

Health and Safety Update

Bristol IOSH/ AOSH

10 January 2019

Laura White, Associate
Pinsent Masons

Phil Newton, Associate
Pinsent Masons



Pinsent Masons

Agenda

- The Hackitt Review
- Fire Safety – R v Butt
- Prohibition Notices – Chevron
- Case Study – ATE
- Sentencing – Electricity North West, Whirlpool

The Hackitt Review and Fire Safety

Dame Hackitt's Report

- Review of fire and building Regulations in light of the Grenfell Tower tragedy on 14 June 2017.
- Interim Report – Dec 2018- criticisms
- Final Report- May 2018
- Sets out principles for a new regulatory framework
- 50 recommendations made to government
- Applies to Multi Occupancy, higher risk residential buildings over 10 stories
- Recommends application to broader range of buildings



NEW APPROACH- SUMMARY

New Approach- overview of themes

- Report is based around principles for a new framework which will drive culture change and new behaviours
- Recommends a clear model of risk ownership- clear responsibilities for Client, Designer, Contractor and Owner
- Duty holders to be overseen and held to account by a regulatory authority
- ‘Real Teeth’- criminal consequences
- Outcomes based- not prescriptive rules and complex guidance

New Approach- overview of themes

- Comparison with CDM 2015 which has delivered cultural and behavioural change in the same sector
- This will require legislative change and will therefore need time to implement
 - No need to wait for legislative change to start behavioural change
 - Sense of urgency and commitment is needed
- Must be applied to existing complex high rise residential buildings
- Points out a moral obligation to change and the need for collaboration and partnership

Key Parameters of new framework

- The following will be established:
- **A new regulatory framework**
 - Based in the first instance on multi-occupancy, higher risk residential buildings, 10 stories or more in height.
- **A new Joint Competent Authority comprising:**
 - LA Building Standards
 - Fire and Rescue Authorities
 - HSE
- A mandatory **incident reporting** mechanism for duty holders

Applicability

- New and existing high rise residential properties 10+ storeys
- Estimate 2000-3000 in existence
- Some recommendations apply to a wider set of buildings:
 - Other multi occupancy residential buildings (eg less than 10 storeys)
 - Institutional Residential Buildings:
 - Hospitals, care homes, hotels, prisons, halls of residence, boarding schools.



DESIGN, CONSTRUCTION, REFURBISHMENT PHASE

Design, Construction and Refurb

- Improving focus during these phases by:
- New duty holder roles and responsibilities
 - These will align with CDM 2015
- Robust gateway points to strengthen Regulatory oversight
 - Will require duty holders to demonstrate detailed and robust plans to JCA to gain permission for progressing a project.
- Change control process:
 - More stringent recording
 - Sign off by JCA for more significant changes
- More rigorous enforcement powers

Construction Phase

Key information products

- **The digital record (Client, PD, PC)**
 - Record of the building and products used to underpin effective understanding of constructed building throughout lifecycle.
- **The Fire and Emergency File (client, PD, PC)**
 - Sets out key building safety info, to be given to building owner
 - Will be provided to anyone carrying out works- shows fire strategy
- **Full Plans (PD primary resp)**
 - Detailed plans/ Spec of building works re structural safety
 - Must be viewed as sufficient by the JCA
- **Construction Control Plan (PC primary resp)**
 - Describes building safety and compliance through construction

Model for future enforcement

- Improvement/ Correction Notices
 - Servable 5/6 years after building completed
- Prohibition Notices
 - Could be imposed at gateway points
 - Serious deficiencies with significant impact on safety
- Failure to comply with either would be a criminal offence



OCCUPATION PHASE

Occupation Phase

- Improved focus on building safety through:
 - Clear and identifiable duty holder- resp for safety of whole building during occupation and maintenance
 - Duty holder will present a safety case to JCA at regular intervals (will result in a rating)
 - Clearer rights and obligations for residents re maintaining fire safety of individual dwellings
 - The JCA to take a holistic view of whole building safety and hold duty holders to account
 - Giving residents a voice through transparency of information and method for escalating concerns

Occupation Phase- recommendations

- At least annual FRA's
- To be shared with residents and notified to Fire Authority
- Duty holder should undertake regular safety case reviews to show:
 - Reducing building safety risk so far as is reasonably practicable
 - Maintaining **golden thread** of information
 - Properly engaging with residents
 - Strengthening resident collaboration and partnership with the duty holder.
 - Introduce whole building approach
 - Improving competence

Residents Rights and Responsibilities

- The more they are informed, the more active role they can take
- Integral to ensuring building safety
- Duty holder expected to develop and maintain resident engagement strategy
- Duty holder required to make residents aware of outcome of safety case reviews and improvement measures required
- Residents will also have responsibilities





WHAT NEXT?

