



dated 20 September 2024

Advice Note

In relation to the rights and responsibilities of Cambridge City Council to effect fire safety works in relation to the buildings known as Hanover Court and Princess Court, Cambridge

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1 Introduction

- 1.1 You have asked us to provide advice in relation to the responsibilities of Cambridge City Council (**you** or the **Council**) regarding fire safety works and whether the Council has any powers to effect these works under the Housing Act 2004 (**HA**), the Housing Health & Safety Rating System Regulations 2005 (**HHSRS**), the Regulatory Reform (Fire Safety) Order 2005 (**FSO**) and/or the Fire Safety (England) Regulations 2022 (**FSER**). Additionally, you have requested confirmation as to how to ensure compliance with the Council's duties under the Building Safety Act 2022 (**BSA 2022**).
- 1.2 We have also reviewed the documentation between the Council and Cambridge Fire and Rescue Service (**CFRS**) to advise on the consequences of receiving a 'Notice of Deficiencies' (the **Notice**) and the potential strategic next steps to resolve the fire safety issues whilst the Council works towards redeveloping the buildings known as Hanover Court and Princess Court (the **Buildings**). We understand that Hanover Court is eight storeys high so will be a Higher-Risk Building (**HRB**) for the purposes of the BSA 2022 and the FSER, whereas Princess Court is five storeys in height so we assume that the FSO and the FSER will apply, as will the parts of the BSA 2022 that apply to all buildings or "relevant buildings" (those that are at least 5 storeys or 11m high), rather than those provisions aimed at HRBs only.
- 1.3 You have asked us to review the long residential leases that affect the Buildings to advise whether you have any rights to carry out works whilst the long leases subsist.

2 Executive Summary

- 2.1 The Notice served upon you by the CFRS indicates that the following fire risks exist:
- 2.1.1 poor compartmentation within the Buildings;
 - 2.1.2 the Buildings have no secure information box (showing floorplans of the building etc).
- 2.2 The Notice is not a formal notice under the FSO. This means that you are not legally required to comply with its contents, and failing to meet the October deadline does not constitute a further offence.
- 2.3 However, regardless of the legal status of the Notice, there is a general duty under the FSO to take reasonable precautions to address fire risk. The Council is the responsible person for ensuring compliance with the FSO. The FSO creates a number of offences that the responsible person may commit, including failure to comply with fire safety duties. The Council may therefore be in breach of the FSO if it does not carry out works that are necessary to comply with its fire safety duties.
- 2.4 The Council has duties under the BSA 2022 to take all reasonable steps to prevent a building safety risk materialising in relation to the part of the building for which it is responsible and to reduce the severity of any incident arising from such a risk. This applies to Hanover Court only.

- 2.5 Under the Housing Act 2004, the Council can serve statutory notices requiring leaseholders to provide access to allow works to be carried out. In the event that entry is refused, you may be able apply to the County Court for an injunction requiring leaseholders to give you access.
- 2.6 The leases affecting the two buildings allow the Council as landlord to gain entry to carry out works or repairs. There is some ambiguity within the clauses of the leases as to whether the works envisaged to address fire safety risks would amount to "repairs". The leaseholders may be entitled to claim compensation from you if they have to move out whilst repairs are undertaken.
- 2.7 However, there may be merit in the argument that the precautions sought by the CFRS (in relation to 2.1.1 above) are not reasonable, given your intentions for the Buildings in the longer-term. If you do not think that it is reasonably practicable in the circumstances to carry out the works requested by the CFRS, it would be best practice to defer to a fire risk assessor to identify alternative control measures to manage the risk of the poor compartmentation for the relatively short period during which the Buildings will continue to be occupied. The Council cannot 'do nothing' now that the CFRS has identified specific fire safety risks, but it may be possible to commission robust evidence to demonstrate to the CFRS that there are alternative means to ensure the safety of residents and others, which constitute reasonable steps in the circumstances, but are less costly than undertaking the compartmentation works. The lack of a secure information box in Hanover Court would seem relatively easy to remedy and there does not appear to be any good reason not to comply with this requirement, assuming that the Council has appropriate floor plans for the Building.
- 2.8 We have set out recommended next steps in the Conclusion section of this advice.

