

Building Safety Act 2022: what about mixed use?



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Dame Judith Hackitt Review

“the evidence has demonstrated that there has been a “race to the bottom” in the construction industry. It is clear that competence, and ability and desire to comply with building regulations, has been “patchy”, with profit the overwhelming priority, leading to cost-cutting at every turn. Underpinning this has been a regulatory system that is not fit for purpose and which has failed to identify systemic issues in the building sector or appropriately enforce building regulations. The manufacturers of construction products have also played their part, with the evidence to the review of both deliberate gaming of the testing regime and questionable marketing practices”.

Bad guys

- The Construction Industry
- Construction Products (Cladding etc)
- The Government?



no leaseholder living in a
building above 11 metres
will have to pay to fix
dangerous cladding



Building Safety Act 2022

An Act to make provision about the safety of people in or about buildings and the standard of buildings, to amend the Architects Act 1997, and to amend provision about complaints made to a housing ombudsman.

[28th April 2022]



Who pays?

Schedule 8 (in a nutshell)

- Para 8 – No qualifying tenant pays service charge in any circumstance for “cladding remediation”
- Para 2 – No tenant pays service charge for relevant defect where the Landlord, or an associated company, is responsible for the defect in question (“the Developer condition”)
- Para 3 – No qualifying tenant pays service charge for relevant defect where the Landlord, or the Landlord’s group of companies, have over a certain net worth (“the Contribution condition”)
- Para 4 – No qualifying tenant pays service charge for a relevant defect where the value of the flats is less than £325,000 in greater London (“the tenants flat value condition”)

Limit on service charge in other cases

- Para 5(1) A service charge which would otherwise be payable under a qualifying lease in respect of a relevant measure relating to any relevant defect is payable only if (and so far as) the sum of—
 - (a) the amount of the service charge, and
 - (b) the total amount of relevant service charges which fell due before the service charge fell due,

does not exceed the permitted maximum.

Permitted maximum is £15,000 in London (£10,000 elsewhere) unless value of flat is over £1million

Annual limit – 1/10th the Permitted maximum.

Issues Arising in Mixed use Properties

- Is your client the Freeholder, or does it hold an intermediate lease, which includes repair obligations, or entitlement to collect service charges?
- Is your client a commercial tenant, letting space in a mixed use building?
- Does your client have management responsibilities for a mixed use building?

Does the Act apply to my (Mixed Use) Building?

(2) “Relevant building” means a self-contained building, or self-contained part of a building, in England that contains at least two dwellings and—

- (a) is at least 11 metres high, or
- (b) has at least 5 storeys.

(3) “Relevant building” does not include a self-contained building or self-contained part of a building—

(a) in relation to which a right under Part 1 of the Landlord and Tenant Act 1987 (tenants’ right of first refusal) or Part 3 of that Act (compulsory acquisition by tenants of landlord’s interest) has been exercised,

(b) in relation to which the right to collective enfranchisement (within the meaning of Chapter 1 of Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993) has been exercised,

(c) if the freehold estate in the building or part of the building is leaseholder owned (within the meaning of regulations made by the Secretary of State), or

(d) which is on commonhold land.

What is a “Qualifying Lease”

- (2) 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, 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.

So, it doesn't apply to Commercial Tenants?

- In fact, it does.
- If there is a relevant defect, in a relevant building, and the landlord meets the “Developer Condition”, schedule 8 para 2 applies to “a lease of any premises”.
- Government felt the need to spell it out in Regulations
 - (2) For the purposes of paragraph 2 of Schedule 8 to the Act—
 - (a) no service charge is payable under a non-residential lease in a relevant building where the conditions set out in paragraph 2(2) of the Act are met; and
 - (b) the reference in paragraph 10(2) of Schedule 8 to the Act applies to non-residential leases.

Any additional duties on Commercial Tenants?

- Part 4 of the Act applies to “Higher Risk Buildings”, ie those over 18 metres in height or 7 stories, with 2 or more residential units.
- Additional duties on Landlord. An “accountable person” responsible for common parts.
- In order to facilitate role as “accountable person” additional obligations, including registration with a regulator; reporting requirements about risks; and, enforcing duties on residents.
- Duties on all owners and residents of residential units, so if commercial unit also owns some residential stock on short lets, additional duties.
- No express powers of entry for non residential property (yet).

Meaning of “relevant defect”

A Defect that

- (a) arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works, and
- (b) causes a building safety risk.

“relevant works” means any of the following—

- (a) works relating to the construction or conversion of the building, if the construction or conversion was completed in the relevant period;
- (b) works undertaken or commissioned by or on behalf of a relevant landlord or management company, if the works were completed in the relevant period;
- (c) works undertaken after the end of the relevant period to remedy a relevant defect (including a defect that is a relevant defect by virtue of this paragraph).

“The relevant period” here means the period of 30 years ending with the time this section comes into force.

“building safety risk”, in relation to a building, means a risk to the safety of people in or about the building arising from—

- (a) the spread of fire, or
- (b) the collapse of the building or any part of it;

Question to consider – does this definition take the Act well outside its initial intended scope? What might this mean for commercial tenants in mixed use buildings?

My client is the freeholder/head lessee/manager – do they bear the cost of all the remediation?

- Simple answer is that all leasehold obligations remain the same, save for liability on lessees to pay service charge. So, if part of repairing obligation, then yes.
- Building Safety (Leaseholder Protection)(Information etc)(England) Regulations 2022 SI 859/2022 provides a complex statutory liability to pass costs “along the chain” of interest holders

Thank you for listening

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