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NEWS

FPRA
FEDERATION OF PRIVATE RESIDENTS' ASSOCIATIONS

LEASEHOLD LAW REFORM A HOT TOPIC

REPORT FROM THE AGM BY THE EDITOR

Leasehold, and its many problems, created one of the biggest postbags the Law Commission has had, Commissioner Professor Nick Hopkins told the packed hall at FPRA's AGM.

Professor Hopkins urged people to respond to the Law Commission's current consultations on residential leasehold and Commonhold. The consultation on enfranchisement closes on January 7. "Please do reply to us," he said. The Commission's decisions were based on the responses received. There was no need to answer every question (and there were many), but just reply to ones that were relevant to you.

"We know we are asking a lot", he said. But it was a one-time opportunity to reform leasehold. All responses were considered, and representative bodies like FPRA had greater weight.

Everyone could also look forward to some "exciting Christmas reading" with the Law Commission's consultation on Commonhold, he said. Commonhold had been introduced in 2002, but hadn't taken off, despite similar systems existing everywhere in the world. It was being considered how Commonhold could be incentivised.

Professor Nick Hopkins of the Law Commission addresses the AGM

One of the topics was whether it should be possible to convert to Commonhold without the consent of the 100 per cent of leaseholders required at present. Policy objectives identified by the Government included re-invigorating commonhold as a workable alternative to leasehold, for both existing and new homes.

In the New Year there would be a third consultation on the Right to Manage.

"We hope in due course that the current body of work will be expanded and will culminate in a streamlined and modernised law of residential leasehold – alongside the development of commonhold," he said.

Two general policy objectives for the Commission's work on residential leasehold were to promote transparency and fairness, and to provide a better deal for leaseholders as consumers.

"Our terms of reference are not neutral – they reflect a policy decision by the Ministry of Housing, Communities and Local Government to reform the law so that it operates more favourably towards leaseholders. You may not agree – but we hope that being transparent about what we've been asked to do enables us to have a constructive engagement with all stakeholders regardless of your own view."

(More information on the Law Commission's consultations on leasehold can be found on its website: www.lawcom.gov.uk)

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The AGM continued from page 1

Chairman Bob Smytherman welcomed members to FPRA's annual event and AGM. He thanked those who had responded to the ongoing project of reviewing and improving the administration of the Federation and said all offers would be considered.

Bob appealed to members to consider becoming new directors, committee members or honorary consultants of the Federation. Marjorie Power was welcomed as a new director.

"The best people to encourage new blocks to join are our members," Bob said.

He hoped the Government would take notice of evidence given to the House of Commons Select Committee on leasehold, to the Law Commission and to all the many consultations in which FPRA had participated.

Treasurer Roger Trigg reported that the finances of the Federation were in fine form with substantial reserves. Subscriptions were kept low thanks to the many volunteers.

The hall was packed and after the AGM business was completed, lively discussions were held at the various round tables, with FPRA experts answering questions on issues such as service charges and enfranchisement.

Director Shula Rich and committee member Gerry Fox

Round Table Advice Sessions

2018 AGM 2018

Committee members Bob Slee (left) and Shaun O'Sullivan (centre) lead a discussion

Legal adviser Nick Roberts, Chief Executive of LEASE Tony Essien, and Hon consultants Anna Favre and Nikki Carr

AGM 2018 AGM 2018 AGM 2018 AGM 2018

Jacqui Abbott from the admin office, director Marjorie Power, Andrew Peartree, treasurer Roger Trigg and director Robert Levene

Chairman Bob Smytherman, treasurer Roger Trigg and director Robert Levene

Hon consultant Mark Chick advises a member

AGM 2018 AGM 2018 AGM 2018 AGM 2018

Nigel Glenn, Chief Executive of ARMA, Hon consultant Maxine Fothergill and committee member Colin Cohen helping members

Vice-chairman Richard Williams and committee member Yashmin Mistry (centre) answering queries

AGM 2018 AGM 2018 AGM 2018 AGM 2018

ARE FLAT OWNERS BEING LEFT

FPRA Committee member Shaun O'Sullivan reflects on the issue of charging of electric vehicles for flat dwellers.

A few months ago the Government launched its 'Road to Zero Strategy' with the ambition for at least half of new cars, and possibly as many as 70 per cent, to be ultra low emission by 2030 – just 12 years away. In addition, the Government's Air Quality Plan aspires to end the sale of wholly conventional car and van sales by 2040 and for every car and van on the road to be zero emission by 2050. Chris Grayling, the Secretary of State for Transport has said that '*The coming decades are going to be transformative for our motor industry, our national infrastructure and the way we travel. We expect to see more change in the transport sector over the next 10 years than we have in the previous century.*'

Although there is little or no doubt that we will all benefit in a variety of ways from breathing cleaner quality air, one can't help wondering how the flat-dwelling community will be affected by this drive for a more environmentally friendly world. Of course, not all flat-dwellers have cars and those residing in inner cities will probably rely less on personal transport than those in the suburbs; but many flat-dwellers do have their own cars and probably the vast majority currently drive vehicles powered by conventional engines, whether petrol or diesel. But on the premise that these plans will come to fruition, things are set to change; the days of the internal combustion engine appear to be numbered.

Of course, the road ahead might eventually lead to the demise of individual personal transport altogether; public transport might be transformed and multi-occupancy autonomous vehicles might become the norm. Although such concepts can't wholly be dismissed as the 'stuff of science fiction', it's the developments over the next few years and the next few decades which will have their more immediate impact.

There are, of course, a number of ways of powering our vehicles in a less polluting way, with the more obvious options being Liquefied Petroleum Gas (LPG), Compressed Natural Gas (CNG) and a range of biofuels, as well as vehicles powered by hydrogen fuel cells. But the race to produce more environmentally friendly vehicles seems, largely and already, to have been won by electric – or perhaps, more correctly, electrified vehicles which do embrace hybrids. However, hybrids apart, the production and uptake of wholly electrical vehicles (EV) seem set to rise dramatically over the next few years as production shifts, infrastructure is constructed and incentives, largely in the form of Government subsidies and grants, are taken up. Figures for new car sales in the last year show that one in 12 cars sold is now electric.

