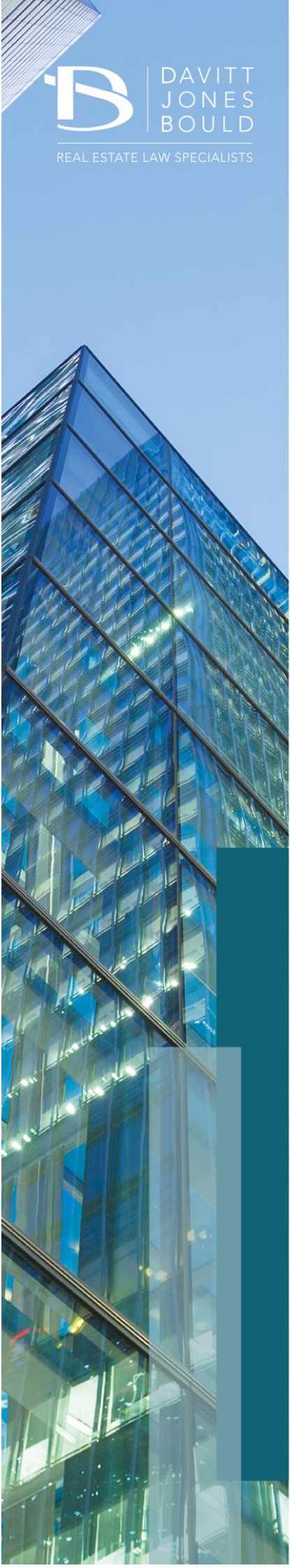
DAVITT JONES BOULD
REAL ESTATE LAW SPECIALISTS



Residential and Mixed-Use Developments: Building Control, Cladding and Legal Considerations

BUILDING REGULATIONS AND GRENFELL

The **Building (Amendment) Regulations 2018**, which came into force on 28 November 2018 in England and 10 January 2020 in Wales, introduced a ban on various types of combustible cladding in relation to buildings of more than 18 metres in height. It is notable that the provisions apply whenever a building contains one or more dwellings. It therefore applies to mixed use, as well as purely residential buildings. The definition of a dwelling under the regulations includes student accommodation, care homes, sheltered housing, hospitals and dormitories. The provisions are currently not retrospective, but this is under review.

REGULATORY REFORM (FIRE SAFETY) ORDER 2005

The **Regulatory Reform (Fire Safety) Order 2005** requires the responsible person in non-domestic premises to carry out a fire safety risk assessment on the premises. The risk assessment is personal to the responsible person and criminal liability cannot be delegated. The assessment must be a satisfactory one and the Government recommends it be done professionally by an expert. The cost of employing an expert and the carrying out of any remedial work required by the report may be substantial. The fire authority is responsible for enforcement and may also serve improvement, alteration and prohibition notices. Non-compliance with the legislation may result in prosecution, as well as vitiating the building's insurance policy on renewal. Presumably, insurers will require such an assessment before they commit themselves to reinstatement after fire. The prospect of not having insurance will no doubt spur lenders into also requiring such a risk assessment.

NOTE: the common parts of blocks of flats are defined as being non-domestic premises. Purchasers of leasehold property must therefore ask for, and landlords should provide, a fire safety risk assessment. The prospect of vitiating insurance policies will presumably mean that where no assessment is available, the mortgage lender must be notified and will withdraw any mortgage offer. The fact that a purchasing residential long leaseholder, who will become a director of a residents' management company after completion, will instantly become a criminal might also exercise the mind of the domestic conveyancer and managing agent. If the flat is in mixed business residential premises, then each of the commercial units should have a separate Fire Safety Assessment. The LPE1 residential management enquiry forms ask the landlord to provide the fire safety risk assessment, to confirm that any recommendations have been carried out and, if not, that the insurers have been told.

In relation to business premises, if an employer is in control of premises occupied by his or her staff then that will trigger the need for a risk assessment which must assess the risk, including necessary remedial work, not merely for the workforce but any relevant persons, including visitors and neighbouring landowners, who may be

A tenant in control of their premises (as will almost certainly be the case) must also have an assessment, whether or not they are also an employee, and a landlord who retains control of the common parts will require a quite separate assessment.
As the costs of the assessment will inevitably be added to the service charge (as also will the cost of any remedial work provided that the landlords may charge for the carrying out of statutory works), then the tenant must fully enquire as to the landlord's assessment.

