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Our Ref KDG/18162.1/LM
Your Ref BR 1502/001/RH/TB

Dear Sirs

The Barbican Estate - Remedial Works to Exterior Concrete

We refer to your letter of 5 November and the subsequent telephone conversation between your Mr Howlett and our Miss Glanville.

Your letter does not address the points made in the third paragraph of our letter of 7 October. Whilst we are not prepared to waive privilege and disclose to you the written opinion obtained from Counsel on behalf of our client (nor should this be necessary in order to illicit your response), we are content to amplify the basis on which we say that our client is not liable to contribute towards the cost of the repairs carried out to the concrete exterior to the tower blocks on the Estate in order to assist you.

The flats comprising the Estate are demised in some cases by leases granted under the provisions of the "right to buy" legislation (Part V of the Housing Act 1985, formerly Part 1 of the Housing Act 1980) with the majority being demised under the terms of voluntary sales leases. The landlord's repairing obligations are not set out expressly in the right to buy leases; they are implied by the relevant legislation. There are express covenants in the voluntary sales leases. However, in all material respects (save for the notice period) the provisions are the same. The City's obligation is "to keep in repair the structure and exterior of the premises and of the Building". The leaseholders are to pay to the City "a reasonable part of the costs of carrying out specified repairs". "Specified repairs" are defined as repairs carried out in order "to keep in repair the structure and exterior of the premises and of the Building in which they are situated (including drains gutters and external pipes) not amounting to the making good of structural defects" and repairs carried out "to make good any structural defect of whose existence the Corporation has notified the tenant..... or of which the Corporation does not become aware earlier than ten [or 5] years after the grant". It is the second limb of the definition which is relevant here.

We trust there is no dispute between the parties that the works which have been carried out to the exterior concrete of the tower blocks, the cost of which you are seeking to recover (and in most cases have recovered) from the leaseholders, are works of repair to remedy a defect. In our letter of 7 October we anticipated, on the basis of the documents we have seen, that the City's contention is that the works were not necessary to remedy a defect in the "structure".

Whilst we accept that what is meant by "structure" depends on the proper interpretation of the particular lease in question, the case law provides some useful guidance as to how the courts are likely to construe that word. In this respect, there are a number of relevant decisions. The first is *Pearlman v The Keepers and Governors of Harrow School* [1979] QB 56, CA in which Eveleigh LJ approved the following passage from the unreported decision of His Honour Judge White in *Pickering v Phillimore* [1976] in which the Court of Appeal had to consider whether the installation of a central heating system was "an improvement made by the execution of works amounting to structural alteration, extension or addition" for the purposes of the Housing Act 1974.

> *"A house is a complex unity, particularly a modern house. "Structural" implies concern with the "constituent or material" parts of that unity. What are the "constituent" or "material" parts? In my judgment in any ordinary sense they involve more than simply the loadbearing elements, for example, the four walls, the roof and the foundations. The constituents are more complex than that.* [He then suggested a definition of "structural" as] *appertaining to the basic fabric and parts of the house as distinguished from its decorations and fittings."*

A similar approach was taken in *Irvine v Moran* [1991] 1 EGLR 261, where the Court had to consider the meaning of "structure" in the landlord's covenant to keep in the repair the "structure and exterior" implied pursuant to Section 11 of the Landlord & Tenant Act 1985. Thayne Forbes QC, sitting as a Deputy High Court Judge, adopted the following approach:

> *"The structure of the dwelling house is something less than the overall dwelling house itself and the exterior of the dwelling house is also something less than the overall dwelling house itself... I am not persuaded... that one should limit the expression "the structure of the dwelling house" to those aspects of the dwelling house which are loadbearing in the sense that sort of expression is used by professional consulting engineers and the like; but what I do feel is, as regards the words "structure of a dwelling house", that in order to be part of the structure of the dwelling house a particular element must be a material or significant element in the overall construction. To some extent, in every case there will be a degree of fact to be gone into to decide whether something is or is not part of the structure of the dwelling house."*

In *Ibrahim v Dovecorn Reversions Limited* [2001] 2 EGLR 46, Rimer J cited the above passage with apparent approval and in *Marlborough Park Services Limited v Rowe* [2006] 2 EGLR 27, Neuberger LJ referred to it as "a good working definition".

In the decided cases the essential distinction to be drawn, therefore, is not between loadbearing and non-loadbearing aspects of a building but between the constituent elements of a building and its decorative or other finishes and fittings. In *Grand v Gill* [2011] EWCA Civ 554, Rimer LJ held in relation to plasterwork as follows:

> *"In the days when lath and plaster ceiling and internal partition walls were more common than now, the plaster was, I should have thought, an essential part of the creation and shaping of the ceiling or partition wall, which serve to give a dwelling house its essential appearance and shape. I would also regard plasterwork generally, including that applied to external walls, as being ordinarily in the nature of a smooth constructional finish to walls and ceilings, to which the decoration can then be applied, rather than a decorative finish in itself. I would therefore hold that it is part of the "structure"."*

In the light of these decisions we consider that the exterior concrete to the tower blocks will be held to be part of the structure of those buildings.

We accept that the leaseholders are liable to contribute to the cost of repairing those defects to the structure of which notice was given on or before the grant of the leases or of which the City has not become aware earlier than five or ten years (as the case may be) from the grant of the leases.

