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**** VERY URGENT ****

Re: Defective Concrete Blocks Scheme (Mica and Pyrite)

Dear Darragh,

I refer to your letter of 2 September.

As you know my Director General and some of the Officials of my Office met with your Secretary General and Officials from your Department yesterday to discuss various issues arising from my previous letters of advices and your letter of 2 September. The proposed agenda referred to a discussion of the report of Paul Forde and issues arising therefrom. As you know, that report is not yet available but I understand it should be available shortly and we can provide further advices at that stage if required. It may be helpful if I identify some of the issues which we discussed and this letter should be read with my earlier advices.

1. The meeting was a lengthy one and we discussed various issues arising from my earlier letters of advices and relating to the operation of the existing Scheme ('the Scheme') as explained by your Department. I understand that it is anticipated there will be at least 6,000 - 7,000 applicants and perhaps considerably more and also that there is considerable pressure to extend the Scheme by providing for more generous payments and extending its scope.
2. As you and the Department are well aware a realistic assessment of the likely number of applicants, is essential in assessing the State's financial exposure in relation to the Scheme in its original or extended form. The terms of the Scheme will of course affect the number of applicants. If the Scheme is made more generous than at present, it is also likely to increase the number of applicants.
3. With regard to the basis of the Scheme, an essential issue which you will have to decide is whether the Scheme will provide for grant payments (subject to a cap) of a proportion of the remedial cost or 100% of that cost. I appreciate there are many policy considerations involved in making that judgment. In financial terms it will be extremely difficult to control the cost of the Scheme based on 100% reimbursement, particularly if there are no caps on such payment.
4. Irrespective of which of the aforementioned options is chosen it is important that there is absolute clarity with regard to the standard that is applicable to the payment of a grant or the payment of 100% of the remedial cost. As I understand it the present standard is intended to provide that grant payments be calculated on the basis of the building standards applicable

at the time the house was built and not by reference to present day standards. This is intended to avoid payment for improvements. It will however be difficult to effectively apply this standard because costs will be presumably presented purportedly with reference to the as built cost but in reality covering all or part of the remedial cost by reference to present day standards. It is not apparent to me what mechanisms are in place to ensure the correct standard is applied and that these betterment costs are not claimed in some implicit way. This is also a fundamental issue with significant financial implications, irrespective of whether the Scheme involves a grant payment or is based on 100% of the cost. Accordingly the application of this standard is necessary irrespective of whether the grant or 100% of the cost option is chosen. The application and costing (in any particular case) of any such standard is a matter that is capable of giving rise to significant dispute amongst experts. Any applicant will pitch his/her claim on the most generous basis that can be credibly advanced.

5. It is unclear whether any of the local authorities have the resources, expertise or capacity to properly assess claims by reference not just to the relevant standard for determining payment but also by reference to the appropriate remedial option and any other applicable terms and conditions that impact on eligibility/payment. While payment caps provide some comfort by definition payment caps are intended to be the outer limit in respect of each option. The very identification of a cap will also encourage claims to be presented at that outer limit instead of on the basis of figures more realistically reflecting the actual cost. While a cap has significant merit and is perhaps absolutely necessary it must be appreciated that it also has the potential, given the amount of claims, to result in the inflation of many claims.

6. I understand that so far as Mayo is concerned the nature of the problem (involving pyrite in the blocks) means, for technical reasons, that it is more likely that a complete re-building of the house will be required in most cases. In Donegal on the other hand, it is hoped that re-building would be the exception and that the other remedial options would more likely to be applicable, in particular Options 3, 4 and 5. Obviously that is a technical matter and I assume the expert report of Paul Forde, which has been commissioned, will throw further light on that critical issue.

7. Present experience, according to the Department, indicates that approximately 50% of all claims made to date, (and that presumably represents an aggregation of the claims made in both Donegal and Mayo) are presented on a demolition and rebuild basis. I strongly suspect that this percentage will climb very significantly (including in Donegal) as further claims are made. Indeed it is evident from the Homeowners' submissions that the Homeowners will be seeking to re-build because of what they regard as the adverse impact on saleability of their houses in the future, and of potential banking and insurance issues, etc., resulting from anything other than a rebuilding. Furthermore, as night follows day, if a significant number of Homeowners are being recompensed on a demolition basis, it is inconceivable this will not encourage most other Homeowners to submit claims on that basis.

8. There is the added complication that many of the engineers, engaged by the Homeowners, preparing reports for submission to the local authorities may not have the required degree of expertise to confidently recommend anything less than full demolition and re-build. Furthermore, these engineers are likely to be pressurised by their clients to submit claims on that basis and it would be difficult for them to resist doing so. There will be a concern amongst engineers that if they do not submit on a demolition/re-build basis that they

might subsequently be sued if further building defects emerge at a later date, and they are likely to be afraid that they will be at risk of a large number of professional negligence claims against them in the future.

