Department for Levelling Up, Housing & Communities

Lord Greenhalgh
Minister of State for Building Safety and Fire
(joint with Home Office)

Department for Levelling Up, Housing and Communities
4th Floor, Fry Building
2 Marsham Street
London SW1P 4DF

Email: Stephen.Greenhalgh@communities.gov.uk

Baroness Hayman of Ullock
House of Lords
London SW1A 0PW

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Dear Baroness Hayman of Ullock,

I would like to thank you for your contributions during the Building Safety Bill Committee debate on 28 February 2022. As promised, I am following up with further information about the specific aspects of the amendments introduced on 14 February 2022.

Leaseholder Protection

We agree that it is fundamentally unfair that innocent leaseholders, most of whom have worked hard and made sacrifices to get a foot on the housing ladder, should be landed with bills they cannot afford, to fix problems they did not cause. That is why, with these amendments we are seeking to spread the costs of decades of malpractice fairly and equitably across the system and ensure above all, that the most vulnerable and at-risk leaseholders are protected.

This is how I envisage the "waterfall" of responsibility for remediation costs as set out in the amendments to work in practice:

1) A developer or a landlord associated with a developer (or if there is more than one, equal amounts from each) (the 'responsibility' test);
2) A landlord which passes the 'cost contribution' test (or if there is more than one, apportioned amounts from each);
3) The landlord seeks recovery from third parties in accordance with clause 117 of the bill;
4) Relevant leaseholder caps need to be reduced by any amount they have spent on costs such as waking watches over the past five years;
5) Relevant leaseholder caps need to be reduced proportionately if they are a shared owner;
6) Leaseholders then pay up to the amount of any caps if applicable or the amount their service charge would have been (i.e. less than the cap in scenarios where the remediation does not cost as much as this);
7) The remainder of the amount for repair should be apportioned between anyone with a freehold or superior lease of the building.

I agreed to provide further clarity on Florrie's Law, including how robust a safeguard it really is for leaseholders. These amendments will ensure that the maximum that most in scope leaseholders will be expected to pay in total is £10,000 (£15,000 in London), spread over five years. No leaseholder will be required to pay more than they would have done in the absence of the protections, and costs already paid out in the last five years will count towards the cap. Where the cap has been met, leaseholders will have to pay no more, and liability to pay for remediation costs or the provision of interim safety measures will fall on other actors in the "waterfall". This means that, in practice, many leaseholders will pay less than this, and some will pay nothing at all.

During the debate, I was asked about what will happen to leaseholders who have already been issued with invoices and what protections there are to ensure that freeholders cannot attempt to pass on costs above the caps, before the legislation comes into force. As I mentioned, the important point is that day zero for the building safety reset is 14 February 2022. Any costs already paid out in the last five years will count against the cap, but leaseholders will not be reimbursed for costs already paid. Leaseholders should not have to prove anything, as service charge payments will be in the service charge accounts.

You asked what we expect to happen to leaseholders who cannot afford to pay the capped maximum amount. It has been common lending practice for high street lenders to lend for some remediation works – the systemic issue to date has been the risks of negative equity, leaseholder affordability and remediation happening across a block. The caps, as part of the amendments, considerably reduce the risk of these being issues for the lending market. At Report stage, we intend to set out the lower property bound, below which leaseholders will be protected from all remediation costs.

My officials are working hard to ensure that the affordability test will be set out in the amendments laid at Report stage. Social Housing providers will be exempt from the affordability test of the "waterfall", and thus will only be required to meet all non-cladding remediation costs where they are or have links to the developer, or where costs exceed the leaseholder cap. They remain eligible to apply to the Building Safety Fund for any applicable issues affecting their leaseholders in buildings over 18m, and to the new industry-funded scheme for cladding costs in buildings of 11-18m.

You asked what would happen where the freeholder of the building – who is not or does not have links to the developer – cannot afford to pay where the costs exceed the leaseholder cap by a substantial amount. Let me be clear - it is not our default expectation that freeholders will have to fund these works from their own resources. We want them to be able to pursue those responsible for defective work, which is why we are bringing forward an ambitious toolkit of measures to allow those responsible for defective work to be pursued.

