



BEALE&CO

Construction Winter Webinar Series

External Wall Fire Safety and Form EWS1

Will Buckby and Ian Masser – 2 December 2020

Introductions

+ Will Buckby - Partner

- w.buckby@beale-law.com
- +44 (0) 20 7469 0411
- +44 (0) 7557 285841



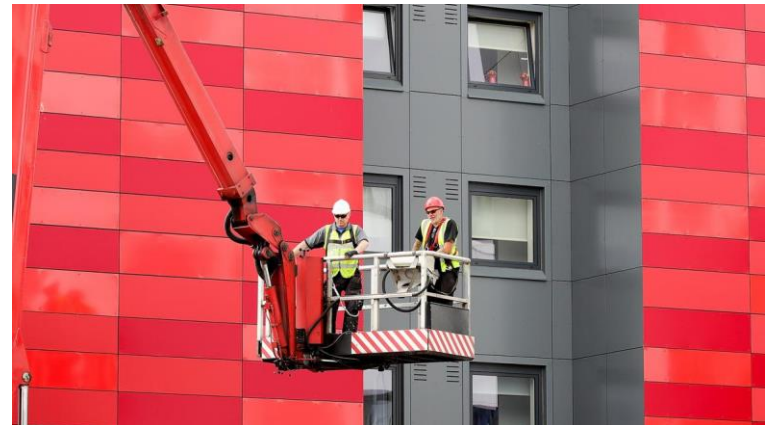
+ Ian Masser - Partner

- i.masser@beale-law.com
- +44 (0) 20 7469 0439
- +44 (0) 7557 285833



Agenda

1. Background: Grenfell fire, change in Building Regulations, **Form EWS1**
2. Change to the Building Regulations
3. Practical considerations arising out of change to the Building Regulations
4. Form EWS1 – the concerns
5. Mitigating current position
6. Conclusions



The News

← → https://www.bbc.co.uk/news/business-50375522 Cladding puts flat owners' lives on hold

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Cladding puts flat owners' lives on hold

By Nell Mackenzie
Business reporter

15 November 2019

[Grenfell Tower fire](#)

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Residents of Prospect East caught in the confusion over cladding

Helen King is desperate to sell her east London flat so that she can finally move in with her partner.

She has had a buyer lined-up for five months, but the sale has not progressed.

Ms King needs to supply them with a cladding safety report for her property to be valued and a mortgage secured


Top Stories

'Too early' to consider lockdown exit strategy
The foreign secretary says measures are "beginning to work", as the number of deaths reaches 5,373.
38 minutes ago


Worst day so far in France as US deaths top 10,000
6 April 2020

Inside an intensive care unit fighting coronavirus
1 hour ago

Features



Obituary: Honor Blackman



The News



Financial Times

New fire safety certificate to unlock UK high-rise flat market

16 Dec 2019

Telegraph.co.uk

Post-Grenfell building rules are wreaking havoc on the property market

Meanwhile, thousands of other leaseholders are trapped because they cannot access an EWS1 form and prove their properties are safe.

2 Sept 2020

BBC News

Imprisoned by cladding: The flat owners who cannot sell

8 Feb 2020

This is Money

Nightmare that stops millions with cladding selling their flats

11 Aug 2020



Background

- + Tragedy of the Grenfell fire in June 2017
- + Changes to the industry, including the Building Regulations
- + What was deemed acceptable in 2017 – may not be the case now!
- + Stringent review of high rise buildings
- + Building owners unable to sell
- + Along came Form EWS1



Form EWS1: External Wall Fire Review

Objective - This form is intended for recording in a consistent manner what assessment has been carried out for the external wall construction of residential apartment buildings where the highest floor is 10m or more above ground level or where specific concerns exist ^(Note 1). It should not be used for other purposes. It is to be completed by a competent person with the levels of expertise as described in Notes 2 and 3 below.

This review is for the sole and exclusive use of the client organisation named below. No responsibility is accepted to any third party for the whole or any part of its contents ^(Note 4). For the avoidance of doubt, the term 'third party' includes (but is not limited to): any lender who may see the review during the process through which they come to make a loan secured on any part of the Subject Address; and any prospective purchaser who may see the review during the process through which they come to purchase an interest in any part of the Subject Address.

Client organisation:

Subject Address (One form per block)

Block or building name	Street	Town	Postcodes (all built)

I confirm that I have used reasonable skill and care to investigate ^(Note 5) the primary external wall materials (typically insulation, filler materials and cladding) and attachments of the external walls of the above building/block.

