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BUILDING SAFETY ACT 2022: CHANGING THE RULES ON THE LANDLORD AND TENANT RELATIONSHIP, PART 2 – QUALIFYING LEASE CERTIFICATES

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SUMMARY

In a previous blog, I explored one aspect of the statutory reallocation of risk for the costs of works to remedy building safety issues in the Building Safety Act 2022 (BSA 2022). The focus of that blog was the new landlord's certificate, designed as a tool for the landlord to communicate with leaseholders as to whether it is "responsible" for defects, or whether it meets the "contribution condition" in the BSA 2022. In this blog, I will focus on the second element of this new framework, the "qualifying lease certificate" or "leaseholder certificate".

The relevant provisions of the BSA 2022 came into force on 28 June 2022, and the related regulations have been in force since 21 July 2022.

THE PURPOSE OF THE QUALIFYING LEASE 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 2022 seeks to shift that burden onto owners and developers by limiting their ability to recover remediation costs from certain leaseholders through the service charge.

The restrictions on passing costs through the service charge are in Schedule 8 of the BSA 2022. The vast majority apply only to a "qualifying lease". This is defined in section 119 of the BSA 2022 as a long lease of a single dwelling in a relevant building, granted before 14 February 2022, under which the tenant is liable to pay a service charge, and where on 14 February 2022 either:

- The dwelling was a relevant tenant's only or principal home; or
- A relevant tenant owned no more than two dwellings in the UK other than their interest under the lease.

It will be clear on the face of a lease whether most of those criteria are met. However, for the last one, a landlord cannot be expected to know whether either of the above is true or not. So the purpose of the new qualifying lease certificate is for the leaseholder formally to inform the landlord that its lease meets that last criterion and therefore qualifies for protection.

THE LANDLORD'S NOTICE

The detailed rules on the procedure are in the Building Safety (Leaseholder Protections) (Information etc) (England) Regulations 2022 (SI 2022/859) (Leaseholder Information Regulations 2022). Those regulations recognise that a tenant can send the landlord a certificate at any time.

Of course, tenants may not be aware of the rules or how to send the information to their landlord. To cover that case, a landlord is required to send tenants a notice that attaches the statutory form of certificate, explains the operation of the rules and the importance of the certificate, and provides a date for reply.

The current landlord must send such a notice within five days of becoming aware either that the leaseholder is going to sell its interest, or that there is a relevant defect in the building. In many cases, of course, the latter trigger will already have occurred, so landlords would be well advised to send out notices promptly.

FORM AND CONTENT OF THE CERTIFICATE

The certificate must be executed as a deed by the current leaseholder. It must be in the form prescribed in schedule 1 to the Leaseholder Information Regulations 2022. It is short and to the point (particularly as compared with the onerous requirements in the landlord's certificate). The tenant must respond to questions concerning the qualifying lease criteria, the value of the lease, and any shared ownership arrangements.

WHAT HAPPENS IF A LANDLORD OR A TENANT FAILS TO COMPLY?

Recognising the risk that this particular piece of paperwork may fall between the cracks either in the landlord's office or the tenant's, the BSA 2022 makes provision for what happens in case either the landlord fails to send the notice out, or the tenant fails to return the certificate.

The key provision is in paragraph 13 of schedule 8. That creates a presumption under which, if a lease meets the first three criteria in section 119, it is to be treated as a qualifying lease unless the landlord has taken all reasonable steps – and any prescribed steps – to obtain a certificate from a tenant and no such certificate has been provided. So in practice, if the landlord does not send out the notice, or if the notice fails to follow the rules in the regulations, the lease is deemed to qualify. By contrast, if the landlord does do all he or she can do, but there is no reply from the tenant, then the landlord can take it that the lease is not qualifying, and can pass charges through the service

charge. Of course, it is to be expected that tenants who know that their lease is a non-qualifying lease (for example, because they own several properties in the UK) will not bother replying, as there is little benefit to them in doing so.

PRACTICAL ISSUES

This is brand new law so the practical issues are yet to be worked through. The queries that we have fielded so far have related more to the essence of the definition in the BSA 2022 rather than the detail of the operation of the regulations. Two points of general interest have come up. The first is that although the objective of the BSA 2022 was to protect residential tenants, it does seem, from section 119, that a qualifying lease can be held by a company (provided that the company owns no more than two other dwellings in the UK). The second is that where the lease is held by more than one person, the all-important fourth criterion is satisfied by reference not to all the tenants, but "a relevant tenant". This appears to mean that if a lease is held by A and B, then even if A does not live there and owns ten other properties, the lease qualifies provided that it was B's principal home.

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