

Sky high cladding costs - Are you at risk?

Wednesday 22 April

Sky high cladding costs - are you at risk?

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It is conservatively estimated that 2000 blocks of flats nationally have cladding that is not safe. The result is that flat owners are having to pay tens of thousands of pounds to rectify the unsafe cladding. Many flat owners are just ignoring the issue, unaware that insurance companies are threatening to refuse to insure the blocks of flats in the future unless the costly works are done.

In this live Webinar **David Marsden**, Property Litigation Partner at Freeths and barristers **Simon Allison** and **Brooke Lyne** from Landmark Chambers will discuss:

- What exactly is the issue with cladding?
- Who bears the costs: Landlord, Tenants, Developer?
- What are the Government doing?
- What other options are there?
- What is the likely future of such claims?



David Marsden

Partner

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David specialises in all commercial and residential disputes including rights to light, possession actions, dilapidations, consent to assign/sub-let, rent disputes, property fraud and insolvency. One of David's cases was listed by the Estates Gazette as a Top 10 Case of 2019.



Simon Allison

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Simon is a property practitioner who is frequently instructed across the full range of real property disputes, including landlord and tenant, issues of adverse possession, restrictive covenants, land registration and easements.



Brooke Lyne

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Brooke is a property practitioner with a diverse range of experience in residential, commercial and real property matters. She had a very busy start to 2020 with two cases in the Court of Appeal in January 2020. Judgments are awaited in both cases.

- What is cladding?
 - Non-structural
 - External
 - Insulate
 - Improve appearance
- Why can it be a fire risk?
- What is ACM?
 - Aluminium Composite Material



History of Fires with Direct Link to ACM

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Year	Building/City/Country	Fatalities
1991	Liverpool, UK	None
1999	Garnock, Scotland	None
2004	Television Cultural Ctr, Beijing, China	7 injured
2010	Shanghai, China	58 / 70 injured
2010	Roubaix, France	7
2012	Saif Belhasa Building, Dubai	2 injured
2012	Tamweel Tower, Dubai	None
2014	Lacrosse, Melbourne, Australia	None
Feb, 2015	The Torch, Dubai	None
Nov, 2015	The Torch, Dubai	None
2016	The Address, Dubai	None



Grenfell Tower

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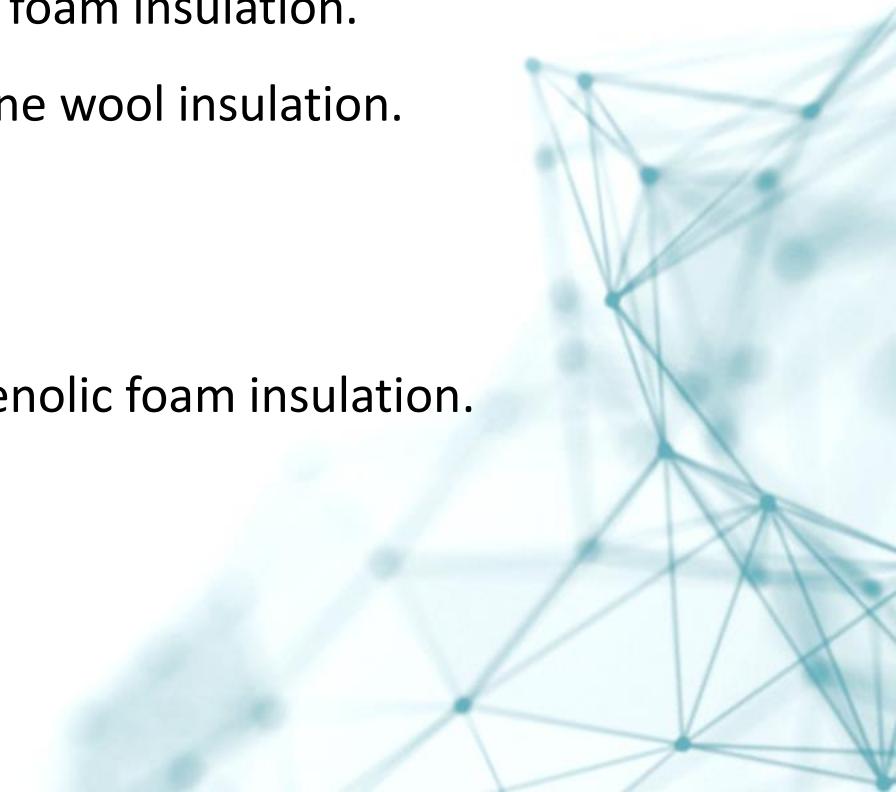
- 24 storey building (67m / 220ft)
- 120x 1 & 2 bed flats
- Non-structural partitions
- 1 stairwell
- Constructed 1974
- Refurbished 2016 (£8.7m)
- At least 72 people died
- At least 70 people injured



