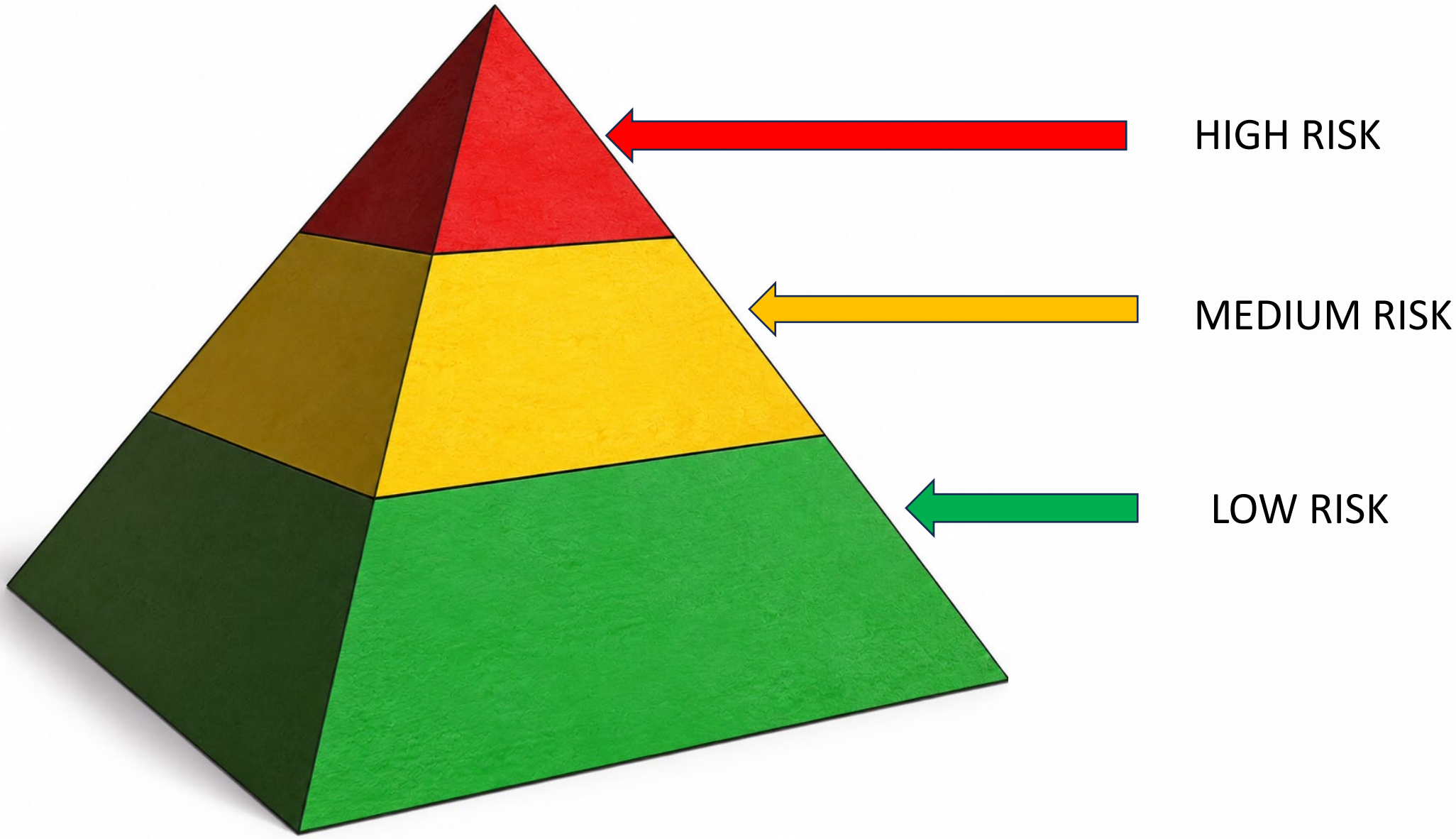


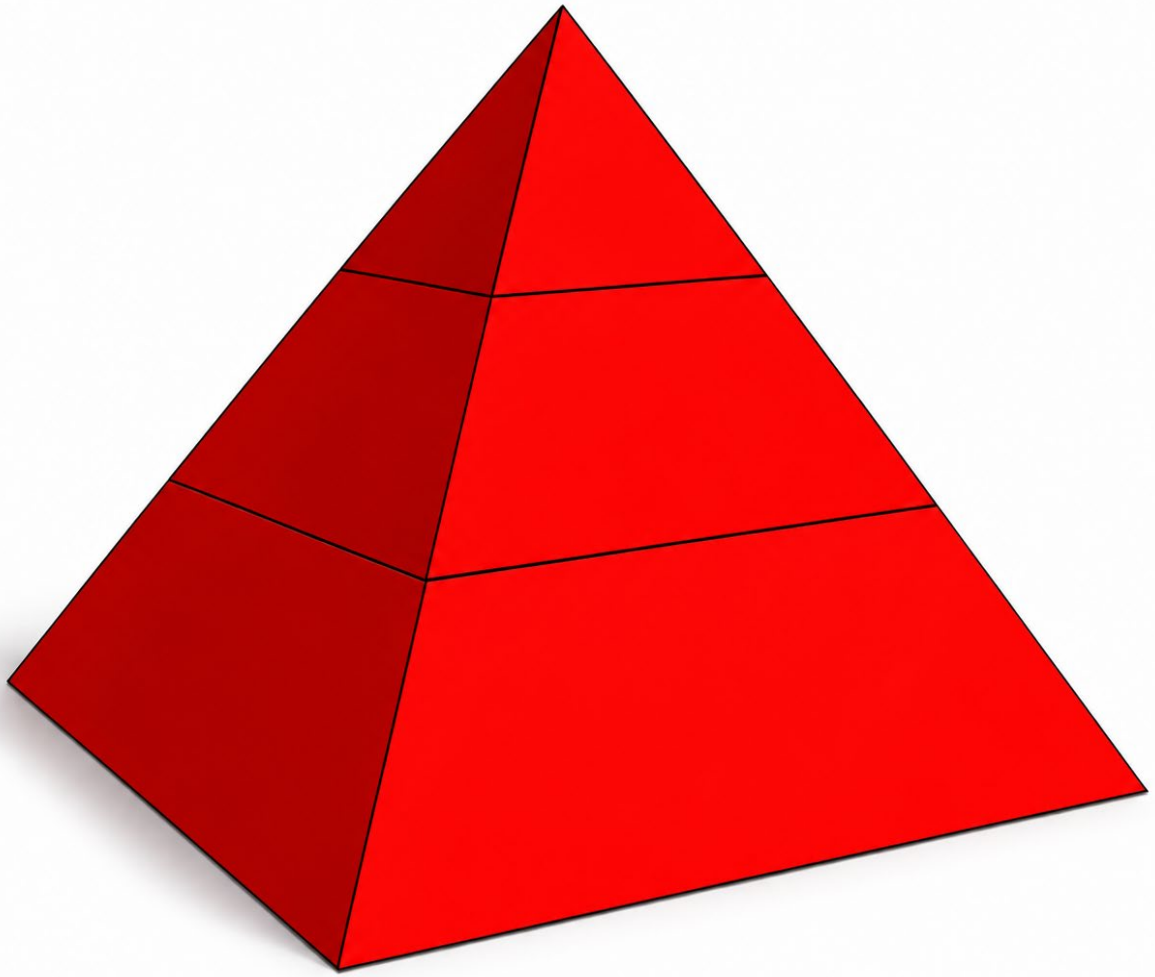

# FIRE SAFETY ISSUES IN RESIDENTIAL LEASEHOLD TRANSACTIONS

SLC CONFERENCE
9.11.26

# THE RISK PYRAMID - RESIDENTIAL LEASES

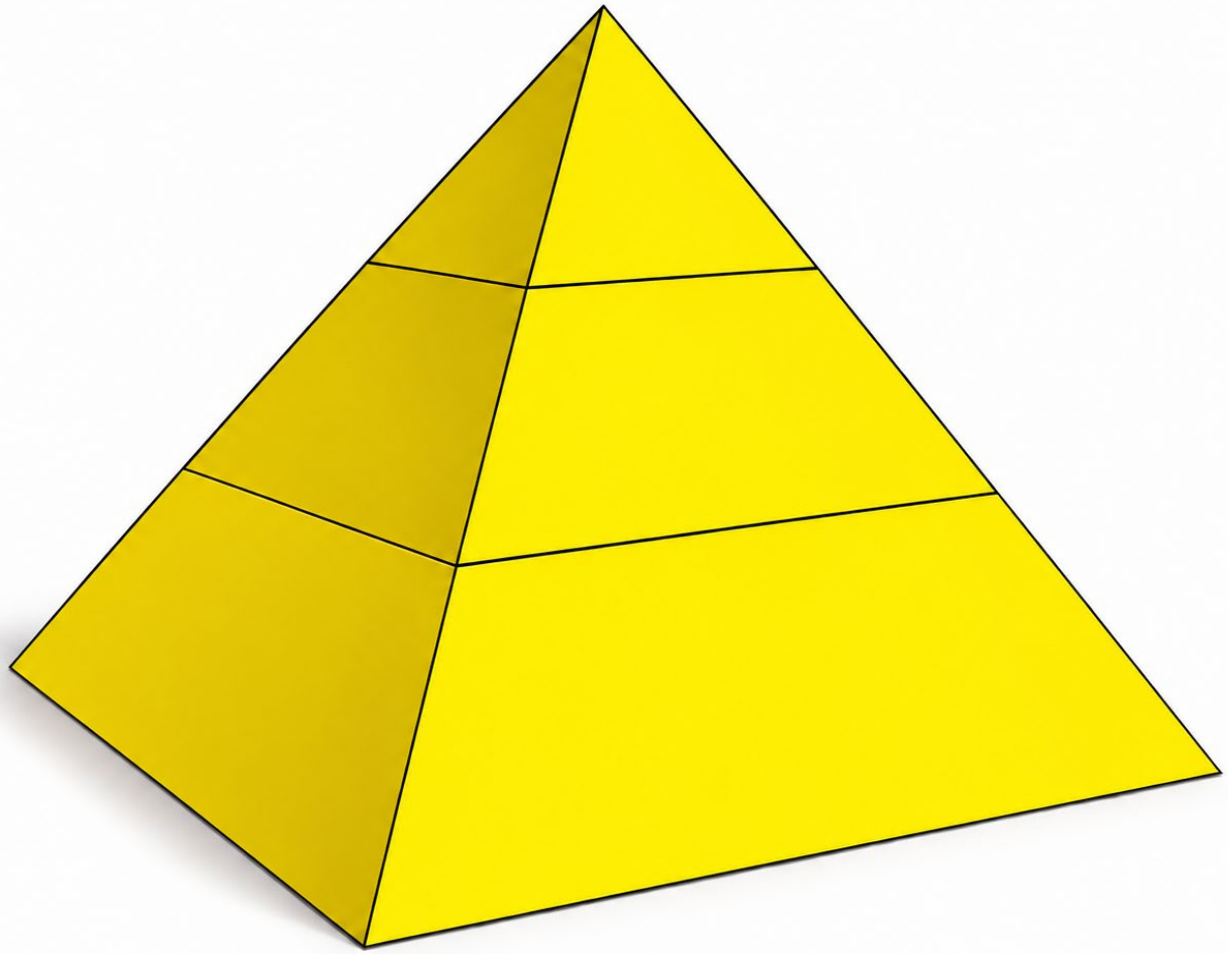


# HIGH-RISK ISSUES



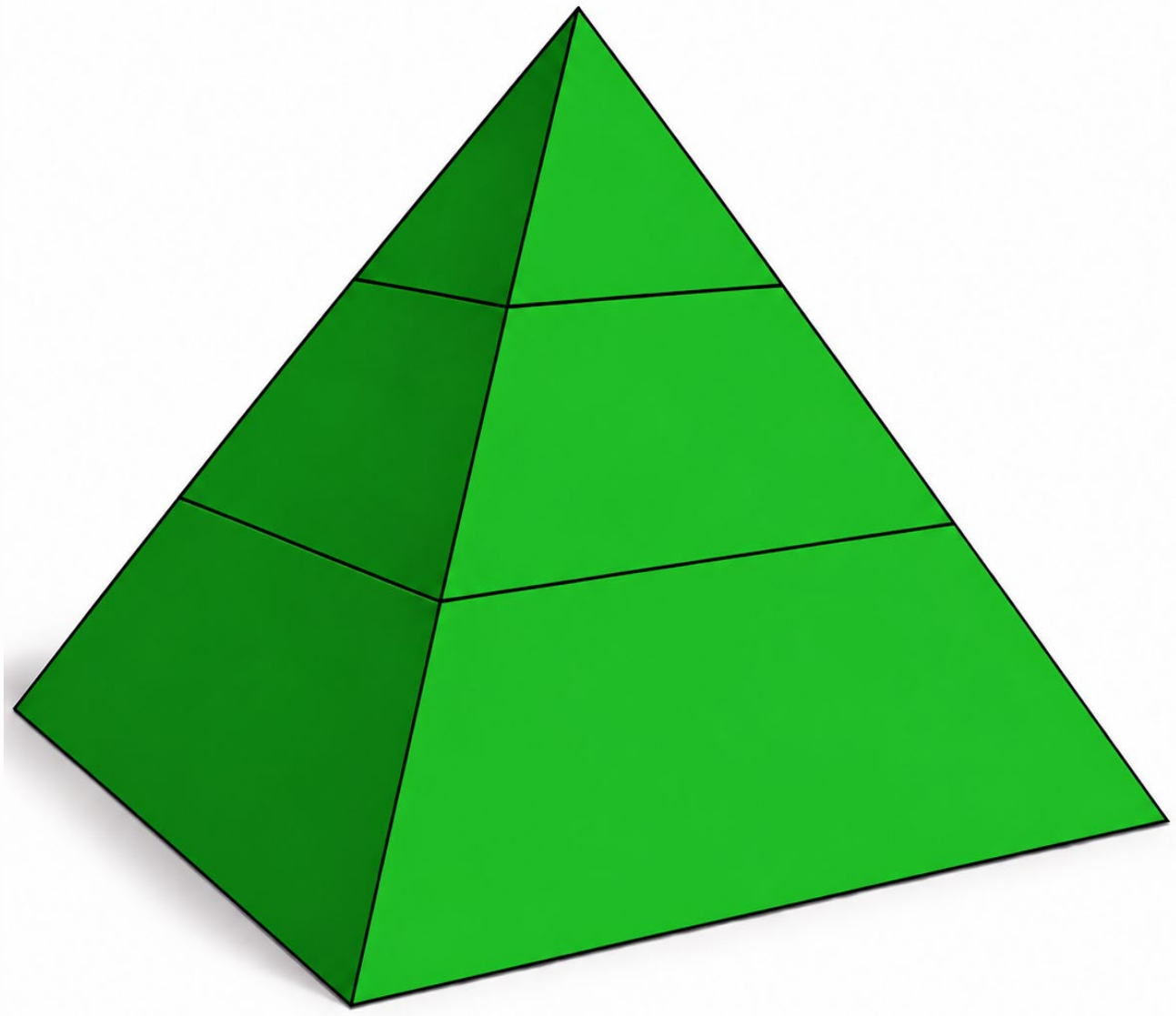
- Failing to explain the bigger picture
- Failing to advise client of key clauses within the lease
- Failing to spot a defective lease
- Failing to scope the retainer to ensure the client is aware of the extent of the conveyancing services you are to provide.

# MEDIUM RISK



- Failing to ensure client has read the lease
- Failing to ensure the client understands the obligations to pay service charge, contributions to insurance costs and, where appropriate, ground rent.
- Failing to advise on leaseholder covenants

# LOW RISK



Failing to:

