ISSUE No.109
Summer 2014

NEWSLETTER

FPRA
FEDERATION OF PRIVATE RESIDENTS' ASSOCIATIONS

LEASEHOLD REFORM
– new this month

FPRA Hon Consultant Mark Chick, explains what's new in the Leasehold Reform Amendment Act.

On May 14, 2014 the Leasehold Reform Amendment Act comes into force in England.

The Act is the result of a Private Members' Bill that makes a very simple but effective amendment to one of the key provisions of the Leasehold Reform Housing and Urban Development Act 1993 – namely the requirement that the flat owner must personally sign a notice claiming a new lease or the right to buy the freehold.

In practice this requirement has caused hardship, particularly where a flat owner has for example, been under a disability and been unable to sign.

We have seen cases where a flat has been owned by someone, who is for instance, in a coma and physically unable to sign a notice. As the law stands we were in the slightly ridiculous position that such a person could not activate a claim to a new lease or take part in a freehold purchase under the 1993 Act, simply because they were unable to sign the notice of claim.

As the law stands, someone holding a power of attorney for the flat owner, or even their duly authorised agent (such as a solicitor acting on their behalf) could not sign the notice.

This Private Member's Bill comes about in part because of constant lobbying by ALEP (the Association of Leasehold Enfranchisement Practitioners) – who have sought to engage with Government on possible reforms to leasehold legislation over the last five years or so. I have been proud to chair the working party on this. In the last year ALEP were able to persuade a number of MPs to sponsor a small but very effective Private Members' Bill, which has the effect of amending Section 99 of the 1993 Act, effectively removing the requirements for personal signature.

The person signing will still need to show that they are duly authorised, but the main practical benefit is likely to be that more people will be able to initiate or participate in claims,

particularly in circumstances where signature may be difficult (for instance where they are abroad, or not readily available and able to sign). This change will also make it easier to bring collective claims to purchase the freehold as the solicitor will be able to sign parts of the notice on behalf of the flat owners.

A number of the technical challenges to getting the notice right will still remain (meaning that expert assistance will very much still be required) – however, this amendment will speed up one element of the process and make claims easier in practice.

Mark Chick is a solicitor specialising in Landlord and Tenant matters.

INSIDE THIS ISSUE

Keeping up the Pressure

FPRA is not taking it lying down that leasehold property is being left out of the new national Flood Reinsurance (Flood Re) Scheme. Further to his letter to Anne McIntosh MP, Chairman of the Environment, Food and Rural Affairs Select Committee (reported in our last newsletter), Richard Williams, FPRA Vice-Chairman has now written separately, as follows, to Lord de Mauley, and Dan Rogerson MP, both Parliamentary Under Secretaries of State for the Department.

Dear Minister

Flood Re exclusion of leaseholders

We wanted to express disappointment at the Government's stance on the exclusion of leasehold buildings insurance from Flood Re and the way this is being portrayed by Government and the insurance industry in the media.

The FPRA represents over 500 Residents' Associations and resident owned freehold companies, including: Right To Manage Companies, Commonhold, and most other forms of Resident Groups. It is fair to say that our members, who are mainly homeowners, are not happy at being discriminated against by the Flood Re arrangements.

Our understanding of Flood Re is that it goes beyond the Statement of Principles in guaranteeing the affordability of flood cover, and not just its availability. That guarantee lasts for 25 years for people occupying houses.

For people occupying flats all they are being offered it seems to us is some vague assurance that if things get bad, as determined by some future Government and the insurance industry, they may or may not intervene.

Such a dichotomy of treatment, simply because some people own houses and others own flats, is difficult to understand and accept, particularly from political parties who like to portray themselves as the friends of homeowners.

We wanted to also comment on the recent statement the Government put out on its flood summit with the insurance industry, where it was stated that "freeholders are legally responsible for buying building insurance for their leaseholders."

Whether that was accidently or deliberately meant to mislead we don't know, but for the avoidance of doubt most of our members are running their own buildings – hard-working people who do it on a voluntary basis and who are not any different to the people who live in houses.

To underline this, Government figures show that leasehold property management arrangements broadly break down as follows:
33 per cent self-managed by lessees
14 per cent managed directly by landlord
14 per cent managed by landlord who appoints a managing agent
33 per cent managed by lessees who appoint a managing agent

The insurance industry as represented by the Association of British Insurers (ABI) who we know the Government has been working closely with over this Act have for many years failed to act over gross injustice in the way that leasehold blocks are treated. We have on many occasions written to the insurance regulators as well as the treasury and others and it would be extraordinary if this Government were on new legislation to introduce a new injustice for leaseholders.

Historically buildings insurance for leaseholders was arranged by big commercial freeholders and thus the insurance industry treated the arrangement of leasehold block insurance as commercial not residential.

