Government to fund replacement of cladding on privately-owned high-rise residential blocks

The Government has announced that it will establish a £200m fund for the replacement of ACM cladding on privately-owned high-rise residential properties.

Submitted	14 May 2019
Applicable Law	UK (England & Wales)
Topic	Construction Insurance > Professional risk Real Estate
Sector Focus	Asset Management and Investment Funds Energy and Infrastructure Financial Institutions Life Sciences Technology Media and Telecommunications
Contact	Sharlmaine Willetts

The Government has issued a press release stating that around £200 million will be made available to remove and replace unsafe cladding from around 170 privately owned high-rise buildings. The Government is already funding works to its local-authority-owned social housing blocks. In short, the intention is that private building owners will now have ready access to a pool of funds to pay for remedial works, allowing disputes as to liability that have often delayed or prevented such works, eg due to lack of cashflow, to be deferred. This raises the interesting question of whether it will have an impact on professional negligence cases. Our initial assessment is that it is unlikely to, at least in the long term (as it is a condition to access the fund that building owners have to take reasonable steps to recover the funded costs from responsible parties, although there may be difficulties for building owners and the Government in achieving such a recovery - see below).

The announcement

The Government's press release confirms that:

- the fund will be available only in relation to privately-owned residential buildings over 18m in height, and for the replacement of "cladding"
- building owners will have only three months to access the new fund once it is available, and will be able to register for it by early July 2019, and
- as a condition of funding, the Government will require "the building owner to take reasonable steps to recover the costs from those responsible for the presence of the unsafe cladding"

The impact

It remains to be seen how the fund will operate in practice, and what it will mean for industry participants currently facing claims by freeholders or others. In theory this is a welcome development, as prompt performance of remedial works will obviously assist in crystallising quantum, which will in turn give greater clarity in relation to the risks parties face. However, a number of potential issues could arise from a practical perspective, such as:

- **What works will the fund cover?**
  - the press release is not clear as to whether the fund will be restricted solely to the replacement of "ACM" cladding. It may not be available to pay for the cost of replacing other potentially non-compliant cladding or cladding system components, or other fire-safety related issues identified during post-Grenfell inspections
  - unsatisfactory situations may arise where only certain elements of remedial works are part-funded by the scheme, and
  - what "residential" means is also unclear; for instance will mixed-use buildings be covered?
- **Who can claim under it?**
  - the press release refers to the "building owner", and implicitly suggests that the fund will only be available to the current freeholder of the Property. It is unclear how entitlement will be assessed: eg whether the freeholder has to show that it is legally obliged to perform the works, or if it can apply on behalf of leaseholders who have that obligation
  - it does not appear that the fund will be "retrospective" (ie there is no suggestion that those who have already paid for and completed remedial works will be able to be re-paid by the fund), and
  - it is also not clear whether building owners with current, and unpaid, remedial works already in progress will be able to access the fund.
- **Impact on claims against industry participants: eg**
  - how will the requirement that a building owner take "reasonable steps" to recover funded costs from "responsible" parties work in practice? Eg
    - what will be its legal effect, and could the building owner/Government run into problems if it is not structured appropriately? For instance, will this be a subrogation arrangement, and/or will the building owner have to hold any recovery on trust for the Government and repay the fund? Absent such structures, it may be arguable that, once the remedial work has been paid for, the building owner no longer has any loss which it can claim as damages from the professional there is no longer a recoverable "loss"
    - what if the current freeholder does not have any legal rights of action against the "responsible" parties?
    - is the requirement actually enforceable (eg what would constitute a sufficient "reasonable step", and who should determine this?) and will the Government have any appetite to enforce it?
  - will prospective defendants still be asked for (or be entitled to have) any input on proposed remedial works schemes which will now be paid for by the fund?
  - will it still be possible to challenge the cost of remedial works paid for by the fund? (eg to argue that there have been unnecessary or unreasonable works and/or betterment)?

A number of these issues will no doubt shortly be clarified, as more information in relation to the fund and its structure becomes available over the next few months. We will be keeping matters under review and will provide further updates on this interesting development in future.

elexica Limited, CityPoint, One Ropemaker Street, London EC2Y 9SS