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NEWS

FPRA
FEDERATION OF PRIVATE RESIDENTS' ASSOCIATIONS

GLIMMER OF HOPE?

By the Editor

"There is a widespread problem that needs to be addressed," the new(ish) Minister for Housing and Planning Gavin Barwell said in an encouraging speech at the end of a recent Commons debate on leasehold.

"I most certainly do not feel comfortable with the level of concern right across the country," he said. "Indeed I am very keen to explore how we can promote greater transparency and fairness, and to work with all interested parties to improve leaseholders' experience of home ownership."

Answering MPs in a debate on December 20, Mr Barwell said the Government was working closely with the Law Commission on the issue of leasehold and would use examples raised by the MPs.

"Several members have pressed strongly for commonhold and continue to do so, arguing that it is a better alternative to leasehold arrangements. Commonhold is one way forward in considering improvements for leaseholders, but we also need to look at what we can do to change the existing system. There have been calls for responsibility for commonhold to be transferred from the Ministry of Justice to my department. That would require a machinery of government change, and it has been agreed with ministers that we will have a look at that in the new year.

"Leasehold legislation has been amended on many occasions over the past 50 years to improve leaseholder rights, including the right to extend their lease, appoint a new manager, challenge unreasonable service charges and purchase the freehold. All of that legislation has helped, but it clearly has not solved the problem, which is probably a lesson for all of us. Why has it not solved the problem? I think that we can point to two clear things. First, the legislation is seen by many as complex, and that can cause problems for leaseholders and freeholders alike. Secondly, the 2016 national leasehold survey showed that 57 per cent of leaseholders either somewhat or strongly agree with the statement: 'I regret buying a leasehold property'. That is a pretty sobering statistic."

The Housing and Planning Act of 2016 would make a big difference to residents' associations which were finding it difficult to obtain the number of members needed to help them to apply for statutory recognition and the additional rights that that brings, he said. It will do so by requiring a landlord to supply to the secretary of a residents' association information that would allow contact to be made with absent leaseholders for the purposes of increasing the association's membership and therefore its likelihood of achieving recognition.

The Act would also restrict abuses relating to the landlord's recovery of litigation costs from leaseholders as administrative charges. At present, where a lease allows a landlord to recover the costs of legal proceedings through the service charge, a court or tribunal can decide to restrict the amount that can be recovered in that way. Courts or tribunals do not have similar

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powers where recovery of the costs of proceedings as an administration charge is permitted by the lease, Mr Barwell said.

"That can lead to unfairness, because the leaseholder will have no choice but to pay the costs of proceedings as an administration charge, regardless of the proceedings. That discourages leaseholders from exercising their rights to challenge the amount of a service charge, particularly as the landlord's costs in the proceedings could well exceed the amount that is being disputed. The commencement planned early in the new year of section 131 of the Housing and Planning Act will enable the tribunal or court to consider, on application by the leaseholder, whether it is reasonable for a landlord to recover all or part of those costs.


Gavin Barwell

"The complicated nature of leasehold can make it challenging for people to ensure that they follow the correct legal procedures. To help leaseholders to navigate through the system, the Government provides access to free, independent legal advice and information through the leasehold advisory service, or LEASE, as it is known.

I want to reassure the House that the Government remain committed to ensuring leaseholders have the best professional advice available to them. Given its increasingly important role, I want to make sure that LEASE is properly equipped to offer help to everybody who needs it. We will look again at how it works, its funding model and its membership."

MPs URGE THE GOVERNMENT FOR ACTION ON LEASEHOLD

The debate came about after a bid from the All-Party Parliamentary Group on Leasehold Reform (APPG). Many FPRA members have urged their MPs to join the group, and membership is flourishing. Introducing the debate, Jim Fitzpatrick (Poplar and Limehouse, Labour) said key issues were the length of leases, service charges, insurance fees, refurbishment costs, recognition rights, ground rents and dispute resolution procedures

He said: "The aims of the all-party group are relatively simple: to reduce the opportunities for exploitation; to alleviate the distress and hardship of leaseholders, particularly the elderly; to do away with the high costs of the property tribunal; to examine incidences of lease forfeiture; to examine the value of retirement leasehold properties; to unearth and publicise scandalous behaviour of professionals involved in the leasehold sector; to examine insurance commissions and matters where leaseholders pay but are not party to the contract; and to ensure that the right-to-manage legislation acts as intended."

Sir Peter Bottomley (Worthing West, Conservative) highlighted the sale of new-build houses on a leasehold basis, and the doubling of ground rent every 10 years. He said: "Leasehold is the only part of the housing market where an unregulated person can hold huge amounts of leaseholder funds and yet has no obligation to act in the leaseholder's interests. When the freeholder appoints a managing agent, who does the managing agent work for? It is the freeholder. I ask ministers, please, to establish a legal position so that the leaseholder has an interest in everything that happens either with their money or in the block where they own the lease."

Oliver Colvile (Plymouth, Sutton and Devonport, Conservative) said: "I would like to see a more flexible, more transparent and less complicated system for RTM, insurance issues and service charges for leasehold properties. The current system has been picked apart by lawyers, and the original Act is not fit for purpose. I urge the Government to relook at leasehold and commonhold reform and to sit up and realise that possibly millions of people across the country face very real blockades, when all they want to do is manage their own property – a right this Parliament gave them almost 15 years ago."

Highlighting the plight of blocks containing mainly elderly and retired residents, he said: "It seems almost unfathomable that we expect pensioners to cope with some of our most complex legislation. If we in Parliament do not understand the process, and officials do not understand the process, why on earth should we expect these elderly consumers to? We owe it to future leaseholders to ensure that they are not swindled out of hundreds of thousands of pounds by greedy landlords and cowboy insurance companies."

Ruth Cadbury (Brentford and Isleworth, Labour) said: "We have seen many complicated hurdles put in the way of leaseholders exercising their right to manage or the right to enfranchise. Dispute resolution procedures are complicated and costly. Lessees are having to pay the landlord's legal costs. Resale charges are up to 20 per cent, which then suppresses resale values. I ought to declare an interest in that this happens particularly in the retirement sector, and my mother has just bought a flat in a retirement community. There are the questionable tie-ups between freeholders and managing agents, and the solicitors they recommend. There is the scandal of lease forfeiture. New homes on their own plots are being sold by volume housebuilders on 999-year leases when they could be freeholdings. Despite advice given to many first-time buyers in these instances, I must say that no, 999-year leases and freeholds are not one and the same thing.

"A Labour Government would give leaseholders security against rip-off ground rents and end the routine use of leasehold ownership in new developments. Will this Government do that? Labour will cap ground rent charges and set out a plan to end their routine use. We need a clear commitment from the Government. We all owe that to the millions of leaseholders in this country, for now and for the future."

(Other MPs spoke in the debate. You can find a complete report of proceedings on the Hansard website (hansard.parliament.uk).

The FPRA are most grateful for the campaigning efforts of our Hon Consultant Martin Boyd from LKP (Leasehold Knowledge Partnership) in raising the profile of these issues which we have campaigned on for many years.

"A Member Writes"

We continue our series in which members write in with their experiences of leasehold life. Here are stories from two more blocks.

Thank you very much to everyone who has written in so far. If you haven't seen your article printed yet, it will soon be appearing in the forthcoming newsletters!

