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NEWS

Government sets out new plan to protect leaseholders and make industry pay for the cladding crisis

Levelling Up Secretary resets government action on building safety in England

Leaseholders living in their own flats will not face any costs to fix dangerous cladding, with developers and cladding companies paying instead

Industry given two months to agree to a plan of action to fund remediation costs, currently estimated at £4 billion

New measures to hold firms to account and restore common sense to the market.

The government has reset its approach to building safety with a bold new plan to protect leaseholders and make wealthy developers and companies pay to fix the cladding crisis.

Secretary of State for Levelling Up Michael Gove guaranteed that no leaseholder living in their own flat will have to pay a penny to fix unsafe cladding.

Following Mr Gove's letter to industry, the old proposed loan scheme for leaseholders in medium-rise flats will be scrapped, with industry given two months to agree to a financial contributions scheme to fund the new plan, otherwise, if necessary, the government will impose a solution in law.

In addition, a new dedicated team of civil servants is being established to pursue and expose companies at fault and to force them to shoulder the burden of making buildings safe.

The Secretary of State revealed a four-point plan to reset the government's approach:

- Opening up the next phase of the Building Safety Fund to speed up taking dangerous cladding off high-rise buildings, prioritising the government's £5.1 billion funding on the highest risk
- Those at fault will be held properly to account: a new team is being established to pursue and expose companies at fault, making them fix the buildings they built and face commercial consequences if they refuse
- Restoring common sense to building assessments: indemnifying building assessors from being sued; and withdrawing the old, misinterpreted government advice that prompted too many buildings being declared as unsafe; and
- New protections for leaseholders living in their own flats: with no bills for fixing cladding and new statutory protections for leaseholders within the Building Safety Bill.

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Hello FPRA

Welcome to our first newsletter of 2022.

I always look forward to this time of the year – longer and lighter days, warmer weather on the horizon and the opportunity to spend more time outside. I'm also feeling much more optimistic and hoping we can move towards a more normal way of living.

Whatever your political leaning, the last few months have truly tested our patience with the government but we welcomed the announcement (made in January) by the Levelling Up Secretary, Michael Gove, with the government setting out a new plan to protect leaseholders and make industry pay for the cladding crisis. You can read all the details in our lead story.

Also in this issue, alongside our regular features, we've sought to provide clarity on the difference between a Barrister and Solicitor, considered the impact on the rise in holiday rentals, and the rules regarding Data Protection when placing security cameras in communal areas.

As valued members, your comments and feedback on all our articles are welcomed, and do continue to send in your questions and post your reviews. Our next series of webinars is underway – don't forget to join us.

We hope you enjoy the newsletter.

Yours,
Val Moore
Editor – FPRA Newsletter
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Appointment to interim residents' panel

We are delighted to announce that our Chairman Bob Smytherman, has been appointed to represent the FPRA on the HSE Residents Panel.

As part of the planned building safety reforms, HSE will be the new Building Safety Regulator (BSR) in England. Under the Bill, which is currently going through Parliament, BSR must set up a Residents' Panel. This will give residents an ongoing voice to help shape the work of BSR in England.

Information regarding the role panel, can be found here: https://www.hse.gov.uk/building-safety/residents-panel.htm

Government sets out new plan

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Secretary of State for Levelling Up, Michael Gove, said:

"More than four years after the Grenfell Tower tragedy, the system is broken.

"Leaseholders are trapped, unable to sell their homes and facing vast bills.

"But the developers and cladding companies who caused the problem are dodging accountability and have made vast profits during the pandemic whilst hard working families have struggled.

"From today, we are bringing this scandal to an end – protecting leaseholders and making industry pay.

"We will scrap proposals for loans and long-term debt for leaseholders in medium-rise buildings and give a guarantee that no leaseholder living in their own flat will pay a penny to fix dangerous cladding.

"Working with members of both Houses, we will look to bring a raft of leaseholder protections into law through our Building Safety bill.

"And we will restore much needed common sense on building safety assessments, ending the practice of too many buildings being declared unsafe."

Dame Judith Hackitt, who chaired the Independent Review of Building Regulations and Fire Safety said:

"The announcement by the Secretary of State is very welcome and should come as a great relief to the many leaseholders who have felt trapped by the prospect of having to pay for remediating defects to properties which they bought in good faith.

