Cladding, levies and the law

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Why is no-one responsible for this?

- The law covering building defects is not fit for purpose.
- Leasehold law is weighted in favour of landlords (and their agents).
- MHCLG Advice Notes have compounded the problem.
- Issues are myriad, but the most important include:
  - Difficult or impossible to claim in contract or tort (duty of care);
  - Defective Premises Act 1972;
  - Time limits on claims (limitation); and
  - Law does not allow recovery of purely money losses (economic losses).
- Individuals should take their own legal advice specific to their circumstances as soon as possible. This presentation is only a simplified overview of the issues and is not legal advice.

Leasehold law is weighted in favour of landlords

- Key issue is that the solution has been developed building-by-building by actors with a vested interest in works being as comprehensive and expensive as possible.
  - Comprehensive works remove any risk for statutory duty holder (e.g. a “Responsible Person” under the Fire Safety Order).
  - Expensive works allow higher fees for agents involved (public figures range from 4% to 17% of the cost).
  - Professionals assessing buildings in line with guidance have no objective standards to follow when assessing risk. It may also be a temptation to use the inspection as an opportunity to pitch for some or all of the contract to do the works.
- Most leases require that the leaseholders pay for routine maintenance and anything required to be done at the requirement or a direction of a “competent authority” (e.g. the Fire Brigade or the local council but probably not MHCLG Advice Notes alone).
- Claims in contract covering the entire building are likely to belong to the freeholder (if such a claim exists). Most leases will require leaseholders to pay all legal fees for legal action by the freeholder. The freeholder in some cases must be satisfied there is a “reasonable prospect of success” before starting any such action.
- Leaseholders have few information rights to be able to obtain information about costs of works and anything which may be hidden in those costs (Sections 21 and 22 Landlord and Tenant Act 1985, Section 30A Landlord and Tenant Act 1985).
- Freeholders (or their agents) apply routinely to dispense with the statutory consultation process, which makes it harder to see and challenge costs later (Section 20ZA applications).
- Some buildings have complicated legal relationships (there may be Head Lessees and Leaseholders, there may be Resident Management Companies etc).

MHCLG Advice Notes have compounded the problem

- ACM/Grenfell-type Cladding "banned" after the fire. Changes to Building Regulations for new buildings from December 2018 made that ban effective. It is still possible to use the same cladding on office blocks, hotels and hospitals.
- Advice Note 14 dated 17 October 2018 (para 10 "*It is, therefore, important that the right combination of products has been installed and maintained correctly, to ensure they adequately resist the spread of fire over the wall to the standard required by current Building Regulations guidance*").
- Consolidated Advice Note issued January 2020 (paragraphs 1.5 and 1.9 in particular).
- Supplementary Note to Consolidated Advice Note issued 21 November 2020 rowed back (para 4 "*The advice does not need to be used if the building, of any height, meets all the functional requirements of the relevant Building Regulations in force at the time of construction…*").
- Yet further non-statutory guidance from the National Fire Chiefs' Council (waking watch) and the Royal Institution of Chartered Surveyors (mortgage valuation surveys) has further compounded the problem.
- These advice notes are very difficult, if not impossible, to challenge. Courts may give a wide margin of appreciation to public bodies/professional regulators dealing with fire safety or building safety matters.
- In addition to prompting freeholders and agents to take action, all this guidance has caused a panic among insurers, who have raised prices.
- Where is the evidence supporting all of this guidance?

Legal issues with any claims (1)

- Unlike in contracts for the sale of goods, there are no standard implied terms (promises written into the contract by law) which provide for buildings to be habitable, safe and fit for purpose.
- Unless you bought a flat off-plan, there is unlikely to be any contract with the developer or builder.
- That leaves other, more difficult claims, such as:
  - A claim under a warranty (if still in force); or
  - A claim in tort (i.e. one based on a duty of care); or
  - A claim under the Defective Premises Act 1972.
- Time limits (limitation) are a killer. In cases involving buildings, the law says any claim in relation to something wrong with a building's design, structure or materials (a "latent defect") is deemed to exist at the date the building was "completed". There can be arguments over what counts as "completed" and this date may be earlier than anyone first lived in the building.
- The most likely claims are generally subject to a six year time limit from the date of completion. That is whether you knew about or could discover the defect or not.
- It is critically important to take legal advice on your specific circumstances as soon as you suspect there is going to be a problem.