The infrastructure to support this shift in gear is beginning to take shape. Already we are beginning to see charging points appearing in a variety of public locations. Service stations, particularly those on motorways, have started to spawn rapid charging points, they are starting to appear in supermarket car parks. Kerbside charging points are beginning to pop up as a new range of 'street furniture' in a number of our city centres. Six councils in London have been trialling charging points installed in existing lampposts; not the rapid charge available elsewhere but enough to 'top-up' and powered by renewable energy. The London Borough of Kensington and Chelsea, in partnership with one of the commercial/domestic energy providers, has had 50 extra lamppost charging points installed.

Perhaps one of the most convenient options for some who drive to work is the availability of charging points in the workplace. Supported by Government subsidies, more and more employers are installing charging points in their car parks and it is expected that half the firms that have car parks will have at least one charging facility by 2022. In addition, the Government's Office for Low Emission Vehicles (OLEV) has set aside £4.5 million for local authorities to tap into in order to install charging points with OLEV funding 75 per cent of the cost, leaving councils to fund the remaining 25 per cent.

However, notwithstanding this range of public charging points, the Government has acknowledged that available evidence supports the expectation that most plug-in vehicle owners will carry out the greatest proportion of their charging at home. So what about charging facilities at home – which for many is a leasehold flat?

As with public and workplace, OLEV will, subject to certain criteria being met, contribute up to 75 per cent of the cost of each charge point and its installation (capped at £500 inc VAT) to households to install domestic charging points – up to two per household for two eligible vehicles. However, it is necessary to already own an electric vehicle or to be able to demonstrate that such a vehicle is on order. Equally it is necessary to provide evidence of designated off-street parking (such as a drive or garage) associated with the property. And prior to installation a survey would need to be undertaken by the installer to ensure that the designated area is suitable and safe for such an installation. The scheme is designed around individual home owners with off-street parking or garage. So how are we flat-dwellers likely to fare as we journey towards a life largely bereft of the internal combustion engine? Well, for the moment at least and perhaps not altogether surprisingly, many existing leaseholders are likely to be left with a flat battery.

Newly built blocks of flats, particularly those with the space offered by large, access controlled, underground parking

WITH A FLAT BATTERY?

areas are likely to fare the best. Some blocks of this type are already being built with a number of charging facilities. Developers are seeing the provision of such facilities as making blocks more attractive to buyers and renters alike, as well as providing a ready charging facility for third parties, such as maintenance contractors while they are working on-site. And the expectation is that planning regulations will soon incorporate a requirement for all new builds – both flats and houses – to have some sort of charging facility. Those for blocks of flats are likely to be more akin to the type installed in workplaces, with a variety of card-based payment options, operated in partnership with energy providers and forming part of the property retained by the landlord, specified in the lease and with ongoing maintenance falling to the landlord and costs to the leaseholders as an element of the service charge.

But for existing blocks the picture looks much less rosy and the prospect of installing charge points – either for individual lessees or on a block basis – is likely to be something of a challenge. Most residential leases do not provide for improvements or enhancements so in most cases the landlord would be unable to impose the provision of such facilities and expect to recover the cost of doing so through the service charge. And, in any event, it is unlikely that investment landlords would see any great incentive for them to do so. The exception might be self-managed blocks who own the freehold; if there were sufficient interest from lessees and if the lease or Articles of Association of the Residents' Management Company (RMC) vested authority in the directors to make material changes to the estate, subject to share-holder support (generally 90 or 100 per cent). Then it might be feasible.

For individual lessees wishing to install a personal charge point the prospects seem remote. Apart from not being able to utilise the OLEV grant, the installation of a charging point would be likely to be met with resistance from the landlord. Even if the lessee had a garage, and even if the garage formed part of that which had been demised, the installation of a charging point would be deemed to be an alteration under the lease requiring landlord approval. In the unlikely event that the lessee's garage were adjacent to the flat, allowing the charging point to be installed without any major impact on the retained part of the property, and utilising the flat's metered supply, one would hope and expect approval; but if the garage were remote from the flat, tapping into the flat's own supply would undoubtedly pose problems. It might be possible to access the communal supply, but to ensure the lessee met the cost, a meter would need to be fitted and the lessee charged for usage – although such an arrangement would be very unlikely to be covered by provisions in the lease and a variation to the lease might be required.

Similar difficulties would be faced with allocated parking spaces; very rarely do parking spaces form part of that which has been demised and most leases simply provide for an easement allowing the lessee right of use without ownership.

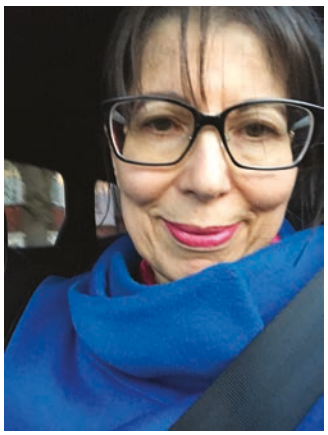
Of course, one to two flat dwellers have already come up with innovative solutions of their own and readers might well have seen pictures in the press of one lessee who had managed to get his two-seat Renault Twizy into the communal area of his block and plugged it into a socket in the communal hallway! His fellow lessees were not amused!! And some owners of electric vehicles have been seen to be trailing leads from their flats to their parked cars. Neither solution should be considered under any circumstances.

None of us really know what might be round the technological corner but, for the time being at least, it would seem likely that, with the odd exception, flat-dwellers who drive to work will have to hope that their employers who have car parks are enlightened enough to utilise the support offered by Government to install charge points. But, for the rest, public charge points would appear to be the current solution. In this respect it is salutary to note that only five local authorities thus far have made use of the OLEV grant and have installed only 50 charge points between them. Perhaps members keen to 'go electric' and, recognising the constraints on installing charge points in their blocks, might want to encourage their local authorities to start installing kerbside charge points – and, ideally, near their flats!