Government response to select committee

- In September, the Government responded to recommendations made by the select committee:
 - It is **right that a risk-based and proportionate approach is taken**, with a primary focus on buildings where oversight is needed most as the risks associated with a fire are greatest.
 - The Government agrees with the conclusions of Dame Judith Hackitt's review that the **suite of Approved Documents guidance should be restructured and revised**, to enhance their usability.
 - The Government will carry out a **wider technical review** of the guidance on **fire safety** and will consider **further recommendations** made by Dame Judith Hackitt.

Government Next Steps - Ban on combustible materials

- New regulations, laid before Parliament on 29 November, limit the use of any materials used on the **external walls** of a tall building to European **fire rating of Class A1 or A2**. This ban will come into force on 21 December 2018.
- The Government has also set out **a list of exempted items** for which there are currently no non-combustible alternatives.
- The Government has also given local authorities the power and financial support to **remove and replace unsafe** cladding on private buildings. Local authorities will then be expected to recoup the costs from building owners.

Building A Safer Future- Dec 2018

- Published on 18 December 2018
- Government plan to implement Dame Hackitt's recommendations
- Also: Technical Review of Building Regs Approved Document B has been announced- a call for evidence has commenced and will run until March 2018.
- Government committed to bringing legislative change ASAP
- Trials of regulatory framework will happen through Joint Regulators Group

Competence

- Competence- key theme
 - Industry leading a proposal to government
 - Needs to be robust
 - Bring coherence to competence of all those working on buildings
 - Drive necessary culture change
 - Provide assurance in the new regulatory system

Consultation in Spring 2018

Will consider:

- The scope of the new regime – whether to broaden applicable range of buildings
- Proposals for new duty holder responsibilities
- Enforcement and sanctions regime
- Implementation of gateways
- Safety case regime
- Fire and rescue authorities as statutory consultees
- Regulatory framework and JCA
- Golden thread- digital?
- How it will be ensured fire safety is prioritised

Fire Safety- Sentencing

Fire Safety – R v Butt

- Appeal against sentence of six months' imprisonment (suspended for 18 months), tagged curfew, fine of £250,000 and costs of £14,210
- Fine of £250,000 was reduced to £150,000
- H&S Sentencing Guidelines do not apply to RRO offences However, in R v Sandhu [2017] Judge Collier QC observed that in fire safety cases the guideline might provide a "useful check for considering whether a sentence arrived at ... has produced a sentence which is either unduly lenient or manifestly excessive."
- Guidelines followed:
 - Harm risked will be at the highest level - level A
 - Culpability will vary depending upon the circumstances of the offending.
 - Referred to requirement of offender to provide detailed evidence of their financial circumstances.
- General guideline: sentencing offences for which there is no offence specific guideline – December 2018

Prohibition notices

Prohibition Notices – Chevron

The Facts?

- 23 April 2013 - HSE took the view that stairways and gratings leading to helipad weakened by corrosion
- Prohibition Notice served - Chevron ordered to stop using the stairways
- Some of the metalwork was removed for testing by Chevron and those tests confirmed that the metalwork met the relevant British Standard and was **not unsafe**

Challenge?

- Chevron appealed against the Notice
- Employment Tribunal cancelled the Notice
- HSE appealed – but cancellation affirmed
- Conflicting E&W judgment :
 - *Rotary Yorkshire v Hague [2014] EWHC 2126 (Admin)*: “...only evidence available or which could reasonably have been available to the HSE Inspector could be taken into account when deciding an appeal”
- HSE sought leave to appeal to the Supreme Court

Prohibition Notices – Chevron cont...

Decision?

- Supreme Court upheld the previous decisions
- Ruled that later evidence **can be taken into account** when determining an Enforcement Notice appeal
- Lady Black said that:

*“When the inspector serves the Notice, section 22 makes clear that what matters is that he is of the opinion that the activities in question involve a risk of serious personal injury. If he is of that opinion, the Notice comes into existence. **However ... when it comes to an appeal, the focus shifts. The appeal is not against the inspector’s opinion, but against the Notice itself***

The Inspector’s opinion about the risk, and the reasons why he formed it and served the Notice, could be relevant ... but I can see no good reason for confining the Tribunal’s consideration to the material that was, or should have been, available to the inspector.”