Over the last few decades and as a result of Government legislation giving leaseholders the right to buy their freehold this has changed and the majority of blocks of flats insurance are now arranged by leaseholders or their representatives.

Because the insurance industry has not moved the classification from 'commercial' to 'residential' leaseholders are continuing in being discriminated against and indeed as a matter of routine overcharged.

This legislation is based upon the 'Pool Re' model where again, because of this dichotomy, the insurance industry makes massive charges for terrorism insurance to leaseholders which it does not make to similar sized other householders.

We hope Government will reconsider its position on leaseholders accessing Flood Re and give all homeowners the assurance they need and deserve.

Yours faithfully

Richard Williams, FPRA Vice-Chairman

DISASTER STRIKES BLOCK

A serious fire in a member block was reported in this newsletter (issue 99, Winter 2011) Now another block has now been struck by disaster, and again, unfortunately, affecting a purpose-built retirement block. This incident was less disastrous than the fire, but, none the less serious, for the residents.

This time, a water problem in the loft caused not only water damage, but also affected the block's electrics. The fire brigade was quickly on site. More than 30 residents had no water or electricity and therefore could not stay in their flats. The emergency services attended and the block's managers were able to act quickly to arrange a local hotel which, fortunately (as the incident occurred on a Friday night), had room to put up the majority of the residents for the weekend. The remaining residents were able to stay with family or friends. Luckily, plumbers and electricians were able to work over the weekend so that the residents were able to move back in on the Monday.

This again, shows the need for disaster planning, and full credit is due to the managers of the block, who were able to react so quickly to what otherwise would have been a more serious incident to many elderly residents.

For all running their blocks, here are some pointers:

- It is important to hold full contact details of all residents and, where possible, family members
- Make sure there is a clear disaster plan
- Make sure everyone knows what to do in the event of a fire
- Make certain that emergency contact details for insurers, agents, local authority and others are available and not just held within the flats.

Freeview and 4G at 800 MHz

Mobile phone operators are preparing to start rolling out 4G networks in Aylesbury, Bucks, and Uttlesford, Essex to provide super-fast wireless broadband in the coming weeks and months.

4G

at800 are now sending postcards to households and businesses in these areas telling them about the mast activation.

Viewers are being advised there is a small chance they may experience some disruption to television reception when masts go live. However, in those few cases, it can be resolved by fitting an individual or communal filter, which will be provided for free by at800.

If you operate or have properties in these areas and receive calls reporting problems with Freeview services, it may be due to mast activation, however do not assume this to be the case. Based on the experiences of mast activations in other locations, at800 are not expecting there to be any significant disruption to Freeview TV services.

If you believe 4G at 800 MHz may be the cause, ask the caller to report the problem to at800 on 0333 31 31 800 or 0808 13 13 800. They will be asked for the address and postcode of the property where a problem has been reported, the nature of the problem and the time it occurred. If you are responsible for solving a problem on behalf of a property owner, please call at800 directly. The appropriate filters for your properties are available to your aerial contractor for free, on request from our contact centre on 0333 31 31 800, as required. Please have their details to hand when you call.

Only new 4G services that will roll out at 800 MHz have the potential to cause problems to Freeview reception. at800 has advised that if the viewer has not been contacted directly through the post, or they watch cable or satellite TV, any interference to the Freeview service is unlikely to be due to the 4G masts being activated.

For more information, visit http://www.at800.tv

UPDATING

FPRA committee members and consultants are busy updating our publication: *A Guide to Running a Block of Leasehold Flats* so that it is bang up-to-date. We will let members know when the new version is available.

ASK THE FPRA

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

Section 20

Q **Our block has 18 residential properties in it and the residents' association is also close to the leaseholders of the commercial units as well. The property is currently in need of a lot of repairs but our managing agents are saying nothing can be done without going through the Section 20 process every time.**

We (the residents and commercial leaseholders) are all in agreement that the works need to be done quickly as they are creating more damage to all our properties. I currently have a roof leak that has been going on for months and which is now going through all my electrics, as do other properties. Other properties have water ingress through walls due to the pointing not being done and windows not being resealed in many years

We have voiced our concerns, including those of Health and Safety, to our managing agent (water leaking through live electrics etc) and we have been told we must still go through this Section 20 process. ALL leaseholders want to get these works done quickly and by our managing agent trickle feeding these Section 20 notices, we are all incurring additional costs for jobs that could be completed at the same time with the appropriate equipment – not erecting scaffolding around the building five times to do five different jobs but do them all at once.

If all the leaseholders are in agreement, is there any way to bypass these Section 20 notices that take months for any works to be able to carried out? Please could you let us know the legal viewpoint on this and where we stand.

A FPRA Hon Consultant Bernie Wales replies:

Obviously I don't know the precise circumstances, nor the managing agent involved, but there is always something which can be done.