More articles are very welcome. Please take the time to write to us. Your experience is invaluable to others.

USEFUL EXPERIENCE OVER MANY YEARS

I have been the secretary to a management company (limited by guarantee) for 16 years. There are 12 flats, seven of which are sublet, so we only have five resident company members. The management company owns the freehold.

Our remit is based on the articles and memorandum of association, and the head lease which has particular rules for each flat. The day-to-day administration is in the hands of three directors, one of which serves as secretary.

The service charge is collected from each owner by standing order directly to the bank on the first day of each month, which makes it easy to check, so that arrears do not become a problem. We do have a detailed five-year cash flow forecast from which each member can see exactly where the money comes from and how it is planned to be used over that period.

We have produced a document entitled *How the Management Company Works*. Each member receives a copy which sets out what the service charge is used for and what the directors are able to do to ensure the value of the flats is maintained.

We also provide sublet tenants with a *Welcome Pack* which outlines similar facts to *How the Management Company Works*, but leaving out some of the information that only applies to members. As tenants change quite frequently, and always cause some damage to the paintwork on the communal stairs, we are now making a charge to the owner of £40 each time the tenancy changes.

Although it is not now a legal requirement, we still have an AGM, and provide members with a proposed agenda. This gives everyone an opportunity to "have their say" although of late most AGMs have been attended only by the directors. We think of this as a sort of vote of confidence that members are happy with the way things are being run. We have now opted for paperless communication with our members, so minutes and notices etc are all done by email.

We used to have a branch of our bank in the town but sadly they have closed, so we have opted for internet banking, which is working well, as all our bills are now paid online, and we can check statements as and when required. We do maintain a credit balance so do not have to pay any bank charges.

The accounts are subject to self audit to avoid accountants' fees. As secretary I prepare revenue accounts each year supported by all the invoices and these are audited by one of the directors. When satisfied, we do have a balance sheet, and annual report prepared by a professional which are then submitted to Companies House.

As secretary, I am required to respond to leasehold enquiries from conveyancing solicitors. This is about 40 questions, and each time new questions arise, the latest is, can we confirm that there is no Japanese Knotweed on the site! We try to deal with these questions by return, so that we cannot be accused of causing any delay. We make a charge for this service which at present is £150, including any supplementary questions.

Five years ago we took a big gamble, with everyone's approval, to invest a lot of our reserve funds – which was earning almost zero at the bank – in 12 Solar Panels fitted to the roof of our south-facing building. This has proved to be a good investment yielding 10 per cent return on the capital, as almost all the power produced is sold back to the National Grid and benefits each member by not increasing the service charge during the 10 year "pay back" period.

We are required, by the lease, to repaint the outside woodwork every four years. The building is now 22 years old, so some of the windows have been replaced by UPVC, the cost of which is the responsibility of each owner. We have a system so that each owner with UPVC gets a refund every four year with a percentage of the repainting cost.

The buildings insurance comes up for renewal each year. This is a very competitive business, so we always get three quotes, and switch brokers quite frequently.

We did prepare our own Fire Risk Assessment with the help of a local fire officer who was a member at the time. This has never been questioned by conveyancing solicitors. We did have to have an asbestos survey carried out by a professional body, although we knew there was no asbestos likely to be found, and that proved to be the case. We now tell solicitors that, and say that if they wish to see the full 10-page report there will be a charge of £10. Suffice it to say, no one has asked for a copy!

The maintenance of the freehold and communal stairwells is all detailed in a "job description" as we have all the equipment required. We use local people on an ad hoc basis and pay in excess of the minimum wage to keep the grass cut, the shrubs at a manageable level, and the car park and the recycling area clean and tidy, all of which adds to what the estate agents call kerb appeal.

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GRASPING THE NETTLE a member takes the initiative, with great results

Prior to the enactment of the Commonhold and Leasehold Reform Act my wife and I purchased the lease on a flat.

The purchase was made in the knowledge the service charges appeared substantial and the garage had a leaky roof, but this was offset by the price negotiated. The vendor had settled all outstanding service charges.

It was not long before we received demands from the managing agent. As there were no details, I asked for a breakdown of the service charges with supporting documents. These were not forthcoming despite many requests and then threats followed of legal action. The agents were not local and from a discussion with a local estate agent I learned the managing agents were known to be difficult. Also, the block had a poor reputation for numerous reasons solely due to the management.

My next action was to canvas other lessees by knocking on the doors in the block one evening, but I only had one response from a lady who was most unhappy with the managing agents. With her help over several weeks, I was able to contact all the other lessees and convene a meeting. All lessees attended the meeting. There was a consensus service charges were excessive and the relationship with the managing agents had broken down. Many lessees had declined to pay service charges over quite a long period. I was asked to investigate these and look into alternative management. All lessees made a contribution into a fighting fund. There was also a date set for a working party and everybody attended. The men repaired a fence, worked on the garden and took rubbish to the tip whilst the ladies deep cleaned the hall and staircases.

At the start of our next meeting, a solicitor and a surveyor attended and advised about right to manage with acquiring the freehold under forthcoming legislation. We were horrified with possible costs and I took the view there must be a better way than going through serving legal notices etc. A decision was taken that a right to manage company be formed and the acquisition of the freehold be left to another date.

With the company duly formed, we could have gone down the legal route to take over management. To me this was a case of "taking a sledge hammer to crack a nut." Instead, I telephoned the CEO of our freeholder and requested his help. To my surprise his response was a resounding "yes," subject to three conditions, the main one being all service charges being settled, subject to agreement with the agents. For his part he instructed the managing director of the managing agents to come to a reasonable settlement. This was negotiated to the delight of all lessees.

Our company started trading on 1 April 2004. It was apparent the company would be very busy in the early years, as so many repairs had been "bodged" or not done at all. A priority list was drawn up. The top of the list was the water tanks in the roof. The old agents a few weeks earlier had sent a plumber along and charged for replacing the ball valves. One ball valve failed as it had not been fitted correctly resulting in major water damage. I went into the roof space and could see nothing wrong with the old valves. There were five 90-gallon tanks each serving three flats of which four had new valves but we had been charged for the replacement of five. My conclusion at time was it was not the valves needed replacing, but the tanks. They were so rusty I reckon I could have kicked a hole in their sides. We replaced them with smaller plastic tanks linked together to serve all flats.

The access to the garages at the rear was by a road in an awful state of repair to the point one lessee had started an action for compensation against the old agents for a broken ankle. All our land drains and rainwater gullies were blocked and when cleared it was found the soak-away under the road had collapsed. The soak-away was replaced and the road properly surfaced. Almost every one of the 17 garage roofs leaked and it was unsafe to venture on them as with the failure of the felt timbers had rotted. None of the exterior lights worked. The garages are now water tight, new gutters and fascia were installed and lights repaired.

Prior to my involvement, the exterior of the flats were painted.

The painting was supervised by a firm of chartered building surveyors who charged 10 per cent of the cost. The invoiced cost included scaffolding, but a lessee informed me all work was done from ladders. This was a gross waste of money as the windows and doors needed replacing. To add insult to injury there was a bill for £850 for freeing off all 56 windows being the total number in the block painted shut. After seeing this I was able to persuade a representative of the

agents to visit the site. The individual admitted no site visits had ever been made before, The surveyors were "in house" and not independent. The £850 bill was cancelled. All windows and doors have now been replaced with maintenance free materials.

