

GRENFELL TOWER INQUIRY
PHASE 2 MODULE 1 OPENING STATEMENT
ON BEHALF OF THE ROYAL BOROUGH OF KENSINGTON & CHELSEA

Introduction

1. This Opening Statement is prepared on behalf of the Council in order to assist the Inquiry. It is intended concisely to set out the Council's position in relation to issues within Module 1 of Phase 2.
2. Before setting out that position, we wish to state on behalf of the Council that it is truly sorry for what happened at Grenfell Tower on 14 June 2017. The tragic events of that night and the people who lost their lives will never be forgotten. They, the Bereaved, Survivors and Residents, will forever be in the thoughts of those who work within the Council.
3. In this Statement, we have set out a number of failings that the Council has identified in the way the Council's building control service ("Building Control") processed and considered the application for building control approval during the refurbishment of Grenfell Tower. The Council apologises unreservedly for those failings.
4. As is well known, the Council has adopted the Charter for Families Bereaved through Public Tragedy and made formal public commitments to candour in its approach to the Grenfell Tower Inquiry. The Council has been guided by these commitments in preparing this Opening Statement, which seeks to assist the search for the truth by doing its best to address the relevant issues.
5. The Council is conscious that present and former Councillors and officers of the Council are yet to give oral evidence in Phase 2. This statement therefore represents the Council's position at a particular moment in time, when the evidence in relation to many of the issues remains incomplete. On behalf of the Council, we have done our best at this moment in time to set out the Council's position on the key issues relevant to it in Module 1; however, it is possible that the position expressed in this Opening Statement will need to be updated in the Council's Closing Statement.

6. This Opening Statement is not limited to matters which were within the knowledge of the Council before the Grenfell Tower fire. However, it does not seek to address every issue that falls within Module 1, many of which have as their focus the organisations contracted or subcontracted to work on the refurbishment project. This is reflected in the list of witnesses due to be called in Module 1. At the time of writing, two former officers of the Council are scheduled to give oral evidence in Module 1. No current officers, no current Councillors and no former Councillors are scheduled to give oral evidence in Module 1. The two former officers due to give oral evidence are John Hoban, a senior Building Control Surveyor who retired from the Council on 31 March 2017, and John Allen, who was the Council’s Building Control Manager at the time of the fire.
7. In its Phase 1 written Closing Statement, the Council acknowledged the failure of the cladding system to comply with the B4 functional requirement and to satisfy the requirements of Approved Document B. In its Phase 1 oral Closing Statement, the Council invited the Chairman to identify in the Phase 1 report the fact that the cladding system did not satisfy the B4 functional requirement and did not satisfy the requirements of Approved Document B.
8. Building Control failed to retain sufficient records for the Grenfell Tower refurbishment project and, as a result, the Council was previously unable to set out a detailed position on the application for building control approval. The Inquiry’s experts have succeeded in partially reconstructing the documentary record from the limited records Building Control held and the documents disclosed by a number of Core Participants including Studio E, Rydon, Harley and Exova. This has enabled the Council to identify a number of failings on the part of Building Control in the processing and consideration of the application for building control approval. These failings are set out in paragraphs 96-105 of this Statement.
9. This Opening Statement contains the following sections.
 - The Council and the TMO
 - The primary refurbishment - overview

- The primary refurbishment - cladding
 - Building control
10. The relationship between the Council and the TMO is addressed first because a proper understanding of this relationship is central to understanding the Council’s position on many Phase 2 issues. The order of the other sections is intended to reflect the chronology of the refurbishment project.

The Council and the TMO

Background – the Council

11. At all relevant times the Council was governed by its Constitution which was revised from time to time.
12. The Council adopted a Cabinet system of governance in 2001. Cabinet met approximately 10 times per year. At all times in the period 2010 – 14 June 2017, the Council's Cabinet operated a system under which portfolios of functions were allocated to elected Cabinet Members.
13. The Council had a number of Scrutiny Committees. Under local government law and the Council’s Constitution, Scrutiny Committees had no executive decision making power.

Background – the history and nature of the TMO

14. The Kensington and Chelsea Tenant Management Organisation (“the TMO”) was incorporated on 20 April 1995 under the Right to Manage legislation. As stated in its November 2008 Memorandum and Articles of Association¹, it was “*established to manage and maintain the housing stock and ancillary properties of the Royal Borough*”. Although the TMO’s Memorandum and Articles of Association were amended in the period 1995 – 2017, the TMO’s reason for existence and core purpose remained the same. In its Phase 1 Opening Statement, the TMO described itself

¹ {RBK00050806}

concisely but accurately as “*effectively a managing agent*”. The Council endorses this description.

15. The creation of the TMO occurred at a time when the creation of TMOs, and the delegation of functions to them, was considered to be a positive and progressive move. In 1993, the Government created a ‘Right to Manage’ and amended the Housing Act 1985 so that local authorities would be obliged to transfer their housing management functions to a TMO where a majority of tenants were in favour of such a transfer and certain other conditions were met.
16. In May 1993, the Government gave approval in principle to the creation of a borough-wide TMO² and the Tenant Consultative Committee declared the tenants’ right to manage pursuant to the Right to Manage legislation. Thereafter ballots of residents (i.e. tenants and leaseholders) took place in 1994 and 1995. In both ballots a majority of residents voted in favour of the development of a tenant management organisation. In the second ballot, 11,367 residents were eligible to vote and 7,366 residents voted of whom 6,943 voted in favour of the TMO³.
17. On 1 April 1996, the TMO was formally delegated the Council’s housing management functions and became operational. To the best of the Council’s knowledge, the TMO was the largest TMO in the UK and the only borough-wide TMO.
18. In 2001, the Council and the TMO agreed that a bid should be submitted to the Government for the TMO to qualify as an arm’s length management organisation (“ALMO”). This initial bid was unsuccessful. The Council was advised that the amended TMO governance arrangements were acceptable to the Government but that the plan for the Council to retain partial control of the housing capital programme did not comply with the ALMO guidance.
19. In 2002, a second bid was submitted which proposed full delegation of the strategic control of the capital programme to the TMO. In April 2002, an Extraordinary General Meeting of the TMO voted unanimously to amend the TMO’s Constitution to enable it

