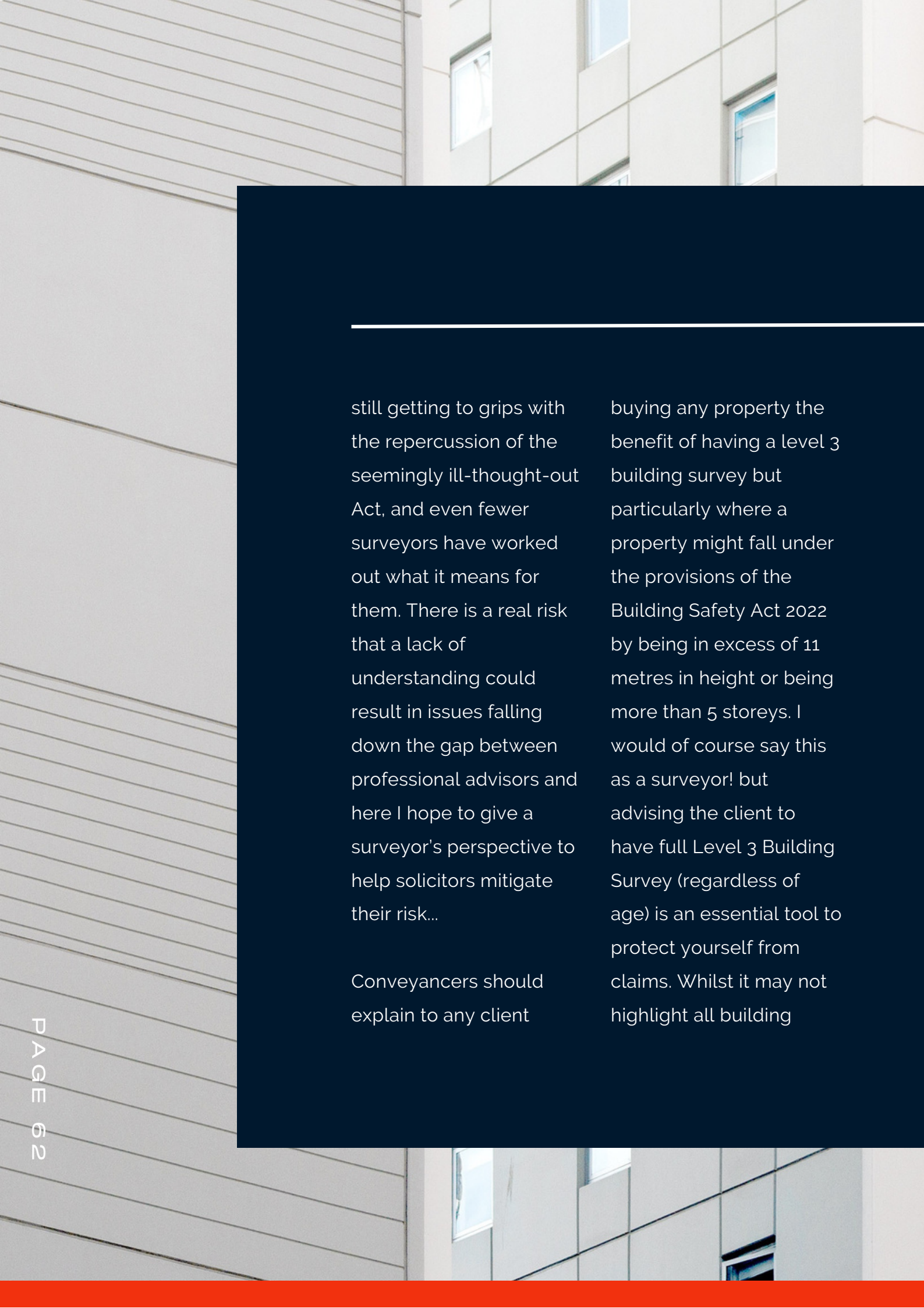
BSA SPECIAL FEATURE

A SURVEYOR'S PERSPECTIVE ON THE BUILDING SAFETY ACT

Over the last 6 months I have been on a 'CPD roadshow' meeting nearly 300 solicitors and delivering free training sessions covering a variety of topics from building regulations to the implications of sprayed foam insulation (please get in touch if this is of interest to your firm). However, one topic which repeatedly dominated the sessions was fire safety, EWS1's and the dreaded Building Safety Act 2022. It quickly became apparent that there was sheer panic across the industry and in April we hosted a training session alongside Ian Quayle, appropriately named 'What the F*** is the Building Safety Act!?.' Many solicitors are