Governmental Response – ACM Testing

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Seven tests were undertaken so that urgent advice could be issued to building owners:

- Test 1** - ACM cladding with unmodified polyethylene filler with polyisocyanurate (PIR) foam insulation.
 - Test 2** - ACM cladding with unmodified polyethylene filler with stone wool insulation.
 - Test 3** - ACM cladding with fire retardant polyethylene filler with PIR foam insulation.
 - Test 4** - ACM cladding with fire retardant polyethylene filler with stone wool insulation.
 - Test 5** - ACM cladding with A2 filler with PIR foam insulation.
 - Test 6** - ACM cladding with A2 filler with stone wool insulation.
 - Test 7** - ACM cladding with fire retardant polyethylene filler with phenolic foam insulation.
- Tests 1, 2, 3 and 7 all failed.
- 
- A faint, abstract graphic in the bottom right corner consisting of a network of light blue dots connected by thin lines, forming a complex polygonal shape.

- £600 million
 - £400 million social housing sector (announced on 16 May 2018)
 - £200 million private sector (announced on 9 May 2019)
- Only for class A1 or A2-s1 ACM cladding
- Only for buildings over 18m in height
- Deadline of December 2019 to apply
- Required a declaration form from each leaseholder
- Conditional upon warranty claims being pursued (and refund any funds recovered)



Government Response - Further Testing

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July 2019

- A HPL panel system with fire retardant (Class B-s1, d0) together with stone wool insulation was tested.
- The Government advised that HPL systems should be removed when used in combination with combustible insulation but refused to fund its removal.

March 2020

- The Metal Cladding and Roofing Manufacturers Association funded a private test of standard HPL panels.
- The HPL cladding system failed the test.

April 2020

- The Government published a report on other types of cladding having tested these in collaboration with BRE.
- It supported the Government's advice published in January 2020 which recommended the assessment/remediation of:
 - ACM
 - EWI
 - HPL Class D and C
 - Spandrel Panels

Governmental Response - Grants - New Fund

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- Announced on 11 March 2020
- £1 billion
 - Both private and social sectors
 - In addition to the £600 million ACM fund
- Applications likely to open in May 2020
- Considered on a case by case basis
- Covers euroclass D and class C
 - HPL (high pressure laminate) cladding (non FR Grade)
 - Types of timber cladding
 - External wall Insulation (EWI) systems with a render or brick slip
- Does not cover other safety defects:
 - Missing fire breaks
 - Faulty compartmentalisation
 - Waking watches
 - Fire alarm installation
- Conditional upon building owners pursuing all other legal remedies available to them
- 18+ metre height limit



Driver for Change

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- Governmental Response
 - Funds available
 - Required steps before eligible
- Insurance
 - Increased premiums
 - Refusal to cover in the future
 - Effect



