

Building Fire Safety – The Legal Framework

By Prashant Popat QC

1. The title of this talk is “Setting the Scene – The legal framework”. It is a talk, however, which is to be limited to 15 minutes. I will, therefore, seek to set a limited scene, focussing on the legal framework governing statutory fire related requirements for the construction of buildings and then obligations related to occupied buildings.
2. The relevant statutory framework governing construction of premises is largely provided by the Building Act and Building Regulations. The framework governing fire safety in occupied premises is principally governed by the Regulatory Reform (Fire Safety) Order 2005 (‘RRO’)
3. The scheme of the legislation is that Building Control authorities supervise and enforce construction and upon occupation the baton passes to the Fire and Rescue Services to enforce the RRO.

Construction and building work

Application

4. When undertaking major building work, whether a completely new building or as an extension or significant alteration to an existing building, the Building Act 1984 applies.

5. Regulations made under this Act are known as the Building Regulations and these contain requirements for:

Securing reasonable standards of health and safety for persons in or about the building and;

The building shall be designed and constructed so as to provide reasonable facilities to assist fire fighters in the protection of life.

6. Under the legislation anyone proposing to erect or carry out building work to a building which is used or to be used as offices or factories (a 'relevant use') has to deposit full plans of the proposals. In turn the Building Control Authority (the relevant local authority) must consult with the Fire Authority.

7. Section 15 (1) of the Building Act states:

Where, in the case of a requirement as to-

(a) structural fire precautions

(b) the provision of means of escape from buildings in case of fire, or

(c) the provision of means for securing that such means of escape can be safely and effectively used at all material times,

. . . the local authority shall consult the fire authority.

Fire Safety Requirements

8. In the case of fire, the Building Regulations set "functional requirements" which must be met. A series of "Approved Documents" have been produced in support of these functional requirements and one of these, Approved Document B, deals with fire safety. The main sections within Approved Document B cover such things as:

B1 Means of Warning and Escape
B2 Internal Fire Spread (linings)
B3 Internal Fire Spread (structure)
B4 External Fire Spread
B5 Access and Facilities for the Fire Service.

9. In essence these provisions are intended to ensure:
- (1) that sufficient provisions are made in design of the building that in the event of fire the occupants can escape to a place of safety by their own efforts;
 - (2) that the internal linings of a building do not support a rapid spread of fire;
 - (3) that the structure of the building should not collapse prematurely and should slow the spread of fire through the building and in unseen cavities and voids by providing fire resisting walls and partitions where necessary;

(4) that the spread of fire between buildings be discouraged by spacing them apart sufficiently and controlling the number and size of openings on boundaries;

(5) that the building is designed in such a way to aid the fire brigade fight fire and effect rescue of persons caught in a fire.

10. In addition to the Approved Document, there are many British Standard Codes of Practice and other guides that deal with various aspects of fire safety linked to particular types of building development and an extensive list of those guides is included as an appendix in all editions of Approved Document B.

Enforcement powers

11. The local authority has a general duty to enforce the Building Regulations in its area and will seek to do so by informal means wherever possible.
12. Where an approved inspector, such as NHBC, is providing the Building Control Service, the responsibility for checking that the Building Regulations are complied with during the course of the building work will lie with that inspector. They will usually do this by advising the client. However, approved inspectors do not have enforcement powers. Instead, the regulations provide that in a situation where they consider the building work does not comply with the Building Regulations they will not issue a final certificate and in addition will cancel the initial notice by notifying the local authority. If no other approved inspector takes on the work, the Building Control Service will automatically be taken on by the local authority. From this point on the local authority will have enforcement powers.
13. The enforcement powers are varied:

Section 35 of the Building Act 1984

14. This gives the authority powers to prosecute for procedural breaches of the Building Regulations 2000 (as amended). This would include procedural matters such as, failure to make an application under regulation 12 and failure to give statutory notification at certain stages of construction under regulation 15. Action must be taken within 2 years of the offence and placed before the Magistrates Court within six months of obtaining sufficient evidence to bring a prosecution. The offender may upon summary conviction be liable to a fine not exceeding scale 5 on the standard scale of fines (£5,000) The courts may also impose a daily fine for each day that the breach continues.