² Department of the Environment News Release 10.5.93 {RBK00055480} at pages 9-12

³ Report A9 15.01.96 {RBK00055481}

to operate as an arms' length management organisation as proposed in the ALMO bid document. In September 2002, the Government gave formal consent under section 27 of the Housing Act 1985 for the delegation of additional responsibilities to the TMO. A Deed of Variation⁴ ("the 2002 Deed of Variation") agreed between the Council and the TMO gave effect to these changes by appointing the TMO as an ALMO. It also gave the TMO responsibility for developing and undertaking all Major Works schemes and the TMO took over management of the capital programme from the Council.

20. To the best of the Council's knowledge, a number of local authorities set up borough-wide ALMOs and transferred the management of their housing stock to them. The TMO was unusual in that it did not follow the normal ALMO model of being an organisation owned by the local authority. The TMO remained an organisation owned by its resident members.
21. At all relevant times the TMO's Memorandum and Articles of Association stated that the Board members appointed by the Council must make up a minority of the Board. Under the TMO's Memorandum and Articles of Association, the Council was entitled to, and did, appoint members to the TMO Board. From 2009 onwards, the Council's general practice was for two of the members appointed by it to the TMO Board to be backbench Councillors – i.e. Councillors who were not members of Cabinet.
22. In 2006, the Audit Commission inspected the TMO between 17 and 28 July and published a report on it dated October 2006⁵. The report noted at paragraph 25 that the TMO was the only ALMO with a majority of tenants on the Board.

Modular Management Agreements

23. The first Management Agreement agreed between the Council and the TMO was entered into on 28 February 1996⁶. In 2006, the 1996 Management Agreement was replaced by a Modular Management Agreement ("MMA") with a start date of 1 April 2006. The 2006 MMA superseded the 1996 Management Agreement and the 2002

⁴ {RBK00029047}

⁵ {RBK00048607}

⁶ {RBK00018516}

Deed of Variation. The 2006 MMA consisted of two volumes⁷ and a number of schedules⁸. Under this agreement, the TMO continued to act as the Council's agent to carry out certain housing management functions including responsibility for developing and undertaking all Major Works schemes and continued to be an ALMO. The text of the 2006 MMA was based on a template MMA for tenant management organisations approved by the Government.

24. In 2015, the 2006 MMA was replaced by an MMA with a start date of 1 December 2015. The 2015 MMA superseded the 2006 MMA. The 2015 MMA consisted of two volumes⁹ and a number of schedules and embedded documents¹⁰. Under this agreement, the TMO continued to act as the Council's agent to carry out certain housing management functions including responsibility for developing and undertaking all Major Works schemes and continued to be an ALMO. The 2015 MMA was based on a template MMA which had been approved by the Government.

The Council and the TMO - roles and responsibilities

Introduction

25. The 2006 MMA and the 2015 MMA were the key legal documents which governed the relationship between the Council and the TMO. Both were detailed, complex legal documents. In particular, they governed the extent to which housing management functions were delegated to the TMO and the extent to which they were retained by the Council. Unless expressly stated below, there was no significant change between the relevant provision in the 2006 MMA and the equivalent provision in the 2015 MMA.
26. The paragraphs below summarise the relevant provisions in the MMAs but, before turning to those provisions, it is right that the Council acknowledges that officers found the length and complexity of the MMAs more frustrating than constructive. There was

⁷ {RBK00019006}

⁸ {RBK00048487}, {RBK00048480} and {RBK00048497}

⁹ {RBK00018796}

¹⁰ {RBK00000408}, {RBK00048481}, {RBK00048483}, {RBK00048489}, {RBK00026642}, {RBK00038315}, {RBK00048482}, {RBK00048502}, {RBK00000615}, {RBK00048496}, {RBK00048499}, {RBK00048486}, {RBK00048490}, {RBK00048495}, {RBK00048498}, {RBK00048492}, {RBK00055482}, {RBK00048493}, {RBK00048484}, {RBK00048494}, {RBK00026645}, {RBK00048491}, {RBK00048488}, {RBK00000526}, {RBK00030473}, {RBK00048501}, {RBK00026644}

a tendency to regard them as a contractual point of reference rather than something of practical use, which led to the MMAs rarely being consulted by officers themselves. As a result, individual officers' understanding of the relationship between the Council and the TMO, and how in practice they worked with their TMO counterparts, may not have fully reflected the terms of the MMAs.

27. The MMAs delegated to the TMO the vast majority of the housing management functions of the Council that fell within the scope of the MMAs.