still getting to grips with the repercussion of the seemingly ill-thought-out Act, and even fewer surveyors have worked out what it means for them. There is a real risk that a lack of understanding could result in issues falling down the gap between professional advisors and here I hope to give a surveyor's perspective to help solicitors mitigate their risk...

Conveyancers should explain to any client buying any property the benefit of having a level 3 building survey but particularly where a property might fall under the provisions of the Building Safety Act 2022 by being in excess of 11 metres in height or being more than 5 storeys. I would of course say this as a surveyor! but advising the client to have full Level 3 Building Survey (regardless of age) is an essential tool to protect yourself from claims. Whilst it may not highlight all building

safety issues, it should highlight some of the main issues such as cladding concerns or structural issues. This approach alongside limiting your own retainer relating to any advice on the BSA (Building Safety Act), will help reduce your own risk.

It is important to appreciate most surveyors have fire safety exclusions in their PI, which means if they miss any issues relating to fire safety e.g., cladding, they do not have the benefit of PI cover. Therefore, most surveyors will adopt a conservative approach and often be unwilling to give definitive answers on anything that could generate exposure to an uninsured claim. Matters relating to fire safety and cladding are specialist and beyond the expertise of most general surveyors to comment on. Nevertheless, surveyors should be flagging any

cladding concerns and requesting an EWS1 or FRAEW where appropriate.

The first stumbling block is in establishing the height of the building to see if it meets the criteria of the Act. I would take a conservative approach, four-storey buildings (and even some tall three-storey buildings) could exceed 11 metres in height- so do not just assume it only applies to five storeys and above. Most surveyors will not confirm if the building is above 11m, the measurements for this are quite complex and certainly outside the scope of a typical survey. It involves measuring from the finished floor level of the top floor of accommodation to the lowest part of the ground level (excluding anything below ground level). This can be achieved if there is a communal stairwell running the height of the building but can be quite difficult and easy to make an error on, either way, most surveyors will just not be willing to risk their PI commenting or advising on this. It seems an easy question, but if they measure it as 11.1m2 and it turns out to be just below and therefore outside the scope of the Act, then the surveyor is heavily exposed to an uninsured claim. I do not yet know of any surveyor offering a service to measure these buildings and therefore establishing the height can prove to be a tricky task and probably not one your surveyor will help with.

The protection afforded under the Building Safety Act only applies to building safety issues, which in most cases is either going to be cladding, fire safety or structural/collapse. As such, there are ways to mitigate these risks...

With regards to cladding, surveyors should be highlighting any concerns they have in their report. If they flag concerns an EWS1 form or FRAEW (Fire Risk Appraisal of External Walls), or other supporting documentation (e.g., evidence it meets the current Building Regulations 2018) should be requested from the building owners. Other fire safety issues could be a lack of fire doors to the communal areas, lack of smoke alarms or escape routes and these issues are likely to be beyond the scope of any survey, after all a surveyor is not a fire safety engineer and any inspection of the communal areas is normally cursory. However, you can always ask, but the best way to cover this risk is checking for a recent Fire Risk Assessment

of the block. If one is not present- I would push for this to be produced.

Structural issues would normally have to be very serious for there to be a safety risk and therefore surveyors should be able to observe and comment upon any visible structural issues (such as significant cracking and movement). Although they might not be aware of all issues for example concrete steel corrosion which might be in hidden areas. If the surveyor highlights any concerns relating to structural movement a further report by a structural engineer should be requested to rule out any issues.

Whilst this does not provide a full-proof risk mitigation, I believe covering these points will help limit the risk of issues for solicitors, arising under the Building Safety Act. Engaging the surveyor as early as possible on these matters will definitely help, it is always better to alert the surveyor pre-inspection so they can focus on these matters when inspecting.