3 **Key Definitions**

3.1 The **responsible person** within the FSO means—

- 3.1.1 in relation to a workplace, the employer, if the workplace is to any extent under his control; or
- 3.1.2 in relation to any premises not falling within paragraph 3.1.1:
- (a) the person who has control of the premises (as occupier or otherwise) in connection with the carrying on by him of a trade, business or other undertaking (for profit or not); or
 - (b) the owner, where the person in control of the premises does not have control in connection with the carrying on by that person of a trade, business or other undertaking.
- 3.1.3 The responsible person must ensure that any duties imposed by the FSO or by regulations made under the FSO are complied with.
- 3.1.4 Any duties imposed by the FSO, or by regulations made under it, on the responsible person, in respect of premises, shall also be imposed on every person, other than the responsible person, who has, to any extent, control of those premises so far as the requirements relate to matters within his control.

3.1.5 Where a person has, by virtue of any contract or tenancy, an obligation of any extent in relation to—

- (a) the maintenance or repair of any premises, including anything in or on premises; or
- (b) the safety of any premises,

that person is to be treated, for the purposes of paragraph 3.1.4, as being a person who has control of the premises to the extent that his obligation so extends.

3.2 **Higher-risk building** is defined under BSA 2022 as a building that:

3.2.1 is at least 18 metres in height or has at least 7 storeys; and

3.2.2 contains at least 2 residential units.

3.3 The **accountable person** for a 'higher-risk' building under the BSA 2022 is defined as:

3.3.1 a person who holds a legal estate in possession in any part of the common parts (subject to the exceptions set out within the legislation); or

3.3.2 a person who does not hold a legal estate in any part of the building but who is under a relevant repairing obligation in relation to any part of the common parts.

3.4 The **principal accountable person** for a higher-risk building is defined as:

3.4.1 in relation to a building with one accountable person, that person; and

3.4.2 in relation to a building with more than one accountable person:

- (a) the accountable person who holds a legal estate in possession in the relevant parts of the structure and exterior of the building, or
- (b) a person who does not hold a legal estate in possession in any part of the building but who is under a relevant repairing obligation in relation to the relevant parts of the structure and exterior of the building.

3.5 A person under a **relevant repairing obligation** is the person who is required, under a lease or by virtue of an enactment, to repair or maintain that thing.

4 **Responsibilities of the Council**

4.1 The FSO applies to all workplaces and commercial buildings, and non-domestic parts of multi-occupied residential buildings, meaning that the FSO applies to a residential building's structure, external walls and common parts. There may be more than one person with duties under the FSO, as it applies to anyone who has control of the premises, and the legislation contains a hierarchy of duty holders intended to encompass all parties with control over fire safety. For multi-occupied properties, this could therefore be the landlord, the freeholder, the managing agent and, depending on the wording of any lease, individual tenants. The primary duty holder is the responsible person and, in law, the primary stakeholder when the local fire authority identifies fire safety breaches. The duties required

of a responsible person begin as soon as the relevant party takes ownership, occupation or control of the premises.