Firstly check the lease to ascertain the legal set up. If this is a freehold/leasehold set up – with the managing agent working for the freeholder – then an application to the First-tier Tribunal (Property Chamber) might be appropriate in due course … regarding unreasonable service charges.

If, on the other hand, there is a Residents' Management Company, a Right To Manage company, or Right To Enfranchise company – with the managing agent working for that company; i.e. for the leaseholders – fire them!

In any event, you could apply to the First-tier Tribunal to shorten the Section 20 process, due to the urgent nature of the works. Section 20ZA refers.

Annoying though it may seem, if the leaseholders club together and carry out works themselves, they may be in breach of the terms of their leases – although I can see the desire to go down this route. Furthermore, such action might leave the leaseholders in a position where they could not pursue the freeholder under the terms of the leases, in respect of those works. Send through a copy lease if more specific advice is needed.

Supplementary Question, with lease attached:

Q **The setup is freeholder/leaseholder with the managing agent working for the freeholder, although the leaseholders combined are responsible for 99.6 per cent of the costs to the building and works. How long would a First-tier Tribunal take to give an answer?**

A Looking at Google Streetview it appears the property is on ground/first/second/third floors. Most roof works should therefore be easily accessible via long ladder and/or cherry picker – certainly for quick remedial works, to patch up problems whilst a longer term solution is priced and consulted upon. The managing agent therefore has no excuse for not doing something (immediate and practical) about the problems.

It might be worth writing to the freeholder, with a copy to the managing agent, pointing out that they are in breach of the terms of the lease – and as such, individual leaseholders may well have a valid claim for damages due to consequential losses.

In particular the following clauses seem relevant:

> 4.1 Quiet Enjoyment …water coming through the roof and causing damage, is not quiet enjoyment
>
> 5.1.2 Insurance/repair…the landlord should mitigate any insured losses by taking appropriate action; e.g. urgent temporary repairs
>
> PART II: THE BUILDING SERVICES…the freeholder is self-evidently failing to provide (some of) the services listed

Bear in mind too:

> 5.2.1 Leaseholders should write to the freeholder (and agent) to formally put them on notice that damage has occurred – and the insurers should be advised

How long will the First-tier Tribunal take to hear the matter? That will vary from time to time – and Tribunal to Tribunal. As you're in London you should contact the London Tribunal offices to enquire 020 7446 7700 rplondon@hmcts.gsi.gov.uk I think you'll find they'll hear your case within a couple of weeks of your Section 20ZA application.

Whilst writing, I note your leases are for a term of 999 years from December 2005…with a ground rent of £250.00pa. Have you thought about buying the freehold, using Right to Enfranchise legislation? With around 990 years unexpired, the cost per person would be relatively affordable. You would then be able to control your own destiny.

Whole or Part?

Q **Is it a legal requirement for a management company to carry out an Electrical Installation Condition Report every five years? If so, does this have to be done on THE WHOLE PROPERTY (ie all flats etc) or just THE COMMON AREAS?**

A FPRA Chairman Bob Smytherman replies:

The simple answer is yes and would apply to the common

parts only and therefore would not normally be too onerous. This is also available on the members area of the FPRA website.

New Constitution

Q **I am secretary to our residents' association. The retirement village has 151 properties, cottages and apartments with 220 members when fully occupied. The association has grown rapidly and in late 2012 adopted a new more democratic constitution. We now recognise that we need to organise ourselves more efficiently. We believe we ought to have formal job descriptions for the three officers and committee members and formal terms of reference for the main committee and any sub-committees. Can you provide any templates for any of these please?**

It feels as if we are going back to work but we believe that we now need to formalise what to date, has been acceptable not to codify.

A FPRA Hon Consultant Shula Rich replies:

If you don't mind my saying so, really well done for having so many members and such interest, and for the co-operative and democratic "feel" that you have given the constitution and membership rules.

You may know that for a recognised residents' association, there is a standard constitution which has been drafted by Government and is available from the FTT (which used to be the Leasehold Valuation Tribunal) and also, guidance notes from FPRA.

If you were denied recognition by the freeholder and had to apply to a Tribunal, you might have to adopt the standard constitution to ensure recognition. However, as far as I can see you are recognised, so there is no problem. If I'm wrong and you are not recognised, and the freeholder denies recognition, then please come back to us for further discussion and advice.

For a legally recognised residents' association, under the Government constitution you:

a) may not have tenants as members, ONLY the leaseholder.

b) each flat has one vote, no matter how many members that flat has.

c) the member first on the list represents and votes for the flat

d) there is no such thing as an associate member. You may create these, but they should also have no right of admission to any meetings

e) you must never allow the freeholder or agent any voting or attendance rights – although of course you may invite them, as you may also invite and welcome tenants to your meetings.

f) please think carefully about accepting funds from the freeholder

g) audit is not needed and can be very expensive – even "small companies" are not obliged to have it.

h) consider decision minutes only – minutes can get very involved and sometimes encourage inertia. Think about doing just short decision minutes only with action points highlighted

You can of course run the association in any way you wish, offering membership and accepting funds from whoever you wish, but to be a legally recognised residents' association the above points a to f will apply.