Data on ACM clad buildings

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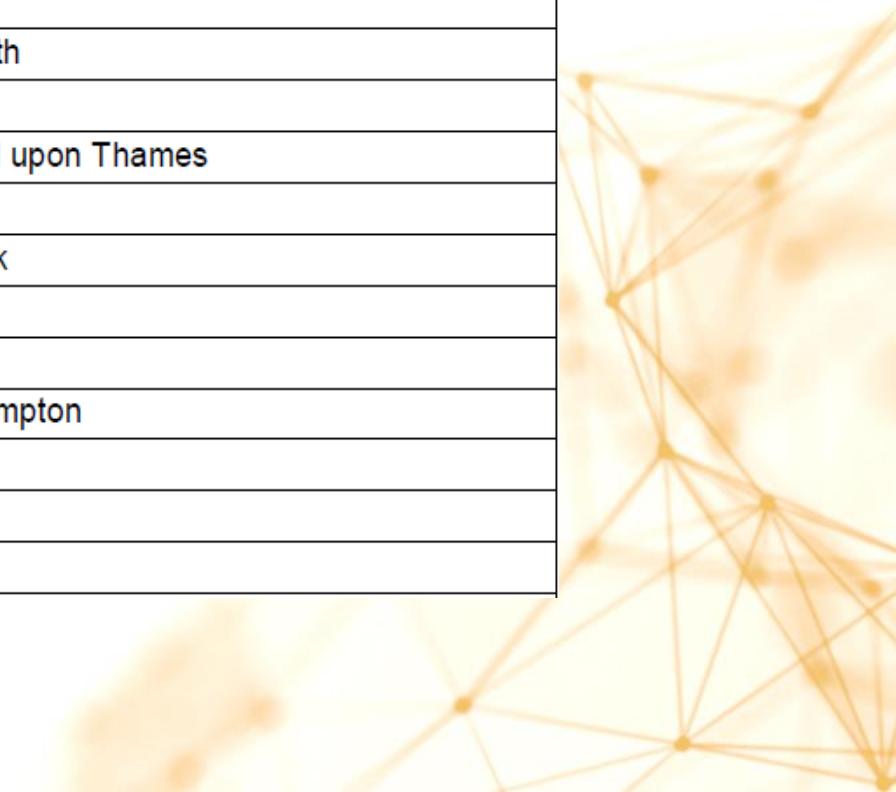
March 2020

- 457 high-rise residential and public buildings in England identified w/ACM
- 144 fully remediated (only 25 are private residential blocks)
- 313 not yet fully remediated, of which:
 - 84 social sector
 - 182 private residential
 - 20 student accommodation
 - 20 hotels
 - 7 public buildings such as hospitals
- Currently NO official data on high-rise buildings clad in other forms of combustible cladding. Likely several thousand more buildings affected.

Number of buildings with ACM cladding systems unlikely to meet Building Regulations yet to be remediated⁴, by local authority England, 31 March 2020

(a) Local authorities with 1 to 5 buildings with ACM cladding systems unlikely to meet Building Regulations yet to be remediated

Birmingham	Harrow	Oldham
Bournemouth, Christchurch and Poole	Hounslow	Plymouth
Bradford	Islington	Portsmouth
Bristol, City of	Kensington and Chelsea	Reading
Bromley	Kirklees	Richmond upon Thames
Cambridge	Leicester	Slough
City of London	Lewisham	Southwark
Croydon	Medway	Sutton
Ealing	Merton	Trafford
Elmbridge	Milton Keynes	Wolverhampton
Gateshead	Newcastle upon Tyne	
Hackney	Norwich	
Hammersmith and Fulham	Nottingham	



Local Authorities

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(b) Local authorities with 6 to 10 buildings with ACM cladding systems unlikely to meet Building Regulations yet to be remediated		
Barnet	Lambeth	Sheffield
Camden	Leeds	
Haringey	Liverpool	
(c) Local authorities with 11 to 20 buildings with ACM cladding systems unlikely to meet Building Regulations yet to be remediated		
Brent	Wandsworth	
Manchester	Westminster	
(d) Local authorities with over 20 buildings with ACM cladding systems unlikely to meet Building Regulations yet to be remediated		
Greenwich	Salford	
Newham	Tower Hamlets	



Why should you care?

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Everyone

- Obvious safety issues

Tenants

- **Cost:** £10,000's per flat
- **Insurance:** huge increase in premium and future refusals to insure
- **Saleability:** will need to be addressed before any sale
- **Mortgage:** risk of loan being called in
- **Delay:** delay could see causes of action against third parties be lost
- **Safety:** Obvious risk to life



Why should you care?

