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NEWS

FPRA
FEDERATION OF PRIVATE RESIDENTS' ASSOCIATIONS

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BIGGEST REVIEW INTO LEASEHOLD LEGISLATION FOR A GENERATION

The Law Commission published three reports on its recommendations for leasehold reform, analysed here for us by FPRA Committee Member Yashmin Mistry of JPC Law.

The long-anticipated reports that form part of The Law Commission 13th Programme of Law were published on 21 July 2020.

The reports contain a series of proposed changes for three particular areas of reform for the leasehold sector, namely:

- **Leasehold Enfranchisement**
- **Right to Manage (RTM); and**
- **Commonhold**

The original terms of reference

The work of the Law Commission must be put in context.

The Law Commission was tasked by the government to "improve consumer choice and provide greater fairness and transparency for leaseholders".

With reference to the three individual areas, the Law Commission was tasked by the government to:

- **With respect to the leasehold enfranchisement process (lease extensions and freehold purchases):** to review the

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AGM UPDATE

Normally at this time of year we are looking forward to our Autumn AGM, with an excellent speaker, round table advice sessions, a glass of wine and opportunities for networking.

Obviously this year is different, so here Chairman Bob Smytherman gives us an update:

Further to my email to you all earlier this year about arrangements for an AGM during the Coronavirus Pandemic, the Directors can confirm that no request to hold an AGM was received by any member before the end of July. Therefore our pragmatic response is to cancel the AGM for 2020 and we include the financial accounts with this newsletter together with our Treasurer's Report. Our Treasurer, Roger Trigg, will be happy to respond to any questions or queries by email.

Please send these to the admin office so we can respond to each question in a timely manner.

As 2021 will be our 50th Anniversary we are planning to have a large celebration

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A Date for the Diary

Although we have no AGM this November, we are fully committed to a big celebration for our 50th Anniversary at our next AGM in 2021. The date for your diary is Wednesday 17 November, 2021.

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enfranchisement process to make it simpler, easier, quicker and more cost effective, and to examine the options to reduce the price payable by leaseholders to enfranchise

- **With respect to commonhold** to recommend reforms to reinvigorate commonhold so that it may offer a workable alternative to leasehold, for both existing and new homes; and
- **With respect to Right to Manage** to review the existing legislation with a view to making the RTM procedure simpler, quicker and more flexible, particularly for leaseholders.

THE KEY PROPOSALS:

Each report contained over 100 recommendations in respect of each specific topic.

For ease, however, below are some of the key highlighted recommendations:

1. Leasehold Enfranchisement

The leasehold enfranchisement reports sets out extensive recommendations of reform which include:

- a new right for leaseholders of both houses and flats to obtain an extended lease for a term of 990 years, with no ongoing ground rent going forward
- a new right for leaseholders to "buy out" the ground rent under their lease without also having to extend the length of their lease
- removal of the requirement for leaseholders to have owned their leases for two years before exercising lease extension rights
- new rights for allowing flat owners to buy the freehold of a block where up to 50 per cent of the building is commercial space
- right for groups of flat owners to acquire multiple buildings in one claim and allowing leaseholders to require landlords to take "leasebacks" of units within the building which are not let to leaseholders participating in the claim
- ensuring leaseholders are protected against the imposition of onerous or unreasonable obligations on acquisition of the freehold title
- replacing the various procedures for making enfranchisement claims with one, streamlined procedure
- all enfranchisement disputes and issues to be decided by the Tribunal; and
- eliminating or controlling leaseholders' liability to pay landlord's costs, in place of the current requirements for leaseholders to pay their landlord's uncapped costs, which can equal or exceed the enfranchisement price.

2. Right to Manage

The Law Commission recommendations in respect of the Right to Manage include amongst others:

- that RTM should be exercisable in respect of leasehold houses as well as flats
- that the non-residential limit be increased to 50 per cent
- that the RTM should be exercisable in respect of premises which comprise or contain at least one residential unit held by a qualifying tenant
- the removal of the current rule requiring the participation of both qualifying tenants in premises with only two residential units
- that shared ownership leases granted for more than 21 years qualify as long leases for the purpose of the RTM legislation, regardless of whether the leaseholder has staircased to 100 per cent
- that the current exclusion from RTM of premises with a resident landlord and no more than four units should be abolished
- that it should be possible for a single RTM company to acquire the RTM in respect of more than one building in a single RTM claim
- that at least one director of each RTM company should be strongly encouraged to undertake online training; and
- the fault-based grounds for the appointment of a manager should be expanded to include circumstances where no director of the RTM company has undertaken training, and it is just and convenient to appoint a manager or terminate the RTM.

3. Commonhold

In its Commonhold Report the Law Commission made the following recommendations including:

- that it should be possible to convert to commonhold if either:
  (a) the freeholder consents; or
  (b) the leaseholders carry out a collective freehold acquisition claim as part of the process of converting to commonhold
- that conversion to commonhold should be possible without the unanimous agreement of the leaseholders and through a collective freehold acquisition claim, and convert to commonhold, by following a streamlined "acquire and convert" procedure
- that unit owners should have a right to apply to the Tribunal under the Law Commission's recommended minority protection provisions
- that "anti-avoidance" provisions should be introduced to ensure that a developer does not attempt to secure a greater degree of control by:

- taking powers of attorney from the purchasers of commonhold units (or seeking to control votes in any other way); or
- attempting to control how unit owners vote by inserting terms in the purchase contracts.

- that shared ownership leases be granted in commonholds;
- that it should be compulsory for all commonhold associations to have a reserve fund;
- that the commonhold dispute resolution procedure should be updated to refer specifically to the Housing Complaints Resolution Service, the Commonhold Regulator, and the New Homes Ombudsman, once these bodies are established.

A WORD OF WARNING

Nick Hopkins, Property Law Commissioner, said: ***'The leasehold system is not working for millions of homeowners in England and Wales. We have heard how the current law leaves them feeling like they don't truly own their home.***

'Our reforms will make a real difference by giving leaseholders greater control over their homes, offering a cheaper and easier route out of leasehold, and establishing commonhold as the preferred alternative system. The reforms will provide a better deal for leaseholders and make our homes work for us, and not somebody else.'

The papers are arguably the biggest review into the leasehold legislation for a generation. Will the government seize this opportunity and take up the challenge?

We can only continue watching this space...

For more information on the Law Commission's reports please click here: www.lawcom.gov.uk/project/leasehold-enfranchisement/

AGM update continued from page 1

event to coincide with the 2021 AGM.

We know many members very much appreciate getting together for the AGM and value the sessions with our Honorary Consultants and guest speakers, so we are planning to roll out more of our interactive webinars from next month. We would welcome your ideas on topics for us to cover. Our first webinar with Honorary Consultant Emily Shepcar and myself, was well attended and feedback was overwhelmingly positive. We also had a separate webinar with our friends at ARMA and hope to run these again too.

All the FPRA webinars will be available for future viewing from our members' website so don't worry if you miss any.

Finally, if any member wishes to have a "one-to-one" meeting with me as Chairman I am happy to facilitate this using Zoom. Just drop me an email to arrange a convenient date and time at bob@fpra.org.uk .

Please remember we are a member organisation here for impartial advice, so please continue to recommend us to other leasehold blocks in your area and review our services on Trustpilot and share our information on social media.

I hope you have valued our services, especially during the challenges of lockdown. As ever we would value your feedback about how we can improve our services to members in a very changing environment for the leasehold sector.

GOING FORWARD ONLINE

FPRA Chairman Bob Smytherman reports on the Federation's latest moves to adapt to the times.

The recent COVID-19 pandemic has meant many organisations have changed the way they communicate with clients. The FPRA is no exception. We have made changes to our office set up to cater for remote working for our admin staff and – more importantly – the need to communicate with our members. While this remains very much the same, we have also introduced a series of live webinars. We are really excited to be able to provide this service to our members and we hope you have found the webinars useful.