You have taken an enormous amount of care and trouble with the constitution, but if there is an issue with the freeholder, you may care to look at the national and FPRA version with a view to adopting it in case you need to apply to a tribunal at any time for recognition – which freeholders are able to withdraw if they wish.

Babysitting Dogs

Q **Our management has recently had two requests from recent resident newcomers to "baby sit" small dogs on our premises.**

Our lease states: "Any resident is not allowed to keep in their flat any animal without first obtaining the written consent of the landlord, which will only be granted in respect of a reasonably sized domestic pet and will subsequently be withdrawn if the animal causes a nuisance or annoyance to other occupiers of the building or fouls any part of the estate and the decision of the landlord as to whether or not the animal is causing nuisance or annoyance is final".

We, the management, have ruled against such requests, primarily on the grounds that it might open the floodgates for all residents to both "baby sit" or in fact own pets. Also where does one differentiate between a small and big pet. Our records show that no pets have been allowed since the block was built in 1984.

We recently circulated a questionnaire to all 24 resident owners, which resulted in a 20/3 decision in favour of our decision (one apartment is up for sale and we had no reply).

We respectively ask whether or not we are correct in making this decision?

A FPRA Hon Consultant Colin Cohen replies:

The question that is raised here is not really a matter for FPRA to agree if they are right or wrong. A decision has been made by a majority of owners and therefore a set of rules of conduct could be drawn up by the freehold company clearly stating that no pets or particularly dogs are allowed in the premises so as to clarify any vagueness stated in the lease. This should be formalised by a resolution at the next AGM of the company and then given out to all owners to ensure that they abide by this.

Delaying Tactics

Q **We are a block of 35 flats. In October 2011 we were told by the managing agents that they proposed to increase service charges by approximately 20 per cent to cover urgent repairs that needed to be carried out to both our lifts. The cost was estimated to be in the region of £20,000. The residents objected at the time and said that they would prefer to make provision individually to cover the cost, as has been done in the past. The managing agents insisted that they were within their rights to ask for this extra amount.**

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Ask the FPRA continued from page four

Two years have now passed and we have recently received a Section 20 notice specifying lift work that, on the face of it, looks like routine maintenance. We have asked the managing agents how much extra service charges have been collected but as yet, they have not given us a figure. We estimate that the amount must now be in excess of the original £20,000 quoted. The most recent service charge demand still includes the extra amount and we are concerned that the managing agents have been, and are still, using delaying tactics as an excuse to keep collecting the increased service charges.

Are the managing agents within their rights? Should this extra amount they are collecting be kept separate from our service charges in a sinking fund? Should we be getting interest on the amount held?

A FPRA Hon Consultant Roger Hardwick replies:

Firstly, your member should consider whether the amount that is being requested is strictly recoverable under the terms of their lease; and whether the manner or mechanism for recovery in the lease is being followed. Often, landlords and agents will try to recover "one off" charges to cover anticipated major works, when the lease does not allow them to do anything of the sort (see *Southwark L.B. v Woelke*). Without sight of the lease (or the demands for payment), I cannot comment any further on contractual recoverability.

Most modern leases work in the following way:

1. The landlord or RMC produces a budget/estimate, and requests an amount "on account" of anticipated expenditure throughout the course of the year. Those "on account" payments might be payable monthly, quarterly, bi-yearly or even yearly. The lease will specify the correct payment dates.
2. At some point after the financial year end (which should also be specified in the lease) the landlord or RMC will be required to produce end of year service charge accounts (usually within a reasonable period of time), showing actual expenditure incurred by the landlord or RMC during that year.
3. The lessee will then either make a balancing payment (if actual expenditure exceeds anticipated expenditure), or a credit will be applied to his/her/their account (if on account payments exceed actual expenditure).
4. Often, the lease will allow the landlord or RMC to set aside money for future expenditure (often major works, which are carried out every 5 or 10 years). This is known as a reserve or sink fund.

Leaseholders have the right to challenge the reasonableness of budgets or anticipated costs as much as they have the right to challenge the reasonableness of costs that have actually been incurred (s.19(2), Landlord & Tenant Act 1985).

If the lift repairs were urgent, I would have expected those repairs to have been carried out. If they were not carried out, why not, and what happened to the money that has been collected for those repairs? Was it reasonable to ask for those monies on account? Were they really intended for lift repairs; and if so, does the agent have expert evidence to back that up? Do they have a planned preventative maintenance programme?

