

## **Submission on behalf of the Residents' Association of Canary Riverside on the draft Building Safety Bill.**

**Our view:** the Bill should not proceed until the fire safety remediation issues arising from AN14 and the 'consolidated advice' issued in January 2020 have first been resolved, including responsibility for the funding of associated remediation costs. The Bill makes leaseholders legally responsible for the cost of building safety and draws no distinction between responsibility for costs incurred in order to *reach* the required safety level versus costs of *maintaining* that basic safety level. The Bill should only address the latter, and must not be the mechanism by which leaseholders, post-Grenfell, are made to foot the bill of making their homes safe to live in.

The Bill has been drafted in isolation from the broader and significant leasehold law issues that first need to be addressed. Leasehold law needs to be reformed per the recommendations made by the Law Commission in July 2020. This Bill will worsen the systemic inequality between landlords and leaseholders inherent in the current law and amplify the 'inequality of arms' that exists between them. It will make flats unaffordable for existing owners and undesirable to would-be buyers. Leasehold disputes will escalate, placing more pressure on an over-burdened FtT.

**The Bill should be set aside and the proposals contained within it 'parked' until remediation costs and leasehold reform have first been addressed.**

### **About Canary Riverside**

Canary Riverside ("CR") is a mixed-use estate on the Isle of Dogs, London E14. The residential element of CR (the part that will be impacted by the draft Building Safety Bill ("the Bill")) comprises 325 leasehold flats within four buildings of varying heights. One of the four is between 11m-18m and the other three >18m. The residential leases are all 999-year at a peppercorn rent.

CR was built between 1997-2000 and residential occupation commenced in 2000. The NHBC 'buildmark cover' expired over 10 years ago (9<sup>th</sup> April 2010). The current owners purchased CR from the original developer in April 2004. They are Octagon Overseas (freeholder) and Canary Riverside Estate Management Ltd (owner of headlease ie, the landlord). Management of the residential buildings and estate services (common parts) is currently undertaken by a Manager appointed under section 24 of the Landlord and Tenant Act 1987, and the s.24 Manager is responsible for levying the service charges paid by residential leaseholders.

Inspections of the EWS on the six residential buildings has identified a significant number of compliance issues that will require remediation in order to comply with the Government's 'Advice for Building Owners of Multi-storey Multi-occupied Residential Buildings' consolidated guidance issued in January 2020 ("consolidated Advice"). It is our understanding that these materials complied with the building regulations in force at the

time of build. Further inspections are currently being undertaken by a fire engineer and remediation costs will be significant (£millions). Like tens of thousands of others, our leaseholders are unable to sell their flats or re-mortgage with new lenders.

Our s.24 Manager has registered with the Government's £1bn BSF, which is a 'first-come first-served source of funding, limited in scope and acknowledged as being woefully inadequate. One of our buildings (>11m but <18m) does not qualify for the fund.

The Government has stressed that leaseholders should look to the 'building owner' and/or 'responsible entity' to cover the costs of remediation. At CR the landlord played no part in the design or build of CR. The tribunal-appointed s.24 Manager is appointed in a capacity similar to that of a court-appointed receiver, ie, it is a personal appointment, and they bear no responsibility for the costs of remediation. The buildings are over 20 years old and are no longer covered by warranties.

## **Response to the Call to Evidence**

### **1. Resolving the issues raised by the January 2020 'consolidated advice'.**

**Recommendation:** Prior to implementing this legislation the Government must first resolve the funding of the remediation works required to ensure that buildings comply with the Government's 'consolidated advice'. The Bill must not be used by the Government as the mechanism by which leaseholders are made responsible for the costs of avoiding a second Grenfell – made to pay to remedy the defects stemming from historical regulatory and build failures.

As currently drafted the Bill would make leaseholders legally responsible for paying costs incurred by the 'Appropriate Person' as a consequence of the Bill, by way of a separate service charge.

Section 17A(3)(a) of the Bill requires the tenant [leaseholder] to pay to the landlord within 28 days a demand in respect of building safety costs.

Page 64 of the 'Impact Assessment' sets out indicative costs ('leaseholder impacts'), which average £78,000 per flat (weighted average cost of £9,000). The only 'protection' offered to leaseholders is the use of the word 'reasonable' (paragraph 312) – which as every leaseholder knows is a meaningless word that offers zero protection from excessive charges, and challenges to the 'reasonableness' would be made in the First-tier Tribunal – Property Chamber (FtT): this is an expensive and time-consuming process. Non-payment of the service charge would put the leaseholder under threat of forfeiture.

Leaseholders are not responsible for remediation works required to bring their home up to safety standards that were not in force at the time their property was built, and no amount of improved transparency/accountability or 'resident'<sup>1</sup> engagement alters this

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<sup>1</sup> The term 'resident' is confusing. Does the Government intend to place rights and responsibilities on AST tenants as well as on (long) leaseholders?

position. The provisions in the Bill, if implemented, must only apply to buildings after they have been brought up to the required safety standard as set out in the January 2020 ‘consolidated advice’.

