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NEWS

FPRA
FEDERATION OF PRIVATE RESIDENTS' ASSOCIATIONS

EXCITING NEW HELP FOR RESIDENT MANAGERS BY THE EDITOR

FPRA has helped to create a free online learning tool for leaseholders looking to manage their own building using their own company.

The Federation has teamed up with LEASE the Leasehold Advisory Service to create "LEASE Learn", an e-learning platform with the aim of helping leaseholders gain confidence in the complex subject of leasehold.

Other contributors to this new service are the Institute of Residential Property Managers (IRPM) and the Association of Residential Managing Agents (ARMA).

FPRA Chairman Bob Smytherman, said: 'As a director of a management company for over 25 years in my own block I know first-hand the importance of good quality impartial advice and support when carrying out the role. This is why I am hugely proud to contribute to the new Leasehold Advisory Service e-learning modules for those directors who have responsibilities within their own developments. I would urge fellow RMC/RTM directors and company secretaries to undergo the training and continue to seek impartial advice and support from organisations such as LEASE or the FPRA.'

Chief Executive of LEASE Anthony Essien, said: 'We know that many leaseholders are very able directors of their Residents' Management or Right to Manage Company. But we are also aware that some are reluctant to take on these very real responsibilities as directors; and that others that have done so could be helped with the fundamentals. We feel that *LEASE Learn* suits these busy people, and we hope to have lots of feedback to make it even better.'

Chief Executive of IRPM Andrew Bulmer, said: 'IRPM are delighted to support this very useful and timely e-learning programme coming to fruition.

Continued on page 3

48th AGM and Special Event

See enclosed documents for our free event for members on 13th November 2019, including our special guest speakers Sebastian O'Kelly, LKP and Tony Essien, LEASE.
This event has been made possible by commercial sponsorship for which FPRA is extremely grateful.

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The event is also supported by:

LEASE
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INSIDE THIS ISSUE

GETTING RECOGNITION – THE BENEFITS

By FPRA Committee Member Yashmin Mistry, in response to a member's query

There are many advantages to having a recognised residents association and some of these include:

- ✔ increase the sense of belonging to a community
- ✔ lobby for change on major issues of concern to the whole community
- ✔ inform residents of their rights under the law and in particular under the Landlord and Tenant related legislation
- ✔ provide local expertise about managing an estate and can readily identify problems, which may not be obvious to property managers
- ✔ exercise a degree of influence over expenditure by landlord or its agent on service charge items; consult with landlord or its agent on proposed expenditure and help to determine the manner in which any extraordinary charges are levied and the maintenance fund (if any) is safeguarded
- ✔ may act on its own behalf in requesting information from a landlord
- ✔ a landlord can also be required to consult a recognised association on matters such as service charges and management. In addition, a recognised Association has power to require a landlord to consult with them concerning managing agents by serving a notice in writing. The Housing Act 1996 Section 84 empowers a residents' association to appoint a surveyor (who must be qualified) to advise on service charge matters. He or she has important rights of access both to the premises and to relevant documents
- ✔ exert pressure upon the landlord or its agent to maintain an appropriate standard of decoration and maintenance to the interior and exterior of buildings, and at reasonable cost
- ✔ exert pressure on the landlord or its agent to carry out regular inspections and timely maintenance of, and at reasonable cost, the building's plant, equipment, wiring and other common services
- ✔ exert pressure on the landlord or its agent to comply with latest fire, health and safety and security recommendations
- ✔ establish a relationship with the landlord or its agent to facilitate good management; represent the needs and views of residents on management issues and report back to the residents the concerns of the landlord or its agent
- ✔ acquaint residents with aspects and problems of management of which they may have been unaware; act as an extension of the landlord's management
- ✔ organise opposition to undesirable planning applications
- ✔ be prepared to take on all responsibilities of management if ceded by the landlord/or its agent or conferred by legislation, Right to Manage or following the purchase by the residents of the landlord's interest
- ✔ exercise the rights conferred by Statute on Residents' Associations:
  - a) obtain statutory recognition of the association
  - b) propose to the landlord or agent and require the due consideration of estimates for major works obtained by an association; (Section 20 Landlord & Tenant Act 1985) as amended by the Commonhold and Leasehold reform Act 2002)
  - c) apply for a determination of the reasonableness of the service charge costs (Section 19 of the Landlord and Tenant Act 1985 as amended by Section 83 of the Housing Act 1996)
  - d) require the landlord to consult with the association in regard to the appointment of the managing agent; (Section 30B Landlord and Tenant Act 1985 as amended by Section 44 Landlord and Tenant Act 1987)
  - e) exercise rights as to information about service charge accounts (Landlord & Tenant Act 1985 Section 21 as amended by Landlord & Tenant Act 1987 Schedule 2 Para 5) and as amended by the Housing Act 1996 Sections 83 and 84
  - f) finally, and perhaps most importantly, facilitating consultation and obtaining consensus amongst tenants as to the possible exercise of the rights of those tenants qualifying under the Leasehold Reform, Housing and Urban Development Act, 1993 to make a collective purchase of the freehold vested in their landlord
  - g) alternatively, facilitating consultation and obtaining consensus amongst tenants as to the possible exercise of the 'Right to Manage' under the Commonhold and Leasehold Reform Act 2002.

There is however no statutory obligation on the managing agents or head landlord to disclose correspondence between themselves and the freeholder.

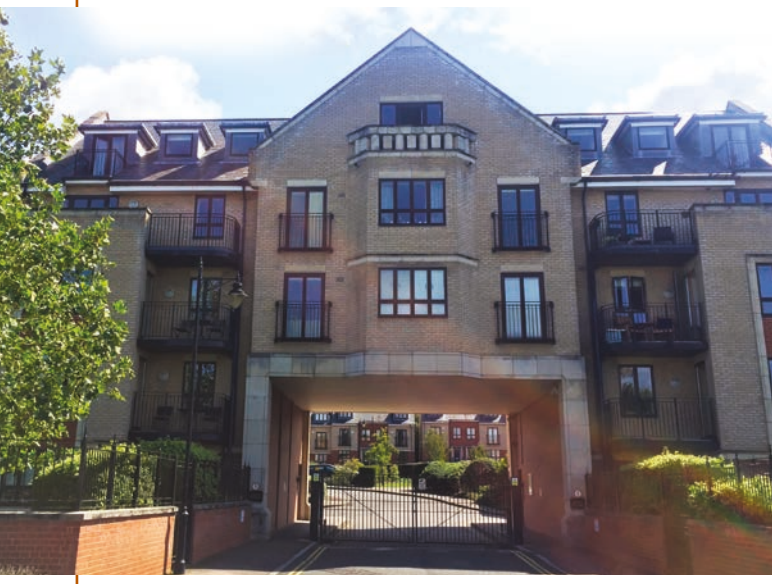
NOT FAIR!

