

## **The Building Safety (Leaseholder Protections etc) (England) (Amendments) Regulations 2023 - changes to the leaseholder protections and the certificates regime**

Since the leaseholder protections came into force on 28<sup>th</sup> June 2022, agents who manage relevant buildings have been getting to grips with the protections and the certificates regime. There's a wealth of information on the Building Safety Hub (including articles and webinar recordings) on leaseholder protections and in particular Landlord's Certificates and Leaseholder Deeds of Certificate.

In an earlier building safety bulletin, we highlighted the draft amendment regulations that were laid before Parliament on 12<sup>th</sup> June.

Those amendment regulations have now been made, and came into force on 5<sup>th</sup> August 2023 as the Building Safety (Leaseholder Protections etc) (England) (Amendments) Regulations 2023.

These regulations make changes to the leaseholder protections and certificates regime, so agents dealing with these matters need to be aware of the changes made.

The headline changes are discussed below.

### **Remediation orders and remediation contribution orders**

Section 124 of the BSA gives the FTT the power to make a remediation contribution order in relation to a relevant building if it considers it "just and equitable" to do so. A remediation contribution order means an order requiring a specified body corporate (or partnership) to make payments to a specified person for the purpose of meeting costs incurred (or to be incurred) in remedying relevant defects relating to a relevant building.

The list of interested persons who can apply to the FTT for a remediation contribution order has been extended, and "interested persons" who can apply for a remediation contribution order now includes the following *additional* categories of potential applicants:

1. Homes England (in its legal identity as the Homes and Communities Agency);
2. Resident management companies (RMCs);
3. Right to manage companies (RTMs); and
4. Named managers.

Section 123 of the BSA gives the FTT the power to make a remediation order in relation to a relevant building. A remediation order is an order requiring a relevant landlord to remedy specified relevant defects in a specified relevant building by a specified time.

The Building Safety (Leaseholder Protections etc) (England) (Amendments) Regulations 2023 extend the list of interested persons under section 123 (i.e. the categories of persons who can make an application to the FTT for a remediation order) so that Homes England is also an interested person for the purposes of section 123, too.

### **Changes to Leaseholder Deeds of Certificate**

The Building Safety (Leaseholder Protections etc) (England) (Amendments) Regulations 2023 deal with the provision of Leaseholder Deeds of Certificate by the current landlord to any RMC, RTM company or named manager.

An obligation is now placed on landlords to provide a copy of any leasehold deed of certificate they receive to any RMC, RTM company or named manager.

The copy of the leaseholder deed of certificate must be provided to any RMC, RTM company or named manager within one week.

There are consequences for the current landlord if they fail to do so. In short, if the current landlord fails to provide a copy of the leaseholder deed of certificate, the costs of a relevant measure relating to a relevant defect will not be regarded as relevant costs to be taken into account in determining the amount of service charge payable under a relevant lease.

Agents therefore need to be very clear with their clients about what services and assistance they are providing to their clients. Agents will also need to consider whether they have the resource (and PII cover) to assist.

If agents have been assisting their clients who are current landlord for the purposes of the regulations with certificates, then agents will need to discuss the changes brought in by the Building Safety (Leaseholder Protections etc) (England) (Amendments) Regulations 2023. Are you going to assist your landlord clients in providing a copy of the leaseholder deed of certificate to any RMC, RTM company or named manager?

In addition, agents acting on behalf of RMCs, RTM companies or named managers in relevant buildings should now expect to receive contact (on behalf of their clients) from the current landlord, as the landlord will need to provide the RMC, RTM company and named manager with a copy of the leaseholder deed of certificate.

Agents may well see many more leaseholder deeds of certificate come across their desks as a result of the recent changes.

### **Changes to Landlord's Certificates**

Agents who have been assisting their landlord clients in relation to landlord's certificates will be familiar with the challenges faced by landlords when producing their landlord's certificate.

The changes aim to try and simplify the landlord's certificate and the information and evidence which accompanies the landlord's certificate, and have also done a spot of "tidying up" in terms of typographical errors and the like.

First and foremost, an additional trigger has been added as to when the landlord's certificate must be provided by the current landlord.

Agents will be familiar with the four triggers set down by regulations 6(1) of the Building Safety (Leaseholder Protections) (England) Regulations 2022.

The Building Safety (Leaseholder Protections etc) (England) (Amendments) Regulations 2023 add a fifth trigger as to when a landlord's certificate must be provided. This fifth trigger requires the current landlord to provide a landlord's certificate within 4 weeks of becoming aware of a new leaseholder deed of certificate which contained information that wasn't included in a previous landlord's certificate.

Next, the Building Safety (Leaseholder Protections etc) (England) (Amendments) Regulations 2023 set out a new form of landlord's certificate that must now be used.

Agents who are assisting their clients in the production (and service) of landlord's certificates will need to ensure that the new form of landlord's certificate is used. The form of certificate is prescribed.