But don't do as some have reportedly done and buy electric before considering charging options.

LESSEES RIGHTS TO SEE ACCOUNTS

By FPRA Director Shula Rich



When someone else is spending our money – whoever they are – many of us feel that an extra level of evidence is needed. The Landlord and Tenant Acts have given us the right since 1985 to look at all the documents supporting the accounts.

However, the two Codes of Practice – ARHM (Association of Retirement Housing Managers) and RICS (Royal Institution of Chartered Surveyors) – differ in the way they interpret this Act.

I went to the ARHM conference last week. A talk on accounts led me to have another look at the ARHM code on which I had actually advised.

I now see that I missed noticing the new ARHM code of practice has only a diluted version of the 1985 Act. This Act contains leaseholders' rights to view accounts and applies to all leaseholders. The RICS Code however – which I also advised on – reflects the accounting law much more accurately

Both codes rightly have a disclaimer (which could be more prominent)

"The Code ..... does not purport to be a comprehensive statement of law. "

Our rights are in the 1985 Landlord and Tenant Act Section 22.
The Act says:

Request to inspect supporting accounts &c.

(1) This section applies where a tenant, or the secretary of a recognised tenants' association, has obtained such a summary as is referred to in section 21(1) (summary of relevant costs), whether in pursuance of that section or otherwise.

(2) The tenant, or the secretary with the consent of the tenant, may within six months of obtaining the summary require the landlord in writing to afford him reasonable facilities —

(a)for inspecting the accounts, receipts and other documents supporting the summary, and

(b)for taking copies or extracts from them.

These other documents may be:

- Books – statutory books include the Cashbook, Sales Ledger, Purchases Ledger and the General Ledger – normally kept in hardcopy and on electronic media
- Deeds – legal documents
- Contracts – agreements in written form, signed by the parties involved, describing work to be done, services to be provided and the conditions to be met. A Purchase Order for supply of building services would constitute a contract
- Bills – documents such as an invoice, prepared in accordance with a Purchase Order, supported by a certificate confirming the work done and duly authorised for payment.
- Vouchers – documents establishing the payment of moneys, or which can be exchanged for goods or services.
- Receipts – documents confirming the supply of goods or services.

The accountant who compiled this list for a leaseholder querying Brighton Council's accounts wrote:

"Inspection of the above would be sight of the original, or facsimiles of the above. There should be an evident 'Audit Trail' to permit the person inspecting the documents to follow a transaction from the original contract through to the final record of payment."

The RICS code clearly states lessees' rights. It says:

"*s.21 Landlord and Tenant Act 1985*
If within six months of receiving the summary under section 21 a leaseholder or the secretary of a recognised tenants' association makes a request to inspect the accounts, receipts and other supporting documents, you must provide such an opportunity. You must not charge for the inspection and copies or extracts from any documents supporting the summary may be taken."

The ARHM code says (point 5.4):
"5.4 The service charge account should include a note explaining that leaseholders have the right to request to inspect supporting receipts and invoices."

The ARHM code needs clarifying. Its kindly tone is eroding legal rights put there to protect lessees from precisely those abuses retirement housing can suffer from.

PARLIAMENT LISTENS TO FPRA

Leasehold can no longer be sold as ownership, FPRA Director Shula Rich told a Parliamentary Committee. It is basically 'a long-term timeshare, the fag end of a timeshare', she said. Only the first purchasers of the flat signed the lease, she said. You buy the leasehold, not the right to own or buy a flat.

Here is Shula's report on her attendance on November 5 as expert witness to the Select Committee on Leasehold Reform (Housing, Communities and Local Government) at the House of Commons:

"The last time I did this there was already a Bill on its way through Parliament and MPs were discussing it.

"As Chair of Brighton Leaseholders' Association, we had written to every MP on the Committee enclosing a threat of forfeiture so that they could get the feel of it.

"Because of our pressure at that time, Hilary Armstrong (the former Labour MP, now Baroness Armstrong of Hill Top) said in the House in her summing up, that all MPs were better informed as a result of the information we distributed, and she described it as a 'tribute to democracy'.

"Controls were placed on forfeiture because of this, but 17 years later they are not sufficient to prevent forfeiture still being used as a battering ram, to force lessees to pay amounts that they are merely querying.

"At that time Barry Gardiner MP said: 'If more than 60 per cent of new build flats are Commonhold, and Leasehold withers as Ministers predict, I will be delighted to eat my words...If only 10 per cent of current residents associations successfully establish themselves as Right to Manage companies, I will be astounded by the Bill's success...'

"He was right – the 2002 Act has not had the impact we hoped for.

"Now here we are again. We are looking at fresh legislation. If anything, the situation has deteriorated. In representing FPRA I explained FPRA commitments in particular to ending Ground Rent escalation in new builds and lease extensions, and promoting Commonhold.

"How long will it be before we get to the stage we were at in 2001 of a select committee to discuss a new Act?

"The wonderful thing about our Parliament and our MPs is that they are genuinely interested in consultation and it is not a charade. Change can come about because of our representations.

"How long will it be before we get to the stage we were at in 2001 of a select committee to discuss a new Act?

"I'd like to say 'not long', but in the meanwhile there are regulations to protect us – improved by the legislation in 2002 – and FPRA continues to give impartial advice on how to implement them."

FPRA Committee Member Martin Boyd, Chairman of the Leasehold Knowledge Partnership, also gave evidence to the Committee.

FPRA has welcomed the call for evidence by the Select Committee on Leasehold Reform and has submitted in writing these points:

The urgent need for law reform
To simplify the unnecessarily fragmented and complicated legislation on leasehold

Taking control: Enfranchisement and the right to manage
Making Commonhold happen

Protection of leaseholders' money
The need for regulation

Insurance and other commissions and payments
The need for transparency

Major works limit (Section 20)
An increase in the £250 limit.

FPRA welcomes the work of the Committee and hopes to have the opportunity to work with Government and other leasehold representatives to bring change and improvement to the sector.

A link is available on our website so you can view the hearing. A transcript of the proceedings is available on the Leasehold Knowledge Partnership website.