Whether or not the reserve fund should be kept separate will depend on the terms of the lease. All service charge monies are held on trust by virtue of s.42 of the Landlord & Tenant Act 1987, and it is considered best practice under the RICS Service Charge Residential Management Code (2nd edition) to keep service charge monies separate, but the requirement to keep funds in a separate designated account (s.42A, 1987 Act) is not yet in force.

It is usually the case that the lease will specify what the reserve fund may be used for. Any unauthorised use (e.g. meeting a temporary shortfall in funds, or covering a shortfall due to unpaid arrears) would be likely to amount to a breach of trust.

Although s.42 (pending implementation of s.42A) does not provide expressly that service charge monies be invested, as a matter of the general law of trusts a trustee ought to invest the sums.

Furthermore, s.42(5) provides for such sums to be invested in any manner prescribed by regulations made by the Secretary of State. The only regulations made pursuant to that sub-section to date are the Service Charge Contributions (Authorised Investments) Order 1988, which provides that such sums may be:

a) Deposited at interest with the Bank of England or

b) Deposited in the UK at interest with various other persons and institutions.

From a practical point of view, it is worth considering Part 4 of the RICS Service Charge Residential Management Code (second edition) which gives useful guidance for landlords and managing agents in respect of how to account when holding tenants' money.

Holiday Chalets

Q **I am chairman of the residents' association. We are owners of holiday chalets – these are detached brick built properties on a holiday park – occupancy is eight months and they are now classed as "dwellings". The leases have some 54-57 years left and ground rent is £25 pa. There are 44 chalets on site, four are owned by the freeholder and our members account for 38 chalets.**

Do we have the right to purchase the lease? The current value is approximately £90,000 – is it possible very broadly to estimate a purchase price of each lease? Would there be right of access problems should we buy our leases? Who would be responsible for the upkeep of communal areas? What serious pitfalls would you envisage?

A FPRA Hon Consultant Andrew Pridell replies:

Any acquisition of the freeholds would come under the provisions of the 1967 Leasehold Reform Act. To acquire the freehold of a dwelling it has to be a "house" and surprisingly there have been a large number of cases including some which have gone all the way up to the High Court to decide what is a house. These have been concerned mainly with mixed use

buildings, eg a shop with flat over etc, or where the use has been changed over the years.

There has always been a problem with your type of structure. Is a chalet, where there is a limited occupancy planning condition, a house? Certainly a mobile home or caravan is not a house. My first reaction is that it is not because you cannot live there permanently and I think this would fly in the face of the building being a "house".

The structure must be "designed or adapted for living in". Whilst there is no reason to query the fact that you can live in the chalets, you cannot live there permanently and I feel this takes them out of the provisions.

Hope this helps for the moment although it is probably not what you want to hear!

Seaside Non-Payers

Q **We are a brick built apartment block of 27 units right on the sea front. The block was constructed in 1979 by a "spec developer" who did not use first class materials in every situation and as a result we suffer greatly from deteriorating brickwork and pointing.**

In the past, the residents' management company has spent considerable sums in patch repair work, chopping out and replacing spalled bricks and repointing areas worst affected. As a result we have a patchwork and the realisation that we will be doing this work ad infinitum.

Two years ago the directors put forward a plan to render the elevations worst affected with a silicone-based render. Although the cost is high (£125,000, which includes some other work as well as the rendering) this was put forward as a long term solution to the continual repair work carried out previously. After some further investigations requested by shareholders at the 2012 AGM, a vote was carried at the 2013 AGM to proceed with the work.

Part of the cost of the work is to be funded by raising a levy of £1,500 per shareholder/owner. This was part of the motion carried at the 2013 AGM. A Section 20 notice was served on all owners/shareholders last year and the request for payment of the levy sent out later in the year with payment required by December 31 last year. After some reminders early this year 24 of the 27 shareholders have paid their levy and three have failed to pay.

Directors believe it is clear in the lease that shareholders are required to fund 1/27 of the cost of this work. We believe it is also clear that the demise of the leaseholders only extends to the internal surfaces of their apartments and that, therefore, the freeholder cannot be prevented from carrying out such work since the structural brickwork is within its demise.

Would you please give us your view on:

The refusal by three shareholders to pay their levy;

The view held by one shareholder that he does not want "his" brickwork rendered;

What remedies there may be to persuade the three non-payers to pay their levies.

A FPRA Hon Consultant Martin Pridell replies:

When the lessees between them acquire the freehold of their block, it is important to remember that the legal relationships remain the same. There is still a party which is lessor, which is a company, the shareholders of which are the lessees. Decisions of the lessor company are made by its directors. To avoid problems, some decisions can be ratified by the shareholders. Some time ago, I prepared a chart which set out these relationships and this was published in the FPRA newsletter. I am sure that the office would send you a copy if asked.

