

Insights

BUILDING SAFETY ACT 2022: CHANGING THE RULES ON THE LANDLORD AND TENANT RELATIONSHIP

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SUMMARY

The Building Safety Act 2022 (BSA 2022) creates a whole new world of building safety regulation and litigation. A key legislative objective was to regulate and direct responsibility for the cost of works to remedy building safety issues, so that the risk of such costs could no longer be the subject of agreement between landlord and tenant, but would (in defined circumstances) be apportioned in advance, by law, to the landlord.

To support that statutory reallocation of risk, the BSA 2022 created a new procedural framework for the paperwork needed to identify which landlords must carry the remedial costs and which tenants benefit from the new rules. In this blog, I'll focus on the new landlord's certificate, setting out financial information about the landlord and its corporate group, which must be sent to all long leaseholders. The relevant provisions of the BSA 2022 came into force on 28 June 2022, and the related Regulations have been in force since 20 July 2022.

THE PURPOSE OF THE NEW CERTIFICATE

One goal of the BSA 2022 is to protect leaseholders from bearing the financial burden of remedying historic building safety defects in relevant buildings. The BSA seeks to shift that burden onto owners and developers by limiting their ability to recover remediation costs from certain leaseholders through the service charge.

Two key restrictions (where no service charge is payable), contained in Schedule 8 of the BSA 2022, are:

- Where the landlord is responsible for the defects in the sense of having been the developer or the contractor; and

- Where the landlord and its group has a net worth exceeding £2,000,000 multiplied by the number of relevant buildings of which it is a landlord (contribution condition).

But of course, the leaseholders need to know whether they benefit from those restrictions on the service charge. The purpose of the new landlord's certificate is for the landlord to formally communicate with leaseholders, providing information as to whether it is "responsible", or whether it meets the contribution condition.

WHEN DOES THE LANDLORD NEED TO SEND A CERTIFICATE?

The detailed rules on the procedure are in the Building Safety (Leaseholder Protections) (England) Regulations 2022 (SI 2022/711) (Leaseholder Protections Regulations 2022). The Leaseholder Protections Regulations 2022 distinguish between the "current landlord" and the "relevant landlord", the latter being the landlord on 14 February 2022.

The current landlord must provide a certificate to all residential leaseholders in each of four circumstances:

- When making demand for payment of a remediation service charge;
- Within four weeks of receiving notice that the leasehold is to be sold;
- Within four weeks of becoming aware of a relevant defect not covered in a previous certificate;
or
- Within four weeks of a request from a leaseholder.

What about defects that the landlord already knew about before the BSA 2022 came into force? In the general context, it is fair to assume that the intention was that the rules would cover such known defects. But there is no express provision on the point. On one view, the logic of the third trigger is that where a landlord knew about a defect already, it became obliged to send a certificate within four weeks of the rules coming into force. But in any case, the number and nature of the triggers means that the landlord will be sending certificates regularly and repeatedly, so a landlord would be well advised to have the document drafted already and ready to go.

WHAT INFORMATION NEEDS TO BE INCLUDED?

The certificate must be in the form prescribed in Schedule 1 to the Leaseholder Protections Regulations 2022. It must confirm whether or not the relevant landlord was responsible for a relevant defect (or associated with someone who was) and whether or not it met the contribution condition.

It must attach all the following:

- Evidence of the structure of the relevant landlord’s group and the beneficial owner of each company in it, including details of any trust arrangements;
- A set of company accounts for the relevant landlord and for each company in the landlord group;
- A statement from a chartered accountant or finance director confirming the net worth of the relevant landlord and each company in the group;
- Evidence of relevant works, including the construction or conversion of the property and remediation of defects in the period after the BSA 2022 came into force;
- Confirmation of the identity of the party who undertook or commissioned the works with the relevant defect, and proof that the relevant landlord was not that party nor in a joint venture with it;
- Details of relevant defects and works carried out from 28 June 2017 to remedy them; and
- Details of the costs paid or to be paid in respect of such remedial works.

Where the current landlord lacks certain information, because it was not the landlord on 14 February 2022, it can request that from the landlord at that time, who is obliged to provide it within three weeks of being asked.

These are onerous requirements. Perhaps the most difficult is the need for a statement of net worth of each company in the group. The concept of “net worth” is defined in the rules, but is already throwing up difficult issues of interpretation – more on that below. But the real abiding challenge is that the information will need to be up to date on every occasion the landlord issues a certificate. So the certificate will need to be updated regularly, to take account not only of costs paid on the remedial works, which will evolve over time, but also of every corporate re-organisation and substantial acquisition or disposal affecting the net worth calculation. The landlord’s certificate will therefore be a “live” document, and its content and appendices will change frequently – it will not suffice to send the same standard form each time.

NET WORTH AND THE “LANDLORD GROUP”

The BSA 2022 is unusual in that it extends obligations and liabilities beyond individual companies to other companies connected or related to them. For the landlord’s certificate, and particularly the net worth calculation, the key concept is “landlord group”. This is defined in Schedule 8 as the relevant landlord and any person associated with it. Whether two companies are “associated” is usually assessed by the test in section 121 of the BSA 2022. That test includes companies associated by having a common director in the five years before 14 February 2022, or being linked by ownership or control on that date.

But the Leaseholder Protections Regulations 2022 complicate matters by saying that (for these purposes) a person is not considered associated with a relevant landlord if it would only be so by virtue of section 121(4), (5), and 6(a). This removes not only the criterion of a common director, but also that of ownership or control. Removing the test for control takes with it various other parts of section 121. While the Leaseholder Protections Regulations 2022 leave in place the framework for assessing whether individuals and partnerships are associated persons, on the more common question of whether two companies are associated, it leaves very little scope. This seems at odds with the legislative purpose.

This area is ripe for further clarification in secondary legislation or the courts. In the meantime, the onus is on freeholders to consider the rules on the landlord's certificate very carefully, and to comply on a timely and complete basis.

WHAT HAPPENS IF A LANDLORD FAILS TO COMPLY?

If a relevant landlord fails to provide a certificate complying with the new rules, it is presumed to be responsible for the defect and to meet the contribution condition. As a result, that landlord may not make any service charge for the costs of fire safety remediation works.

This article first appeared on the Practical Law Construction blog dated 16 November 2022.

UPDATE: 14 MARCH 2023

This blog should be read subject to two matters.

First, since the publication of this blog, Statutory Instrument No. 126 of 2023 amended the Leaseholder Protection Regulations 2022 so that from now on, a person is **not** considered associated with a relevant landlord if it would only be so by virtue of section 121(4) or (5)(a) of the BSA (removing the former reference to section 121(6)(a)). This means that the test for associated persons is closer to the standard test in the BSA, save only in respect of connections through directors. This removes the oddity in the original drafting of the Leaseholder Protection Regulations and reinstates the connection through related companies.

Secondly, as spotted by a keen reader, the updating of the landlord's certificate will be limited. The certificate relates not to the current landlord but the relevant landlord i.e. the landlord at the qualifying time of 14 February 2022. This means that the information in the certificate relating to the landlord group and net worth must capture the position as at that date, and need not be updated subsequently. Of course, the more time that passes before the current landlord serves its first certificate, the more difficult it could be to find the information relating to the qualifying time, particularly if the building has changed hands during the intervening period. The information in the certificate relating to defects and remedial costs paid will still need to be updated as and when

necessary, but this is considerably less onerous than updating with every evolution of corporate or financial information.

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