(The full detail of FPRA's submission – and all the Federation's other responses to Government consultations – can be read on our website).

Legal Jottings

Compiled by Nikki Carr

Upper Tribunal

It's All Relative

Reiss v Ironhawk Ltd [2018] UKUT 311 (LC)

In this enfranchisement case, there was a substantial dispute between the valuer for the Landlord and the Valuer for the Leaseholder on the question of the relativity of a lease of a flat in London N17 with an unexpired term of 75.23 years on the valuation date 29 September 2016 (in determining the premium to be paid).

The subject flat was between Bruce Grove and White Hart Lane Stations. The parties agreed that the Freehold Vacant Possession ('FHVP') at the valuation date, but could not agree the FHVP at the date it was acquired by the leaseholder in 2013, and therefore could not agree relativity. Act rights were agreed at 2.5 per cent.

It would not be an unfair summary to suggest that the valuers couldn't agree on pretty much anything else, and the UT's summary of the evidence is itself reflective of the kinds of punch-up the readership might themselves have witnessed in such proceedings. So starkly different was their approach that the Landlord's valuer concluded that relativity was 70.23 per cent, and the Leaseholder's that it was 93.5 per cent. Somehow, the Landlord managed to persuade the FTT that 72.77 per cent was correct, valuing the premium for the new lease at £36,400. The Landlord relied predominantly on transactional evidence regarding the subject property in 2013, and sales of two flats opposite with somewhat different features; the Tenant relied predominantly on the (without Act rights) Nesbit & Co graph (not updated since 2008).

Not mincing his words, Deputy President Martin Rodger QC concluded, in giving permission to appeal, that 'it ought to have struck the FTT' that that was 'obviously too low' despite the difficulties caused to it by the limited evidence provided by the parties. The Deputy President cited in his reasons for permission *Mallory v Orchidbase* [2016] UKUT 468 (no doubt previously addressed in these jottings), in which a lease of 17.5 years less remaining term was valued at 4 per cent higher relativity than the subject property. The Deputy President opined that on a 'stand back and look' basis, had the FTT looked at the figure it had come to against the totality of the evidence, 'it would have appreciated that the figure was so inconsistent as to be unsustainable'.

The appeal came before Mr Trott FRICS, who (in genius move to avoid matters ending up in casualty) adopted an entirely different approach to either of the experts. Using the with Act rights enfranchiseable graphs provided by Savill's 2012 and 2015, and applying them to the relativity between the two comparator properties to ascertain the relative percentage between the two properties, he concluded that the relativity of the anomaly of the Landlord's valuation should have been obviously unsustainable. He determined that relativity was between 90.87 per cent (2002 graph) and 89.1 per cent (2015 graph), adopting the latter due to the valuation date of the subject lease an deducting the agreed allowance resulting in a relativity of 86.9 per cent. The result to the Leaseholder? A premium of £18,524...

*Terms and conditions apply

Klosterkotter-Dit-Rawë v Greyclyde Investments [2017] UKUT 289 (LC)

In this Service Charge dispute, Mrs Rawë (if it's good enough for the official report, it's good enough for me!) complained to the FTT that a failure to certify her annual service charge rendered the future sums charged to her in each financial year by the Landlord irrecoverable. She had thus not paid them for some years. In so far as material, the terms of the lease were:

2(2)(d): ▶ As soon as practicable after the end of each financial year of the Lessor the Lessor shall cause the amount of the Service Charge payable by the Lessee for such financial year to be determined by an accountant... to be appointed by the Lessor...

2(2)(e) ▶ For the purposes hereof the costs expenses and outgoings incurred by the Lessor as aforesaid during the financial year of the Lessor shall be deemed to include not only [(for the sake of brevity!!) the CE&Os] which have been actually disbursed incurred or made... but also sum or sums... on account of other [CE&O's]... which the Lessor shall have incurred at any time prior to the commencement of the relevant financial year... as the Accountant may in his reasonable discretion consider it reasonable to include... in the amount of the Service Charge for the relevant financial year

2(2)(f): ▶ As soon as the Accountant shall have determined the amount of the Service Charge payable by the Lessee for the relevant financial year of the Lessor the Accountant shall prepare a written statement (hereinafter called "the Accountant's Certificate") containing a summary of the costs expenses and outgoings incurred by the Lessor during the relevant financial year together with the future sums indicated by the Accountant pursuant to Clause 2(2)(e) hereof... and specifying the amount of the Service Charge payable by the Lessee as aforesaid...

2(2)(h) ▶ The Lessee shall if required by the Lessor with every half-yearly payment of the rent first reserved hereunder pay to the Lessor such sum in advance and on account of the Service Charge as the Lessor or its agents shall from time to time specify at its own discretion to be a fair and reasonable interim payment.

Mrs Rawë stated that the charges didn't fall due because the certification had not been provided. Following *Warrior Quay Management Company v Joachim* (LRX/42/2006), the FTT wholeheartedly agreed.

The UT wholeheartedly disagreed. *Warrior Quay,* alike almost all such cases, was not something for the FTT to 'follow'. It turned, as did this case, on the construction of **the lease**. Construction of a lease is about the language of that particular lease, not legal precedent. Construction of **this** lease meant that the Landlord could call for an on-account service charge in advance half-yearly. The very lease anticipated the Accountant's certificate not being

available at that point (as it provided to the Landlord it's enforcement remedy even if the Accountant's certificate was unavailable (clause 2(2)(j)). Even though it was understandable that Mrs Rawë was cross that the Landlord failed to comply year on year with its obligation to provide an accountant's certificate in respect of sums actually expended, her liability to pay was not conditional on that happening. Mrs Rawë was left in the position that she had to pay the sums to the Landlord it had called for, no matter how sympathetic the UT might be with her frustration.

Claim from beyond

Gateway Holdings (NWB) Ltd v Mrs Lydia McKenzie and Mr Simon Greenfield [2018] UKUT 371 (LC)

In this case, the material point raised was whether a successor in title was entitled to seek a determination of service charges paid by a deceased predecessor in title.

