Landmark Chambers

Property Law Nuts & Bolts 4: Service Charges Cladding & Fire Safety post-Grenfell

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Context

As at 30 September 2019:

- 114 high rise residential and publicly owned buildings completed remediation works to remove ACM cladding
- 321 yet to be remediated

- 81 of 97 social sector residential buildings with ACM cladding unlikely to meet Building Regs have started remediation works

- 24 of 168 private residential buildings have started remediation works

MHCLG Building Safety Programme: Monthly Data Release 10 October 2019

Issues

- **Who pays?**
  - Replacement cladding
  - Fire marshal patrols
  - Other fire precaution/safety measures
- **Access?**
- **Consultation requirements where urgent works/measures**

Who pays? (1)

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Blocks owned by social landlords

- No cost will be borne by social and assured tenants
- Long leaseholders (eg those who have exercise right to buy) – will depend on the provisions in the Lease, and works being carried out

Who pays? (2)

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CAM/38UC/LSC/2016/0064

- 5 residential blocks owned by Oxford City Council
- Mainly occupied by secure tenants – some long leaseholders
- Application given Scott Schedule to determine which services and works would be recoverable from long leaseholders (estimated cost to individual long leaseholders £48k +)
- FTT made clear service charges limited to works/services OCC covenanted to provide under lease

Who pays? (3)

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CAM/38UC/LSC/2016/0064 (contd)

- Leases not in identical terms, but essentially OCC bound to maintain repair and maintain the structure of the building to include the roof, pipes, cables, main entrance, staircases, windows, doors etc.
- Inspection:
  - External cladding: generally in good condition
  - No sprinkler system, smoke ventilation or fire retardant to walls
  - Fire alarm system, with some unidentified problems

Who pays? (4)

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- **CAM/38UC/LSC/2016/0064 (contd)**

- Cladding deemed to be an improvement – not payable under the service charge provisions

- Fire precautions (new alarm system, fire doors, sprinkler system etc) "desirable" but (1) no statutory or regulatory requirement for work and (2) no evidence to suggest such works were repair or general maintenance.

- Long leaseholders' contribution reduced to c.£2500 in respect of relatively limited works that were found to constitute repairs

Oxford CC – the follow up

Oxford City Council v Dr Piechnik, County Court at Oxford, 31 July 2019 (unrep*)

- In order to carry out the proposed works discussed in the FTT proceedings, OCC demanded access to tenant's property. Tenant refused.
- Tenant covenants included covenant to:

> *"…permit the Council and its Surveyor or Agent and (as respects work in connection with the premises and any neighbouring or adjoining premises) their lessees or tenants with or without workmen and others at all reasonable times during the term on giving 2 days previous notice in writing (or in case of emergency without notice) to enter into and upon the whole or any part of the premises for the purpose of repairing any part of the said building or any other adjoining or contiguous premises and for the purpose of making repairing maintaining supporting rebuilding cleansing lighting and keeping in order and good condition all roofs foundations sewers pipes cables watercourses gutters wires television aerials and associated apparatus (if any) or other structure or other conveniences belonging to or serving or used for the whole or any part of the building ……"*

*Extracts from the judgment can be found on the 'Nearly Legal' website: https://nearlylegal.co.uk/2019/09/freeholder-rights-of-access-to-leaseholders-premises-to-carry-out-works/

Oxford CC – the follow up (2)

Oxford City Council v Dr Piechnik, County Court at Oxford, 31 July 2019

- Court held that the obligation to provide access was not co-extensive with the repairing obligation – and was possibly wider. Covenant was wide enough to encompass purposes going beyond express or implied repairing covenants

- OCC also sought access for ‘beneficial works’ which were not covered by the clauses in the lease or covenants implied under the Housing Act 1985.

Oxford CC – the follow up (3)

Oxford City Council v Dr Piechnik, County Court at Oxford, 31 July 2019

- Court held that there was a "limited right of access" which arose independently from the express terms of the Lease or the implied right of access associated with the covenants implied by HA 1985, in circumstances where tenant's refusal of access would interfere with powers otherwise available to the landlord, which the landlord wished to exercise so as to avoid risk of death or personal injury, or remedy a state of affairs that was injurious to health.
  - NB: Under a secure tenancy a landlord would have an implied right of access to carry out works to avoid injury - see *McAuley v Bristol CC* (1992) QB 134 and *Lee v Leeds CC* (2002) 1 WLR 1488).

- Left for trial judge to determine whether each of the disputed works fell within the various rights of access articulated

Who pays? (5)

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Private sector residential blocks

- Leaseholder's liability will depend on terms of the lease – and the works proposed

- Even if no express provision dealing with fire safety, check any 'sweeping-up' clauses – eg clauses enabling recovery of monies spent for 'the benefit of the building' or 'good estate managemetn;'

Who pays? (6)

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LON/00AH/LSC/2017/0435- the "Cityscape" case

- Application by managing co. under s.27A for determination re leaseholder's liability for replacement cladding and cost of 'waking watch'
- Lessee covenant to pay proportion of the "Maintenance Expense" – "the moneys actually expended or reserved for periodical expenditure by or on behalf of the Manager or the Lessor at all times during the Term in carrying out the obligations specified in the Sixth Schedule"
- Sixth Schedule included 'sweeping up' clauses

Who pays? (7)

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LON/00AH/LSC/2017/0435- the "Cityscape" case (contd)

