Comptroller and City Solicitor
Michael Cogher LLB (Hons), Dip.L.G., Solicitor
Comptroller and City Solicitor

Pemberton Greenish
Solicitors
45 Cadogan Gardens
London SW3 2AQ

Telephone 020 7332 1690
Fax 020 7332 1992

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Dear Sirs

The Barbican Estate - Remedial Works to Exterior Concrete

Further to your letter of 22 November 2013, and my reply of 26 November, 2013, I have now taken instructions from my client and considered the issues raised in your letter with Counsel. This letter sets out the City of London's response to the arguments raised in your letter.

There is no dispute between the parties as to the terms of the leases relevant to this matter, nor that the works in question to the exterior concrete of the towers are works of repair to the structure and/or the exterior of the blocks affected. We do not, however, agree with your description of the works, contained in the third paragraph of your letter, as "works of repair to remedy a defect".

One of the key difficulties with this description of the works is that it does not use the language contained in the lease but, rather, elides the two separate concepts in clause 5(4) of the lease, *i.e.* that of "keep[ing] in repair the structure and exterior" of the premises and of the building and that of "mak[ing] good any defect affecting the structure". While we accept that, as a matter of definition, the lease uses the term "specified repairs" to mean both kinds of work, as a convenient shorthand, that does not, in our view, affect the proposition that they are conceptually distinct and intended, by the lease, to be so.

It is clear in our view that the leases were drafted in this way, reflecting the provisions of Part V of the Housing Act 1985, so as to distinguish between works of what might be called ordinary "repair" to the structure and/or exterior and works to "make good" what are described as "structural defects" or "defects affecting the structure". It is to be noted, that in relation to the latter, that the activity referred to is one of making good the defect rather than repairing it, and that the phrase "structure and exterior" is not used.

This distinction is meaningful, particularly in the context of whether or not the cost of undertaking the works is recoverable from leaseholders under the service charge provisions of the lease. Ordinary repairs and maintenance to the structure or exterior of the buildings on the estate, such as the replacement of rotten window frames, or repointing of brickwork, or the reapplication of mastic seals, is different in kind from works for the making good of structural defects. The City

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believes that the repair of localised areas of loose and/or spalling concrete, caused essentially by wear and tear to the buildings (*i.e.* their exposure over time to the elements) rather than by any inherent defect to the concrete, falls into the former category of works.

The City therefore does not accept your contention that any work to the structure to repair some aspect of it that has gone out of repair amounts to the making good of a structural defect. While we do not dispute the various authorities to which you refer on the meaning of the word "structure", we do not consider them to be particularly relevant because the critical issue is not whether the external walls of the blocks are part of their structure but, rather, what is meant by the term "structural defect". Our interpretation of the lease, which accords with the way that the courts have construed the use of the same language under Part V of the 1985 Act (see below), is that "structural defects" are confined to inherent or design defects.

This interpretation has the advantage of preserving the distinctions in the lease between repairs to the structure and exterior and the making good of structural defects, to which I have already referred, above. Your interpretation, on the other hand, as we understand it, collapses that distinction. This seems unlikely to be correct because it deprives of any effect, so far as the structure of the buildings is concerned, the provisions relating to repairing the structure and exterior: in other words, all works to remedy wants of repair to the structure would also amount to repairs to remedy a defect and would thus be works to make good a structural defect. This would mean that notice on or before the grant of the lease (or absence of knowledge of the "defect" for 5 or 10 years) would always be required for recovery of the costs through the service charge to be possible.

The construction of the lease provisions I have suggested above is supported by the case of *Payne v Barnet LBC* (1998) 30 HLR 295, CA, which considered the meaning of the provisions of s.125, 1985 Act and the equivalent, predecessor provisions in the Housing Act 1980. The third holding in the headnote reads:

> " 'Structural defects' are defects affecting the structure which require making good, as opposed to ordinary items of repair or maintenance; in the context of right to buy applications, structural defects are limited to the narrow category of inherent defects."