- 4.2 Fire authorities turn to contracts to ascertain the identity of the responsible person. Having reviewed a tenancy agreement from each building, we presume the Council is responsible for maintaining and repairing the Buildings' common parts. Whilst not all aspects of the common parts are set out in the leases, the third schedule outlines numerous responsibilities of the Council, whose costs can be recovered from the leaseholder. This demonstrates that the Council has control of the common parts. We have not been made aware that overall control of either Building has been transferred to a management company in a manner that would transfer the role of responsible person.
- 4.3 The Council would be defined as the responsible person by virtue of being the owner and potentially an employer. It is generally established that as landlords operate and receive income from properties with multiple units, and will have employees and contractors visiting such buildings, these are regarded as places of work, and therefore, landlords are analogous to employers.
- 4.4 As a responsible person, the Council (or another responsible person if mutually agreed) must carry out an assessment of the fire risks to people on the premises or within its vicinity. This must be completed to a suitable and sufficient standard, meaning that the fire risk assessment (**FRA**) is proportionate to the size and type of building. The FRA should identify general precautions that the responsible person must take in order to comply with the FSO. After completing an FRA, the responsible person should record prescribed information which includes the findings of the FRA, any precautions and fire safety arrangements that will be implemented and any group of persons who have been identified as being especially at risk. The responsible person must then ensure that the identified arrangements are adhered to. Such arrangements should again be proportionate and should cover the planning, organisation, control, monitoring and review of preventative and protective measures. The FRAs for both Hanover and Princess Court have highlighted issues related to compartmentation noting that these pose a substantial risk to life due to the lack of fire resistance between floors and the potential smoke spread.
- 4.5 Other duty holders would also require consideration in relation to the overarching strategy for managing fire risks in the Buildings. Article 5(3) of the FSO places a shared liability on any other person who has control of the premises concerning fire safety (this includes when engaged under a contract for the safety and maintenance of the premises). Whilst the responsible person's duties can be delegated to a competent third party, the associated responsibility and liability cannot. For example, many responsible persons use third parties, such as management companies, fire alarm maintenance companies and fire risk assessors. Article 5(3) allows fire authorities to use their enforcement powers against third parties where they are responsible for a breach of duty within their control. The Council should therefore consider any other organisations it engages and how these organisations may have a role in complying with the breaches highlighted by the CFRS. However, the Council is ultimately liable for the fire safety works as it is the responsible person within the meaning of the FSO as the building's owner.
- 4.6 The FSO creates a number of offences that the responsible person may commit, including failure to comply with fire safety duties. The Council may therefore be in breach of the FSO if it does not carry out the works required by the Notice. However, if the Council were to commit an offence under the FSO due to the act or default of some other person, for

example the tenants refusing access, then that person is also guilty of the offence, and charges may be brought against them, whether or not proceedings are taken against the Council.

5 **Implications of the Notification**

5.1 The most recent Notice of Deficiencies dated 23 August 2024 (the **Notice**) outlines CFRS's current view that fire safety breaches are still present. In order to be satisfied that such breaches exist, CFRS must be satisfied that the Council is the responsible person, that there has been a breach of a duty, and that the breach places persons at risk of death or serious injury in the event of a fire.

5.2 CFRS is of the view that the following breaches exist:

5.2.1 **Breach of Article 8: Duty to take general fire precautions**

Article 8 imposes an overarching duty to take general fire precautions, and CFRS suggests that some deficiencies raised in the FRA remain and have not been remedied. These failures relate to poor compartmentation within the Buildings. Specifically, *'pipes and service ducts, and other openings in the walls, floors, partitions and ceilings for the passage of building services not being adequately sealed with fire-resisting materials, or bushed, in order to minimise the danger of the spread of heat, smoke or fumes.'* If compartmentation is primarily poor in respect of building services, notably gas and electrical supply pipework, the risk of death and serious injury is likely. Both remain potential ignition sources in the event of fire and could contribute to fire spread and smoke spread between floors.

5.2.2 **Breach of Regulation 4(5) of the FSO**

CFRS suggests there has been a breach due to Hanover Court being an HRB and the requirement to ensure that there is a secure information box present that is inspected annually to ensure its contents meet the requirements of the legislation. The primary risk of severe injury and death arises out of the need for building floor plans within the secure information box. In the event of a fire, CFRS must navigate the building and understand critical points should they be required to save residents. This is a far less onerous duty to comply with than the breach of Article 8, and only applies formally to one of the Buildings.

5.3 The primary implication of the Notice is that deficiencies still exist, and if a fire were to occur, residents would be at a very real risk due to the lack of compartmentation. However, the FSO outlines that general fire precautions must be reasonable and reasonably practicable in the circumstances. The Council should consider whether there is a set of control measures that are both reasonable and reasonably practicable to meet the ongoing risk due to poor compartmentation which do not require the level of work and expense suggested by CFRS. There is merit in the argument that the precautions are not reasonable, given your intentions with the properties in the longer-term. There may also be an argument that with so few residents remaining in the Buildings, the fire risks are reduced, but this is a technical matter on which we cannot advise. Therefore, it would be best practice to defer to a fire risk assessor to try to identify alternative control measures to meet the risk of the poor compartmentation.

5.4 In the CFRS's view, sufficient evidence suggests that breaches of the FSO exist. Due to this, there is an ongoing risk of enforcement proceedings. If convicted, proceedings under the FSO attract unlimited fines and so can be very damaging financially and reputationally.