The RTM company inherited a contract for the maintenance of an entry phone system. The annual charge increased each year by the rate of inflation, and on sight of the contract it was unclear who had signed it. The terms were such it could never be terminated. The providers admitted if the outdated system failed there were no parts available for repair. Negotiations took place and the contract was ended. Some years later the system failed and a modern replacement cost no more than the original annual charge.

Insurance is the greatest annual expenditure. The cost in 2016 is less than it was 2004. How is this possible? Firstly, we went to an insurance broker and obtained a vast reduction in premium. We have placed our business with the broker ever since and not been able to improve cost. Secondly, there was concern about the insured value of the flats and garages, so a chartered building surveyor was engaged to give a valuation. It transpired the property was over insured, so the sum insured was reduced accordingly. The resulting reduction in premium paid the surveyors fee.

It has been a long haul to make the property what is now a desirable residence and I have only highlighted some of the work and repairs done. There is now a good community spirit in the block.

So how does the management company operate? From the outset there was an agreement any individual who did work for the company should be remunerated and their pay and work would have to be agreed by a director. One lessee was engaged to do the cleaning of the common parts and another resident do garden maintenance. There was so much work to be done in the early years I was remunerated on an hourly basis, but am now paid a fixed sum each year. Six weeks before the end of our financial year lessees are notified of the anticipated service charges for the forthcoming year for buildings etc insurance, including directors' and officers' liability cover, maintenance costs, management/accountancy, sundries and contingencies. Fortunately, we have had no problems with collecting payment. After the audit of our accounts we have an AGM.

We have no sinking fund, so at the annual meeting major works are discussed and agreed thus giving notice of large costs well in advance. Appropriate notice is served to each lessee as required by law and an invoice is issued with the notice for payment on a set future date so we have funds in the bank before work commences. Sometimes the cost is partly offset by surplus funds from a previous year.

Finally, a few years ago the purchase of the freehold and lease extensions came up for review. This was done as a separate exercise and not part of the management company. Lessees made a payment to a fund to cover costs and the surplus after the review was refunded. A local chartered building surveyor provided a report. This was considered by the lessees, but as there was not full support for the purchase of the freehold this aspect was dropped. Some lessees wanted to extend their leases.

There were various options put forward in the report and the amounts varied from flat to flat depending on size and whether the lease included a garage. I was asked to negotiate with the freeholder and once again the CEO made a positive response. Firstly, he indicated it probably a waste of our money for us to pay for his company to have a report as is required by law. When the CEO was in receipt of a copy of our report an offer was made. After discussions acceptable sums were agreed for each flat. These sums included his legal costs for his "in house" solicitor and there was an understanding our lessees would combine to use one solicitor. The matter was concluded in a month.

Running a management is recommended although to some it may be a daunting task, but as a member of the FPRA help and advice is available.

FROM DEVELOPER TO MANAGER – A JOURNEY

By our regular columnist Roger Southam, non-executive Chair of the Leasehold Advisory Service (LEASE)

It is always exciting to be buying a brand new property, whether it is your first home, your next step or an investment for your pension. It is like any retail experience where the newness and expectation is all; except of course on the largest scale you will buy anything and you need a lot of help and guidance.

If you are buying a new flat in a new development your first engagement will most likely be with the developer's sales team. You will be looking at plans, models and 3D imagery in the show home alongside the scaffolding, cranes and concrete. Once the development reaches practical completion, ("PC" – ie finished to be able to complete the sale to you) then it is time for the final checks, completion of legal paperwork and transfer of the purchase price. The keys are handed over and the flat is yours.

At practical completion the management of the property will be passed over to the managing agent who will be responsible for running the service charge and delivering the services to maintain the building. This is where the grey areas start. In an ideal world at practical completion everything will be finished perfectly and the builders would all leave site and the manager take over.

In reality because of the process of development, it doesn't work like that. The contractor wants to get their money for building the building and wants PC as soon as possible. The developer wants PC so they can complete the sales and get in the purchase monies to be able to pay the contractor and make their profits. This often means that the first units sold will still have other parts to finish around them. The timescales and impacts can be dictated by when the contractor's or developer's year end is or quite simply the nature of the financing of the development. A complicated process and it has been ever thus, probably back to when Noah contracted his Ark to be built.

The biggest challenge this can create however is between flat owner and managing agent. You do not care who deals with what parts if you have items not working or the next phase of the building works is causing nuisance, dirt or dust. However, it is important to understand the different roles and the different relationships between the various parties as it can ease stress and strain as well as enable more effective solutions to your issues.

Perhaps the development process is one area that needs explaining more and there should be a greater understanding of the different roles and responsibilities. When the purchase of a flat is a very occasional experience you have to learn so much so quickly that easy guidance and assistance is essential. The team at the Leasehold Advisory Service are there to help and advice. On the website there is a wealth of experience. (www.lease-advice.org)

Legal Jottings

Compiled by Philippa Turner

FTT	First Tier Tribunal
UT	Upper Tribunal
UKUT	United Kingdom Upper Tribunal
UKCA	United Kingdom Court of Appeal

Leasehold Reform Housing & Urban Development Act 1993

A dispute arose in *4 – 6 Trinity Square v Corporation of Trinity Square of Deptford (2016 UKUT 484)* as to whether rights "appurtenant" to the freehold interest being transferred on enfranchisement under the Act should be permanent or revocable. The problem was that the licence granted in the leases to use the gardens at the rear of the property was expressly revocable at the discretion of the freehold owner. However, Section 1(4a) of the Act provides that such appurtenant rights should, on enfranchisement, be "permanent" and "as nearly as may be the same" rights as previously enjoyed. The freeholder in this case failed to persuade the UT that, by granting a permanent right to enjoy the gardens in order to comply with the Act, this would be different from and therefore not "as nearly the same" as that granted under the leases. The UT did, however, allow the retention of the freehold ownership.

In *Howard de Walden v Accordway (2016 EWCA 1176)* the lessee applied for a lease extension under the Act. The terms were agreed with the head lessor who was the "competent landlord" under Section 40 but there was also an "intermediate landlord" who was the immediate reversioner of the lease. He objected to the apportionment of the premium payable for the new lease (£3,400 out of the total £269,000). It was held by the Court of Appeal that Section 40(2) of the Act gives to the "competent landlord" the authority to conduct the negotiations and to refer the matter to the FTT for endorsement or determination in the event of disagreement; the FTT's determination would be binding on all other (intermediate) landlords. The rights of the latter are confined to being separately represented in legal proceedings and to applying to the County Court for directions as to the conduct of negotiations or for damages caused by negligence. These rights do not replace the Section 40(2) authority.