Section 36 of the Building Act 1984

15. This gives the authority the power to serve notice against work that does not appear to comply with the building regulations. The notice can require that the work is altered, or taken down within a specified time period. The owner may appeal to the Magistrates Court against the notice. If the owner does not appeal and does not carry out the specified works, the authority may carry out the works in default on a rechargeable basis. Action must be taken within 12 months of the offence occurring.

Injunction (Section 36)(6) the Building Act 1984

16. Where the Authority considers a breach of building regulations to be a serious and immediate risk to health and safety, it may apply to the County or High Court for an Injunction.
17. Under section 36(6) an injunction may be obtained by the Authority, or indeed by any individual, at any time they are aware of a serious breach. There is no

time limit and this allows the authority to take action against works brought to its attention outside the normal statutory limits outlined above.

Section 77 of the Building Act 1984

18. This section gives the authority powers to apply to the Magistrates Court for an order to make safe a dangerous building or structure, where there is a potential danger, but not an immediate risk. The order will specify the works to be undertaken and a time scale. If the owner fails to carry out the works the local authority may carry out the works in default and recover its reasonable expenses. The owner may also be liable to a fine on summary conviction not exceeding scale 1 on the standard scale (£200.00).

Section 78 of the Building Act 1984

19. This section gives the authority powers to take emergency action where there is an immediate danger and where immediate action is required to remove the danger. Attempts must be made to contact the owner and give them the opportunity to undertake the works. Where the owner cannot be contacted, or is unwilling, or unable, to carry out the required works, a 'Proper Officer' of the Local Authority can authorise such action. The local authority may recover any expenses reasonably incurred by them.

Regularisation procedure, regulation 21

20. This procedure applies where it appears to a local authority that unauthorised building works has been carried out on, or after 11 November 1985. “Unauthorised works” means where building work has been carried out without:
- a) a building notice being given to the local authority; or
 - b) full plans of the works being deposited with the local authority; or
 - c) a notice of commencement of work being given, where a building notice, or full plans have been deposited.
21. The owner (applicant) may apply to the local authority for a regularisation certificate. The local authority may require additional information to support the application, or require laying open of works to ensure that the relevant requirements are met. Where the local authority are able to satisfy themselves that the relevant requirements have been met, they may give a certificate of regularisation.

The Regulatory Reform (Fire Safety) Order 2005

Scope

22. The RRO came into force on 1st October 2006. The RRO replaced over 70 pieces of separate fire legislation. The approach of the RRO is that those best placed to identify fire risks and address fire safety should be responsible for doing so. Therefore, it places duties on the ‘responsible person’ to conduct risk assessments, implement appropriate fire safety measures to minimise those risks and to keep the assessments under review and up to date.

23. The RRO is specifically directed towards “*the safety of people in relation to the **operation and use** of certain buildings once occupied*”¹ [emphasis added] and that there are “*clear distinctions of jurisdiction between building work and an occupied building...*”² The purpose of the RRO is to govern safety in respect of the operation and use of occupied buildings and not in respect of building works.

Who has responsibilities under the RRO?

24. **‘Responsible person’:** Article 3 RRO defines the term “*responsible person*”. Pursuant to Article 3 there are three categories of people that can be the “responsible person”:
- (a) **Employers:** If the premises are a workplace³ the employer will be the responsible person, to any extent that the workplace is under his control. An employer will not be responsible in respect of parts of the premises which are not under his control.
 - (b) **Persons in control in connection with a trade, business or undertaking:**
If the premises are not a workplace, such as shared parts of a block of flats,

¹ Building Regulations and Fire Safety procedure Guidance, 4th Edition July 2007 at paragraph 1.12

² *Ibid* paragraph 1.29

³ A workplace is defined by Article 2 RRO as “*any premises or part of premises, not being domestic premises, used for the purposes of an employer’s undertaking and which are made available to an employee of the employer as a place of work and includes –*
(a) *any place within the premises to which such employee has access while at work; and*
(b) *any room, lobby, corridor, staircase, road or other place*
(i) *used as a means of access to or egress from that place of work; or*
(ii) *where facilities are provided for use in connection with that place of work, other than a public road.*”

the person in control of the premises in connection with a trade, business or undertaking, will be the responsible person.

- (c) **Owners:** If the person in control of the premises does not do so in connection with a trade, business or undertaking, the owner of the premises will be the responsible person.