Below are the dates and topics we have covered so far:

WEDNESDAY 1 JULY: **Managing Agents,** hosted by Bob Smytherman and FPRA Honorary Consultant Emily Shepcar (available to view on our website)

WEDNESDAY 16 JULY: **Managing Agents and General Legal Issues**, a joint FPRA and ARMA webinar (available to webinar participants only)

Coming up:

TUESDAY 8 SEPTEMBER: **Fire Safety** hosted by Bob Smytherman and FPRA Honorary Consultant Jonathan Gough

TUESDAY 22 SEPTEMBER: **Insurance** hosted by FPRA Consultant Belinda Thorpe

Joint FPRA & ARMA

General legal

General Q&A with FPRA Chairman Bob Smytherman

Please keep an eye on your emails (always sent to the main contact) and our website for future dates. Is there a subject not covered above that you would like to see? Please email us at info@fpra.org.uk and we would be happy to cover.

Our newsletter will again be sent electronically this quarter. We would love to hear your feedback which will help us to understand if this is something we can continue to do – the savings made will ensure your membership fees continue to be great value.

(NB: up-to-date information on Covid-19 and how it affects leaseholders is available on our website.)

ELECTRIC CAR CHARGING

This is becoming a very hot topic for residents of blocks of flats. In addition to two articles here, we have a Question and Answer in our Ask the FPRA section on page 12

UPDATE ON THE PROVISION AND FUNDING OF ELECTRIC VEHICLE CHARGING POINTS

In issue 127 (Winter 2018) of the newsletter Shaun O'Sullivan outlined some of the issues surrounding the installation of electric vehicle charging points in existing leasehold developments. And in issue 133 (Summer 2020) Jamie Willsdon pointed towards some of the increasingly sophisticated technical solutions which are now emerging which offer less disruption and allow charging to be paid for by only those who wish to avail themselves of the service.

However, although some landlords might be receptive to granting consent (licence) to individual leaseholders to install charging points – and this is likely to be hugely dependent on whether or not garages/parking spaces form part of the demise and whether a ready/accessible source of power is already available – for the most part it is likely that the basic infrastructure to support their installation would impinge on the retained part of the property and would have to be funded separately. Some altruistic landlords might be prepared to meet the cost of this – or, indeed, fund the provision of communal points – from their own resources. And some RMCs might find that their Articles of Association allow them to do so on the basis of a certain level of membership support with the cost being met from company funds. However, for the most part the provision of the basic infrastructure might be deemed to be an improvement and, in that regard, unlikely to be permissible as a call on the service charge.

For existing non-residential properties, it is being proposed that buildings where there are 20 or more parking spaces should, by way of a separate enforcement regime, be required to provide one charge point. However the government consultation failed to address the problem of the provision of infrastructure for existing residential buildings, including leasehold flats.

In this regard it has been suggested that something along similar lines proposed for non-residential properties should be mandated for existing blocks of flats. In responding to this suggestion, Rachel Maclean, Parliamentary Under Secretary of State for Transport says that: 'The On-street Residential Charge-point Scheme provides grant funding to local authorities looking to install charge-points for residents that lack off-street parking. Since beginning in 2017, 60 local authorities have been awarded funding. The funding for the scheme has doubled for the 2020/21 financial year to £10 million.'

Good though this is, it fails to recognise fully the fact that many leaseholders who might have some form of off-street facility, are still at a disadvantage compared to those living in houses with similar facilities. In this regard the Minister acknowledges '....that installing a charge-point is not always easy for those who rent or are in leasehold properties and we are working with colleagues across government to investigate this issue.'

It is essential that these investigations lead greater clarity so far as the provision of charge-points in existing leasehold properties is concerned. We will monitor this closely and keep members abreast of any developments.

CAN COMMONHOLD SOLVE THE CHARGE POINT CONUNDRUM?

By Jamie Willsdon, Director of EV charging solutions provider Future Fuel

The government has been consulting with the property industry on proposed changes to the Building Regulations to give every new residential building with a parking space, an electric vehicle (EV) charge point.

However, the consultation, which closed in October 2019, made no mention of existing residential blocks of flats and no solutions were offered to the many questions around EV charging raised by leasehold property. These include restrictions on development or modifications within building leases, who pays for charge point installation, and how should costs be allocated among residents?

Jamie Willsdon has raised these issues with the Department for Transport. George Freeman MP, Minister of State for the Future of Transport responded to Jamie last month. He said: 'With regard to ensuring leaseholders are not denied the right to install charging infrastructure, the Ministry of Housing Communities and Local Government are working to make commonhold more widely used in which, unlike the leasehold system, the individual has absolute ownership over the property. We are also working with industry to ensure guidance is available to allow landlords to understand and have confidence in the installation of charge points at their properties'.

Leading property lawyer Cassandra Zanelli from PM Legal, also FPRA Honorary Consultant, works with Future Fuel to advise leaseholders wishing to install EV charge points in their blocks. 'Commonhold is not, in my view, going to be the answer to the problems that lessees have with regards to installing charging infrastructure,' she says.

Cassandra explains that with commonhold, the units (instead of flats) are held on a freehold basis and each unit owner is a member of the Commonhold Association which owns the structure and common parts. 'So even in commonhold blocks, a unit owner wouldn't be able to start cutting into the common parts in order to install the charging infrastructure, because those common parts aren't owned by them personally: they're the property of the Commonhold Association,' she says. Commonhold does not, therefore, resolve the problem that an individual still needs permission from either their landlord or Commonhold Association to install the infrastructure.

Jamie believes that excluding existing buildings from the consultation and proposed regulations offers no help at all to leaseholders who may want to install a EV charging point, but who, because of the complexities of leasehold law, are unable to do so. He is continuing to lobby government on behalf of flat owners and will be following up on the Minister's pledge to ensure that effective guidance is made available to landlords of existing blocks that won't be covered by any changes that come out of the recent consultation.

ROOFTOP CONTROVERSY

In the last edition of this newsletter we reported that consternation has been created in some blocks by the government announcement that freeholders will be allowed to build two extra storeys on the top of the building. Here we give voice to the other side of the debate.

Airspace Development can empower Leaseholders

Anthony Seddon, Director of Sussex Airspace Developments Limited, gives his personal view of how the benefits of rooftop development can outweigh the negative effects.

This summer saw an announcement from Housing Secretary Robert Jenrick that airspace development, or rooftop development as it is also known, will fall under permitted development rights in certain circumstances. Amongst a raft of proposals, set out within a Planning White Paper, to get the country building housing stock once more, it was said that developers will be able to construct up to two storeys of new accommodation immediately above the existing topmost residential storey of purpose-built, detached, blocks of flats. Rightly so, the policy came with numerous conditions attached to it and instances where permitted rights would not apply. Some leaseholders may shiver at the mention of permitted development rights after far too many substandard developments took place after legislation was passed to permanently allow offices to

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FIRE SAFETY IN HIGH RISE HOMES AFTER GRENFELL

FPRA Committee member Mary-Anne Bowring, CEO at Ringley Group, reports on chairing the United Kingdom Apartment Association round table overview of the Hackitt Review.

Mary-Anne hosted the UKAA roundtable on the Hackitt Review, which was introduced following the Grenfell Tower tragedy that saw the deaths of at least 79 people in one of modern Britain's worse residential fires.

The event – attended by a mixture of property managers, investors, lawyers and consultants – provided a detailed overview of the Hackitt Review and what the implications would be for the industry.

Known formally as *The Independent Review of Building Regulations and Fire Safety*, Dame Judith Hackitt's investigation outlined a series of recommendations to ensure the industry has a sufficiently robust regulatory system for the future, and to reassure residents the buildings they live in are either safe or will be made so.

The review analyses current building and fire safety regulations and related compliance and enforcement, with a focus on high rise residential buildings (HRRB).

The review outlines the regulatory approach that the Joint Competent Authority (JCA) – made up of Local Authority Building Standards, fire and rescue authorities and the Health and Safety Executive – will take. "So far as is reasonably practicable" is the outcome-based approach, which will allow the JCA to effectively regulate by placing the responsibility on duty holders to exercise their judgment when making the safety case to the regulator.

However, the recent announcement from housing secretary Robert Jenrick, states that it is solely down to the Health and Safety Executive to establish the new regulatory body.

Mary-Anne explained that the duty holder is in fact the owner of the building, and they will be solely responsible for carrying out the new inspection and testing based assessments (as opposed to desk top materials studies) to the building to verify fire safety measures.