Here is an example of questions you may wish to ask the surveyor on BSA issues:

With regards to the BSA 2022 is there anything you can advise to help mitigate my client's risk? Whilst I appreciate you cannot give definitive answers and some of this will fall outside your survey scope, did you note any building safety issues or defects during your inspection? Specifically, from your inspection:

- Was there any evidence of cladding, combustible attachments/balconies, or anything else that may be a fire safety concern and/or require an EWS1?
- Were there any other visible fire safety issues to the communal areas e.g., lack of fire doors, smoke alarms etc.
- Were there any visible structural issues which could pose a safety concern e.g., structural movement or cracking which could result in collapse
- Were there any signs of remediation work having been undertaken to the

building related to or connected with fire safety or defective construction

The above advice all focuses upon the risks of building safety defects being discovered and the implications for you as advisers if it turns out that they do not benefit from the protections under the Act. However, there are various other implications of the Act which might be of concern. For example, if they are undertaking a lease extension which results in a surrender and re-grant- this will potentially take the new lease outside of the Act. This has recently been addressed by the Government who have stated they will amend it as soon as the parliament timetable allows, in the meantime they have asked parties to honour the original protections of the Act in the new lease. However, it goes without saying that the practical implications of this 'goodwill' are unlikely to transpire in the real world and it is unlikely the landlord will do this without charging a premium. Therefore, the current advice is not to extend a lease which benefits from protections under the Building Safety Act until the government make the necessary changes. A shame no one thought about that at the time!

Navigating the repercussions of the Building Safety Act 2022 is a real headache for conveyancers at the moment. My view is that there has been a somewhat knee-jerk reaction with solicitors panicking and in many cases refusing to act. By all means, increase your fees to reflect the increased risk and complexity, but I believe that the risks can be significantly reduced by limiting your retainer, asking the right questions, and gathering the right documents.

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REGULAR FEATURE

CASE STUDY: UNLOCKING COST EFFICIENCIES

Earlier this year, Insight Legal — already one of the UK's premiere legal practice management innovators — joined forces with the global leader in legal technology, Dye & Durham.

By acquiring Insight Legal, Dye & Durham expanded its industry-leading suite of conveyancing and onboarding solutions to include a high-quality, modern legal accounting and practice management system designed for UK law firms.

Based in Gloucestershire, property law firm Dobbs & Drew is one such firm taking control of their service delivery

and costs using Dye & Durham's Insight Legal platform.

Dobbs & Drew
Property Lawyers

Founded in March 2016 by co-directors Lisa Dobbs and Sue Drew, the firm helps clients get the legal process right when moving house. It offers services such as land and property searches, arranging contracts, exchanging funds, and ensuring that the ownership of the property is straightforward throughout.

