



BRIEFING PAPER

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Leasehold high-rise flats: who pays for fire safety work?

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Summary

Following the Grenfell Tower fire in June 2017 the Government established a Building Safety Programme with the aim of “ensuring that residents of high-rise residential buildings are safe, and feel safe from the risk of fire, now and in the future.”

At 16 February 2018, 288 residential blocks in England had been identified as having Aluminium Composite Material (ACM) cladding, i.e. of the same or similar type to that applied to Grenfell Tower. These blocks are described as “unlikely to meet current Building Regulation guidance.”

Remediation work is complex, and the associated costs are expected to be significant. The question of who is responsible for paying for remedial works has been described as “a legal quagmire” and is at the forefront of debates about how quickly the necessary work can be carried out and the financial implications for some residents, particularly those living in privately owned blocks.

This short note considers the debate about where the costs of the necessary works might fall.

Affected long leaseholders are best advised to seek professional legal advice and assistance. The [Leasehold Advisory Service](#) and the [Leasehold Knowledge Partnership](#) (which also acts as the secretariat for the All-Party Parliamentary Group (APPG) on leasehold reform) are potential sources of advice. The LKP has a dedicated email address: cladding@leaseholdknowledge.com. The APPG will be considering fire safety issues at its next meeting on 26 April 2018.

1. Who owns the affected blocks?

The Ministry of Housing, Communities and Local Government (MHCLG) releases a monthly Building Safety Programme bulletin which contains data on progress in identifying high-rise residential buildings with unsafe cladding combinations. The [February 2018 bulletin](#) notes that, as at 16 February 2018, 314 buildings over 18 metres had been confirmed as having ACM cladding, of which 301 were “unlikely to meet current Building Regulations guidance.”¹ 158 of the affected buildings are social housing blocks owned/managed by a local authority or housing association, while 130 are privately owned residential blocks, including hotels and student accommodation.

¹ MHCLG, [Building Safety Programme: monthly data release - February 2018](#), 27 February 2018

2. Blocks owned by social landlords

When major works are carried out on blocks owned by social landlords there is no additional cost to be met by secure and assured tenants.

Long leaseholders in these blocks *could* be liable to pay a contribution towards the cost of the works depending on the wording of their lease agreements. As a rule, lease agreements will provide for the recovery of the cost of major works from long leaseholders; this can result in individuals facing some substantial bills, e.g. for roof or lift replacement. More information can be found in the Library briefing paper: [Leaseholders in social housing: paying for major works \(England\)](#).

The Government has made repeated references to a commitment by social landlords not to recover the cost of remedial works associated with cladding safety from long leaseholders:

Just as social landlords are not seeking to pass on costs for cladding remediation, in the private sector we believe that the morally right thing to do is for landlords to not pass these costs onto leaseholders.²

David Orr, CEO of the National Housing Federation, the representative body of housing associations, responded to this saying:

As freeholders of leasehold properties, our members have legal responsibilities as part of their leases and are therefore legally entitled to recoup the reasonable costs through service charges.³

Some social landlords *are* seeking to recover a proportion of the cost of associated fire safety works from their long leaseholders. For example, 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:

Legal advice has been received that the cost of these works would be recoverable from leaseholders by way of service charges and the sprinkler systems would be maintained by the Council. Of the 6,401 properties that would benefit from the installation, 2,358 are leasehold. There are 1,315 resident leaseholders and 1,043 leaseholders living away from their property.⁴

A further LBW report prepared by the authority's Director of Housing and Regeneration, refers to the council's fiduciary duty to recharge long leaseholders:

The Council is of the view that if works are necessary and chargeable under the terms of the lease **then the Council 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.⁵

LBW resolved to refer the decision to recharge long leaseholders to a First-Tier Tribunal:

In recognition of concerns raised by some leaseholders over the proposed works, the report recommends that the Council makes a proactive application to a First Tier Property Tribunal to ensure that the leaseholders' voice is listened to and to seek a clear decision on the Council's ability to undertake the works.⁶

² [Flats: Safety: Written Question: HL4910](#), 5 February 2018

³ HC Deb 21 December 2017 c455WH

⁴ [LBW, Paper 17-269, September 2017](#)

⁵ [LBW, Paper 18-12, 2018, para 5](#)

⁶ *Ibid.*

There has been little reference to the potential for authorities to be challenged for breach of their fiduciary duty where no attempt is made to recover contributions from long leaseholders if the leases in question allow for this. During a Westminster Hall debate on fire safety and cladding on 6 March 2018, Andy Slaughter made the point that not charging leaseholders in social housing blocks for fire safety works means that “ultimately the money for them will come from tenants.”⁷

