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IGNORE AT YOUR PERIL! DECODING THE BUILDING SAFETY ACT 2022

AND WHAT IT MEANS FOR THOSE INVOLVED IN UK BASED BRANDED RESIDENCES AND HOTEL PROJECTS

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Historically, the United Kingdom has lagged behind the likes of Dubai, South Florida, New York, Hong Kong SAR and Singapore in the branded residences space, as us Brits have tended to prefer traditional house living. However, this is gradually changing, particularly in London which, as a global city, has to cater for international tastes. Opting to live in a branded residence brings with it many lifestyle benefits – the space is new, is fitted out to a high specification, and has the added benefit of access to services and amenities (highly desirable in today's fast-paced society where people have little time to dedicate to upkeep of their homes). Discerning buyers want the luxury hotel brand experience brought into their home, with quality hotel services, access to the restaurants, the spa, and even to room services.

Investors and developers have jumped on this trend; Savills research indicates that 20 branded residences schemes will be either completed or in the pipeline to open by 2030 in London. The OWO Residences by Raffles and The Peninsula Residences London are the most recent luxury branded residences to be brought onto the market, with residences ranging in price from around £5 million for a two bedroom apartment to an eye watering £100 million for the penthouse in The OWO.

There is clearly an opportunity for inbound investors to capitalise on this emerging market. However, those that choose to invest in the UK must be fully aware of the statutory and legal framework that residential high-rise schemes must abide by, and, at its most reductive, items which may impact their returns. Enter stage left, the BSA.

THE BSA – WHAT IS IT AND WHY IS IT NEEDED?

In 2017, a devastating fire broke out in a 25-storey tower block[1]in North Kensington (known as Grenfell Tower), which resulted in 72 people tragically losing their lives. The fire, which started due to an electrical fault in a fridge freezer in one of the flats, entered the exterior cladding, and thereafter rapidly spread, engulfing the building entirely within 3 hours. In the public inquiry that followed, the rapid spread of the fire was largely attributed to the use of polyethylene polymer filler

in the external cladding, which melts and combusts at elevated temperatures. There were other major building safety failures at the block which contributed to the loss of life, including a faulty smoke extraction system, no wet risers, and flat doors which did not meet fire resistance standards.

Following Grenfell, and with a view to eliminating any chance of it happening again, the Government commissioned an independent review of the building safety regulations. The resultant report (known as the "**Hackitt Report**") recommended the implementation of a new, robust regulatory framework across the entire life cycle of "higher risk buildings" ("**HRBs**"), with safety at its heart. The BSA establishes this regulatory framework.[2]

Unhelpfully, the content and implementation of the BSA differs across England, Wales, and Scotland, so for the purposes of this article, we have focused on the regime applicable to England.

ARE HOTELS AND BRANDED RESIDENCES HRBS?

An HRB, in broad terms is a building in England that: (i) is at least 18 metres in height[3]or at least 7 storeys[4]; and (ii) contains at least two residential units.

How does this apply to hotels and branded residences? As the above definition suggests, the BSA does not currently apply to standalone hotels[5] without a "residential" element[6]. There is good reason for this; unlike residential blocks, hotels are already required to have a robust fire escape strategy.

What is meant by "residential"? The Government has clarified that "residential unit" means "a dwelling or any other unit of living accommodation, for example a flat".[7]Standard hotel rooms will not be caught by this, but what about luxury hotels, where there are penthouses on the upper floors and guests reside there longer term (e.g. in her later years, Lady Margaret Thatcher lived in the Ritz in London)? Such arrangements may bring a hotel room within the definition of a residential unit, and therefore the hotel within the BSA regime, notwithstanding the fact that standalone hotels are purportedly excluded from the BSA's scope. What is clear is that the BSA legislation and guidance does not neatly map some sophisticated hotel models; so it is always best to take appropriate advice if not clear on whether the regime applies to your building or not.

What about developments over 18 meters / 7 storeys with *both* a qualifying residential component and a standard hotel component? Will the BSA bite in respect of both the residential and hotel elements, or, will the residential and hotel elements be treated as independent and the BSA limited in application to the residential parts? The position here is a little more complex. During the *design and construction phase* of a mixed-use building, the entire building will need to comply with the BSA. However, it is possible for the hotel element to be exempted from the *occupational phase*, dependent on whether the hotel is considered to be truly separate from the residences. Based on information published by the Government to date, access between the residential and hotel

elements will be key to determining whether the hotel is subject to the BSA regime. Where each element is able to be "accessed"[8] from the other by way of connecting hallways and doorways (which will almost certainly be the case to assist with the provision of services and to give access to the hotel amenities), then the entire building will be subject to the BSA regime. By contrast, where the hotel and residential elements are segregated with no access between the two and each having independent entrances and exits, then the BSA is unlikely to apply to the hotel element. In any event, the position is by no means clear cut, and a prudent developer/ investor should always seek appropriate advice regarding the BSA's application.