Commonhold & Leasehold Reform Act 2002

The facts in *Reiner & Wismayer v Triplark (2016 UKUT 524)* were particularly unusual. The issue was whether there had been a breach of covenant by the lessee in obtaining consent from the landlord for assignment of the lease. The prohibition on assignment contained in the lease was in the usual terms: not to assign sublet or part with possession without the consent of the lessor, such consent not to unreasonably withheld. In this case the lessor was an RTM company to whom, by virtue of Section 3(8ii) of the Act, application for consent should be made; it is an obligation under the Act that, after consent is given or withheld, the RTM company notify the head lessor (Section 98(4)). The complication arose because the sole director of the RTM company at the relevant time was Mr Wismayer the person to whom the lessee, Mrs Reiner, wished to assign the lease and which she expressly made subject to the condition that he obtained the necessary consent. The purchase money was paid, completion took place, the lessee vacated the premises and gave the keys to Mr Wismayer. He, however, failed to notify the head lessor, Triplark, (deliberately, taking the view that to do so would delay completion). This was fatal because in the event he was unable to register the leasehold title at the Land Registry, Triplark having entered an objection; the result was that the legal title remained vested in Mrs Reiner. Triplark took Section 168 proceedings before the FTT (see *News 119* page 10) which found there had been a breach of covenant and this was upheld by the UT. Even though it was found that, on perusal of the relevant documentation and consideration of Mr Wismayer's actions during his directorship, there had been consent impliedly granted by the RTM company, but, in absence of registration, no assignment had occurred; rather the breach lay in the "parting with possession" of the premises which on the facts had undoubtedly occurred. Accordingly although Mrs Reiner did not need to obtain consent to assignment, she ought to have done so for parting with possession.

Costs

The vexed question of costs in the FTT and the UT was considered fully in *Willow Court v Alexander (2016 UKUT 290)*. Under Rule 13(1b) of the Tribunal Rules costs may be awarded against a party who is found to have acted unreasonably. Guidelines were given as to the proceedings and matters to be taken into account when making a decision on what, if any, order should be made.

Service charges

The leaseholder in *Southwark LBC v Prokter (2016 UKUT 504)* sought to avoid payment of service charges for the year 2012-13 by arguing that the landlord had not observed the procedure laid down in the lease. This provided, as is commonly the case, that an estimate for the year should be supplied to the leaseholder prior to the start of the service charge year and quarterly payments should be made in advance with a balancing exercise at the end of the year after actual expenditure was calculated. The landlord had not included in the estimate any sum for major works to the emergency lighting system which were contemplated to be necessary in the forthcoming 12 months for which it would be necessary to consult in accordance with Section 20 of the Landlord & Tenant Act 1985. During the period the consultation was duly carried out and the leaseholder's contribution was demanded to be due on the first day after the end of the service charge year. In the event, this payment was never pursued because of technical failures to observe the Section 20 procedure correctly. Nevertheless, the leaseholder withheld payment of the balance of monies due and the FTT agreed, holding nothing was payable. The UT allowed the landlord's appeal on the basis that failure to include anticipated expenditure in the estimate did not invalidate the demand; at the time it was issued it was accurate and subsequent events did not alter its nature. Accordingly, the leaseholder was liable to pay the sum demanded.

In *Tedworth North Management v Miller & others (2016 UKUT 522)* 28 out of 49 lessees agreed to pay for the replacement of single-glazed by double-glazed windows at the cost of £291,000. The remaining lessees opted to keep the old metal Crittal windows, save for one who had at her own expense already replaced hers. She, together with two others objected to paying the service charge

contribution for the extra costs necessitated by the installation work and replacement of timber sub-frames. The FTT held that the condition of the old windows was not such as to require repair which would bring it within the repairing covenant in the lease and, accordingly, there was no obligation to pay towards these costs. It was irrelevant that it was, in the opinion of the landlord's surveyors, prudent to replace with modern windows which would require little maintenance over the years and thus saving lessees money over a long period. The UT dismissed the landlord's appeal against this decision.

The circumstances in the case of *Thomas Homes v MacGregor (2016 UKUT 495)* were slightly unusual: the lessee's flat was one of 130 in a conversion of a former hospital building. The service charges of 39 of these were, as a consequence of planning permission granted subject to the provision of a proportion of flats being made available for "social housing", capped at a low level. The other flats all paid a proportion of total maintenance costs calculated according to the size of the flat in question. The lessee of one of these (paying a 10 per cent share) challenged service charges for three years on the basis that there was a degree of subsidy by the private lessees of the shortfall created by the inability of the lessor to recover a fair proportion from the social housing lessees. The FTT held that this was not reasonable and the amounts needed to be recalculated. The UT did not agree: the amounts due were correctly demanded in accordance with the lease and there could be no implication that there should be no element of subsidy; however, it declined to make any finding as to how the shortfall might be funded, certainly there was nothing in the lease and no other evidence available before the Tribunal. In any event, the dispute was in respect of on account service charges and no final accounts for the three year period had yet been prepared. In the circumstances, the lessee's challenge failed but the UT declined to make a costs order in favour of the lessor since the lessee's defence had been entirely reasonable. A further complication in this case was that the service charge provisions in the lease were drafted in such a manner that, taken with the other leases, there would be a 3,000 per cent recovery of costs incurred had the lessor chosen to rely on them. In fact, it had not, since it accepted that there had clearly been a drafting error which would inevitably have to be corrected, probably by an application to the Court under Section 35 of the Landlord & Tenant Act 1987 to vary the leases. For this reason the UT ordered under Section 20C of the Landlord & Tenant Act 1985 that the costs of these proceedings should not be added to the service charges.

The appeal in *Bucklisch v Merchant Exchange (2016 UKUT 527)* was on a point of law, after the decision on which the case would need to be remitted to the FTT for further hearing. The lessees' case was that the service charges in issue were not due since a condition precedent to their payment contained in the lease had not been observed, namely, that the accounts should be audited before due to be paid. The FTT held that the lessees were prevented by way of issue estoppel from taking this point, never having done so in the previous 11 years during which they had been lessees (and the condition had not been observed). They were members of the residents' company which owned the freehold and had been present at the company meeting when the accounts had been approved and had not raised the matter on that occasion. The UT disagreed and remitted the case to the FTT for a decision on the estoppel and/or the waiver. The UT itself could not come to a decision since it was a hearing on documents only and there was insufficient material, in particular, the lease itself in the absence of which it was not possible to adjudicate.

The issue in *East Towers Apartments v No.1 West India Quay (2016 UKUT 553)* concerned the cost of centrally supplied gas, water and electricity to be recovered through the service charge, both as a share of the air-conditioning costs for the whole building and, separately calculated, for individual flats' consumption. The method of calculation provided in the leases was extremely complex and was challenged by the lessee of 42 out of the 158 flats in the block occupying the upper floors of a building containing a Marriott hotel on the lower 12 floors; the challenge was on the basis that the figures were all estimated and, in the case of the air-conditioning costs, there was no evidence of an accurate apportionment and, in respect of the domestic costs, some of the meters were faulty making actual figures impossible to obtain. Also included in the demands were various items, not consisting of the cost of energy, but of VAT (which should not have been charged to domestic consumers), CCL (climate change levy), the charges of the specialist agent employed to calculate the cost and work out the billing and to make up for a shortfall caused by energy used but not recorded by the various meters. The FTT determined that, in the circumstances and perhaps unusually, estimated charges were justified but that certain of the extra items should be disallowed (VAT, CCL and the agents' fees) but it was unable to arrive at an actual sum due for the years in question (2008 -14) since no figures had been provided by the parties. The UT upheld the decision and remitted it for further submissions by the experts on both sides to arrive at unit prices.