FPRA Director Shula Rich advises on Unfair Terms in Contracts

Contracts are generally written in the interests of the person or organisation offering the contract.

So, if a managing agent or a builder or any of the businesses we come across in the course of managing our blocks offers us a contract, it needs to be read in detail.

Where the contract is between individuals then we are protected by legislation. However, where it is between two businesses, then there is little or no protection. Even though we may think of ourselves as individuals signing a contract – where it is on behalf of our block as resident management companies, or right to manage companies – we are 'businesses'.



For example, I have advised a block where the chair was unreasonable and tried to do too much herself in the opinion of the leaseholders. They at last persuaded her to appoint a good managing agent.

Having signed the contract, he emailed me that she wanted to cancel it as she was 'within her 14-day cancellation period for contracts.'

However, I advised this did not apply as she was the chair of an RTM company and it was therefore a business to business contact. He is still there and at present they are living in the block 'happily ever after'.

If an RMC or an RTM company signs a contract, the protections given to an individual don't apply. It's up to us, as directors of a management company, to make sure that contracts suit us before we sign them, and to discuss changes required rather than accept the document as presented.

For this reason I always suggest looking at contracts in detail and with some cynicism.

First – on the appointment of a managing agent I suggest asking for their contract first, before talking to them. If it's pages of 4-point type I would suggest not talking to them, as, if they need so much small print to protect them from the client, what can they be considering getting up to?

On the appointment of a builder for major works, I suggest using the JCT (Joint Contracts Tribunal) contract originally worked out by a consortium of those engaged in building works, from architects to surveyors to major builders. These contracts are perfect examples of fairness and good record-keeping. Generally, they are used by surveyors and architects. RTMs and RMCs need to ask for these if they are not proposed and for an explanation in their absence. It maybe the works are too small – in which case look at the proposed agreement first before agreeing to the works.

If a contract is readable and there is an intention to appoint, it is always possible to amend the terms if the other party agrees (and if not, why not?) The explanation maybe reasonable and acceptable – but it's always best to discuss.

There are standard contracts for the appointment of a block manager from ARMA and RICS – these can have additional pages added and amends made if we as the client, think it's appropriate. I write this article having drafted what I consider to be a fair contract for block management which many agents also use.

This too allows for amends to suit both parties.

The contracts I think we need to query intensively are those drafted by agents for their own use that are not from ARMA or RICS (or my own, drafted originally for the National Federation of Property Professionals). These others may give far too much authority to the agent without consulting the client.

All that is required is to go through them, and add in the proviso "after consultation with the client" if the contract as proposed offers the agent opportunity for arbitrary action without consultation.

An amend becomes part of the contract when added into it, and initialled and dated by both parties.

FPRA often gets queries on agents' contracts after they have been appointed.

The time to query is before.

Exciting New Help continued from page 1

It could not be more timely, as the duties and responsibilities of resident management company directors are being brought into sharp focus as leasehold tenure and building safety management is reformed. Beyond just the directors, we would go further and recommend that all members/shareholders/residents of a management company benefit from this course.'

Chief Executive of ARMA Nigel Glen, said: 'ARMA welcomes the new LEASE e-learning platform. Improving understanding for anyone involved in leasehold can only be a good thing. We are sure it will prove an invaluable aid for the sector.'

There are four interactive modules for leaseholders to learn more about managing their building and leasehold law:

1. Introduction to residential leases
2. Being a director
3. Financial management basics
4. Professional advisers and service providers.

Go to learn.lease-advice.org to find out more. It's free of charge!

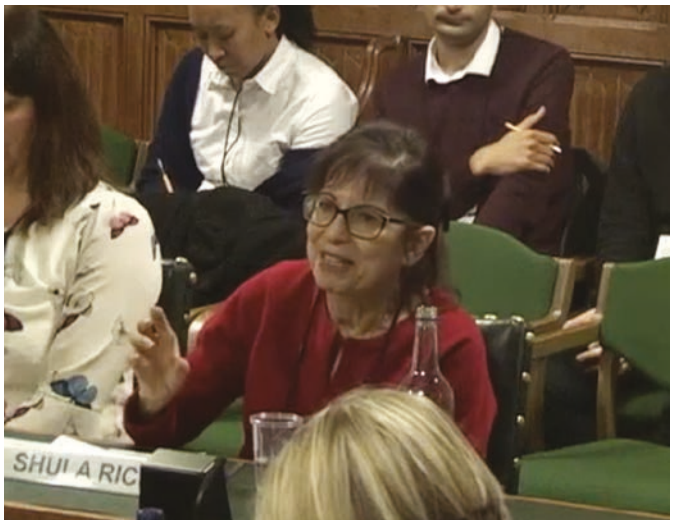
CHANGING THE LAW ON LEASEHOLD

FPRA Director Shula Rich comments on the government response to the Housing, Communities and Local Government Select Committee report on Leasehold Reform, presented to parliament in July. Shula herself gave evidence to the select committee in the House of Commons.

I have been personally involved in both the 1996 legislation and the 2002 Leasehold Reform legislation.

What comes out as an Act of Parliament is very different from what goes in as proposals or comments.

Sometimes it seems, by the way that proposals are greeted, these are proposals for legislation. They're not. They are proposals about proposals. Even if they are brought in as actual legislation, they may never "leap off the page" and into our lives because no Statutory Instrument is introduced to activate them.



When an Act is introduced into parliament not all of it comes into force at the same time. Some of it is brought in by way of Statutory Instruments. Government also consults on these.

As an example, S156 of the 2002 Commonhold and Leasehold Reform Act has never been brought in. This concerned the way in which leaseholders' money was kept in one or more client accounts and the way in which it was reported to leaseholders.

S156 was a substantial and welcome reform to leasehold accounting, However, though printed in the legislation it was not implemented. Our accounting system for service charges has remained the same for more than 30 years in spite of the care put into S156 and the fact that it's there on the printed page in an Act of Parliament

Until proposals are:

(1) Put into a bill

(2) There is some indication that "legislative time will be found",

I don't think it is worth any of us holding our breath.

On the positive side – more areas than ever are being considered for leasehold reform, and leasehold has never had a higher profile. Boris Johnson has announced that he will review all areas of proposed legislative changes. This could cause a further delay but it's possible that the proposals will then be implemented without the delay of transitional periods or statutory instruments.

Best – and not well known – are proposals for a set of conveyancing changes which the Conveyancers Association has said should be adopted as a standard now, even before legislation is brought in. These will make a big difference to us as existing leaseholders. As far as I can see they have not attracted attention so far.

The news is featured in *Today's Conveyancer* on June 27.