KEY CHANGES INTRODUCED BY THE BSA

Having established that your scheme (or a part of it) is bound to comply with the BSA, what requirements need to be adhered to? It would be impossible to detail all the changes brought about by the BSA within the parameters of this article, but below are some of the key obligations to be mindful of, at each stage of the project.

DESIGN AND CONSTRUCTION PHASE

Not all HRBs currently in the design and construction phase will be caught by the full suite of requirements prescribed by the BSA regime. After all, it could leave owners and developers severely out of pocket if they have to re-work an entire scheme that is nearing completion. For your HRB to benefit from the transitional arrangements, it needs to satisfy the following:

- an initial notice or deposit of full plans for building control approval would have needed to be submitted to the local authority by 1 October 2023;
- work must be "sufficiently progressed"[9] by 6 April 2024;
- the person conducting the work must notify the local authority no more than five days after the point the work is considered to be sufficiently progressed, and before 6 April 2024; and
- the approved inspector must be registered as a building control assessor by 6 April 2024.

If the above requirements are met, the building control approval regime and building regulation requirements existing at the time of submission of the initial notice and plans will apply. However, the building will be subject to all requirements under Part 4 of the BSA in relation to the subsequent occupation phase. There is an argument that notwithstanding the application of the transitional arrangements, it may be worth owners / investors applying the higher safety requirements to the extent they can in any event, to safeguard against future tightening up of these rules, and to also reduce costs during the occupation phase.

In relation to HRBs which *do not* qualify for the transitional regime, the full fat version of the BSA must be complied with. Key changes to note are broadly:

- the introduction of a new building safety regulator (the "**Regulator**") as part of the Health and Safety Executive, which will function as the building control authority in respect of all HRB works;
- a new "gateway" building control approval regime for the regulation of the design and construction of relevant HRBs, which will comprise three hard stop-points before a project may proceed through the planning, construction, and completion stages and before occupation; and
- new duties which require the creation and maintenance of a "golden thread" of key safety information (to include building design, details of the duty holder team, building approvals, evidence of compliance with building regulations etc).

The responsibility for these undertakings will be placed on the relevant "accountable person" (the "**AP**") during design and construction phase, and the "principal accountable person" (the "**PAP**") in the subsequent occupation phase, ensuring that a single entity takes overall responsibility for the day-to-day management of risks in an HRB.[10]

PRACTICAL COMPLETION

There are a range of requirements which must be adhered to (by either the PAP or the relevant AP) before a completed building may be occupied. These include:

- obtaining a completion certificate from the Regulator (noting that the Regulator has 8 weeks in which to consider the application);
- registering the building with the Regulator[11];
- preparation of a "safety case report" containing the assessment of the building safety risks and a description of the steps taken to reduce risk;
- where directed by the Regulator, applying for a building assessment certificate; and
- preparation of a residents' engagement strategy for promoting participation in the making of building safety decisions, and establishment of a system for the investigation of complaints made to the Regulator concerning either building safety risk at the building or compliance by the accountable person with duties under the BSA or secondary legislation.

Compliance with the various obligations will be enforced by the Regulator, by way of contravention notices. Contravention of a notice without reasonable excuse will be a criminal offence. Separately, even in the absence of a notice, if an AP / PAP contravenes one of its duties under the BSA and that places people in the building at risk, that will be a criminal offence (risking a fine, imprisonment, or both).

OCCUPATION

The BSA empowers residents with the right to seek remediation orders in respect of defects which cause a building safety risk, and the funding of the same. It will be illegal for owners to pass on costs to qualifying leaseholders where a building requires the remediation of sub-standard cladding / removal of the same; and leaseholders will also have robust protection from the costs of other defects.

The BSA also extends the period in which homeowner and residents may pursue a claim under the Defective Premises Act 1972 against those responsible for constructing a new residence or conversion which is not fit for habitation: (i) to 30 years *retrospectively* (for any causes of action that have arisen within 30 years of 28 June 2022); and (ii) for all claims that arise after 28 June 2022, to 15 years.[12]

In relation to those suffering damage as a result of a breach building regulations, the period in which to bring a claim has been raised from 6 years from completion to 15 years for those buildings completed after 28 June 2022.[13]

REFURBISHMENT OF EXISTING HRBS

The BSA does not currently mandate that existing HRBs immediately undergo remedial work to make the buildings fully compliant with the BSA. However, where an HRB is refurbished or extended, compliance with the BSA is expected (save to the extent that the works are minor), and the regime applies thereafter.