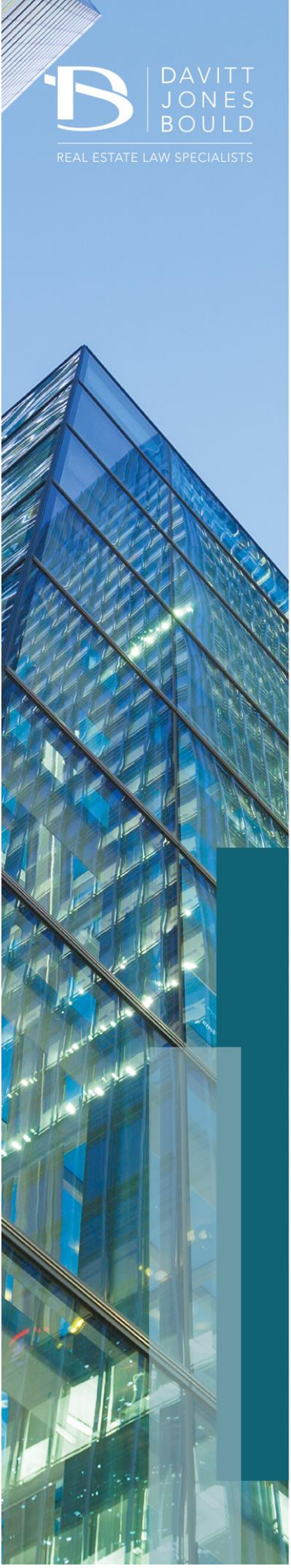
The **Fire Safety Act 2021** received Royal Assent on 29 April 2021 but will not come into force until detailed guidance has been provided. The Act makes clear that a fire safety risk assessment carried out under the 2005 regulations must include the exterior, structure, external doors and windows, internal doors which open into the common parts, balconies, and other external fixtures. By definition, the assessment will therefore include any cladding on the building's exterior.

In the Queen's Speech on 11 May 2021, the Government announced that it would be going ahead with the Building Safety Bill 2021 whereby an appropriate person would have to be appointed to oversee health and safety in residential high-rise blocks. They would have ultimate responsibility to the Health and Safety Commission. The Building Safety Bill was introduced into Parliament on 5 July 2021. It is not expected to become law for some time. Amongst other things, the Bill introduces the concept of high-risk residential buildings. In England, these will be buildings of 18 metres or more or which have seven or more storeys. In Wales, separate provisions may be made. In such buildings an Accountable Person must be identified. This will usually be the landlord but may be an RTM company. They must also appoint a Building Safety Manager who is answerable to the Building Safety Regulator who is part of the Health and Safety Executive. The Building Safety Manager must listen to complaints to tenants. There are potential criminal offences and fines attached for non-compliance. Any work may be charged to the tenants via a building safety charge which may charge for services outside the service charge.

In relation to all dwellings, currently under **S1 (6) of the Defective Premises Act 1972**, a purchaser can only bring an action in relation to a defective property within six years of becoming aware of the defect. In the case of ***Sportscity v Countryside [2020] EWHC 1596*** it was held that the six-year period will not be extended if defects are remedied badly, and further remedial work is required later. Under the Bill, however, there will be a 15-year limitation period in relation to defects which will be backdated when the Bill comes into force. Thus, for example, if a dwelling was completed in 2010 there would be a claim until 2025. This is subject to Human Rights claims and also developers use special purpose vehicles which means that within 15 years there will be no-one in existence to sue. There is also provision whereby if a landlord does not claim off building guarantees, then they cannot collect via service charge, although this is probably the case already: see ***Avon Ground Rents v Cowley (2019)***.

THE EWS1 FORM AND EXTERNAL CLADDING

Following the Grenfell Tower disaster in June 2017, mortgage companies naturally became reluctant to lend on flats in blocks which might have combustible cladding. On occasion, valuers were valuing such flats at £0. There was, moreover, no standardisation between the lenders. The industry's response was the EWS1 (external wall systems) certificate which was introduced in December 2019 after discussion between UK Finance and the Royal Institution of Chartered Surveyors.



A recognised property professional with the requisite qualification would carry out an inspection when deemed appropriate and would produce an EWS1 certificate which would be required by the mortgage company. The certificate would last for five years and would only be required for multi-let residential properties of more than 18 metres (c. six storeys) in height. If the cladding was deemed safe then the mortgage company would proceed, it would require the cladding to be replaced, a process which can take a significant amount of time.

Unfortunately, in January 2020, the Ministry of Housing Communities and Local Government muddied the waters somewhat when it produced **Advice for Building Owners of Multi-Storey, Multi-Occupied Residential Buildings**. This suggested that the EWS1 may be appropriate in some multi-let premises of less than 18 metres in height and which do not have external cladding, the issue apparently being high pressure laminate which is causing some concern. This concern increased after it was found to contribute to a fire in a block of halls of residence in Bolton in November 2019. As a consequence, some mortgage companies have required the EWS1 on buildings with three storeys and where brick is the building material. This is surely not what was intended.

