Written Evidence: Steve Day

Introduction

1. This note sets out details of our proposal for a Dangerous Buildings Remediation Scheme based on the polluter pays principle.

Issue

2. The Grenfell fire exposed a catastrophic failure in fire safety regulation leaving tens of thousands of people living in unsafe buildings. Leaseholders—through no fault of their own—are facing bills running into the tens of thousands of pounds for the remediation of fire safety defects which will mean, for some, bankruptcy and the loss of their homes. In the meantime, they are being billed thousands of pounds for interim fire safety measures, such as 24-hour waking watches, new fire alarm systems and huge increases in building insurance premiums. Living in unsafe and unsellable flats is taking a significant toll on their mental health and wellbeing. Ministerial exhortations to developers and building owners to do the right thing and protect leaseholders from these costs have largely fallen on deaf ears.

Government response

Building Safety Fund/Leaseholder Loans

3. The Government has provided, through the Building Safety Fund, £5.1 billion for the removal of dangerous cladding in buildings over 18m. It also proposes to offer leaseholders living in blocks between 11m and 18m low interest loans, capped at £50 per month, for the same purpose. However, no funding has been provided for the remediation of other fire safety defects, such as inadequate internal compartmentation or missing cavity barriers and fire breaks. Public funding alone will not be sufficient to meet the estimated £15 billion cost of remediating blocks above 18m, let alone the as yet unquantified bills for medium and low-rise buildings.

Residential Property Developer Tax/Gateway Two Levy

4. The Government has also announced a residential property developer tax that will raise £2 billion over the next ten years. However, the proceeds will be used to offset the cost of government funding for the remediation of unsafe cladding. Developers seeking to construct high-rise buildings will also have to pay a Gateway Two levy.

5. Reliance on a narrowly-focused and limited tax and levy risks punishes innocent parties—leaseholders, taxpayers, and the majority of developers that did not build defective blocks of flats—by passing remediation costs on to them. Moral hazard is increased as the guilty get off largely scot free, undermining the Government's

attempts to raise building standards and making a repetition of the current crisis more likely.

Limitation period extension

6. The Government intends to extend the limitation period for claims under the Defective Premises Act 1972 so that leaseholders can sue developers and other potentially responsible parties. However, this change is unlikely to be effective as leaseholders generally do not have the funds available to engage in lengthy and expensive litigation. And, as the Committee has heard in earlier evidence, the original developer may no longer exist.

7. By leaving the burden of litigation to leaseholders, the Government is also risking the emergence of a two-tier system with British citizens at a considerable disadvantage to foreign nationals. Unlike UK leaseholders, foreign nationals caught up in the building safety crisis may be able to bring cases under the investor state dispute settlement mechanisms found in the UK's bilateral investment treaties and use the arbitration process to claim compensation directly from the Government.

Dangerous Buildings Remediation Scheme

8. Our proposed amendment seeks to improve on Government's current approach by making provision for a Dangerous Building Remediation Scheme that is:

- simple, fast and cost-effective—not reliant on lengthy and expensive legal proceedings that would slow the speed of remediation works;
- fair—avoids moral hazard by ensuring that, as far as possible, remediation costs fall to the entity responsible for the unsafe work—the polluter pays principle, and
- comprehensive—covers all construction defects, not just unsafe cladding.

9. Although the Scheme enshrines the polluter pays principle in the residential development context, we are aware of the deficiencies in the approach adopted in Part IIA of the Environment Protection Act 1990 that has limited its use and have adapted our proposal accordingly.

10. The Scheme provides for a statutory administrative determination process to come to decisions as to whether a building was compliant with building regulations in force at the time of construction. If a building was non-compliant the developer would be required to pay remediation and interim safety costs. The Scheme has been designed with the principles of simplicity, certainty, clarity and equity in mind to ensure fairness to all parties, including developers.

11. Remediation costs should be readily absorbed by developers. In the decade from 2010, the top ten developers distributed £12 billion to shareholders and currently collectively hold around £23 billion of net assets.