"Those who caused the problem now need to step up, take responsibility and show some leadership. This problem has gone on for too long and we need a rapid solution, not months of debate and negotiation leaving innocent leaseholders in further limbo."

Those who caused the problem now need to step up, take responsibility and show some leadership

The announcement that industry is being put 'on notice' follows both the suspension of Rydon Homes, because of its links to Rydon Maintenance, the company responsible for the refurbishment of the Tower, from the government's Help to Buy Scheme last month, and the welcome decision by Mercedes to end their sponsorship deal with Kingspan.

Remediation costs

The Levelling Up Secretary has written to developers to convene a meeting over the next few weeks, and report back before the House rises at Easter with a fully funded plan of action including remediating unsafe cladding on 11-18m buildings.

Should industry not come to the table and agree to a solution, the government will be forced to impose one.

Clauses in the Building Safety Bill will allow the government to introduce a levy on developers of high-rise buildings, building on the four per cent tax on the largest most profitable developers, which was announced in this year's Budget and expected to raise at least £2 billion over the next 10 years to help pay for building safety remediation.

To ensure that every dangerous building has the necessary work done to make it safe, we will open up the next phase of the Building Safety Fund later this year and focus relentlessly on making sure it is risk driven.

In a bid to provide more transparency, leaseholders will also soon be able to access a new portal which will show them the status of their building's application to the Building Safety Fund. More information will follow shortly.

Protecting leaseholders

To protect blameless leaseholders in buildings over 11m from short-term enforcement of excessive bills and potential bankruptcy, the government will introduce a series of rapid measures.

An additional £27 million will see fire alarms installed in all high-risk buildings to keep residents safe and end the dreadful misuse of costly waking watch measures, which are usually paid for by leaseholders.

The government will also work with MPs and Peers to consider further amendments to the Bill to enshrine protections for leaseholders in law, and will continue to work across government to ensure leaseholders are protected from forfeiture and eviction due to historic fire safety costs.

Changes to grant funding guidance will help those in Shared Ownership homes who want to sublet their properties and encourage landlords and lenders to approve requests, in recognition of the hardship shared owners are facing.

The government will also introduce amendments to the Building Safety Bill to retrospectively extend the legal right of building owners and leaseholders to demand compensation from their building's developer for safety defects up to 30 years old. The Bill currently covers defects up to 15 years old and so this amendment will give thousands more leaseholders the right to challenge.

Restoring common sense

To help restore common sense to the market, The Levelling Up Secretary insisted there must be fewer unnecessary surveys, an assumption that there is no risk to life in medium and low-rise buildings unless clear evidence of the contrary, and far greater use of sensible, risk-mitigating fire safety measures such as sprinklers and alarms.

Following our statement in July, the government is withdrawing the Consolidated Advice Note – interim guidance which has been wrongly interpreted by the industry as requiring remediation of all cladding irrespective of building height.

The government will also support updated guidance, produced by the British Standard Institution, to help fire risk assessors take a proportionate approach to the assessment of walls and avoid wholescale cladding replacement where safe to do so.

In the minority of buildings where valuers deem EWS1 forms are still necessary, the government will introduce an indemnity scheme for building assessors to give them greater confidence to exercise professional judgement. We will also begin auditing building assessments to make sure expensive remediation is only being advised where necessary to remove a threat to life.

New data from lenders, also published today, demonstrates that EWS1s are requested by lenders for fewer than one in 10 mortgage valuations for flats, and lenders are encouraged to continue to minimise their usage in medium and lower rise blocks.

Fairer and safer housing

The action being taken on building safety is part of a wider programme of reform to create a fairer housing system, hold landlords to account and ensure a crisis can never happen again. This includes putting forward the recommendations of the Hackitt review into law and the commencement of the Fire Safety Act, which is due shortly.

> ...ensure a crisis can never happen again

New procurement guidance, published today, will help remove incentives for industry to cut corners, while legislation going through parliament will ban ground rent charges for most new residential leases, expected to take effect later this year.