2.1 Additional Government funding?

Another contentious issue is whether the Government will make additional funding available to assist social landlords in carrying out fire safety work. When pressed on this issue the Government has said:

My Department has made clear that it considers that building owners should take responsibility for funding fire safety measures including replacement of dangerous cladding. Government will consider financial flexibilities for local authorities who need to undertake essential fire safety work to make a building safe.⁸

On 15 January 2018, Tamara Finkelstein, Director-General, Building Safety MHCLG, confirmed that 36 requests for assistance had been received from local authorities when giving evidence to the Communities and Local Government (CLG) Select Committee:

Nine of them are authorities that have aluminium composite material cladding; others have other work they are looking to do. The criterion is that, if there is essential work that is required to make a building safe, we can look at financial flexibilities in terms of having more borrowing headroom or accessing other general funds that normal restrictions would not allow them to use in order to fund the work.⁹

The number of authorities requesting assistance has risen to 41 according to a PQ response provided on 8 March 2018.¹⁰

Tamara Finkelstein went on to confirm that discussions were ongoing with four of the authorities to determine what flexibilities might be right in their circumstances.¹¹ Melanie Dawes, Permanent Secretary at MHCLG, confirmed that no flexibilities for any authority had been confirmed at 15 January 2018 because discussions had not been concluded.¹² This was still the case on 8 March 2018.¹³

Brent Council wrote to the Secretary of State in July 2017 – the council’s stock is not affected by ACM cladding but a decision has been made to undertake further fire safety works in high rise blocks at an estimated cost of £10 million. Brent’s letter outlines the potential impact of funding the work on its planned and reactive repairs service:

The funding of these improvements needs careful consideration. The Council will reach its Housing Revenue Account (HRA) borrowing cap for capital purposes in 2018/19. You will already be aware that your department's policy of reducing social housing rents by 1% per year until 2020 has put councils' HRAs under considerable strain - the cost of this policy change in Brent is in aggregate £23.3m to 2020. The impact of your department's, policy on high value voids will also increase that pressure. The Council does not believe that social housing tenants should have to pay for these improvements to the stock through a deprioritisation of both planned and reactive repair and maintenance works. For example, £10m equates to 40 new homes or the replacement of 4000 boilers. As such, the Council resolved to request the

⁷ [HC Deb 6 March 2018 c83WH](#)

⁸ [High Rise Flats: Fire Prevention: Written Question – 127874](#), 27 February 2018

⁹ [HC 553, 15 January 2018, Q34-35](#)

¹⁰ [Local Government Finance: Fire Prevention: Written question – 130236, 8 March 2018](#)

¹¹ [Ibid., Q35](#)

¹² [Ibid., Q38](#)

¹³ [Local Government Finance: Fire Prevention: Written question – 130236, 8 March 2018](#)

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Government to provide the direct financial support to meet the costs incurred. This letter acts as our official request.¹⁴

The Secretary of State wrote to local authorities and housing associations on 26 July 2017 saying:

Where a local authority has concerns about funding essential fire safety measures, they should approach us as soon as possible to discuss their position.

Where works are necessary to ensure the fire safety of a building, we will ensure that lack of financial resources will not prevent them going ahead. It would not include general improvements or enhancements to buildings which go beyond this.¹⁵

Melanie Dawes was pressed on the Ministry's position on funding the retro-fitting of sprinklers by CLG Select Committee members on 15 January 2018. She said:

We are primarily dealing with a problem of faulty cladding here. It was put up and it is now clear it was not safe, particularly when combined with certain types of insulation. That is our primary focus for this work. For any government support on funding, that has to be our primary focus. As Tamara said, in some circumstances local authorities are very clear that sprinklers are an important part of that package. We have not ruled that out, but we are having individual conversations with individual local authorities about that.¹⁶

During a Westminster Hall debate on leasehold reform on 21 December 2017, the Shadow Secretary of State for Housing, John Healey, called on the Government to fund some of the costs social landlords are facing:

The consequences of Grenfell for residents and owners in other high-rise residential tower blocks are becoming clearer, and the wider weaknesses in the leasehold system are thrown into sharp and urgent relief by the challenges that come from Grenfell: the immediate fire safety measures that need to be put in place, the substantial remedial work required in many cases, and the question of who really is responsible and who really should be paying for that.

There is also the question of whether some freeholders will abuse or misuse the first-tier tribunal system to try to prove themselves against any challenge for passing on these very heavy costs to leaseholders. There is a concern among some social landlords that such practices will be followed and certainly a concern about privately-owned residential blocks.

The Grenfell Tower fire was a national disaster. People expect national leadership and a national response from Government. It exposed—we had only really had warnings from coroners' reports on earlier fatal fires—the complete collapse of the national system of building control and regulation. Therefore, the national Government must take some responsibility by putting in place measures immediately to ensure that it does not happen again.