In short, the answer is yes, which some may find surprising. The FTT had rejected the Landlord's contention that the ability to challenge a service charge was limited to the tenant of the property at the material time. The wording of section 27A Landlord & Tenant Act 1985 was general and there was no reason to impose any restriction on the category of persons who could bring such a claim.

Excellent news, right?

Well, not entirely. The UT was in absolute agreement with the FTT, up to the point at which it discerned in the FTT's reasoning that it believed Mrs McKenzie could **benefit** from such a determination. Wrong, said the UT. She can certainly bring the proceedings, it said. BUT even if successful, the benefit of any service charge surplus accrued from the years pre-dating her ownership, absent specific provision in the assignment as to how any such overpayment should be dealt with between the outgoing and incoming leaseholders, could probably only inure for the benefit of the estate of the deceased. Although Mrs McKenzie was the deceased tenant's daughter, she was not the executor of the estate, she would have no ability to enforce any such determination.

It's not about the money, money, money...

Staples v Cranfield [2018] UKUT 341 (LC)

As we all know, the FTT's costs discretion to award costs, deriving from section 29 of the Tribunals, Courts and Enforcement Act 2007, is encapsulated in the Tribunal Procedure (First Tier Tribunal) Property Chamber) Rules 2013, rule 13. The appellant in this case, Mr Staples, sought to persuade the UT that in fact the FTT's discretion was wider than that because of section 24 Landlord & Tenant Act 1987 (powers on appointing a manager), and argued that the FTT had a separate, self- standing power to award costs arising from the application to vary a management order arising out of that section, under subsection (4).

'Not so', said the FTT. 'The FTT's power is only as laid out in rule 13'. 'Quite right!' replied the UT.

'Aha!' said the Appellant. 'So what about this? I say that for the purposes of rule 13, unreasonable conduct that the FTT is able to take into account is this: the management order has been made. But he won't comply. That unreasonable conduct has meant I have had to come to make an application to vary. That MUST be conduct within the meaning of rule 13! Case closed!'

'No no no!' sayeth the FTT. 'Conduct **leading** to you issuing proceedings is NOT conduct in bringing, defending or conducting proceedings in the case.'

'Now hold up just one minute there,' quoth the UT. 'That's a very interesting point. We cannot decide whether the conduct was unreasonable or not, that is not a question before us. But yes, come to think of it, the order gave permission to apply to the FTT to carry itself into effect. The application you have made is within those proceedings. If the application has come about because of the unreasonable failure or refusal of the leaseholder to comply with that order, that is in proceedings, is it not?'

'Ooooh', exclaims the FTT. 'Give us another go, will ya?'

Court of Appeal

Possession is nine tenths of the law

Reiner v Triplark Ltd [2018] EWCA Civ 2151

In this case, the tenant's lease of a flat in a block managed by an RTM company required her to obtain consent to assignment of the lease or parting with possession of the flat. She put it up for sale but various disputes between the RTM company and the landlord apparently made it an unattractive prospect. Connected or otherwise, most of the directors of the RTM company had resigned, leaving only a gentleman named Mr Wismayer, who it appears was very keen on purchasing the flat, but not so keen on telling the landlord as he thought that their dispute might mean they refused consent (considering the facts of this case, one might see why they might...). Instead of letting the question of consent play out, on the tenant notifying him (as the RTM company) formally of her intention to assign the interest (to him), he deliberately decided, unbeknownst to the tenant, NOT to notify the landlord regardless of the very clear obligation on the RTM company so to do.

The landlord discovered, after the deed of assignment had been executed, that Mr Wismayer had purchased the Flat and failed (as the RTM company) to act in accordance with his obligations under section 98(4) of the Commonhold & Leasehold Reform Act 2002. It applied to the Land Registry for registration of a restriction, to prevent registration of the transfer to Mr Wismayer.

The tenant appealed against the finding of both the FTT and the UT that she had not parted with possession of the flat when she had assigned the lease, as the assignment had not yet been registered at HM Land Registry and she essentially still held the interest as a bare trustee. She also sought to argue that if she had in fact parted with possession, the failure of the RTM Company to give consent amounted to an unreasonable withholding of consent within section 1 of the Landlord and Tenant Act 1988.

On the question of parting with possession the Court of Appeal held, perhaps unsurprisingly, that legal possession meant the right to enter and occupy the land to the exclusion of others (Clarence House Ltd v National Westminster Bank PLC [2010] 1 W.L.R. 1216 considered). The tenant had parted with possession of the flat on completion of the sale of the flat to Mr Wismayer. She had given up physical possession and control of the flat to him. She had removed all her belongings and delivered the keys to him. By completing the contract to assign her interest as lessee she had ceded all legal right to possession of the flat. The fact that the transfer had not been registered at the Land Registry was of no relevance.

In respect of the second question, the Court of Appeal recognised that an RTM company is expressly prohibited by section 98(4) of the 2002 Act from giving consent until 30 days' notice has been given to the landlord. It followed that, until such notice had been given, the RTM company could not be under a positive duty to assent or otherwise; there could not be in these circumstances an unreasonable withholding of consent by the RTM company. The tenant's recourse was to make an application to the court under s.107 of the 2002 Act, to require the RTM company to make good the default in notifying the landlord.

ASK THE FPRA

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

Employer's liability

Q **As we have been receiving mixed messages from insurers on the subject, what advice can you offer on the value of Employer's Liability insurance? We have no 'employees': window and household cleaning services are hired in only periodically.**
We do have Directors & Officers' Insurance, but while one broker suggested employers liability cover was unnecessary, another responded as follows: "Please note that directors (including those working on a volunteer basis) are considered employees of any company to which they are appointed. As there is a legal obligation to provide Employers Liability cover, this has been included in my quotation."

A FPRA Insurance expert Belinda Thorpe replies:
I would agree with the statement provided by the broker. Employers Liability usually forms part of a standard flats policy anyway and is not normally charged for.