The proposals are:

- to limit the cost of providing leasehold information to £200
- to limit the time allowed to 15 days
- to limit the cost of refreshing the information to £50

The Conveyancers Association says:

'We are particularly delighted at the capping of the fee payable for the sale of information in the LPE1 to that which is accurately reflective of the work involved in producing it and for that to be no more than £200. ...The £50 cap on the refreshment of the information is particularly welcome as it means sellers can now obtain the information at the point of marketing knowing that if they do not exchange contracts within six months, it will only cost £50 to renew the information.'

They continue:

'Perhaps though, the most impactful point in the announcement is the requirement that information should be delivered within 15 days. Currently, a leasehold property transaction automatically adds three weeks to the entire purchase process. We know that in over 30 per cent of leasehold transactions it takes the lease administrator more than 50 days to produce the LPE1 after they have been paid. Clearly, if they now have to deliver within 15 days, and the LPE1 can be ordered even earlier in the process, we have the potential to knock three weeks off the average leasehold transaction and chains of transactions where there is a leasehold property.'

We can be very happy with the following radical demand to reduce and control the cost of leasehold extensions from a profession which I have mistakenly considered to be cautious. Director of delivery at the Conveyancing Association, Beth Rudolph, describes the premiums we are presently asked to pay for lease extensions as:

'An excessive premium to extend the lease passed the arbitrary number of years set by the very people who will then value the premium for that extension using calculations only ever meant for commercial leases where there is the real expectation for the

lease to run out and be delivered back to the freeholder. I am talking about such constructs as 'relativity, 'marriage value', 'hope value', 'development value' and 'the graph of graphs' none of which have a place in valuing someone's home.'

She suggests the government's announcement means that we can expect changes now in the conveyancing procedure and there is no need to wait for legislation:

'We can therefore now forge ahead and implement the Ministry's work by requiring lease administrators to produce the information in the LPE1 for no more than £200 and within 15 days, and we have already produced a template for our members to use when requesting the LPE1 to highlight to lease administrators government expectations that leaseholders should no longer be the subject of financial abuse, nor should they be subject to ridiculous delays to get the information they need and are paying for.'

In summary:

The Reform proposals

1. Do not deal with a sunset clause on leasehold as government still seems very confused and suggests that keeping leasehold offers people a choice of tenure (like keeping mouldy food with good food offers a choice of dinner).
2. Do not look at a Consolidation Act although admitting that there are more than 50 Acts concerned with enfranchisement alone.
3. Finally they say they intend to balance the interests of all involved. This despite the fact that some are entrenched in the perpetuation of the system often referred to as Feudal and others suffer under it.

However, this is the most wide-ranging examination so far of leasehold. Our campaigners are better informed than ever. There is greater parliamentary support than ever and I have every hope that if we "keep on keeping on" we will get the support needed for more efficient and useful change than so far proposed.

'A Member Writes'....

We continue our series in which members write in with their experiences of leasehold life. Contributions from members are welcome – please consider sharing yours with our readers.

DEALING WITH THE NON-PAYMENT OF SERVICE CHARGE

I have been the chairman of the management board of our block of 27 flats for more than 25 years. We manage the property ourselves as volunteers and we own the freehold via our management company. Some years ago we set up service charge payments so that each owner paid the charge for their flat as a regular monthly standing order (a charge of between £26-£65 per month depending on the size of the flat). This was to minimise the time and effort needed to collect and manage service charges. Over the years this has worked well with only the occasional payment missed due to administrative error or some minor dispute over some repair/cost.

New owners are made fully aware of how we manage the flats including service charge payments before they buy and expected to set up an appropriate standing order. However one of our new owners in 2017 paid the first month's service charge and then stopped making payments. We pursued him for payment for about a year with him claiming he had lost his job with various promises to make the payments in due course. Subsequently he found a job with promises to make the outstanding payments, but these did not appear.

Consequently, in August 2018 I made a court claim for the money – by then more than £1,000. I made this claim online after exploring possible mediation (but none of the potential mediators returned my calls!). The fee for the online application was £70. Our debtor did not respond to the claim and the court granted an order against him on 5 Nov 2018.

Despite further promises the debt was still not cleared. I therefore went back to the court to enforce the order (Feb 2019). The various options for getting money after a judgment has been granted are set out in the Courts leaflet EX321 and we concluded that an Order to obtain information (using form EX324) was the best way forward. Such an Order requires a defendant to attend court to explain his finances. This application incurred a further fee of £55 (all fees can be added to the debt). The court granted this Order and then set an appointment for 9 April 2019 for our debtor to attend the court. I served the papers on him, not a pleasant experience. But probably more appropriate than using a bailiff and certainly cheaper.

Our debtor then paid his debt a few days before the hearing. Perhaps he might have found it difficult to explain their recently upgraded cars to the court!

To conclude, the Small Claims Court procedures worked effectively to deal with our service charge debt with all costs recovered in the debt apart from the time I spent working through the procedures. It does take time (some months) to work through the procedures, which is consequently stressful. But if we are unlucky to encounter this problem again, I would use these procedures.

ROLLING OUT ULTRAFAST FIBRE TO THE PREMISES (FTTP)

ECO Matters' area of expertise is working with people who manage privately owned blocks of flats, usually providing free loft and cavity wall insulation under the Energy Companies Obligation introduced by the government. Recently, ECO Matters has been selected as one of only two companies to work with Openreach on their Obligation to roll out Ultrafast Fibre across the United Kingdom.

What is Ultrafast Fibre?

The average speed of broadband across the UK is currently 46 Mbps, even though fibre optic cable has been installed in the street up to the green box. The main constraint being that the connection to 27 million properties is still reliant on the existing copper cable from the green box to the property. With copper, the longer the distance from the telephone exchange to the street cabinet and from the cabinet to a building, the weaker the data signal becomes.

A full fibre infrastructure is an entirely different proposition. The building will be connected by a fibre link all the way from the telephone exchange to the apartments. That link can carry massive amounts of information (as pulses of light) over far greater distances than copper, without any discernible loss in signal. The fibre cables are so thin, they are unobtrusive when installed and give people the option to upgrade to speeds of 1Gbps.

What is the Openreach Obligation?

Openreach has been targeted with an initial installation to three million homes by 2021. Due to the great faith Clive Selley the CEO, has in his organisation, he has pledged to be ahead of the game and to install to four million homes before the end of the first milestone.

Where premises are serviced Overhead (via a telegraph pole), Openreach will simply be able to run additional cabling to the target properties without needing to access the inside of a building. Apartment blocks though, tend to be more challenging as Openreach needs to gain access to the property to be able to upgrade the service to bring fibre to the door of each unit. Openreach need a wayleave agreement to proceed. ECO Matters is working with clients who manage or own blocks of flats in this latter category to identify properties that are within reach of existing FTTP infrastructure.