5.5 In the long term, if CFRS takes the view that an enforcement decision must be reached, the Council will have been made aware of these breaches for some time, meaning that there are two compounding aggravating factors. The first is that the breaches persist, and their seriousness increases over time. The second is that the Council's awareness increases its culpability for failing to remedy the breaches. Both factors may increase the likelihood of prosecution by the CFRS. Also, if sentenced, both would substantially increase any fines following conviction.

6 **Appealing the Notification**

6.1 The Notice is not a formal notice under the FSO. This means that you are not legally required to comply with its content, and failing to meet the October deadline does not constitute a further offence. However, as a result, there is no formal route to appeal the Notice under the FSO and the only avenue to push back formally would be via a judicial review. This is not a cost-effective solution. Under the CFRS Enforcement Policy, the issue of the Notice is the lowest level of action they take to identify and remedy breaches. Fire authorities generally prefer to provide information and advice to duty-holders in writing before deploying their enforcement powers.

6.2 However, if there is ongoing non-compliance, CFRS may consider issuing a formal notice. CFRS's Enforcement Policy states '*Formal action will be taken when the consequences of fire are such that people are likely to be harmed, suffer serious injury or death. It can require specific action or the cessation of certain activities.*' This matter falls well within the definition and there is therefore a material risk that ignoring the Notice entirely could result in formal enforcement action.

6.3 Formal enforcement action would usually involve service of an Alteration Notice, Enforcement Notice, or Prohibition Notice. If the Council were to be served a notice, it would likely be an Enforcement Notice. CFRS may serve a notice requiring the Council to undertake any actions necessary to remedy the breaches that pose a fire risk. Any failure to do so would be an offence of failing to comply with a statutory notice and could lead to enforcement proceedings. The Courts generally regard non-compliance with Enforcement Notices as a very serious fire safety offence, due to the numerous occasions the Council would have been made aware of the deficiencies and its ongoing failure to resolve them. Further to this, as an Enforcement Notice would require specific decision-making by individuals within the local authority, such as whether to comply or not, it can attract secondary liability offences whereby officers of an organisation can be held liable for the actions of that organisation. This, however, is less common.

6.4 As the Notice is not served under the FSO, this provides time to consider the approach to the substantive compartmentation issue and communicate to CFRS the long-term plans for the site. CFRS takes issue with the waking watch as a permanent solution to the fire safety risks, as it is recommended to be a temporary measure of no longer than 12 months which expires in January 2025. Therefore, the Council needs a set of control measures (other than improving structural compartmentation) that will satisfy CFRS in the intervening period between January 2025 and when the future of the Buildings is resolved. If the Council can maintain a consistent dialogue regarding suggested control measures, this should prevent

or at least delay the service of any notices. Depending on the time period beyond January 2025 when the waking watch is no longer permitted as a legitimate risk management measure, it may be appropriate to maintain this nonetheless, assuming that a suitably-qualified fire risk assessor can confirm this from a technical fire safety perspective.

- 6.5 If the Council is served with a notice, consideration should be given to the merits of appeal. This would have the effect of suspending the notice (except for Prohibition Notices) during the period of appeal. This would again provide further time but also a reconsideration of what is reasonable by a Court. Appeals also provide another catalyst for fire authorities to review their decision-making and they can occasionally resolve matters prior to attending any appeal hearing. In addition, the Court systems are heavily backlogged so it would also provide further time to resolve the future of the blocks. We recommend that you contact us immediately if you receive any further notices.

7 **Enforcement from Regulators**

- 7.1 In the event that you do not comply with the Notices, and the hazards are allowed to persist, it is possible that the Council may also face enforcement action from the Building Safety Regulator (**BSR**). Under the BSA 2022, the Regulator has the power to serve a compliance notice on the Council as the accountable person for Hanover Court, if the BSR considers that the Council is contravening a relevant requirement of the BSA 2022. Additionally, under the Social Housing (Regulation) Act 2023, the Regulator of Social Housing (**RSH**) has the power to inspect social housing properties, including properties owned by local authorities, and if necessary undertake emergency remedial action and/or require a registered provider to implement a Performance Improvement Plan and monitor its progress closely. Such additional intervention from the RSH seems unlikely given the current involvement of the CFRS, but should you receive any notices of this kind we recommend you obtain legal advice as a matter of urgency.