Source: Department for Levelling Up, Housing & Communities

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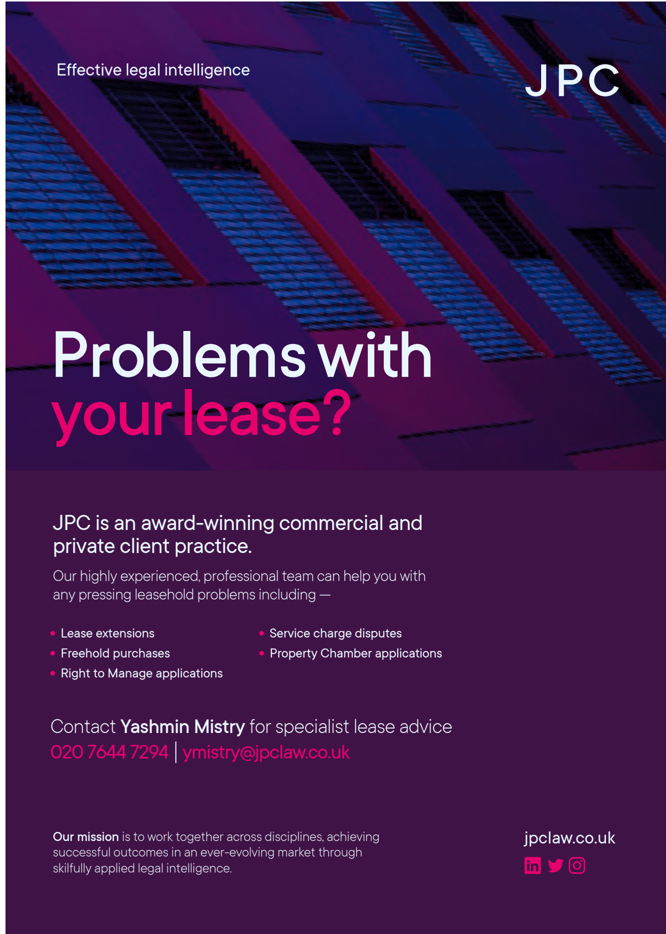

Are cameras operating in a communal space, an invasion of our privacy?

As we become increasingly aware of how and when our personal details are accessed, used and shared, the FPRA's Legal Adviser, Nicholas Roberts, considers the question raised by one of our members regarding the use of cameras in a communal space.

Question

One of our residents has installed one of these fancy internet linked door bells with camera and recording facility. The camera has been located above the door near the ceiling and covers the landing where there are three other flats and the stairs leading to nine other flats. Some residents consider this to be an invasion of their privacy and have asked if it is legal to have their movements under surveillance.

Answer

I must say that I find Data Protection Law to be unlike almost any other area of law that I have come across. When I have attempted to find guidance from their website it seemed to rely on various 'principles' and 'guidelines', with no coherent indication of how these various principles were to be prioritised when they happened to come into conflict: which is almost always the case when there is a dispute. Nevertheless a few cases do go to the courts, and the judges then have to try to make sense of the law.

Your case is in fact very similar to a case which I came across recently on the BBC News website: Neighbour wins privacy row over smart doorbell and cameras - BBC News. You will see that the result of the case is that a home owner who installed the doorbell with a recording video camera was said to be facing a substantial fine (the report may be wrong here: the case report refers to an award of damages to the claimant). It is possible that, if you draw this news item to the resident who has installed the camera, they may decide to remove it (or at least partially to disable it: in particular the recording facility).

The decision was made by a judge in the County Court so, as the article says, it does not formally set a legal precedent (only a decision in the High Court, Court of Appeal or Supreme Court would do that). But it is of some 'persuasive' authority, so another judge in the County Court elsewhere would very probably follow it, unless he or she was convinced that the judge in Oxfordshire was wrong.

Although drawing the BBC report to the attention of the leaseholder in question may provide a rough-and-ready solution to your problem, I fear that the position under Data Protection law may be more complicated than a cursory reading of the BBC website would suggest. I am fairly sure that I also heard an item on a news or magazine programme on the radio about the case in Oxfordshire. That suggested that it was an over-simplification to draw from the case the idea that any use of a smart doorbell incorporating a camera would be a breach of Data Protection law. The import of the item on the radio seemed to be that, if a doorbell camera simply recorded those passing by in the street, it would not amount to a breach. In Dr Fairhurst's case the breach arose because two of Mr Woodard's other security cameras could record her even when she was on her own property.

