




PART FIVE: SERVICE CHARGE RECOVERY AND CERTIFICATES

In the previous article in our series on the obligations of a landlord of an occupied building, we explained some of the restrictions on service charge recoverability under the BSA. In this article, we explore a few further traps for an unwary landlord.


COSTS OF BUILDING SAFETY MEASURES VERSES COSTS OF REMEDIATION WORKS

Under the BSA, there are broadly two sets of costs. These are:

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- costs of complying with the landlord's duties of ongoing management under part 4 of the BSA; and
 - costs of remediation works to remedy historic defects in the construction of a building under part 5 of the BSA.

The costs of remediation works may not be recoverable from the leaseholders (occupiers) of high-risk buildings as certain leaseholders may benefit from a raft of protections. For further detail on these protections, please refer to our last article.

DANGEROUS PRESUMPTIONS FOR A LANDLORD



The leaseholder protections under the BSA were created to help allocate the burden of the cost of any remediation works. The BSA creates a structure to direct the remediation costs to the developers and/or building owners rather than the individual occupiers of the dwellings. To help a leaseholder evidence that they have the benefit of the leaseholder protections, the BSA has created two types of certificate. These are:

- Leaseholder deed of certificate – information to be provided by a leaseholder to its landlord; and
- Landlord certificate – information to be provided by a landlord to its leaseholder;

and each certificate has a process. A process which, if missed by a landlord, can result in a leaseholder acquiring benefits that it wouldn't have otherwise had.

LEASEHOLDER DEED OF CERTIFICATE

A leaseholder deed of certificate demonstrates that a leaseholder holds a qualifying lease and so has the benefit of the leaseholder protections. The leaseholder deed of certificate evidences the position as at 14 February 2022 and so is a crucial document for the landlord to see when it is seeking to recover remediation costs from a leaseholder (from a leaseholder's perspective, it is also important on any sale of the individual dwelling) as it will be used to determine the value of any service charge caps that the leaseholder may have.

A leaseholder can send a certificate to their landlord at any time, however, a landlord must request a leaseholder's deed of certificate from a leaseholder, upon any of the following triggers:

- within five days of finding out that a leaseholder intends to sell their dwelling; or
- within five days of finding out there is a relevant defect (see our [last article](#) for a fuller explanation).

If the landlord sends the request for a certificate, the leaseholder has up to 12 weeks to respond. If the leaseholder fails to respond within the timeframe, the leaseholder will be presumed to be a non-qualifying leaseholder. But if the landlord does not request the certificate from the leaseholder within the five-day period, the leaseholder will be deemed to be a qualifying leaseholder regardless, and this can give a non-qualifying leaseholder qualifying status. Therefore, if a building does need remedial work, and the relevant landlord was not responsible for the defect, it is important that a landlord follows the correct procedures to prevent it paying further costs that it may not be responsible for.

LANDLORD'S CERTIFICATE

The landlord's certificate demonstrates the landlord's financial circumstances and therefore whether the landlord should be responsible for the remediation costs or whether it is appropriate to seek to pass the costs onto the leaseholders.

A landlord's certificate needs to be produced by a landlord:

- where the landlord makes a service charge demand for remediation costs;
- within four weeks of being notified by a leaseholder that its leasehold interest is to be sold;
- within four weeks of becoming aware of a relevant defect; or
- within four weeks of a leaseholder requesting one.

If a landlord fails to provide the certificate within the four-week period, then the landlord will be deemed to be responsible for the relevant defect, and this applies to all leaseholders (regardless of their true qualifying status).

The information to be included in the certificate and the evidence that needs to be provided is extensive and includes:

- whether they were, or were associated with, the developer of the building on 14 February 2022; and
- whether they met the contribution condition on 14 February 2022.

The significance of this information is explored in our last article.

PRACTICAL STEPS FOR LANDLORDS



- ascertain which buildings within a portfolio are relevant buildings;
- carry out building surveys to ascertain whether any buildings have any relevant defects;
- gather the information needed for the landlord certificate to ensure that the landlord can comply with any certificate requests quickly and within four weeks period following a request;
- write to leaseholders in relevant buildings inviting them to complete and return a leaseholder deed of certificate and have a system in place to record and chase; and
- have an internal procedure and train all staff, as to what steps to take when a leaseholder requests a landlord's certificate, or the leaseholder informs the landlord that they are selling (and have a record keeping system to monitor all requests).

WHERE DOES THIS LEAVE YOU?

The BSA will need to be carefully analysed and applied to any building that could be within its scope. There are many detailed limitations and exemptions that this note doesn't attempt to cover but could apply to your given situation. But the aim of the legislation is to pass building safety costs onto those who are considered to have deeper pockets rather than the person on the street. Landlords are highly likely to have to pay something for remediation and perhaps also management but we are here to help. We can help you navigate what it is you need to do and help you maximise the sums you are able to recover from tenants but perhaps also third parties. There might be claims a landlord can make against former landlords, other current landlords and contractors. Please get in touch with your usual Wedlake Bell contact or any of the following members of the real estate team. If your property is in Wales, please contact us for further information, as this note relates to buildings in England.

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