8 **Statutory Powers of the Council**

- 8.1 We have reviewed the statutory powers held by the Council to effect works that may be necessary to comply with your fire safety duties, particularly in instances where leaseholders have declined to provide necessary access.
- 8.2 All landlords are required to ensure properties within their portfolios are free from hazards likely to cause a health and/or safety risk to their tenants. For the purposes of the HHSRS, a 'hazard' means any risk of harm to the health or safety of an actual or potential occupier of a dwelling which arises from a deficiency in the dwelling or in any building or land within the vicinity (whether the deficiency arises as a result of the construction of any building, an absence of maintenance or repair, or otherwise).
- 8.3 The HA, through the HHSRS, creates powers for local authorities to identify and protect against potential risks and hazards caused by deficiencies in residential housing. The Council may undertake an inspection of the state and condition of a dwelling, usually as a result of an individual request or complaint, in order to identify any deficiencies. The Council should then produce an HHSRS assessment and hazard rating for the property. In circumstances where the Council is not the landlord, it may take enforcement action, including accessing the property and/or carrying out the emergency improvement works itself. However, there is case law to the effect that the Council cannot enforce the HHSRS against itself as a landlord.

- 8.4 We understand that Hanover Court is classified as an HRB under the BSA 2022. As the Council holds a legal interest in the Property, it will satisfy the above definition of an accountable person. We assume that the Council has also been designated as the principal accountable person.
- 8.5 Accountable persons have various statutory obligations and responsibilities under the BSA 2022 which include the management of building safety risks for occupied HRBs. An accountable person must take all reasonable steps to prevent a building safety risk materialising in relation to the part of the building for which it is responsible and to reduce the severity of any incident arising from such a risk materialising (s.84 BSA 2022). This includes carrying out works to the parts of the building for which the Council is responsible. Under the BSA 2022, a building safety risk includes a risk to the safety of people in or about a building arising from the spread of fire. The deficiencies identified by CFRS within the Notice would likely satisfy this.
- 8.6 An accountable person may request access to a property for the purposes of carrying out their duties to manage building safety risks. This request must:
- (a) be in writing;
 - (b) set out the purpose as to why the request is being made;
 - (c) explain why it is necessary to enter the property; and
 - (d) request access at a reasonable time with a notice period of at least 48 hours.
- 8.7 In the event that entry is refused, an accountable person may apply to the County Court for a court order for access in order to facilitate its duties under s.84 of the BSA 2022. The Court may also authorise the taking of measurements, photographs, recordings or samples by the accountable person. The Council is unlikely to be able to claim that it lacks sufficient statutory powers to implement the requirements of the Notice in respect of Hanover Court.

9 **Powers under the Leases**

- 9.1 A review of the leases provided and the leases downloaded has made it clear that there are two main types of lease.
- 9.2 The attached Schedule of Leases identifies the relevant terms and which type (1 or 2) applies to the title numbers or flat numbers of the leases with which we have been provided or have downloaded. Below we consider the implications of the lease terms for the Council's rights under the leases.

Demise

- 9.3 Under all of the leases, the Council owns and has the repairing obligation for *'the main structural parts of the buildings'*.
- 9.4 In the Type 1 leases the Council excepts from the demise of the Flat *'the main structural parts of the building in which the flat is situate including the roof foundations and external parts'*

9.5 In the Type 2 leases the Council excepts from the demise of the Flat '*the main structural parts of the building and those other parts which the Landlord is liable to repair, renew or redecorate under this lease*', that is, among other obligations, the Common Parts.

9.6 The repair obligations are set out in detail below.

Statutory Obligations

9.7 The tenants are obliged to comply with statute. This is set out in the Type 1 leases at clause 2(7)(b) below:

To execute all such works as are or may be under or in pursuance of any Act or Acts of Parliament already or hereafter to be passed be directed or required by any district council or by any local or public authority to be executed at any time during the said term upon or in respect of the flat whether by the Landlord or the Tenant and to keep the Landlord indemnified against all claims demands and liability arising thereout.

9.8 In the Type 2 leases a similar obligation is set out at clause 6(3).

(a) The Tenant must comply with all statutes, regulations, orders, statutory instruments and byelaws whether made before or after the date of this lease and with all lawful directions and requirements of any public authority in respect of the Flat or the Tenant's occupation or use of the Flat.