I have in fact been able to access a copy of the lengthy court judgment. It is clear from it that the judge held that using a doorbell camera which merely recorded those passing by in the street did not amount to illegal collection of data on Dr Fairhurst.

The position with regard to the recording of information in your block would seem to me to fall somewhere between the two clearer examples. When residents are using the landing and stairway, they are neither on the public highway, nor are they on their 'own' property: they are within the common parts, which is private property owned by the Residents' Management Company. Each leaseholder is then using the common parts because they have a right to pass through them under their lease.

I would hesitate to say precisely how the Fairhurst v Woodard case would apply here. The situation in that case was not quite as clear-cut as my summary above would suggest: Dr Fairhurst was being observed and recorded when using her parking spaces, which were not physically part of her property, and it is not clear whether she actually owned them, or had the legal right to use them. But I think on balance that it is likely that a judge would rule that one leaseholder was not entitled to take video recordings of the landing outside their flat if it meant that it also recorded all the comings and goings of their neighbours and their visitors.

Fortunately, I think there is probably a simpler legal solution here, rather than embarking on litigation under Data Protection and privacy law which might well need to push the decision in Fairhurst v Woodard a bit further and thus to 'break new legal ground'. You say that 'the camera has been located above the door near the ceiling'. My reading of this is that the camera is outside the leaseholder's own front door.

It is absolutely clear from your lease (see clause 1.1.1(c)) that the outside surface of this wall is not owned by the leaseholder, but forms part of the freehold of the property. Attaching the camera to the exterior (i.e. landing) surface of an internal wall is thus a clear act of trespass to the freehold. Leases of flats will generally follow this pattern.

The leaseholders do not own the outside walls of their flats. If the freehold is now owned by the Residents' Management Company (but only if the freehold is now owned by the Residents' Management Company) you are entitled to write to the leaseholder concerned making the point that the affixing of the camera is an act of trespass as against the freehold (i.e. the property remaining with the Residents' Management Company), and unless it is removed within 14 days, the company will itself have it removed (you would of course be obliged to return it).

If the freehold is still owned by the original ground landlords, rather than the Residents' Management Company, I cannot see that you would be entitled to act in this way, as the trespass would then be against property owned by them: the fact that the Residents' Management Company is responsible for managing it would not be of relevance.

Data Protection breaches are the responsibility of the Office of the Information Commissioner, and they offer an advice service to individual enquirers: https://ico.org.uk/

LEASE has launched a new E-Learning Module!

LEASE has launched a new E-Learning module to help leaseholders learn about leasehold disputes and the types of alternative dispute resolution (ADR) that can be used to resolve them.

Find the module here.

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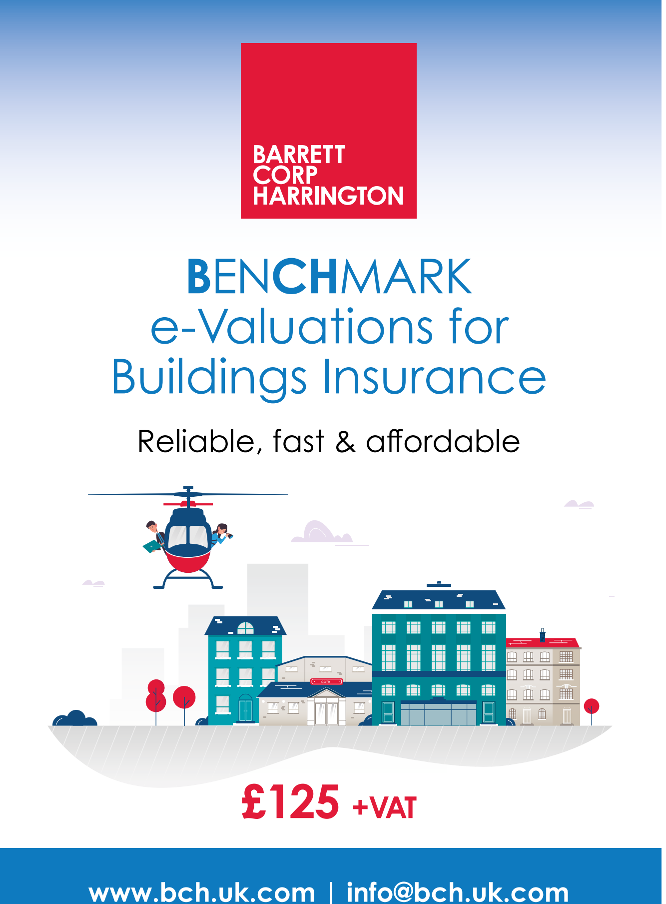