Maintenance and Major Works

28. Responsibility for responsive and planned maintenance repairs was delegated to the TMO (2006 MMA Volume 1 chapter 2 clause 1.1; 2015 MMA Volume 1 chapter 2 clause 1.1). The MMA stated that the Council and the TMO agreed that the retained responsive and repair responsibilities of the Council were “*assumed to be nil*” (2006 MMA Volume 1 chapter 2 clause 2; 2015 MMA Volume 1 chapter 2 clause 2).
29. The MMA stated that the TMO would draw up proposals for “*the capital programme for Major Works for cyclical redecoration and associated repairs, structural repairs, renewal of components, fixtures or fittings, and improvements to dwellings in accordance with the protocol contained in Schedule 2. The proposal shall include the Major Works it intends to undertake and a detailed programme for the intended Major Works.*” (2006 MMA Volume 1 chapter 2 clause 4.1; 2015 MMA Volume 1 chapter 2 clause 4.1). The MMA also stated that, if the TMO decided that Major Works were necessary, it “*shall prepare and approve Major Works within the level of financial resources made available to it by the Council*” (2006 MMA Volume 1 chapter 2 clause 4.3; 2015 MMA Volume 1 chapter 2 clause 4.3).
30. The composition of the TMO's senior management team was consistent with the fact that, under the MMA, the Council had delegated to the TMO responsibility for the capital programme, Major Works and responsive and planned maintenance. For example, in May 2013, the TMO employed: a Chief Executive; an Executive Director

of Operations; an Executive Director of Financial Services and ICT; an Executive Director of People and Performance; and a Director of Assets & Regeneration¹¹.

Responsibility for Health and Safety and Fire Safety in properties managed by the TMO

31. By reason of the MMAs, the TMO was responsible for health and safety and fire safety arrangements for the housing stock which it managed on behalf of the Council, including Grenfell Tower. Further, the TMO's Memorandum and Articles of Association stated that the TMO was responsible for the management and maintenance of the housing stock and ancillary properties of the Council¹².
32. The Regulatory Reform (Fire Safety) Order 2005 ("the Fire Safety Order") imposes requirements and duties on the 'responsible person' as defined by Article 3 of the Order. The responsible person has a duty to take general fire precautions pursuant to Article 8 of the Fire Safety Order. The Fire Safety Order also imposes requirements and duties on Article 5(3) persons.
33. The identity of the responsible person(s) in relation to a premises is a matter of law for the Chairman to determine if he considers it necessary to do so. The Council's position is that (i) between 1 April 2006 (when the Fire Safety Order came into force) and 2017, the responsible person for Grenfell Tower (outside of the period of refurbishment¹³ and not including the non-residential units) was the TMO and (ii) the Council was an Article 5(3) person throughout that period. We note that our position that the TMO was the responsible person accords with Dr Lane's analysis in her Regulation 38 Fire Safety Information report, paragraph 20.1.19 of which states:

"The KCTMO have consistently been the responsible person, since 2006 when the RR(FS)O was introduced."

¹¹ {TMO10002692}

¹² {RBK00050806}

¹³ During the refurbishment, the position would have been more complex because parts of the Tower would have been the workplace of employees of Rydon and its subcontractors.

34. The Council's position as set out above is premised on our view that, as a matter of law, the Article 3 definition of the responsible person (which is not as clearly drafted as it could be¹⁴) strives to identify a single responsible person for each premises by adopting a hierarchy¹⁵ or flowchart approach. If that is correct, then for all the properties which it managed on behalf of the Council, the TMO would have been the responsible person given that the MMAs conferred on it greater control over those properties than the Council.
35. The issue of whether the Council was a responsible person in addition to the TMO is essentially an academic one because, if the Council was not a responsible person, it was in any event an Article 5(3) person. For practical purposes, what matters according to the Fire Safety Order is the extent of control of premises, because, where the premises are not a workplace, both the responsible person and the Article 5(3) person are required to comply with the fire safety duties within Part 2 of the Fire Safety Order "*...so far as the requirements relate to matters within [their] control*".¹⁶
36. The Council acknowledges that, before the Grenfell Tower fire, there was no Council document clearly stating that the TMO was the responsible person for its residential housing stock and that there were within the Council's possession documents authored by the TMO stating that both the Council and the TMO were responsible persons for the properties managed by the TMO on behalf of the Council. The Council further acknowledges that, on 28 April 2010, the LFB's Assistant Commissioner (Fire Safety Regulation), wrote a letter about the maintenance of dry rising main ("DRM") installations addressed to the "Acting Head of Housing, RB Kensington & Chelsea" which stated amongst other things¹⁷:

"On the issue of resident's safety you will appreciate that it is important for our fire crews that all DRM within your buildings are secure and maintained to the high standard required for operational use. In view of this I am writing to all

¹⁴ See 'Initial Evaluation of the Effectiveness of the Regulatory Reform (Fire Safety) Order 2005, Fire Research 3/2009' published by DCLG in March 2009, at pages 5, 7 and 77

¹⁵ See 'Collected Perceived Insights Into and Application of The Regulatory Reform (Fire Safety) Order 2005 For the Benefit of Enforcing Authorities', 2015 Revision, Chief Fire Officers Association, at page 22

¹⁶ See the Fire Safety Order, Articles 5(2) and 5(3)

¹⁷ {RBK00018545}

housing providers in the capital who have responsibility for residential high rise buildings, which are 6 floors and higher with a DRM installed, to request that each main is inspected to determine its condition ...”

“I would also remind you that as the ‘responsible person’ for these premises under the Regulatory Reform (Fire Safety) Order 2005 you required to maintain all firefighting facilities within the building in working order and to ensure this is recorded on the fire risk assessment.”

37. This proforma letter is likely to have had a large circulation list. We do not know whether LFB’s Assistant Commissioner (Fire Safety Regulation) was aware of the arrangements between the Council and the TMO, or turned his mind to them, when considering to whom to address this letter.
38. The evidence submitted to the Inquiry that has been disclosed to date clearly indicates that the TMO understood and accepted that, in its “managing agent” role, it was responsible for both day-to-day fire safety and the longer-term management of fire safety within the properties it managed on behalf of the Council, including Grenfell Tower. Responsibility for fire safety within Grenfell Tower is a matter on which evidence will be heard in Module 3. We will return to this issue, and address the factual understanding of the Council and others in more detail, in our Opening Statement for Module 3.