She said: 'With building regulations, the mindset is you get planning, you build it, you're finished, and from that moment on it's down to us as practitioners to keep that building safe. The JCA will have a life-long duty to that building, which is fundamental. How they're going to resource it and quite how often they're going to check up on it has not yet been decided or published – what is clear is that the intent is for it to be a self-funding body – which means fees paid by those who will be required to use it.'

The duty holder will also be responsible for maintaining the "golden thread" of information about the building structure and materials, detailing the maintenance, testing and inspection routine as well as how fire risk assessments are undertaken and actions implemented.

The focus of the JCA will be to maximise the focus on building safety within HRRBs across their entire life cycle. 'The changes suggested focus on the lifecycle of the building, not just the point of completion. A simple example of this is the difference between a building in use and one that isn't. The occupiers create risk, meaning things have to be considered and carried out differently. Some people treat these documents as just that, where the minimum applies and that's good enough. What the government wants to do is change the approach to focus on a total picture of the envelope of the building,' Mary-Anne explained.

The review also suggests that the JCA should design and operate a full cost recovery model. In addition, it outlines the three key gateway points that should be satisfied by the duty holder. These three points are:

The relevant duty holder must:

- satisfy the JCA that the planned building will be sufficiently accessible by the fire service, in order for the Local Planning Authority to determine the planning application in order to get permission to use the land for intended purposes
- satisfy the JCA (who will conduct a review of the safety features of the proposed design) that their full plans show that key building safety risks are understood and will be managed,

that robust processes are being put in place and that the design will meet all building regulations requirements in order to start building work

- satisfy the JCA that the signed-off design has been followed (or that any changes since that point are properly verified and acceptable) and that the completed building has met all key building safety (and other building regulations) requirements, that all key documents have been handed over, and a resident engagement strategy is in place in order to start occupation.

A formal duty for residents is also proposed. Residents will be responsible for maintaining building and fire safety protection measures in their flats, and will be expected to cooperate with the duty holder to ensure that essential safety checks can be carried out. They will receive information about the layers of protection in place to keep the building safe, and will be involved in discussions about changes to their building. The duty holder will be responsible for making residents aware of the outcome of safety case reviews and any required improvement measures.

The review also highlights the immediate measures put in place to protect residents, which are:

- Get the fire risk assessment updated
- Keep it updated as your investigation reveals new facts
- Review the fire emergency evacuation plan policy to ensure it is a GET OUT policy
- Ensure 'fire action notices' make all aware of the GET OUT policy and the reasons
- Strongly recommend every owner installs smoke alarms in every room inside the property and tests them regularly
- Install a fire alarm if there isn't one present to ensure early warning.

'We find out now three years later that the External Wall System (EWS1) form requires us to understand the full system of the cladding, i.e., the cladding, the brackets, the fixings, the fire stopping around windows, the insulation behind the walls, etc,' explained Mary-Anne.

'It's about the total combustibility of the external wall system and anything that "assists a fire" on or within it. When the Building Research Establishment (BRE) was testing these buildings for free, it was just about the cladding, so we've now moved on from that. It's quite important to understand this because a lot of us have to retest these buildings that have already been tested, even though we know the cladding on the outside is fine. Now we have to go back and retest the insulation in these buildings.'

The challenges faced in these assessments come from the difference in what is specified to be put on a building – or materials used in construction – and what is actually put on a building.

Mary-Anne warned that some lenders won't provide a mortgage or remortgage on residential buildings without an EWS1 form in place. However, different mortgage lenders have adopted different approaches. 'For those of you that don't know what the EWS1 certificate is, EWS stands for "External Wall System' and the form is required by mortgage lenders on any high rise residential building, and they won't give you a mortgage unless you've got that form.

'And if you're already living in those buildings, and can't produce the certificate, the lender may well put your mortgage interest rates up until you can produce it. That's the reality. We have leaseholders that are paying upwards of £100 extra interest a month while waiting for these forms.

'The journey from applying for an EWS1 form to getting it probably takes around two and a half months. In the meantime, you will be paying penalty interest. Remortgaging where the mortgage valuer finds cladding or anything that "assists a fire" on the "External Wall System" without a signed EWS1 form (with a grade A1, A2, A3) is also being denied by high street banks.'

The second phase of the Grenfell Inquiry has now started, and hearings will be heard until at least April 2021, with 200,000 pages of evidence due to be disclosed and reviewed during the period. The inquiry will consider how the high-rise block came to be wrapped in flammable cladding, which was deemed the reason in phase one for the rapid spread of flames in the block.

Mary-Anne hosted a second round table which focused on the EWS1 form and certificate developed and introduced by The Building Societies Association, RICS and UK Finance. The process requires a suitably qualified expert to assess the composition of a high-rise building's walls. The form will be valid for five years and only needs to be completed once per building or block.

(If you are interested in reading the full report from the Hackitt Review, you can read it via this link).

BUILDING SAFETY BILL

By Jonathan Gough, Head of Health and Safety at Fexco Property Services and FPRA Honorary Consultant

Created to improve the accountability and responsibility of developers and building owners from construction to occupation to take greater responsibility for the safety of residents – the draft Building Safety Bill has arrived. This new legislation aims to improve the safety of residents, create cultural change and increased levels of competence within the sector.

The bill will be enforced by the Building Safety Regulator (BSR) set up within the Health and Safety Executive (HSE). Work has already started so the new regulator has the right infrastructure and powers. The new regime will apply to all multi-occupancy residential buildings of 18 meters in height, or more than six storeys. The regulator will be able to review the scope and suggest changes to government, as required. They will work closely with other agencies and will obtain advice from the Fire Service, local authorities, HSE and other technical experts.

Decisions will be based on evidence submitted by duty-holders, Accountable Persons, and on property inspections. The BSR authority will start at the design and construction stages, but I will focus on the occupation stage as this will affect our members the most.

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Duty Holders

Accountable Person (AP) – will be legally responsible for understanding the fire and structural risks in the building so it can be safely occupied. They will need to appoint a competent Building Safety Manager (BSM), who has been approved by the BSR, to help them conduct daily tasks involving the safe management of the property. However, accountability will stay with the AP.

The AP could be an individual, partnership or corporate body that holds legal rights to receiving funds through the service charge from leaseholders, in some situations there may be several accountable persons. The government will be publishing more guidance where a complex structure exists.

Building Safety Manager (BSM) – this can be a person or corporate body. The AP must give the BSM enough resources to safely deliver their role and carry out several functions including:

- Keeping the building's safety case up to date
- Ensuring that only competent contractors work on the building's fire and structural elements
- Speak to residents about the safe management of their building through the development and delivery of the Residents Engagement Strategy (RES)
- Engage with residents before the commencement of any communal refurbishment projects that effect the fire and or structure safety of the building
- Submit applications for significant refurbishment projects to the Building Safety Regulator (BSR) for approval
- Collate applications from residents on any structural alterations they want to make in their homes and advise if the work can proceed and/or notify the BSR. No work may start until approval has been given by the regulator.

Once again, it is important to stress that legal duty sits with the AP as all the BSM's tasks are delivered on behalf of them. The AP must make sure they appoint a BSM with the necessary skills, knowledge, and experience (or competence) to do these functions.

Administrative costs incurred during the occupation of buildings must be transparent and proportional and should fall to those directly benefiting from these reforms. The government is currently developing more guidance on this.

Important documents

Building Registration Certificate (BRC) – without a valid certificate the property cannot be legally occupied, the certificate will have to be displayed in a prominent area within the common parts. It will name the appointed person and BSM and explain any specific conditions placed upon the building by the BSR. The appointed person must apply to the BSR for their building registration certificate.

Safety Case – this must be supplied to the building safety regulator and will be the responsibility of the BSM to keep all content relevant and up to date. The safety case will hold information about management of fire and structural risks. The BSM will be required to explain what mitigating actions are in place with appropriate written evidence. Putting the case together is based upon established risk assessment principles of:

- Identifying hazards
- Recording who might be harmed and how
- Evaluation of the risks
- Deciding upon further control measures
- Recording of these actions
- Evaluation and ongoing monitoring

Fire risk assessment, fire precautions/strategy documents and other risk assessments relating to the building must also be included within the safety case.

