

The Building Safety Act – A briefing note for Conveyancers

Introduction to the Building Safety Act 2022 and its relevance for conveyancers

The Building Safety Act 2022 ('the Act') came into force (in large part) on 28 June 2022. Amongst other things, it provides protections for 'qualifying leaseholders' against the cost of remediating all cladding-related fire risks.

There are implications for solicitors who have acted in the purchase of relevant leasehold properties since 14th February 2022, and particularly where there is a lender involved, following changes to the Mortgage Lenders Handbook since December 2022.

This briefing note is in response to demand from solicitors for guidance, and reflects the position as understood as at the date of publication. It is for information purposes only. As a fast evolving area of practice, and given the dearth of official guidance on the topic, you should ensure that you read and understand the terms of the Act, and the relevant current Mortgage Lenders Handbook provisions carefully, and take independent advice where required.

There are a number of conditions that must be met, in order to qualify for protection against the cost of remediating fire risks¹:

- > The leaseholder protections apply to buildings of more than 11 metres height, or 5 storeys, that have at least two dwellings (note – the legislation contains several other requirements that must also be met). The building must have been constructed or the defect created by works undertaken since 28 June 1992 and before 27 June 2022.
- > The protections are afforded to qualifying leaseholders – but *it is the leaseholder who had the leasehold interest in the property on 14 February 2022* that determines that status, regardless of who has that interest now. Furthermore, in order to obtain the financial protections under the Act, the leaseholder (as at the start of 14th February 2022, not necessarily the current leaseholder) must complete a Leaseholder Deed of Certificate.

Combined, these factors have created a range of complexities that leaseholders and solicitors are only starting to grapple with.

¹ See ss.117-122, & Schedule 8 of the Building Safety Act 2022. Extracts are provided in Annex 1

The Building Safety Act – A briefing note for Conveyancers

Where you have acted for purchasers of leasehold property on or after 14 February 2022

Purchasers of relevant leasehold properties after 14 February 2022 are in an unusual position. The applicability of the protection from remediation costs is determined by the owner as at the 14 February 2022 meeting various criteria (it being their only or main home, or not owning more than three dwellings in the UK (including their interest under the lease in question)).

There is therefore a risk to all purchasers of impacted leasehold properties on or after 14th February 2022 that facts outside of their control, and knowledge, at the time of purchase, will determine the availability of important financial protections.

While clients who purchased such properties from 14 February 2022 should presumably have been aware of unsafe cladding - the subject having been very much in the public domain - there may be concern regarding what advice, if any, was given regarding cladding or other less obvious fire safety defects.

It is difficult to see how firms could have advised clients meaningfully before the Act came into force (on 28th June 2022), concerning the impact of the Act's provisions on leasehold properties. From the date the Act came into force, it is less clear as to the extent of conveyancers' obligations in this regard.

It is relevant that, as we understand it:

- > Lender requirements were only updated from late December 2022.
- > Relevant Law Society protocol forms were only updated in January 2023 (including requests for Leaseholder Deeds of Certificate); and
- > No guidance has been provided by the Law Society regarding conveyancers' obligations in this regard as at the date of this note.

Scenario:

The property was purchased after 14 February 2022, and satisfies all the requirements of a relevant property, and the current leaseholder would have met the requirements of a qualifying leaseholder however the leaseholder from whom the property was purchased did not.

The absence of certification means it will not get the benefit of protection from cladding renovation costs. The current leaseholder is therefore unlikely to be able to sell/sell at full value – unless remediation works are completed and evidenced as such.

There may be an argument that the purchaser should reasonably have known about the risk of cladding remediation costs, but if the remediation did not relate to cladding, it is easy to see a complaint or claim arising, regardless of validity.

² The Act refers to '*the beginning of 14 February 2022*' as the qualifying date (our italics) therefore presumably transactions which completed on 14th would result in the current leaseholder not being the 'relevant tenant' under the Act.

The Building Safety Act – A briefing note for Conveyancers

Acting for leasehold purchasers now and in the future

Relevant leaseholder purchasers will need to be advised regarding the implications of the Building Safety Act 2022, whether or not there is to be a mortgage in place.

It is likely that solicitors will be required to request information from the seller's solicitor regarding the need for completion of remediation works, and copies of the Landlord's Certificate(s). Relevant defects relate to any building constructed or refurbished between 28 June 1992 and 27 June 2022 (a 30 year period).

It remains unclear how, and at what stage in a purchase, information regarding potentially relevant defects may be identified, particularly if a Landlord's Certificate is not available. The current understanding is that even if there are no relevant defects requiring remediation, a Leaseholder Deed of Certificate requires to be served in order to obtain a Landlord's Certificate which should confirm whether works need to be done. If the leaseholder at 14 February 2022 does not meet the criteria, this suggests that the Landlord's Certificate would not be obtained. Lenders appear not to be prepared to lend without such clarity. There is a question regarding what survey would be required to meaningfully identify such works.