FINAL THOUGHTS

The BSA is undoubtedly a complex beast which is in its infancy, and is yet to be fully tested. Those looking to invest in hotels and branded residences, need to be alive to this regime, and what the various requirements and implications are at each stage of a project. One would hope that the safety requirements imposed by luxury operators as part of their brand standards would exceed the bar set by the BSA (and to the extent that is not the case then operators will quickly adjust to reflect best practice), but it is dangerous to assume this. If in doubt as to the BSA's application, it is best to seek legal advice at an early stage; the reputational damage to all those involved in a non-compliant project, and the cost of rectifying any deficiencies could be huge.

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FOOTNOTES

[1] The 25-storeys included a basement and ground floor to floor 23.

[2] Please note that the BSA both (i) amends the pre-existing legal and regulatory framework contained in existing legislation, such as the Building Act 1984; and (ii) introduces new rules and regulations. Within the parameters of this article, we have reported on the regime created by the "BSA" (even though this may be effected by a change to another Act).

[3] Pursuant to regulation 5 of the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023, the height of a building is to be measured from ground level to the top of the floor surface of the top storey of the building (ignoring any storey which is a roof-top machinery or roof-top plant area or consists exclusively of roof-top machinery or roof-top plant rooms). Where the top storey is not directly above the lowest part of the surface of the ground adjacent to the building, the height of the building is to be measured vertically from the lowest part of the surface of the ground adjacent to the building to the point which is a horizontal projection from the top of the floor surface of the top storey of the building (ignoring any storey which is a roof-top machinery or roof-top plant area or consists exclusively of roof-top machinery or roof-top plant rooms).

[4] Regulation 6 of the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023, sets out how to determine a 'storey'. Broadly, when determining the number of storeys the following are to be ignored: (i) any storey which is below ground level; (ii) any storey which is a roof-top machinery or roof-top plant area or consists exclusively of roof-top machinery or roof-top plant rooms; and (iii) any storey consisting of a gallery with an internal floor area that is less than 50% of the internal floor area of the largest storey vertically above or below it which is not below ground level.

[5] Note that the Government has clarified that serviced apartments do not fall within the meaning of hotel and are considered HRBs if they meet the height or storeys threshold.

[6] A caveat to the standalone hotel exclusion, The Building etc. (Amendment) (England) Regulations 2022, which supplement the BSA, prohibits the use of combustible materials in and on the external walls of certain, including new hotels and existing hotels undergoing external wall refurbishment (likely recladding) which are over 18 meters in height (irrespective of whether there is a residential element attached or not).

[7] Regulation 1 of the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023.

[8] Regulation 7, Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023 defines "Access" to mean a doorway, archway or similar opening but does not include a

doorway, archway or similar opening intended for exceptional use including emergency use or use for the purpose of maintenance.

[9] Regulation 1(6), Schedule 3, The Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 defines "sufficiently progressed" as:

For the construction of a new HRB, when the pouring of concrete for the permanent placement of the trench, pad or raft foundations, or the permanent placement of piling, for that building has started; or

Where the building work consists of work to an existing HRB, when that work has started, or where the building work consists of a material change of use of a building, when work to effect that change of use has started.

[10] Broadly speaking, an AP is anyone with a property interest over the common parts, excluding: (i) leaseholders with lease terms of 21 years or more, with another entity, such as a facilities management company, having the repairing obligation in respect of the common parts; or (ii) the repairing obligations in relation to the common parts are functions of a Right To Manage Company under the commonhold and Leasehold Reform Act 2002. It also includes any entity which has a common parts repairing obligation in respect of the common parts under a lease or by virtue of an enactment. Notably a managing agent can be a PAP or AP where they have derived their interest via a lease, but not by way of a property management agreement (albeit it is possible for PAPs and APs to delegate their responsibilities to third parties whilst retaining ultimate accountability). Where chains of leases exist, the BSA provides that for the purposes of identifying the PAP, the relevant legal estate will be the highest head-lease which also carries a repairing obligation in respect of the exterior and structure of a building, so in complicated leases structures we would generally expect the superior landlord to be the PAP. When buildings have a single AP, that entity or person will also be the PAP.

[11] All existing occupied HRBs required registration with the Regulator by 1 October 2023.

[12] Section 135 of the BSA has inserted Section 4B into the Limitation Act 1980.

[13] Section 135 of the BSA has amended Section 38 of the Building Act 1984.

RELATED PRACTICE AREAS

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