

Cladding and Fire Safety Improvements Post-Grenfell

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30 October 2018





Latest MHCLG figures (12 October 2018)

There are 457 high-rise (over 18 metres) residential buildings and publicly-owned buildings in England with Aluminium Composite Material (ACM) cladding systems unlikely to meet current Building Regulations guidance:

- 157 are social sector residential buildings, managed by local authorities or housing associations;
- 291 are private sector buildings, of which:
 - 201 are private residential
 - 28 are hotels
 - 62 are student accommodation
- 9 are publicly-owned buildings, comprising hospitals and schools.



- There are approximately 30 private sector residential buildings where the cladding status is still to be confirmed
- 22 of the 157 social sector buildings (14%) have finished remediation – including receiving sign-off from building control where necessary, and a further 98 buildings (62%) have started the process of remediation. There are 33 buildings where a remediation plan is in place, and a further 4 buildings where the building owners intend to remediate and are developing plans.
- Interim fire safety measures are in place in all affected buildings to keep residents safe until the cladding has been replaced.

- Of the 291 private sector buildings:
 - 17 have finished remediation – including receiving sign-off from building control where necessary;
 - 21 have started remediation;
 - remediation plans are in place for 92 buildings but remediation works haven't started on these buildings yet;
 - there are 40 buildings where building owners intend to remediate and plans are being developed; and
 - remediation plans remain unclear for 121 buildings

Total estimated bill



- The UK is facing an estimated £1bn bill to replace defective cladding on high-rise buildings.

Blocks owned by social landlords

- No cost will be borne by assured and secure tenants
- Long leaseholders who have exercised the right to buy may be liable depending on:
 - The service charge provisions and landlord obligations in their leases;
 - The nature and extent of the works being carried out.

CAM/38UC/LSC/2016/0064



- 5 tower blocks in Oxford
- 54 RTB leaseholders
- Major works by Oxford City Council as landlord, including cladding and fire safety improvements
- Circa £50,000 service charge on each leaseholder

- FTT held that the works (except for limited structural repairs and lift maintenance) did not fall within the landlord's covenant to maintain the properties
- There was no scope in the leases for recovering a service charge for improvements
- Result: £50,000 unreasonable, and replaced by circa £2,500

Central government commitment on cladding



- On 16 May 2018, the Government announced that it would meet the reasonable cost of the removal and replacement of unsafe cladding by councils and housing associations. It has estimated the cost at £400 million.
- *“This will not be means tested, and will be available regardless of whether work has been started, completed or not yet started, so that building owners do not have to worry about the cost of work displacing other activities.”*
- First tranche to twelve local authorities and 31 housing associations announced on 17 October 2018

Cladding



- Applications for 159 buildings have been received as at 17 October 2018 and 135 applications have been approved in this first tranche of funding.
- Twelve applications were not eligible for funding because they didn't meet the application criteria – for example the buildings are below 18 metres, owned by commercial freeholders or the cladding is not ACM.
- Twelve applications have been deferred while building owners provide further information to confirm eligibility.
- Applications received after the 31 August deadline will still be reviewed.
- The government is paying 80% of the estimated eligible costs up front when work starts, with the remaining 20% when the work is complete and final costs are known. The funding allocated so far comes to £248 million.

What about other works?



“The government will also provide financial flexibilities to councils for other essential fire safety measures and is directing local authorities to take cladding-related issues into account when carrying out reviews of housing conditions in their areas.”

Financial flexibilities: *“more borrowing headroom or accessing other general funds that normal restrictions would not allow them to use in order to fund the work”*

Retro-fitting sprinklers?

- The government commissioned an independent, forward-looking review of the building regulations and fire safety system. The final report was published on 17 May 2018.
- The Housing, Communities and Local Government Select Committee's report on the independent review report was published on 18 July 2018.
- The SC recommended that: *“Where structurally feasible, sprinklers should be retro-fitted to existing high-rise residential buildings to provide an extra layer of safety for residents. The Government should make funding available to fit sprinklers into council and housing association-owned residential buildings above 18 metres ...”*

Retro-fitting sprinklers (cont)

- The Government has refused to make a firm commitment on sprinklers. Their response to the SC recommendations on 18 September 2018 stated:
- “... An appropriate level of fire safety can be achieved without the need to retro fit sprinklers and, as the Committee notes, it may not be feasible to install a system, for example for structural reasons. It is for building owners to seek professional advice and decide whether to fit sprinklers, on the basis of their assessment of the particular risk faced in their building(s). ... The Government intends to undertake a technical review of Approved Document B and will publish a call for evidence in the autumn. Possible changes to the guidance in Approved Document B, including on the use of sprinklers, will be considered in this review. **The Government will also consider financial flexibilities for local authorities concerned with funding other essential fire safety works in buildings which they own.**”



LB Wandsworth – case study

- The London Borough of Wandsworth (LBW) is seeking to retro-fit sprinklers in all its blocks of 10 storeys or higher and has obtained legal advice to the effect that the cost, estimated to be around £3,000 to £4,000 per unit, is recoverable.
- Of the 6,401 properties that would benefit, 2,358 are leasehold. There are 1,315 resident leaseholders and 1,043 leaseholders living away from their property.
- LBW say that if the works are necessary and chargeable under the terms of the lease then it is under a strict fiduciary duty to recharge and that meeting leaseholders' contributions from the Housing Revenue Account (HRA) or the General Fund is likely to be challengeable.
- A section 27A application has been made to the FTT by LBW.