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Building Owners

- Government/local authority enforcement
- Responsibility: “responsible person” and terms of the lease

Developers/Cladding Companies

- Potential costs
- Limitation Issues
- Being aware of what is coming: building owners are likely to be in contact
- Reputational risks



Enforcement

Brooke Lyne



Statutory Regimes

- The Regulatory Reform (Fire Safety) Order 2005
- Housing Act 2004

The Regulatory Reform (Fire Safety) Order 2005

- Applies in relation to all premises that are not expressly excluded (Art.6)
 - “domestic premises” are outside the scope of the Order
- Imposes a whole range of duties including obligations to carry out risk assessments, mitigate against fire risks etc. (Arts.8-22)
- There is a duty on the responsible person “to take such general fire precautions as may reasonably be required in the circumstances of the case to ensure that the premises are safe.” (Art.8)

The Regulatory Reform (Fire Safety) Order 2005

- Who has to comply?
 - A “responsible person”
 - But, also “every person, other than the responsible person...who has, to any extent, control of those premises so far as the requirements relate to matters within his control”

The Regulatory Reform (Fire Safety) Order 2005

- Enforcement for non-compliance
 - By the fire and rescue authority for a particular area
 - Inspectors have powers to inspect and require documents to be produced
 - Notices
 - Alteration notice (Art.29)
 - Enforcement notice (Art.30)
 - Prohibition notice (Art.31)

The Regulatory Reform (Fire Safety) Order 2005

- Enforcement
 - Non-compliance with a notice is an offence
 - Failure to comply with any of the fire safety duties, where that failure places one or more relevant persons at risk of death or serious injury in case of fire, is also an offence (Art.32)
- Reform?
 - Fire Safety Bill

Housing Act 2004

- Imposes duties on local housing authorities to improve housing standards and require remedial works to be carried out
- System of assessing conditions and evaluating hazards for enforcement purposes
 - Category 1 or Category 2 hazards
- LHAs entitled to carry out inspections (s.4)

Housing Act 2004

- Applies in relation to “residential premises” (s.1)
- So, usually enforcement is against the flat owner
- But, in the case of premises containing flats, action may be taken against an “owner” of premises in relation to the common parts of the building containing the flats, if the authority are satisfied that the deficiency from which the hazard arises is situated in the common parts
- LHA must consult the fire authority before bringing enforcement action

Housing Act 2004

- Enforcement
 - Hazard awareness notice (ss.28-29)
 - Improvement notices (s.11)
 - Prohibition orders (s.20)
- Will be served on the “owner” and the person who the LA considers “ought to take the action” that is required.
- You can appeal a notice in the FTT
- Failure to comply with an improvement notice or prohibition order is an offence (ss.30, 32)

Conclusion

- There has been a notable lack of enforcement to date
- But, this is unlikely to continue