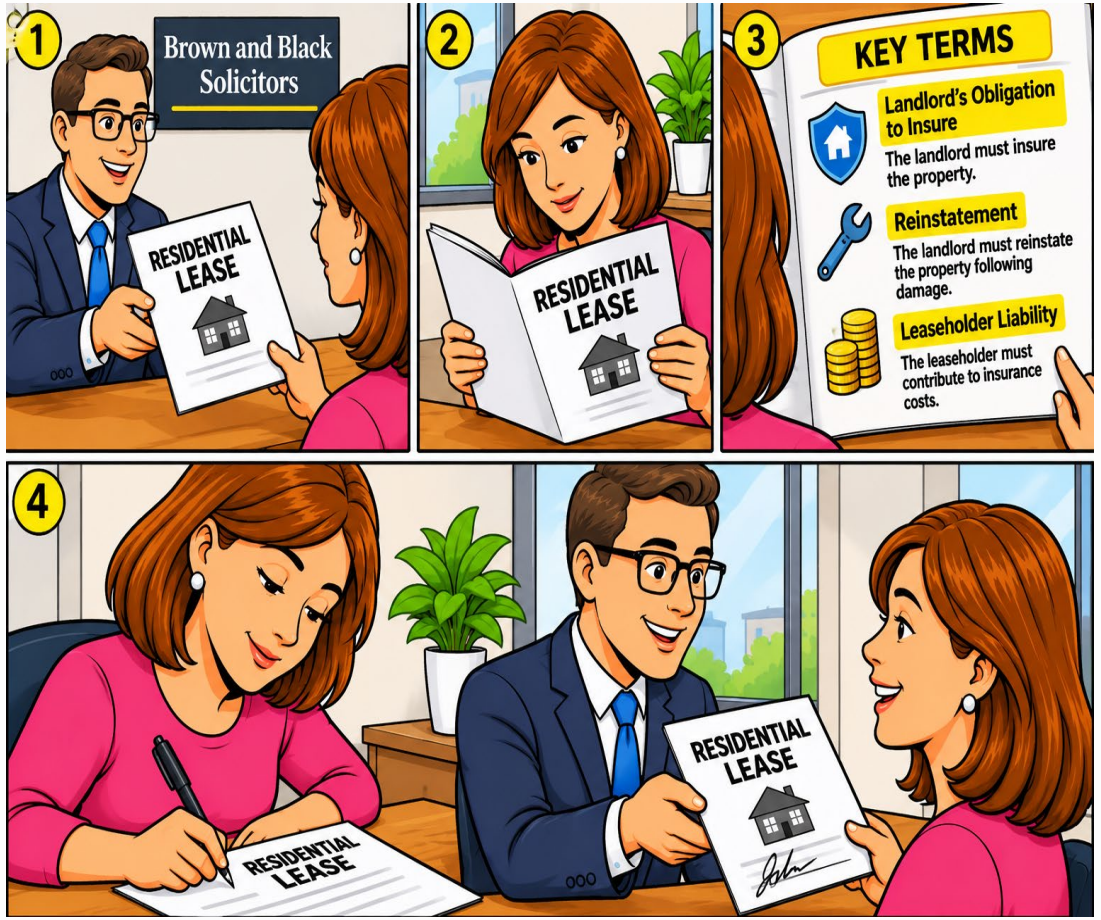
- ✓ Check lease plans
- ✓ Failing to advise on parking
- ✓ Properly apportion ground rent or service charge costs
- ✓ Advise on actual or potential BSA-related risks
- ✓ Advise of fire safety issues or recommend to the client that specialist advice should be sought

# FIRE ISSUES AND RESIDENTIAL LEASES

- Key Clauses
- The demise, the building and/or the development
- Who insures?
- What are the risks that are insured?
- Has the policy and policy schedule been provided?
- Is specialist advice required?

# KEY CLAUSES

- Insurance
- Reinstatement
- Payment of Premium
- Obligations of the leaseholder
- Management Regulations



# ADDITIONAL FIRE SAFETY INFORMATION

- The TA7
- The LPE 1
- Estate Agents – The National Trading Standards Estate and Lettings Agency Team Specified Information (30.11.2023) – issues about safety or structure of the building, the cost of remediation or other costs.
- Fire Risk Appraisal of External Walls (FRAEW).
- Fire Risk Assessment – required for all multi-occupied buildings of any height in England and Wales.
- The External Wall System Fire Review Certificate (EWS1).

# ADDITIONAL FIRE SAFETY INFORMATION

The Building Safety Act 2022

- **Relevant Buildings:**

✓Leaseholder Deed of Certificate

✓Landlord Certificate

- **Higher Risk Buildings –** as above and

✓Evidence of registration

✓Completion Certificate

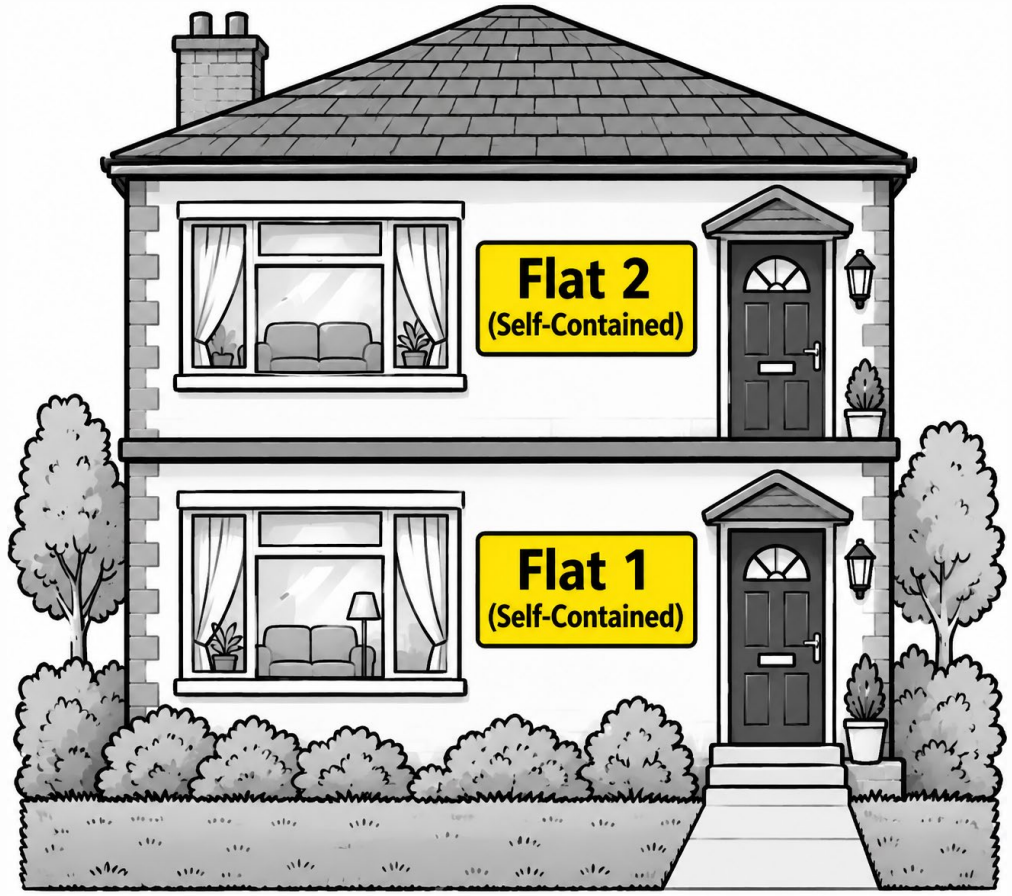
✓Golden Thread

✓Additional fire safety management information (see later)