**Safety recall:** Analogies can be drawn with motor vehicles, which are subject to stringent safety measures that have evolved over the years. If a vehicle is recalled by the manufacturer for a safety reason the consumer will not usually have to pay for any repairs or parts. The Government’s ‘consolidated advice’ can be viewed as the equivalent of a safety recall for buildings: responsibility for paying for repairs and parts should therefore lie with the Government, whose building regulations failed to ensure that our homes are safe to live in. Compare a residential building clad in combustible materials to an equivalent safety risk found in a car or a plane. The DVSA would demand an immediate safety recall, the CAA would ground the plane. The motorist/airline would have their car/plane made road/airworthy at no cost to them.

The Bill places legal responsibility for all costs associated with building safety on the unwitting consumer (leaseholder), who bought their flat in good faith on the assumption that it met building regulations. The Government acknowledges that the £1bn BSF is woefully inadequate. Through this Bill they evade responsibility for costs and instead make the people least able to stand up/defend themselves pay: leaseholders.

## **2. Preventing amplification of the conflicting interests inherent in leasehold: leasehold must first be reformed.**

**Recommendation:** The Bill should be delayed until such time as the Parliamentary timetable allows for major reforms to leasehold first to be implemented, as proposed by the Law Commission. The Fire Safety Bill currently progressing through Parliament reduces the urgency of this legislation. The Bill will, if progressed in the absence of leasehold reform, exacerbate the conflicts of interests that currently exist between landlords and tenants. It will tilt the legislation even further in the landlord’s favour and place yet more pressure on the FtT to resolve the inevitable disputes.

**The opposing interests of landlords and leaseholders:** Unless reforms to leasehold of the nature and magnitude proposed by the Law Commission<sup>2</sup> are implemented the Bill will serve to further amplify the conflicts that exist between landlords and leaseholders. As the Law Commission explains, the interests of landlords and leaseholders are diametrically opposed:

*“All of the criticisms summarised above derive, at least to some extent, from those inherent limitations – namely that the asset is time-limited, and that control is shared with the landlord. Those limitations are compounded by the fact that the landlord and leaseholder have opposing financial interests – generally speaking, any financial gain for the landlord will be at the expense of the leaseholder, and vice versa. Accordingly, the leasehold system has been reformed over the years in an attempt to create an appropriate balance between those competing interests. Given their*

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<sup>2</sup> Law Commission reports on Residential Leasehold and Commonhold published 21<sup>st</sup> July 2020

*opposing interests, it is very unlikely that leaseholders and landlords will agree that the balance that has been struck between their respective interests is fair. Their interests are diametrically opposed, and consensus will be impossible to achieve.”<sup>3</sup>*

In the same report (para 1.27), the Law Commission notes the systemic inequality between leaseholders and landlords:

*“Arguments about inherent unfairness are compounded by the inequality of arms that exists, broadly speaking, between leaseholders and landlords in the current leasehold regime. It is a systemic inequality between leaseholders (as a whole) and landlords (as a whole), as opposed to an individual inequality as between particular people within those groups.”*

The cost consequences for leaseholders of the Bill will be significant, and leasehold is increasingly becoming an unaffordable tenure. Freehold house owners are free to determine their own expenditure priorities: leaseholders risk losing their homes if they do not pay the sums demanded by their landlord. Any increase in the cost liabilities of leaseholders must be accompanied by a significant rebalancing of the relationship between landlord and leaseholder that resolves the present conflicts. For millions of flat owners across England and Wales, leasehold is currently often a form of taxation without representation: landlords are unwilling to involve leaseholders in any aspect of the management of their homes and investments.

**Transparency and engagement with residents:** Just because leasehold legislation places responsibility on the landlord to disclose certain information and documents to leaseholders (eg, per section 22 of the LTA 1985) does not mean they will. And if they don't comply? Section 22 of the LTA 1985 can result in a landlord being fined in the magistrate's court - but unless the local authority is willing to prosecute (they usually won't) leaseholders have to bring their own private action, with the associated cost risk. This may result in the landlord being fined (up to a maximum of £2,500), but it still doesn't provide a remedy for the leaseholders.

At CR fire risk assessments were not shared with leaseholders, and leaseholders had to resort to FOI requests in order to see the London Fire Brigade's Fire Safety Inspection reports concerning their buildings.

**High service charges impact leaseholders' investments not landlords':** The Bill will exacerbate the issues that leaseholders already face. Service charges will increase considerably in order to cover the costs of inspection, building manager, PI cover for the accountable person etc - together with any actual works carried out to our buildings. Flats will increasingly become unaffordable and unattractive to buyers. Landlords' investments (the land and income from ground rents), by comparison, will be unaffected.