Replacement of cladding post Grenfell

Q **We have scheduled external redecoration in 2019, and we are given to believe that it is proposed to replace the cladding. In spring this year our residents' association put in writing our objection to the proposed Intention to carry out works on the cladding as the earlier findings of the *Fire Service stated the cladding does not pose any immediate risk*. There was an advisory that the cladding be replaced with fire retardant material when redecorated when easy access is available to replace it. There was a specialist examination to see if the cladding was combustible. Following this visual examination of materials and building structure, it would seem that their 'Expert Report' on the type/state of the cladding does not categorically state that the cladding needs to be replaced immediately. *The windows currently act as fire breaks between the cladding and we have an exit rather than stay put policy. However, they say this 'interim arrangement' should not be used in place of materials that comply with the standards.***
In the absence of any 'official' demand (but advisory) for cladding replacement when reasonable to do so, the question is as leaseholders we have not requested replacement, so one concludes that it is principally a freeholder initiative. Therefore, under these circumstances is it appropriate/legitimate for the leaseholders to be expected to pay for this (and what precedents are there for that conclusion)?

A FPRA Chairman Bob Smytherman replies:
It would certainly appear from the managing agent's report that there is a potential risk from the cladding currently in place. The Government has certainly stated very publicly in the House of Commons that any cladding deemed to be unsafe should be removed at the expense of the freeholder and not the leaseholders – which is a view I would fully support. The problem is many freeholders and their agents are using clauses in leases to pass on these costs to the service charges.
As a local councillor in Worthing, I do know that our council inspected all high rise blocks after the Grenfell tragedy and concluded none were at immediate risk. However it would appear that may be they have suggested your blocks cladding still should be replaced. My advice would be in the first instance to contact the Building Control Dept at the council and share with them the agent's report and my advice.
If they conclude that the cladding does require removal on safety grounds I suggest they put this in writing for you to share with your freeholder as they clearly should be removing the cladding at their expense as required by Government. If of course they still insist charging to the service charge we will then need to ask our lawyers for further review of your lease to see if this can be done legally.

Training for the role

Q **We have just upgraded the fire alarm systems to four separate blocks on our site including heat detectors within each flat. (37 in total). As part of the refurbishment we decided to upgrade our Fire Risk Assessment documentation by appointing an independent fire safety person and I've just received the first draft.**
I have been aware of the responsible person role required for some time and I have, as secretary, inherited this role by default! The new document indicates the importance of this role and I would be prepared to do some training. My question is, do you know of any organisation that can provide a certificated training package, perhaps online, so I can feel a little more confident that I know what I'm supposed to do within this role!
In addition, I have been secretary for 30 years and am reasonably confident as regards the duties involved but I do wish to retire from the role within the next 12 months. I may have a replacement, but he would require training. Again is there any training organisation that can provide company secretary training for a flat management company?

A FPRA Hon consultant Emily Orner replies:
1) As the responsible person for the property, you have an obligation to ensure that you have put in place the necessary measures to ensure the safety of the residents of the property. You have done this by having a competent person conduct a fire risk assessment and it is then for you to ensure that the recommendations of the fire risk assessment are followed and general checks are made to ensure the continued compliance.
2) The role as a responsible person can be a daunting one but employing the assistance of competent contractors is of great benefit.
3) There are certificated training packages available but these can be very expensive and may not be totally relevant to a block of flats, they tend to concentrate on commercial blocks

of offices and shopping centres.
4) The Leasehold Advisory Service (LEASE)has a section on fire safety and this is targeted at leaseholders and which contains a lot of sensible information in relation to reasonable steps to take in respect of fire safety – www.lease-advice.org/fire-safety
5) If you do wish to undertake a course there is a recommended course run online by FIREFM – www.firefm.com – which you may find helpful. It is relatively cheap but provides a good overview and would be certificated to show that you have endeavoured to take additional steps to comply with your obligations. Attached are some details of the fire safety courses offered.
6) The role of a company secretary for a residential management company, such as yourselves, is a fairly unique role. There are many courses which will give advice on the role of a company secretary, but these generally fail to deal with the specific difficulties of the shareholders of the company usually also being the owners of properties which the company is managing.
7) The Association of Residential Managing Agents (ARMA) www.arma.org.uk has recently expanded their offering to now allow resident management companies to join as Affiliates. As an affiliate of ARMA you would gain access to their RMC Portal which is full of webinars and articles about the role of a resident management company and the operation of such a company. Not only would this provide you with further clarification about your company secretary role, but it would also assist with the day to day running of your limited company. There is a charge to join as an Affiliate and you would be able to gain further information by contacting scott@arma.org.uk

Paying for fire safety improvements

Q **In the absence of relevant provisions in the lease, does the management board have any legal authority to compel leaseholders to accept (and pay for) fire safety improvements in the apartments, for example, intumescent seals and self-closing hinges being added to front doors? Another example is the installation of heat detectors just inside apartment front doors connected to a communal detection system. Both of these are improvements resulting from a professional fire risk assessment earlier this. We are still collecting quotes for the work, so we haven't asked leaseholders for their agreement on any proposals.**
My concern is that a leaseholder refusing to accept safety improvements is effectively endangering other residents. Our lease does not cover this specifically, though there is a clause about complying with 'any statute byelaw order or regulation'.

A FPRA Chairman Bob Smytherman replies:
With regards to fire safety improvements to front doors of flats if these improvements have been requested by your local Fire Service as part of a review of a Fire Risk Assessment, then in my view most leases would require individual leaseholders to carry out these improvements to meet the legislative requirements and failure to do so would be in breach of lease, (subject to your own lease).
With regards to the communal fire alarm, if this is to pay for from the service charge and will cost each flat £250 or more than a Section 20 consultation with all Leaseholders should be carried out.

