

The Welsh Government

Cathays Park

Cardiff

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Dear Sirs,

## **Introduction**

We are instructed by a concerned resident of an apartment situated in a building deemed to be a fire safety risk as a result of un-safe cladding. The purpose of this letter is to ask when a decision will be made about funding arrangements for leaseholders in relation to un-safe cladding. There has now been a considerable delay in the decision-making process of the Welsh Ministers since the UK Government announced that it was establishing a £1bn fund for leaseholders. If a decision is not reasonably imminent, we may send a formal pre-action protocol letter in relation to unreasonable delay in the decision-making process.

The further purpose of this letter is to identify issues that arise out of the prevailing position of the Welsh Ministers in relation to funding, which we would be grateful if you could address in your response and clarify whether these issues will be addressed by the Welsh Ministers when they make their decision on funding models going forward.

## **Background**

As you know, the UK Government announced on 16 May 2018 that it would meet the cost associated with removing unsafe cladding and related fire safety remediation by local authorities and housing associations. Then, on 9 May 2019, due to a lack of action by freeholders in the private sector, the UK Government announced that it would fund the removal of unsafe aluminium composite material ('ACM') on high-rise (18 metres) residential properties. Finally, on 11 March 2020 the UK Government announced a £1bn scheme for the removal of all unsafe-cladding (non-ACM) open to social and private landlords so as to avoid the unfairness of the cost of removal falling on leaseholders in both situations.

As a result of these funding commitments of the UK Government, the Welsh Government received consequential funding; £59m in March 2020.

However, the Welsh Ministers have not followed the same decision-making processes as the UK Government. So far as we are aware, the Welsh Ministers have only funded "the public sector"; see the written statement of the Welsh Minister for Housing and Local Government on 19 September 2019. Please could you clarify what is meant by "the public sector"; does that include both local authorities and social landlords?

Beyond that, the Welsh Ministers have committed to deciding about a funding arrangement. On 23 October 2020 the Welsh Minister for Housing and Local Government stated:

“...we are considering funding models that allow us to ensure work is carried out to make these buildings safe, help prevent leaseholders from facing the full burden of the costs and ensure funding is contributed from other sources.”

Then on 3 December 2020 the Head of Building Safety Programme at the Welsh Government Department for Housing and Regeneration wrote to this office and stated that at the time consequential funding was received in March 2020, the Welsh Government’s priority was its response to the Covid-19 pandemic but:

“...we are not in a position to consider how any funding might work and which defects it might cover...We remain committed to financial support to help fund remediation in a way that is fair to leaseholders and taxpayers.”

### **Delay**

The Welsh Ministers should be acutely aware of the effects on leaseholders that has flowed from the Grenfell Tower fire and updated building regulations. Leaseholders are trapped in their mortgages whilst their leasehold is zero-rated, their insurance premiums have increased exponentially and most importantly, they are being asked to fund the remedial works by the freeholders who, more often than not, are not the developers and not liable for the remediation work in civil law. There are human consequences too; adverse effects on mental health, child poverty, old age poverty and the spectre of homelessness for those who cannot afford the cost of the remediation works.

It is therefore surprising that action by the Welsh Ministers lags so far behind the action taken by UK Government to address this crisis; at least 18 months. Both governments have had to contend with the Covid-19 pandemic so that is not a complete answer for the delay. Our client is not willing to wait much longer for an announcement on action by the Welsh Ministers. We therefore request that you set out your timetable for action following which our client will consider their position. The delay on the part of the Welsh Ministers can now be said to be unreasonable.