If the Government were willing, for instance, to reconsider their point-blank refusal to help fund some of the costs that social landlords face in completing essential remedial fire safety work, they could make it a condition of any funding help they give that leaseholders are protected from bearing any of that cost.¹⁷

The point was repeatedly made by Members during the Westminster Hall debate on 6 March 2018, that the installation of combustible cladding had arisen due to a failure of the regulatory system and that that it should not be left up to tenants, via their rent payments, nor long leaseholders via service charges, to meet the cost of the necessary remedial work.¹⁸

¹⁴ [Brent Council's letter to Sajid Javid](#), 13 July 2017

¹⁵ *Inside Housing*, "[Javid responds to councils on fire safety funding](#)", 27 July 2017

¹⁶ [HC 553, 15 January 2018, Q52](#)

¹⁷ [HC Deb 21 December 2017 c490WH](#)

¹⁸ [HC Deb 6 March 2018 c78WH](#)

3. Privately owned blocks

As noted above, there are around 130 privately owned residential blocks, including hotels and student accommodation, with ACM cladding.

Flats in the affected residential blocks will be owned on a long leasehold basis. As with long leaseholders in blocks owned by social landlords, long leaseholders *could* be liable to pay a contribution towards the cost of the remedial works depending on the wording of their lease agreements. The Government funded Leasehold Advisory Service has posted the following response to the question of who pays for fire safety measures, such as changing cladding on blocks of flats, on its website:

It depends on the terms of the lease between the building owner (the freeholder) and the leaseholders.

Sweeping-up clauses

Even if the lease doesn't say anything about passing on fire safety costs to leaseholders, the freeholder might still be able to.

Freeholders might use something called a '[sweeping-up clause](#)'. This could allow freeholders to get leaseholders to pay for a range of unexpected costs.

These costs could include:

- money spent for the 'benefit of the building'
- money spent to enable 'good estate management'¹⁹

The Association of Residential Managing Agents (ARMA) has warned that leaseholders could face fire safety bills "in the tens of thousands". ARMA has proposed that the Government should provide interest-free loans to leaseholders to cover the cost of the work to avoid safety being compromised by delays in removing ACM cladding.²⁰

During the aforementioned Westminster Hall debate on 21 December 2017, the Shadow Secretary of State for Housing also suggested the establishment of a Government-backed loans scheme for private landlords:

They could consider, for instance, a Government-backed loans scheme for private landlords who genuinely struggle to cover the costs themselves. The Government could also consider a similar condition that might help to address the concerns the Minister has heard from some of my hon. Friends about the position of leaseholders in private high-rise blocks. In any case, I ask the Minister to reflect carefully on the points that have emerged in the debate, linked to the work required after Grenfell Tower, and early in the new year to make a clear statement on what the Government will do to try to deal with the concerns for leaseholders with both private landlords and social landlords.²¹

During the debate on 6 March 2018, Robert Neill made the point that interest-free loans would still place a burden on leaseholders:

I understand that interest-free loans have been suggested, but a lot of these people are already suffering, so how will they repay the capital? I am glad that additional funding has been made available to the Leasehold Advisory Service, but again, that does not address the underlying situation. A failure of regulation is a failure of governance, whoever was in government at the time, so ultimately the Government

¹⁹ [Who pays for fire safety work such as changing the cladding on blocks of flats?](#) 2017

²⁰ *Inside Housing*, "[Leaseholders across the country could face fire safety bills in the tens of thousands](#)", 18 January 2018

²¹ [HC Deb 21 December 2017 c490WH](#)

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need to stand behind those affected, rather than expecting the costs to be picked up by individuals who did nothing and had no control over what happened.²²

One block that has attracted media attention is Citiscape in Croydon which is managed by Firstport on behalf of Proxima Properties. The estimated cost of removing and replacing the cladding on this block is reported to be between £1.8 and £2 million. Reports have said that this could result in leaseholders facing average bills of £21,000 depending on the size of their flats. Firstport referred the question of the recoverability of the cost from leaseholders to a First-Tier Tribunal (Property Chamber) – on 13 March 2018 the Tribunal ruled that the cost *is* recoverable from the block's leaseholders.²³ However, the leaseholders were told that they can appeal the judgment and the judge reportedly said:

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 has been suggested elsewhere, the relevant building regulations were not fit for purpose.²⁴

Inside Housing has reported that the property management company in charge of New Capital Quay in Greenwich, a block which has similar cladding to that of Grenfell Tower, 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.²⁵

The question of who might be responsible for the cost of remedial works is further complicated where defects are identified with the installation of cladding. For example, *Inside Housing* has 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.²⁶