Existing buildings within scope

The exact way that existing buildings that fall within scope will be dealt with has not yet been decided upon. However, we do know that the AP must register the building with the BSR and produce a building safety case for assessment. Failure to do so will be an offence by the AP.

Resident Engagement Strategy

The BSM must produce and implement a Resident Engagement Strategy, it should clearly explain how they will inform and engage with residents in decision making processes. The BSM will have to demonstrate:

- How core building safety information is shared
- If requested, how detailed information about building safety will be made available
- How residents will be communicated with, what method(s) will be used and how often communications will be made
- How residents will be involved in decisions about the building's safety, during any refurbishment
- How complaints about safety can be made, and how they will be handled
- How residents will be told about their safety responsibilities
- Steps taken to ensure engagement takes account of the diverse needs of their residents
- How implementation of the strategy will be measured

Residents responsibilities

Residents will have a new statutory duty to cooperate with the BSM. Some actions that would constitute a breach of the duty are:

- Making structural alterations to their flats that undermine the fire compartmentation
- Removing, altering or replacing compliant fire doors and windows
- Damaging or removing any element of the communal fire alarm/detection systems; or
- Hindering or frustrating the Building Safety Manager in the discharging of their duties to keep the fire and structural integrity of the building directly effecting the safety of residents.

The BSM will be able to enforce with the help, if required, of other enforcement agencies through the courts.

At the moment all this change may seem daunting, but this proposed legislation has a clear goal, to keep people safe in their homes. A desire that we surely all share and support.

LIFT MAINTENANCE – A BEGINNER'S GUIDE

FPRA Honorary Consultant Paul Masterson is our expert on lifts and answers members' questions on the subject. Here a colleague from his firm PIP Lift Service, Brian Palfreman, takes us through the essentials.

The importance of lift maintenance can easily be overlooked. However, when managed properly it can improve the longevity of the lift, making it a cost-effective way of ensuring your lift maintains its efficiency, reliability and safety.

Here are some of our most frequently asked questions:

How do I go about finding a reputable company to maintain our lift?

We recommend you ensure that all their staff are fully qualified to carry out these works, and have all the correct, up to date insurances in place. Ensure they cover your area, with their own engineers and do not use sub-contractors. Most reputable companies will have a website, with all their accreditations and insurances. But most of all, for peace of mind, they are members of the Lift and Escalator Industry Association, www.leia.co.uk. Before you get the cost, ensure they are familiar with the equipment and are flexible.

Do we have an obligation to have our lift maintained?

The short answer is yes. However, as with many areas of legislation it is not cut and dried when it comes to potential legal liability. Where a lift is installed in domestic premises, two pieces of legislation, PUWER (The Provision and Use of Work Equipment Regulations) and LOLER (The Lifting Operations and Lifting Equipment Regulations) come into effect. This is because the lift is deemed to be an item of work equipment and that places a legal obligation on the lift owner to take all necessary steps to ensure the lift is safe for the use of its employees and the public.

Strict application of PUWER and LOLER implies that private lift owners (and lifts primarily for use by the public) have no responsibility for their maintenance, as they are not considered to be work equipment. However, owners of lifts still have a duty of care to persons not in their employment under the Management of Health and Safety at Work Regulations. For example, where resident management associations or agents employ contractors, such as lift companies, cleaners of common areas etc to work in residential buildings, the premises becomes an area of work and lift owners have a duty of care to ensure their lift is maintained and meets relevant safety standards.

How often should our lift be maintained?

There is no one right answer to this. The frequency of service visits depends on the number of lifts you have, the number of floors served and the amount of use they are subjected to. Your lift provider should be able to advise you on the necessary maintenance profile. It is, however, important to consider that lift servicing is about improving the longevity of your lift. Having your lift regularly serviced is likely to minimise your running costs in the medium to long term.

What will a service visit involve?

During a service visit an engineer will check the safety features on a lift, in addition to cleaning, lubricating and adjusting all components for optimum performance. An engineer will record any work carried out and also make recommendations for any repairs or works of improvement that are not covered in the service visit. The customer should always sign and check the service report on each visit.

What happens if someone is trapped in the lift when it breaks down?

Any persons trapped in a lift when it breaks down should be able to contact someone on the outside via an emergency telephone in the lift car. All credible lift service providers should deal with any trapped passengers as a priority and should offer a 24/7, 365-day emergency call out service.

All new lifts installed since 1997 are legally required to comply with the European Lift Directive, including the provision of a lift communication system. For existing lifts, the European Standard EN81-80 was introduced in 2003 and covered a 74-point list of recommendations for making old lifts safer. This includes the provision of a lift communication system, as is reasonably practical (which in almost all cases it is).

Should I be charged for breakdowns or repairs?

This ultimately depends on the type of contract you have with your lift provider. Most lift companies offer a choice of contracts depending on the type of service package you are looking for. This can range from basic, where everything other than service visits are chargeable, to fully comprehensive, which includes breakdowns and repairs, as well as the cost of replacement parts and labour.

It is important to be aware of the terms of your contract and understand exactly what is, or isn't, included.

Even comprehensive contracts may have certain major parts or components written out in order to reduce the premium.

Legal Jottings

Compiled by Nicholas Kissen, Senior Legal Adviser at LEASE

Upper Tribunal (Lands Chamber)

Thierry Fivaz v. Marlborough Knightsbridge Management Limited [2020] UKUT 0138(LC)

The Upper Tribunal (Lands Chamber) ("the UT") decided that under the terms of a residential long lease and as a matter of contractual interpretation the entrance doors to flats were not to be looked on as "landlord's fixtures".

The facts

F owned two one-bedroom flats within a block on long leases granted in 1972 and 1978 respectively both of which were identical with M the freeholder of the block. F had owned both flats since September 2013.

F replaced the front doors to both flats in or about 2014 and around five years later M applied to the First-tier Tribunal (Property Chamber) ("the FTT") under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a declaration that by doing so F was in breach of a covenant in the lease.

It was not disputed that the new doors were compliant with all relevant fire regulations and were entirely fit for purpose.

The lease covenant

Clause 3(4) of the lease reads as follows:
"Not at any time during the…term to make any alterations in or additions to the demised premises or any part thereof or to cut main alter or injure any of the walls or timbers thereof or to alter the internal arrangement thereof or to remove any of the landlord's fixtures therefrom without first…having received written consent of the Lessor…"

M relied on the words "remove any of the landlord's fixtures."

The FTT decision

M succeeded in being granted a declaration that the lease covenant had been broken by F.

Two issues pre-occupied the FTT:

- Were the flat entrance doors "landlord's fixtures"?
- And if the answer is yes, were the doors "removed" by F?

The answer would need to be "yes" to both questions for M to establish that F was in breach of the lease covenant.

The FTT decided that being fixed to the building the doors were not chattels so it must be a fixture. The FTT also decided that although the doors had been replaced, they had indeed been removed and so the consent of M was required. As such consent had not been obtained prior to the doors' removal there had been a breach by F of a covenant of the lease.

F sought leave to appeal to the UT first applying to the FTT who declined to grant permission to do so. The application was renewed before the UT who granted such permission.

The UT decision

F succeeded on his appeal and the FTT decision was reversed.

The UT considered general principles of contractual interpretation because a lease is a contract. "The leases must be construed in the light of the words that have been used paying due regard to the particular context in which those words are to be found. It is not a matter of asking, in the abstract, whether the entrance door to a flat is a "landlord's fixture". This is because it is possible, in different contexts, and in different leases, an entrance door may, or may not be captured by that terminology.

The House of Lords provided the leading authority on whether an object is a fixture in the 1997 case of *Elitestone Limited v. Morris* where a "three-fold classification" proposed in a leading textbook on landlord and tenant was adopted:

"An object which is brought onto land may be classified under one of three broad heads. It may be (a) a chattel; (b) a fixture; or (c) treated as being part and parcel of the land."

The UT acknowledged that the object's status, initially a chattel, may change but such changes may not lead to it becoming a fixture (to be contrasted to becoming a part of the land).