The primary refurbishment – overview

The decision to refurbish Grenfell Tower

39. Both the Council and the TMO played a leading role in the decision to refurbish Grenfell Tower. The purpose of the refurbishment project was to benefit the residents of Grenfell Tower and the local community by, amongst other things, upgrading the communal heating system which served approximately 650 properties including all the flats in the tower, installing new windows in the tower and improving external thermal efficiency and weathertightness in the tower.

40. From 2011 onwards, the TMO, with encouragement from the Council, worked on proposals to refurbish Grenfell Tower.
41. The consultation carried out by the TMO in March 2012 revealed that there was overwhelming resident support for the TMO's proposals¹⁸.
42. On 29 March 2012, Mark Anderson (the TMO's Director of Assets, Investment and Engineering) presented a report to the TMO Board recommending that the Board approve the submission of an HRA Regeneration Bid for Grenfell Tower and appoint certain consultants to undertake detailed development of the project¹⁹.
43. On 2 May 2012, Cabinet approved a proposal to refurbish Grenfell Tower.
44. At the time, the Council was informed that this decision was supported by most residents - on 30 August 2012, Councillor Coleridge's Housing Digest Meeting received a presentation from Bruce Sounes (Studio E) which referred to majority support from residents following consultation²⁰. The Council acknowledges that over time, and following delays in the project and residents' experience of living in the building during the construction works, there was a decline in residents' support for the refurbishment.
45. The Council invites the Inquiry to accept the evidence of its expert, Mr Hyett, that the intention behind the refurbishment project was "*laudable*" (para 2.8.19) and that "*in short, it was an ecologically sustainable solution that should have secured significant improvements in the quality of life for residents*" (para 2.8.6). The Inquiry is also invited to accept his evidence that:
 - (i) The decision to improve the thermal performance of the building was a perfectly reasonable one (para 2.8.2); and
 - (ii) Of the options available in terms of upgrading the thermal performance of the building, the decision to apply thermal insulation to the outside of the existing external concrete walls was a good one (para 2.8.3).

¹⁸ {RBK00000374} at para 6.3.5

¹⁹ {TMO10001095}

²⁰ {RBK00000474}

The budget for the refurbishment and the organisations involved in it

46. Under the MMA, responsibilities for “Major Works” were delegated to the TMO. The refurbishment of Grenfell Tower constituted “Major Works”.
47. In December 2011, the TMO was asked by the Council to provide indicative costings²¹.
48. The 29.3.12 report submitted by Mark Anderson to the TMO Board recommended that the TMO Board approve (i) the submission of an HRA Regeneration Bid for Grenfell Tower in the sum of £6m and (ii) the appointment, through a dispensation of the TMO Contract Regulations, of the Kensington Academy & Leisure Centre (“KALC”) design team members to undertake a detailed development of the project. The TMO Board decided to submit such a bid²².
49. Following the decision of the TMO Board in March 2012, the TMO engaged a number of organisations who were working on the KALC project to work on the development of the Grenfell Tower project. These included: Leadbitter, Studio E, Max Fordham and Artelia (at the time known as Appleyards).
50. Artelia provided quantity surveyor services. As such, Artelia provided expertise in estimating construction costs and advice on ways of controlling costs and enhancing value for money²³.
51. During 2012 and the early part of 2013, the TMO and Artelia became increasingly of the view that Leadbitter was not a suitable organisation to undertake the Grenfell Tower refurbishment. This was for a range of reasons including its lack of experience of projects of this nature, its lack of experience of working on sites with residents in occupation and concerns over its ability to provide value for money. The Council’s Director of Housing (Laura Johnson) agreed with the TMO’s view that the contract should be put out to tender and discussed this with the TMO. She had experience of Leadbitter through her role as Senior Responsible Officer for the KALC project on

²¹ {TMO10001095} at para 4.3

²² {TMO10037603}

²³ {ART00006544} at paras 10 and 11

which there had been issues with Leadbitter's budget including the fact that Leadbitter could not agree a financial close figure in line with Stage D of the cost plan.

52. In June 2013, Peter Maddison (TMO Director of Assets and Regeneration) recommended to the TMO Programme Board that the contract with the Principal Contractor be re-tendered through an OJEU procurement process.
53. Subsequently, the Council's Director of Housing submitted a report²⁴ to Cabinet for consideration at the meeting on 18 July 2013. The report recommended an increase of the budget to £9.7million. The report noted: *"In order to achieve efficiencies and minimise disruption to residents, it is planned to undertake additional works at Grenfell Tower as part of the same project. The estimated costs of the overall scheme is approximately £9.7 million, although won't be confirmed until the tendering process is completed later in the year."* Cabinet accepted this recommendation.
54. Accordingly, Cabinet were aware of the proposal to re-tender but the decision to initiate the re-tender process was formally taken by the TMO. This was consistent with the MMA and the Council's Procurement Framework Contract Regulations which stated:

"Contracts let by the TMO will not normally be key decisions. Under the terms of a statutory delegation by the Council under Section 27 of the Housing Act 1985 (as amended) the procurement decisions affecting these contracts are the sole responsibility of the TMO."
55. The tender process was run by the TMO with assistance from Artelia and an independent consultant. The final choice was between Rydon and two other companies. Rydon scored 76.64 on quality (the other companies scored 62.23 and 58.42) and also submitted the least expensive tender (£9.2m compared to £9.9m and £10.4m). A TMO Board member and a ward councillor were on the Evaluation Panel in order to represent the views of residents; at interview, Rydon was scored highest of the three companies interviewed²⁵.