25. There may be a number of people with shared responsibility in relation to premises. For example, an owner/landlord may be responsible for fire safety for the parts of the premises over which he retains control, whereas his tenant who uses the premises as part of his business may be responsible as an employer in respect of those parts of the premises over which he has control. The enforcing authority can therefore bring a prosecution against more than one person in respect of the same premises.

26. In guidance documents produced by the Government⁴ on the RRO the following examples are given of those who may be an Article 3 responsible person:

- the owner or manager of a business;
- the owner or managing agent of premises which are shared between a number of businesses;
- individual occupiers within a multiple-occupancy building, such as self-employed people or voluntary organisations if they control someone within the premises;
- the employer for those parts of premises staff may go to.

⁴ See for example 'Fire Safety and Fire Assessment' produced by Business Link at <http://www.businesslink.gov.uk/bdotg/action/layer?topicId=1074253164> and 'Regulatory Reform (Fire Safety) Order 2005 A short guide to making your premises safe from fire' produced by DCLG

27. **Other person:** Article 5(3) imposes the duties under the RRO on “every person, other than the responsible person referred to in paragraphs (1) and (2), who has, to any extent, control of those premises so far as the requirements relate to matters within his control.” Therefore, in order to establish that a person is an Article 5(3) ‘other person’ the prosecution must demonstrate that that person has control, to any extent, of the premises.

28. The Department of Communities and Local Government’s (DCLG) Procedural Guidance document on the RRO states that an example of a person that might be a responsible person by virtue of Article 5(3) is a contractor who is responsible for maintaining a fire alarm system.⁵ It is evident that such a person would only have control in respect of the fire alarm system but not the remaining fire safety measures for the premises.

Duties

29. Article 8 sets out the duty to take general fire precautions and Article 8(1)(b) provides that:

(1) *The responsible person must—*

⁵ Building Regulations and Fire Safety procedure Guidance, 4th Edition July 2007, Appendix B3

(b) *in relation to relevant persons who are not his employees, take such general fire precautions as may reasonably be required in the circumstances of the case to ensure that the premises are safe.*

30. In summary, duty-holders are required to:

- take general fire precautions to ensure the safety of any employees and non-employees on the premises;
- carry out a risk assessment to identify what general fire precautions are required for the particular premises and keep this under review;
- keep records, which must include the significant findings of the fire risk assessment (and any review); the fire precautions that have been, or will be put in place to address the significant findings; and any group of persons identified by the assessment as being especially at risk;
- make and give effect to fire safety arrangements, as appropriate;
- take measures for fire-fighting and fire detection, including the provision of appropriate equipment at the premises;
- ensure that the premises, any fire safety equipment, and all emergency routes and exits are properly maintained and kept in working order;
- cooperate with other people who have fire safety responsibilities and coordinate with each other;
- provide information and safety training for employees; and
- provide information about fire safety risks for third parties who may be affected, and those who are responsible for such people.

31. Additionally, duty holders should:

- if required, appoint competent persons to help discharge duties relating to fire-fighting in the premises; implementing evacuation procedures; and undertaking preventative and protective measures; and

- give consideration to the additional risks arising from any dangerous substances at the property and take steps to eliminate or reduce those risks.
32. There is an overlap between the Building Act and Regulations duties during the construction phase and the RRO duties. Some of the duties under the RRO are clearly required to be discharged during construction. For example, the risk assessment required by Article 9(1) must be complete and the necessary measures in place prior to the first day of occupation.⁶ The Article 8 duty to take general fire precautions is also likely to involve steps taken during the construction process when these measures are installed in the premises.
33. In contrast, there are a number of duties under the RRO require the responsible person to have control post completion and occupation. Article 9(3) requires the responsible person to review the risk assessment “*regularly so as to keep it up to date*” and “*where changes to an assessment are required as a result of any such review, the responsible person must make them.*” Therefore, the responsible person has a duty on an ongoing basis. Article 17 requires the responsible person to ensure that the premises and fire safety facilities or equipment are “*subject to a suitable system of maintenance and are maintained in an efficient state, in efficient working order and in good repair.*” Again, this requires the responsible person to have control to some extent over the premises not only when general fire precautions are being installed, which may be during construction, but also beyond that stage in order to ensure that the safety measures put in place are properly maintained.