The holiday rental

FPRA Director, Ross Weddell, shares his personal experience and thoughts on the impact of increasing holiday rentals.

In many blocks of flats across the UK, the number of holiday rentals and second homes has increased over recent years. This is not just the case in seaside beauty spots, such as my own in Saltburn-by-the-sea, but in other destinations such as Cornwall and the Yorkshire Dales.

To give a sense of the number of holiday rentals that can be in a location, Trip Advisor listed over 100 holiday rentals in Saltburn-by-the-sea (January 2022). The number of these properties is having an impact on the town, particularly its amenities. The increase also has an impact on the way blocks of flats, such as my own, are run.

The trend towards holiday rentals has many causes. For a start, there are people who want a second home in a beautiful location. Then there is the growth of sites such as Airbnb and Trip Advisor. These sites, combined with specialist holiday rental management companies, make the operation and advertising of a holiday rental substantially easier and cheaper than it was in the past. There is also a financial cause. A holiday rental can earn in excess of £500 per week whereas the same property on the private rental market could earn around £150 per week. So moving a property from the private rental market to the holiday rental market could make financial sense, providing the property can attract sufficient customers.

> The increase has an impact on the way blocks of flats are run

In my building, the number of holiday rentals has increased from 15 per cent five years ago to 40 per cent today. This inevitably has meant changes for residents and the management company alike.

- Firstly, there has been an increase in people around the building. Each holiday rental has guests and cleaners using the flat in any period. Most of these people will be unknown to residents and the management company. This poses security concerns.
- Secondly, there has been an increase in waste. Frequent holiday rental changeovers and the resulting professional cleaning, produce more waste than a resident typically would.
- Thirdly, it leads to challenges enforcing lease conditions (e.g. relating to noise).

To reduce these issues, I've been very clear that the leaseholders are responsible for the flat and I've also offered help to improve compliance with lease conditions.

Looking to the future, I see the number of holiday rentals plateauing, then gradually declining to an arguably more sustainable level. The drop will be led by the increasing ease of holidaying abroad along with the pressures of price inflation, which will mean that the overall number of holidays taken will decrease. The other angle to consider is the political one.

Politicians across the UK are finding that the issue of the increasing number of holiday rentals is important, particularly in local communities. This means that more politicians will be campaigning on this issue and therefore policies that control the number of holiday rentals are more likely to be enacted.

In beautiful places across the UK there is a constant battle – a battle between the needs of the people of the area and the needs of holidaymakers. The holidaymakers need local people to run the amenities and maintain the area. The local people need the holidaymakers to provide income for them. It is essential that the interests of both groups are catered for. This requires a delicate balance between competing and often conflicting priorities. In places such as Saltburn, will this balance be restored?

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Defibrillator grant available for resident associations

An important message from London Hearts for our London members

The need for a defibrillator has never been greater. The Coronavirus pandemic has caused a drastic rise in the number of out of hospital cardiac arrests.

In addition recent tragic cardiac arrest events involving persons at the peak of their fitness shows that cardiac arrest can happen to ANYONE, ANYTIME, ANYWHERE!

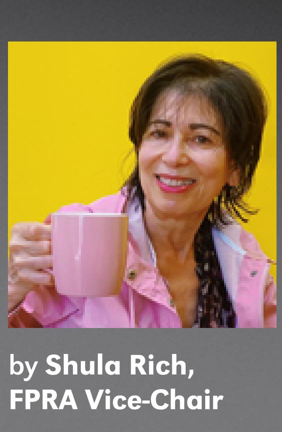
If you go into cardiac arrest without a defibrillator, you have a seven per cent chance of survival. If a defibrillator is on the patient within the first three to five minutes, the chances of survival is over 70 per cent.