Changes to the Building Regulations



- + Grenfell Tower Fire July 2017
 - Advice Notice 14 (18 December 2018)
 - Building (Amendment) Regulations 2018 (21 December 2018)
 - MHCLG – Advice Note on Balconies on Residential Buildings (24 June 2019)
 - Circulate letter regarding the application of requirement B4 of the Building Regulations 2010 (1 July 2019)
 - New version of Approved Document B (30 August 2019, and corrections on 19 September 2019)

The Building (Amendment) Regulations 2018 (S.I. 2018/1230)

- + Introduce a ban on the use of ‘combustible materials’ on the exterior walls and certain attachments of new buildings in England that are over 18 metres in height
- + Combustible materials are those which do not achieve a European/British classification of either A2-s1, d0 or A1, in accordance with BS EN 13501-1:2007+A1:2009.
- + Regulations do not have retrospective effect, but they will apply where there is a ‘material change of use’ which results in building falling Regulations



Example materials typically subject to litigation



- + Aluminium Composite Material with Polyethylene cores ('ACM PE')
- + High Pressure Laminate ('HPL') (e.g. Trespa Meteon HPL Panels)
- + Kingspan K15 Insulation ('K15')
- + Polyisocyanurate ('PIR') and Phenolic foams
- + Metal Composite Material ('MCM')
- + Expanded Polystyrene Insulation (EPS)
- + Render and Timber wall systems

Examples of products/materials considered by experts



- + VitraDual 3mm Thick A1 rated panels
- + Rockwool Rainscreen Duo Slab
- + Rockpanel FS-Extra to A2-s1,d0
- + Others

- + Two important caveats to the above:
 - this list is not exhaustive
 - the use of such products/materials would still always need to be checked on each individual project by the Design Team involved to ensure overall suitability for the project and overall compliance with the Regulations

Complications and litigation

- + Regulations do not have retrospective effect
- + Complications and litigation are arising on buildings where:
 - the design/construction was completed before the new Regulations (Building (Amendment) Regulations 2018 (21 December 2018)) came into force
 - where the design/construction is already significantly advanced
- + Building owners also require assurance that all new buildings are compliant with the new Regulations.
- + Case studies
- + This is where Form EWS1 becomes relevant, and why consultants have been asked to sign the Form



Form EWS1 - introduction



- + Changes in Regulations has led to a stringent review of high-rise buildings to ensure compliance
- + Many building owners have been unable to sell their property because mortgage lenders have refused to lend
- + Along came Form EWS1
- + Limited consultation - RICS, the BSA and UK Finance
- + Industry-wide process – to be used by valuers, lenders, building owners and fire safety experts
- + Building's 'fire safety' is confirmed formally using Form EWS1

EWS1 Form – significant risks

- + The Council of Mortgage Lenders' website, Form EWS1:
 - *“delivers assurance for lenders, valuers, residents, buyers and sellers”*
- + Significant risks for the consultant, including professional indemnity insurance implications
- + *“A better solution must be found, and the advice to consultants being asked to sign this Form is to, frankly, avoid it; and if similar confirmation is required use an alternative.”*



Current position of insurers

+ RICS – Professional Indemnity Insurance – April 2020 Update:

EWS1 Form

In December 2019, [RICS launched a new External Wall Fire Review](#) (EWS) process to be used by valuers, lenders, building owners and fire safety experts in the valuation of high-rise properties, with actual or potential combustible materials to external wall systems and balconies.

Concerns have been raised around completing the [EWS1 form](#) and the liability that could derive from RICS members that complete the form. An exclusion of liability has therefore been inserted into the new terms. All those undertaking EWS-1 form work, must disclose and discuss this with their insurer.

+ Market position

Insurance – UK Parliament Position (21 November 2020)

3. Professional Indemnity (PI) insurance

In response to reports of the insurance industry being reluctant to offer PI insurance to professionals completing EWS1 forms, [the Government said they are](#):

“...exploring ways to address ongoing concerns around the availability of professional indemnity insurance and welcomes industry’s progress on developing a portal where lenders, valuers and leaseholders will be able to find out if their building already has an existing EWS1, thereby reducing the demand for duplicate forms.”

Form EWS1: External Wall Fire Review



- + Objective as stated on Form
- + Consultant's duty of care *"to investigate the primary external wall materials (typically insulation, filler materials and cladding) and attachments of the external walls of the above building block"*
- + Concerns:
 - Joint and several liability
 - Common law duty of care to recipient
 - Form EWS1 does not state the assessment carried out and extent of investigations
 - Consistent with appointment and services provided?