# CASE STUDY 1

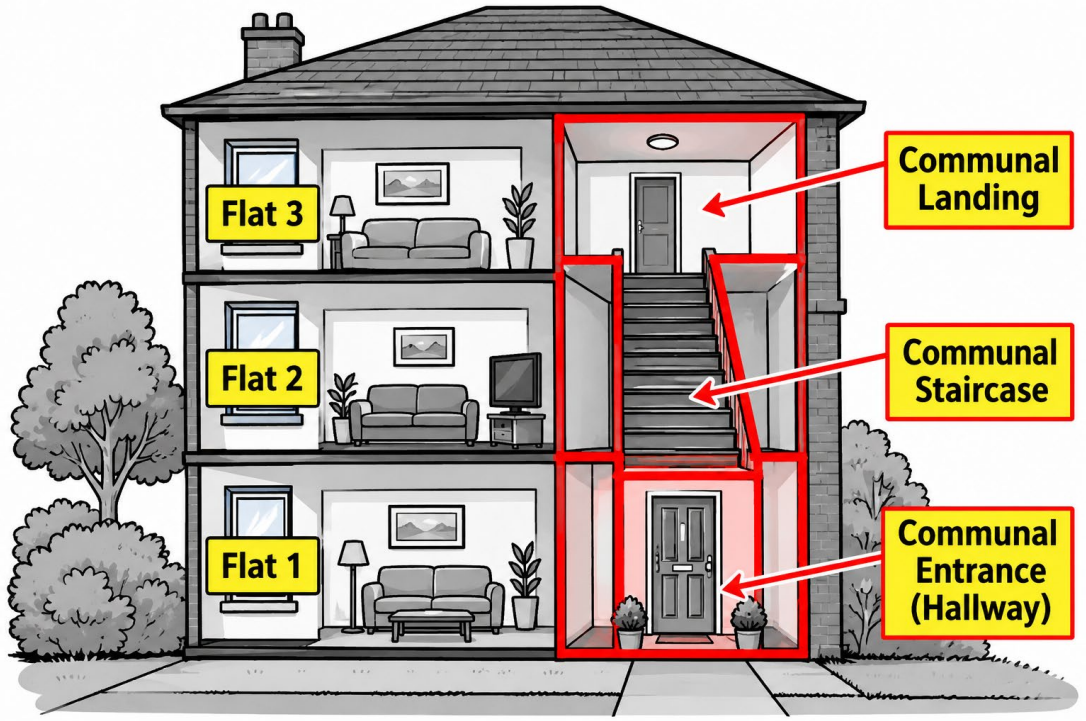
- Your client is acquiring the long lease of Flat 2.

- What would you need to look out for?



# CASE STUDY 2

- Your client is acquiring, on assignment, the long lease of Flat 3.
- What would you look out for?

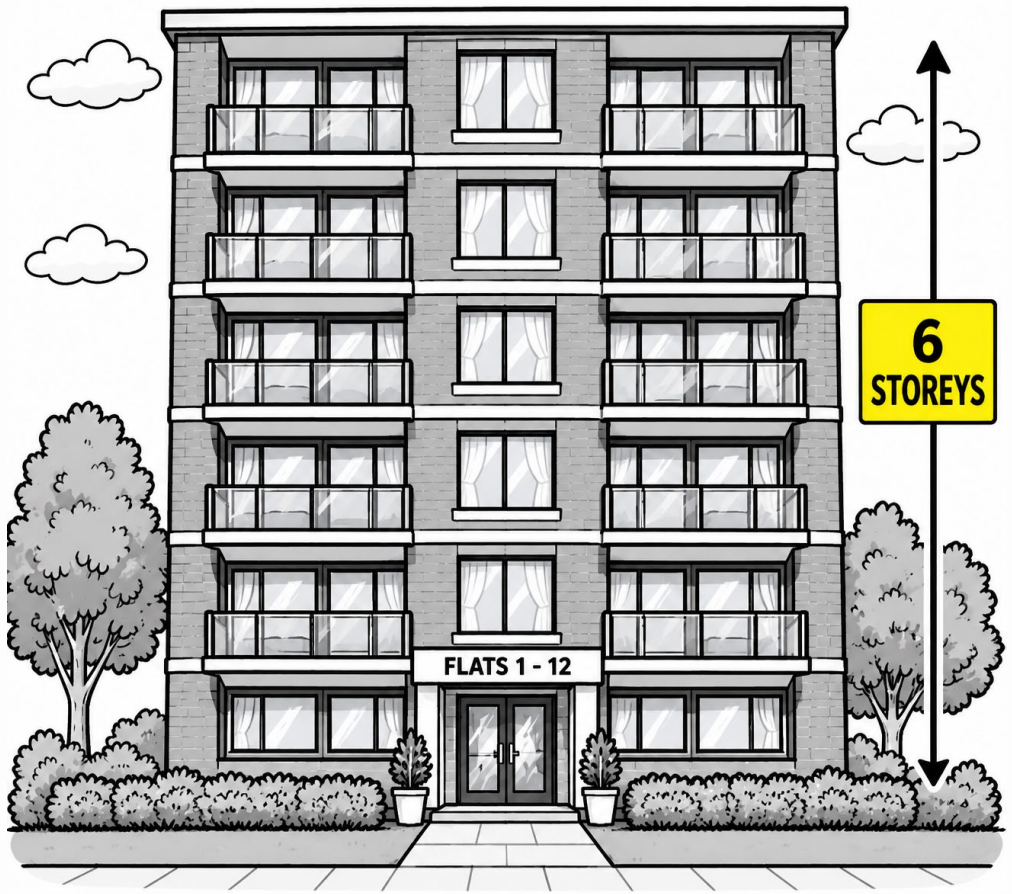


# WHAT WOULD YOU LOOK OUT FOR?

- What does the lease say ?
- Who insures ?
- What risks are to be insured ?
- What is the premium ?
- Have you had sight of the policy and policy schedule ?
- Is the client risk averse and is specialist advice required ?
- What fire safety issues arise ?