Who Pays & Future Developments

Simon Allison



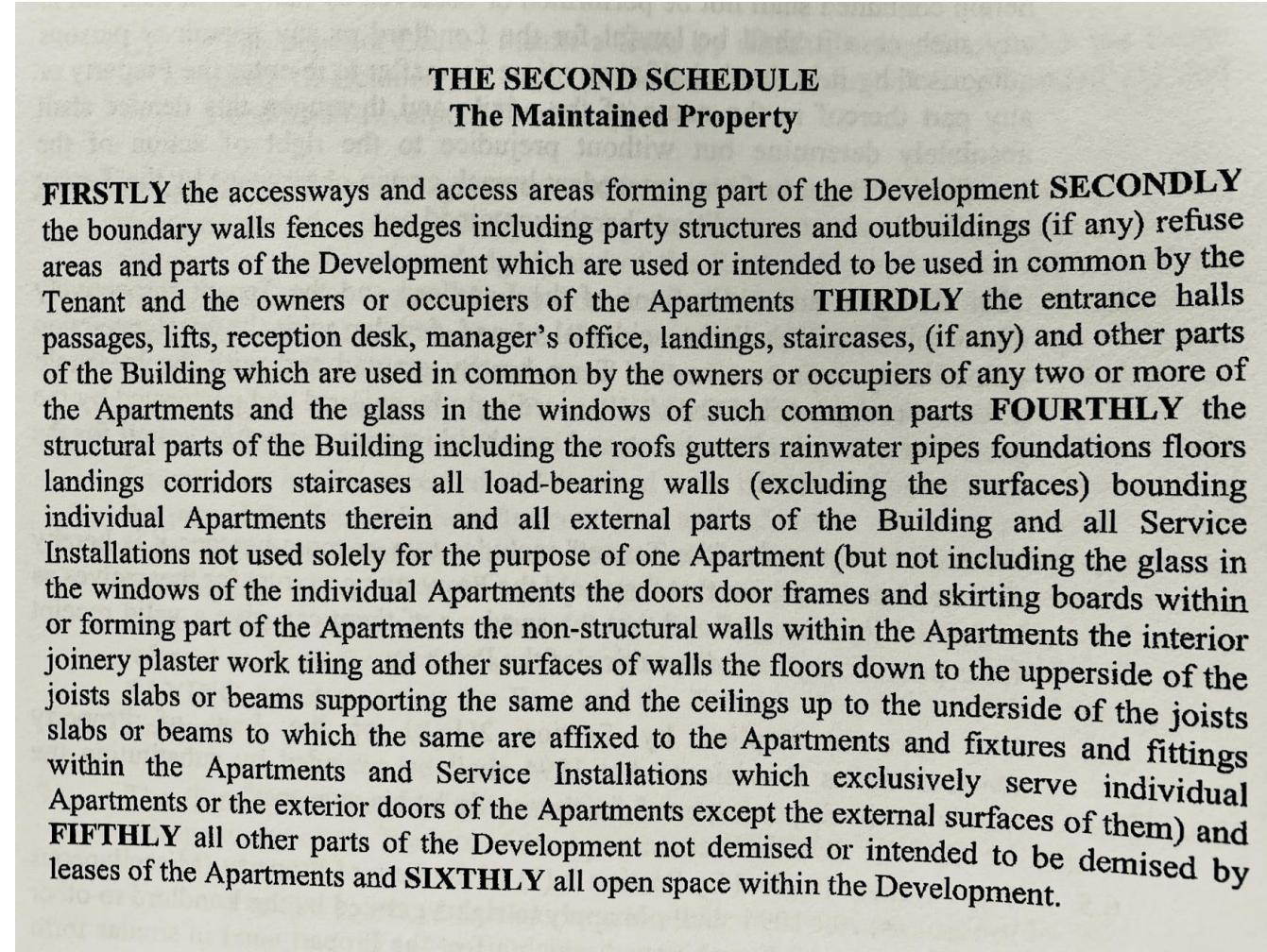


Potential paying parties

- Developer
- Building inspector?
- Government
- Warranty Provider
- Landlord
- Leaseholders
- Managing agent?



What does the lease say?



Service charge expenditure

- To keep in repair / good order / substantial condition (depends...)
 - Quick v Taff Ely BC [1986] QB 809
 - Holding and Management Ltd. v Property Holding [1990] 1 All ER 938
 - Welsh v Greenwich LBC (2001) 33 HLR 40
- To renew / replace / rebuild ‘where necessary’ (probably, where resi)
- To ‘insure and keep insured’
 - E&J Ground Rents No.11 LLP v Leaseholders of Fresh Apartments [2018] 1 WLHK 364
- To comply with requirements and directions of any competent authority
- To comply with statute and regulations orders and byelaws
- Sweeper clause (in service charge context)

What does the future hold?

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Fire safety

APPROVED DOCUMENT

B

VOLUME 1 – DWELLINGHOUSES

- B1 Means of warning and escape
- B2 Internal fire spread (linings)
- B3 Internal fire spread (structure)
- B4 External fire spread
- B5 Access and facilities for the fire service

Grenfell
Tower
Inquiry

Building a Safer Future

Independent Review of Building
Regulations and Fire Safety:
Final Report

So What Can Tenants do?

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- Something!
 - Engage with residents
 - Engage with experts
- Find out your options
 - Sinking Fund
 - Requirement for grant
- Likely Options
 - Residents fund - apply for grant
 - Third party options



Any Questions?

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- We will now deal with the live chat questions....
- If we do not get to your question, don't worry, we will follow up with you directly in the few days after the seminar.
- Alternatively, please contact David Marsden directly by email at david.marsden@freeths.co.uk.