Legal issues with any claims (2)

- Outside of contract, the law restricts the ability of people to recover "economic losses" (i.e. money) from people unless they are subject to a duty of care. This prevents claims against e.g. developers, building inspectors etc.
- Defective Premises Act 1972 section 1 places a duty on those involved in construction or refurbishment to "*see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed*"
  - Duty covers common parts of a building not just any given flat;
  - Cases to date have only implicated those involved in design or construction, not people like building inspectors (so presumably not also fire engineers);
  - Uninhabitable does not mean impossible to live in; and
  - Damages limited to costs of repair (other costs, e.g. waking watches, are economic losses).
- Both the six year time limit and the restriction on recovering economic losses applies to claims under the Defective Premises Act 1972 as well.

Why is litigation not the solution?

- There appears to be no viable route in the legal system to hold the Government to account for the consequences of its Advice Notes.
- As against builders, there are few, if any, viable legal routes to recovery once a building is out of warranty and/or more than 6 years old.
- Litigation is a costly, time-consuming and risky endeavour. The only guaranteed winners are the lawyers involved.
- Litigation of this nature will be complex. It will involve not just evidence of fact but expert evidence about Building Regulations, custom and practice, fire safety, construction materials, products and so on.
- Any claims will be contested vigorously by well-resourced developers (or insurers) who will fight hard to avoid setting any precedent for the future. Trials and subsequent appeals could drag on for years.

Why does the government's loans idea not work?

- There is little detail at the moment. In a nutshell, the idea is that the government will give loans to freeholders at low interest that will be repaid via service charges for terms between 30 and 60 years.
- If so, Leaseholders will pay 100% of the cost of fixing others' mistakes. The government appears to have come around to some sort of levy on industry, but it appears it will not cover the full cost. How much will leaseholders have to pay?
- In cases where there are viable legal claims or where a warranty claim is possible, a freeholder may decide it suits its own interests to take out a loan at the leaseholders' expense even if there are other parties who could pay.
- It is suggested that once loans are in place, those responsible will either (a) volunteer to make contributions and/or (b) those responsible will be pursued for contributions.
- So the idea is borrow-fix-pursue.
- The "pursue" part is unlikely to happen in practice, except by imposing taxes or penalties, for the reasons explained on previous slides. Bottom line: there are no good legal options for pursuit where the building is out of warranty and/or more than 6 years old. Pursuing legal options may result in further large bills for leaseholders.
- "Pursue" is also unlikely to happen voluntarily. The directors of companies owe statutory duties to protect that company's assets. Volunteering money to pay someone else's loan will infringe those duties, particularly where the loan payer has no legal claim against the company in question.
- There may also be technical problems in implementing any loan scheme when existing secured borrowing is already in place over the freehold and restricts further borrowing (a "negative pledge").

Other issues to be addressed

- Nothing is being done to address the defects in leasehold law that are allowing freeholders, managing agents and their allied professionals the opportunity to make money from this issue.
- There is no financial, legal or technical solution that can solve the main problem here: no-one has set acceptable levels of risk and means of assessing risk. Every building is being treated as another Grenfell waiting to happen.
- The solution developed at the moment does not recognise that there are limits to what can be done to remediate existing buildings. Buildings should be categorised according to risk. Only the highest risks should be remediated.
- As currently proposed, the Building Safety Bill will compound this problem in three important ways:
  - Existing buildings of a certain number of storeys and of any age will be forced to meet standards being applied to new buildings;
  - Existing buildings may be recategorised as “higher-risk” buildings at any time. You may live in a building not subject to the rules one day but subject to the rules the next day; and
  - Buildings not eligible for the Building Safety Fund (which sets eligibility based on height measurement) may be caught by the Building Safety Bill (which appears to set eligibility based on number of storeys irrespective of height).
- The Building Safety Bill will force further costs onto leaseholders via the proposed new Building Safety Charge.

How would a levy work in practice?

- The LKP proposed levy follows established statutory levy models, such as:
  - The Banking Levy;
  - The Pension Protection Fund; and
  - The Financial Services Compensation Scheme.
- An Act of Parliament would be required. Changes could be rolled into the Building Safety Bill or a short bill could be passed separately, for example as a schedule to the Finance Bill as part of the budget process.
- Timelines are no longer (and possibly shorter) than those required to implement the government's loan solution.
- The Act of Parliament would:
  - Set the rules for the levy (e.g. share of levy paid by developers, ground rents, non-resident SDLT);
  - Place a duty on the body to ensure the levy was always sufficient to meet coupon payments due on the bond;
  - (Option) Require the body to work with the MHCLG/new Building Safety Regulator to conduct a national audit of building safety issues, set appropriate risk levels and make grants according to risk levels; and
  - (Option) Require the body to provide free project management support to eliminate the fees being charged by managing agents.
- If the government wanted to adopt this idea, there is nothing stopping it borrowing money to address current issues and rolling that into the bond proposed by LKP at a later date. That is what happened with e.g. the bank rescue in 2008 before UK Asset Management was established.