# THE BUILDING SAFETY ACT 2022 – RELEVANT BUILDINGS

- What is a relevant building?
- What are the consequences of relevant building status?
- The Leaseholder Deed of Certificate
- The Landlord Certificate



# THE BUILDING SAFETY ACT 2022 – RELEVANT BUILDINGS

- Be careful
- You have been told or have been advised that your client's property is not within a relevant building.
- The landlord intends to undertake an airspace development.
- The building could become a relevant building to which the BSA applies



# ACTING FOR THE SELLER KEY POINTS

- Developer Remediation Contracts.
- Residential long leaseholders are afforded some protection for remediation work on relevant defects in relevant buildings.
- Confirmation of the Cascade Principle.
- Conveyancers must establish the status of a remediation contract and work done or to be done.



# ACTING FOR THE SELLER

- The TA7
- Other information and documentation
- Questioned regarding lenders' handbook information
- Encouraged to complete a leaseholder deed of certificate
- Questioned about communication with the landlord



# ACTING FOR THE BUYER

- Scoping the Retainer.
- Explain there could be delays.
- Explain there could be problems with lenders' instructions.
- Highlight potential problems.
- Explain the limitations of your retainer.



# ACTING FOR THE BUYER

- Is there a developer remediation contract?
- Is the building a relevant building
- Is there a leaseholder deed of certificate?
- Is there a landlord certificate?

# ACTING FOR THE BUYER

- Does the buyer know the status of the building?
- Is the building a relevant building?
- Is the building a higher risk building?
- Could the building be subject to airspace development?

# KEY POINTS

- Are you going to give advice or an explanation concerning remediation work?
- Yes – are you sure?
- No – ensure the client is aware of the limit in your retainer and the consequences
- Ensure you are giving robust advice to clients about their obligation to pay service charges generally and the existing general protection under the  LTA 1985
- Why is there a distinction between historic safety defects and future safety defects?



# KEY POINTS

- Leaseholders are given some protection under Schedule 8 if the building is a relevant building.

- Schedule 8 does not provide blanket protection for all remediation costs for leaseholders holding qualifying leases.

- The Guidance distinguishes between cladding and non-cladding remediation costs.

# CLADDING REMEDIATION

- Is the building a relevant building?
- Is the lease a qualifying lease?
- Has the landlord made a claim under a Government Scheme?
- Did the landlord do the cladding that requires remediation (see Schedule 8, Para 2 protection for all leaseholders)?
- Has the landlord attempted to recover costs from the contractor that did the original work?

# NON-CLADDING REMEDIATION

- Is the building a relevant building?
- Who did the work?
- Was it the landlord or an associate?
- All leaseholders are protected.
- See Para 2 of Schedule 8.

# LIMITATIONS ON SERVICE CHARGES (SCHEDULE 8):

- Landlord or associate responsible for the relevant defect in the relevant building (para.2) – no need for the lease to be a qualifying lease.
- Landlord as at 14.2.22“meets the contribution condition” (para.3).
- Lease below certain value (para.4).
- Service charge exceeds “permitted maximum” (paras.5-7).
- Cladding Remediation if leaseholder holds a qualifying lease (para.8).
- Legal or Professional Services (para.9).

# LIMITATIONS ON SERVICE CHARGES (SCHEDULE 8 PARA 2)

- Does this really mean all leases are protected where remediation work is required for work undertaken by the landlord and/or an associate of the landlord?
- Para 2 is ambiguous; its purpose is to exempt a tenant from the payment of service charges in respect of a relevant defect if “a relevant landlord” is responsible for that defect.
- A relevant landlord is the landlord under the lease at the qualifying time.
- Does “the lease” in the definition of “relevant landlord” mean the same lease as that under which the tenant is obliged to pay service charge? Or does it mean “the lease at the qualifying time”, even if that is different to the current lease under which service charge is payable?
- If the former, Para.2 protection is limited.
- If the latter, all leases are protected.

# LIMITATIONS ON SERVICE CHARGES (SCHEDULE 8)

- Can’t use reserve or sinking fund to pay for costs (para.10).
- No increase for other tenants (para.11).
- A covenant or agreement (whenever made) is void insofar as it purports to exclude or limit any provision made under this Schedule (para. 18).

# NON-QUALIFYING LEASEHOLDERS

- Para. 2, Schedule 8 protection.
- Cannot be liable for remediation costs that cannot be recovered from leaseholders holding qualifying leases.
- Clients holding or buying non-qualifying leases need to be warned about risk.
- They should also be advised about the general protection for leaseholders prescribed in the LTA 1985 and elsewhere.

# LEASEHOLDER DEED OF CERTIFICATE

Purpose?

- To determine if a lease is a qualifying lease.
- Does it have to be served on a landlord?
- Only if the landlord requests it.
- If it is requested and not served within the 8-week or 12-week time limit, what are the consequences?
- Lease IS non-qualifying or ASSUMED to be non-qualifying.

# LEASEHOLDER DEED OF CERTIFICATE

- Failure to provide a leaseholder deed of certificate when asked to do so by the landlord means the lease is deemed (assumed) to be non-qualifying.
- Required to determine if the lease is protected by Schedule 8 of the BSA 2022.
- Provides a record of ownership and occupation as of 14.2.2022.
- In essence, self-certification.