It has been suggested by Mr Howlett that the City was not aware of the defects to the concrete until 2011; this is disputed. The report of the Director of Building & Services to the Barbican Residential Committee for the purposes of a meeting on 14 April 1986 clearly shows that the City was aware, by 5 April 1986, that there were some defects affecting the concrete and that it was at least suspected that there were "local instances of insufficient cover to reinforcement and less dense concrete" (para 2.2.6). The 1986 report referred (at para 2.2.9) to defects found in five locations including Flat 373 in the Cromwell Tower and Flats 12 and 251 in the Lauderdale Tower, in relation to which "the potential hazard was averted due to timely intervention and repair although it is not clear what work was done. The defects were ascribed to "a repair or other interference with the concrete work effected during the construction or shortly after construction had been completed". The 1986 report recommended that a walk-round survey and report, followed by a "reconnaissance survey" be conducted over a total period of about 45 weeks and at an estimated cost (at that time) of £35,000.

The 1991 report headed "The Physical Future of the Barbican Estate" refers, under the heading "Spalling in Concrete" to the walk-round survey being carried out and the report of the reconnaissance survey being received in April 1991.

A report commissioned by the Association from William J Marshall & Partners refers to and considers the results of fairly extensive testing in relation to the tower blocks by Martech. This reveals that although Marshall did not consider the results to be "exceptional" for buildings of their age and class, between 17% to 20% of more than 2,400 cover meter readings were at or below the depth of 40mm which was the recommended depth at the time of construction. Furthermore, although the area affected in each case was generally around only half a metre square, there were about 120 locations where compaction was found to be inadequate, a significant number of which were on the north elevation of the Cromwell Tower (para 3.10). Although 95% of 200 tests revealed the carbonation depth to be 20mm or less (para 3.14), in some locations carbonation had occurred to a depth of over 50mm (in other words to a depth greater than that of 42% of the areas where depth of cover had been tested). Even on these figures around 1 in 20 of the tested areas showed carbonation to a depth which matched or exceeded the cover levels recorded in around 1 in 50 of all the tested areas (para 3.7). About 280 areas of spalling concrete were identified and about 50 areas of exposed reinforcement (para 3.18). Intrusive investigation revealed one instance of "significant corrosion" of a reinforcement bar (para 3.22). It is not suggested that defects in these affected areas had been caused by previous repair work as opposed to the original construction.

Accordingly, the extent of the low cover and poor compaction combined with instances of spalling concrete and exposed reinforcement suggests significant and widespread defects in the concrete, albeit in patches generally of half a metre square. These defects have occasionally resulted in significant damage. There are apparent parallels between the results of the Martech testing, as analysed in the Marshall report, and the "local instances of insufficient cover to reinforcement and less dense concrete" recorded in the 1986 report (para 2.2.6). At the very least, the information presently available demonstrates longstanding defects in the original construction of a kind which the Corporation knew about from 1986 and which were then sufficiently widespread to warrant wide ranging surveys. Further, it is apparent that localised repair of the concrete surface in an area where it had become disrupted or loose by reason of corrosion of the embedded reinforcement caused (at least in part) by inadequate cover and/or compaction would not address other areas of inadequate cover or compaction in which the same surface damage may later become manifest.

We consider that, at least by the time of 1991 report, the City was aware of unremedied defects in the concrete because it had decided that a second cycle of inspections was required. The reports do not

suggest that there is any material difference in the construction of the concrete as between the various different buildings. The City was, therefore, aware of such defects across the Barbican Estate including the tower blocks, in two of which actual defects had been discovered by 1986.

It is a fact that no notification was given to any lessee of any structural defect in relation to the concrete either at or before the leases were granted or within the relevant five or ten year period notwithstanding the City's knowledge of their existence. It is in this context that our letter of 7 October refers to no notice having been given to the leaseholders. It has been suggested by Mr Howlett that the Notice of Intention served on the leaseholders pursuant to Section 20 of the Landlord & Tenant Act 1985 (referred to in the decision of the Leasehold Valuation Tribunal dated 30 July 2013) constitutes "notice" for this purpose. In view of the compelling evidence as to when the City became aware of the problems, this cannot be the case.

The City's application for dispensation from the consultation requirements proceeded unopposed and on the assumption (on the part of the City and not questioned by the Tribunal) that the costs incurred in carrying out the remedial works were recoverable as part of the service charge. The Tribunal was not asked to make a decision in respect of this issue of substance. Its determination cannot bring within the serve charge regime costs which are not recoverable under the terms of the leases, nor is it the case that a failure to oppose the application by the leaseholders and/or the payment of the sums demanded of them, affect their liability under the leases or preclude them from challenging the City's entitlement to recover these costs and/or seek reimbursement of the sums already paid.

We have been asked by the leaseholders to put you on notice that they intend to seek redress in respect of those sums which have been improperly recovered from them in respect of the cost of carrying out repairs to the concrete structure to the tower blocks. This is quite apart from any arguments they may have as to the reasonableness of the sums demanded and/or the standard of the works carried out.

We hope that on reflection you will feel that there may be some benefit in having a meeting to explore whether this matter can be resolved without the need for applications to the Court and/or Tribunal. Our client is prepared to make available to you in advance of any meeting a copy of William J Marshall & Partners' report.

We look forward to hearing from you.

Yours faithfully

Pemberton Greenish LLP

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