In respect of your three questions;

1. Your lease puts a clear liability on each lessee to pay 1/27th of the lessor's costs.

2. The area of the demise of each flat is limited to the area "coloured pink". Plaster on interior walls is included, so I have very little doubt that the outer walls are excluded. The glass is included, but that can be differentiated.

3. Enforcing the lessees' duty to pay is not always easy. The ultimate sanction is the forfeiture of the lease, but the courts will always be reluctant to take such a step. You can threaten an action in the court. The lessee might be reluctant to have this on his credit rating. Alternatively, the lessee might take legal advice and, if you don't go ahead, you might have to pay his costs. It is worth consulting CAB locally about the possibilities.

Which Number?

Q **If there are 46 dwellings on the park, of which 42 are privately owned and four are owned by the site owner, does the overall expense for the park have to be divided by 46 or (as our landlord does) by 42?**

A FPRA Hon Consultant Andrew Pridell replies:

It should DEFINITELY be divided by 46!

Valuable Wine in Common Parts

Q **I am the Chairman of my association and live in a building of five apartments on three floors. On each floor there is a services cupboard (about 2 square metres) containing water pipes and telephone and video entry cables leading between floors. These cupboards have been unused for 15 years since the building was constructed. Each cupboard door is secured by a simple bolt lock at the top and bottom.**

A recently arrived new resident has asked me if he can use the cupboard on his floor for the storage of cases of valuable red wine probably amounting to a value of several thousand pounds. He maintains that the temperature in the unheated cupboard is more suitable to long term wine storage than his centrally heated flat, which I suppose is true. He also wants to fit a five-lever secure lock to the cupboard door.

I consider it inappropriate that a resident should use a cupboard situated in the common parts of the building to store his valuable private assets. For one thing, our building insurance contents does not cover such items.

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Ask the FPRA continued from page six

Can you advise me if there is any regulation of any kind that forbids the storage of private items of a resident in such a cupboard in a shared occupancy building? Or is it generally permitted for service cupboards to be used for such purposes if the majority of residents agree?

A FPRA Hon Consultant Colin Cohen replies:

There are two aspects here which come to mind, one is that, although I have not seen a copy of a lease for this property, I would suspect that the cupboard outside the flat is more than likely to be a communal area and not demised to any individual property, hence it is not for the leaseholder to use solely to store their personal possessions/contents as it is not reasonable to other leaseholders.

Secondly, more importantly, it would be against health and safety legislation to store any items in the cupboards which houses any power, water supply or any other services.

Late Payer

Q **We have one persistent late payer of their service charge. We are now mid-March and yet the December 2013 payment is outstanding. This has gone on for years, and despite reminder and reminder, and a five per cent interest levied, they will not pay. One of the problems is that the flat is unoccupied but the owners live elsewhere. So we feel enough is enough and would want to institute County Court procedure. As the amount owed is under £400, could we claim using the Money Claim Online process? As it is a fixed amount, would we be able to opt for this route? We assume the owner is paying their council tax, which is absolute as is the service charge.**

A FPRA replies:

There is always one bad payer in every block! May I suggest that to implement a County Court order will take time, and for the amount involved it might not be worth it right now, but wait until the debt gets bigger. Alternatively one may think about going via the Small Claims Court. However, since the debt is barely three months old, the court may not take too kindly to this strong action so soon. Hence I would recommend perhaps thinking about employing a debt collector service. We use one which is very effective, although they do charge initially £150, which they pass on to the debtor. They will take on the case and, if necessary, recommend the next step of going to court for a judgement order, which, upon receiving, they then can pursue any mortgage lender, who would usually pay up to protect their interest.

The letters above are edited.
The FPRA only advises member associations – we cannot and do not act for them. Opinions and statements offered orally and in writing are given free of charge and in good faith, and as such are offered without legal responsibility on the part of either the maker or of FPRA Ltd.

Legal Jottings

Compiled by Philippa Turner

EWCA	England & Wales Court of Appeal
EW HC	England & Wales High Court
UKUT	UK Upper Tribunal
UT	Upper Tribunal
LVT	Leasehold Valuation Tribunal (now called First Tier Tribunal FTT)

Landlord & Tenant Act 1985

In *Morshead v Di Marco (2014 EWCA Civ 96)* the landlord was successful on appeal from the decision reported in Newsletter 106; although Sections 21 and 22 of the Act provided a criminal sanction for failure to provide a written summary of the accounts and facilities for inspection, it did not allow a civil remedy of an injunction and/or damages. NB a new Section 21A allowing a leaseholder to withhold service charges if there was non-compliance is not yet in force.