- Obligations in Sixth Schedule included (in Part A) *"5) Inspecting rebuilding 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."*
- + more general provisions in Part D – including a 'sweeping up' clause in para 15 – "*All other and reasonable property expenses (if any) incurred by the Manger in and about the maintenance and proper and convenient management and running of the Development including in particular and without prejudice to the generality of the foregoing any expenses incurred in rectifying or making good any inherent structural defect in the Building(s) or any other part of the Development…"*

Who pays? (8)

Landmark Chambers

LON/00AH/LSC/2017/0435- the "Cityscape" case (contd)

- Outcome
  - 'Waking watch' costs reasonable and reasonably incurred – up to December 2017 (post Dec 2017 not decided)
  - 'Waking watch' costs recoverable under Part D of Sixth Schedule, paras 10 ("complying with the requirements and directions of any competent authority….") + para 15
  - Cladding costs were reasonable (tenants argued too low!) and recoverable under Part A + Part D para 15

Who pays? (9)

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LON/00AH/LSC/2017/0435- the “Cityscape” case (contd)

- On the ‘waking watch’ costs:

  [48] “*The Fire Safety Guidance Note issued by the London fire Brigade on 19 September 2017 falls within the ambit of "the requirements and directions of any competent authority". Equally the waking watch cost is a "reasonable and proper expense ... incurred by the manager in and about the maintenance and proper and convenient management and running of the Development". Indeed had we been asked to decide the point we would have been satisfied that the waking watch cost falls within paragraph 2 insofar as it is incurred in "providing and paying such persons as may be necessary in connection with the upkeep of the property". We do not consider that the wording is obviated by payment for the fire marshals through an independent subcontractor*.

Who pays? (10)

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LON/00AH/LSC/2017/0435- the “Cityscape” case (contd)

- On the ‘cladding’ costs:

  “[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 and as we pointed out at paragraph 44 if the manager is obliged to do the work the tenants are obliged to contribute to the cost.”

Who pays? (11)

- **MAN/OOBR/LSC/2018/0016 – The "Green Quarter" case**
  - FTT concluded that cladding replacement and 'waking watch' costs were recoverable under the service charge provisions at Cypress Place and Vallea Court, Manchester
  - Charges fell within a number of provisions of the lease – including 'sweeping up' clauses of (1) works for "general benefit of the apartments in the building" and (2) works and/or services deemed necessary by the landlord in accordance with "the principles of good estate management"

- **MAN/OOBR/LSC/2017/0068**
  - FTT concluded that cost of providing fire marshals for a 'waking watch' was recoverable under para 6.18 "complying with the requirements and directions of any competent authority…." + as cost of maintaining insurance for the property – "*… it is hard to see how the Applicant would not have run a significant risk of being in breach of the policy if it did not implement a 'Waking Watch'".*

Central government funding

- **Public sector buildings:**
  - 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. Estimated cost: £400 million.
  - Not means tested and applies regardless of whether works started, completed, or not yet started.

Central government funding (2)

- **Private sector buildings:**
  - In May 2019, the Government announced a fund of £200 million to “fully fund the replacement of unsafe aluminium composite material (ACM) on high-rise private residential properties where building owners have failed to do so”
  - Fund available for the benefit of leaseholders who would otherwise have an obligation to meet the cost of cladding remediation by virtue of provisions in their leases.
  - Building owners expected to actively identify and pursue all reasonable claims against those involved in the original cladding installations, and to pursue insurance and warranty claims where possible.
  - Applications open July – end Dec 2019

Central government funding (3)

- Exclusions
- The fund will not be available for:
  - non-residential buildings.
  - buildings under 18m in height.
  - non-ACM cladding systems or other structural works which are not directly related to the remediation of unsafe ACM cladding systems.
  - buildings where a warranty claim for the full costs of remediation has been accepted.
  - costs which would not otherwise be recovered from residential leaseholders through the service charge provisions in their leases
  - buildings owned by social sector landlords who should instead apply for funding from the Social Sector ACM Cladding Remediation Fund9.Text

Dispensation of consultation requirements

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- The FTT has dispensed with some or all of the consultation requirements in a number of cases, including:
  - CAM/ 42UWLDC/ 2018/0015 (St Francis Tower, Ipswich, cladding & installation of fire alams)
  - CHI/OOMR/LDC/2618/6038 (Horizon Building, Hampshire, fire alarm system)
  - LON/OOAW/LDC/2018/0104 (Collier House, London, fire detection and alarm system to obviate need for 'waking watch')
  - AN/OOBN/LDC/2018/43005 (The Cube, Manchester, improved safety alarm system and 'waking watch' provision following enforcement notice)

Dispensation of consultation requirements

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- Factors considered in FTT decisions include:
  - Urgency of the works – and potential consequences if not undertaken
  - Whether Enforcement Notice served / likely to be served by the relevant fire authority
  - Reports (etc) obtained by the applicant – and extent to which applicant has tried/been able to obtain competitive estimates
  - Engagement with / information provided to tenants

Future developments?

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- June 2019 MHCLG consultation: “Building a Safer Future: Proposals for reform of the building safety regulatory system”
  - Sought views on (inter alia) safety reviews of existing buildings & how costs associated with remediation works could be managed. Consultation paper expressly refers to review of service charge regime as part of Gvt’s wider leasehold reform agenda
  - Any new legislation will require consideration against service charge provisions in leases – or in drafting new /renewal leases
- Potential litigation against those “responsible” for installing cladding?
  - Eg New Capital Quay leaseholders v Galliard Homes Ltd & Roamquest Ltd

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Thank you for listening

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