UNFAIR TRANSFER

Have any members found their block's water supply account has been transferred from domestic usage to a business account?

One member has alerted FPRA that his flat management company had (without any consultation) been incorrectly transferred by their supplier. He says the issue derives from the false assumption that "non-household" equates to "business" and that the supply to a company is necessarily the supply to a business. Following his complaint, the account was transferred back to domestic, but he thinks other flat management companies might like to check this has not happened to them.

"I wonder whether other flat management companies with a water supply have been incorrectly transferred by their supplier and whether there are wider implications, for example in electricity supply?" he writes.

"I have no idea whether we would have been better off as a business customer but my guess is that business customers are more likely to be subject to things like minimum charges, or charges for some sorts of repair, than domestic customers."

FPRA Chairman Bob Smytherman comments: "I suspect this may be more widespread than you would think. We did work with energy companies previously on disconnection protocols for flats as suppliers were treating blocks as businesses and cutting off supply."

Do write in and let us know if you have had a similar experience.

ASK THE FPRA

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

Painting the front door

Q **One of our residents has changed his door which he prefers not to paint white like the other doors. His wish is to keep the natural wood colour and has asked for advice. (His previous door was white). On checking with the lease, it states the "exterior of the building should be decorated in manner at point of demise", or words to that effect. Do you think "exterior" refers to internal doors of flats? Two of us have advised he should paint it in keeping with other doors but we're not clear as to whether he's obliged to do so. A relatively trifling issue I know, but your advice would make it easier for us to present our case.**

A FPRA Hon Consultant Claire Allen replies:

Thank you for the copy lease in relation to the flat in question. The description of the flat itself is relatively minimal. While there is no mention to the doors or windows in the flat, I do note the flat includes both the internal and external walls of the flat. It is quite unusual for the external walls to be included, as generally the external walls would form part of the freehold demise and therefore be the freeholder's responsibility to repair and maintain. Doors and windows are generally included in the flat but the external decorative surfaces of the doors/windows are not. It is more practical for the freeholder to decorate the external doors and windows so that their appearance is kept similar.

There is helpfully a landlord's covenant of the lease stating that the landlord is responsible for the maintenance for the main entrance, passages, landings etc in the building. This would seem to suggest that the external surfaces of the flat doors would be for the landlord to redecorate.

Sorry I can't be more helpful – the lease description is not entirely accurate! It is my view however that for the sake of consistency all external surfaces of the flat doors should be painted by the landlord.

Paying to make improvements

Q **Our scheme of 32 flats has experienced several managing agents. Residents have, at their own expense, installed new bathrooms and kitchens, also windows and front doors etc. Until now these works have had to be requested and permission gained without fees. We have now been told that a fee of £75.00 will be charged for each application. Surely, the management fee included in the service charge should include the occasional resident's application for internal improvements?**

A FPRA Director Shula Rich replies:

Re a fee, this is an admin cost. If may be challenged at a Tribunal if you think it is unreasonable. It's a fee for consent – and not unusual – but it depends what they are doing for it. If it's just a signature, then it's an overcharge. If it involves reviewing the work and supervising, then it's reasonable

As an admin charge, the £75.00 demand must be accompanied by an S158 schedule 11 notice or it is not payable. I suggest you see what clerical supervisory work they are doing to justify the fee. Say you will challenge if they are doing nothing or very little.

Holiday chalets

Q **We are a residents' association representing 40 holiday chalets (brick built, detached), with limited occupancy (8 months).**

1. Is it leasehold law that all service charges levied by the landlord have to be held in a trust account?

2. As we intend applying for a 50-year lease extension, could you ascertain whether we are definitely classed as dwellings and are eligible to apply? If you have a solicitor on board we would like him to have a look at this.

Any help you consultants can give us on this would be greatly appreciated – preferably someone with a legal background. We did originally seek enfranchisement but have been firmly advised against this route.

A FPRA Legal Adviser Nicholas Roberts replies:

As you will be aware, there is a great deal of legislation which has been passed to improve the position of leaseholders, and offer them various measures of protection. Your position as lessees of detached holiday chalets is somewhat anomalous. Some statutes apply to ***leaseholders generally***, and these will apply to you. Others have been passed to address problems faced by ***leasehold flatowners***. These will not apply to you. It is easy to assume that guidance – articles, or replies to legal queries – that you read in the FPRA newsletter, or in the publications of LEASE (the Leasehold Advisory Service) or elsewhere, do apply to you, when in fact they do not.

Legislation dealing with ***service charge*** matters does, in general, apply to the owners of leasehold dwelling generally. It has been accepted in various cases that the term 'dwellings' includes properties such as yours, which are not intended to be permanently occupied.

It is not a legal requirement that service charge be held in a trust account ***as such***. Section 42 of the Landlord and Tenant Act 1987 requires that a freeholder or management company who receives service charges holds them on trusts, which are set out in that section. This means that the funds are classed as 'trust moneys' regardless of what sort of account they are lodged in (and whether they represent current contributions, or funds in a reserve fund or sinking fund). Having the status of 'trust moneys' means that, in certain circumstances, they can be recovered if they are misappropriated, and get into the wrong hands. It does not, however, mean that they are absolutely 'guaranteed'.

There is in fact a further section, s.42A, which has been added to the 1987 Act, which would require that all service charge funds be lodged in a designated trust account. In order to take effect, however, it needs the Government to produce supporting Regulations. It has proved impossible to draft these so as to satisfy everyone: in particular so as to

strike a balance between protecting leaseholders' money and not incurring unnecessary bank charges and accounting costs. It might even be in the interests of your freeholder or managing agents to advise their bank that the moneys in an account are trust moneys. The problem is, however, that technically payments such as ground rents, or other charges which may be paid with service charges, are NOT trust money, so they should either not be paid into a trust account, or should immediately be transferred out and lodged in a non-trust account. There are also complications if the service charge funds of more than one estate/development are run through the same account. At the moment it is not illegal to do this. If the bank account is properly audited, and cross-checked to the individual estate accounts, there should in theory be no problem. In practice there can be scope for abuse.

Before turning to your other question, I ought perhaps first to explain one issue, to make sure that I have understood your intentions. Generally, owners of flats – and his may include many conversions of buildings into holiday dwellings – will consider the 'collective enfranchisement' of the whole development. In other words, the leaseholders will get together, set up a company, and purchase the single freehold which underlies their properties, and the communal facilities. They are entitled to do this under the Leasehold Reform, Housing and Urban Development Act 1993. If they proceed with the purchase they will then remain leaseholders of a company in which they are themselves the shareholders. They may well decide to grant themselves extended leases (without further charge) at the conclusion of this process.

In many respects this would be the ideal vehicle for a development such as yours to adopt: the leaseholders would then end up owning the development between themselves. Unfortunately, owners of holiday chalets are not entitled to proceed under the 1993 Act, as it is based on the idea that the individual owners are the leaseholders of 'horizontally divided' buildings: in other words, flats or apartments. The fact that your chalets are freestanding rules out this route.

