

Form EWS1 – a better solution needs to be found

Will Buckby and **Ian Masser** of **Beale & Co** warn consultants that they should avoid taking on work under Form EWS1 - designed to provide assurance that a high rise building is fire safety compliant - which imposes unlimited liability on them. Professional indemnity insurance could be compromised by its use, they advise.

KEY POINTS

- 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.
- For consultants, there are significant concerns in using Form EWS1 (including unlimited liability), and the Form should be avoided.
- By signing Form EWS1, there could be implications under the consultant's professional indemnity insurance.
- 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.

The tragedy of the Grenfell fire in June 2017 has seen a number of changes to the industry, including in respect of the Building Regulations in connection with 'combustible materials'. Amongst other things, what was deemed acceptable by the industry then in relation to the selection and specification of certain materials may now not be the case.

It has also led to stringent review of high-rise buildings to ensure compliance with applicable Building Regulations and the building's overall fire safety. Against this backdrop, many building owners have been unable to sell their property because mortgage lenders have refused to lend, until confirmation is obtained that the building has been tested and complies with industry requirements.

Along came Form EWS1. Following what seems to be limited consultation, RICS, the BSA and UK Finance agreed an industry-wide process – to be used by valuers, lenders, building owners and fire safety experts – in the valuation of high-rise properties. Form EWS1 requires a fire safety assessment to be conducted by a suitably qualified and competent professional. The building's 'fire safety' is then confirmed formally using Form EWS1.

The writers, and large parts of the construction sector, have significant concerns with this Form, particularly from the perspective of the consultant who is required to sign it. As stated on the Council of Mortgage Lenders' website, Form EWS1 "delivers assurance for lenders, valuers, residents, buyers and sellers". That may be the case, but the Form contains significant risks for the consultant including professional indemnity insurance implications, which seem to have been ignored in the development of this Form before introduction to the industry.

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.

Changes to the Building Regulations

Before explaining some of the key concerns with

Form EWS1, it is important to remind ourselves of the legal framework that prompted the introduction of the Form.

The Government's efforts to increase safety in this area culminated in the introduction of The Building (Amendment) Regulations 2018. The Regulations made a number of amendments to the Building Regulations 2010, and to Approved Document B, which covers fire safety matters within and around buildings in England. Entering into force on 21 December 2018, the Regulations introduced 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 that do not achieve a European/British classification of either A2-s1, d0 or A1, in accordance with BS EN 13501-1:2007+A1:2009. The ban does not apply to materials which achieve class A1 or class A2-s1,d0 ratings - the Government has clarified that this also includes materials deemed by European Commission decisions to meet these requirements.

Unless there is a material change in use, the Regulations do not have retrospective effect (so will not apply to existing residential buildings above 18 metres in height). That said, complications and litigation are arising on buildings where the design/construction was completed before the Regulations came into force or where the design/construction is already significantly advanced. Building owners also require assurance that all new buildings are compliant with the new Regulations.

This is where Form EWS1 becomes relevant, and why consultants have been asked to sign this Form.

Form EWS1 – the concerns

Investigations

The Form confirms that the consultant has investigated the primary external wall materials and attachments of the external walls of the relevant building/block. As a first point, as a result of the investigations required of the consultant, the Form increases the likelihood of the consultant being jointly and severally liable with the contractor in respect of the works because Form EWS1 does not distinguish between matters of design and matters of pure workmanship. The author of the Form EWS1 is likely, at the very least, to owe the recipient/beneficiary of the Form a common law duty of care to ensure it is

completed accurately. Therefore, if any aspect of the confirmation provided in the Form is incorrect, the recipient/beneficiary of the Form may allege negligence.

Note 5 on Form EWS1 states that the investigations would often include either a physical inspection, inspection of photographic evidence, inspection of the standards of construction or a review of design drawings. But Form EWS1 does not state what assessment has been carried out. Either way, if the consultant has not been required to carry out any of these tasks as part of its appointment, it should not sign the Form.

Moreover, Form EWS1 does not state what the extent of any investigations were or when the investigations took place; the drafting suggests (but this is not clear) that it is for the consultant to decide using reasonable skill and care. What is typical for similar compliance certificates is for the extent of any investigations to be precisely set out, such as 'an intrusive inspection on x day', so that the consultant's task is clear. Again, the drafting in Form EWS1 may require the consultant to do more than it has agreed to provide under its appointment. For example, if the circumstances would have required the consultant exercising reasonable skill and care to undertake a detailed investigation, such as an opening up of the external wall, the consultant should have done so.