There has been much commentary about the admin burden of landlord's certificates, particularly where the landlord accepts that they meet the contribution condition, or where there are no relevant defects in the building. The Building Safety (Leaseholder Protections etc) (England) (Amendments) Regulations 2023 also modify the information to be provided in the landlord's certificate and the evidence which must currently accompany the landlord's certificate.

The provisions are a little complicated, but I have set out below an extract from the guidance published by DLUHC on 10<sup>th</sup> August which explains the impact:

11. *If the landlord on 14 February 2022 was responsible for, or associated with the person responsible for, the relevant defect or did not believe at the time of completing the certificate that there was a relevant defect, and either i) the landlord met the contribution condition or ii) the leaseholder's lease is not a qualifying lease:*

- *there is no need to provide any evidence to accompany the certificate*

12. *If the landlord on 14 February 2022 was responsible for, or associated with the person responsible for, the relevant defect or did not believe at the time of completing the certificate that there was a relevant defect, but the landlord did not meet the contribution condition, the following information must be provided:*

- *evidence C, D, E, F, I and J of Table 1 below*
- *no evidence is required in respect of the links with the developer*

13. *If the landlord on 14 February 2022 was not responsible for, or associated with the person responsible for, the relevant defect, and i) the landlord met the contribution condition or ii) the leaseholder's lease is not a qualifying lease, the following information must be provided:*

- *evidence B, F, G and H of Table 1 below*

14. *If the landlord on 14 February 2022 was responsible for, or associated with the person responsible for, the relevant defect or did not believe at the time of completing the certificate that there was a relevant defect, and the landlord was a private registered provider of social housing, a local authority, a government department (including an arm's length body), the Crown or an NHS Foundation trust, the following information must be provided:*

- *evidence F, I and J of Table 1 below*
- *no evidence is required in respect of the links with the developer*

15. *If the landlord on 14 February 2022 was not responsible for, or associated with the person responsible for, the relevant defect, and the landlord was a private registered provider of social housing, a local authority, a government department (including an arm's length body), the Crown or an NHS Foundation trust, the following information must be provided:*

- *evidence A, B, F, G, H, I and J of Table 1 below*

16. *If the landlord on 14 February 2022 was not responsible for, or associated with the person responsible for, the relevant defect, did not meet the contribution condition, and the value of the qualifying lease on 14th February 2022 (for example, as set out in a leaseholder deed of certificate) was below £325,000 in Greater London or £175,000 elsewhere in England, the following information must be provided:*

- evidence A, B, C, D, E, F, G and H of Table 1 below

17. In all other scenarios, the landlord must provide all ten pieces of evidence in Table 1 below.

18. The current landlord must provide a landlord certificate which meets the prescribed requirements. If not, the liability for the relevant defect will fall to the landlords as if they were responsible for, or were associated with the person responsible for, the relevant defect.

19. RMCs, RTMs, and named managers may then pursue the landlord for amounts owed via civil debt recovery (in the county court) or a remediation contribution order (in the First-tier Tribunal).

I have also set out, at the end of this note, a copy of the table referred to in the DLUHC guidance.

Agents assisting clients with the provision of landlord's certificates will need to work through each of the scenarios carefully, in order to establish whether any of the above scenarios are relevant, and therefore whether the information to be provided and evidence which must accompany the landlord's certificate has changed.

Next, and in the same way that landlords must provide a copy of the leaseholder deeds of certificate to the RMC, RTM company or named manager, the amendment regulations also make provision for the landlord to provide the RMC, RTM company and named manager with a copy of the landlord's certificate.

Under the Building Safety (Leaseholder Protections etc) (England) (Amendments) Regulations 2023, the landlord has a window of one week to provide the RMC, RTM company or named manager with a copy of the Landlord's Certificate.

Again, there will be consequences for the current landlord if they fail to do so. If the current landlord fails to provide a copy of the landlord's certificate, the costs of a relevant measure relating to a relevant defect will not be regarded as relevant costs to be taken into account in determining the amount of service charge payable under a relevant lease.

It follows that agents will need to be very clear with their clients about what services they are providing in terms of certificates generally, and whether agents are going to assist their landlord clients in providing the landlord's certificate to any RMC, RTM company or named manager. Clarity on instructions is crucial. Similarly, agents will need to consider whether they have the resource (and PII cover) to assist.

### **What do agents need to do?**

The leaseholder protections have recently had their first birthday, as they came into force on 28<sup>th</sup> June 2022. So, agents will already be familiar with the protections and certificates regime, and no doubt will have had discussions with their clients about the services they are providing, particularly so far as certificates are concerned.