Form EWS1 – Option A or Option B

+ Two options:

- Option A for buildings “where the materials used in the external wall would be unlikely to support combustion”
- Option B “where combustible materials are present in external wall”

Note 2 –For Option A, the signatory would need the expertise to identify the relevant materials within the external wall and attachments and whether fire resisting cavity barriers and fire stopping have been installed correctly. However, this would not necessarily include the need for expertise in fire engineering. The signatory should be a member of a relevant professional body within the construction industry.

Note 3 - For Option B the signatory would need expertise in the assessment of the fire risk presented by external wall materials and should be a member of a relevant professional body that deals with fire safety in the built environment. This could be a Chartered Engineer with the Institution of Fire Engineers or equivalent.

Option A



- + Consultant confirms that the primary materials used in the construction of the external walls **“meet the criteria of limited combustibility or better and cavity barriers are installed to an appropriate standard in the relevant locations”**
- + Additionally:
 - **A1**: no attachments whose construction includes significant quantities of combustible materials
 - **A2**: an appropriate risk assessment of the attachments confirming that no remedial works are required
 - **A3**: neither of the above and potential costs of remedial works

Option A - concerns

- + If confirmation incorrect – likely to be jointly and severally liable with the contractor
- + How does the consultant satisfy itself that the contractor has carried out works correctly?
- + A3 – “there may be potential costs of remedial works to the attachments”:
 - What if the consultant has been responsible for the design/other services relating to the external wall



Option B



- + Consultant uses the reasonable skill and care that would be expected of the relevant professional advisor to **assess the level of fire risk presented by the external wall construction and attachments**
- + **B1** – concludes that the fire risk is sufficiently low that no remedial works are required
- + **B2** – concludes that an adequate standard of safety is not achieved AND identifies to the client organisation the remedial and interim measures required
- + Note 9 guidance

Option B - concerns

- + Again, confirmation must be correct to avoid a potential negligence claim
- + With Option B2 risk of professional indemnity claim if admitting negligent design or services previously carried out
- + What if such 'remedial and interim measures' are not within the consultant's scope or have not been priced for?
- + Again, how does the consultant satisfy itself that the contractor has carried out works correctly?



Other considerations



- + Unlimited liability!
- + Note 11 provides that the form is valid “up to 5 years from the date at which it was signed”
 - What does this mean?
- + Other protections missing

Mitigate the position?

- + **Do not agree to sign to Form EWS1**
 - Increases scope
 - Significantly increases the consultant's potential liability
 - May see consultant walk into a professional indemnity insurance claim
 - Unlimited liability
 - No insurance cover
- + Market position



Press release: 21 November 2020

Press release

Government steps in to help homeowners caught up in 'EWS1' process

Owners of flats in buildings without cladding will no longer need an EWS1 form to sell or re-mortgage their property.

Published 21 November 2020

From: [Ministry of Housing, Communities & Local Government](#)



Other options



- + If you are unable to avoid giving a reliance letter or compliance certificate – provide alternative version with necessary protections, i.e.:
 - Linked to underlying appointment
 - Duty of care
 - True reflection of inspection, and when
 - “Cursory”, “Visual” etc.
 - Not responsible for the works
 - No greater or longer lasting liability
 - Define reliance

- + Use Form EWS1 and have appointment ‘trump’ form?

Conclusions



1. Form EWS1 has been introduced in order to provide confirmation as to whether a high-rise building is compliant with industry requirements and is safe.
 - . It is also to provide comfort to building owners, tenants and mortgage lenders wishing to sell properties.
 - . The Form requires a fire safety assessment to be conducted by a suitably qualified and competent professional.
4. For consultants, there are significant concerns in using Form EWS1 (including unlimited liability), and the Form should be avoided.
5. By signing Form EWS1, there could be implications under the consultant's professional indemnity insurance.
6. If the consultant can't avoid providing a reliance letter/compliance certificate, they should prepare a bespoke version linking the form to the consultant's appointment and ensuring that all the usual protections are contained therein.



Future webinars – “Construction Winter Webinar Series”

- + 25 November (recorded) - **Software as a Service – Consultants as Technology Providers and the Legal Ramifications**
- + 16 December 2020 – **Prolongation and Variations in Consultant’s Appointments**
- + 13 January 2021 – **Where will the Golden Thread lead – the Draft Building Safety Bill**
- + 20 January 2021 - **Contractual Considerations in 2021 – a New Landscape**
- + webinars@beale-law.com
- + marketing@beale-law.com

Contact Details

+ Will Buckby - Partner

- w.buckby@beale-law.com
- +44 (0) 20 7469 0411
- +44 (0) 7557 285841



+ Ian Masser - Partner

- i.masser@beale-law.com
- +44 (0) 20 7469 0439
- +44 (0) 7557 285833

