BLAKE MORGAN

Cladding Replacement under the Fund: Some FAQ's

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We get asked lots of questions across our portfolio of cladding replacement works so to help managing agents, RTMs etc we have set out a Top 10 of questions and answers. Please bear in mind the answers are not advice specific to your circumstances but an indication of the likely position only.

1. Do I need to serve a section 20 for works in relation to the fund

You don't need to serve Section 20 directly in relation to the Fund. The Fund is standalone. However, a Fund application may or may not succeed, the works still need doing and the Fund may or may not cover all costs therefore many agents are instigating Section 20.

The reason is Landlords must consult if works will cost over £250 for any one contributing leaseholder. Thus, in a property with unequal service charge contributions, the landlord must consult all leaseholders if any one of them would have to pay more than £250. If consultation is not undertaken, the landlord may not be able to recover costs over £250 per leaseholder.

Detailed regulations have been produced under section 20 of the Landlord and Tenant Act 1985 (as amended by S151 of the Commonhold and Leasehold Reform Act 2002) which set out the precise procedures landlords must follow; these are the Service Charges (Consultation Requirements) (England) Regulations 2003 ('the Regulations'). The requirements in the Regulations are defined under three headings:

- Qualifying works
- Qualifying long-term agreements
- Qualifying works under long-term agreements

Remedial works of the type applied for under the Government Fund are also likely to fall within 'Qualifying Works'. These are works on a building or any other premises – that is, works of repair, maintenance or improvement. The inclusion of improvement in the definition of qualifying works does NOT allow a landlord to recover costs for improvements unless a liability for costs of improvements is included in the lease. When calculating the estimated cost, VAT on works must be included.

A Landlord for the purpose of consultation includes 'any person who has a right to enforce payment of a service charge' (Section 30, Landlord and Tenant Act 1985) and could therefore be any of the following: Freeholder, Head lessee, Resident Management Company, Right to Manage Company.

2. Do I need to serve a section 20 for professional fees

Professional fees may fall within 'Qualifying long-term agreements'.

A qualifying long-term agreement is an agreement entered into by the landlord with a wholly independent organisation or contractor for a period of more than 12 months. (Agreements before 31st October 2003 are exempt.) The deciding factor is the minimum length of the commitment. In other words, it is an agreement for a term which must exceed 12 months. Examples include agreements affecting the building generally (e.g. lifts, entry-phone systems, waste management or maintenance contracts); cleaning and gardening; insurance; utilities; and management agency agreements.

The minimum length of the contract is the determinative issue. If a contract has no specified minimum length, and is not anticipated to necessarily last for more than 12 months, it would arguably not constitute a qualifying long term agreement. If it does not constitute a qualifying long term agreement, it will therefore sit outside of the regime and you will not need to run a section 20 consultation.

A cautious approach may well be best.

3. What fees are covered by the fund

The Prospectus for the Fund issued in May 2020 specified that:

"Subject to eligibility, state aid checks and qualifying leasehold arrangements, MHCLG will meet the capital costs associated with the remediation of non-ACM cladding systems"

Eligible costs will be those costs which could be attributed to the capital costs of the project. Ongoing revenue costs, such as the cost of interim safety measures, are not eligible. The fund will provide a grant to cover the 'reasonable' cost of eligible items only. In relation to fees, the Prospectus provides the below:

Eligible items covered by the fund	**The fund will not cover**
Professional team fees in respect of qualifying items (*apportioned appropriately directly related to qualifying costs where a project also includes non-eligible costs). An initial grant may be provided where applicants are unable to cover project design and development costs.	Professional team fees in respect of non-qualifying items. Buildings where a warranty claim for the full costs of remediation has been accepted. Applications will be considered where recovery action is ongoing, this will be assessed when determining the grant funding agreement.
Managing agents' fees in respect of administering qualifying expenditure (*apportioned appropriately directly related to qualifying costs where a project also includes non-eligible costs) Managing agents' fees in respect of administering non-qualifying expenditure.	Managing agents' fees in respect of administering non-qualifying expenditure.
Extraordinary technical requirements which incur extra costs essential to but not normally associated with removing and replacing unsafe cladding systems may be included. MHCLG will consider such requests for funding against relevant evidence.	Costs which would not otherwise be recovered from leaseholders through the service charge provisions in their leases.

4. Is it a legal requirement to obtain a façade report and / or fire engineers reports

There are several ways of looking at this question:-

1: Yes potentially to meet the Health and Safety requirements and to implement the Government Guidance Notes, recently consolidated in the January 2020 document (well worth a careful review).

2: Yes to substantiate any claim in relation to defective cladding/façade and for the purpose of a claim, for example, under warranty (NHBC etc), under the Defect Premises Act and to apply to the Fund.

Remember the Fund requires you to pursue all other reasonable claims and it is difficult to comply with this requirement without detailed legal advice on the claim options and detailed façade advice.

5. Is the EWS1 form a legal requirement and what are the issues if I don't obtain one

The form is intended to respond to the Government guidance notes to give a consistent means of assessing external wall systems on buildings above 18m for safety to allow lenders to offer mortgages. Not every building above 18m will require an EWS1 form – only those with some form of combustible material, making them unsafe, or, for example, combustible material on balconies.

The building owner has a legal responsibility to undertake the required assessment. An EWS assessment is required every five years for each building or block.

Government advice in January 2020 mean some residential buildings below 18m which have 'specific concerns', may now require an EWS1. Examples include 4-6 storey buildings which may have combustible cladding or balconies with combustible materials and therefore are a clear and obvious risk to life safety and may require remediation in accordance with the latest Government advice.

The risks in not getting one are:

A: It will suggest Health and Safety obligations have not been met and could lead to prosecution, and

B: Leaseholders may not be able to sell or remortgage

6. What are the penalties for the responsible person / duty holder if they don't comply with the Building Act and ensure residents safety?

There is Extensive Health and Safety law with unlimited fines, prison sentences and strong pressure from Government for tougher sentencing. There are also routes for interested parties and Local Government to enforce against buildings not built in accord with Building Regulations. Your focus should of course be on compliance and the safety of residents, not penalties.

7. My building is under 18m do I need to do anything and why

Even if your building is below 18m in height remedial works may be required to the external façade if the systems installed are in breach of the Building Regulations and posing a risk to the health and safety of the occupants of the building. Expert input will be required to assess whether the systems installed are in breach, having regard to the height and use of the building. An expert can also advise whether, due to the height of the building, the systems installed are compliant and suitable to protect the safety of residents.

8. What qualifications and insurance must the consultants have for completion of the EWS1 form

The EWS form must be completed by a fully qualified member of a relevant professional body within the construction industry with sufficient expertise to identify the relevant materials within the external wall cladding and attachments, including whether fire resisting cavity barriers and fire stopping have been installed correctly.

The process only recognises qualified chartered members of the relevant professional bodies such as IFE and RICS will have the necessary self-assessed competence and professional indemnity insurance to carry out this work.

Please also be aware that the Government Fund requires evidence of experience/professionalism and insurance to be involved in replacement projects.

9. Is the Government Fund for residential blocks still open for registration?

No registration has now closed. Please note the Social Housing element is still open.

10. What are the pressing deadlines?

End of the year for submitting an application for funding based on a full design and tender, putting considerable strain on both designers and the industry in a difficult working environment. The replacement project then has to go to site, ie be on site by the end of March 2021.

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