So, the UT had to consider the above approach in asking themselves whether the flat entrance doors were "landlord's fixtures".

The problem is that the concept of "landlord's fixtures" is not at all clear. There were quotations from past case law describing the term as "a most inaccurate one", "not a happy expression" and "always had a difficulty in understanding what is meant".

In the 1925 case of the *Boswell v. Crucible Steel Limited* the court said:

'A fixture, as that term is used in connection with a house, means something which has been affixed to the freehold as accessory to the house. It does not include things which were made part of the house itself in the course of its construction. And the expression "landlord's fixtures", as I understand it, covers all those chattels which have been so affixed by way of addition to the original structure, and were so affixed either by the landlord, or, if by the tenant, under circumstances in which they were not removable by him'.

The UT came to the view that the doors were not "landlord's fixtures" but an inherent part of the demised premises themselves.

'It is important to remember the demised premises are not the building (the block of flats) but the leaseholder's individual flat. Each lease is a demise of one flat only…In that context, the entrance door to the flat assumes a far greater significance, and while the door may still not be part of the structure of the flat, the absence of a door would derogate significantly from the grant of the flat. Moreover, the doors had been made part of the flat itself in the course of its construction. Indeed, the doors were themselves part of the "Demised Premises" within the terminology of the lease.'

The UT decided that the FTT's decision that the doors were "landlord's fixtures" was wrong in law.

"Not only did the FTT omit to address an important question (whether the entrance doors were part of the demised premises) there is no doubt in my mind that its conclusion – that the doors

were "landlord's fixtures" – was wrong as a matter of law in that it does not accord with a proper construction of the terms of the lease."

Because of this conclusion the UT did not need to decide the second issue of whether the doors were "removed" when F replaced them with other doors.

The UT also criticized the FTT's failure clearly to identify the breach of lease covenant the existence of which it claimed to have found. The decision of the FTT stated only that there had been a breach of covenant.

"The purpose of s.168(4) is to provide clarity and to ensure that the parties know the scope and extent of the tenant default prior to the inception of forfeiture proceedings. Where application is made for a determination pursuant to s168(4) it is essential that if a breach is proved the FTT states in clear terms what covenant (or condition) has been broken by the leaseholder. It should not be left to the parties to read between the lines.

Points to note

When the words "landlord's fixtures" in a lease are interpreted it is important to consider their meaning in the context of the lease in which the covenant in question is found. This UT decision should not be regarded as meaning the front entrance door of a flat will never be a landlord's fixture.

A SMOKING GUN OR A FACT OF (LEASEHOLD) LIFE

FPRA Director, Shaun O'Sullivan, looks at the uneasy relationship between smokers and non-smokers in blocks of flats.

Although questions from members are many and varied, one which emerges quite often – and particularly so from Residents' Management Companies whose directors find themselves in the firing line from fellow leaseholders – is that of smoking and, in particular, the potential impact on other residents as the result of one heavy smoker in a block.

Firstly, it should go without saying, that smoking is not permitted in the internal communal areas of blocks of flats; this was banned in 2007 and signage of at least A5 size and displaying the international no-smoking symbol in colour and of a minimum diameter of 70mm (available from the members' area of the website) is required to be displayed in such areas.

But what about those who smoke inside their flats? As ever, and as with most contentious issues in a leasehold property, the starting point is the lease. One of the overarching covenants implicit or explicit in any lease is that of "quiet enjoyment", a somewhat outdated phrase which has little to do with being quiet or enjoying oneself! In essence it means that the leaseholder must be able to live in the property in peace and without any undue disturbance from the landlord or anyone acting on his behalf. Thus, any attempt by the landlord to interfere with this most basic of rights

could cause him to be in breach of the covenant of quiet enjoyment. So landlords must be careful not to unnecessarily, or even unwittingly, undermine the leaseholder's right to "enjoy" the property – and if someone wishes to smoke in their own property then, unless the lease specifically prohibits it, they are quite within their rights to do so.

In reality it is unlikely that a lease could be found which actually bans smoking (although sub-tenants might well find such a prohibition in their tenancy agreement); nevertheless smoke that pervades one flat to others can be very disturbing and, to those with respiratory issues, a real problem with potential health implications; in short, it might be described, if somewhat disingenuously, as a "nuisance". Although most leases include covenants placing an obligation on leaseholders not to cause a nuisance (or disturbance), it is unlikely that much would be gained by attempting to utilise such a covenant in an attempt to frustrate the activity of the smoker. Most leases, whilst requiring leaseholders not to cause a nuisance, will also require the leaseholder who seeks to invoke the terms of the covenant, to indemnify the landlord for any costs of pursuing such action.

In extreme cases, however, one avenue open to those suffering from the effects of passive smoke is to seek the help of the local authority. Local authorities have a duty to take such steps as are "reasonably practicable" to investigate complaints of "statutory nuisance" as set out in the Environmental Protection Act 1990. Complaints of smoke passing from one premises to another would usually be carried out by local Environmental Health Officers (EHOs) who would need to determine whether the problem constituted a "nuisance" under the terms of the Act. It has to be borne in mind, however, that EHOs are required to balance differing interests and to assess what is "reasonable" in the circumstances and to determine whether the effect of the smoke is prejudicial to health. Equally the assessment of what constitutes a "nuisance" must take into account the standards of an average person (rather than someone who is particularly sensitive) as well as the duration, frequency and severity of the problem.

ASK THE FPRA

Members of the committee and honorary consultants respond to problems and queries sent in by members

Meeting virtually

Q Following restrictions under the COVID-19 legislations, our directors meet online using a 'virtual' meeting platform, and most of management tasks are carried out to satisfaction of leaseholders, more or less. However, our problem is the AGM, which we need by our constitution to adopt and finalise our service charge accounts. We normally hold it in April but have naturally postponed it indefinitely. Our constitution does not explicitly allow or forbid a virtual general meeting, but pressing on a virtual meeting could raise an argument of unfairness and thus illegitimacy of the meeting, because some of our residents do not have access to such meetings for technical reasons (no home PC, no camera etc).

Current governmental guidelines are vague. It will be illegal to meet more than 6 people outdoors, but also "... Businesses and venues following COVID-19 Secure guidelines can host larger (than 30) groups provided they comply with the law. This can include weddings, civil partnership ceremonies and funerals (which we advise should be limited to no more than 30 people), religious ceremonies and services, community activities and support groups."

Would residential management of a leasehold estate (non-commercial) count as 'community activity'?

Could we consider ourselves an equivalent of a business?

A FPRA Committee Member Mary-Anne Bowring replies: It has become commonplace for AGMs now to be held on Zoom; most managing agents are doing so.

Choosing cover

Q We are about to renew our directors' liability insurance. What level of directors' liability insurance is appropriate? There is a wide range of levels of cover, from 100k up to 2M. But how much is needed to cover all potential liabilities – given we also obviously have standard buildings cover in place, which covers freeholders' liability regarding the buildings.

We have 30 flats, valued at £350-400,000. There are six directors and all are flat owners. Most are resident and all are amateur, i.e. none of the directors have relevant professional qualifications.

A FPRA Hon Consultant Belinda Thorpe replies: Unfortunately, there is no set amount that could be recommended for directors and officers liability insurance. All quotes are based on the limit of indemnity and the number of flats – it would be up to your RMC to decide what the company's risk is. I can confirm, however, that most of our clients with 30 units normally pick either £500,000 or £1 million limits of indemnity. The higher limit of indemnity is only £50 more than the lower.

Re-mortgage

Q A resident has re-mortgaged their property and their legal representative has sent us the notice of change of mortgagee. What action do we need to take as the freeholder?

A FPRA Hon Consultant Emily Shepcar replies: It is usual that a lease will provide for a notice to be given to the freeholder every time that there is an assignment of the lease (i.e. the property changes hands) or there is a charge against the lease. In taking a new mortgage, this is a new charge against the lease for which notice must be given to the freeholder. There is usually a fee payable for the registration of this notice.

This notice should be placed on the file for the property and can be helpful should you need to pursue any breach of the lease (including recovery of any arrears) and you may need to advise the mortgage company of the same, given their interest in the property.