Costly fire protection

Q **We have been sent a quote for fire doors and other fire precaution works. The total being £35,000 and two further quotes for £15,000 each, for works to be considered (emergency lighting and our flat doors being upgraded) to meet fire door regulations.**
Can you advise if this seems a reasonable quote? Would these costs be solely down to us as leaseholders, or does the freeholder have some responsibility in sharing the costs for the works to the common parts?
What is the best way to bring our freeholder/managing agent into line in the way they treat us? They are trying to bully us into paying for major works for our lifts and have not as yet allowed me to take it down the route of an official complaint (they do not have a procedure). I have offered them solutions for us to renegotiate and they have flatly refused to accept any of them, so I am now going down the route of lodging a complaint and hope this will stop them from carrying out the work until we have come to some sort of resolution.

A FPRA Chairman Bob Smytherman replies:
Having read the extent of the Fire Precaution works I would suggest this should have been the subject of a Section 20 consultation procedure with all leaseholders. Works of this nature would need to judged as 'reasonable' and leaseholders should be given an opportunity to seek alternative quotes.
The schedule of works would need to be justified by a Fire Risk Assessment to establish the reasonableness of the proposals which should be made available to all leaseholders, if your residents' association wants to get a second opinion, then I suggest contacting your local fire service who are the enforcing authority of the Fire Safety Order.
Updates to fire door standards and emergency lighting are perfectly reasonable upgrades to ensure all occupiers can access the 'means of escape' safely in the event of a fire and the fire doors will need to be '30 minute' fire door minimum if your block has a 'stay put' policy.
Once you have received a copy of the Fire Risk Assessment to establish whether upgrades are 'reasonable', I suggest reviewing the proposals against the Guidance for Fire Safety in Blocks of Flats which is available on our website to download.
With regards the cost of such works, the schedule should be competitively tendered and at least two tenders should be provided to each leaseholder and the landlord would need to justify which quote is 'reasonable'. It may not necessarily be the cheapest but must take account of the Fire Risk Assessment.

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Ultimately if you believe the service charges are unreasonable leaseholders individually or collectively can challenge this at the FTT (First Tier Tribunal).
Usually for works such as this scale it would often be reasonable to prioritise in a number of stages to share the cost over a longer period, but this would depend on the urgency identified in the Fire Risk Assessment. The local fire service can assist with this process.
It is certainly good practice for your managing agent to fully communicate this level of expenditure and major works clearly with all leaseholders. If this communication is not satisfactory, then you may wish to consider Right to Manage in future.
It is essential that the managing agent is fully compliant with the terms of the lease. If you believe this not to be the case we can arrange our legal adviser to review this for you.

Bird nesting nuisance

Q **The exterior extractor fan covers in our development are not fit for purpose. Many of the slats have broken off and birds are entering through them and nesting in the ducting. As many of these covers are on the exterior walls on the third and fourth floor it would be necessary to hire a cherry picker or scaffolding tower to replace them. Our management company say that this is not their responsibility as the covers are demised to the apartments. Please can you indicate where this is stated in our lease?**

A FPRA Committee member Shaun O'Sullivan replies:
I am assuming that the extractor fans/ducts in question are serving individual flats and not the common areas of the building. That being the case 'The Premises' (as defined in Clause 1(h) of the lease as meaning the '...property hereby demised as described in the Third Schedule...') include '... drains sewers pipes wires cable ducts conduits and channels used solely for the purpose of the said Apartment....'. In my view this would include anything related to the extractor fan and the associated duct serving any individual flat. To that extent I believe the management company are right in their assertion. Perhaps there's a case for those lessees affected to join forces in order to minimise the cost of repair.

No pets allowed

Q **We are a block of 20 apartments. Our lease (we are freeholders) states quite clearly, when originated some 30 years ago, that NO pets are allowed. Over the years the committee, on compassionate grounds only, have allowed new owners/renters who already had a pet to keep them ...but not to replace them. Is this practice legal now or enforceable? Has there been a change in attitudes?**

A FPRA Hon consultant Nikki Carr replies:
It is not uncommon for older leases to have a blanket ban on pets. In modern times, however, there are a couple of things that it is worth having a think about.
Firstly, a blanket ban might be indirectly discriminatory against those who have assistance pets (blind dogs, hearing dogs etc). You should carefully consider whether your procedures permit of some latitude in this respect.
Such a clause might also be challengeable as an unfair contract term. It is, however, extremely rare for a tenant to challenge such a term, and of course the benefit of the term is that everyone knows where they stand. Such a term might be tempered by the simple addition of the words 'without consent'. There is no difficulty in a term that provides for no pets save for with consent. Things get a bit more tricky if you add the words 'not to be unreasonably withheld', but even in such cases the court has upheld the landlord's decision to operate the policy on a predominantly blanket basis – see the most recent case of Victory Place Management Co Ltd v Kuehn, in which the landlord operated such a term as an almost blanket policy (some discretion is required so as not to infringe reasonableness), and the High Court upheld the decision that was lawful. What the case suggests is that the landlord should be in a position to explain their approach to the decision making.
From the tenor of your email, it does not seem as if you are directly opposed to the concept of pets at the premises – and indeed have been operating individual discretions. This is something that, if you are willing, you might take a straw poll of your tenants as to their thoughts. It is not unusual for a group of tenants to object to pets on grounds of fouling, noise etc. Taking a measure of attitudes is one way that you can demonstrate 1. That you listen to your tenants and 2. That you are not being unreasonable, as it is their wishes you are implementing. If, however, you wish to carry on with the ban then obviously this is a slightly risky strategy.

Looking after leases and absent leaseholders

Q **We have one copy of the lease of easements for the 22 properties on our estate. They are stored in a metal box in the property of our former Chair. Should these be kept in a safety deposit box? Is there any requirement? I have looked into renting a secure box in a bank but the cost would be around £330 per annum which would add just under £30 to the service charge. What is your recommendation?**
One of our leaseholders (who lives off site and rents out his property) has instructed us not to send anything to his

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home address. He has asked us to contact him by text or email. His email is not a personal email but that of a building firm. He jointly owns the property, I have no way of knowing whether or not the co-owner has access to the company email he gave us to be contacted on. He has recently failed to respond to a request to remove rubbish from his property sent by email, nor did he collect a document which could not be sent by email. We would prefer to communicate to both owners at a physical address. Can we insist we communicate via his home address?

