



# Fire Safety Update – Progress Made but a Long Journey Ahead



## Introduction

The Grenfell Tower Disaster in June 2017 was of course tragic from a purely human perspective. However, beyond that, the ramifications of the disaster have been monumental for flat leaseholders, mortgage providers, professionals engaged in the construction arena and the professional indemnity insurance industry.

The Fire Safety Bill is making its way through Parliament.

On 10 February 2021, the government announced that further monies would be available to cover the costs of the removal of unsafe cladding as well as the intention for a state backed professional indemnity insurance scheme in relation to Form EWS1.

In this note we explore the current position and some of the issues arising from it.

## THE CURRENT CONTEXT

### Fire Safety Defects

Since the Grenfell Tower Disaster it has become apparent that numerous buildings suffer from fire safety defects. For the purpose of this note, it is important to categorise fire safety defects as follows:

**Defective / Unsafe Cladding:** Essentially, this is cladding on the external walls of buildings which is not safe from a fire safety perspective.

**Other Fire Safety Defects:** These are any fire safety defects not amounting to cladding on an external wall. For instance, these could include defective compartmentation within a building as an example.

Various buildings of all sizes suffer from both defective cladding and other fire safety defects.

### The Fire Safety Bill

The Fire Safety Bill is currently passing through the parliamentary process. It will amend the Fire Safety Order 2005 to clarify that the responsible person or duty-holder for multi-occupied, residential buildings must manage and reduce the risk of fire for: (a) the structure and external walls of the building, including cladding, balconies and windows; and (b) entrance doors to individual flats that open into common parts. Helpfully, it will empower fire brigades to take enforcement action in relation to these matters i.e. to require

their remediation where appropriate. That begs the question as to what the position is as regards whose responsibility it is to cover the cost of the remedial works covered by the bill and, indeed, fire safety remedial works generally.

## The Problem for Leaseholders – Remedial Costs / Service Charge Provisions

Flats are typically owned on a leasehold basis via long leases. The landlords of the blocks of flats have attempted to pass on the cost of removing unsafe cladding to the long leaseholders via service charge provisions. In a number of cases these attempts have been successful.

As one example, ***Cypress Place & Vallea Court, Manchester v Pemberstone Reversions*** was a First-tier Tribunal (Property Chamber) (the "FTT") case where two blocks of flats in Manchester were covered in cladding which did not meet the applicable fire safety regulations. The landlord added about £3 million to the leaseholder's annual service charge to remove and replace the cladding and to allow for a "waking watch" which is a 24-hour security service to watch for a fire. The FTT found that the £3 million was a service charge item and therefore payable by the leaseholders.

This type of situation is financially disastrous for many leaseholders. The severity of this problem was exemplified by a report in "*Inside Housing*" which explained that one in six leaseholders, who were subject to the cladding crisis, was exploring bankruptcy options.

The issue of defective cladding has severely impacted upon the marketability of such flats. Would be purchasers, who are often first-time buyers, do not want to acquire leases requiring them to pay significant sums to rectify unsafe cladding. Mortgage lenders have been concerned that the terms of leases requiring such sums to be paid reduce the value of the leases and accordingly the security they have for the loans advanced.

However, the fire safety defects from which buildings suffer are not just limited to unsafe cladding, but also include other fire safety defects which are wide ranging. Accordingly, the impact upon the marketability of the flats within buildings are also arising from fire safety defects which are not cladding related.

## Form EWS1 – A False Dawn

Form EWS1 was designed to alert mortgage lenders as to whether remedial works were needed in respect of buildings with cladding where the highest floor is 18 metres or more. Taking a simplistic view of the form it should have enabled lenders / prospective leaseholders to identify the extent to which remedial works in respect of cladding were needed or not. In the case of the latter, it was intended to provide comfort for: (a) mortgage lenders that the leasehold interest of a flat would provide adequate security for its loan; and (b) in respect of would be purchasers that they would not be subject to an obligation to contribute to extensive remedial works.

Form EWS1 has to be completed by a member of one of a number of professional bodies. Within the form there are two options as follows:

- a. Option A – This section is called "*Where external wall materials are unlikely to support combustion*". Essentially, the professional has to confirm to the best of his/her knowledge either that essentially the materials used meet the criteria of "*limited combustibility*" or better and that cavity barriers are installed to an appropriate standard in relevant locations or alternatively that they are not.
- b. Option B – This section is called "*Where combustible materials are present in external wall*". Essentially, the professional has to confirm that they have used reasonable skill and care to assess the level of fire risk presented by the external wall construction and that either the risk is sufficiently low that no

remedial works are required or that an adequate standard of safety is not achieved such that remedial works are required.