(b) The Tenant must carry out all works required in respect of the Flat by or under statutes, regulations, orders, statutory instruments and byelaws whether made before or after the date of this lease.

9.9 The tenants do therefore have an obligation under the lease to carry out any directions of the fire authority 'in respect of the Flat' but this would not extend to works in the Common Parts or the Structure that are the responsibility of the Council.

9.10 We understand that the works required, while they may necessitate entry into the flats and disruption within the flats, are to be carried out within the structural parts of the Buildings and within the service conduits, which are part of the landlord's demise and repairing responsibility.

Rights of Entry

9.11 The tenants are obliged to allow the Council to enter the flats for the purposes of both inspecting any want of repair on the part of the tenant and also carrying out any repairing or other obligations it has under the leases.

9.12 Repairing obligations on the tenant are for the interior of the Flat but also importantly all doors and windows.

9.13 In the Type 1 lease this is expressed as '*the flat and everything demised hereunder and additions thereto and the Landlord's fixtures and fittings sanitary apparatus and appurtenances installed in or affixed to the flat and the doors and window glass window sashes frames cords catches and fastenings thereof*'.

9.14 In the Type 2 leases the Tenant has repairing obligations for all non-structural parts of the Flat, all doors and windows as well as 'all electricity cables, mains and wiring' which solely serves the Flat.

9.15 The Council's rights to enter are, in the Type 1 leases, set out as below at clause 2(9):

To permit the Landlord and its employees surveyors and agents at all reasonable times upon prior written notice (except in the case of an emergency) to enter any part of the flat for the purpose of repairing any part of the building in which the flat is situate and for the purpose of making repairing maintaining rebuilding cleansing lighting and keeping in good order and condition all sewers drains channels pipes cables watercourses gutters wires party structures or other conveniences belonging to or serving or used for the flat or the building in which the flat is situate (without prejudice however to the obligations of the Tenant hereunder with regard thereto) and also for the purpose of laying down maintaining repairing testing disconnecting stopping up removing or renewing drainage gas and water pipes and electric wires cables and conduits for similar purposes.

9.16 There are similar reservations in the Second Schedule at paragraph1(ii) as below:

The right for the Landlord and its employees or agents upon giving previous written notice (and in case of emergency without notice) at all reasonable times to enter any part of the flat for the purpose of carrying out repairs to the building in which the flat is situate and for carrying out its obligations under this lease PROVIDED THAT the Landlord shall make good all damage to the flat or to the fixtures fittings sanitary apparatus appurtenances goods or effects installed therein or affixed thereto caused by the carrying out of its obligation.

9.17 The Council's rights to enter for necessary repairs of the building are set out in the Type 2 leases as below at clause 13.3(a):

The Tenant will allow the Landlord, its employees and agents, and others authorised by the Landlord at all reasonable times on prior notice (except in an emergency) to enter the Flat to repair the Building or to carry out any other works for the benefit of the Building or the Flat.

9.18 At clause 13.1(a) the Council also has the right to enter to carry out any other obligations it has under the lease:

The Tenant must permit the Landlord, its employees or agents, and others authorised by the Landlord, on reasonable notice (except in an emergency), to enter the Flat

- to examine its state and condition*
- to examine how it is being used, or*
- to exercise any of the Landlord's rights under this lease.*

9.19 The Council further has a reserved right in paragraph 2 of Schedule 2 of the leases to 'construct or maintain in the Flat any conducting media for services to or from any part of the Building or adjoining land of the Council.'

9.20 As with the Type 1 lease, the Council must make good all damage to the Flat caused by such entry and/or work (Clause 13.3(b)).

9.21 If the Council can argue it has a right of entry to the flats under the leases to carry out the necessary works (but as we note below, this is not absolutely clear), it may be able to obtain an injunction to allow entry to carry out the works if tenants refuse entry. It would therefore appear that the Council is not prevented from carrying out the works required by CFRS through the terms of its leases.

Repair or Improvement?

9.22 However, the Council's right of entry to carry out works depends on whether the works come within the obligations on the Council under the leases.