At present we have funding available to assist Resident Associations in obtaining this life-saving equipment. We are currently able to offer an increased grant of £300 towards the cost of every defibrillator we supply to Resident Associations across England. With every defibrillator we supply we provide free online training.

Equipment is available now and can be with you in a matter of days.

In order to proceed in obtaining a defibrillator(s) simply complete our short online application to receive a quote via the following link: https://londonhearts.org/apply-for-a-defib

If you have any queries or wish to discuss obtaining a defibrillator, please contact Amy or Jo by telephone on 020 7043 2493 or by email at: amy@londonhearts.org



by **Shula Rich,**
FPRA Vice-Chair

Direct Access

Interview with **Ibraheem Dulmeer, Barrister**

Many people believe that only Solicitors speak to Barristers and that the two are always needed together. Whilst we always hope that leaseholders can avoid litigation, it's not always possible. In addition there are times when an Opinion is needed of a lease clause or situation and it's possible to go straight to a DPA Barrister. More here...

1. What's the difference between a Barrister and a Solicitor?

Barristers are commonly used to represent legal matters in court or tribunals and, before a change in the bar rules, required instruction from a Solicitor.

Solicitors generally perform most of their legal work in drafting and reviewing legal documents, such as contracts, and should matters proceed to court, will enlist the help of a Barrister for representation of their client.

Barristers are now able to advise on legal disputes and accept instruction from the public. They have extensive knowledge of the courts and tribunal determinations, detailed knowledge of the law and can provide a realistic opinion of a matter.

2. Is it still the case that Barristers and Solicitors have different rights in courts?

Yes they do. However, some Solicitors have the same rights in courts as Barristers – this is referred to as 'higher rights'.

3. What does Direct Public Access mean to the individuals with a problem?

A Direct Access Barrister (DPA) can be instructed without needing to firstly instruct a Solicitor. Individuals can be advised on their matters from the initial stages right through to the court process. Individuals, with the aid of a Barrister, will be informed of how their legal matter will be viewed in court before it gets to that stage. This ensures that they are not wasting any time with their matter and can reduce the often seen back and forth with correspondence.

If a Solicitor is not used, legal fees can be more cost effective. A Barrister's fees are fixed and are set out and paid on the onset; individuals are not required to have a certain amount of money on account or to have to anticipate an invoice once a matter is resolved.

Often, individuals instructing a Barrister are seen as representing themselves with the legal advice of a Barrister, allowing for all correspondence to be sent directly from the individual.

Shula: "I understand… of course if you have a Solicitor then all correspondence goes through them and the bills can mount accordingly."

Ibraheem: "Using a Direct Access Barrister is a transparent process, which gives the client the control. The client decides which letters need responding to and the Barrister provides a draft – it is a collaborative approach. Correspondence is sent to the other party by the client."

Shula: "Sometimes when there are deep pocket freeholders they will use very well known Barristers, and it helps the client to know that an acknowledged specialist is representing them too. Can the client say you have drafted the letters?"

Ibraheem: "Yes. If I am drafting the submissions for court or a tribunal and they are submitted by the client, they may wish to inform the court/tribunal that a Barrister has prepared a bundle and/or work. Either way, dependent on whether a Barrister is or isn't instructed to represent them in court, it will provide reassurance in my opinion."

Shula: "Does a Barrister charge by the hour for opinions and how is it costed?"

Ibraheem: "Barristers have an hourly charge. The amount I charge depends on the amount of work involved and the complexity of the matter. For example, preliminary advice and a conference comes at a fixed quote."

Shula: "Oh yes – I'd forgotten to ask about the Clerk. What does the Clerk do?"

Ibraheem: "A Clerk is the initial person any client would speak to. They are responsible for obtaining client details and confirming proof of identity. They send out client care letters and help with diary management. Personally, I take a more hands approach with certain leasehold matters and I aim to keep and build a more personalised relationship with my clients."

