PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

First Delegated Legislation Committee

DRAFT BUILDING SAFETY (LEASEHOLDER PROTECTIONS ETC.) (ENGLAND) (AMENDMENT) REGULATIONS 2023

Monday 17 July 2023

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Friday 21 July 2023

The Committee consisted of the following Members:

Chair: Mrs Sheryll Murray

† Clarke-Smith, Brendan *(Bassetlaw)* (Con)
† Colburn, Elliot *(Carshalton and Wallington)* (Con)
† De Cordova, Marsha *(Battersea)* (Lab)
† Doyle-Price, Jackie *(Thurrock)* (Con)
† Evennett, Sir David *(Bexleyheath and Crayford)* (Con)
† Fletcher, Colleen *(Coventry North East)* (Lab)
† Foy, Mary Kelly *(City of Durham)* (Lab)
† Gardiner, Barry *(Brent North)* (Lab)
† Gideon, Jo *(Stoke-on-Trent Central)* (Con)
† Greenwood, Margaret *(Wirral West)* (Lab)
† Heald, Sir Oliver *(North East Hertfordshire)* (Con)
† Holmes, Paul *(Eastleigh)* (Con)
† Jones, Fay *(Brecon and Radnorshire)* (Con)
Lewis, Clive *(Norwich South)* (Lab)
† Maclean, Rachel *(Minister of State, Department for Levelling Up, Housing and Communities)*
† Pawsey, Mark *(Rugby)* (Con)
† Pennycook, Matthew *(Greenwich and Woolwich)* (Lab)

Yohanna Sallberg, *Committee Clerk*

† attended the Committee

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Monday 17 July 2023

[Mrs Sheryll Murray *in the Chair*]

Draft Building Safety (Leaseholder Protections etc.) (England) (Amendment) Regulations 2023

4.30 pm

The Minister of State, Department for Levelling Up, Housing and Communities (Rachel Maclean): I beg to move,

That the Committee has considered the draft Building Safety (Leaseholder Protections etc.) (England) (Amendment) Regulations 2023.

It is a pleasure to serve under your chairmanship, Mrs Murray. The draft regulations amend the existing leaseholder protection regulations made under the Building Safety Act 2022 to clarify and simplify some provisions in the light of experience and to address points made by the Joint Committee on Statutory Instruments and in the two stayed judicial review applications. I will start by providing some context and background to the draft regulations.

As hon. Members know, the Government introduced the leaseholder protections to protect many leaseholders from the cost of remedying historical safety defects in their building, either entirely or with liability firmly capped. The Joint Committee on Statutory Instruments reported the 2022 affirmative regulations for cases of suspected defective drafting and doubtful vires. Notwithstanding the Committee's concerns, the Government were satisfied that no issues with the regulations would prevent the process from operating successfully.

My predecessor, my right hon. Friend the Member for Nuneaton (Mr Jones), committed to introduce changes if it became apparent that they were necessary. I therefore laid the regulations before us to address the issues that I have mentioned, and they were engaged in two rounds of correspondence with the Joint Committee, culminating in a memorandum of response set out in the appendix to the Joint Committee's 44th report of the 2023 Session, published last Friday.

To summarise, the Joint Committee reported the regulations for one case of defective drafting in relation to a lack of consequence for failure to notify the landlord associated with the developer of their liability. The Government are grateful to the Joint Committee for its careful scrutiny of the regulations and have considered the issue carefully. As set out in the memorandum published by the Committee, the Government are satisfied that no issue with the regulations will prevent the process from operating successfully.

It is imperative that the regulations come into force before the summer recess so as to alleviate the issues facing named managers and landlords. We will of course monitor closely the progress of future cases and, if it becomes apparent that further changes are necessary, we will come back to Parliament with proposals.

The regulations can be considered in three parts. First, they address points made in the Joint Committee's report of July 2022. They make it clear that to recover the remediation amount, L—the body responsible for managing the building—must issue a notice to the landlord with the liability to pay. The notice must include the prescribed information on both the amount to be recovered and the appeals process. The regulations clarify the powers of the first-tier tribunal in determining the outcome of an appeal: if the appeal is unsuccessful, the appellant has to pay the amount set out in the notice; if the appeal is successful, the appellant has to pay either nothing or an alternative amount determined by the tribunal.

The Joint Committee considered regulation 6(1) of SI 2022/859, which purports to allow a leaseholder voluntarily to provide a leaseholder deed of certificate to their landlord, to be ultra vires, so the draft regulations remove that provision. I should make it clear, however, that nothing prevents a leaseholder from providing a certificate to their landlord at a time of their choosing. The regulations clarify that the prescribed evidence is required as part of the leaseholder deed of certificate and that failure to provide a completed leaseholder deed of certificate and the required evidence will result in the lease being treated as if it were not a qualifying lease. The regulations also provide that "shared ownership lease" has the same meaning as that used in schedule 8 to the 2022 Act.