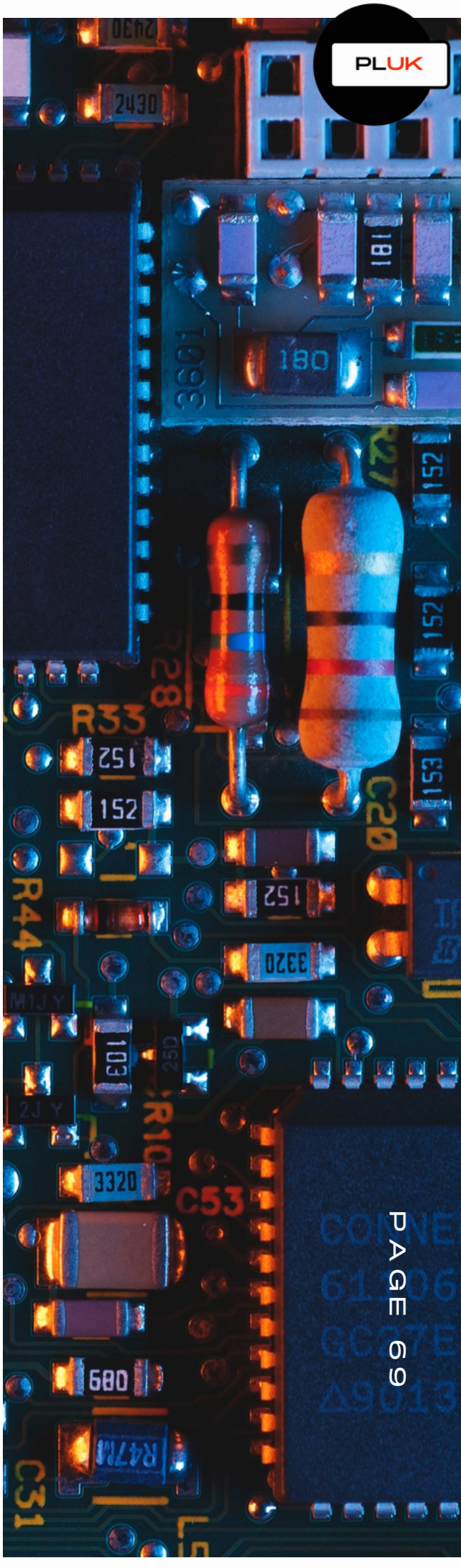
Its team is dedicated to helping clients move house in a quick and hassle-free manner and providing ongoing support throughout the conveyancing process. To do this, Dobbs & Drew sought legal software that offered them extensive case and legal accounts management functions at a reasonable cost with a user-friendly system to help the team deliver a quality service to its clients.

The Requirements

Launching as a start-up law firm three years ago, Dobbs & Drew wanted to drive maximum value at low cost in all areas of the business. The need to keep company spending under control while improving operational efficiency became a significant factor when the small team began its search for a legal software solution.

"When we decided to start up a new law firm, we knew that we needed to find a legal software system that was primarily cost-effective but also wasn't overly complicated for us and our staff to install and get to grips with quickly," says Lisa Dobbs.

Dobbs and Drew had used other practice management systems before, but found those providers had high set-up costs and lacked the



features needed to handle legal accounts and practice management tasks easily within the same solution.

"As a small business, we knew that having limited software like that in place could prohibit our practitioners from handling client cases and accounts effectively and delivering the best service possible," Dobbs says. "We were therefore very conscious to weigh up cost, functionality and ease-of-use when determining which legal software was able to meet the needs of our staff and the expectations set for our clients."

The Solution

Insight Legal enables firms and their practitioners to complete daily case management, legal accounts, and practice management duties through one centralised, user-friendly system. Offering a range of intelligent reporting and document generation and storage capabilities, the software is designed to alleviate much of the heavy lifting associated with managing case files and accounts, helping users to improve productivity through greater operational efficiency.

In addition to its software, Insight Legal's experienced team of industry practitioners also offers full training and support to each of its users to educate them on the features available and help them take advantage of the system in a way that best fits the needs of their firm.

"We were introduced to Insight Legal after the company's Head of Training and Support Services, Deborah Edwards, gave a training session at one of my mother's businesses," says Dobbs. "After arranging a full demonstration of the software, we saw for ourselves just how simple its interface was to use and complete daily case and account management tasks."

Saving time was a big priority for Dobbs and her co-director, she adds, and they learned that Insight Legal's system allowed them to manage all areas of their practice and legal accounts in one accessible platform – something sorely lacking in the other software they had sampled.

The company fully implemented Insight Legal's software in March 2016, adopting its full suite of case management, legal accounts, and practice management solutions.

"After seeing the system first-hand, we determined that Insight Legal offered us the tools we needed to perform many of our day-to-day activities effectively and reduce the time spent on completing tasks, such as generating reports," Dobbs says.

"We knew that Insight Legal offered us an array of features at a very effective cost to the business and was ultimately the best fit for our practice and current position in the market. Additionally, the Insight Legal team also provided training and support throughout the installation process and beyond, which helped to get our team up to speed with the software quickly."

The Results

As a small team, providing excellent client services and managing every stage of a case in good time was essential to Dobbs & Drew's early growth. Selecting Insight Legal as its primary legal software provider has allowed the firm to meet

these demands and drive maximum value across their practice through greater ease of use and time savings.