Usually this will just sit on the file until the information may be relevant, but you do have a duty as a freeholder, in line with GDPR, to hold this data securely.

Charging electric vehicles

Q We have an AGM and one of the tenants has requested we discuss electric car charge points. This has been a subject we have been mulling over for quite some time, as although we do not have a tenant in the block with an electric car, the future of personal cars will mean that we will all have an electric car within about 25 years. The government may in fact increase the road tax on petrol and diesel cars to force a change before then.

Our block has eight flats over four floors, with the top flats being duplex. We all have a dedicated parking space in the basement, some of which are used for parking but in the main storage of bikes and boats etc.

In the case of having a dedicated charging point we have the space for one car in the garage for each flat, and we have electricity supply in the basement BUT this is not related to any of the flats as it is in a common space. The meters for each flat are next to the front door of the flats, which are two on the first floor, two on the second floor and four on the third floor. They are therefore a long way from the garage.

My question therefore relates to the installation of these charge points and if there is any information we can obtain about other blocks and what is available for this type of installation for the future.

A FPRA Director Shaun O'Sullivan replies:
'You have raised a topic which is generating some considerable level of debate both within the FPRA as well as the wider leasehold community and, before addressing the specifics of your own situation, you might find it helpful to have some general background.

The Department of Transport/Office of Low Vehicle Emissions (OLEV) issued a consultation document last July on the provision of Electric Vehicle Charging Points (EVCP). The FPRA's response, should you wish to read it, can be found on the FPRA website – just search for "electric vehicle". However the essence of the response is that we believe that the leasehold sector has been largely ignored in the proposals as currently formulated. You may also wish to read or re-read the article in issue 127 (Winter 2018) of the newsletter which attempted to outline some of the issues and challenges surrounding the subject. And you might also like to refresh your memory on some of the possible technical solutions outlined by Jamie Willsdon in his article in issue 133 (Summer 2020) of the newsletter.

Any changes as the result of the OLEV consultation notwithstanding, the proposals seem to be that new builds of blocks of flats will have EVCP installed as a matter of routine and reflected in building regulations; and the proposals also seem to be that blocks undergoing material change and which have 10 or more parking will be required to have cables installed in readiness. However there appears to be no proposals in respect of existing residential buildings, including blocks of flats.

Thus, as things stand, I am inclined to the view that the installation of EVCP in existing blocks and on a communal basis will be construed as an improvement. In this regard very few residential leases (with the exception of local authority leases) provide for landlords to make improvements to leasehold property and to recover the costs of so doing through the service charge. Although some might argue that the imperative to move to electrified vehicles and the consequent need to install charging points, could be construed as a inextricable necessity and not an improvement in leasehold terms, this has not, to my knowledge, been tested in the courts/ tribunals and, although I am not a lawyer, my own view is that it is an improvement.

Of course, there is nothing to stop individual leaseholders seeking consent (licence) from their lessor to install a charging point in that part of the property which has been demised to them. Although this would be for the landlord to consider it would, in my view and in the majority of cases, be unlikely that such consent would be granted, not least because in most cases the retained part of the property would have to be compromised (perhaps by having to lay cables and/or conduits etc) and I can't imagine that many landlords would want to do this on a piecemeal basis. Although leasehold case law suggests that applications to alter cannot unreasonably be withheld, this only applies to that part of the property which has been demised and not to the retained part of the property in respect of which the landlord can quite reasonably refuse consent.

Turning to the specifics of your own situation, unsurprisingly your lease appears not to mention improvements, with the thread running through being to maintain, repair, redecorate and renew. Thus, unless you can find anything in your Articles of Association that would allow the provision of such a facility at a cost to Company rather than service charge funds, as things stand I don't believe that you could legitimately install a charging point, as a cost to the service charge, in that part of the basement which has not been demised (i.e. the retained part of the property).

So far as that part of the basement with parking spaces is concerned, the spaces (according to the Second Schedule of your lease) have been demised to individual leaseholders and (according to Clause (21) of the Fifth Schedule) are there to allow the storage of a motor vehicle. In this respect any or all of those leaseholders could seek consent to install a charging point in accordance with Clause (9) of the Fifth Schedule.

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However, it would appear, from what you describe, that individual meters and individual sources of supply are a considerable distance from the basement and, to that extent, might suggest considerable impact on the retained part of the property which you might consider unacceptable.

So, as things currently stand and for the immediate future, most existing blocks will probably have to rely on public charging points. Although, in this regard, such an option might be seen to put leaseholders at a disadvantage compared to those who live in houses with garages or off-street parking and who are not constrained by leases/leasehold law, there are schemes which allow residents to nominate locations for public charging points such as www.powermystreet.co.uk although, as you rightly point out, on-street facilities are increasingly at a premium.

All that said, as the result of further lobbying, the government has acknowledged the challenges of installing charge-points in existing leasehold properties and, to quote from a recent letter from the Department of Transport are "...working with colleagues across government to investigate this issue."

Subject to what might emerge from this and depending on the configuration of your basement, what you might find possible is for your communal supply in the basement to be utilised to meet demands of individual leaseholders. As Jamie Willsdon's article points out, there are now innovative pay-as-you-go systems available which would avoid the difficulties of those who own EVs drawing down "free" electricity from the communal supply and at the expense of those who don't own such a vehicle – or, indeed, don't have a vehicle at all! So, if there were a directive that lessors of existing blocks of flats were required to provide a charging facility, this might be the best solution in your circumstances.

We are keeping abreast of developments and will update on the subject in the newsletter.

Liability insurance

Q We have recently become members of the FPRA and have now enough members in our residents association to form a constitution, which we did yesterday. Do we need liability insurance for the officers and, if so, can you please recommend someone?

A FPRA Hon Consultant Belinda Thorpe replies: You will have many legal responsibilities and may be held personally liable for any decisions or actions taken while working for the association. We would recommend taking out Directors' Liability Insurance to protect yourselves against the cost of potential compensation claims against any alleged wrongful acts.

Costs start from approx. £90 per annum. All Flats Insurance providers can provide these policies – google "Blocks of Flats Insurance directors and officers" and you will find a number will come up.

Managing agents

Q We are a development of 154 units and are in the process of tendering for a new managing agent. We want to ensure we are following the correct process, so would appreciate some advice on the following points:

As this is a service change to residents which is higher than £100 per leaseholder and a longer-term arrangement, would we be required to issue a Section 20 Notice?

What are the requirements/ processes for an RMCL to send out Section 20 notices? (Normally this would be issued by the managing agent but as we are looking to replace them we would need to issue this ourselves).

Do you have a copy of a standard Section 20 notice which we could edit and would you be able to review the final notice to ensure it is compliant?

Is there a requirement to send out hard copies of the notice, or would an electronic emailed version be acceptable?

A FPRA Hon Consultant Jonathan Channing replies: If the residence wishes to avoid serving Section 20 Notices, they should sign up with a new managing agent on a year-long agreement, and not a day more. The managing agent contract becomes a qualifying long-term agreement if the agreement is for longer than one year and any single leaseholder is expected to contribute £100

(including VAT) to the contract. Most managing agents' standard terms and conditions default to one year for this reason.

That said, in my opinion, far too few RMCs engage managing agents on a qualifying long-term agreement, which is a real shame. The Section 20 restrictions discourage RMCs from developing a longer-term relationship with their managing agent, purely from a practical viewpoint. An agreement for, say, three years encourages longevity, loyalty and usually brings the management fee down. I know from my 20 years as a managing agent that when a client wanted to sign up to an agreement for more than a year, that showed us that they intended to WORK with us for the longer term and that encouraged us to INVEST in the client.

That longer term relationship also encourages the RMC to select their new managing agent with more due care and attention. Far, far too many RMCs bounce from one managing agent to another, every year or so. There are some very good agents out there.

In practical terms, RMCs like yours need to look to a consultant to serve the section 20 notices, as it is inappropriate (obviously) for the in situ managing agent to serve the notices.

