

# WEIGHING UP THE LAW

**Kizzy Augustin and Helen Scambler provide an update on recent fire safety legislation and ask 'where are we now?'**

THERE HAS been significant legislative activity in the past few years relating to fire safety, and in turn, building safety – largely as a result of the Grenfell Tower Fire public inquiry recommendations. The primary objective is to protect people from the risk of personal injury or death in the event of fire, hold people to account for fire safety management, and reduce the possibility of another 'Grenfell' in the future. This article sets out the key legislation and explores how the law is working to mitigate future fire safety risk in the UK.

## **The Regulatory Reform (Fire Safety) Order 2005 (FSO) / The Fire Safety Act 2021 (FSA)**

The FSO is the primary piece of legislation regulating fire safety in buildings in England and Wales and applies to all workplaces and the common parts of buildings containing two or more domestic premises. It places a legal duty on those who own or are in control of relevant buildings, namely the "responsible person" (who could include the freeholder, developer, leaseholder, or managing agent), to undertake fire risk assessments and adopt appropriate fire safety measures.

The FSA amends the FSO to clarify and strengthen fire safety requirements for buildings with two or more sets of domestic premises in England and Wales. The FSA puts greater accountability on responsible persons to be responsible for not only the common parts of the building, but the building's structure/exterior of the building, external walls, balconies, windows, cladding/façades, insulation, and flat entrance doors that open onto the

common parts. It provides a framework for assessing and managing fire risks and consequently grants the fire and rescue services greater enforcement and decision-making powers to take action if they deem buildings unsafe.

## **The Fire Safety (England) Regulations 2022 (FSRs)**

The FSRs apply to all buildings in England that comprise two or more domestic premises (including the residential parts of mixed-use buildings) and serve as an important step towards implementing the recommendations of the Grenfell Tower Inquiry Phase 1 report. The FSRs seek to improve communication between responsible persons and relevant stakeholders by requiring the sharing of documents and information, and the provision of fire safety instructions and specific information to residents and fire and rescue services (such as floor plans). There are specific requirements depending on the height of the building – some apply to all buildings, some to buildings over 11m in height and some to 'higher risk' buildings (18 metres or more).

## **The Building Safety Act 2022 (BSA)**

The BSA establishes a new regulatory framework, largely for the safety of multi occupied, high-rise buildings (i.e., residential buildings in England 18 metres/7 storeys or more). This includes the introduction of a new Building Safety Regulator (BSR) to oversee and enforce high fire safety standards, with extensive powers to take formal action against those that breach their obligations. An "Accountable Person" (the entity or person that owns



**Kizzy Augustin** is Head of Health & Safety and a Partner in the White Collar Crime & Investigations Group at Mischoon de Reya.

A Solicitor Advocate with Higher Rights of Audience, she has significant experience in defending companies, senior directors, and employees in corporate manslaughter and serious fire/health and safety prosecutions. She was recognised by The Legal 500 in 2022 as an "exceptional Leading Individual" for health and safety.



**Helen Scambler** is an Associate in the White Collar Crime & Investigations Group at Mischoon de Reya.

She has a range of experience advising both individuals and corporate clients in investigations and criminal defence proceedings. Her cases involve advising corporate clients conducting internal investigations and defending clients facing allegations of serious regulatory and compliance matters.

or has responsibility for the building or has repairing or maintenance obligations for the common parts) and a “principal accountable person” (an accountable person with responsibility for the exterior and structure of the building) must be appointed to take responsibility for fire and structural safety in the building. This follows the theme of holding specific entities, and possibly individuals, ‘to account’ for the mitigation of fire safety risks during occupation.

Building owners and developers will be required to produce a “golden thread” of building information, maintained throughout the lifecycle of the building, to include the risks associated with their buildings and how those risks will be mitigated.

Section 156 BSA will be brought into force on 1 October 2023 which amends the FSO by requiring responsible persons for relevant buildings to provide comprehensive relevant fire safety information to residents, as well as recording and reviewing their fire risk assessments, which should encourage improved communications between responsible persons.

### The effects of the new legislation on fire safety

Together, the legislation is shaping the culture and conversation around fire safety risks. The key themes arising out of the legislation are:

1. **Accountability:** There is a clear focus around the responsibility of managing fire safety risk, and accountability is firmly placed upon building owners and those who manage and control the buildings to appropriately assess and manage the relevant risk.
2. **Cooperation and communication:** There is a noticeable push towards effective co-operation between key stakeholders, largely through the

communication of information and risks between potential ‘accountable persons’.

3. **Maintenance:** The legislation highlights the importance of regular fire safety checks and risk assessments, as well as a proactive approach to dealing with concerns from occupiers and residents.

