

The Law Society of Scotland

Cladding update 20th Dec 2019

Background

Following Grenfell, the Ministry of Housing, Communities and Local Government (MHCLG) issued guidance, earlier this year, on the use of cladding on high rise buildings in England and Wales. Although not applicable in Scotland the information contained within it is relevant in Scotland and the Scottish Government references the guidance on its own website.

As a consequence of this guidance, UK lenders issued instructions to their panel valuers that, absent the existence of satisfactory certification from a suitably qualified professional confirming that such cladding does not pose a fire risk, valuers were to place a £0 value on the property. It is important to note that these instructions cover not just ACM cladding (as was on Grenfell) but all cladding materials on buildings in excess of 18 metres high (measured from the actual ground level to the carpet level of the top floor property).

The effects of these new instructions were felt first in Scotland due to the system of Home Reports, meaning the first valuations were carried out here.

Following discussion within Royal Institute of Chartered Surveyors (RICS) it was subsequently agreed that the Home Report itself should mark the issue with a "3" but provide a valuation whilst the generic mortgage valuation or transcript valuation would contain the £0 valuation. Sellers have had to seek certification from fire professionals to enable prospective buyers to secure mortgages.

Initially no one knew who would be competent and qualified to provide such a report, how much it might cost or how long it might take to compile it nor whether a specific lender would accept it.

A meeting of relevant professionals was convened in Edinburgh at the end of October by ESPC and chaired by Andy Wightman MSP to discuss and clarify the issue and to seek to find a resolution to it.

Proposed certification

That meeting was told that RICS was working on a form of certification which seemed to be acceptable to lenders. Form [EWS1](#) has now been published.

The EWS1 is a two stage document. A suitably qualified expert, who must be a member of a recognised professional body, will firstly assess whether the cladding materials are of a combustible nature or not. If not, that expert will certify that on the EWS1. If they are, a further expert must inspect and test as necessary and then certify whether fire risk is low enough or not to conclude that no remedial works are required and certify accordingly.

The inspections required will mean both a fire engineer and other expert will be required and will be disruptive.

This applies to new build properties as well.

It has become apparent that professional indemnity insurers will not provide cover for a report addressed to all co-owners. This creates a big difficulty in Scotland as that is how

the block is owned and factors don't have the power to commission a report without approval from a majority of co-owners.

The certifying expert will offer no liability to anyone other than the owner of the building instructing the report and specifically not to third parties such as lenders or purchasers.

Note four of the EWS1 envisages experts agreeing to extend liability to specified individuals on application and payment of a suitable fee but caveat as to whether PI providers would look kindly on that. That could perhaps extend to other co-owners as well as purchasers so that one inspection could ultimately cover all flats.

Professional Update

- EWS1 is the required format for certification.
- Scottish legal tenure causes issues around commissioning reports as PI insurers are not willing to extend cover where the EWS1 is being commissioned by multiple co-owners. Factors are precluded by the Factors Act from commissioning these unless they have an appropriate majority of co-owners to do so. It is not yet clear how reports will be commissioned nor by whom.
- It is hoped that PI insurers will allow the issuer of the EWS1 to "assign" the benefits of a certificate to a 3rd party on a case by case basis subject no doubt to issuing further terms of business to, and payment of a further fee by, that 3rd
- There is a very small number of potential experts to carry out these reports. They are unlikely to be available very quickly. It has been suggested that they could cost £10,000 each.
- It is expected that PI cover will be very expensive further limiting these experts who chose to offer these services.

Matters to consider when advising clients

1. Clients who are owners of flats in blocks with cladding (especially those over 18m high) should be encouraged to engage as soon as possible with their co-owners and factors to look into the issue and commission a report for their own safety and well-being as well as to understand any issues with the marketability or structure of their building. It is important to appreciate that 18m should not be seen as an absolute standard as it is known that there are actual issues with blocks lower than this so the height criteria could change from a lending perspective and certainly does not absolve lower buildings from a safety perspective.
2. It is unlikely that reports will be cheap or carried out quickly and solicitors acting as estate agents should advise selling clients accordingly as well as enquiring whether a suitable report currently exists.

3. It may be that experts decline to provide reports until all or at least a suitable majority of co-owners have consented to any disruptive work to the common walls that may be entailed
4. Any EWS1 issued may not be accepted by a particular buyer or by their lender and selling clients should be aware of that before commissioning and paying for such a report themselves.
5. The original draft of the EWS1 included a list of suitably qualified individuals who could provide the certification. The final version does not. There is a list contained in Ministry of Housing, Communities & Local Government Information Note 1 of 11 December 2017 so it can be assumed that suitably qualified individuals from that list can provide the certification required.
6. If an EWS1 indicates the existence of attachments which "include significant quantities of combustible materials" and a further expert concludes that remedial works are required due to the level of fire risk, co-owners could be faced with significant remediation costs and maybe unable to sell until they have done so.
7. A purchaser's solicitor does not have either the technical knowledge or the PI cover to advise on the terms of an EWS1 other than to confirm that one exists and the terms thereof and should make that clear to the client either in letter of engagement or at the time the issue arises. A purchaser should be advised that if they wish further advice they would need to consider engaging a suitably qualified person to provide that. If a buyer does proceed where an EWS1 exists it will be good practice to record the client's wishes in a file note or email to the client.
8. If the expert is prepared to assign the liability under the EWS 1 to a buyer, the purchaser's solicitor should consider what knowledge and experience they have as to whether they can advise their client as to the benefits and limitations of such a step.
9. If a purchaser is buying a flat with cladding for letting purposes or a seller decides to rent as they can't sell, the solicitor acting should consider the issue of any liability which might accrue by the purchaser or owner to any tenant and advise accordingly.
10. The risk of buildings insurers declining to renew cover or withdrawing cover in any circumstances should be considered when advising a client about buying a flat with cladding particularly where the terms of the EWS1 are not straightforward.
11. Although Scottish Government are aware of the issue and are considering this as part of the wider work on ADS, no commitment has been made to offer relief for buyers who have paid ADS and are unable to sell within 18 months and therefore unable to reclaim ADS due to a cladding issue.
12. These issues apply to new build flats with cladding so purchasing agents should be seeking certification from builders. It may be difficult to ascertain whether or not there is to be cladding and what height the building is to be. Particular care will need to be taken around mortgages for new builds and to what extent clients should be

committed to unconditional missives in case the situation moves on and lenders were to seek to withdraw or qualify mortgage offers.

13. Family Lawyers should also consider the position of one party seeking to retain the property by way of a transfer of title. Lenders may be unwilling to lend or transfer the mortgage due to the perceived financial risk the transferee might face for any remediation works and will certainly not do so without satisfactory certification in place. Solicitors for a proposed transferee should advise their client on the potential risk and liability before agreeing it and any agreement should be conditional upon satisfactory EWS1 being provided and an offer of loan from the lender.