In areas that are not remote, the installations will be made by Openreach free of charge.

Target areas

Openreach is rolling out FTTP on a geographic basis. London, Manchester, Leeds, Glasgow, Bristol, Exeter and Salisbury are the immediate areas of focus. However, there are also 42,000 other postcodes where there is already fibre to the door and this coverage is growing every day.

If your block is outside of their current build plan it can be added to the database of stock that assists Openreach in deciding where to prioritise their install plans. If there are enough units, Openreach is flexible to move these blocks ahead of their scheduled rollout.

What are the benefits of using Openreach for your fibre infrastructure?

1. A faster, more reliable connection. We are increasingly reliant on the internet. Just three years ago, we used less than half the data we do today on our home broadband. Many people now have connected homes; toasters, fridges, heating, doors and alarms are all linked to the internet and controlled by their mobile phones. In fact, 78 per cent of people say that slow broadband would put them off renting or buying a property.

The Ultrafast Fibre download speeds will allow faster upload speeds for gaming and a two-hour, 4K definition film can be downloaded in 15 minutes.

Working from home will be as effective as working in the office.

The ultrafast speeds are excellent for CCTV.

2. Open network. Openreach only provide the infrastructure – which goes all the way to a tiny box outside each flat. This is important because it stops in the common areas, meaning that individual leaseholder permission is not required. It also means that the resident is free to choose whichever broadband supplier they would like eg BT, TalkTalk, Sky, Virgin and it doesn't require a certain number of people to sign up for the infrastructure to be provided.

3. Nationwide infrastructure. Openreach already has a significant nationwide infrastructure, which runs to 165 million kilometres of cable which it manages and maintains. They can usually use their existing copper conduits, so there is little, if any, need to dig up roads and gardens. Openreach competitors do not have the same historic footprint and consequently must undertake significant digging to get their cable in. Openreach also carry out a proper survey and fire risk assessment.

4. All legal work will be taken care of by the Openreach team.

Rural FTTP roll out

As with all Obligations, often rural and outlying areas are the most difficult to access and in many cases, the resident must pick up a bill for the laying on of the service. However, the Department for Digital, Cultural, Media and Sport (DCMS) plans to get the UK to 100 per cent full fibre coverage by 2033 and has launched a £200 million fund to deliver FTTP to public buildings in rural areas and support a voucher scheme that residents and business can access to help them to get a full fibre service.

The rural gigabit voucher scheme will offer up to £1,500 for residents and £3,500 for small business to encourage take-up of FTTP services.

Process

Provide us with a list of postcodes of properties where you would like to have Ultrafast Fibre. We will check the infrastructure options available and produce a detailed proposal of our solution for your review. Following the survey and with the Wayleave agreement in place, Openreach will schedule an installation on an agreed date.

Legal Jottings

FPRA is delighted to welcome our new Legal Jottings contributor, Nicholas Kissen. Nicholas is Senior Legal Adviser at LEASE, the government-backed leasehold advisory service, and has decades of experience as a solicitor.

FTT First-tier Tribunal

UPPER TRIBUNAL

Service charges – Getting back company expenses and directors/officers insurance

Chiswick Village Residents Limited v John R.F.Southey [2019] UKUT 148 (LC)

Chiswick Village is a 1930s development containing 280 leasehold flats spread among a number of buildings and where the leaseholder-owned company CVRL acquired the freehold in 1997.

There were a number of issues covered by this decision of the Upper Tribunal including those relating to natural justice and procedural fairness but I wish to cover only one of them as I feel it will be of particular interest to FPRA members especially those who are directors of companies that own the freehold interest in their building or of management companies under tri-partite leases or of Right to Manage Companies.

CVRL sought to recover the expenses amounting to £7,600-odd run up in a) obtaining directors and officers liability insurance b) organising its own AGMs c) hiring premises for the AGMs and d) taking advice on conducting meetings and its entitlement to exclude certain persons seen as likely to disrupt proceedings.

The focus was of course on the provisions of the lease which was for 999 years at a peppercorn rent with the relevant service charge provisions being payment towards:

- The costs of effecting insurance against the liability of the lessor to third parties and against such other risks and in such amount as the lessor shall think fit (but not against the liability of individual tenants as occupiers of the flats in the building)
- All legal and other costs incurred by the lessor including those relating to the recovery of maintenance contribution and other sums due from the lessee.....in the running and management of the building and in the enforcement of the covenants conditions and regulations contained in the leases granted of the flats in the building
- All costs incurred by the lessor (not specifically referred to in the lease) relating or incidental to the general administration and management of the lessor's property.

Directors and officers liability insurance

The FTT decided the lease did not allow recovery through the service charge of the premiums for this insurance on the basis that directors and officers were separate persons from the landlord CVRL itself with insurance taken out for their benefit not being "insurance against the liability of the lessor".

The Upper Tribunal came down on the side of CVRL.

It looked at the context of the leases in issue. All of them were granted by a leaseholder owned and managed company and in the Upper Tribunal's judgment the language of the insurance obligation 'is apt to cover the cost of the lessor obtaining insurance against the liabilities of its own directors and officers. The structure of the paragraph allows for insurance against liabilities of persons **other than the lessor itself,** although the lessor would have to act reasonably in determining that it was appropriate to obtain such insurance'.

A landlord wholly owned by the leaseholders and having no other assets or interests faces an obvious risk against which it might wish to take out insurance; namely its own directors being sued.

'Without such insurance it would be difficult to find individuals willing to take office or for the company to function at all unless the directors were to be expected to obtain insurance at their own expense despite providing their services voluntarily and for the benefit of their fellow leaseholders. There is therefore no reason why the lessor should not obtain it, at the expense of the leaseholders'.

The corporate expenses

The FTT had decided these were not embraced by the provisions of the lease.

Again the Upper Tribunal came down on the side of CVRL arriving at a different conclusion to the FTT.

The FTT had considered these expenses were not run up by CVRL in the administration and management of CVRL's property being the development but instead in the administration and management of CVRL itself.

The barrister representing CVRL referred the Upper Tribunal to the decision of the Upper Tribunal in Solar Beta Management Company Limited v. Akindele [2014] UKUT 0416(LC) a case which concerned a leaseholder-owned management company (not a landlord) of which the leaseholders were obliged to become members.

This particular company was trying to recover through the service charges administrative expenses incurred by its own directors of photocopying, printing, postal services and the odd piece of travel.