Independently of that risk it will in any event be difficult for local engineers to detain the necessary objectivity and more particularly to interpret the relevant regulations and guidelines in a rigorous manner. All these and other factors will combine, in my view, to greatly increase the number of demolition and re-build claims and that in turn will have an enormous impact on the costing of any scheme.

9. As previously advised it is going to be essential to lay down stringent conditions which must be fulfilled by every applicant in order to obtain payment on the basis of any option other than the least costly option.

10. You and the Department will be in a better position to make a judgment on this issue, but I believe it is barely conceivable that the local authorities will have the requisite time, expertise, resources, or capacity to properly scrutinise and verify the applications for compliance with conditions. If an applicant's engineer advises that a full re-build is necessary, it is not obvious how the local authority could reject such a claim, and decide that a less costly remedial option is appropriate, without at the very least a detailed examination of the individual house by an expert with the appropriate expertise and experience and without conducting a detailed analysis of the claim made providing a strong and coherent basis for its rejection. Furthermore, if claims are rejected on any other basis this will most almost certainly result in litigation against a local authority. Even the threat of such litigation can place considerable pressure on the local authority and encourage the local authority to accept claims if they appear superficially justified. This creates a real risk that a claim will be made by an applicant against a local authority on the basis that the applicant is entitled to be paid on foot of the Scheme on the basis put forward by the applicant's engineer and that the local authority has unlawfully denied the claim on that basis and cannot justify such a denial.

11. Furthermore, while there is a detailed document prepared with regard to the administration of the Scheme it is not apparent to me that the local authority would have the time, capacity and resources to properly implement the guidelines contained in that document and ensure they are fully complied with.

12. There is an added difficulty with administering any scheme through local authorities. It is almost certain that local authorities will come under tremendous pressure from people living in the locality, and more particularly individual officials in the local authorities will come under such pressure, when assessing the applications. This will make it very difficult for them to rigorously and independently examine and assess applications. Accordingly I reiterate the view that I expressed in my previous advices, that the system for the administration of this Scheme must be reconsidered again, in the light of experience and the changed circumstances. In my view the Scheme should be implemented and administered on a centralised basis by a body or group of persons with the necessary expertise, experience and independence, and which has the necessary resources. I also remain strongly of the view that individual houses, in respect of which claims are made must to be assessed by independent engineers acting on behalf of the State and appointed by it. I believe that reliance on engineering reports from applicants will not only greatly increase the cost of assessment but will lead to significant abuses for the reasons already discussed.

13. In addition to the approach to assessment necessitated by the factors that I have identified above, depending on the scope of the Scheme, there will be a need to assess the additional items of cost (provided for in the Scheme), such as alternative accommodation etc. The assessment of those costs will also be time-consuming and is likely to give rise to significant disputes in individual cases.

14. The likelihood of disputes in relation to the application of the Scheme in individual cases is another reason for centralising this process and appointing appropriate experts to implement the Scheme. Those experts could prepare standardised processes which would greatly reduce costs, ensure appropriate specialists are available to assess applications for eligibility and payment and those specialists would also be in a position to properly assist in defending litigation if individual applicants were to bring claims on the basis they were entitled to be paid on a more generous basis than was allowed. This area of potential dispute with regard to the basis of payment is a matter for real concern and there is a real risk that it will lead to mass litigation against the State unless this matter is properly addressed. It will be extremely difficult and costly to address such mass litigation. If such litigation is commenced then it would be difficult and costly to defend, particularly if the Scheme continues to be administered through local authorities and without the necessary structures and expertise which underpin its operation. It must be remembered that litigation on foot of the Scheme is a very real risk in circumstances where there are different payment options and any proper assessment of costs involves judgment. Unless the Scheme is properly administered there is a real risk that demolition and rebuild will become the default option and that this Scheme could cost significantly more than its highest estimates.

15. I also think it is necessary that careful consideration be given to the practicalities of operating the Scheme. As I understand it the expectation is that costings will be spread over a number of years. However, if as is likely, applications come in as soon as the Scheme is introduced it is not apparent to me how it will be possible to deal with all of those applications, in a timely and effective, efficient and rigorous manner. If there are delays in admitting applicants to the Scheme this will undoubtedly give rise to significant complaints and perhaps also litigation.

16. I understand that Paul Forde will advise on other experts who would be on assistance in relation to any scheme. Ideally the views of those experts should be canvassed before the Scheme is finalised as they may have an important contribution to make to the finalisation of any scheme.