Option A or Option B

The statements that the consultant is required to make in using Form EWS1 are also a concern. When assessing such buildings the signatory of the Form has two "options" to select: Option A for buildings "where the materials used in the external wall would be unlikely to support combustion" or Option B "where combustible materials are present in external wall".

If Option A is selected the 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, the consultant has also to select one of A1, A2 or A3 in relation to the external wall build up. Clearly as noted above, if the consultant provides this confirmation, and it is incorrect, it may result in the consultant being jointly and severally liable with the contractor.

Further, one obvious hurdle is how the

consultant goes about satisfying themselves that the contractor has indeed installed cavity barriers in the relevant locations. Can the consultant trust the relevant as-built record drawings? In any event, the consultant's ability to rely on the accuracy of such record drawing is not expressly enshrined within Form EWS1.

Option A3 is of particular concern. If selected, it states that where options A1 (which confirms that there are no attachments whose construction includes significant quantities of combustible materials) or A2 (which confirms that following an appropriate risk assessment of the attachments no remedial works are required) do not apply, "there may be potential costs of remedial works to the attachments". Now, if the consultant has been responsible for the design or other services relating to the relevant external wall, and the reason for remedial works is because of the consultant's doing, selecting option A3 may result in the consultant walking into a professional indemnity insurance claim.

There are similar concerns with Option B. Where combustible materials are present in the external wall, the consultant must select option B1, which provides that the fire risk is sufficiently low and that no remedial works are required, or, option B2, which confirms that an "adequate standard of safety is not achieved and [the consultant] has identified to the client organisation the remedial and interim measures required". Again, the confirmation must be correct to avoid a potential negligence claim. In particular, by selecting option B2, as with option A3, the consultant could be walking into a professional indemnity claim by admitting negligent design or services previously carried out. Furthermore, what if such 'remedial and interim measures' are not within the consultant's scope or have not been priced for? Once again, the same concerns regarding the consultant being at the mercy of the accuracy of the contractor's as built record drawings remain.

Unlimited liability!

What is even more worrying is that Form EWS1 says nothing about the consultant's liability position, save for at Note 11 which provides that the form is valid "up to 5 years from the date at which it was signed" (and the consequences of this are unclear).

Where a reliance letter or compliance certificate is given it is paramount that liability is limited

and/or excluded as much as possible. This is typically done by linking the relevant letter/certificate to the related appointment and providing that, under the letter/certificate, the consultant shall have no greater or longer lasting liability than that which arises under the related appointment. It is also not uncommon for such a letter or certificate to include a net contribution clause and an indirect and consequential loss exclusion.

This has to be a 'red flag' or 'showstopper', which should prevent the consultant from signing the Form. Otherwise, in the event of a claim arising liability will be unlimited.

Consistent with typical reliance letters/compliance certificates, Form EWS1 does state that reliance of the Form is "for the sole and exclusive use of the client organisation named... No responsibility is accepted to any third party for the whole or any part of its contents". This is welcomed, but does not make Form EWS1 acceptable given all of the concerns above.

What to do?

As noted, Form EWS1 must be avoided. The Form could increase a consultant's scope, would significantly increase the consultant's potential liability, may result in the consultant walking into a professional indemnity insurance claim, and there would be unlimited liability. Furthermore, the insurance market has expressed concerns with the Form - the writers understand that in particular one major insurer has expressed real nervousness including advising insureds not to agree to Form EWS1 and if they do this would have significant implications on any approaching renewal.

What else should you do in the circumstances? If you are unable to avoid giving a reliance letter or compliance certificate, the consultant should provide its own alternative version with the necessary protections included therein; the reliance letter/compliance certificate should be linked to the underlying appointment.

If the Form EWS1 has to be entered into (which as noted this should be avoided), a solution may be to deal with all the risks arising in the underlying appointment, such that the drafting 'trumps' the Form EWS1. This would require very careful drafting and is not without risks; it is nevertheless a solution in the circumstances.

Finally, the circumstances are calling out for an industry wide response. **CL**