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<sup>3</sup> Paragraph 1.33 of 'Leasehold home ownership: buying your freehold or extending your lease'.

**Protection against unreasonable costs:** The Bill relies primarily on existing legal ‘checks and balances’ to prevent a landlord from charging leaseholders anything other than ‘reasonable’ costs: unreasonable costs can be challenged, eg, at the FtT per section 27A of the LTA 1985. The reality is the current legislation is tilted towards landlords:

- **Legal costs:** The ‘inequity of arms’ that exists between landlords and leaseholders includes the fact that landlords are often able to recover the legal costs associated with FtT proceedings from leaseholders, whereas leaseholders can never recover their legal costs from the landlord. This incentivises landlords to engage barristers and top legal firms because it increases their chances of winning and, therefore, recovering their legal fees from leaseholders. At CR, despite being successful in an application to have a s.24 Manager appointed to manage the estate/service charge the landlord was still entitled to recover over £300,000 of their legal costs from leaseholders. The applicant leaseholders had to pay their own legal costs.
- **Costs of litigation outweighs the benefit:** A substantial level of over-charging is usually required to make it cost-effective for a leaseholder to challenge unreasonable service charges at the FtT. Overcharging 250 leaseholders £100 each adds up to a lucrative £25,000 for a landlord/managing agent. For a leaseholder, the cost and time/energy required to mount a challenge in the FtT, whether for £100 or £1,000+, will often outweigh their likely net benefit (unless they are willing to fight on principle).
- **Uniting leaseholders:** Buildings and developments with >500 flats are increasingly common in London, often with a significant proportion of non-resident ‘buy to let’ owners. It is increasingly difficult for leaseholders to join together to share views and experiences and, given the inherent conflict between the interests of landlords and leaseholders, the majority of landlords are not supportive of residents’ associations, viewing this ‘unionisation’ of leaseholders as a threat to their own interests.
- **S.20 consultation for major works needs reform:** it is unclear as to how existing legislation relating to consulting for major works or long-term contracts (s.20 of the LTA 1985) will apply to the building safety service charge. If s.20 applies it will inevitably lead to higher costs at CR because of the administration costs that apply to such consultations. A s.20 consultation for ‘major works’ is required when the cost to one leaseholder reaches £250. At CR, when that trigger-point is reached the cost to the majority of flats is less than £80. This is because the largest flat at CR pays a service charge six times higher than the smallest, and three times more than the average-sized flat. Qualifying contracts have a threshold of just £100.

S.20 is no longer fit for purpose. Consultation requirements for major works costing £1M in a block of 500 flats are the same as those for works costing £1,000 in a house split into two flats. Reform is long overdue, and the additional

service charge costs arising from the draft Bill will exacerbate the existing problem.

### 3. **Capping costs – providing certainty to leaseholders.**

**Recommendation:** The Bill should legislate for a cap on the costs associated with regulation to enable leaseholders to be aware of the maximum cost they will face, enabling them to budget accordingly.

Prior to the Bill coming into force, buildings **must first be remediated** so that they are compliant with the building regulations set out in the Government’s ‘consolidated advice’<sup>4</sup>. The Bill’s focus should be on ensuring that a building maintains compliance, achieved through regulatory oversight.

In the 12 months ended 30<sup>th</sup> June 2018 there were 1,770 reported road deaths. The provisional estimate for 2019 is 1,870 deaths. Drivers have a legal obligation to ensure that their vehicle is road worthy, and there is a well-developed regulatory framework to ensure compliance. Vehicle owners know that they are responsible for maintaining their vehicles’ road worthiness. They also know the maximum they will pay for their annual inspection – which, in the case of a car, is £54.85. Leaseholders should be given the same level of certainty, with costs capped at a maximum amount per flat.

Unlike vehicle owners, leaseholders have little/no choice in who should carry out their building’s ‘MOT’, nor the repairs indicated to be necessary in order to pass. And as every car owner knows, all garages are not equal when it comes to honesty and integrity in respect of the repairs required. Property maintenance is no different, but leasehold adds to the mix the fact that it is the landlord and not the leaseholder that is the customer. Leasehold is the equivalent of a MOT ‘postcode lottery’: where you live determines which garage will carry out your MOT and associated repairs, your only role is to pay the associated bill. Uncomfortable with that prospect? Welcome to the world of leasehold.

The Bill needs to include sufficient protections for leaseholders to prevent exploitation carried out in the name of building safety. What those protections need to be is difficult to propose given the inherent inequity faced by leaseholders under the current legislation. What is clear is that, as drafted, the Bill exacerbates those inequities.

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<sup>4</sup> As detailed earlier in this submission, the associated remediation costs should not fall to leaseholders.