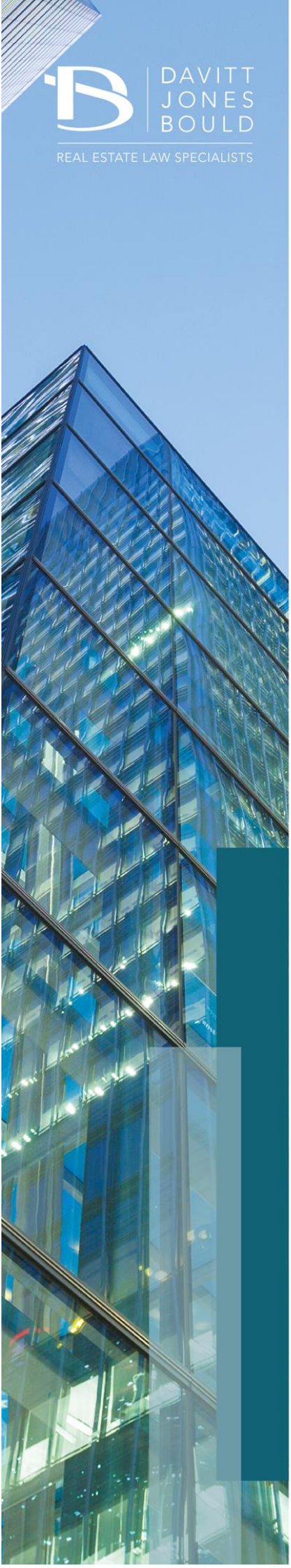
The EWS1 is undergoing review, and this cannot come too soon for many, especially at the current time when many wish to relocate to the countryside from their small city-centre dwellings. If changes are not made soon, some estimate that the level of negative equity in such premises will be greater than during the credit crunch of 2008-2011.

On 21 July 2021 the Ministry of Housing announced they had reached agreements with some mortgage companies that EWS1 certificates will not be required for buildings of less than 18 metres. Whether this is the case is yet to be seen. On 21 November 2020 the Government announced that they would provide £700,000 to train fire safety inspectors under the auspices of the RICS.

On 8 March 2021, the Royal Institution of Chartered Surveyors produced its new guidance note on the valuation of properties in multi-storey multi-occupied residential buildings with cladding, which states that:

- An EWS1 certificate should be required for buildings over six storeys in height where there is cladding or curtain wall glazing or where there are balconies vertically above one another and both the balustrades and decking are constructed of combustible material such as timber, or where the decking is constructed of combustible material and the balconies are directly linked by combustible material;
- If the building is of five or six storeys in height then a certificate will be required if approximately one quarter of the whole elevation is comprised of cladding, or there is aluminium or metal composite material or high-pressure laminate panels on the building or fire risk in relation to balconies as above;
- If the building has fewer than five storeys a certificate will be required if there are aluminium or metal composite or high-pressure laminate panels on the building.

The guidance also makes clear that if the building complies with the **Building (Amendment) Regulations 2018** (or 2020 in Wales) an EWS1 certificate should not be required. At first glance this alleviates many of the problems.



However, the original purpose of the EWS1 certificates has been expanded to include high pressure laminate and balconies and not merely combustible cladding. Buildings of less than 18 metres in height may also still require the certificates which was not what was intended when the EWS1 was introduced. Although a step in the right direction and the guidance has solved the problems for some, do not assume that the issue has gone away.

SERVICE CHARGE AND IMPROVEMENTS

Generally, the cost of improvements cannot be charged for unless the service charge allows this: see ***Mullaney v Maybourne Grange*** **[1986] 1 EGLR 53**, where replacement of wooden window frames by UPVC double glazing was held an improvement. However, in ***Craighead v Homes for Islington Ltd*** **[2010] UKUT 47**, where windows were not replaced like for like, due to intervening changes in Part L of the Building Regulations, it was implied that the landlord could improve the windows to modern standards under the repairing obligation and add the cost to the service charge. This was held despite the building being listed and potentially exempt from Part L. The difference between the two cases seems to be due to the intervening statutory provisions. If correct, this may be an extremely useful argument for landlords, for example, in relation to increased energy performance of buildings.

Under **S19 LTA 1985**, which relates to residential property only, service charge costs must be reasonably incurred. Where the building is commercial, however, save in exceptional circumstances, as long as the lease covers the works done, the landlord's determination is conclusive.

In ***Criterion Buildings v McKinsey & Co*** **[2021] EWHC 256** the landlord successfully claimed £2.2 million plus interest of service charge arrears. The lease stated that the tenant would pay a "due proportion" of the service charge as determined by the landlord. A due proportion of the costs of services and expenses was defined under the lease as "a fair proportion to be determined from time to time by the landlord or the landlord's surveyors taking into account the use made of and benefit received from the services and expenses…". The Court held that a fair proportion was not determined objectively and that the landlord could make a subjective decision, as long as it was a rational one. In the future, tenants may consider making clear that the landlord's decision must be objectively reasonable, subject to the burden of proving otherwise being on the tenant. Other possibilities include caps on service charges, fixed service charges or clearly excluding certain types of expenditure.

This decision might be extremely significant in the future when landlords wish to charge for making premises more efficient and replacing out of date heating and lighting systems. Consider the problems in relation to air-conditioning systems caused by the ban on R22s (a type of CFC) as a case in point. If the landlord is not able to repair or replace like for like due to an intervening statute, unless the service charge provision clearly deals with the matter, they would be able to add the cost to the tenant. In particular, when a short term lease or a lease with a short term left is involved, this would be catastrophic. It is suggested that tenants should wish to have these very common service charge clauses changed on a lease renewal. See above as to whether the court may permit this.

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