²⁴ {RBK00013783} at para 3.17

²⁵ {ART00002205_0023}

56. On 27 March 2014, the TMO appointed Rydon as the preferred contractor and, on 22 May 2014, the TMO and Rydon entered into a Pre-Construction Agreement²⁶. The Council was kept informed about the tender process and the decision to appoint Rydon.
57. The formal contract for the refurbishment of Grenfell Tower was signed on 30 October 2014 by the TMO as employer / client and Rydon as principal contractor. It was a Design and Build (“D&B”) Contract. The Inquiry is invited to accept Mr Hyett’s evidence that *“over the last 30 years or so Design and Build has grown in popularity to the extent that, certainly for medium and larger scale projects, it is by far the more frequently used procurement process”* (para 2.10.5) and that *“it would have been unusual if the procurement route had not been Design and Build”* (para 2.11.3).
58. The Council was not a party to the D&B contract. The refurbishment project was a notifiable project for the purposes of the Construction (Design and Management) Regulations 2007 and 2015 (“the CDM Regulations”) and was governed by those Regulations. For the purposes of the CDM Regulations, the Client was the TMO and the Principal Contractor was Rydon. For the purposes of the CDM Regulations, the Council was not a relevant organisation.
59. The Council was also not a party to any of the other contracts relating to the refurbishment. The other organisations who worked on it (including Studio E, Harley, Max Fordham, Exova and Artelia) were either engaged by Rydon as subcontractors or engaged directly by the TMO.
60. The Council had appointed Studio E as architect for the KALC project. Subsequently, the Council introduced Studio E to the TMO for the purposes of the Grenfell Tower project. The TMO progressed discussions with Studio E about the Grenfell Tower project and, on 29 March 2012, the TMO Board took the decision to appoint Studio E as part of the Grenfell project team which was to undertake detailed development of the project.

²⁶ {TMO00829114}

61. Given Studio E’s track record and standing within the profession (addressed in section 2.5 of Hyett’s report), it was reasonable for the TMO to progress discussions with Studio E and offer to appoint it as architects to the project. Paragraph 2.5.12(a) of Hyett’s report states:

“Studio E Architects would appear to have been a very capable architectural practice. Delivering projects of the size and complexity evident from the practice portfolio would have required considerable levels of architectural design and technical skill, good organisational and management skills, and a sustained level of dedication and discipline.”

62. In 2012, the TMO had engaged Exova to provide consultancy services on the Grenfell Tower project and to review the existing fire safety arrangements. As Dr Lane acknowledges, Exova’s industry reputation is that of a “*top tier*” fire safety engineering firm, with extensive experience.²⁷ Dr Lane consequently states that the Grenfell Tower primary refurbishment project had the benefit of what was reasonably expected to be very competent fire safety advice and by appointing Exova, “*it would be entirely reasonable for KCTMO and Artelia, indeed any party, to assume that the Grenfell Tower primary refurbishment project team had access to and could rely on highly competent experts for all aspects of fire safety design and compliance.*”²⁸

Value engineering

63. It is clear from the witness statement of Mr Sounes (Studio E) that plans to engage in a value engineering process on the Grenfell Tower refurbishment had been under active consideration since 2013²⁹. An email from Peter Blythe (Artelia) to (amongst others) the TMO and Studio E dated 12 December 2013 entitled “Grenfell Tower – Value Engineering” stated³⁰: “*It is always best to plan for the worst so we can ensure that, if value engineering is necessary, we can bring the cost down whilst keeping the quality*

²⁷ {BLARP20000003_0041-42} at para 4.3.22

²⁸ {BLARP20000003_0044} at paras 4.3.30-31

²⁹ {SEA00014273} see for example paras 20, 25, 137 and 138

³⁰ {SEA00010155}

of the project high". Subsequently, a value engineering process was applied to Rydon's bid following its appointment as principal contractor.

64. In paragraph 3.3.21 of his report, Mr Hyett cites the definition of value engineering set out in the Royal Institute of British Architects ("RIBA") Stage Guide 2015:

"a systematic and organised approach to provide the necessary functions in a project at the lowest cost. Value engineering promotes the substitution of materials and methods with less expensive alternatives without sacrificing functionality."

65. In section 2 of his report, Mr Hyett offers a commentary on value engineering, and his opinion as to whether value engineering or competitive tendering processes are matters that should be considered as possible contributory causes of the fire at Grenfell Tower (para 2.8.11).

66. Paragraph 2.8.18 of his report states:

"It is my opinion that any requests made by the Employer (KCTMO at the various stages of the design development) or any pressure that might otherwise have existed on Studio E, other members of the design team, Rydon or Harley, either individually or collectively to make cuts in the construction budget through 'value engineering', cannot in any way be accepted as an explanation or excuse for the circumstances that allowed the fire on the 14 June 2017 to spread so far and so fast, and ultimately to escalate out of control with such devastating effect."

67. The Council invites the Inquiry to accept this evidence and also Hyett's evidence that:
- (i) Competitive tendering and on-going value engineering are themselves intrinsic parts of most UK construction projects (para 2.8.13).
 - (ii) Value engineering and competitive tendering processes are not incompatible with maintaining the highest levels of safety in either design or manufacture (para 2.8.16).

(iii) Neither competitive tendering nor value engineering processes, as carried out both pre and post tender stages of the Grenfell Tower over-cladding and refurbishment project, should be considered as any form of excuse for the fact that the over-cladding arrangements did not comply with the Building Regulations 2010 and were not safe (para 2.8.17).

68. In January 2017, the Royal Institution of Chartered Surveyors (“RICS”) published a Guidance Note entitled “Value Management and Value Engineering”³¹. Whilst this document post-dates the completion of the refurbishment project, the historical perspective that it provides in relation to the concept of value engineering may be of assistance to the Inquiry in understanding what those working in the construction industry meant when using the phrase “value engineering” in the years before the Grenfell Tower fire. Paragraph 1.1 includes the following:

“Value engineering (VE), originally known as value analysis, developed in the USA in the 1940s and 1950s when manufacturing materials were in short supply in the aftermath of the Second World War. This prompted the consideration of alternative materials and designs to achieve the same outcome, many of which were then found to perform better at lower cost.”