(Shula: Generally Barristers work from chambers which will have several Clerks. The Clerks work with individual Barristers and, as work comes in, will allocate it to one of the Barristers they work with. The Clerk gives the Barrister's quote to the client and is able to negotiate on behalf of the Barrister. Generally, once a Barrister has accepted the work, information is sent to the Clerk who forwards it to the Barrister.)

Shula: "What do you think about the situation where a client is paying twice because the Barrister wants a Solicitor present at a conference, and so the client is paying two hourly fees?"

Ibraheem: "That may be the case at times, for example before a court hearing, but it really does depend on the circumstances. In the case of a Direct Access instruction, it would be the Barrister and the client, without a Solicitor, which in essence is only paying once."

Shula: "So this means that if you want to have a conference with a DPA Barrister there is no compulsion to also have a Solicitor there, if it's felt that this service is not needed?"

Ibraheem: "Correct."

4. Are some cases more suitable for DPA than others?

Ibraheem: "Not all cases are suitable for Direct Access. In the event where an individual requires a Solicitor, a Clerk or Barrister would advise you of this and help you find a suitable Solicitor. If a client needs help digesting information or finds doing any required preparation difficult, this is when a Solicitor can be useful. I try to keep my advice as straight forward as possible."

Shula: "Yes, I understand. Simplicity is actually above complexity. I also go from the complex to the simple because one needs a lot of experience to be able to simplify things."

5. Can you explain the difference between a Barrister's opinion and being represented by them?

Ibraheem: "Representation occurs when a client's matter goes to a court or a tribunal. An Opinion is a written piece of work where a Barrister outlines their views on the prospects of matters using various legal arguments. This provides the client with an indication of possible outcomes and can even result in the matter being resolved without going to court using correspondence drafted by the Barrister."

(Shula: It depends what's affordable. An Opinion and drafting submissions, can generally be done for a fixed fee so that in cases where there are several parties, everyone knows what their contribution will be. For representation the quote would include travel and other disbursements, unless it is heard by telephone or video conference.)

6. Do Direct Public Access Barristers also represent individuals or limit themselves to opinions?

Ibraheem: "In general no. I have a wide practice, where I provide a service to fit the needs of the individual or group."

Shula: "From my experience, some Barristers will only give opinions and won't represent clients without a Solicitor."

Ibraheem: "Personally I don't do that. My practice involves a lot of Direct Access work which includes Opinions, conferences, drafting correspondence and representation in the County Courts and Tribunals."

7. There were once 30 occupations which automatically had Direct Access; is this still the case? If so which are the main occupations?

Ibraheem: "Yes that is still the case; this is called Licensed Access."

Shula: "I think there are Surveyors, Accountants, Architects… I can't remember any others and also people like myself who have a Direct Bar License to consult Barristers who don't do Direct Access."

More information on DPA barristers (Access guidance for lay clients) is available here

Ibraheem Dulmeer Barrister/Mediator
www.ibraheemdulmeer.com

Shula Rich BA MSc
www.shularich.co.uk/

Thank you to Ibraheem for this interview and for his work with FPRA.
We will be publishing more interviews, with its great band of Honorary Consultants, for the inside story of their work.

Legal Jottings

Compiled by Nicholas Kissen, Senior Legal Adviser at LEASE

UPPER TRIBUNAL (LANDS CHAMBER)

S.J. Newman v. (1) J.L. Birch-Phaure (2) R.J. Taylor [2022] UKUT 0036 (LC)

The importance of property tribunals being procedurally fair to the parties before them is the subject of a recent decision of the Upper Tribunal (Lands Chamber).

The law

Section 27A of the Landlord and Tenant Act 1985 ('the 1985 Act') permits an application to be made to the Appropriate Tribunal to decide whether a service charge is payable. If any such application is made the Tribunal may also decide the amount which is payable.

The application may be made by a landlord or a leaseholder.

The 'Appropriate Tribunal' in England is the First-tier Tribunal (Property Chamber) ('the FTT') and in Wales it is the Leasehold Valuation Tribunal.

A landlord may engage a legal team which might comprise a Solicitor and a Barrister to deal with the proceedings at the Tribunal and represent them at any hearing.

A lease may permit the landlord to recover the legal costs referable to the Tribunal proceedings through the service charge.

If so, then a leaseholder may apply for an order to stop this happening.