Acting for lenders, particularly Nationwide, Barclays, and Mortgage Works, brings very onerous Part 2 requirements that solicitors believe are difficult or impossible to satisfy. Part 1 refers to any leasehold flat – not simply a relevant one, so Landlord's Certificates are unlikely to be available in such cases, which poses problems for solicitors in complying with lenders requirements.

Problem areas include requiring the solicitor acting for the lender to:

- > Verify any past as well as the current landlord's details.
- > Verify that the dwelling was the relevant leaseholders only or principal home.
- > Check that the relevant leaseholder owned no more than 2 other dwellings in the UK.
- > Confirm the full details of last sale pre 14 February 2022, including date and price, even if not included in the Leaseholder Deed of Certificate.
- > Ensure that evidence supporting the Landlord's Certificate reflects the information provided in it, including re group net worth and work undertaken already on relevant defects.
- > Where the lender has not provided relevant information, an obligation to source it.
- > Full and comprehensive advice to be given to the borrower regarding their obligations under the Act.

The Building Safety Act – A briefing note for Conveyancers

Actions to consider

This is a fast-evolving area and while QBE does not specifically endorse any of the following, they are recognised approaches being adopted by a number of firms.

- > **Consider compiling a list of leasehold properties** acted on since 14 February 2022 in order to follow up with such clients regarding the impact of the Building Safety Act. Impacted leaseholders are being encouraged to prepare Leaseholder Deeds of Certificate now, to provide a record of ownership as at 14th February 2022, and the purchase price. Consider whether to take a different approach regarding clients who purchased between 14th February and 27th June 2022, and those who purchased on or after 28 June 2022 (when the Act 2022 came into force).

Note: It may be safer to email all leasehold clients advising impacted clients to get in touch. The alternative (to identify and contact only impacted clients) carries with it a risk of inadvertently missing impacted clients and thus exposing the firm to potential negligence claims.

- > **Consider whether clients completing the Leaseholder Deed of Certificate should receive legal advice, and if so whether it should be charged for.** The complexity and status of the document may suggest that advice should be obtained. If not advising, clearly exclude such advice from your scope. Where advising, ensure that you clearly exclude advising or warranting the specific content of the declaration.

- > **Firms should be assiduous in notifying all leasehold transactions to lenders**, in compliance with Part 1 Mortgage Lenders Handbook requirements, and requesting confirmation that the lender is satisfied as to whether or not there is a qualifying lease in a relevant building.
- > **Add enhanced transaction vetting for leasehold property transactions.** It may be reasonable to refuse to act in certain leasehold transactions where particular lenders are involved. Part II of the Mortgage Lenders Handbook should be checked regularly as part of due diligence processes.
- > **Review your engagement letters on conveyancing matters** to include information regarding the Building Safety Act and risk issues associated with leasehold purchases. Particularly note any obligations imposed by the lender (e.g. to 'ensure that the borrower understands the extent of any financial contribution they will be required to make towards the cost of remediation, the remediation status of the building, and the impact of any remediation timescales'). You may wish to reserve the right to cease acting where a lender imposes unreasonable terms with which you cannot comply.
- > **Review your conveyancing precedents.** Purchasers should be advised that there may be defects in the property that may not be revealed in a survey.
- > **Review your fee structure for leasehold conveyancing.**
- > **Keep informed and lobby: attend relevant seminars on the topic**, and make your concerns known to the Law Society.

The Building Safety Act – A briefing note for Conveyancers

Responses to Common Questions

What “documentary evidence” are we expected to obtain to prove that someone is an owner-occupier or did not own more than 3 dwellings as at 14th Feb 2022?

There is a real concern that sellers may state that they do not own more than three properties, but this may be very difficult to meaningfully verify.

Lenders appear to suggest using the Index of Proprietor Names for this purpose, but note the warning in Practice Guide 74 that the index ‘does not distinguish between different persons or organisations of the same name’.

It remains a question as to whether a Statutory Declaration or Statement of Truth might constitute sufficient evidence.

We intend to build in additional onboarding checks to filter out high risk leasehold transactions.

One factor would be to flag buildings of 5 or more storeys or 11m in height, but it is not clear how to accurately do this.

While some properties will be patently 5 or more storeys, or over 11 m high (s.118 confirms this is measured from ground floor to floor of the top storey*) this may be complex as ground levels can vary, mezzanines can impact the assessment of storeys, loft conversions are not explicitly referenced, the building may be on different levels. The height/storeys of the building is not captured in the Landlord’s Certificate so a query remains as to how best to assess this timeously (via a surveyor, fire risk report, or the landlord?).