Private sector

- Flats in affected residential blocks will be held on long leases
- It will depend on the terms of the lease who is liable to pay for cladding replacement and other fire safety measures
- Even if there is no express provision dealing with fire safety, freeholders might use a 'sweeping-up' clause. This could allow freeholders to recover a service charge for:
 - money spent for the 'benefit of the building'
 - money spent to enable 'good estate management'

Case study – Citiscape in Croydon



- Citiscape in Croydon is managed by Firstport on behalf of Proxima Properties.
- Landlord wanted to replace the ACM cladding and introduce a “waking watch” (permanent on-site fire marshal) after Grenfell.
- The estimated cost of removing and replacing the cladding on this block was between £1.8 and £2.5 million, with leaseholders facing average bills of £21,000 depending on the size of their flats. The waking watch would be circa £250k p.a.
- Firstport referred the question of the recoverability of the cost from leaseholders to the FTT who held on 13 March 2018 that the cost is recoverable from the block’s leaseholders: LON/00AH/LSC/2017/0435.

FTT's decision

Waking watch: recoverable within *“Inspecting rebuilding re-pointing repairing cleaning renewing or otherwise treating as necessary and keeping the Maintained Property comprised in the Block and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts therefore.”*

Also within:

- *“Complying with the requirements and directions of any competent authority and with the provisions of all statutes and all regulations orders and bye-laws made thereunder relating to the Development insofar as such compliance is not the responsibility of the lessee of any of the Dwellings.”*
- *“All other reasonable and property expenses (if any) incurred by the Manager in and about the maintenance and proper and convenient management and running of the Development”*
- *“Providing and paying such persons as may be necessary in connection with the upkeep of the Maintained Property.”*

FTT's decision



- **Removing and replacing cladding [58]:**

“The words *“renewing or otherwise treating as necessary”* go beyond simple repair. Equally the words *“in good and substantial repair order and condition”* indicate an obligation that goes well beyond simple repair: if it did not the words *“order and condition”* in the phrase would be superfluous. We do not see how the two blocks can be said to be *“in good and substantial repair order and condition”* whilst the cladding remains a fire risk. Finally, and subject to Mr Ede’s point considered below, the reference to *“rectifying or making good any inherent structural defects”* in paragraph 15 appears to us to encompass the removal of the defective cladding and its replacement with fire resistant cladding ...”

- At [62]:

“By granting 999 year leases the original freeholder was effectively relinquishing any capital interest in the flats. There is no prospect of the freeholder receiving other than nominal premiums either on enfranchisement or on individual lease renewals under the Leasehold Reform, Housing and Urban Development Act 1993. In such circumstances it is reasonable to conclude that the parties would have intended that all future costs associated with the blocks would be the responsibility of the tenants. That intention is reinforced by the use of identical words to define both the manager’s obligation to undertake work and the tenant’s obligation to pay for it.”

“66. It is foreseeable that the tenants may have claims against a number of parties: against the manufacturer of the cladding in particular if any warranties were given as to its suitability: against Barratt Homes if they were negligent as to the selection and installation of the cladding: against the Local Authority if there were errors in the certification process: against the DCLG if, as been suggested elsewhere, the relevant building regulations were not fit for purpose.

67. The difficulty with all these potential claims is that they are entirely speculative with uncertain outcomes.”



After the FTT's decision

- On 19 April 2018, Barratt Developments, the original developers of the block, told leaseholders that they would cover future and backdated costs relating to employing a fire warden and the removal and replacement of unsafe cladding.



Another fire warden decision

- E & J Ground Rents No.11 LLP various leaseholders of Fresh Apartments, Salford: <https://www.lease-advice.org/files/2018/01/DOC019.pdf> (24 January 2018)
- Reaches the same decision about the recoverability of costs for a “waking watch”, in the context of similar lease terms.



Latest voluntary action by developer

- On 16 October 2018 it was announced that Bellway has set aside £5.9m to carry out works to replace combustible cladding used on two of its apartment developments, Prospect Place in Cardiff and New Festival Quarter in east London.

Other remedies

- According to Inside Housing, the property management company in charge of New Capital Quay in Greenwich has launched a legal challenge against the National House-Building Council (NHBC) on the basis that the cladding complied with the building regulations in force at the time of construction and was signed off by the NHBC in their building control role:
<https://www.insidehousing.co.uk/news/news/nhbc-faces-liability-claims-for-dangerous-cladding-on-tower-blocks-54198>
- Inside Housing has also reported on a block in Salford where surveys have revealed inadequate fire breaks in cladding panels, which may mean that insurers have a liability under the leaseholders' warranties.