I assume, therefore, that you are considering proceeding under the legislation applicable to houses (including semi-detached and terraced houses, provided that the properties are divided vertically), which goes back to the Leasehold Reform Act 1967. This was originally passed to give the owners of modest long leasehold houses the right either to acquire their freehold, or to extend their leases. When it was first passed, in order to qualify, one had to have been in occupation of the property as one's sole or main residence for a number of years. This effectively excluded owners of almost all holiday dwellings. This residence condition was reduced over the years, and since the Commonhold and Leasehold Reform Act 2002 there has been no residence requirement. The only requirement now is that the leaseholder has held his or her interest for at least two years.

In theory, you would have the choice of enfranchising i.e. acquiring the individual freehold to a chalet, or of acquiring an extended lease. I would agree that it is likely to cause difficulties if leaseholders go down the route of acquiring their own freeholds. Some means would have to be found of ensuring that owners of what would become freehold chalets continue to contribute to the communal facilities. These are likely to be more significant in estates of holiday chalets than they would be in an estate of ordinary houses. There are methods that could be adopted, but they tend to be less than satisfactory, and it is not clear whether the best can actually be imposed under the Leasehold Reform Act 1967. If individual leaseholders insist on acquiring their individual freehold, it can result in the financial arrangements breaking down, to the detriment of all concerned. It is likely to be more satisfactory in the long term if you instead all stick to acquiring extended leases.

I have gone here into more of the history of the reforms in this area than is perhaps strictly necessary, as it does help to explain why individual enfranchisement or individual lease extensions are available to you, but not collective enfranchisement, which in many respects would be the most satisfactory.

Dangers of wi-fi

Q **A situation has arisen about the use of wi-fi in our block of flats. We have one rented flat where the tenant is very susceptible to the microwaves from wi-fi and feels physically sick if she is exposed to wi-fi from adjacent flats. To this end she has contacted the other owners and tenants and asked if they can switch off their wi-fi when not in the flat and at night and/or use wired internet connections. She has even bought and lent Ethernet equipment to a close neighbour to encourage them not to use wi-fi.**

This, as you can imagine, is causing issues with the other tenants/owners who consider that this encroaches on their own use of their property and not being inflicted with the same physical issues cannot really understand what all the fuss is about.

Having heard her story and investigated the matter for myself I did find a huge amount of evidence showing that these new microwaves are becoming known as the new danger for humanity which we are ignoring as we did the danger of smoking.

The issue with smoking became evident in the 50s but only acted on in the 80s and even now variations of smoking are still being promoted on TV advertisements as

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"vaping". The Queen's father George VI died of smoking related lung cancer in 1952 and my own mother, a heavy smoker, died in 1963 of the same disease. However, only a lot later in the 80s was the connection between smoking and cancer linked to such a degree that something was done about it and smokers were put under pressure to stop. Thirty years is a long time to make any positive moves towards limiting smokers and making it publicly unacceptable to smoke.

So with microwave telephony are we potentially facing an epidemic in the future? In the research I have done I came across a video clip showing eight phones, all active on calls, surrounding a frying pan with a raw egg, and the microwaves were frying the egg. Approximately eight per cent of the population are knowingly affected by microwaves. So I think that this issue is real and could be the next major health warning for the population as a whole. However, as always there are too many people and companies making too much money from telephony where microwave signals are used.

So as a management company where we have one susceptible tenant in a block of eight flats where only four have permanent occupants and the rest are holiday flats this situation is causing a problem for the other tenants who are being asked not to use wi-fi. We have heard that there could be an Ethernet solution which would mean a wired connection and could help this tenant with her health problems.

Does the FPRA have any similar instances or if not do you have any ideas as to how this issue can be overcome?

A FPRA Chairman Bob Smytherman replies:

Thank you for your very interesting question which I have to say is a first for us! I have been asked to respond from a practical point of view as our Health & Safety adviser rather than a legal point of view.

Your comparison with smoking in interesting. I was thinking about something more recent which is mobile phones and masts which were thought to be a hazard to health – we don't hear about that so much these days. I wonder whether the tenant that is concerned about wi-fi has a mobile phone and whether that signal impacts on their health?

My own view is that wi-fi is very much part of modern life and it would not be reasonable for any tenant or owner to tell another flat occupier that they should turn it off in their own demised premises. In situations like this I always seek to try and identify a compromise, but I am not sure if there is one here?

The legal situation is if the tenant felt these 'microwaves' were causing a 'statutory nuisance' they would need to report this to the local council environmental health department who would need to take enforcement action if they felt that it was a nuisance as determined by the Environmental Protection Act. I would be surprised if they did reach that conclusion and ordered the wi-fi to be turned off, but we live a strange legal world these days.

The practical solution would be for the tenant to give notice and leave the property if such a simple part of modern life was affecting them in this way. After all, the effect of wi-fi waves could happen anywhere during their day. Are they really going to be able to avoid all such 'microwaves' which are now everywhere included public spaces?

A possible compromise could be that you obtain quotes for a block internet system without the need for wi-fi and that met the specification of all the flats, but I am unsure whether your lease would allow you to charge this to the service charge or whether such a system was available.

I think my best advice would be for you to contact the environmental health department yourselves, explain the situation and ask for their guidance as to whether it is reasonable to expect flat owners to turn off wi-fi following a request from a tenant.

I would certainly be interested to receive their response and share with other members as a generic question and answer, because if it was the case a tenant could reasonably request this on health grounds this would have huge implications, not just in blocks of flats.

Fixed or variable service charge?

Q **We had a meeting last night with our property manager and it is clear they believe, rightly or wrongly, that the Landlord has the right to use the service charge income to pay for proposed work and confirmed that this is their understanding of all the leases. Unfortunately I only have mine, but suspect that at least several others will be the same.**

In previous correspondence you appear to be regarding the service charge in my lease as fixed rather than variable. I had previously been advised that because the £620 per month charge is subject to a variable annual adjustment of 3 per cent or RPI index, whichever is the greater, the charge would be considered a variable service charge.

Does this, in fact, make any difference to your "good news" interpretation of my lease?

A FPRA Hon Consultant Roger Hardwick replies:

The definition of "service charge" (which is relevant for the purpose of determining which charges fall within the scope of the Landlord and Tenant Act 1985, which contains, among other things, the reasonableness limitation, the obligation to consult, the obligation to include a summary of rights with demands etc.) can be found in s.18 of the LTA 1985:

"In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent—

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs."

The 3 per cent inflation adjustment does not bring the service charge within the scope of s.18. The charge has to vary

"according to the relevant costs". The definition of "relevant costs" can be found at s.18(2): "...costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable". The "service charge" in this case may vary according to inflation. It does not vary "according to the relevant costs". It is, therefore, not a service charge within s.18 of the LTA 1985.

There is authority for this. In Coventry City Council v Cole (1993) 25 H.L.R. 555, the Court of Appeal found that charges which vary in accordance with a published index such as the RPI or an index of building costs do not fall within the definition of s.18. The landlord may use the fixed service charge income he has collected to pay for the works, but he cannot charge the leaseholders directly for a proportion of the actual cost of the works.

Right to light

Q **Is there a legal basis of a "right to light" that may be blocked by adjacent trees?**

We are a small development of 22 flats set in what was the copse of an old manor house. Our grounds are surrounded on two side by trees both in our grounds and outside our boundary which act as a barrier from the road for us and is part of the street scene outside. The majority of the trees in our grounds are subject to Tree Preservation Orders and every couple of years or so we apply to our local authority for planning permission to maintain the trees.