Brooke LJ, at p.300, said this.

> "…Part III of Schedule 2 to the 1980 Act, as amended, …set out the terms of any lease which might be granted under these provisions. Paragraph 13(1A) of this schedule imposed on the landlord (a) an implied covenant 'to keep in repair the structure and exterior of the dwelling-house and of the. building in which it is situated (including drains, gutters and external pipes) and to make good any defect affecting that structure;' and (b) an implied covenant to keep in repair any other property over or in respect of which the tenant has any rights by virtue of this schedule. We will call the repairs referred to in these two paragraphs 'ordinary external repairs' as distinct from making good structural defects.
>
> "We make this distinction because it appears to us that the draftsman of this schedule was well aware of the vexed problem in landlord and tenant law of distinguishing between a liability to repair and a liability to make good an inherent defect in the property demised (see *Woodfall on Landlord and Tenant,* Volume 1, paras 13.029-13.037 and the well-

> known cases there cited). In *Post Office v. Aquarius Properties Ltd* [1987] 1 All E.R. 1055, for instance, this court held that a covenant by a tenant to keep demised premises in good and substantial repair did not impose any obligation on him to remedy a defect in the structure of the premises, whether that defect resulted from faulty design or workmanship, if it had been present from the time the building was constructed and had caused no damage to it. In the Housing Act scheme the landlord is fixed not only with the liability to keep the dwellinghouse's structure and exterior in repair, but also with the liability to make good any defect affecting that structure. However, the requirements he must fulfil if he is to be able to pass on to the tenant any of the expense he may incur in meeting these liabilities are different in each case."

At p.312, he added:

> "Parliament has required the landlord to tell the tenant of any structural defects, meaning defects affecting the structure which require making good, as opposed to ordinary items of repair or maintenance…"

The repair of isolated areas of spalling concrete on buildings which are more than 40 years old is not, in the City's view, works to make good structural defects, but ordinary works of repair and maintenance much like the examples I have given above (re-pointing brickwork or replacing rotten window frames). Neither the design nor the construction of the buildings' external walls was defective in any respect; over time, however, concrete repairs will become necessary due to wear and tear including, in particular, the exposure of the external surface of the concrete to the elements. It is clear from the expert reports which we commissioned and which your clients have seen that the quality of the concrete in general is extremely high and still generally providing good cover to the steel reinforcement.

I cannot therefore agree with the central thesis of your letter that recovery of the costs of the works depends on the giving of notice or the date of the City's knowledge of the need for the works. Accordingly, I do not propose to comment in detail on your assertions derived from the William J Marshall report or the Martech testing. In any event, having not been given sight of the Marshall report, the City has no option but to reserve its position on the contents of that report. I have already commented in general terms on the 1986 conclusions of Ove Arup, in my letter of 26 November.

The one point I would make, in general terms at this stage, is that I do not accept that knowledge of a need for localised concrete repair works in either 1986 or 1991 would be such as to put the City on notice of the need for further concrete repairs in 2011. This is because, as I have said, the damage to the concrete is caused by the effects of exposure to the elements over time. While it is to be expected therefore that from time to time further such repairs will be required, it was only in about June 2011 that officers of the City became aware of an area of unsound concrete on the 37th floor of Shakespeare Tower which led to the current investigative and repair works. In *Payne*, where the issue of knowledge was considered in the context of the notice requirements of Part V, 1985 Act, the Court of Appeal pointed out (at p.312) that:

> "It is, of course, knowledge, not suspicion about a possibility, that is required before the obligation of disclosure under section 125(4A) of the Act can have any effect."

If, in the light of this response, your clients still wish to have a meeting with us to explore whether the matter can be resolved, then I am instructed that officers are willing to meet with you. It is important, however, that any such meeting should not proceed on the misunderstanding that the City accepts the proposition that the works undertaken related to anything other than routine repairs and maintenance to give effect to its obligation to keep in repair the structure and exterior of the blocks in question.

Yours faithfully

R Howlett
For Comptroller and City Solicitor