What was important to the Upper Tribunal in the Solar Beta case were the following factors:

- It was a single-purpose tenant-owned company
- It was obliged to provide and perform the services to which the service charge related
- It had no source of income other than the service charge
- It would become insolvent if it ran up expenses it could not recoup from the service charge
- Only through the activities and decisions of its directors could the company discharge its contractual duties either by appointing and supervising managing agents or by doing some or all of the management itself

Continued on page 8

Legal Jottings continued from page 7

- The directors were responsible for complying with the Companies Act and other relevant regulations
- Non-compliance with this legislation would lead to the company being struck off
- A struck off company cannot perform the obligations imposed on it by the lease.

In other words the Upper Tribunal in the Solar Beta case considered there was an overlapping to some extent between the functions of **managing the building** and **managing the company**.

Returning to the Chiswick Village case the Upper Tribunal were satisfied that it is legitimate to apply the same approach:

- General administration and management of the building owned by CVRL could not take place if CVRL as a company was not managed
- The company CVRL existed for one purpose only; namely, to administer, manage and run the building on behalf of its members
- The company's corporate governance activities contribute to its own continuance and therefore to achieving that purpose
- All expenditure by the company on those activities is directed towards the same purpose.

CVRL was intended to have no income producing assets of any significance and was to be owned by the leaseholders themselves and so the Upper Tribunal found no difficulty in accepting that the parties to the lease were unlikely to have intended any clear distinction between company management and estate management.

Accordingly it was in order for CVRL to include within its service charge the expenditure necessarily incurred in conducting its own AGMs and in obtaining advice on the basis that it was incurred in the running of the building, or was related or incidental to the general administration and management of Chiswick Village.

Take-aways from this decision

Tribunal decisions dealing with liability for payment of service charges will usually centre on the terms of the lease under consideration and this one is no exception.

This decision should however provide some assistance to leaseholders owning and controlling a freehold-owning company or a management company that is not the landlord if they wish to recover director and officers' liability insurance and corporate expenses through the service charge. The provisions at issue in the Chiswick Village case are not unusual ones and doubtless the same or substantially similar ones can be encountered in other leases.

HIGH COURT

Being a leaseholder and a company member – getting right what rights you have

Pandongate House Management Company Limited v. Barton (Newcastle District Registry)

Section 116 of the Companies Act 2006 gives a right to inspect the register of a company's members and, where the company receives such a request, by Section 117 either it complies with the request or makes an application to the High Court.

If the court is satisfied that the request is not made for a proper purpose it shall direct the company not to comply.

This case centred on Pandongate House a block of flats in Newcastle.

All the flats were let on long tripartite leases with the parties being the landlord, the management company and the leaseholder.

The leaseholders were all members of the management company.

Mr. Barton one of the leaseholders/members made a Section 116 request and in response a Section 117 application was made by the management company to the High Court.

Why did Mr. Barton make this request?

Basically he was unhappy with the way the block was being managed including the level of service charges and the performance of the managing agents and was keen to raise these matters with the other leaseholders and maybe persuade some/all of them to come together with him in pursuing a case at the FTT against the management company.

To this end he needed to see a list of all the leaseholder members plus their contact details. Hence the request under Section 116.

The management company contended this request was not for a proper purpose there being a distinction between a) the affairs of the management company **as a company** and b) the affairs of the company **as a manager of the building**. Section 116 exists for the purpose of enabling people to raise matters relating to the former and not the latter. Intending to use details of the lease-holders to bring service charge litigation was not a proper purpose.

The High Court came down on the side of the management company and turned down Mr. Barton's request.

Intending to use the information obtained from the register of members to pursue service charge litigation against a company over the way it is running a building is not about the management of the company and so the request by Mr. Barton was not for a proper purpose.

Take-aways from this decision

Leaseholder-owned companies could exist in the following ways – a freehold owner of a building containing flats perhaps following a collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993, a tripartite lease as in the Pandongate case, a Right to Manage Company under the Commonhold and Leasehold Reform Act 2002.

It is important in any of these three cases that leaseholders/members even though they may be the same people can tell apart the rights and duties they have as leaseholders and those they have as company members.

The management of the building relates to the flat owner's capacity as a leaseholder whilst company related affairs were relevant to their capacity as a member of the management company.

Two separate capacities mean two different hats can be worn.

Section 116 exists for the purpose of enabling those wearing the hat of a company member to bring up matters about the management of the company. Litigating against the company over the way it manages the building falls outside the scope of

the management of the company. Such litigation would be the hat worn by a leaseholder.

UPPER TRIBUNAL

Insurance of the building – losing the right to contest service charges.

Howe v. Mahamood [2019] UKUT 0155 (LC)

Is there any possibility that a leaseholder could lose their entitlement to challenge the service charges?

There are some circumstances where they can.

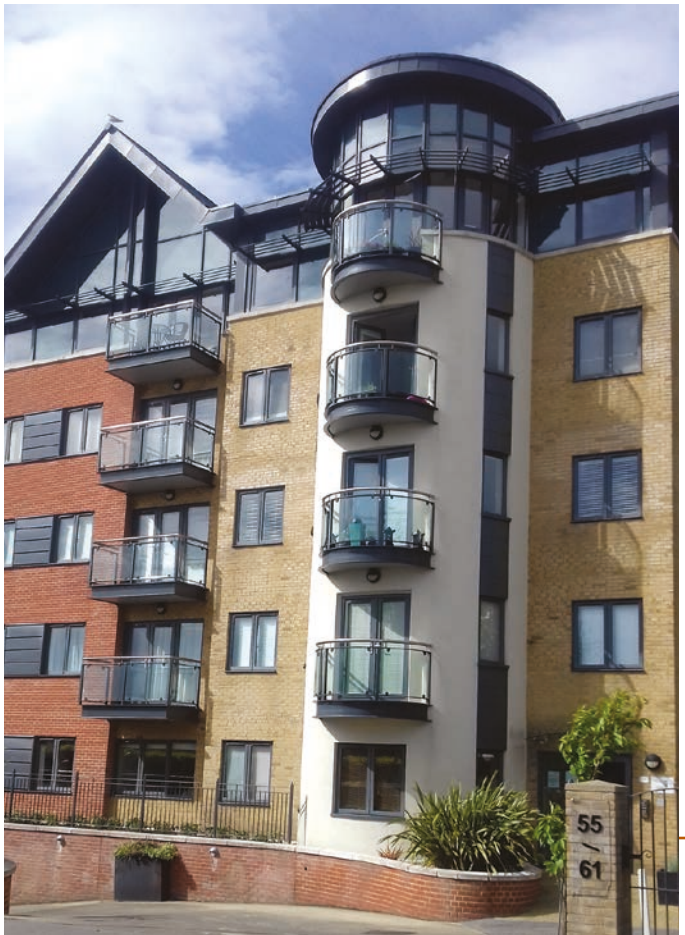
For instance by Section 27A(4) of the Landlord and Tenant Act 1985 no application may be made to the FTT to challenge the payability and/or reasonableness of service charges in respect of a matter which has been agreed or admitted by the leaseholder.