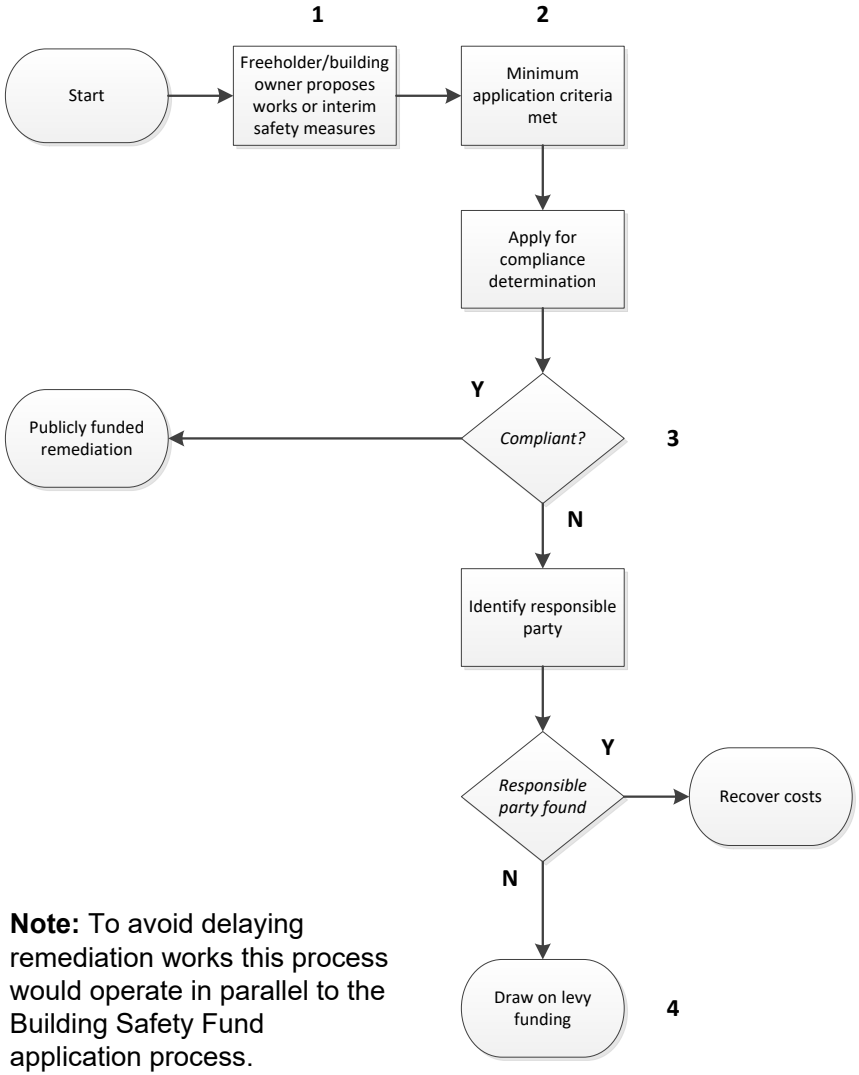
12. Some developers use special purpose vehicles that are either wound-up on the completion of the development or sold to ground rent funds. To ensure that these companies are not able to walk away from their responsibilities, the parent company would be held to account for any failures by their subsidiaries.

13. Where it is not possible to obtain recompense from responsible parties, funding would come from levies on the construction industry and ancillary businesses. Developers will make reparation through the residential property developer tax, but the causes of the building safety crisis are sector-wide so other responsible parties, such as cladding manufacturers that sold unsafe and untested products, should also contribute to putting things right.

14. The inclusion of other responsible parties in sector-wide levies widens and deepens the potential compensation pool. It also allows public funding to be reallocated for the remediation of buildings that were compliant but are now considered unsafe.

15. Following a positive meeting with MHCLG, we are refining the detail of the Scheme so are not yet able to publish the amendment. However, high-level detail of the Scheme's application and determination process can be found at Figure 1.

Figure 1: Application and determination process



Note: To avoid delaying remediation works this process would operate in parallel to the Building Safety Fund application process.

1. When freeholders or building owners propose to charge leaseholders for works or interim safety measures, above a minimum threshold, they need to consider if the costs arise from a failure to comply with building regulations in force at the time of construction.

2. If minimum application criteria are met, they must apply for a compliance determination. Minimum criteria would exclude costs relating to wear and tear or end of life replacement of equipment, etc.

3. If a building is found to be non-compliant, remediation and interim safety costs, in the first instance, would be recovered from the developer.

4. If the responsible party cannot be found, remediation and interim safety costs would be funded out of levies on the construction industry and ancillary businesses.

16. The polluter pays approach is widely supported. We asked Peter Kellner to design a balanced poll on the issue. The poll found that 64% of respondents supported the view that developers should pay to remediate defective buildings. Full details can be found at Annex A.

Conclusions

17. If implemented, the Dangerous Building Remediation Scheme would go a considerable way to solving the building safety crisis and reduce the chances of a similar scandal happening again.

18. It should raise considerable sums from those directly responsible for the construction of unsafe buildings. The public funding on offer is insufficient to deal with the problem, but it would be inequitable to seek additional taxpayer support without first calling on the resources of the responsible parties. The Scheme would also help ensure that construction standards are raised and maintained as the commercial benefits of a “race to the bottom” would be removed to the benefit of homebuyers and their mortgage lenders.

19. The Scheme’s approach of a statutory administrative process to determine questions of compliance and liability eliminates the need for leaseholders to embark on expensive, lengthy, and risky legal action and is likely to reduce the overall quantum of litigation. It also removes the unfair situation with overseas investors having potentially more attractive options for successful legal action than their British neighbours.

20. In addition, several developers—after some prompting—have agreed to cover remediation costs. Those developers that have stepped up to their responsibilities should not be placed at a commercial disadvantage vis-à-vis those that have chosen to abandon their customers.