9.23 One of the issues with dealing with rectification of defects is that the obligation to 'repair' has been established in case law as requiring 'disrepair', and an inherent defect, created at the time the building was constructed, is not a 'disrepair'.

9.24 In the Type 1 leases the Council's right of entry is to 'repair' any parts of the building. However, it is attached to a widely drafted set of obligations including rebuilding, removing and renewing and '*keeping in good order and condition*' '*all sewers drains channels pipes cables watercourses gutters wires party structures*'. There is not a definition of channels or pipes in the leases but it is possible this could be applied to the risers and elements of the compartmentation that requires remediation. There is some case law that would suggest that '*keeping in good order and condition*' could be said to include ensuring that the said elements were safe and did not represent a risk to residents.

9.25 In the Type 2 leases the repairing obligations at clause 7.1 are to *repair and where necessary renew the structure and the exterior of the Building*, including among other elements:

- *interior structural walls, but not the interior surface of any wall bounding the rooms of the Flat or the surface of any interior structural wall*
- *timbers, joists, beams and structural slabs*
- *the pipes, wires cables and sewers which provide services to the Building*
- *any boilers and heating apparatus serving the Building*

9.26 The Council is also permitted entry to '*carry out any other works for the benefit of the Building or the Flat*'.

9.27 Again, these obligations would not on the face of it cover remediation of defects, but it is possible the Council could rely on the fact that it was carrying out works 'for the benefit of the Building or the Flat'.

9.28 We consider that, while there would be a risk this could be challenged were the Council actually to go ahead and carry out the Works and charge leaseholders, it is at least in the first instance arguable that the Council has the right to carry out the Works and enter the flats if necessary in order to do so.

Temporary removal of tenants and Compensation Costs

9.29 While the Council does not have any explicit right to require the tenants to move to temporary accommodation while works are carried out, if it can establish that it has the right

to carry out the works, and it is necessary for the tenants to move to temporary accommodation because there is no other 'reasonable' alternative course of action, the Council could potentially require the tenants to be decanted.

9.30 All the leases contain a covenant for quiet enjoyment and in any event there are common law rights to quiet enjoyment and non-derogation from grant. Hence tenants may have a right to compensation for the noise and disruption if it is not considered a reasonably necessary result of works that the Council is obliged to carry out.

10 **Recovery under the Service Charge**

10.1 Both Princess and Hanover Court are 'relevant buildings' under the BSA 22.

10.2 Recovery of costs of the works will depend on whether the defects are 'relevant defects', that is, they arise from works carried out between 29 June 1992 and 28 June 2022 (the 'relevant period') which have given rise to a building safety risk.

10.3 If this is the case, recovery of the costs of the works are governed by the restrictions in Schedule 8 of the BSA 22 and in the associated regulations.

10.4 Both buildings pre-date 1992, and it is likely therefore that the defects are not 'relevant defects', but this is not a completely straightforward question. If major works were carried out in the relevant period that might have impacted on the defects or ought reasonably to have included steps that could have remedied the defects, then they could be considered 'relevant defects' arising from something 'not done' at that point.

10.5 This is a complex area of the legislation and to give definitive advice we would need to see further details of the defects, and details of works carried out in the relevant period, and potentially obtain expert technical advice.

10.6 If the defects are considered to be relevant defects, then in order to determine whether costs are recoverable from leaseholders, we would need to review what steps the Council has taken already in regard to issuing landlord's certificates in relation to the defects; requesting leaseholder's deeds, and establish whether leaseholders hold qualifying leases or not.

10.7 If the defects are not relevant defects, the usual service charge clauses and statutory obligations with regard to 'reasonableness and s.20 notices apply.

10.8 In the Type 1 leases the Council may recover cost incurred in meeting its obligations to 'repair' the Building, which is subject to the same caveats as noted above. The Council does also have the right at paragraph 11 of Schedule 3 to charge for costs incurred *'in taking all steps deemed desirable or expedient by the landlord for complying with ... the provisions of any legislation or orders or statutory requirements thereunder concerning town and country planning public health highways streets drainage or other matters relating or alleged to relate to the building'*. There would likely be an argument for saying that this would cover the costs of complying with fire safety legislation but we would be doubtful that a court would allow quite significant costs to be recharged under this type of 'sweeper' clause if they were not recoverable under the repairing obligations.