This case concerned a flat in Southend-on-Sea, Essex located in a building consisting of commercial premises covering almost the whole of the ground floor with three leasehold flats on the floors above.

The leaseholder applied to the FTT to decide certain service charges being the contribution towards the premium for the building insurance in respect of the years 2005 to 2017 inclusive.

First up was an argument that the landlord had not obeyed his obligation to insure the building in accordance with the terms of the lease and as a result the leaseholder was under no obligation to make any payment, by way of reimbursing the insurance premium, to the landlord as part of the service charge.

Concerning years 2005 to 2014 the leaseholder claimed that, in contrast to the lease obligation to insure the whole building, the landlord took out separate insurances for the ground floor commercial premises and for each of the three flats. That is there were four separate insurance policies in place –rather than a single policy-which did not amount to insurance of the whole of the building as required by the lease.



The Upper Tribunal concluded that the insurance placed constituted complying with the lease obligation with each of the entities-commercial unit and the three residential flats- insured and rejected the argument that there were some parts of the building not insured. Hence the building was properly insured.

The leaseholder also argued that the insurance premiums had not been properly apportioned following the terms of the lease under which the landlord was entitled to recover one sixth part of the total premiums spent on the insurance,

For 2005 and 2006 the insurances were placed by the landlord and a demand made to the leaseholder for the premium to be reimbursed through the service charge.

However for 2007 to 2014 the premium was collected not as part of the service charge but by the insurance brokers sending the demand for the premium payable in respect of the flat to the leaseholder who then paid it to the brokers.

The Upper Tribunal accepted this apportionment of the total premium for the building was not as contemplated by the lease but felt the leaseholder had no legitimate grounds for complaint upon this point concluding that for all the years of direct payment to the brokers, rather than paying a contribution towards the insurance via the service charge, the amount of the relevant insurance premium had been "agreed or admitted" by the leaseholder bringing into operation Section 27(A) 4 of the 1985 Act.

Section 27(5) of the 1985 Act provides that a leaseholder is not to be regarded as having agreed or admitted any matter by reason only of having made any payment.

But in this case the matter went beyond the leaseholder merely making a payment but instead the landlord and leaseholder had both proceeded on the basis of the leaseholder not making any payment through the service charge in respect of the insurance premium but instead settling the matter directly with the broker by paying the premium for the insurance on the leaseholder's flat.

Thus the parties were proceeding in a manner clearly not precisely in accordance with the terms of the lease and in doing so the Upper Tribunal concluded the landlord and leaseholder have agreed the amount so paid to the brokers is to be treated between them as the agreed amount of the leaseholder's liability in respect of insurance premiums for the years in question.

As a result the leaseholder was not entitled to challenge the amounts paid.

For years 2015 to 2017 the Upper Tribunal decided the relevant proportion due from the leaseholder.

Take-aways from this decision

This case showed conduct amounting to an agreement or admission so that the leaseholder was not entitled to challenge the amounts for the years in question that the payments were made.

A leaseholder needs to take care to ensure they do not lose their right to challenge liability for service charges. Should they anticipate they will in the future be disputing liability for particular element(s) of the service charge, when making payment they should expressly make it clear that it is without prejudice to their right to challenge later on.

ASK THE FPRA

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

Collection fees

Q **Our managing agents have just advised leaseholders that, as they are no longer allowed to charge credit cards fees to individuals, following 2017 Payment Services Legislation, they will now put all credit card charges onto the service charge under a line named 'Collection Fees', in effect, requiring leaseholders to pay their neighbour's credit card fees. The agents advise that they have taken independent legal advice and that they can do this and call it Collection Fees.**
We countered that legislation states they are no longer allowed to charge people for paying using credit cards, and that even if they are charged themselves if someone uses a credit card, they cannot charge that cost forward. It is not a collection fee.
Do you have anything on this matter?

A FPRA Committee Member Shaun O'Sullivan replies:
It is true that the 2017 Payment Services legislation prevented retailers from applying surcharges for users of credit cards. Nevertheless, your managing agent will still be charged fees by the credit card company for every payment accepted by credit card and these charges form part of the managing agent's overheads which he is entitled to recover for the services provided via the service charge. It is not at all unusual for lessees who might all be bound by the same level of service charge to benefit unevenly. For example, ground floor lessees will generally contribute to the same degree as upper floor lessees in relation to the maintenance of lifts even though they may never use them. This is one of the many imperfections of leasehold life.
The only way to avoid these costs is to petition the freeholder to require the managing agents not to accept any payments by credit card (a situation not at all unusual in many developments). Of course, this is unlikely to find favour among those of your neighbours who have become accustomed to paying in this way.

Electric car charging

Q **The government has stated its intent to see all electric vehicles on the roads of the UK by 2040, so we need to find a solution. Would one solution be for our RA to seek permission from the leaseholder to have electrical points installed by an accredited company, and for individuals to privately fund their own portion of the work, be it for 1, 10, 40, or for all 65 apartments? Or is there another solution that you could suggest we investigate?**

A FPRA Committee Member Yashmin Mistry replies:
The situation is a tricky one and of course has not yet been tested through the courts or tribunals as yet. Yes there is the option you set out. You would also need to seek the consent of the freeholder to the proposed works. Another option may be to ask the Tribunal to vary the leases if there are sufficient numbers on board to support such an application.

Unsafe gates

Q **We have three sets of swing vehicle gates with automatic opening. We have been advised by the gate maintenance company that the gates are not compliant with the new rules on gate safety (notably the need for safety edges) and need to be upgraded. The precise scope of the upgrade is not wholly clear but it will involve significant cost.**
As it seemed likely that the overall cost of upgrading the three gates would exceed the Section 20 limit for qualifying works (in our case this works out at £6,500), we took the precaution of issuing notices of intention to carry out these works, based on a general description of the required work. These have not drawn any comment.
Given the questions about the precise scope of the works, it has not yet been possible to obtain competitive quotes. In the meantime, however, the gate maintenance company has issued notices of unsafe operation and so we are faced with a potential quite long gap while the gates are left open (thus compromising security).
Against that background, we have two questions relating to Section 20:
1. Is it possible to short circuit the next stage of the process whereby we give lessees one month to comment on the outcome of the tender process, on the basis that the work needs to be carried out urgently?
2. Although we have treated the overall project to bring the gates up to scratch as one that triggers the Section 20 procedure, are there grounds for treating the work on each gate as a separate item for Section 20 purposes? In that context it may be worth mentioning that we are in any event considering decommissioning the automatic opening on one set of gates (leading to the basement car park). It is possible that this would bring the overall cost of the works down below the Section 20 limit.