In summary:

1. If a management agreement is for fewer than 366 days, it is not a qualifying long-term agreement, so Section 20 Notices are not required.
2. A longer-term agreement between RMC and managing agent should be encouraged – BUT subject to a termination clause of say three months to be served by either party at any time. Section 20 Notices would be needed if any single flat is required to pay £100 or more to this agreement.
3. If you would like to consider a longer term agreement instead of just a year, then the Section 20 Notices need to be served very carefully and by someone who has plenty of experience of doing so. RMCs tend to outsource this exercise to a consultant.
4. Section 20 Notices need to be served by first class post. Best practice these days is to serve them via email too.

Vexatious leaseholders

Q We are subject to written assault by around two per cent of our leaseholders. We have received a Data Subject Access Request from one of these vexatious individuals that has been subjecting our staff to a campaign of abuse which has involved calling the police on a few occasions including at between 2 and 4 am.

The DSAR is requesting everything we hold from 2003 to now. Can we reject this DSAR on the grounds of it being manifestly unfounded?

A FPRA Director Shaun O Sullivan replies: Although we are able to provide much advice in respect of leases, leasehold law and company law (so far as it affects leasehold property), our ability to offer detailed advice on data protection is limited. However, you might find the article on page three of issue 124 (Spring 2018) of the newsletter helpful. This can be accessed on the FPRA website under the Publications drop-down menu and will give details of the links to the Information Commissioner's Office (ICO). Additionally you might find this link helpful https://www.gov.uk/data-protection. However, I do not believe that you can reject the request for information as my understanding is that individuals do have the right to know what data on them is being held and how it is being used and protected.

I would expect a Residents' Management Company to hold a limited amount of data – perhaps address, telephone number(s), email address for the legitimate purposes of carrying out its business, to enable it to communicate with its members/shareholders, to issue service charge demands and to ensure confirmation statements to Companies House can be completed etc. To that extent I wouldn't envisage meeting the request, however unwelcome, to be too onerous. Data should, of course, be protected and not passed onto third parties. In that respect it is, in my experience, all too easy not to protect email addresses when communicating with residents en bloc so it is undoubtedly wise to use bcc in order to help protect email addresses.

Problem with quotes

Q I am one of the directors for the share-of-freehold residence association of a small block. Work is required to the drains which is above the Section 20 limit, so accordingly we will need to follow the Section 20 procedure to inform and consult owners. It would seem the company we employ as managing agents is having great difficulty obtaining more than one quote for the work, and while we will of course ask residents if they know of other contractors as I believe is required under Section 20 procedures, I am not hopeful that this will yield anything. Are we reasonably able to proceed even if we are able to obtain only one quotation for this work?

A FPRA Committee Member Colin Cohen replies: You must follow Section 20 consultation notice procedure. In the first instance you should serve the first notice of intent stating the nature of the works and details of the contractor whom they have obtained a quote and put A N Other as a second in the notice and ask the leaseholders to suggest an alternative.

If after the expiry of this notice no contractor has been put forward and the managing agent cannot obtain

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another quote, then you would have no other choice but to seek dispensation from the First Tier Tribunal (FTT) for a fast track ruling. Otherwise you would not be able to charge more than £250.00 per leaseholder.

Freeloaders

Q Around 15 of our 20 lessees have expressed a willingness to acquire the right to manage our building, so there is a qualifying majority. This would leave five or so who would derive all the benefits but avoid payment, and effectively be freeloaders. As a solicitor of 40 years' experience myself, my advice would be to simply pay the costs out of the general service charges

A FPRA Committee Member Yashmin Mistry replies: Service charge monies collected can only be used for the items of expenditure set out in the lease. That being the case, without sight of the lease we cannot be sure, but most leases will not include a provision within allowing service charges to be used for the exercise of the right to manage or things of that nature.

Accordingly, the usual position is that the costs for dealing with the right to manage claim cannot be taken from the general service charge account. The usual position is that leaseholders that have expressed an interest in exercising the right to manage would set up their own fighting fund which would be separate and distinct from the service charge monies.

Cladding and mortgages

Q In the fallout from Grenfell steps are being taken to ensure the safety of wall claddings; and there have been a few reports of people being refused mortgages on properties that have not had a safety assessment, and any appropriate remedial work. Obviously, problems with mortgage ability affect marketability. How common has it become for a mortgage application to be refused for this reason? Is it a widespread problem or a matter of a few isolated cases?

A FPRA Committee Member Martin Boyd replies: The problem of obtaining mortgages without an EWS1 certificate is unfortunately becoming worse. Some lenders had informally agreed to remortgage at discounted relates to existing borrowers if their financial circumstances had not changed but changing supplied is becoming more and more difficult.

There are now very long delays is obtaining EWS reports and the danger that when those reports are supplied they may indicate the need to remediate. There will be some sites requiring no works but many will see anything from a small amount of the external wall system needing to be changed to to major remediation works.

The best thing is to work closely with the agents who are facing this issue on many sites and to press the local MP to explain the problem. Things will only change if the government steps in to change the market.

Maintaining the property

Q We are a development of 18 apartments. In the lease (Lessor Covenants) it talks about the Lessor having the responsibility to maintain the property (in particular the general and major structural areas) in a "good and tenantable state of repair...including the renewal and replacement of all worn or damaged parts".

In this same schedule it also talks about the "Lessor or its Managing Agent serving on the Lessees a notice for their proportionate payment" in relation to all the costs incurred in carrying out its obligations under this schedule.

So although it talks about the freeholder having the "responsibility" to ensure that the property is maintained: this does not imply a "financial responsibility" and the freeholder therefore is able to claim back all costs associated with any such repairs/ improvements (so long as correct procedures eg S20 are followed).

A FPRA Director Shaun O'Sullivan replies: Yes, similar covenants will be found in all residential leases. It is fundamental to leases and leasehold law that the lessor will be obliged to maintain that part of the property not demised and that the lessee will be obliged to pay. In some leases the lessor's obligations can be prescriptive in terms of the frequency of certain maintenance obligations (perhaps by obliging him to redecorate the exterior of the property every (say) five years) whereas in others it can be less so. It's not, however, a case of the lessor 'claiming back' the cost but a matter of him levying a charge for the work involved – usually referred to as the Service Charge or, as is the case with your lease, the Maintenance Fund.

It is the case, however, that the cost of improvements, to which you refer, cannot generally be met from the service charge funds and I can see no reference to improvements in your lease. Thus, the obligation is to maintain what is there including repair and renewal.

Sublets

Q We would like it be a legal requirement of anyone renting out their property to inform the head leaseholder – and the residents' association where there is an accredited one – with the name and contact details of any person renting their apartment within the building. The incident that caused this suggestion occurred recently when two people wearing what seemed to be PPE were seen escorting someone who appeared unsteady on his feet out of our building. This caused residents to wonder whether

someone had been suffering from Covid-19 symptoms, in which case building management needed to be aware and take clean-up measures. But we have a number of apartments that the owners rent through an estate agent and do not know who is using their apartment. And the renting agents won't provide that information to the residents' association or the property management. So we have people living in the building with whom we cannot make contact ....and anything put into their post-box tends to be ignored.

This leads to the proposal that everyone renting out their property should have a statutory duty to supply to the head leaseholder and the residents' association with the name and contact details of any person occupying their rented apartment

A FPRA Committee Member Colin Cohen replies: There is already an obligation under the leases for this property for any sublet property (ie underlease) to be registered with the landlord (in this case the head lessor). Hence whoever manages the property should inform the landlord. It may be against data protection to provide this information to the residents association unless they manage the property. The manager may be able to enforce this is done on each flat, advising of penalties such as possibly a fine, if this not complied with.

Terrorism

Q **Can you advise us on the issue of terrorism insurance? We are a block of 12 flats in south London and we have recently renewed our buildings insurance policy. We were invited to purchase terrorism insurance.**

Our block is a self-managing block (although there is a separate private freeholder) in a residential neighbourhood, not close to any obvious terrorism target. Should we take this cover out? If not, can you suggest how we should think about this in order to make an appropriate decision based on our duties as leaseholders and directors?

A FPRA Honorary Consultant Belinda Thorpe replies: We recommend terrorism insurance as most mortgage lenders require terrorism insurance to be in place. Where the decision is made not to accept terrorism insurance, we would always recommend that a letter is sent out to all owners advising them of the decision and then collate the responses to show everyone's approval of their decision.