A few years ago the area in which we live was designated a Conservation area so now we not only have to apply for planning consent to have tree works on the trees covered by TPOs we also have to apply for any tree work under the Conservation Order.

We have four blocks, three of two floors, ground and first, and one block which is in the wooded area of our grounds, has three floors, ground first and second. The leaseholders who live on the top floor of this block have asked for the trees surrounding them to be reduced in height to allow more light into their apartments.

Our local authority trees officer is of the view that the trees are healthy and form part of the conservation area/ character and street scene and are not in need of reduction. The tree officer maintains the "right to light" is a factor that does not come into the decision making when considering applications for reducing trees.

Are you able to advise me on this matter? I would be most grateful to know our legal position, particularly as I have arranged a site meeting with all parties concerned.

A FPRA Hon Consultant Yashmin Mistry replies:

I am not a right to light specialist but my basic knowledge is as follows:

- There must be a specific right so that light is claimed for particular windows or skylights and there cannot be a general claim for light over the whole piece of land. Having reviewed the lease however, I cannot see any specific rights to light to specific windows in the leases.
- The amount of light which one can claim is that which is necessary according to the ordinary notions of mankind. Thus this right would be infringed where the light so obstructed that in a dwelling the electric light had to be lit all day.
- A mere diminution in the light is not sufficient.

I know of no law that gives a legal right to light (where obstructed by trees) and can't possibly conceive there would be such a law. If there were, no doubt the councils would all be bankrupt from paying out!

There are rights enabling an owner to cut back parts of a tree that over hang your land there are liabilities should an owners' tree cause structural damage to a neighbour's properties.

Smoking nuisance

Q **We have two blocks of maisonettes with communal corridors and outside each front and back door there is a canopy with our name on in.**

The problem we have is that as smoking is no longer permitted in the internal communal areas – and a lot of owners do not want smoking in their homes – a number of residents (and visitors) are in the habit of convening outside the front doors to have a cigarette.

The living room windows of the ground floor flats are right next to the door and consequently, if a window is open you get the smell of the smoke all over the curtains and wafting in to the room. Coupled with the noise made by people gathering right outside your windows, this habit has become increasingly offensive and annoying to a number of residents.

We have within our boundary a large area that used to contain the waste bins (now kept elsewhere) and also has washing lines. It is surrounded by four walls and has a gate but no roofing of any kind. Do we have any legal right to ask smokers to use this area if they wish to smoke or can we insist that they at least keep away from the immediate area of the doors?

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FPRA Chairman Bob Smytherman replies:
Thank you for your email about the difficult issue of smoking in communal area. Since the ban on smoking in enclosed public places in 2007, a number of people have succeeded in giving up smoking or switching to electric cigarettes, which can also be annoying and not currently covered by the law.
With regards to the smoking of cigarettes, the legislation that came into force was very clear and banned smoking in enclosed public places, which as you rightly mentioned included the common parts of blocks of flats. Unfortunately, as a consequence of the legislation, smokers congregated outside the door of premises such as blocks of flats which – providing there is no cover over the area – is perfectly lawful.
I think the best advice I can give from my own practical experience self-managing my own block is to try and reach a compromise by creating a convenient place for smokers to go and smoke away from buildings, windows etc. and provide a suitable environment for them to do so such as seating, ash trays and even a covered shelter. From our experience this has encouraged neighbours to be more neighbourly and respect people living close to the front door.
There is lots of useful advice on this on the Smoke Free England website about the law and signage available. www.smokefreeengland.co.uk
If your neighbours are not compliant with the legislation, then I suggest contacting your local council who are responsible for enforcement, but from my experience this needs to be an absolute last resort if a reasonable compromise can't be reached as it sounds like from your description that smokers are compliant with the legislation by going outside and just being unneighbourly by being so close to the building and other neighbours windows.
The lease may well contain terms about causing a 'nuisance'. This is very difficult and costly to both prove and enforce, therefore finding a compromise solution and a place for smokers to go such as a smoking shelter has to be preferable.

Poor attendance

Q **Each year our AGM attendance is diminishing. Only eight residents out of a possible 100 attended this year. In one of your recent magazine articles I read that it was not always the case that an AGM was a legal requirement. I would really appreciate receiving any information regarding this as the committee is becoming very despondent at the lack of interest and the AGM attendance just makes the situation worse.**

A FPRA Chairman Bob Smytherman replies:
The issue of poor attendance at AGMs is one we have been dealing with for many years. In a self-managed block like my own I would always recommend continuing with AGMs as this is the only way formally to hold the directors of the company to account by the shareholders. Trying to remove this looks like you are trying to hide something even if you are not.
We have tried a whole variety of ways to get people to attend, such as changing venues – the pub is quite a good one – and include the formal business as part of a social evening. Not advisable if you have serious topics on the agenda where controversy is likely though.
Time of meetings may also be an issue and transport might also be a requirement if the venue is not walking distance or you have leaseholders living elsewhere. Always encourage proxy voting by providing a form to send back. From our experience we have concluded if attendance is poor this means they are happy with the service you are providing.
Ultimately as a limited Company the AGM arrangements are set out in the Articles of Association and should be complied with as far as possible. Company Law has changed many of the requirements for small companies, but ultimately the principal of transparency is the key one that should be maintained and strengthened. My view is the more open and transparent you are with the company business, the more content people are and less likely to attend a formal meeting especially if these are held in a cold hall on a winter evening.
I would say don't get despondent at the lack of attendance. From our experience large numbers attending do not come along to thank you but to moan or criticise. If you need a full legal response about your options with AGMs if you send us a copy of your Articles of Association I could arrange one of our Company Law specialists to advise further on this?

Emergency care line

Q **We'd be grateful for your advice and comments on a matter that has emerged during the last 12 months and is now on the agenda for our AGM. Our block has 12 apartments for residents over 55. The lease provides for the service of a warden in case of an emergency. This service was available until l985 when it ceased and was replaced by an emergency care line service, installed via each resident's existing telephone line. It was – and still is – provided by an outside firm, and the cost is included in the service charge, payable monthly, pro rata.**
All the residents are now of the opinion that the service is outmoded as they each have individual means of calling for emergency help. They feel that the cost of the service is unnecessary and its removal would not be detrimental to their safety whilst reducing what is, in their opinion and by any standards, an unreasonably high overall service charge. The landlord has acknowledged residents' wishes and would agree to the cessation of the service, subject expressly to two conditions, namely:
1. a secret ballot to such effect, agreed in writing by each resident and
2. a Deed (or, possibly Deeds) of Variation to remove the relevant clause of the leases of the 12 apartments to be entered into by ALL residents.
While all residents are prepared to accept and fulfil (1) above, they are of the opinion that condition (2) above is wholly unnecessary (and maybe a deliberate stumbling block) because an emergency warden service is not now available and could not practicably be made so, and

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Advertisements

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nowhere in the leases is there any reference to its replacement by the current service provider. Accordingly, will you please advise on the following:
1. Whether or not the preparation (and, presumably registration) of a Deed (or Deeds) of Variation is strictly necessary (ie what is there to vary?) and
2. In the event that they are so obligatory, what is the likely amount of legal costs, Land Registry fees and, possibly, costs of an application to FTT?