# LEASEHOLDER DEED OF CERTIFICATE SECTION 117(2)

- Relevant Building - 11 metres in height or at least 5 storeys and two dwellings within the building – PROBLEM.
- Relevant Lease – residential long lease  (21-year term).
- Granted before 14.2.22.
- Obligation on leaseholder to pay service charge.
- Check the lease.
- Ownership as at 14.2.22 – only or principal home; other dwelling /no more than two other dwellings - PROBLEM.

# THE LEASEHOLDER DEED OF CERTIFICATE

- Should it be volunteered to the Landlord?
- What happens if the landlord requests it, and it is not provided?
- The lease is presumed to be non-qualifying.
- The presumption can be rebutted by the provision of a leaseholder deed of certificate confirming the lease is a qualifying lease.

# KEY ISSUES

- Does a buyer need to have a valid leaseholder deed of certificate?
- Does a leaseholder deed of certificate have to be served on a landlord?
- Can a company provide a leaseholder deed of certificate and can it own a qualifying lease?
- Can an executor execute a leaseholder deed of certificate on behalf of a deceased leaseholder?
- Can a conveyancer for a buyer validate or verify the content of a leaseholder deed of certificate?

# LANDLORD CERTIFICATE

- The Building Safety (Leaseholder Protections) (England) Regulations 2022.
- Application – Building of 11 metres in height or at least 5 storeys and containing two residential dwellings.
- Information on charges for building safety works.
- Required – transmission of costs into service charge, leaseholder is selling, leaseholder requires it, service charge demand is made relating to remedial work,
- AND within four weeks of a landlord becoming aware of a new Leaseholder Deed of Certificate, where there is information not included in a previous Landlord's Certificate.

# LANDLORD CERTIFICATE

- Where a trigger event occurs, the landlord can give a leaseholder notice requiring a leaseholder deed of certificate.

- The Building Safety (Leaseholder Protections ) (Information etc.) (England) Regulations SI 2022 /859 Regulations impose prescribed steps and require reasonable steps for the request to be made to the leaseholder.

- A leaseholder deed of certificate must be produced within 8 weeks of request, which can be extended to 12 weeks if an extension of time is requested.

- If a leaseholder fails to comply, the lease is deemed to be non-qualifying, but the position can be remedied in the future by the leaseholder serving a leaseholder deed of certificate confirming the lease is a qualifying lease.

# KEY ISSUES

- Does a buyer need a landlord certificate?
- YES, to determine whether the landlord meets the contribution condition.
- YES, to identify whether remediation work for relevant defects has been done or needs to be done.
- NO – if not served within time ( or defective !!!), the landlord is deemed to meet the contribution condition, meaning the landlord cannot recover historical remediation costs for relevant defects in connection with this lease.
- Landlord cannot be compelled to produce a landlord certificate.

# RELEVANT BUILDINGS  EXCLUDED LEASES AND LEASEHOLDERS

- Leases that are granted after 14.02.22.
- Leases and leaseholders in leaseholder-owned blocks.
- Leases and leaseholders in buildings that are not relevant buildings.
- Note: a higher-risk building is a relevant building.

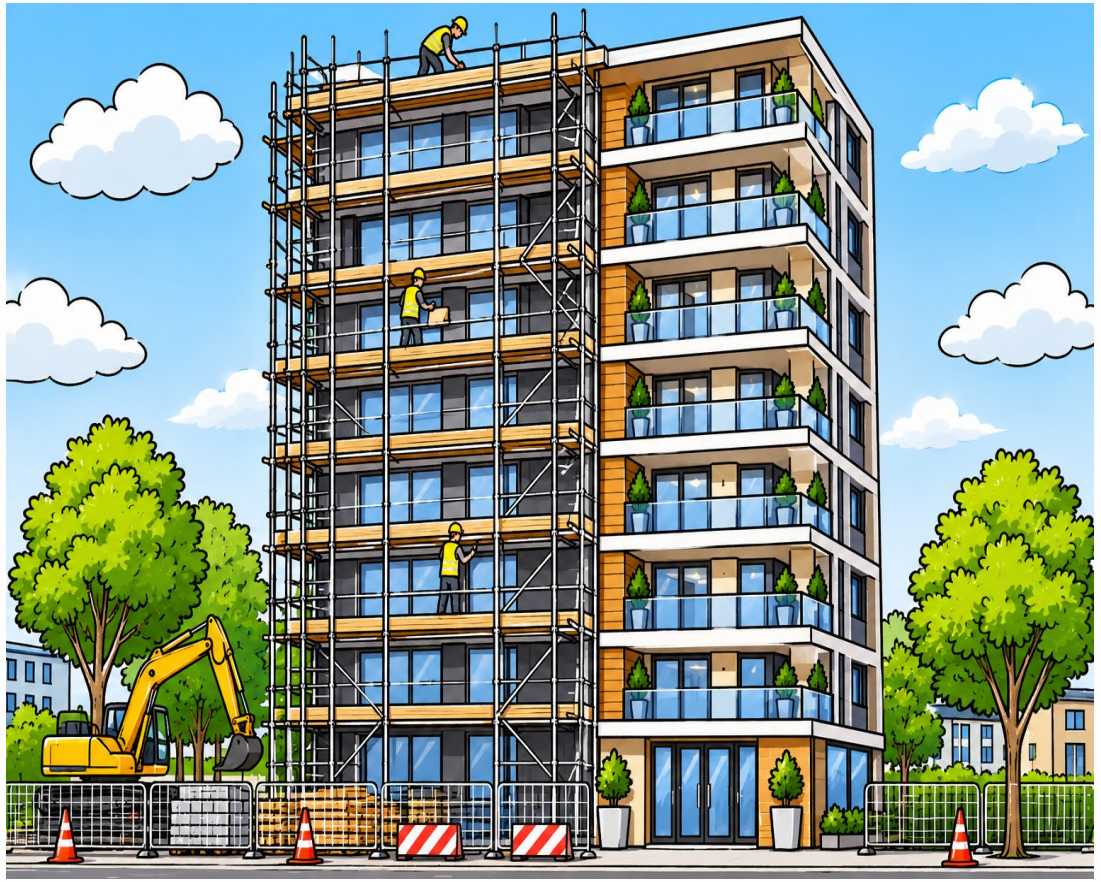
# THE BUILDING SAFETY ACT 2022 – HIGHER RISK BUILDINGS

- What is a higher-risk building?
- It is likely to be a relevant building.
- A register of higher-risk buildings is maintained by the Building Safety Regulator.
- A residential long lease of a higher-risk building has terms implied in the lease.
- The accountable person (usually the landlord) has additional duties, leading to increased service charge costs.