A FPRA Committee Member Gerry Fox replies:
1. The First Tier Tribunal has the power to dispense with the requirements of Section 20. The dispensation is not given automatically and a case needs to be made. Having regard to the period of time since the first notice was served it is by no means certain that the Tribunal would grant a dispensation on the grounds of urgency. The application to the Tribunal does take some time, and it is possible that as you have already served the first notice you will not achieve a great deal of time saving by being granted dispensation. Once you have the necessary estimates you need to allow leaseholders 30 days to make observations after the second notice has been served.
2. You should not split the work into separate gates or by any other means merely to avoid the requirements of Section 20. If you do not have the responsibility to carry out work to the third gate then this should be excluded from the quotations you seek. If as you indicate the cost of the works will then no longer go over the Section 20 limit you are not obliged to

continue with the Section 20 requirements.
As you have served the first notice it would be appropriate to write to all leaseholders advising them of the works you will be proposing, the cost and perhaps ask for their observations informally, but you may then seek a speedy response, not being bound by the 30 days of Section 20.
In view of your comments regarding the possible dangers associated with the gates, you should take the gates out of service until remedial work is carried out. I suggest that you write to all leaseholders advising them of your proposals and telling them to inform their insurers of the circumstances.

First refusal

Q **Our landlord has made a right of first refusal offer to sell us the freehold. It is my understanding that during the 12 months following the notice he cannot sell to a third party at a lower price without re-offering it to the tenants. Should the 12 months expire without a sale going through (either to the tenants or to 3rd party), would the landlord be entitled thereafter to dispose of the freehold without any further restrictions, or would the right of first refusal requirements begin afresh?**

A FPRA Hon Consultant Anna Favre replies:
The right of first refusal would begin afresh after the end of the 12-month period and the landlord would need to serve fresh notices.

Statutory recognition

Q **Can you suggest how to get statuary recognition?**

A FPRA Chairman Bob Smytherman replies:
This is a decision for your freeholder to grant which should be straight forward as your RA has 15 members out of 22 which is a clear majority We should have a template letter on the members' section of our website for you to use to write to the freeholder. This can be found on page 32 of the information pack.
Should they decline to recognise, you have a right of appeal to the First Tier Tribunal where they would need to justify their decision which will be difficult if you can clearly demonstrate that you represent the majority.

Q **We followed your guidance on the recognition process. We got what were thought were enough signatures – 60 per cent of flat owners. We had included the commercial unit and also the two shared ownership flats. But it seems they aren't happy to include them despite the fact that they are members of our association.**

A FPRA Director Shula Rich replies:
It is now down to 50 per cent for recognition. Shared ownership lessees are eligible if their name is on the leasehold title. Commercial units are not.

Hostile meetings

Q **I live in a Victorian house converted into four flats and am secretary of our company. For about 10 years I have done all the work for the company, including organising our meetings. I always ask the other three directors what they want to put on the agenda and type it up for them. I type up the minutes, using my notes and those of another director and give copies to everyone.
No one ever contested them until last month's meeting, when one of the directors denied that we had voted at previous meetings to charge £30 for late payment of service charges. This was in the minutes. For years now, this same director no longer pays his service charges by direct debit and is habitually up to two months or more late, ignoring my letters and emails requesting payment.
I am wondering if it would be sufficient for one of the directors to sign the minutes?
I am also wondering who has the right to attend meetings? As usual, the last meeting was held in my flat, but this same gentleman brought his partner, who used to live here but had not been to a meeting for five years. I was not expecting him. I knew he does not own**

Continued on page 12

CLADDING NEWS

Details of financial help available for the replacement of ACM cladding (as implicated at Grenfell) in high rise buildings have been published by the government.

In July the Ministry of Housing, Communities and Local Government published the prospectus for the Private Sector ACM Cladding Remediation Fund.

The prospectus sets out the scope and eligibility criteria for the fund, against which applications will be assessed. It describes which costs are covered (and not covered), the eligibility criteria, how the fund works – including important rules on State Aid – how to apply and the timetable for submitting applications.

The Communities Secretary, Rt Hon James Brokenshire MP, said: 'By the end of December 2019, any building in the private sector which I have not been assured is permanently safe should have a clear commitment to remediation, with a start and finish date agreed. Where no such safety assurance or plan has been brought forward by the end of December, building owners can expect enforcement action to be taken. My expectation is that, other than in exceptional circumstances, building owners should complete remediation within six months of agreeing a plan – by June 2020.

'I acknowledge that this government also has a role to play in ensuring that remediation is undertaken. That is why, on 9 May I announced that this government was introducing a new £200 million fund to unblock progress in remediating private sector high-rise residential buildings. My department has been in contact with relevant building owners or managers to enable them to start preparatory work on an application to the fund.'

Ask the FPRA continued from page 11

the flat but had to question him several times before he would admit it.
We knew the meeting would be difficult as we have new owners who want to make extensive alterations to non-demised parts of the house and garden. The partner was extremely hostile to me throughout the meeting and kept putting pressure on myself and another director to give consent.
The new owners are a couple and I believe they are joint owners. I would be grateful if you could please confirm that I should declare them both as directors to Companies House but they only have one vote?
I am concerned, of course, apart from security dangers, that the cost of any work to non-demised parts would be shared by all four flat owners and would be grateful if you would confirm this too.

A FPRA Vice-Chairman Richard Williams replies:
The normal practice at meetings of directors is for the minutes of a meeting to be agreed by the directors at the next meeting. In the absence of any detailed requirement in the articles as to the authentication of the minutes there is strictly no requirement for the minutes to be signed. It is obviously good practice to have some such authentication and the signature of one director is quite sufficient.
Only the directors are **entitled** to attend. Others may attend if the directors agree. In the case of a jointly owned flat, Article 6 of the Articles of Association provide that only the first named shall exercise voting and other powers, so that strictly speaking it would seem that only that individual has to be appointed as a director and registered as director at Companies House. If the directors decide that the second-named joint owner should be allowed to attend directors' meetings in place of the first-named one, then he or she should also be registered as a director.
As regards alterations to non-demised parts, members can only be obliged to pay for these if the lease requires the landlord to carry out the works. The details are contained in the fourth and seventh schedules of the lease. Generally, these provisions seem to be directed to maintaining what is already there, rather than making alterations. Therefore, the new owners' suggestions should be studied carefully, in detail, to see whether they are within these provisions, if the cost is to be shared by all the members.

New rules on VAT

Q **We read in the press an alarming note on VAT. New HMRC Rules mean that managing agents will have to charge VAT on cost of staff that managing agents themselves employ on behalf of leaseholders.**
In our case, this was the situation when the leaseholders took over the freehold company together with the original managing agents (long gone). Since then our own company directly employs our three porters with proper contracts, although our agents do the actual salary payments on our behalf. Does this method of payment catch us? Our gardening company also charges us VAT as do almost all our suppliers, workmen etc.