A FPRA Hon Consultant Roger Hardwick replies:

I agree that the provision of a care line service is not a service which the landlord is obliged to provide, nor is a service for which the landlord is entitled to charge under the terms of the lease. The leaseholders would be well within their rights to refuse to pay for this service.

The Landlord is obliged to use "best endeavours" to provide a "warden" to render reasonable assistance in cases of an emergency, "so far as practicable". The term "warden" is not defined. A couple of points:

I can't see that the landlord is able to recover the cost of providing a "warden" as a service charge. Under your lease, the tenant covenants to pay a proportion of the "expenditure on services", which is defined as the expenditure on the matters set out in a schedule, which contains no reference to a warden (or any similar services). It may be that the exit fee exists partially for the purpose of compensating the landlord for this expense.

I can see why the landlord would want to remove the clause, particularly if there is no obligation to contribute towards the expense. An obligation to use "best endeavours" is more onerous than an obligation to use "reasonable endeavours". It effectively obliges the covenantor to do everything possible, no matter how onerous, to perform the subject matter of the covenant. The term "so far as practicable" limits the landlord's obligation somewhat, but in my view it would take more than the provision of a warden simply being economically or financially onerous, or awkward or impractical, to absolve the landlord. I would not recommend agreeing to the removal of this provision. I can't see how it would benefit the leaseholders.

My firm would charge a set up fee of £2,000 plus VAT and then a further fee of £500 plus VAT per flat for preparing, completing and registering the deeds of variation. It is not possible to say how much an application to the FTT would cost. The cost would depend on a range of factors: what application is being proposed (an application to vary leases, an application to determine service charge liabilities); what, exactly, would you be asking the FTT to determine; how many applicants and respondents would there be; how many individuals would be likely to support and oppose the application... etc.? The cost could be anywhere between £15,000 - £40,000+ plus VAT, if the matter were to proceed to a full oral hearing.

Extortionate amount of money

Q **The new LPE1 form has the following question: Please confirm the date of the last buildings reinstatement cost assessment? I have spoken with the insurance broker that the previous managing agents and the freeholder use and neither has any record of this.**
We took over the management in 2005 and the insurance has always been based on the previous year with an up-lift for inflation. We are being advised to have a valuation carried out. The freeholder has said that it is the responsibility of the management company.
On contacting one company we were told the cost of the valuation would be £9,900 + VAT. Should this be the responsibility of the freeholder or should the residents have to pay this through their service charges?

A FPRA Hon Consultant Belinda Thorpe replies:

Insurers recommend that valuations are completed every three years. Once you have the valuation it is sensible to check with your Insurer to whether they require VAT adding on or not, as some do and others do not.

I would expect that whoever has the responsibility to make the arrangements to insure the block, should also be responsible for ensuring it is insured adequately and correctly and therefore responsible for the cost of the survey. If you are not sure who is responsible to make the arrangements to insure, then I expect it should be shown in your lease. I am happy to review the lease, if this helps at all.

Lastly, £9,900 seems an extortionate amount of money for a rebuilding cost survey. One company I know has rates for a block this size at £21 per flat.

Rival residents' association

Q **I live in a block of eight flats on a large purpose built mixed residential estate (freeholders, leaseholders and social housing). In 2011 residents of our block of flats formally established a residents' association in line with the procedures set by the First-tier Tribunal (Property Chamber) in England to act on behalf of residents in dealing with the RMC, which at that time remained in the hands of the developer, and their management agent. The RMC was recently transferred to residents and directors, of which I am one appointed.**
Recently a group of residents has announced themselves as a residents' association acting on behalf of residents. However, nobody on the estate appears to know how it was setup, how its constitution was approved (if it has one), or how its three officers were elected.
The three officers are rather elusive, but enquires indicate that it was set up by a small group of residents. When several residents enquired as to why they had not been informed or involved in its set-up, they were told that to join, residents of the estate have to apply to the Committee to get membership and that joining was by 'application only'.
This sounds like a self-appointed club / pressure / focus group rather than a residents' association. However, I would appreciate clarification on:

Do all residents' association need to be set up in compliance with the procedures of the First-tier Tribunal (Property Chamber) in England?
Does a group set up in this way constitute a residents' association?
Are there any regulations preventing them from calling themselves a residents' association?
Do they have any authority to speak on behalf of residents of the estate as a whole?

A FPRA Legal Adviser Nick Roberts replies:

I think the main point to make in replying to you is that a "Residents' Association" is not a legal term of art. Those that join FPRA tend to be leaseholders' associations, but there are also residents' associations which are formed to protect the amenities of an area, including perhaps to resist unwelcome planning applications, etc., and they are all equally entitled to call themselves residents' associations.

In answer to your first question, only leaseholders' organisations which seek to be recognised tenants' associations, within the meaning of s.29 of the Landlord and Tenant Act 1985, need to satisfy the membership criteria of the First-tier Tribunal.

In answer to your second and third points, the group which has been set up is certainly entitled to call itself a residents' association, but – unless it changes its procedures – it

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would seem unlikely that it will ever be in a position to secure recognition as an RTA under s.29 LTA 1985.
In answer to your fourth point, I do not see how anyone can prevent any group from purporting to speak on behalf or to represent a larger interest group: but if those that they purport to represent make it clear that they do not share their views, then they will eventually lose credibility.

Who makes the decisions?

Q **A situation has arisen where a meeting has been held where all leaseholders were present and it was agreed that leaseholders would make decisions on projects and their costs. As far as I can see this is incorrect as only directors can make those decisions as they have financial responsibility for the company. They should take the leaseholders' views into account but should not be bound by leaseholders' "decisions" in a general meeting. If individual leaseholders feel strongly about the management then the way forward is to become a director to influence the decision making. I would be interested in your view on this.**

A FPRA Chairman Bob Symtherman replies:
I respond as a company secretary /director of my own self-managed RMC.
Consultation and communication are the two most important elements in a well-run and managed self-managed block. However, you are quite right, it's the democratically elected directors that have the decision making responsibility and accountability as well as liability. This is why having Directors & Officers Insurance is essential as it will be the directors and company secretary that are held personally liable in the event of litigation.
If leaseholders and shareholders have concerns about individual or collective directors' management, then the Articles of Association sets out the procedure for removing directors, usually at an AGM or at a EGM, provided it has been properly convened with formal agenda and notice given. If Leaseholders have concerns about the suitability of a director they can raise this with Companies House who can confirm whether they are able to be company directors.
If as a result of consultation the directors vote to differ from the majority of shareholders, it's really important this is well communicated and explained with clear minutes of the decision making process and decision.
I should add that I am not a lawyer but have many years' practical experience as an RMC Director if you have a more specific legal query or want advice about Directors' Insurance we have dedicated advisers who can deal with this for you.

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.

COMMENT FROM A MEMBER

"Our emerging association is enormously encouraged and energised by the support we are receiving from the FPRA after 22 years of combat with our freeholder (whom we usually describe as a tax exile living abroad)."

Contact details:
The Federation of Private Residents' Associations Limited,
Box 10271, Epping CM16 9DB
Tel: 0371 200 3324 Email: info@fpra.org.uk
Website: www.fpra.org.uk
If telephoning the office please do so weekday mornings.

www.linkedin.com/grp/home?gid=3721009
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