Secondly, the regulations address points made in the two stayed judicial review applications. They provide for named managers to recover the cost of relevant measures in relation to relevant defects from landlords in the same way as resident management companies and right-to-manage companies. They also provide for L to be able to recover notified amounts from landlords as a civil debt and for L to be able to pursue a remediation contribution order against the landlord to recover costs. The regulations also provide that a landlord who is associated with the developer must be notified of its liability to pay for relevant measures or relevant defects. However, nothing in the regulations prevents L from instead pursuing another liable landlord if, for example, they feel that funds are more likely to be recovered in that way.

Thirdly, the regulations deliver additional detail to clarify and simplify some of the provisions in the 2022 regulations. They enable Homes England—the Department's delivery partner for remediation work outside London—to apply for a remediation order or a remediation contribution order. They provide that a landlord may apply to the first-tier tribunal for a 30-day extension to the appeal process, to give time for out-of-court engagement. They also provide that the landlord must update the landlord certificate to reflect a lease's qualifying status within four weeks of receiving a leaseholder deed of certificate.

Finally, amendments are made to the 2022 regulations so that the current landlord does not need to provide certain evidence where they accept liability for a relevant defect, and the existing landlord certificate is replaced by the schedule to these regulations to reflect that. This change reduces the information-sharing requirement to that which is essential for a leaseholder and L to determine liability. The regulations also provide that current landlords must provide L with copies of the landlord and leaseholder

certificates within a week of completion or receipt, to enable L to apportion costs in line with the 2022 regulations. Where the current landlord fails to comply, the regulations provide that their share of costs cannot be passed on to leaseholders.

Barry Gardiner (Brent North) (Lab): The Minister will be aware that many landlords have sold or gone into liquidation and referred on, and the current landlord may now be in a very different jurisdiction and may often be difficult to get at. Has the Minister considered the effect of that on these regulations, and how the notifications and periods she has set out will impact on leaseholders if, as she has just said, it will be possible for the cost to be passed on to them in this situation?

Rachel Maclean: I thank the hon. Gentleman for his contribution. He will be aware that this is a very specific provision in the regulations, which serve the specific purpose of providing the detail needed to clarify and simplify some of the provisions in the existing leaseholder protection regulations.

To continue—

Barry Gardiner: Will the Minister give way again?

Rachel Maclean: No, I am not going to give way again, if that is okay, Mrs Murray.

The regulations also address concerns raised by the Joint Committee last July and the two stayed judicial review applications. That will enable landlords to complete a shortened landlord certificate and enable L to take civil action against non-compliant landlords.

I hope hon. Members will join me in supporting the draft regulations, which I commend to the Committee.

2.38 pm

Matthew Pennycook (Greenwich and Woolwich) (Lab): It is a pleasure to serve with you in the Chair, Mrs Murray. I thank the Minister for the detailed explanation she has just read into the record.

The Opposition welcome this instrument and do not intend to oppose it, although we do bemoan the fact that it has proven necessary for the Government to bring it forward. After all, these regulations consist mostly of technical amendments to regulations previously made under the Building Safety Act after it came into force. For example, regulation 10 amends the definition of resident management companies to ensure consistency across the relevant regulations. Surely, the need for such basic definitional alignment could have been anticipated in the drafting of the previous regulations. We appreciate fully that these are not simple matters, but the fact that this Committee is having to meet this afternoon to rectify what are largely obvious deficiencies and omissions in the drafting of the previously approved regulations does not exactly inspire confidence in the Government's approach to leaseholder protections and the building safety crisis more generally.

During the passage of Building Safety Bill, we warned about the consequences of rapidly overhauling what was already a complex and technical piece of legislation in order to reflect the Government's belated change of approach. Indeed, I remember arguing when we considered Lords amendments to the Bill in April last year that it was deeply problematic that this House had so little time to carefully consider or properly scrutinise substantial changes to the legislation. As I said at the time,

"this is no way to make good law"—[*Official Report*, 20 April 2022; Vol. 712, c. 191.]

Our concerns persist when it comes to the regulations before us. What assurances can the Minister give us that, in rectifying the deficiencies and omissions in previously approved regulations, the same errors will not recur in respect of the many other building safety instruments that we still need to consider?

While the bulk of this instrument concerns technical amendments to recently approved regulations made under the Building Safety Act, there are some noteworthy new provisions. I would like to press the Minister for specific information on one in particular: regulation 4, which adds Homes England to the list of interested persons who may seek remediation orders and remediation contribution orders under sections 123 and 124 of the Act. Leaving aside the obvious question of why it was not included from the outset, particularly given that it administers the building safety fund outside London, the addition of Homes England to the list of persons who can seek an RO and an RCO raises several questions.

