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Cladding Disputes Following The Grenfell Tragedy

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Introduction

In response to the **Grenfell tragedy** in 2017, the government introduced a number of reforms intended to improve fire safety in high-rise multi-occupied buildings, including the Building (Amendment) Regulations, which came into force on 21 December 2018. The amendment prohibits the use of combustible materials anywhere in the external walls of high-rise buildings over 18 metres in height, which contain one or more dwellings. This means that residential housing, hospitals, residential care premises, boarding school dormitories and student accommodation all fall within the prohibition if they are over 18 metres high. The ban applies to (1) new buildings; (2) refurbishment work where the external wall is involved; and (3) buildings which are not currently within the scope of the ban but **following** a change of use means that they fall within the scope (at which point the external walls must be brought into compliance with the Building (Amendment) Regulations).

Notwithstanding the wording of the prohibition, the Government published an Advice Notice in January 2020, strongly advising building owners of multi-storey, multi-occupied residential buildings to investigate the risks of any external wall system in their fire risk assessments, irrespective of the height of the building, and to not wait for the regulatory system to be reformed. This has led to many building owners identifying the need to undertake very costly and disruptive remedial works to remove combustible materials in the external walls. Building owners are, therefore, actively seeking to recover the costs of these rectification works from those involved in the original **cladding** installations and to pursue insurance and warranty claims wherever possible.

The Government has made funding available for the removal and replacement of Aluminium Composite Material ('ACM') **cladding** and unsafe non-ACM cladding. This fund is available for the benefit of leaseholders in relevant buildings who would otherwise have an obligation to meet the cost of the **cladding** remediation works by virtue of the service charge provisions in their leases. This obligation is subject to future change as the House of Lords recently passed an amendment to the Government's Fire Safety Bill making changes to the current legislation to protect leaseholders from having to pay for historical fire safety remedial work.

Whilst the Government has made this funding available, it will not result in any less claims being brought by building owners against those responsible to recover the costs for fire safety remediation works. This is because the fund is expected to cover only a third of affected buildings and is limited to buildings over 18 metres in height. More importantly, the availability of Government funding is contingent on building owners being able to show that they are actively identifying and pursuing all reasonable claims against those involved in the original **cladding** installations and pursuing warranty claims where possible.

Claims Against Those Responsible For The Installation Of Unsafe Cladding

Ordinarily, a building owner will have a contractual relationship with the relevant architect and/or design and build contractor. In these circumstances, the architect and the design and build contractor will owe certain contractual obligations to the building owner, such as an obligation to act / carry out the works with reasonable skill and care. It is the purported breach of this contractual obligation that will form the basis of any claim against those responsible for the installation of unsafe cladding.

Any such claim for breach of contract will face, however, a number of hurdles that will need to be overcome. Firstly, it is often the case that the works in question occurred a significant number of years ago rendering the claim time-barred, as was determined in Sportcity v Countryside Properties. Secondly, there may be problems locating contracts, purchase orders, and any relevant correspondence, due to the passage of time. Thirdly, a number of the original design professionals and contractors involved in the design and build process are no longer trading or have become insolvent.

If there is no contract in place, a building owner could consider bringing a negligence claim against those responsible who may have owed a duty of care to carry out works with reasonable skill and care. The success of any such claim is unlikely because defendants are not liable in tort for 'pure economic loss', which is damage suffered because of a negligent act, and which is not accompanied by any physical damage to a person or property. This principle would apply in any scenario where the cladding, though unsafe and a defect, has not caused damage to any other part of the building or to persons.

Ignoring the above issues, claims against those responsible for the installation of unsafe **cladding** are being defended on the basis that they complied with Approved Document B which was the custom and practice at the time of the works being carried out to demonstrate observance of fire safety requirements. However, having said that, by publishing the Advice Note in January 2020, it appears that the Government is retrospectively seeking to rewrite the regulatory system on the basis that compliance with Approved Document B is no longer sufficient to evidence adherence to the requirements of the amended Building Regulations. At present, it is unclear which of these competing positions the courts will favour. An answer should be reached once a decision has been made in relation to the claim Camden Council commenced against PFIC and its principal subcontractors. The Council is seeking to recover £130 million that it incurred in addressing multiple fire safety failings such as the removal of ACM **cladding** from the outer façade and the rectification of inadequate internal fire stopping and fire doors.

Warranty Claims

Claims for the replacement of defective **cladding** could be brought under a building owner's latent defect insurance policy. Latent defect policies provide cover in the event of an inherent defect in the design or materials used which becomes apparent after practical completion. Unsurprisingly however, insurers are refusing to pay on the basis that building owners are unable to show that the defective **cladding** constitutes a breach of the fire safety regulations in force at the time of the construction. Indeed, insurers are stating that it is of no significance that the defective **cladding** may be a breach of the current regulations; as Lord Denning stated, "We must not look at a 1947 accident with 1954 spectacles".

Conclusion

There has been an increase in **cladding** and fire investigations into existing buildings **following Grenfell** and this has led to **cladding** remediation claims being commenced. The approach the courts will adopt in dealing with these claims is unclear at present. Nevertheless, any developers, contractors, designers or architects that

have been impacted by the revised fire safety regulations should be seeking legal advice at the earliest point.

Silver Shemmings Ash LLP - Brandon Silver