A FPRA Committee member Bob Slee replies:

I assume that the copies of the lease that you hold are the official counterpart leases held on behalf of the freeholder. That being the case, you obviously need to take responsible care of them as they are executed deeds in their own right.

I know a number of self-managed freehold companies where the counterpart leases are held in the way that you currently hold yours and that should be perfectly adequate.

The RMC that I am involved with personally decided a while ago that we would place the counterpart leases in the care of the solicitor that undertakes work on behalf of the RMC from time to time. The solicitor makes no charge for this, but they have indicated that they might do so if the instructions that we otherwise refer to them should fall below a minimum level.

The £300 per year that you are considering for secure storage of the documents seems to be rather on the high side. If, on the other hand, you simply have photocopies of the leases and the official counterpart leases are held elsewhere then I do not believe it is necessary for you to adopt any particular measures for their custody.

I can understand your frustration in connection with the absent lessee who is unhappy about providing a postal address for serving communications and notices. Unfortunately, there is nothing in your lease to enable you to insist that a postal address rather than any other address is provided to you. It might be a safeguard to inform the lessee that you would prefer a postal address for the service of notices and correspondence and that if the lessee insists on the use of an email address that the onus will be on him to check the email account regularly and he must accept the consequences of his failure to do so in relation to his obligations under the lease.

We have the opposite problem in the block that I am involved in managing. We decided a few years ago to become as paperless as possible in our management of the estate and we now conduct almost all of our business electronically. Unfortunately, we have two lessees who have no interest in having email accounts and we are obliged to issue them with paper versions of everything – hopefully that will change over time.

Disabled access

Q **I am encountering apparently contradictory statements regarding disabled access. We are a block of 26 seafront flats and we own the freehold.**

Firstly, I have read that under the Equality Act 2010, if you are a freeholder of a block of flats, you have a statutory duty to allow reasonable adaptations to the communal areas of the block where a request is made by a resident leaseholder. And that all residents have the right to be consulted before adaptations can be made to any communal areas. The costs are usually met by the individual requesting the alterations, who most likely will also warrant that the building will be reinstated to its original condition if they move away.

On the other hand, the Equality Act itself, under its Section 20, talks about Duty to Make Adjustments and says, for example, in part, 'The first requirement is a requirement, where a provision, criterion or practice of Adjustments puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.'

Citizen's Advice say 'The Equality Act says you should never be asked to pay for the adjustments!' Can you expand on which of the above applies?

A FPRA Chairman Bob Smytherman replies:

I have written numerous articles for our newsletter and lobbied Government on Section 20 which you have rightly stated refers to common areas of leasehold blocks of flats. To the best of my knowledge, the Government never actually implemented S.20, largely for the reasons we lobbied about – which is the conflict between competing rights of disabled people and other users of the common parts of blocks of flats.

The key issue for your directors when considering a request for a 'reasonable adjustment' is the reasonableness of the request and being able to communicate clearly and concisely your decision and reason especially if a request is declined.

My own view is when considering a request is what will the impact be on other users of the common areas. For instance, would a stair lift impact on other residents' means of escape in the event of fire or become a trip hazard?

Certainly, the cost of any adjustment should be borne by the leaseholder making the request, not the general fund, unless there can be demonstrated a benefit to other leaseholders and of course compliant with your lease. If you are unsure what your lease will allow, please share a copy with us and we can ask our lawyers for a view about this and indeed whether S.20 is now a legal requirement. I don't believe it is.

Another important consideration is insurance. You will need to consult your insurers to ensure that the adjustment does not do anything to invalidate the policy.

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FUTURE SUBSCRIPTIONS

As members will be aware, your voluntary committee agree the subscription rates in advance to enable our members to collect the necessary funds from their leaseholders in plenty of time and at the correct rate.

We have shown in the table (right) the current rates, the rates from 1 April 2019 (which were announced previously), and we are now showing the rates from 1 April 2020.

While this represents an increase, it still is a very low cost per association. The increases have been necessary to take us back into 'break even' after many years of losses and using up reserves.

The committee is very hopeful that, with the change in administration proposed for 2020 that rates going forward can be better linked to just the cost of inflation.

No of flats	2018/19	2019/20	2020/21
Up to 25	£107.50	£127.50	£137.50
26 – 50	£125.00	£145.00	£155.00
51 – 100	£190.00	£210.00	£220.00
101 -150	£265.00	£285.00	£295.00
151 +	£325.00	£335.00	£345.00

WELCOME TO THE TEAM

An interesting new FPRA honorary consultant adds to the expertise of our team.

Neil Jinks is a legal debt recovery and civil law enforcement expert with 30 years of experience working for several leading law firms. He was previously a Court Officer, formerly National Head of High Court Client Services for Europe's largest group of civil enforcement companies.

Neil is a Fellow of the Chartered Institute of Credit Management, and a Member of the Institute of Revenues, Rating & Valuation. He has acted for numerous property professionals in respect of the recovery of property-related debts, including rent, ground rent, service charges and insurances, as well as dealing with taking possession of property and enforcement action.

A director of Reality Law, Neil is supported by a team of leasehold property experts including a property litigation specialist solicitor with 30 years of experience and various other solicitors specialising in the sector and other legal professionals.

REGULATING MANAGING AGENTS

FPRA will be consulted on a Government working group on the regulation of property agents.

Lord Best, a crossbench Peer who is chairing the group, has written to FPRA Chairman Bob Smytherman to confirm the Federation's views would be taken into account.

Bob had told the Ministry of Housing, Communities and Local Government: "It is our members that pay the managing agents and our members who suffer when there is poor service and indeed the misappropriation of funds."

Lord Best has replied: "To get all the component organisations on board, it is clear that we need to look beyond the core membership to draw in the contribution of other bodies. This is going to involve us convening sub-group meetings, covering key elements, as well as canvassing written contributions on these themes. One specific area of interest is indeed the leasehold side which we will reach later next year. It would be very helpful to have an input from FPRA, and your views will certainly be important: I look forward to hearing them in due course."

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