“In the UK, value management (VM) developed in the 1980s and 1990s as a broader process to explore how value could be provided for a project at a strategic level by helping to develop the right project brief. Used effectively, it can reduce design and construction time by giving the team a clearer focus on the client’s priority requirements.”

“In everyday use, the terms value management and value engineering tend to be synonymous, but in this guidance note the distinction between strategic value management and tactical value engineering will be maintained where appropriate. Despite this, both VM and VE encourage the project team to reconsider the assumptions that are made during design and construction in search of more cost-effective ways of achieving the desired outcomes.”

³¹ RICS guidance note, Value Management and Value Engineering, 1st edition, January 2017

“In the UK, it is generally accepted that VM takes place during the earlier stages of a project and that, once designs and specifications have been developed, the same process becomes VE. In practice, the terms tend to get used interchangeably and the surveyor should be prepared for this. It is important to understand what they have in common – a focus on eliminating unnecessary cost from the project or asset, or from systems, components or processes associated with it, to improve the ratio between benefits and costs. It can be argued that this should already be part of the surveyor’s everyday work. The exercise is not about removing necessary cost from a project by reducing its scope, omitting work items or downgrading the specification below the level of performance required by the client.” (emphasis added)

69. The Council acknowledges that at a Housing and Regeneration Policy Board held on 20 March 2014, the Director of Housing reported that *“officers will need to do some value engineering as the bid has come in £500,000 higher than the budget”*³². There was, and is, nothing sinister, inappropriate or unusual about seeking to achieve value engineering and budgetary compliance in a publicly funded construction project.
70. In June 2014, the Director of Housing submitted a report to Cabinet recommending that the budget include a contingency of £0.6m and that the budget be thereby increased to £10.3m³³. The original plan had been to request an increase of £400,000³⁴ but in the event it was decided to seek an increase of £600,000. Cabinet approved the increase in the budget to £10.3m³⁵. This was the third and final occasion in which the refurbishment project was considered by Cabinet. On the first occasion (2 May 2012) it decided to proceed with the project. On both the second occasion (18 July 2013) and the third occasion (19 June 2014) it decided to increase the budget in accordance with the recommendations made to it.

³² {RBK00003538}

³³ {RBK00017739}

³⁴ {RBK00003613} at para 6.2

³⁵ {RBK00032421} at item A8

The primary refurbishment – cladding

The choice of cladding system

71. The Council recognises that the Inquiry will wish to establish how the cladding system came to be chosen. Whilst it would be correct to say that a cladding system with zinc panels was at one time proposed, it would not be correct to say that a decision to install such a system was ever taken. It will be important to bear this in mind when assessing evidence about a “change” from zinc to aluminium.
72. At the time of writing this Statement, it is not clear who ultimately took the decision to select a cladding system comprising ACM panels. This is a matter which the Council hopes will become clear before the start of Module 1 or, failing that, in the course of Module 1. The decision was not taken by the Council, nor would one would expect it to have been. Responsibility for Major Works was delegated to the TMO under the MMA and, in the circumstances, one would not have expected the Council to override the TMO’s decision-making authority on matters relating to the detail of the project.
73. The Specification issued by the TMO for the re-tender process expressly requested that those submitting tenders provide prices for specified alternatives to a cladding system with zinc panels. One of those specified alternatives was a cladding system with ACM panels. Leadbitter had in fact “*indicated a £300k saving to switch from zinc to aluminium*” back in February 2013³⁶.
74. The Council acknowledges that whatever cladding system was chosen by the TMO and the organisations working on the detail of the project would still have required planning permission from the Council’s Planning service (“Planning”).
75. Conditional planning permission was granted by Planning on 10 January 2014³⁷. Condition 3 stated:

“Detailed drawings or samples of materials as appropriate, in respect of the following, shall be submitted to and approved in writing by the Local Planning Authority before the relevant part of the work is begun and the works shall not

³⁶ {SEA00007298}

³⁷ {ART00001999}

be carried out other than in accordance with the details so approved and shall thereafter be so maintained: Materials to be used on the external faces of the buildings(s).”

76. Therefore, rather than specifically approving the use of a cladding system with zinc panels, this decision left open for future consideration the question of the materials to be used on the external façade of the cladding system.
77. The breakdown of the quote for the cladding system provided by Rydon clearly indicated the possibility for significant cost savings to be made depending on which cladding system was chosen. For example, at the Contractor Introduction Meeting in April 2014 (not attended by the Council), it was identified that a change from a cladding system with zinc panels to an ACM cladding system would create a saving of £376,175³⁸.
78. Officers from Planning were involved in the choice of the colour of the ACM panels. For example, on 8 May 2014, a meeting took place attended by representatives from Planning, Studio E, Artelia, Rydon, IBI Taylor Young and the TMO. At the meeting, ACM panels were proposed to Planning as the cladding material and Planning were presented with 5 sample panels. The sample panels were all ACM panels but were in 5 different colours. The purpose of the exercise was to give Planning the opportunity to express its preferences on the colour of the panels³⁹.
79. In September 2014, Planning informed the TMO’s planning consultants (IBI Taylor Young Ltd) that they had concerns about the colour ‘Champagne’ for the panels and would prefer a grey. As a result, the colour ‘Smoke Silver Metallic’ was proposed instead and approved by Planning⁴⁰.
80. Officers from Planning stated a requirement for a cassette fixing system rather than a riveted fixing system. Rivet fixings (which would have resulted in a cost saving of approximately £80,000) were considered unacceptable by Planning because of the

³⁸ {TMO00830348} at para 2.1

³⁹ {SEA00010942} at paras 1.2 and 1.4

⁴⁰ {IBI00001805}, {IBI00001799} and {RBK00000262}

perceived effect on the smooth surface of the panels and evidence of weathering badly that was apparent on viewing an earlier Rydon installation at Chalk Farm⁴¹.