Health and Safety Sentencing

ATE – The Facts

- Leading used truck and trailer specialists
- Used scrap metal dealer to dismantle trailers for many years – worked from a number of premises
- Didn't pay him for work but he was allowed to keep the metal and sell it for scrap
- Scrap metal merchant hit hard times so ATE allowed him to use part of their premises to carry on his business – he paid them £50 per trailer in lieu of rent. Debate as to whether defined area.
- Some debate over method used (albeit involved FLT to provide support)
- Scrap metal merchant fatally injured when trailer he was dismantling fell and struck him on the head
- No witnesses

ATE - Plea

- Initially pleaded not-guilty – no responsibility for contractors work / method
- Later pleaded (on invitation of HSE) guilty to Reg 3 – MHSWR (s. 3 HSWA dropped) – on basis didn't provide written risk assessment for few occasions ATE's own employees completed same task (albeit using different method as had crane available)
- HSE criticised contractors method but no criticism of ATE's own method
- ATE / HSE agreed:
 - Low culpability
 - Level A harm (ATE said low likelihood, HSE said medium)
 - Offence had “more than minimal, negligible or trivial connection with the accident leading to Mr Price's death but that it was not a major cause” – on basis that possible contractor would have changed his method if he'd seen ATE's risk assessment
- Plea basically accepted guilt in respect of contractor via breach to its own employees

ATE – Crown Court

- Found high culpability:
 - failed to put in place measures that are recognised standards in the industry
 - allowed the breach to subsist over a long period of time
- Agreed Level A harm but found high likelihood
- Turnover meant ATE was just within range for “medium”
- Gave full credit for plea
- Fined £475,000
 - Starting point £625,000
 - Increased to £750,000 for actual harm and risk to others
 - Reduced for plea and mitigation

ATE – Court of Appeal

- Grounds for appeal
- Fine manifestly excessive
- Judge made factual errors
 - ATE not completed task itself many times
 - Period of offending limited on indictment
 - No industry standards
 - ATE employees separated from contractors activities
- Judge departed from agreed basis of plea without justification
- Low culpability was correct
- Low likelihood of harm due to many years without accident – Harm Category 3 – up to 2

ATE – Court of Appeal

Prosecution position:

- Low culpability
 - (1) it was not an operation habitually undertaken;
 - (2) ATE otherwise had good safe systems of work;
 - (3) ATE genuinely, though mistakenly, believed that it had no responsibility for the way Mr Price did his work;
 - (4) there had been no prior warning.
- The seriousness of harm was at level A.
- There was a medium likelihood of the risk of harm materialising; the work was inherently dangerous with a hidden lurking danger; it was undertaken without a risk assessment.
- Factor 2 ii) was engaged so an uplift was to be considered (to harm category 1).

ATE – Court of Appeal Judgement

- Confirmed that court not bound by agreed position but promoted sensible agreement and that court should only depart after careful consideration.
- Some concern re artificial nature of plea
- Culpability - agreed low
 - should only consider ATE's own method not method of contractor
 - No industry standard
 - Went outside time period in indictment
 - Judge not justified in finding high culpability

ATE – Court of Appeal Judgement...

- Medium likelihood of harm (Harm Category 2)
 - Accident free period didn't mean likelihood of harm low
- Paragraph 2a – risk to others – didn't apply as no evidence
- Paragraph 2b – death – did apply (moved up to Harm Category 1)
- Starting point at top of Harm Category 1 - £300,000
- Full credit for plea
- Fine reduced to £200,000

Sentencing - Appeals – Electricity North West

- Employee died after falling 6 meters from a ladder in 2013
- He had cut through his work positioning strap whilst cutting ivy near to power lines
- Convicted of contravening the Work at Height Regulations 2005 but acquitted of breaching the Management of Health and Safety at Work Regulations 1999 and the Health and Safety at Work Act 1974.
- Appeal against conviction dismissed (company considering its position) but appeal against sentence allowed.
- Court of Appeal concluded there was not 'sufficient basis' for high culpability and that there was a low likelihood of harm
- No need to make upward adjustment to reflect being a 'very large' organisation.
- Fine reduced from £900,000 to £135,000 – an 85% reduction

Whirlpool UK Appliances



- **Facts**

- Whirlpool Factory, Bristol, tumble dryer manufacture
- Sub contractor moving a heat detector, standing on elevated platform between two conveyors with baskets hanging down
- Elsewhere in the factory maintenance of the conveyor was ongoing
- Conveyor maintenance workers could not see injured
- Conveyor was started and a basket hit the platform toppling it
- Fatal injuries

Whirlpool UK Appliances

- Breach
 - S3(1) HSWA 1974
 - Inadequate risk assessment for maintenance and inadequate permit to work for heat detector
- Sentence
 - Low culpability, harm category 3
 - **Fine: £700,000**
 - **Reduced to £300,000 on appeal**

Whirlpool UK Appliances- Appeal

- Issues on appeal:
 - Death resulting: Justified moving to top of next category range.
 - Identification and treatment of ‘very large organisation’: Fine increased further due to very large status.
 - Arithmetic approach discouraged.
 - This reduction was very much on the facts of this case.

Questions?



Laura White, Associate

Laura.white@pinsentmasons.com

020 7490 9274/ 07917 515 931