# THE BUILDING SAFETY ACT 2022 – HIGHER RISK BUILDINGS

- A change of use of a building that meets the height or storey criteria for a higher risk building could become one due to change of use.
- Care needs to be exercised and the client's objective identified if acting for the landlord.
- Caution should be exercised if acting for a leaseholder and the landlord discloses alterations or airspace development.



# THE DUTIES OF THE ACCOUNTABLE PERSON

The accountable person or principal accountable person has substantial duties and obligations under the BSA, including:

- The assessment of building safety risks.
- The management of building safety risks.
- Preparing safety case reports.
- Information on mandatory occurrences to the Building Safety Regulator.
- Keep and provide guidance information about higher-risk buildings.
- The golden thread must be kept in electronic format, secure, and accessible,
- Engagement with residents.
- Establish a complaints procedure.

# HIGHER RISK BUILDINGS – PART 4 BSA 2022

- The principal accountable person is required to provide information about the building's structure, key building information and fire safety protocols.

- Section 30 C Landlord and Tenant Act 1985 (as amended by the BSA 2022) – implies terms into leases of residential units in higher-risk buildings.

- Residents in high-rise buildings will have more say in how their building is kept safe and will be able to raise building safety concerns directly to the owners and managers of their buildings, known as accountable persons and responsible for repairing the common parts of a high-risk building, as defined in section 72 of the Act.

# IMPLIED TERMS SECTION 30 C LANDLORD AND TENANT ACT 1985 – THE LANDLORD

- If the landlord is the accountable person, there is an implied covenant that the landlord will comply with their duties under the BSA 2022.

- If the landlord is not the accountable person, then the landlord covenants to co-operate with the accountable person (taking any steps reasonably required to facilitate compliance with the BSA 2022 .

# IMPLIED TERMS SECTION 30 C LANDLORD AND TENANT ACT 1985 – THE LEASEHOLDER

- The leaseholder has a duty of compliance and must comply with their duties under Section 95 and Section 97 of the BSA 2022.

- The leaseholder must allow a landlord or a relevant person or other party authorised in writing access to the premises at a reasonable time if 48 hours' notice has been given

# PRACTICE POINTS

- When acting on a residential leasehold transaction, scope the retainer carefully.
- Are you going to give detailed advice on fire safety?
- Are you not going to give detailed advice on fire safety other than in general terms, and are you instead going to advise the client to seek specialist fire safety advice?
- Are you going to give advice on the documentation received ?

# PRACTICE POINTS

- BSA 2022 related issues
- Are you going to give advice as to the status of the building?
- Are you giving detailed advice on the leaseholder deed of certificate or landlord certificate?
- Are you going to give advice on building safety risks – ie risks associated with the spread of fire or risk of building collapse?

# PRACTICE POINTS

- Ensure clients receive general advice on protection from service charges.
- What does the lease say about the provision of services and recovery of expenses?
- Landlord and Tenant Act.
- Service charge costs must be reasonable.
- Leaseholders must be advised of their statutory rights to challenge service charges.
- Costs are only recoverable if service charge accounts have been produced or leaseholder's notified of an expense being incurred within 18 months of expense arising.
- Landlords are obliged to consult if costs exceed £250.00 per item (£200.00 if for a long-term qualifying agreement).

# PRACTICE POINTS

- Which costs are recoverable?
- Questions asked by the Tribunal when determining reasonableness.
- Recovery of legal costs.
- Kensquare Limited v Boakye [2021] EWCA Civ 1725.

# PRACTICE POINTS

- Are disliked by the Courts.
- Sella House Ltd v Mears [1989] 1 EGLR 65.
- Kensquare Limited v Boakye [2021] EWCA Civ 1725 - litigation costs are not part of the “management” of the Building. But whether this is limited to the facts of this case and the type of litigation with which it was concerned, or all litigation generally, is to be seen.
- Dell v 89 Holland Park Limited [2022] UKUT 169(LC) – recovery of costs related to the landlord’s management of the building and, in the absence of direct wording to cover them, these legal costs were not recoverable.

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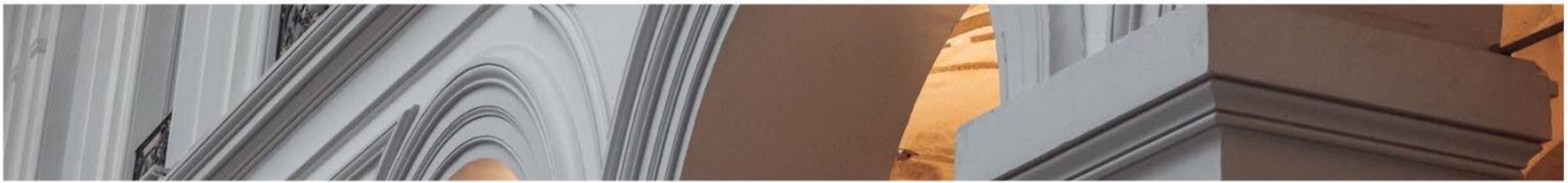

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