The freehold in *Conway v The Jam Factory (2013 UKUT 592)* was owned by 50 per cent of the leaseholders; however, this did not prevent some of the other leaseholders being sufficiently dissatisfied to challenge the decision to reappoint the former managing agents by way of an application under the 1987 Landlord & Tenant Act for the appointment of a manager. Their claim failed and the LVT ordered that the costs incurred by the freeholder in defending the application could be added to the service charge accounts. On appeal, the UT upheld this decision: such costs falling within the term in the lease setting out items which could be included in the service charge as being those costs incurred "in connection with the general overall management administration and supervision of the building". In the same case, the LVT had made an order under Section 20C of the Act, preventing the freeholder from adding these particular costs to the service charge and this decision was also the subject of an appeal to the UT. It was partially successful in that it ordered that only 10 per cent of the costs should be deducted and only from the service charge demands of the individuals who were parties to the action (and not from those of the non-participators). Whilst there were, in this case, grounds for invoking and applying Section 20C, the decision was reached in recognition of the freehold being leaseholder owned and thus having no other assets than those necessary for running the development; it would not be just and equitable to deprive the owners of the means of recovering expenditure incurred in the course of management.

! Legal Point

Section 20C of the Act, as added by the Landlord & Tenant Act 1987 and amended by the Housing Act 1996 Section 83(4) provides that application may be made by a leaseholder for an order that all or any of the costs incurred by the landlord in connection with proceedings before a court or tribunal are not relevant costs when determining the amount of the service charge. On such an application, the court or tribunal may make such order as it considers to be just and equitable.

Re SCMLLA (Freehold)'s Appeal (2014 UKUT 58) was also a case concerning Section 20C and also where the freehold of the building was owned by the leaseholders. There was a successful appeal against the LVT order that costs should not be charged to any of the leaseholders through the service charge. It was considered by the UT that only one leaseholder had applied and had not sought an order in such wide terms as to benefit all the other leaseholders. The UT did however give leave to the leaseholder to return to the LVT for full consideration of the point and to allow other leaseholders also to make an application should they wish to do so.

Prior to the decision of the Supreme Court in *Daejan v Benson* (see Newsletter 105), the LVT had, in deciding *Re OM Properties(2014 UKUT 9)* refused the landlord dispensation from the consultation provisions contained in Section 20, thus allowing recovery of only £250 from each leaseholder which was only a small proportion of the total cost of the works: there had been a failure (i) to release copies of all four estimates for the cost of the work, but only the two lowest and (ii) to summarise and distribute the leaseholders' observations who had responded to the original consultation. However, in reliance on *Daejan*, the landlord appealed and the UT took the view that the focus should be on whether the leaseholders were prejudiced by the landlord's breach, the burden of proof being on the leaseholders. Furthermore, even if dispensation were granted, it could be conditional and not absolute. It was concluded that (i) there was no evidence that lack of the two highest estimates had caused the leaseholders paying for inappropriate work or paying more than necessary; (ii) it was not a relevant consideration that leaseholders should not be made aware of others' response to the consultation on the basis that it would have allegedly promoted confidence and (iii) dispensation was granted so that £200,590 plus VAT would be recoverable (as opposed to £42,500 ie £250 per leaseholder) conditional on paying the leaseholders' costs in the LVT (they were not represented before the UT) and not adding its own legal costs to the service charge.

Right to Manage (RTM)

The property in *90 Bloomfield Road RTM v Triplerose (2013 UKUT 606)* was the subject of an application by its leaseholders for the right to manage and consisted of two separate buildings in the same ownership and under the same management regime. The UT held (i) that Section 72(1) of the Commonhold & Leasehold Reform Act 2002 did not preclude an RTM Company applying in respect of more than one self-contained building: the Section merely defined the type of building which would qualify; (ii) it was not necessary to serve separate notices for each building as long as it was sufficiently clear that the conditions of the Section had been complied with and (iii) the number of qualifying leaseholders needed to be calculated for each building separately.

On the other hand in *Albion Residential v Albion Riverside RTM (2014 UKUT 6)* the UT held, in allowing an appeal from the LVT, that the application by the leaseholders for the RTM should be refused. The development consisted of nine floors over a basement car park which extended under other buildings and under a piazza which was integral with both the flats and the other buildings. Under Section 72(1) of the 2002 Act, the right could be exercised by residents of "a self-contained building or part of a building with or without appurtenant property" and not structurally detached; in this case it was, on the physical facts, structurally part of the wider development and thus did not come within the Section.

The leaseholders in *Assethold v 7 Sunny Gardens Road RTM (2013 UKUT 509)* were also unsuccessful in their application for a RTM through sheer bad luck. The building contained only three flats and all the leaseholders formed a RTM company and were registered as directors and members but, before the formation was completed, one leaseholder died and therefore ceased to be a leaseholder. The remaining two were not entitled to acquire the RTM.