Central government funding?

- The Housing, Communities and Local Government Select Committee's report on the independent review report, published on 18 July 2018, recommended that
- *“The Government should fully fund the replacement of any cladding on existing buildings which had been permitted, but is subsequently banned as a consequence of the consultation. In those circumstances, this funding should be made available to both public and private sector landlords.”*

Government's response



“The Government has already provided funding for remediation of cladding in the social sector. In the private sector more and more firms are doing the right thing and replacing cladding themselves without the costs falling to leaseholders. The Government will consider what further steps may be appropriate as part of the detailed analysis of the consultation responses and the wider reforms proposed by the Independent Review.”

Other recommendations

- *“... some of these blocks do not have a single ‘building owner’, rather an owner of the modest freehold ground rent and the constituent long-leaseholders, the latter often being the only parties with a contractual obligation to carry out remedial works. We therefore recommend that the Government conduct an urgent review into responsibility and liability of such buildings to ensure the necessary work can be carried out for the safety of residents, which is paramount. The Government should then produce further subsequent guidance for building owners.*
- *While it is encouraging that an insurance company has recently accepted a claim to pay for remedial work on a private sector development in Greenwich, nevertheless, more needs to be done now to ensure that unsafe cladding is removed urgently. To avoid any further delay, we propose that the Government introduces a low-interest loan scheme for private sector building owners, to ensure that remedial work is carried out as quickly as possible and that costs need not immediately be passed on to leaseholders.*

Government's response

- The Government has been clear that building owners are legally responsible for ensuring residents' safety. They must undertake remediation action where potentially dangerous ACM cladding has been used and we have said that they should do all they can to protect leaseholders from incurring costs, either funding it themselves or looking at alternative routes such as insurance claims, warranties or legal action.

- We are not persuaded that a review into responsibility for buildings is necessary; and would be concerned about the further delay that it could introduce into the process. We have written to the relevant building owners to remind them of their responsibilities and to highlight that, where building owners do not take action, local authorities have extensive enforcement powers to ensure that required remediation is undertaken. We welcome Mace's decision to cover the full costs of recladding two blocks at its Greenwich Square Project in south-east London. We also welcome the decision of developers such as Barratt Developments, Legal & General, Taylor Wimpey and Peabody to pay for work to remove cladding. We call on others to follow their example.



- We have met leaseholders to understand their concerns, and industry to discuss the barriers to remediation and to work on solutions for individual building owners who cannot resolve building remediation themselves. We do not rule out any options if industry, individual building owners or developers do not come forward with their own solutions. Our new minister-chaired taskforce will be charged with ensuring that remediation plans are put in place swiftly across all private sector buildings with ACM cladding systems.

Government threats to private landlords

- James Brokenshire on 17 October 2018: *“In the private sector, I want to see landlords protect leaseholders from these costs. I am pleased that a number have stepped forward to do so, including Barratt Developments, Legal & General, Taylor Wimpey, Mace and Peabody. However, there are some who are not engaging in this process. If they don’t, I have ruled nothing out”*
- In September 2018 the Minister wrote to around 60 building owners and developers threatening “enforcement action” if they do not strip unsafe material from their blocks, referring to a “moral imperative”. The threat may include preventing developers/owners from accessing government schemes.
- Plans for a “two-pronged approach” that would involve financial penalties on landlords and restricting access to housebuilding schemes for developers who refused to cover recladding costs: The Times, 20 October 2018

Legal challenges by private landlords



- On 20 October 2018, The Times reported that “the government will face legal challenges to its plans to force private landlords to cover the cost of removing and replacing Grenfell Tower-style cladding from housing blocks”

Dispensing with consultation requirements

- There have been two successful applications to the FTT under section 20ZA to dispense with the consultation requirements in view of the urgency of carrying out works considered necessary in light of the Grenfell incident.
 - LON/00BC/LSC/2017/0086
 - LON/00BB/LDC/2018/0083 & LON/00BB/LDC/2018/0084

Conclusions

- In the public sector, the Government's position on funding beyond cladding replacement is uncertain and subject to change – the question of what is considered an “essential” fire safety measure will likely hinge on the outcome of the inquiry.
- The Wandsworth fire-sprinkler case will test the RTB lease provisions as to whether leaseholders are liable.
- In the private sector, the Government is clear that it will not fund, and the dispute is between those with legal interests in the property.
- The FTT has so far found the service charge provisions to be wide enough to cover cladding replacement and waking watch measures.
- However, every lease is different and the dispute is only partly a legal question as to who is responsible under the lease. Some parties are voluntarily assuming responsibility, and legal/insurance/warranty claims will need to be considered.