A precautionary approach should be taken in assessing the risk. If seeking to rely on third party evidence, this would have to be obtained at a very early juncture.

Note, that this should not simply be risk assessed for purchases with a mortgage: Cash buyers also a risk issue for firms, and so the additional due diligence should extend beyond matters where a lender involved: if the client does not wish to pay for a survey, at a minimum, firms would want a signed disclaimer to continue to act.

**s118 (2) The height of a building is to be measured from ground level to the finished surface of the floor of the top storey of the building (ignoring any storey which is a roof-top machinery or plant area or consists exclusively of machinery or plant rooms).*

(3) When determining the number of storeys in a building:

- (a) any storey below ground level is to be disregarded;
 - (b) any mezzanine floor is to be regarded as a storey if its internal floor area is at least half of the internal floor area of the largest storey in the building which is not below ground level.
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Should we be keeping a central register of Leaseholder Deeds of Certificate?

There is no definitive position on this currently. Solicitors are used to retaining certain documents (‘deeds packets’) for longer than the file. Consider retaining the Leaseholder Deed of Certificate along with the deeds.

The Building Safety Act – A briefing note for Conveyancers

Annex 1: Building Safety Act 2022 extracts

- 117 (2) “Relevant building” means a self-contained building, or self-contained part of a building, in England that contains at least two dwellings, and
- (a) is at least 11 metres high, or
 - (b) has at least 5 storeys.
- 119 (2) A lease is a “qualifying lease” if
- (a) it is a long lease of a single dwelling in a relevant building.
 - (b) the tenant under the lease is liable to pay a service charge.
 - (c) the lease was granted before 14 February 2022, and
 - (d) at the beginning of 14 February 2022 (“the qualifying time”).
 - (i) the dwelling was a relevant tenant’s only or principal home.
 - (ii) a relevant tenant did not own any other dwelling in the United Kingdom, or
 - (iii) a relevant tenant owned no more than two dwellings in the United Kingdom apart from their interest under the lease.
- 119 (4) (a) A “long lease” means a lease granted for a term of years certain exceeding 21 years.
- 122 Schedule 8
- (a) provides that certain service charge amounts relating to relevant defects in a relevant building are not payable, and
 - (b) makes provision for the recovery of those amounts from persons who are landlords under leases of the building (or any part of it).

Annex 2: Lender Requirements extracts

PART 1: 5.14.17

“Where the security will comprise a leasehold flat you must request the following information **from the seller’s conveyancer** about the safety of the building in which the flat is situated:

- > Confirmation as to whether the building has been *or will be remediated* under the Building Safety Act 2022.
- > Copies of any Landlord’s Certificates, signed by the Landlord in the form set out in the Building Safety (Leaseholder Protections) (England) Regulations 2022.
- > Copies of any executed Leaseholder Deed of Certificate (in the form set out in the Building Safety (Leaseholder Protections) (England) Regulations 2022) and confirmation that they have been submitted by the relevant leaseholder to the landlord.”

NATIONWIDE PART 2: 5.14.17 (extracts only)

“Where we have identified a relevant security we will provide to you, along with the Offer, all the documentation that we have collected through the application process which *may include* the following”.

- > An Executed Leaseholder Deed of Certificate and Landlord Certificate.
- > Confirmation of any costs and amounts not covered by the Building Safety Fund or other Scheme (i.e., capped/ non-capped charges).
- > Confirmation that interim fire safety measures are satisfactory.
- > One of the following:
 - > Confirmation from the ‘scheme provider’ that the building will be remediated under a Developer/ Government/Freeholder Scheme, or

⁴ Where a Landlord’s Certificate can’t be provided, confirmation will be provided that the Responsible/Accountable Person has complied with current legislative requirements and that there are no Fire Safety Issues.

The Building Safety Act – A briefing note for Conveyancers

- > A Fire Risk Assessment of External Walls report (FRAEW) with executive summary including an indicative rating, or
- > An EWS1 form, or
- > A letter stating why none of these are available.

Where you receive contrary information or documentation to that which was provided to you with the Offer regarding Building Safety, you are required to report this to us with full details (being mindful of requirements under Part 2.3 of the Handbook), you are required to do this in sufficient time ahead of Exchange to allow us to review as any further information may impact our decision to lend.

*“You must check that, **to the best of your knowledge**, the Leaseholder Certificate and any Landlord Certificate have been appropriately and accurately executed and populated”.*

*“You are required to ensure that the information provided **in the Leaseholder Certificate** is reflective of the lease agreement. Including: the building address, the current leaseholder and the *details of the leaseholder (if different to current)* as of 14th February 2022”.*



This information is intended as a general discussion of the topics covered and is for guidance purposes only. It does not constitute legal advice and should not be regarded as a substitute for taking legal advice. QBE UK Ltd is not responsible for any activity undertaken based on this information.

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