



Building Safety Bill

Retrospective extension of the limitation period under the Defective Premises Act 1972.

What will happen, and what can and should clients do?

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6 October 2021

Background

- 14 June 2017: Grenfell Tower fire
- 30 August 2017: Independent Review of Building Regulations and Fire Safety led by Dame Judith Hackitt
- 12 September 2017: call for evidence
- December 2017: Hackitt Interim Report
- 17 May 2018: Hackitt Final Report
- 6 June 2019: MHCLG consultation commenced
- 2 April 2020: Government response to consultation



Hackitt Review

- Aims:
 - Clear and identifiable dutyholder
 - Stronger oversight of dutyholders with incentives for the right behaviours, and effective sanctions for poor performance
 - New regulatory framework for multi-occupancy higher risk residential buildings (HRRBs)
 - More effective testing regime with clearer labelling and product traceability



Background

- 20 July 2020: Draft Bill provided for pre-legislative scrutiny
- 24 November 2020: HCLG Committee report on draft Bill
- 26 May 2021: Government response
- 5 July 2021: Building Safety Bill published, first reading in Commons
- 21 July 2021: Commons 2nd reading
- September 2021: Commons Committee stage
- 15 September 2021: Michael Gove MP appointed



Leaseholder problems

- HCLG Committee Report:

“The Government must recommit to the principle that leaseholders should not pay anything towards the cost of remediating historical building safety defects...”

Page 14-16 set out various comments from members of the government. Eg:

“The Government are clear that it is unacceptable for leaseholders to have to worry about the cost of fixing historic safety defects in their buildings that they did not cause.”

20 July 2020 Robert Jenrick MP



Building Safety Funds

- Highly complex
- Building Safety Programme:
 - Up to about £4bn for ACM remedial works on residential buildings taller than 18m
- Building Safety Fund
 - About £1bn for unsafe non-ACM cladding system on residential buildings taller than 18m
- Loans for 11m-18m buildings



Claims against developers etc

- Problems:
 - Need to fund lawyers and experts
 - Investigate state of building
 - Investigate contracts and specifications for construction
 - Identify causes of action: contractual, collateral warranties, Defective Premises Act, tortious
 - Do potential defendants have substantial assets or are they insured?



Building Safety Bill

- Clause 126 of Bill
 - Retrospective extension of time for claims under Defective Premises Act 1972
 - Limitation period is currently 6 years
 - Bill increases that to 15 years
 - There are cross party amendments to increase this to 25 or 30 years



Human Rights Act 1998

- Bill has sub-clause stating:

Where an action is brought that, but for subsection (3), would have been barred by the Limitation Act 1980, a court hearing the action must dismiss it in relation to any defendant if satisfied that it is necessary to do so to avoid a breach of that defendant's Convention rights.



Article 6

- Article 6: Right to a fair trial

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

- *Zielinski* principle (2001) 31 E.H.R.R. 19

- Retrospective legislation which affects pending proceedings can only be justified on compelling grounds in the public interest



Fair Trial Issues

- Compelling grounds in the public interest?
- Is it necessary that the claim be pending to engage art 6 rights?
- Application to the loss of a defence?

AXA v HM Advocate [2012] 1 AC 868; though note
R v SS for Work and Pensions [2017] Q.B. 657

- Compelling grounds for interfering with rights?
- Concept of “reasonable time”
- Loss or unavailability of witnesses/evidence?



A1 P1

- Article 1 of Protocol 1:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ...



A1P1 issues

- It is arguable that legislation which overrides a legal defence is an asset for the purposes of A1P1:
 - By analogy, *Pressos Cia Naviera SA v Belgium* (1995) 21 EHRR 301
- Concepts of legitimate expectations
- How prejudice arising in particular cases:
 - Winding down business
 - No insurance available
 - Witnesses/evidence



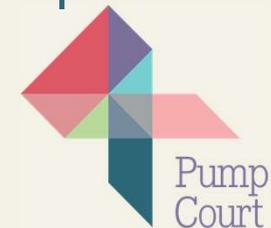
Other problems

- Extending limitation defence does nothing to assist:
 - Solvency of defendant
 - Availability of insurance
 - Problems faced in litigation of this nature
 - (exacerbated by HRA issues)
 - Query whether extending limitation even further will be of much practical use



Building Safety Bill: other features

- Part 3: Higher-risk buildings to have a separate Building Regs system under Health and Safety Executive
 - “Higher-risk” means >18m or as further stipulated
 - May include multi-residential units
- Part 4: Higher risk buildings to have “accountable person”
 - Slightly different definition of higher risk buildings
 - Accountable person: anyone possessing the common parts or is subject to a repairing obligation in respect of any of the common parts



Part 4 Payment Obligations

- Amendments to Landlord and Tenant Act 1985 to mean landlord can recover costs of building safety charges
 - Nb cl.84 of Bill
- Not clear what happens where freehold or intermediate long lease is held by shell company
- Systemic problems where accountable person does not have a substantial obligation to pay for building safety works?



What will happen? What can you do?

- Possible that the Bill will change in relation to costs of remediation
- Problems going forward:
 - Complexity of regulation
 - Inbuilt risk of excessive costs
 - No real answers to leaseholders facing large bills
- Clients:
 - Review old claims and consider what might happen if limitation point is extended



Thank you!

- <https://www.4pumpcourt.com/buildingsafetybill/>

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