Fire safety risk mitigation must be taken seriously and those who manage and own buildings must ensure they meet these high standards, as failure to comply can result in the loss of life, property, and significant legal ramifications – including personal liability. The penalties for non-compliance can result in significant fines, imprisonment, and reputational damage. Therefore, it is vital for those who fall in scope to take a proactive approach to fire safety and ensure they follow the legislation to protect people and their assets.

### Conclusions

It is reassuring that fire safety is finally at the top of the agenda through the introduction of legislation. The Fire Authorities have not been reluctant to take action against responsible persons who fall short of their fire safety duties and the new Building Safety Regulator is likely to do the same. Whilst progress to improve fire safety compliance is potentially slower than desired, we must note that we are seeing vital improvements in culture and attitudes to fire safety management.

Considering the potential consequences for both organisations and individuals, it is essential that building owners or managers become familiar with the new requirements and take appropriate measures to ensure that buildings meet the understandably high standards, as these regimes are here to stay. ◀



## Sailesh Mehta speaks to David Smith, partner at JMW Solicitors, about some of the challenges faced when defending a fire safety prosecution

**SM:** The case we will discuss here has some echoes of Grenfell, albeit on a smaller scale, and illustrates some of the things highlighted during the Grenfell Inquiry. What were the details of the case being brought?

**DS:** I was representing a managing agent who acted for the landlord of a small four-storey block. A fire started in a ground floor flat and very quickly the fire escaped as the doors were not up to modern standards. There was a great deal of smoke escape into the common areas and into further flats that panicked other residents. The smoke levels led to difficulties in escaping that ultimately saw the fire service evacuating the building through windows, and some residents had to jump from windows, which led to some minor injuries.

**SM:** Thankfully, no one died in this case, but the prosecution argued that was a matter of luck, rather than design.

**DS:** Yes and it gives a microcosm of some of the problems that the Grenfell Inquiry has since uncovered occurred during the Grenfell Tower fire: high levels of smoke in common areas, difficulties evacuating through smoke-filled common areas, and problems with smoke escaping into common areas from flats that are on fire.

**SM:** The first issue that you encountered with this case was that five years had elapsed between the time of the fire and the hearing in court. How did you approach this issue?

**DS:** There was indeed a long delay and one of the intriguing aspects of this case is that, based on the case law at the time, we were inclined to argue that the delay was excessive and could impact a fair trial. However, when we came to present this argument, the court had previously been hearing an application for further prosecutions of Rolf Harris for sexual offences from around 30 to 40 years prior. With those charges deemed admissible in that case, a five-year delay wasn't going to cut it in ours.

**SM:** So having raised and then abandoned the delay arguments, what was the next stage?

**DS:** There were a number of aspects that were hard to put a positive spin on. It came down to a complex question of whether to go to trial on an issue of disputed expert evidence as to whether the property really was unsafe. It was particularly difficult for us to argue that the fire doors, particularly in the problematic area, were safe due to the type of glazing around

them. All in all, it was a fairly bleak situation to defend, so we went to negotiating a guilty plea.

**SM:** This fire occurred in 2011, some years after the Fire Safety Order had come into force, but there was still a lack of clarity in certain areas.

**DS:** Firstly, people were not paying attention to compartmentalisation, and in our case there was uncertainty whether it was sufficient. The second problem was the issue of responsible persons, which has been a big issue post-Grenfell, and which the Building Safety Act (BSA) has sought to resolve. In this case we had both a managing agent and a landlord, and so we had to ask if the agents were a responsible person for the purposes of the Fire Safety Order. In today's parlance, post-BSA, they were, but prior to the act coming into force it was less clear.

**SM:** How did the contract that your clients had impact the case?

**DS:** The contract between the agents and the landlord had strict limits on spending money, but the agents did have substantial authority in terms of what work got done. It was an unusual situation in terms of the management arrangement, but this can often be the case, with a wide range of management relationships. At the time, however, this did not tie well to the idea of a responsible person.

**SM:** An agent who has little to no authority, does seem to accept significant liability.

**DS:** Yes, this is often the case in smaller blocks, and one of the problems with the BSA is that there are a lot of blocks that sit just below 18 metres. They therefore fall outside the stricter approach of the act and management arrangements can be hazy. I don't think that this is an aspect of the BSA that government have turned their minds to properly and so these buildings and the management of them are not being effectively dealt with.

**SM:** Your caseload can often involve regulatory work, so how does this interact with fire law?

**DS:** A lot of my work involves property licensing as one of the strong drivers for licencing HMOs is fire safety. In fact, when the thresholds for licencing were set, they were linked to average numbers of deaths in properties during fires. The Housing Act 2004 has other safety features, including the Housing Health and Safety Rating system that, prior to the BSA, became a huge part of regulating cladding in residential property. ◀

# LEGAL CASE STUDY



RED LION CHAMBERS