10.9 The service charge clauses in the Type 2 lease are in almost identical terms and the same analysis applies.

10.10 We consider that, while there would be a risk this could be challenged were the Council actually to go ahead and carry out the Works and charge leaseholders, it is at least in the first instance arguable that the Council has the right to charge leaseholders for the Works.

11 **Conclusion and next steps**

11.1 The Council has statutory powers to gain entry to the flats to undertake compartmentation works, and it may also have rights under the leases, although the case for this is not as clear as we would like, given that the fire safety works may not be classed as "repairs" if they relate to inherent defects. Nonetheless, the Council may not consider implementation of the works to be reasonably practicable in the circumstances, even if it has the power to undertake them,

11.2 Despite the forthcoming plans to demolish and rebuild the Buildings, the Council cannot ignore the safety deficiencies identified by CFRS, so its strategic aim should be to identify alternative means of putting in place control measures that mitigate the risk posed by poor compartmentation, without having to carry out expensive compartmentation works which would ultimately be demolished as part of the redevelopment plans.

11.3 We would suggest deferring to a fire risk assessor on this specific issue as to whether there is a control measure or group of measures that will ensure the safety of residents until the Council is in a position to redevelop the site. This advice should be commissioned as a matter of urgency, both to demonstrate the Council's compliance with its statutory fire safety requirements under the FSO, and to identify as soon as possible if an alternative approach to keeping residents safe, is reasonably practicable.

11.4 If a set of measures can be identified, then the Council should continue its dialogue with CFRS to obtain its agreement that those measures are satisfactory for the relevant period residents remain in the buildings. A proactive approach should provide weight, dissuading CFRS from using its enforcement powers and serving notices that would legally require the works to be undertaken. As set out above, the Council could however consider, and likely appeal, any notice received, which would provide further time.

11.5 In the event the Council is left with limited alternative options to address the fire risk, and must undertake the works, the powers within the BSA 2022 could be deployed to provide access to residential units. Where entry is refused, you could apply to court for an injunction.

11.6 If there are no viable options other than to carry out compartmentation works, this would increase the pressure on the Council to secure private treaty agreements with the leaseholders to gain vacant possession before the Council is forced to undertake expensive, and ultimately unnecessary, compartmentation works. Therefore negotiations with leaseholders should be given a high priority.

11.7 Unfortunately, there is no power under either the FSO or the BSA 22 for the Council to remove the residents permanently from an unsafe building. The FSO provides CFRS the power to prohibit the use of the building if it deems the risk to be so severe that the residents would have to leave, however in this scenario the Council would have to rehome them. Prohibition notices are extremely rare because the safety risk must be balanced against the threat of rendering persons homeless. The Council could explore with the CFRS whether they would consider this option subject to the Council providing alternative accommodation,

but we suspect that they will be reluctant to proceed in this manner as it would be draconian, and the expense could outweigh the compartmentation works.

11.8 Going forward, the Council will need to consider the use of compulsory purchase powers to gain vacant possession of the Buildings as soon as possible, given the on-going safety risks. Whilst an assessment of the case for compulsory purchase is beyond the scope of this advice, we recommend that the Council explores this further as soon as possible given that it can take around 18 months from the making of an order before the order is confirmed. Please let us know if you would like us to advise you further on the promotion of a compulsory purchase order.

11.9 We recommend that you:

11.9.1 Appoint a suitably-qualified fire risk assessor to advise on what temporary measures (pending demolition) can be put in place instead of carrying out the compartmentation works;

11.9.2 Present the outcome of the above advice to the CFRS, explaining the Council's intentions to demolish the buildings and seeking agreement on the way forward;

11.9.3 In the unlikely event that there are no reasonable alternatives to compartmentation works being carried out, write to the leaseholders setting out the fire safety issues that are in play, and setting out the Council's legal powers (under the leases and statutory powers) to gain access, and inviting them to agree a relocation package whilst the works are being undertaken;

11.9.4 In tandem with the letter mentioned at 11.9.3 above, write to the leaseholders offering to acquire their interests and setting out a package of compensation in each case;

11.9.5 As soon as possible explore the case for making a compulsory purchase order to mitigate against the risks of private treaty negotiations failing.

Trowers & Hamlins LLP

20 September 2024