### **Issues for consideration**

Firstly, we would like to know whether the Welsh Ministers complied with s149 of the Equality Act 2010 and the public sector equality duty when it decided to provide funding only in the public sector (clarification as to what is meant by that is sought above). As can be seen from the UK Government scheme for removal of all unsafe cladding (and related remedial work), it is open to private landlords as well as housing associations and in fact, housing associations have to establish that they cannot afford the remedial work. Given that the Welsh Ministers owed no duty to either local authorities or housing associations to fund the remedial work, please could you clarify why it was decided that only leaseholders in relationships with social landlords should benefit from funding from the Welsh Ministers and not leaseholders in the private sector; and whether an equality impact assessment was conducted when that decision was made.

It is obvious that there are leaseholders in the private sector with protected characteristics who may be equally if not more vulnerable than leaseholders in properties owned by social landlords. For example, families with children who are in and around the poverty line, disabled persons and older people. The socio-economic impact on those protected groups of the inability to pay their share of remedial works may be considerable. Older people may lose their life savings, disabled people may be facing homelessness and/or destitution. Each may be in real danger of not having their needs met and could become a burden on social service departments of local authorities.

In relation to children, the Welsh Ministers are of course under a duty to treat their best interests as a primary consideration under section 1 of the Rights of Children and Young Persons (Wales) Measure 2011. Please could you explain how the current failure to provide financial assistance to leaseholders with children in the private sector is consistent with the Welsh Ministers' Child Poverty Strategy. Please confirm whether or not a Child Rights Impact Assessment was carried out and if so, please disclose a copy of the same.

Secondly, please could you explain how the existing position is justified and proportionate by reference to article 14 (non-discrimination) and article 1 of the First Protocol (property rights) of the European Convention on Human Rights. There can be little doubt that difference in treatment as between leaseholders in the public / private sectors when it comes to government funding for remedial works falls within the scope of A1P1, both because state benefits must be administered without discrimination<sup>1</sup> and because people's property rights may hinge upon the receipt of funding. Thus, by reference to the above mentioned statuses – children of families on low income, older people on state pensions, disabled persons (including mental health) – please justify the extant decision to fund the remedial works in the public sector but not the private sector.

Thirdly, please identify the reasons why the Welsh Ministers have only funded the public sector, given that they were under no obligation to do so and, as set out in the current UK Government scheme, social landlords are, in general, better placed financially to pay for the remediation than, for example, right to manage companies.

In particular, please explain the statement by the Welsh Minister for Housing and Local Government on the 19 September 2019 that the taxpayer "cannot be expected to fund failures in the construction of private sector residential buildings". There are two problems with that statement; (i) it is in direct contradiction of the approach of the UK Government which led to consequential funding for the Welsh Ministers; and (ii) it would appear that the Minister fettered her discretion in relation to any new funding model, perhaps without having considered the issues raised above. In fairness, that statement was made before the 2020-21 budget; therefore, please confirm whether the Minister's position changed when the UK Government made its funding decision which led to consequential funding or whether the Minister stands by that statement. Whilst macro-economic policy is quintessentially a matter for Ministers, if the Minister did not review her position once the UK Government made its decision, then that would be unreasonable.

Further, please explain what consideration was given to leaseholders in the private sector who participated in the shared ownership scheme and why they were not included in the Welsh Ministers' funding.

*1 Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47, [2015] 1 WLR 3250 per Lord Wilson at §17; R (TD) v Secretary of State for Work and Pensions [2020] EWCA Civ 618 per Singh LJ at §21; R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department [2020] EWCA Civ 542 per Hickinbottom LJ at §§ 99 and 104.*

Fourthly, please clarify whether the Welsh Ministers' well-being objectives were considered and if so, which ones they considered were engaged by the funding decision and whether the Welsh Ministers considered that they were taking all reasonable steps to meet those objectives, in accordance with section 3 of the Well-being of Future Generations (Wales) Act 2015.

### **Conclusion**

Therefore, so as to avoid litigation (which will be indicated by a letter of claim), please respond indicating the following:

a. When a decision will be made on funding of unsafe cladding to privately owned residential buildings and/or shared ownership leaseholds; b. That such a decision will address the issues identified above.

Yours faithfully

Watkins and Gunn