NEED LEGAL HELP? GO STRAIGHT TO BARRISTER

By Ibraheem Dulmeer, FPRA Hon Consultant and Direct Access Barrister and Mediator at Normanton Chambers

Historically, the Bar was a referral profession, meaning that it could only accept instructions from a professional client such as a solicitor. The system was similar to the way a consultant doctor sees a patient on a GP's referral. However, now a barrister can now accept instructions from clients directly under the direct access scheme.

It strikes me that many do not realise that they can go directly to a barrister if they have a legal problem. The direct access enables a member of public to work directly with a barrister rather than going to a solicitor first.

I have spoken to thousands of leaseholders and the one thing they want is cost effective legal advice. Direct access may have the answer.

You might instruct a barrister directly to (non exhaustive):

- discuss your options in a meeting (this can be in a group or individually)
- draft letters for you
- give you written advice about your case
- give you an opinion about your case
- draft court or tribunal paperwork for you.

When you have a legal problem, you may want to obtain initial advice on how to deal with the matter. In such a situation you don't need a solicitor, you can go directly to a barrister.

The main difference between instructing a barrister and a solicitor is that generally a solicitor will enter into a retainer to litigate a case, whilst a barrister under direct access undertakes bespoke work that is governed by the client care letter.

The advice sought on a direct access basis will be more cost effective. This is because there would be an additional charge to process the papers by solicitors before the matter is eventually passed onto a barrister for an opinion. Using a direct access barrister means that you do not need to have the solicitor liaise with the barrister on your behalf.

The direct access route would allow clients to have full control of how much is being spent at each stage. Given the tumultuous times we all find ourselves in, this can be financially comforting. As a direct access barrister myself, clients have appreciated the fixed fees with no hidden surprises!

(The information provided in this article serves as a useful guidance. Please note that this is not intended to be comprehensive. Please note that not all matters are suitable under the direct access scheme.)

Rooftop Controversy continued from page 5

residential conversions back in 2016. A high level of regulation is paramount to ensure this will not happen within the airspace sector and calls, which we at Sussex Airspace Developments echo, have been made across the industry to put processes in place that will guarantee it does not. That said the announcement was great news for the industry and since 1 August the permitted development rights have been in force. An easing of regulation will significantly speed up the ability to deliver new airspace homes, but can it also be great news for residents and leaseholders too?

The simple answer is yes it can. With any airspace development, modular offsite construction is recommended where possible as it causes such little disruption to residents. New apartments can be factory built up to 90 per cent complete and installed onsite over the course of a few days. As part of the development a schedule of internal and external upgrades should always be included which will improve the existing building and increase the leasehold values, and finally the additional apartments will reduce individual leaseholders' service charges as they are spread over a greater number of dwellings. The major benefit that often goes unmentioned however, is the empowerment to leaseholders that airspace development can bring. Leaseholders considering collective enfranchisement should see airspace development as an opportunity to recuperate some of the cost of buying the freehold. Once they legally own the freehold they can enter a joint venture with companies such as ourselves to take advantage of that opportunity and build new accommodation on the property rooftop which can be sold on with the proceeds offsetting the original cost of enfranchisement. The more risk averse could even finance the entire development themselves, contracting an airspace developer as a project manager, to see an even higher return on their investment.

Taking aside the wider benefits of airspace developments, such as the sustainability of not using any new land and the low-carbon approach of offsite construction which reduces waste by as much as 90 per cent, another major benefit to leaseholders is the opportunity it can create to get things done. This can range from resolving maintenance issues such as using the development to ensure they are put right, to having all the existing leases amended to make sure they match, putting all leaseholders on a level footing. A development we are working on currently came about because the existing building needed a new roof. The share-of-freehold residents' management company explained the cost of repair would need to be split between the existing leaseholders but that there was also another option. Allow the airspace to be developed and not only would the cost of the roof repairs be taken by the developers but a host of other much needed enhancements could also take place at no cost. The choice went to a leaseholder vote and the decision unsurprisingly was to have the failing rooftop developed. In this instance the major works required happened to be on the roof itself but the principal can apply to any major works that might need doing.

There can of course be negative effects to airspace development as well but most of the common complaints can be reasonably easily resolved. A major issue of adding an additional storey can be the loss of light or privacy to neighbouring properties, however this should be surveyed as part of an initial feasibility study when deciding if a site is appropriate to be developed. If the report flags it as being a problem, compensation has to and normally can be arranged to be acceptable for the affected property. Extra dwellings can also put an additional strain on existing facilities and infrastructure such as schools and health services. Developer contributions such as Section 106 and Community Infrastructure Levy payments are used to make sure that this is not the case. Not all developments can be constructed offsite but the large majority can be. Where it isn't possible a good developer should work with the residents and neighbours of the property due for development to arrange an acceptable development management plan.

There will always be personal issues such as top floor flat owners, who wanting to remain that way, will be opposed to any rooftop development. An offer of first refusal on the new apartments is a possible compromise. As the saying goes "you can't please all of the people all of the time" and there will always be an element of residents or neighbours who just don't like change. Everyone is entitled to their opinion and rightly so. In this instance it isn't always possible to find a positive solution. That said this is normally the minority and looking at the greater picture the benefits of an airspace development will generally far outweigh the negative effects.

Sussex Airspace Developments welcome any residents' freeholding management companies considering major works on their property or leaseholders considering collective enfranchisement to contact us and find out what the potential of their airspace may be worth.

(FPRA welcomes comments from members on this issue, or any other).

Advertisements

NEW HONORARY CONSULTANT IBRAHEEM DULMEER

Ibraheem Dulmeer is a barrister and mediator at Normanton Chambers in London and a door tenant at KBG Chambers in the South West of England.

He is Direct Access qualified, which means a member of the public may instruct him directly. He is also a mediator, having trained with the Society of Mediators.

Prior to coming to the Bar, Ibraheem worked as a legal adviser for the Leashold Advisory Service (LEASE) for almost six years, providing advice to thousands of residential leaseholders on a wide range of landlord and tenant matters.

Ibraheem has featured in respected publications including: Estates Gazette, Landlord and Tenant Review, Law Society's Property in Practice, RICS Property Journal, News on the Block, Flat Living and The Negotiator.

CAN YOU CONTRIBUTE?

FPRA welcomes new Directors, and please do offer your services if you would like to join us. Chairman Bob or another member of the team will be pleased to have an informal conversation with you to answer any queries.

SAD FAREWELL

FPRA is very sorry to say goodbye and good luck to long-serving Honorary Consultant Gordon Whelan.

Gordon has volunteered for FPRA for eight years, answering many questions, especially on Service Charge, which is his speciality.

Gordon is taking up a new professional role as Head of service charge for Ballymore Asset Management (Managing Agents). As Gordon explains: 'This is quite a big step and will involve commuting to London on a regular basis.

'In view of this, I no longer feel able to act as Honorary Consultant to the Association. It has been a pleasure to help the FPRA over the past eight years and I have really enjoyed meeting so many great people associated with the organisation. I would like to wish you all the best for the future.'

Chairman Bob Smytherman replied: 'Thank you for all you have done and the time you have given to support our members with service charge account queries. This has been hugely appreciated by members. On behalf of everyone at the FPRA can I wish you well with your new role and thanks again for all your support over many years.'

THANK YOU BOB

FPRA would like to thank Bob Slee very much for his work for the Federation. Bob, an expert on self-managing blocks, has now resigned as a Director, but contributed a great deal in answering members' questions and writing articles for this newsletter. Chairman Bob Smytherman commented: 'We are very grateful to Bob for his personal contact with members every year at renewal time.'

MEMBERS LEAVE 5 STAR REVIEWS

'**AS A DIRECTOR** of a resident management company (RMC) I rely heavily on the extremely valuable, professional and prompt responses I receive to questions that crop up in managing a block of 16 flats. I would give 10 stars if that were possible!'

'**EXCELLENT PROMPT** detailed and knowledgeable, professional, reliable service. Highly recommend!! We are using FPRA to help form and now support us through dealing with a dispute with our managing agent and their surveyors over proposed works. And feel supported to do this with confidence and excellent information from their advisers.'

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