Leaseholders are also being asked to meet the cost of 'waking watch' fire marshals. These marshals have been installed in affected blocks to provide additional fire safety protection pending the removal and replacement of ACM cladding. Costs for this service are reported to be around £4,000 per week. A First-Tier Tribunal decision concerning the recoverability of these costs from long leaseholders was issued on 24 January 2018. The Tribunal in this case found that the costs were recoverable based on the wording in the lease agreements.²⁷ Giles Peaker of the specialist housing law website, Nearly Legal, commented:

The wording of similar clauses will be stress tested in a manner that these usually uncontroversial and untested clauses have not seen before.²⁸

More information on the case and its implications can be found on [the Leasehold Advisory Service's website](#).²⁹

²² [HC Deb 6 March 2018 c80WH](#)

²³ *Inside Housing*, "[Leaseholders lose appeal over cladding removal costs](#)", 14 March 2018

²⁴ *Ibid.*

²⁵ *Inside Housing*, "[NHBC faces liability claims for dangerous cladding on tower blocks](#)", 29 January 2018

²⁶ *Inside Housing*, "[Fire safety: the leaseholder issue](#)", 2 March 2018

²⁷ [E & J Ground Rents No.11 LLP various leaseholders of Fresh Apartments, Salford](#)

²⁸ [Fire Safety - Who pays?](#) 4 February 2018

²⁹ [The use of wardens and recovery of costs from leaseholders](#), January 2018

3.1 The Government response

The Government have called on freeholders to cover the cost of the necessary works and have provided additional funding for the Leasehold Advisory Service:

The Secretary of State has made clear that building owners should do all they can to protect leaseholders from costs relating to interim measures and cladding remediation – either funding it themselves or looking at alternative routes such as insurance claims, warranties or legal action.

It is important that leaseholders are able to access specialist advice to understand their rights. The Secretary of State announced on 4 December that the department is providing additional funding to the Leasehold Advisory Service (LEASE), an arm's length-body which provides free initial legal advice to leaseholders, to advise on fire safety issues.

The department is keeping the situation under review.³⁰

The suggestion that freeholders should meet the cost has been described as 'unrealistic' by some. For example, the following observations were made on the [Nearly Legal housing law website](#):

- The current owners of some blocks may not have been responsible for commissioning the 'flawed' work – on this basis they may be reluctant to fund the necessary works.
- Some private landlords may not be able to fund the works. For example, a lessee-owned freehold vehicle (e.g. a nominee purchaser post-enfranchisement) may struggle to raise the finance given that the capital value of the building is primarily in the long leases.
- Traditional private landlords hold a freehold reversion in order to generate an income stream and not to fund substantial works "where the benefit is, on any view, at least shared with the leaseholders."³¹

During the Westminster Hall debate on 6 March 2018, Robert Neill referred to the fiduciary duty owed by directors of commercial companies to their shareholders and the fact that this could represent a 'conflict' for those considering who should meet the cost of fire safety works.³² Several Members speaking in the debate mentioned the moral duty on freeholders the Minister had referred to, pointing out that "a moral duty is not legally enforceable."³³ Responding to the debate, the Minister, Dominic Raab, said:

In the private sector, of course, the allocation of responsibility depends on the terms of the leasehold arrangements, as qualified by general law. The determination of the legal position will obviously need to be settled ultimately by a court. Proceedings are under way in the constituency of the hon. Member for Croydon North, as I am sure he knows. I took the point that my hon. Friend the Member for Hendon (Dr Offord) made: that it cannot be right for a Minister to pre-empt or prejudge the legal determination of a relationship, where it is not only spelled out in the leasehold arrangement, but qualified by general law.

In some cases, the costs fall, in practice, to landlords or building owners; it may be clearer in some leases than in others. Where the costs do not fall to landlords or building owners as a matter of strict law, we continue to urge those with responsibility to follow the lead of the social sector. We urge those private companies to do the right thing, and not to attempt to pass the costs on to residents. They can meet some of those costs—hon. Members asked about this—through alternative routes such as insurance claims, warranties or legal action. It is rightly for them to

³⁰ [High Rise Flats: Written Question: 126695](#), 8 February 2018

³¹ [An air of unreality](#), 4 December 2017

³² [HC Deb 6 March 2018 c80WH](#)

³³ *Ibid.*

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pursue those avenues. They have the financial means, the relationship—legal or otherwise—and the wherewithal to do so. The Secretary of State and I have been clear about that in direct conversations, including with those who own the property in the constituency of the hon. Member for Croydon North. Where building owners are seeking to pass on remediation costs to leaseholders, it is important that leaseholders are able to get specialist advice. The Government have provided free legal advice and support through a range of measures, including the Leasehold Advisory Service, or LEASE—a free and tailored service.³⁴

³⁴ Ibid., cc102-3WH

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