Whilst the intention of Form EWS1 was admirable, the reality is that Form EWS1 is problematic in a number of respects for professionals who are asked to sign them. We do not propose to repeat all of the ways in which it is problematic but make the following brief comments. Firstly, it potentially hugely increases the scope for claims against the professional in circumstances where the professional providing the form may not even have been involved in the project when the block of flats was constructed. Secondly, it is not clear as to the extent of investigations required to be undertaken. Thirdly, it does not allow the professional to limit their liability – cautious professionals will seek to agree reasonable limitations on their liability where possible. There are other ways in which Form EWS1 is problematic which are beyond the scope of this update.

It is also important to reiterate that Form EWS1 does not help identify non-cladding fire safety defects and is therefore limited in its scope as against a wide-ranging problem.

## A Lack of Professional Indemnity Cover

Since the Grenfell Tower Disaster the scope for fire safety claims against professionals / contractors has increased greatly.

Whilst the intention behind Form EWS1 may have been a good one, we consider it has also enhanced the scope for fire safety claims concerned with cladding. However, as explained above, fire safety claims are not limited to cladding issues. They are wider ranging and often concern the internal parts of a building as explained above.

Unsurprisingly, given the exposure to fire safety claims, professional indemnity insurers have sought to cut their exposure to these claims. Another factor may have been the existence of a “*soft market*” for years prior to the Grenfell Tower Disaster.

Presently, we understand, for most professionals / contractors it is essentially proving near impossible for them to obtain professional indemnity insurance which covers claims based on fire safety (save under a RICS wording which presently provides for some aggregate cover). That is because we understand most professional indemnity insurers are applying blanket fire safety exclusions which, whilst totally understandable from insurers’ perspective, is incredibly difficult for those engaged in the construction arena with exposure to fire safety claims.

## THE GOVERNMENT ANNOUNCEMENT

### Additional Funding

On 10 February 2021, the government announced that there would be additional funding granted to tackle the issue of unsafe cladding beyond the £1.6 billion funding which it had previously committed to.

**Buildings above 18 Metres:** On 10 February 2021, the government announced additional funding of £3.5 billion for the removal of combustible cladding on high rise blocks of 18 metres and above.

**Buildings between 11-18 Metres:** The government also said that for buildings between 11 and 18 metres they intended to develop a long-term low interest loan scheme where “*no leaseholder will ever pay more than £50 a month towards the removal of unsafe cladding*”.

The additional £3.5 billion in funding for buildings of 18 metres and above should of course be welcomed as should the proposals in relation to buildings of between 11-18 metres. However, it does not address all relevant matters which are causing serious problems in that it only applies to cladding related remedial works. It does not apply to non-cladding remedial works which is a very significant issue.

As explained above, fire safety claims in respect of which there is limited or no professional indemnity cover for encompass defects beyond cladding and for instance can relate to fire stopping within the internal parts of a building as one example or defective compartmentation as another. The HCGL Committee has said that rectifying all fire safety defects in every high-rise / high-risk building could cost up to £15 billion (as against the £5.1 billion the government has committed too).

## Form EWS1 & A State Backed Insurance Scheme

The government is seemingly alert to the lack of professional indemnity cover at least in relation to claims based on defective cladding. A government statement said:

*"The government is aware that securing appropriate professional indemnity insurance to cover the completion of EWS1 forms is a major barrier to qualified professionals undertaking EWS1 forms. The government is therefore committing today to work towards a targeted, state-backed indemnity scheme for qualified professionals unable to obtain professional indemnity insurance for the completion of EWS1 forms.*

*The government will work closely with industry to design an appropriate scheme. Further details on the scheme, including eligibility and the claims process, will be provided in the coming weeks."*

Further detail is awaited with great interest. A state backed scheme in this respect would alleviate some of the pressure for professionals and leaseholders in certain respects. However, significant issues remain to be dealt with including the lack of professional indemnity cover for claims based on non-cladding fire safety defects. It seems that it is inevitable that there will have to be some movement in this sphere although what that movement is remains to be seen.

## OVERALL

It is fair to say that those flat owners within buildings of 18 metres or more are those with the most to celebrate, but even for them there is a long way to go because the announcement only assists in relation to defective cladding as opposed to other fire safety defects which are widespread.

The proposed state backed insurance scheme for Form EWS1 is clearly necessary and will be welcomed but, similarly, is limited to defective cladding as opposed to other fire safety defects which are widespread. Accordingly, even if that scheme were to be implemented, there will still be a lack of professional indemnity cover for claims based on fire safety more generally which is problematic and needs to be addressed.

Overall, we are still at the beginning of a process to deal with serious widespread fire safety issues. The steps taken by the government deal with some of the issues. It is fair to say they are baby steps and that there is plainly a very long way to go.

### Further Information

Given the generality of the note it should not be treated as specific advice in relation to a particular matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note.

If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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