Building control

Designers, planning and building control – the legal context

81. We fully recognise that it is not the role of the Inquiry to determine questions of civil liability. Nevertheless, we consider that the legal analysis set out below will assist the Inquiry to understand the legal framework within which the relevant organisations were operating at the time of the Grenfell Tower refurbishment. All of them were specialist organisations operating within a well-established legal framework; a framework with clear rules about the allocation of financial risk in the event of construction related problems arising during or after a construction project.

82. Planning applications are assessed under the Town and Country Planning Act 1990 and the functions associated with assessing and processing them are purely statutory in origin. The circumstances in which the courts have held that local authority planning services owe a duty of care are very limited and are wholly unconnected with fire safety. There is an obvious reason for this - compliance with the fire safety requirements of the Building Regulations was not a material consideration under planning law and therefore did not fall within the remit of a local planning authority. All of the observations made by officers from Planning about the design of Grenfell Tower were made in that context. The specialist organisations involved in the refurbishment understood that those observations related solely to planning considerations such as visual appearance and durability.

83. There is a fundamental conceptual distinction between a person who creates a design and a person who checks it. Designers create designs. Building control professionals check designs. This is true of both local authority building control professionals and Approved Inspectors. We invite the Inquiry to accept the following evidence of its expert, Beryl Menzies, at paragraph 52 of her report:

⁴¹ {SEA00011344} and {SEA00011373}

“It is important to recognise that the role of a Building Control Body is only to check for compliance with the requirements of the Building Act and the Building Regulations. A BCB has no role in the design: it checks submitted proposals and inspects works on site to ascertain compliance.”

84. The question of whether there are material differences between the system of local authority building control and the system of Approved Inspectors was considered by the Court of Appeal in The Lessees and Management Company of Herons Court v Heronsea Ltd [2019] EWCA Civ 1423, in particular at para 54. Hamblen LJ rejected a submission that the position of an Approved Inspector was materially different to that of a local authority inspector. The statutory regimes directly parallel one another. Both regimes require the responsible person to issue a completion certificate where they are satisfied, having taken reasonable steps, that the work carried out complies with the requirements of the Building Regulations.
85. The one difference that Hamblen LJ identified was that the enforcement powers granted by the Building Act 1984 apply only to local authority inspectors. However, the comparatively limited nature of those powers is worth noting. Whilst local authorities have the power to bring a prosecution (section 35) and to issue a notice giving the recipient 28 days to pull down / remove / alter work that does not comply with the Building Regulations (section 36), unlike the Health & Safety Executive, they do not have power to issue a notice prohibiting construction work from continuing⁴². In addition, as noted by Dr Lane, *“there are no provisions in the Building Regulations that give powers to the local authority to prevent the occupation of a building before the issue of a Completion Certificate, or at any other time during building work”*⁴³. It was recognised by Rydon, amongst others, during the refurbishment that a Completion Certificate was not a requirement for occupation⁴⁴. Further, section 36(6) of the

⁴² See section 22 of the Health and Safety at Work etc. Act 1974. Other legislation contains similar powers to issue Prohibition Notices e.g. Article 31 of the Fire Safety Order 2005, section 10 of the Safety of Sports Grounds Act 1975, and section 262 of the Merchant Shipping Act 1995.

⁴³ {BLARP20000005} at para 7.6.10

⁴⁴ {RBK00003856} at para 9.01

Building Act 1984 does not appear to give local authorities any greater right to apply to the courts for an injunction than that enjoyed by any other person⁴⁵.

86. The distinction between designing and checking was expressed clearly and forcefully by the Court of Appeal in The Lessees and Management Company of Herons Court v Heronsea Ltd. Hamblen LJ drew the following distinction between the role of architects and engineers (i.e. designers) and the role of building control (at para 40).

“The emphasis is therefore on those who do work which positively contributes to the creation of the dwelling. That may include architects and engineers who prescribe how the dwelling is to be created, not just those who physically create it. It does not, however, include those whose role is the essentially negative one of seeing that no work is done which contravenes building regulations. Building control ensures that the dwelling is legal and properly certified, but it does not positively contribute to the provision or creation of that dwelling.”

87. Since Anns v Merton [1978] AC 728 was overruled by the House of Lords in Murphy v Brentwood DC [1991] 1 AC 398, no case in England and Wales has held that a local authority owes a duty of care in respect of the acts or omissions of its building control function. An important theme in the speeches of the judges in Murphy v Brentwood was that any extension of the liabilities of local authorities in respect of defective buildings should be left to Parliament rather than the common law⁴⁶. Whilst section 38 of the Building Act 1984 creates civil liability for damage caused by breach of a duty imposed by building regulations, Parliament has not brought this section into force in the 35 years which have elapsed since the Act was passed.
88. The legal framework in which specialist designers and building control professionals operate has therefore been settled since the early 1990s.

⁴⁵ “This section does not affect the right of a local authority, the Attorney General or any other person to apply for an injunction for the removal or alteration of any work on the ground that it contravenes any regulation or any provision of this Act ...”

⁴⁶ see Lord Mackay at page 457, Lord Keith at page 472, Lord Bridge at page 482 and Lord Jauncey at page 498

89. The 7th edition of Jackson & Powell on Professional Liability, published in 2012, stated at para 9-206⁴⁷:

“Architects and engineers commonly seek to defend their designs against criticism by relying on approvals granted by building control and other authorities. This defence typically fails.”