17. At our meeting I advised that it is vital that your Department immediately obtain an expert quantity surveyor who can give advice on costing issues and in particular identify approaches that might be beneficial in limiting costs.

18. In advising on the above issues I am making an assumption that there will be changes to the Scheme. If the Scheme is to be extended, which as I understand is likely, I believe it necessary given the potential exposure for the State that sufficient time be taken to ensure whatever scheme is introduced it addresses the issues which now arise, as opposed to those that arose in 2020.

19. It is also necessary that Homeowners should understand the reasons why the Scheme is, as I understand it to be the case, intended to be different from the pyrite 100% scheme. I have touched on some of these reasons already, for the distinction between the two Schemes, in my previous advices and also discussed these reasons yesterday with your Officials. A major difference, of course, is the potential cost to the State, because of the extent of the remedial works required to address these problems.

20. As I understand it there is pressure to extend the scope of application of the Scheme from principal private residences to any residence owned by any person. This would significantly increase the cost exposure and in effect would involve compensating people for investments that have gone wrong.

21. Another aspect which informs some of the above issues is the fact that there is a desire on the part of Homeowners to ensure that what is paid, under the Scheme, effectively solves problems arising from pyrite and mica, and is not limited to providing for the building costs. In particular it is claimed that unless compensation is payable on a particular basis this will have an ongoing impact on resale value, insurance, banking arrangements, etc. If the Scheme provides compensation in respect of those matters it will be virtually impossible to control the costs as these matters (apart from their quantum) are very likely to give rise to endless disputes.

22. The issue of obtaining compensation from third party wrongdoers must be fully addressed, even if, as is believed by the Department, a meaningful recovery will be difficult to obtain. I understand Paul Forde will express some high level views on the technical issues which might give rise to liability on the part of different wrongdoers. I have already advised on a potential range of wrongdoers. I do understand there may be many different builders and quarries, etc. involved and that many, if not most of the claims may now be statute-barred. That does not mean however that this issue should not be carefully looked at. It will certainly be fully scrutinised by the Comptroller and Auditor General at a later stage. There was a concern expressed by the Department that there may not be documentation to prove which quarries supplied the product. The lack of documentation adds a complication but by no means prevents recovery. Oral evidence from builders, Homeowners, etc. can establish the relevant quarry which supplied the materials to a particular house and the identity of other potential wrongdoers. Furthermore, discovery can be obtained, and inspections carried out by geologists in any proceedings commenced. All of this would help identify the source of the product.

23. I believe it is important to urgently engage competent local solicitors in each of the affected counties who could provide advice, based on local knowledge with regard to the identity of potential wrongdoers and the extent to which they might have assets to meet claims. It must be well known locally which builders, quarries, block manufacturers, etc were involved and some general identification, by those solicitors. of who the potential wrongdoers might be, would be very important. The local State solicitor would be an option in this regard and the CSSO could make contact with them if required. There is considerable urgency with this because if any claims are not statute barred it would be necessary to issue proceedings urgently to avoid them becoming statute barred.

24. I also understand that some wrongdoers involved may have gone into liquidation, e.g.

Cassidys in Donegal. This may be an attempt to avoid liability. Information needs to be obtained as to whether this is in fact the situation and if so, what the likely motivation for the liquidation might be. The CSSO will carry out a search of the CRO to see if there is information on that in relation to Cassidys but local solicitors are probably in the best position to provide meaningful information, because they would presumably know the identity of other potential wrongdoers which will be unknown to the CSSO.

They will also have the benefit of local knowledge. It should be borne in mind that if a company is in liquidation a claim can still be made in the liquidation and where there is insurance then the insurance can meet these claims.

25. It is also important that no concession is made that the State has any liability in this regard. As your officials pointed out it is important to avoid use of terms like "compensation" or "redress". The State is making a voluntary payment on the basis of no liability with the intent of assisting people in difficulty. I have seen no document or evidence that would suggest liability on the part of the State. There might be a potential liability if some relevant EU Regulation had not been transposed in time and failure in transposition meant the appropriate building standards were not applied or had the consequence that claims could not be made that would have been otherwise brought on the basis of those Regulations against potential wrongdoers. I am not aware of any such Regulations but your Department would be in the best position to confirm the position in relation to that.

26. This is not meant to be a comprehensive note of the meeting but it does identify the main points discussed. I hope it is of assistance to you. I have explained to the Department if further advices are required on any issue the request needs to be made in a timely manner if this Office is to have an opportunity of considering the matters properly and providing it prior to the announcement of any changes to the Scheme.

Best wishes

Yours sincerely

Paul Gallagher SC