⁶ Building Regulations and Fire Safety procedure Guidance, 4th Edition July 2007 paragraph 2.41.1

Enforcement and offences

34. Article 32 sets out the offences under the Order. Article 32(1)(a) is as follows:
- “(1) It is an offence for any responsible person or any other person mentioned in article 5(3) to—*
- (a) fail to comply with any requirement or prohibition imposed by articles 8 to 22 and 38 (fire safety duties) where that failure places one or more relevant persons at risk of death or serious injury in case of fire...”*
35. Under Article 32(3) any person guilty of one of the principal offences (under Article 32(1) and (2)) is liable, on summary conviction to a fine of up to £5,000 and on indictment to an unlimited fine or up to 2 years imprisonment.
36. Article 32(10) provides for liability of persons other than the responsible person on this basis:
- “Where the commission by any person of an offence under this Order, is due to the act or default of some other person, that other person is guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this paragraph whether or not proceedings are taken against the first-mentioned person.”*
37. Article 33 provides:
- “Subject to article 32(11), in any proceedings for an offence under this Order, except for a failure to comply with articles 8(1)(a) or 12, it is a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence”*
-

38. The authorities to date suggest that on RRO prosecutions the Crown Court is willing to take a harsher line on conviction, particularly if the defendant is a significant organisation.

39. The following three cases stand out in particular so far:

- **Shell International Limited - Crown Court, June 2009**

The Shell building is a prominent London landmark in which about 2,700 people work. Two small unrelated fires occurred in the building, caused by contractors working there. No one was injured. An inspection followed the second fire and a prohibition notice was issued. The inspector's complaints related to (a) open and/or poorly maintained fire doors, (b) obstructions to fire doors and fire escape routes, (c) high fire loads and no fire risk assessment review since 2003. There was no suggestion that any of these faults contributed to the fires or had aggravated the consequences of either fire

Shell was prosecuted for 13 breaches of the RRO. It pleaded guilty to two counts, seven were dropped and it successfully defended a further four counts. In mitigation on the two guilty pleas it was submitted that none of the defaults had been an attempt to save costs, none were deliberate or reckless and no one had been injured or killed. Shell had co-operated extensively once the issues had been identified, taking immediate steps to remedy the breaches and it had no previous record. The Crown Court imposed a fine of £300,000 plus prosecution costs of £45,000.

▪ **Co-operative Group Limited - Crown Court, April 2010**

The Co-operative Group Limited was prosecuted for six breaches of the RRO which came to light following an inspection in September 2007. There had been no fire and no one was injured as a result of the breaches. The failures complained of were: (a) locking rear emergency exit doors, (b) the use of a lock requiring a security code on an emergency door, (c) fire alarm call point in the storage area obstructed, (d) manager's insufficient fire safety instruction and training, (e) absence of regular alarm testing and (e) absence of early detection of fire in one area which would alert those in the manager's office and allow safe evacuation

The Co-operative Group Limited was fined £210,000 and ordered to pay prosecution costs in excess of £28,000.

▪ **New Look - Court of Appeal, November 2009**

This prosecution followed a fire in April 2007 at New Look's Oxford Street premises. No one was injured but there were some aggravating features, including the alarm being switched off when it first sounded and staff ignoring smoke pouring out of a window. There were 150 people in the store at the time and another 300 were evacuated from neighbouring premises. Initially 35 charges were brought against New Look. This was negotiated down to two on guilty pleas, with nine other charges taken into account on sentence. The issues complained of by the prosecution were broadly inadequacies in the risk assessment for the premises and inadequacies in staff safety training. The failures complained of were failures to: (a) provide clear statements about fire alarm arrangements and testing, (b) clearly identify emergency escape routes, (c) make

arrangements with neighbouring occupiers as to emergency procedures, (d) identify deficiencies or remedial steps in its risk assessment, (e) identify emergency escape lighting, (f) organise refresher training and fire drills, (g) keep an exit from a basement area clear, (h) electrically link the fire alarm system to the basement fire exit so that it would unlock in an emergency.

New Look had no relevant prior convictions, took effective steps post fire and pleaded guilty promptly. No one suffered injury. Additionally the breaches admitted had not caused or contributed to the fire that occurred. It was, nevertheless, fined £400,000 and ordered to pay more than £136,000 in costs. The court considered that these failures resulted in a system falling a very long way below the standard required and to be expected of a company of this size. It considered that as a result, the potential for real human tragedy was very real and an appeal against the level of fine was dismissed.

40. Individuals prosecuted under the RRO have also received custodial sentences and curfew orders.

Prashant Popat QC

26 November 2012