First, is it the Government's intention that, following the passage of this instrument, Homes England will largely or wholly take over the Department's functions when it comes to applying to the first-tier tribunal for ROs and RCOs? Secondly, if that is the intention, do the Government expect this transfer of responsibility to lead to an increase in the number of such orders being applied for, beyond the extremely small number of orders that the Department is presently taking forward? Thirdly, will Homes England be provided with any further funding in order to fulfil this new responsibility—perhaps some of the £1.9 billion of allocated funding that the Department recently returned unspent to the Treasury?

As I have suggested, while there is good reason to believe that the need for them could and should have been anticipated, the instrument contains a series of perfectly sensible refinements to previous regulations, the effect of which should be to streamline the landlord certificate and leaseholder deed of certificate process. As the Minister has made clear, the draft regulations include provisions specifically requiring a landlord certificate to be served within four weeks of a landlord becoming aware of a new leaseholder deed of certificate containing information not included in a previous landlord certificate; changes to the information required to be included in a landlord certificate; and changes to the time period within which a landlord must share a copy of a received leaseholder deed to any RMC, RTM or named manager or else be prevented from recovering costs.

We take no issue with any of these measures. However, we regret that, although the instrument makes these necessary changes, it is a missed opportunity to resolve a number of other glaring deficiencies in the Building Safety Act that the Government really should have resolved by now. Let me give the Committee two brief examples.

The first example concerns the gap in the Building Safety Act that exists for those leaseholders who need to extend or vary their lease on or after 14 February 2022.

[Matthew Pennycook]

The Minister and her officials are well aware that any leaseholder granted a lease extension or variation in a block of flats after that date does not benefit from the protections provided for under schedule 8 to the Act, even if the surrendered lease had the benefit, with the effect that leaseholders are being advised by the Government to try to persuade their landlord to apply those protections as contractual terms. The Government have stated on the record that they are

"looking to legislate to resolve this issue as soon as parliamentary time allows."—[*Official Report, House of Lords,* 2 May 2023; Vol. 829, c. 1392.]

Why are the Government not using this instrument to address that shortcoming?

The other example concerns the circumstances in which the costs of remediating relevant defects in relevant buildings can be charged back to leaseholders. As the Minister will know, in the recent case of Adriatic Land 3 Ltd *v.* Leaseholders of Waterside Apartments, St James Court West, Accrington, the first-tier tribunal held that the service charge protections under schedule 8 to the Act were not retrospective. As a result, those landlords who, seeing the writing on the wall, quickly sent out demands for service charges to cover the cost of remedial works before the Act came into force on 28 June last year have seemingly got away with passing on significant costs to leaseholders. The Government are surely not expecting individual leaseholders or groups of leaseholders to fund litigation to settle the law, so why are they not using this instrument to clarify that the provisions of schedule 8 are retrospective?

In addition to the specific questions that I have put to the Minister about regulation 4, I would be grateful if she explained why these and many other unresolved issues are not being addressed in this instrument, and if she provided further detail on whether and when they will finally be addressed.

4.44 pm

Rachel Maclean: I thank the hon. Gentleman for his comments and will address his points. He asked why we are amending leaseholder protections again. He is right that mistakes were raised by the JCSI last July, with correcting regulations in February and now these draft regulations. The Government committed in the House last summer to making any necessary amendments to the leaseholder protection regulations, and that is exactly what we are doing.

The Building Safety (Leaseholder Protections) (England) (Amendment) Regulations 2023, which came into force in February, corrected an error in the definition of "associated persons" to ensure that complex corporate structures cannot avoid liability. That was always the Government's intention. Those regulations were able to be dealt with under the negative procedure, which is why we were able to bring them into force the day after laying them. It was important to do that to ensure that landlords could not avoid the new requirements. Today's draft regulations, considered under the affirmative procedure, do the opposite: they minimise information-sharing requirements for landlords and provide clarity to ensure the protections have effect in the way originally intended.

The hon. Gentleman asked about Homes England. It will not be taking over from the Department, but it will be able to apply, where it thinks it appropriate to do so, and we constantly review the enforcement arrangements and resourcing. I put it on the record that no money has been handed back to the Treasury, as the hon. Gentleman stated incorrectly. Homes England funding is being reprofiled, which is a normal process of Government funding and a responsible way to account for public money, and all the money will be spent on affordable housing. I hope that sets hon. Members' concerns straight on that point.

As I said earlier, these draft regulations deliver additional detail to clarify and simplify some provisions in the existing leaseholder protection regulations. There is of course more to do in this area, some of which will require primary legislation, and the Government will come back to the House with further proposals in due course. I hope the Committee will welcome these important and necessary regulations.

Question put and agreed to.

4.47 pm

Committee rose.