Baroness Pinnock asked whether it will be leaseholders and tenants who will end up taking on liability for the removal of cladding and putting right the fire safety defects if no one pays up. Our amendments will make it clear and unambiguous who is liable to pay for historical building safety defects, and freeholders and landlords must comply with the law as set out by Parliament. We are also bringing forward measures to ensure that those who try to evade their responsibilities can be held to account.

Lord Young of Cookham asked whether enfranchised leaseholders will have to pay all the costs for remediation. I want to be absolutely clear that they will not. Where leaseholders have collectively enfranchised, the building is de facto owned by its residents; there is no-one else in line to be asked to contribute, other than the developers/construction product manufacturers. It would simply not be possible to cap remediation costs for enfranchised

leaseholders, as there would be no-one else in the chain to pick up the remaining remediation bill. However, these amendments will enable leaseholders, collectively, to pursue those who caused the problem in a far greater range of circumstances than at present, including via a cause of action and enabling associated companies to be sued.

The Earl of Lytton rightly raised whether limited partnerships are included in the definition of “associated persons”. This is our intention, and we will make an amendment to the bill in time for Report. He also asked about the impact on pension funds which may own buildings. We want building owners – including pension funds – to be able to pursue those responsible for defective work, which is why we are bringing forward a toolkit of measures to allow those responsible for defective work to be pursued.

Amendment 69 provides the Secretary of State with the power to make regulations in connection with remediation orders. The specifics will be set out in due course, but the order will compel a building owner to undertake works to remedy a historic defect within a specified timeframe. The clause provides that the regulator, a local authority, a fire and rescue authority or any person prescribed by the regulations can apply for a remediation order. It is likely that the applicant will know what outstanding remediation work needs to be undertaken. Let me also clarify that leaseholders already have the right to apply to the court to enforce performance of repair and maintenance obligations under their lease, and it is, therefore, unnecessary to include provisions for leaseholders to apply for a remediation order here. However, we will consider whether we need to include leaseholders as a prescribed person in regulations made under the clause.

Remediation contribution orders will force parent and associated companies to contribute to the cost of historical safety defects, if the building owner is failing to meet their new liabilities. The order will set out the monetary amount and the specified time by which an associated company needs to make payment to remedy the historical safety defects in the building. It will provide the applicant with an important enforceable proclamation by the courts that the parent or associated company must follow.

Lord Naseby asked me to reconsider buy-to-let landlords with more than one additional leasehold property, who are currently out of scope of these amendments. These amendments are fundamentally designed to ensure those living in their own home (including those who have moved out and sublet, and shared owners) do not face unaffordable remediation bills. We will endeavour to revisit the question of what number of properties would be right to have in scope to give a fair balance between the parties, by Report.

<u>Residents and access to redress</u>

Earlier in Committee I said that the Bill will put into statute a national regulator for construction products (NRCP) in the Office for Product Safety and Standards (OPSS). I would like to clarify the legal basis of the NRCP and the role of OPSS in delivering this function.

Clause 128 of the Bill creates a broad power to make regulations relating to the marketing and supply of construction products. Schedule 11 of the Bill sets out in more detail the provision that can be made within such regulations. This means that the Bill paves the way for the NRCP through making provision to introduce a strengthened regime for market surveillance and enforcement, rather than creating this function in statute.

The Secretary of State will be the national regulator for construction products, which includes responsibility for enforcement of regulatory requirements. It is intended the functions of the

construction products regulator will be delivered by the NRCP in the name of the Secretary of State. The NRCP will be based in OPSS. In this capacity, OPSS will be able to use the powers available to the Secretary of State, which will be set out in regulations, to identify non-compliance and enforce the law.

I thank noble Lords for our spirited debate, and I hope that I have provided the information and reassurance needed. Please do not hesitate to contact me if you have any further inquiries.

I am copying this letter to Baroness Pinnock, Lord Stunell, Lord Young of Cookham, Lord Blencathra, Baroness Neville-Rolfe, Lord Naseby and Lord Leigh and will place a copy in the Library.

Yours sincerely,

Lord Greenhalgh
Minister of State for Building Safety and Fire
Department for Levelling Up, Housing & Communities and Home Office