In anticipation of these new regulations coming into force, agents may well have already started to have discussions with their clients on certificates, and have already sought clarity on their instructions. If not, then it is important that agents now do so. The Building Safety (Leaseholder Protections etc) (England) (Amendments) Regulations 2023 came into force on 5<sup>th</sup> August, and set out some very tight timeframes, with some rather onerous consequences if things are not done in those timeframes. And of course agents should check with insurers about their PII cover if they are going to be providing these kind of services.

And without wishing to preach to the converted, agents should of course keep a very keen eye in their inboxes over the next few weeks, as TPI will be keeping members up to date with these matters as they progress.

ARMA has introduced a new training course – **TC110** – which specifically focuses on leaseholder protections and the certificates regime. The course was a sell out last time around, and is scheduled again for 26<sup>th</sup> September 2023.

**Table 1. Information and evidence required to complete a landlord’s certificate**

**A:** The percentage of the storeys in the relevant building for which each landlord or superior landlord was the landlord on 14 February 2022

(Regulation 6(3)(a) of SI 2022/711 as replaced by regulation 11(4) of the amending regulations)

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**B:** Where a landlord or superior landlord was part of a landlord group on 14 February 2022, details of the corporate structure of that landlord group including:

- the names of all the directors of each company in that group and directors of each corporate trustee, including in each case nominee and shadow directors or any person occupying the position of director by whatever name called
- the name of any other person who has the right to exercise or does exercise significant control or influence directly or indirectly over the group
- details of the type of trust if any, the law to which it is subject and where it is tax resident; and
- in relation to trusts with an interest in the shares of any company comprised in the group, details of the economic settlor, the named beneficiaries or class of beneficiaries and protector and any other person who has the right to exercise or does exercise significant influence or control directly or indirectly over the trust

(Regulation 6(3)(b) of SI 2022/711 as replaced by regulation 11(4) of the amending regulations)

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**C:** Where the landlord under the lease on 14 February 2022 was part of a landlord group at that time:

- details of the corporate structure of the group, setting out:
  - a. the companies which make up the landlord group
  - b. the beneficial owner of each company in the group, and
  - c. if the beneficial owner of the group or any company comprised in the group is, or includes, a trust foundation or arrangement of a similar character, details of the trust and the trustees
- the name of any other person who has the right to exercise or does exercise significant control or influence directly or indirectly over the group

- details of the type of trust if any, the law to which it is subject and where it is tax resident; and
- in relation to trusts with an interest in the shares of any company comprised in the group:
  - a. details of the economic settlor
  - b. the named beneficiaries or class of beneficiaries and protector, and
  - c. any other person who has the right to exercise or does exercise significant influence or control directly or indirectly over the trust

(Regulation 6(3)(c) of SI 2022/711 as replaced by regulation 11(4) of the amending regulations)

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**D:** The set of company accounts for the landlord under the lease on 14 February 2022, in accordance with regulation 5 of SI 2022/711, and, where the relevant landlord is part of a landlord group, for each company in that group

(Regulation 6(4)(a) of SI 2022/711)

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**E:** A statement from a chartered accountant or finance director of the landlord company:

- setting out the net worth of the landlord under the lease on 14 February 2022 and, where the relevant landlord is part of a landlord group, of each company in that group
- confirming the net worth is calculated in accordance with regulation 5 of SI 2022/711 and paragraph 3 of Schedule 8 to the Building Safety Act 2022 (the “net worth calculation”)
- confirming the net worth calculations accurately represent the net worth of the landlord (and, where the relevant landlord is part of a landlord group, of each of the companies in that group)

(Regulation 6(4)(b) of SI 2022/711)

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**F:** Documents or receipts that demonstrate that the relevant building was constructed or converted before the relevant period (i.e. before 28 June 1992) and details of any relevant works which were carried out in the relevant period

(Regulation 6(4)(c) of SI 2022/711)

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**G:** Evidence that the person who undertook works relating to the relevant defect or commissioned those works was not, or was not associated with, the landlord or superior landlord on 14 February 2022 together with confirmation of the identity of the person who did undertake such work

(Regulation 6(4)(d)(i) of SI 2022/711)

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**H:** Where those works were commissioned or undertaken by a joint venture, proof the landlord or superior landlord on 14 February 2022 was not party to that joint venture, together with details of the persons who were parties to the joint venture

(Regulation 6(4)(d)(ii) of SI 2022/711)

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**I:** Details of any relevant defects and any relevant measures taken in relation to those relevant defects since 28 June 2017

(Regulation 6(4)(e) of SI 2022/711 as amended by regulation 11(5)(a) of the amending regulations)

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**J:** Details of any costs paid or due to be paid in relation to any relevant measures taken in relation to any relevant defects in the relevant building since 28 June 2017, including:

- the total sum of any such costs
- details of the number of flats between which the costs should be divided; and
- the leaseholder's maximum remaining liability

(Regulation 6(4)(f) of SI 2022/711 as amended by regulation 11(5)(b) of the amending regulations)