“In the common situation of an architect’s or engineer’s negligent design having been approved by a local authority building inspector, it is submitted that such approval will be treated by the courts as irrelevant to the issue of the architect’s or engineer’s liability.”

90. The advice from RIBA that was current at the time of the fire was that: *“the architect may produce design documentation that is approved by the building control service, but the architect must still comply with the requirements of the Building Regulations themselves and not rely solely on this approval”*.⁴⁸

91. In a similar vein, the Approved Code of Practice (“ACoP”) to the 2007 CDM Regulations stated⁴⁹:

“117. Local authority or government officials may provide advice relating to designs and relevant statutory requirements, for example, the Building Regulations 2000, but this does not make them designers. This is because these are legal requirements where the designer has no choice in respect of compliance. Any such requirements should be treated as 'design constraints' in the usual way. However, if the statutory bodies require that particular features which are not statutory requirements are included or excluded (for example stipulating the use of hazardous substances for cleaning or the absence of edge protection on flat roofs), then they are designers and must ensure that they comply with these CDM Regulations.”

⁴⁷ The same text can be found in the 8th edition (at para 9-148 and a footnote to that para)

⁴⁸ Law in Practice – The RIBA Legal Handbook, 2nd edition, 2013 at para 7.5.1

⁴⁹ See also paragraph 73 of the ACoP to the 2015 CDM Regulations

92. Therefore, prior to the Grenfell Tower fire, the construction industry operated on, and was structured on, the common understanding that designers were responsible for producing designs that complied with the Building Regulations and that, if they failed to do so, those financially affected should look to designers, rather than local authority building control services, for compensation.
93. None of this is intended to imply that building control services should not be professional and conscientious when considering drawings, deciding what inspections to make, carrying out those inspections and issuing Completion Certificates. They should be when doing all of those tasks. The relevance of the above analysis will arise in the event that those with design responsibility seek to suggest (i) that the existence of a Completion Certificate in some way absolves them of design responsibility or (ii) that their role is merely to obtain a Completion Certificate rather than to create safe designs that comply with the Building Regulations.

The role of a building control service within a local authority

94. Local authorities are required by the Building Act 1984 to provide a building control service. In the Council, the building control service fell within the Planning and Borough Development Directorate. This does not alter the fact that the building control function, which is highly technical in nature, is both conceptually and in practice wholly separate from planning. Both are purely statutory functions which arise under wholly separate statutory regimes. We invite the Inquiry to accept Mr Hyett's evidence at paragraph 5.2.8 of his report.

“... the Planning and Building Regulation Departments are effectively separate entities within a local authority and applications for consent under Planning and Building Regulations are quite separate processes. In my experience external agencies deal with the Planning and Building Regulations Departments on an individual basis, and in discharging their statutory duties in relation to the Planning Act and Building Regulations for which they are independently responsible, the departments do not have any direct dialogue with each other around an application.”

95. The fact that the Council was the owner of Grenfell Tower did not influence the way in which the application for building control approval was dealt with by Building Control.

Failings on the part of Building Control

96. As stated above, Building Control failed to retain sufficient records for the Grenfell Tower refurbishment project and, as a result, the Council was previously unable to set out a detailed position on the application for building control approval. The Inquiry's experts have succeeded in partially reconstructing the documentary record from the limited records Building Control held and the documents disclosed by a number of Core Participants including Studio E, Rydon, Harley and Exova. This has enabled the Council to identify the failings on the part of Building Control set out in paragraphs 97-105 below.
97. Building Control did not have a formal procedure for tracking the progress of applications for building control approval. There was no requirement for it to have such a procedure but the Council accepts that Building Control should have had one and that, had one been in place, it would have reduced the likelihood of aspects of the application or the building control approval process being overlooked.
98. Construction work commenced on site on 2 June 2014. The Full Plans Application form was submitted by email by Studio E on 4 August 2014; no drawings were attached to that email. The first drawings submitted in support of the application were emailed to Building Control on 29 September 2014. Those responsible for the submission of the application failed to provide Building Control with sufficient information presented in a structured, easily accessible format and in a timely fashion.
99. The Council acknowledges that Building Control bears some responsibility for the fact that the application process continued to suffer from a failure by those acting on behalf of the applicant to provide sufficient information and to present it in a structured, easily accessible format.

100. Building Control failed to issue a Decision Notice following receipt of the Full Plans Application.
101. Building Control failed to ask for comprehensive details of the cladding system, including the Crown.
102. The last Exova Fire Safety Strategy received by Building Control was Issue 3 dated November 2013 (submitted to it by Studio E on 29 September 2014). Building Control failed to request an up to date version of this document.
103. Building Control failed to identify that the insulation materials / products used in the cladding system were not of limited combustibility and therefore did not satisfy the requirements of paragraph 12.7 of ADB 2013.
104. Building Control failed to recognise that insufficient or no cavity barriers to seal the cavities at openings within the walls, including around the windows, had been indicated on the plans submitted to it.
105. Building Control issued a Completion Certificate on 7 July 2016. It should not have done so.
106. The Council apologises unreservedly for the failings in the processing and consideration of the application for building control approval. It is committed to co-operating fully with the Grenfell Tower Inquiry and helping to prevent a tragedy like Grenfell ever happening again. On 26 October 2018, the Council provided the Inquiry with a Position Paper setting out key changes made within the Council since the fire. The Council has made further changes since October 2018 and will be updating the Inquiry on those changes in modules 1, 3 and 4. It intends to provide the Inquiry with a written update on key changes made within its building control service before the start of Module 1.

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20 December 2019