Leasehold Reform Housing & Urban Development Act 1993

Although the property in *Houser v Howard de Walden Estates (2013 UKUT 597)* looked like a house, it did not qualify for enfranchisement under the Leasehold Reform Act 1967, one part of it being overhung by another building to which it was structurally attached. The leaseholder therefore sought to purchase an extended lease under the 1993 Act. The landlord's valuation was 99 per cent of the freehold value of such a house but the leaseholder was unsuccessful in arguing that, because only a 138 year lease extension was being granted, the correct figure should be no more than 95 per cent. The UT ruled in favour of 99 per cent, bearing in mind that such properties were scarce in such a prestigious area, thus inflating its leasehold value over and above what might be obtainable elsewhere.

Lease Interpretation

The service charge dispute in *Pas Property Services v Hayes (2014 UKUT 26)* arose in respect of a building which consisted of four flats, two of which were converted from an existing building and two were in a purpose-built new building. There was a communal heating system only for the two new flats and the common parts. The landlord sought a contribution towards the cost of heating gas from all four leaseholders. The lease was silent on who should pay although there was a "sweeper" clause designed to cover all possible items not expressly mentioned elsewhere in the service charge provisions. The UT held the sweeper clause was, without express words, insufficient to cover charges for heating of individual flats but would cover the common parts. However, the clause in the leases of all the flats required the leaseholders to "pay and discharge the cost of all water electricity gas and telephone . . . used or consumed" in the flat, did enable the landlord to recover from each individual leaseholder the cost of gas, even though not included in the service charge accounts; it followed that only those in the new flats would pay because only those were connected to the system. The reasonable apportionment would need to be assessed by the landlord's surveyor.

Each of the twelve 999-year flat leases in *H. Waites v Hambledon Court & others (2014 EWHC 651 (Ch)* included garages in a separate block. The freeholder purported to grant a lease of the airspace over the garages to a developer who planned to erect flats over the garages and to support the structure on steel columns on their own foundations. It was held in the High Court that the demise of the garages to the leaseholders included the roof. Such a demise was akin to the grant of a freehold and accordingly was deemed to include the airspace above and the soil below.

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BLOWING OUR OWN TRUMPET

Thank you to the members who wrote these comments, when sending in their blocks' subscriptions:

> *May I say that having read the FPRA newsletter avidly since becoming a member, I unreservedly congratulate and thank all concerned with the publication.*

> *May I say that we find your newsletters quite invaluable. Thank you.*

> *We are following your excellent step-by-step advice from the Information Pack (as well as by phone and email) and have held our IGM, now collecting subscriptions and authority forms, about to seek formal recognition from our landlord and managing agent. Many thanks to you and all your advisers and volunteers. With your support we look forward to 2014-15 with renewed vigour!*

And another member writes:

> *Thanks again for your help. Thanks to the Newsletter we have recently had the VAT on our common ways electricity reduced from 20 per cent to five per cent! By the way, others might want to know that a year ago we had motion-activated switches installed for the lighting in the hallways etc, instead of being on timer switches. It cost about £2,500, but we saved that amount in the first year, halving our electricity costs. We are now investigating LED lights which use far less energy.*

To any members who have not sent in this year's subscription (due April), please could we politely remind you to renew as soon as possible. As you know, we are a not-for-profit organisation largely run by volunteers and we rely on the subs to continue.

YOUR VIEWS COUNT

Property Management Enquiry

The Competition & Markets Authority (formerly the Office of Fair Trading) are in the process of conducting a market study into residential property management services. The CMA is interested in a roundtable discussion with FPRA members who would like to share their views about property management. If you would be interested in participating in the round table, please can you contact the FPRA admin office by email: info@fpra.org.uk with your contact details. The roundtable will be limited in number, so a selection may be made from responses received.

If you are unable to participate in the roundtable, but would like your views to be noted we encourage you to visit the CMA website and respond directly to them. The web address is: www.oft.gov.uk/OFTwork/markets-work/residential-property-management/#.Uz5_fVGwLaE

NEW HON. CONSULTANT

Jo-Anne Haulkman

Jo-Anne trained as a Chartered Accountant with Grant Thornton's Brighton and Petersfield offices. A year after she qualified, Jo-Anne decided to develop her career closer to home and joined Spofforths LLP. Jo-Anne says this felt like 'coming home' in more ways than one, as she gained work experience with Spofforths when she was a teenager.

Jo-Anne has a diverse client base – many of which operate in regulated sectors so this calls on her specialist expertise. As well as being a registered statutory company auditor, Jo-Anne looks after many occupational pension schemes and legal firms, including carrying out their Solicitors Regulation Authority client money inspections. Jo-Anne is a member of the firm's technical quality assurance team and likes to keep ahead of the changes in the accounting industry.

A naturally creative person, Jo-Anne's main hobby is lampworking and glass work.

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