FPRA Hon Consultant Gordon Whelan replies:
In September 2018, HMRC issued new guidance on the application of VAT to residential service charges. The guidance clarified HMRC's position when a landlord is contractually required to provide services to the occupant of a property and uses a property management company to provide those services. The guidance was considered necessary because managing agents were not charging VAT on site staff costs.
The justification for this was reliance on an Extra Statutory Concession (ESC3.18) which exempted VAT on domestic service charges paid by the occupants of residential property towards the upkeep of the block of flats in which they reside and towards the provision of wardens and caretakers. The revised guidance made clear that this exemption only applies when the services are provided by the freeholder. It does not extend to circumstances when the services are provided by a managing agent or a Residents' Management Company (RMC). From the details provided it appears that you are affected by this guidance and that the employment of the three porters is subject to VAT at the standard rate of 20 per cent.
VAT is a complex tax and the correct advice will depend on the exact circumstances of the company. You should discuss your position with your accountant to determine the best way forward for the company.

Section 20 admin fee

Q **We are in the process of preparing for major works due to happen this summer. We agreed percentages payable to the surveyor at the start of the process. The costed tenders have come and, out of the blue, the managing agents advise they can add "S20 administration fee of 2.5 per cent of the total cost of the Works, relating to the new regulations for consultation."**
Is it correct that they can charge this extra 2.5 per cent? is it correct that it is a 'new' cost, so that they will not have known to make us aware of it at any time in the last 18 months?

A FPRA Committee Member Colin Cohen replies:
If you own the freehold and therefore appointed the managing agent, you need to look at the agreement and on what terms and fees the agents were appointed to see if there is a provision for additional fees for work with regard to major works. I am not aware of any regulation to do so but that's not to say it is not unreasonable.
I must admit because of the constraint of what agents charge for management today with the additional requirements now the role requires, many agents do charge extra for administering major work as it considered above their usual role and basic fees.

Advertisements

FOND FAREWELLS

Chairman Bob Smytherman pays tribute

At this year's AGM the FPRA will be saying farewell and thank you to three stalwarts of the organisation without whom the organisation would not exist and have continued to grow as a vital resource for our members over the last 47 years.

Philippa Turner has been involved as a Director since the 1970s and the formation of the organisation, and over the decades has helped many hundreds if not thousands of leaseholders living in their blocks of flats. For many years Philippa was our legal jottings editor which was one of the most popular features of our newsletter.

Richard Williams has been Deputy Chairman for many years and provided a safe pair of hands for the organisation, steering the FPRA through some challenging times financially and seeing us through to a more sustainable position, as well as standing in for me in my absence especially during 2013 when I took time out as Mayor of Worthing.

Finally, Robert Levene who has been involved again for many years as Director, and for a short time Chief Executive, before taking over the admin office at a very challenging time for the organisation. He has been overseeing a smooth transition to a new admin office provider.

I hope all members will join me in thanking all three for their dedicated service to the FPRA and will join us at their final AGM to wish them all well for the future and to thank them personally.

FANTASTIC **FIRE SERVICE**

Many of our members will already know of the excellent free service offered to leaseholders in many parts of the country by the Fire Service.

A leaseholder in Rottingdean, near Brighton, who did not know, was delighted to receive a letter to his flat from the East Sussex Fire and Rescue Service. It read:

'East Sussex Fire & Rescue Service are offering free Home Safety visits with free smoke alarms, if required, fitted by the firefighters in your home. Firefighters from Roedean Fire Station, Brighton, would like to visit you in your home, to discuss any fire safety issues that are specific to you. If needed, we will supply and fit a smoke alarm, free of charge, and offer advice on any fire safety issues you may have in your home.'

The leaseholder reported: 'It was a fantastic service. They even made an appointment on a Saturday for me. They tested my fire alarm, found it to be near the end of its life, and fitted a new one. They checked the fuse board and advised me not to keep anything near it in the meter cupboard, particularly anything flammable, like the plastic bags I had in there.

'They advised on ways to prevent a spread of fire, by closing all interior doors at night, and suggested I made sure there were no trip hazards. Just as they were concluding their visit they were called away on an emergency!'

Advertisements

NEW FACES

FPRA is delighted to welcome three new experts to our team.

Taking the role of Honorary Consultant with special responsibility for the retirement sector is **Cecilia Brodigan**.

Cecilia has more than 30 years' experience in senior operational roles in private and social housing organisations. As a consultant leasehold specialist and a keen advocate of improving customer focus and service improvement in the leasehold sector, Cecilia helps organisations to make sense of leasehold combining her practical operational skills and knowledge of leasehold legislative framework.

Cecilia has a keen interest in the leasehold retirement sector and supports the voluntary Board of the Association of Retirement Housing Managers (ARHM) in its day to day operations and representing them at the various Government and Law Commission consultative forums driving forward the leasehold reform agenda.

New Honorary Consultant **Shabnam Ali-Khan** spent 14 years working for LEASE before moving into private practice. Shabnam has a great deal of experience in dealing with various landlord and tenant matters ranging from collective enfranchisement, lease extensions, right to manage and service charges. At LEASE she gave extensive advice on many issues over the telephone, face-to-face and in writing.

As a Senior Associate at Russell-Cooke, Shabnam takes instructions from clients on various leasehold matters ranging from lease extensions, to freehold purchase to the right to manage. She has become increasingly involved in public speaking engagements at the firm's own seminars as well as assisting external bodies in training.

New Director **Malcolm Wolpert** says: 'I live in a self-managed block of 14 flats in London, and have been a director of the RMC for 11 years. In the past, I joined the board of management companies of other blocks where I have lived: one at an estate of 57 flats in five blocks and 25 garages and gardens in London and another block in Brighton. I am qualified by experience having had to deal with many of the day-to-day problems encountered with block management. In all I have been on boards of block management companies for 16 years.

'In my working life I have run large customer service teams in four PLC companies in the telecommunications and utility industries. Before retiring in 2010, I was a director in charge of human resources. I am now a consultant to my previous company, assisting with the running of large business events around the UK. I act as a voluntary mentor to several people setting up their own businesses and I am a volunteer at The Royal London Hospital.'

NEW HOUSING MINISTERS

FPRA welcomes the new Secretary of State for Housing, Communities and Local Government Robert Jenrick and newly appointed Housing Minister Esther McVey. Chairman Bob Smytherman says: 'We look forward to continuing with the process of leasehold reform started by previous ministers.'

MEMBER'S COMMENT

Thank you very much indeed for your response to my recent follow-up enquiry. Many thanks for the legal opinion and for the advice provided. It is very much appreciated and helpful.

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