“We’ve seen a remarkable reduction in the amount of time it takes to carry out standard practice duties, and this is purely because of the simplicity of being able to handle both our accounts and case management in one extremely user-friendly system,” Dobbs says.

“With the software in place, jobs such as managing client funds and generating financial reports can be completed swiftly and with minimal complications, improving the productivity of our staff and ultimately the satisfaction of our clients.”

Using Insight Legal has also enabled the firm to reduce its monthly outgoings and to invest in the software for every member of staff, which was not possible with other more costly platforms.

“The support Insight Legal’s system offers us on a daily basis is also incomparable,” Dobbs adds. “Insight Legal has been fundamental to our efforts to save time and costs across our practice and will continue to play a huge role in enabling our team of experts to achieve our aim of a first-class legal service for every client, both now and in the future.”

Visit Dye & Durham online here.

INDUSTRY EVENT CALENDAR

June

InfoTrack
Event: Webinar - InfoTrack Commercial: Premium Portfolio Management
Date: 30 June 2023
Time: 11 AM
Cost: Free
Booking link

IQ Legal Training
Event: Webinar - Flying Freehold with Zoe Upson
Date: 12 July 2023
Time: 11 AM - 12 PM
Cost: £40 per delegate
Booking link

July

IQ Legal Training
Event: Webinar - Enquiries – What's the Score? With Zoe Upson
Date: 05 July 2023
Time: 11 AM - 12 PM
Cost: £40 per delegate
Booking link

IQ Legal Training
Event: Webinar - Half Year Review 2023 – Residential Conveyancing with Ian Quayle
Date: 13 July 2023
Time: 11.15 AM - 12.15 PM
Cost: £40 per delegate
Booking link

InfoTrack:
Event: PII - how your digital processes can support renewals - webinar
Date: 05 July 2023
Time: 2:00 PM
Cost: Free
Booking link

IQ Legal Training
Event: Webinar - Half Year Review 2023 – Commercial Property with Ian Quayle
Date: 18 July 2023
Time: 11.15 AM - 12.15 PM
Cost: £40 per delegate
Booking link

INDUSTRY EVENT CALENDAR

July

Today's Training and IQ Legal Training
Event: Webinar - Private Rights of Way Roads and Driveways with Zoe Upson
Date: 26 July 2023
Time: 1.00 - 2.00 PM
Cost: £55 + VAT per delegate
Booking link

September

Redbrick Solutions:
CPD Event: The Digital Conveyancing Roadmap, Newcastle with various speakers.
Date: 13 September 2023
Time: 9:30 AM - 4:30 PM
Cost: £20.00 per delegate
Booking link

Today's Training and IQ Legal Training
Event: Webinar - Climate Change and Due Diligence with Ian Quayle
Date: 19 September 2023
Time: 11.00 AM - 12.00 PM
Cost: £55 + VAT per delegate
Booking link

Redbrick Solutions:
CPD Event: The Digital Conveyancing Roadmap, London with various speakers.
Date: 20 September 2023
Time: 9:30 AM - 4:30 PM
Cost: £20.00 per delegate
Booking link

Redbrick Solutions:
CPD Event: The Digital Conveyancing Roadmap, Leeds with various speakers.
Date: 27 September 2023
Time: 9:30 AM - 4:30 PM
Cost: £20.00 per delegate
Booking link

October

Redbrick Solutions:
CPD Event: The Digital Conveyancing Roadmap, Birmingham with various speakers.
Date: 04 October 2023
Time: 9:30 AM - 4:30 PM
Cost: £20.00 per delegate
Booking link

INDUSTRY EVENT CALENDAR

October

Today's Training and IQ Legal Training

Event: Webinar - Highways for Residential Conveyancers with Tom Graham

Date: 25 October 2023

Time: 1.00 - 2.00 PM

Cost: £55 + VAT per delegate

Booking link

December

Today's Training and IQ Legal Training

Event: Webinar - Residential Conveyancing Update with Ian Quayle

Date: 13 December 2023

Time: 1.00 - 2.00 PM

Cost: £55 + VAT per delegate

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