This is because under Section 20C(1) of the 1985 Act, a leaseholder may make an application to the Appropriate Tribunal for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with the proceedings before the Tribunal, are not to be regarded as relevant costs to be taken into account in deciding the amount of any service charges payable by the leaseholder or any other person or persons specified in the application to the Tribunal ('a Section 20C order').

By Section 20C (3) of the 1985 Act, the Tribunal may make such order on the application as it considers just and reasonable.

The facts

Mr.N owned the freehold to a building in Folkestone, Kent being a house divided into four flats each of which was held on a long lease.

In February 2021 Mr.N applied to the FTT under Section 27A to decide the reasonableness of service charges for the year ending 24 December 2020 and of the on-account service charge for 2020/21.

Other issues were also a subject of the application including whether he had complied with the consultation requirements in respect of major works as set out in Section 20 of the 1985 Act.

Only three of the leaseholders took part in the FTT proceedings.

What did the FTT decide?

The charges for the year ending 2019/20 and the sums demanded on account for 2020/21 were held to be reasonable.

Whilst both Ms.P and Mr.T had made applications for a Section 20C order, they were not referred to during the hearing.

In making their Section 20C applications they submitted that Mr.N should not recover costs against them as leaseholders. No reasons were included in their respective applications.

The FTT was satisfied that Mr.N has a contractual right to recover his reasonable legal costs in relation to the FTT proceedings through the service charge under the provisions of the leases.

One of the categories of recoverable costs within the definition of service charges in the leases cited by the FTT was 'all other costs and expenses reasonably incurred by the Landlord in connection with the building (including the management thereof)... or carrying out his obligations under the provisions of this lease'.

The FTT remarked that having found in favour of Mr.N as the freeholder/landlord, there was on the face of it, no reason to grant a Section 20C order.

However, the FTT said there were factors making it 'just and equitable' to make limited Section 20C orders.

Therefore, an order was made that Mr.N should be allowed to recover only 25 per cent of the share of his reasonable legal costs otherwise payable by Ms.P. and 50 per cent of what would have been payable by Mr.T.

A number of reasons were given by the FTT for its decision to make Section 20C orders:

- The application to the FTT by Mr.N had been unnecessary.
- During the hearing it soon emerged that Ms.B and Mr.T never suggested there was any dispute about their liability to pay.
- The FTT had to conduct a hearing by remote video platform made necessary by the length and complexity of Mr.N's written submissions and it would be unfair for both of them to be obliged to pay for that.
- Regarding Ms.P, the FTT said Mr.N had singled her out and failed to take account, in correspondence, of her disability which made lengthy documents difficult for her.
- She would have agreed to pay all the sums demanded had Mr.N explained things more clearly to her.
- Concern was expressed that Mr.N had not enquired of the two leaseholders' financial circumstances during the pandemic.

Mr.N appealed to the Upper Tribunal (Lands Chamber).

What did the Upper Tribunal (Lands Chamber) decide?

The appeal succeeded and the two Section 20C orders were set aside and the matter remitted to the FTT.

It was not disputed that the Section 20C applications were not referred to during the hearing.

In the circumstances it would have been expected that once its substantive decision about reasonableness of the service charges had been made, the FTT would have invited both leaseholders, if they wished to pursue the Section 20C applications despite the outcome, to do so in writing and to explain why the Section 20C orders should still be made.

What happened is that instead, the FTT produced its own reasons for making the Section 20C orders and did so without providing Mr.N as the applicant with the opportunity to comment on them.

Since it did not give him the chance to be heard, the procedure adopted was unfair and for that reason must be set aside.

The Upper Tribunal went on to state that they did not need to comment in detail on the reasons given by the FTT for its decision to make Section 20C orders but observed that whilst it became apparent at the hearing that both leaseholders did not dispute the adequacy of the statutory consultation process or the reasonableness of the service charges, that cannot have been understood by the FTT from the written material submitted to it and led it to list a hearing rather than to deal with the matter based upon the papers. Clearly there was a dispute between both sides making necessary a hearing, an examination of the consultation process and a substantive decision. Therefore, it was not clear to the Upper Tribunal why the FTT considered the application by Mr.N was unnecessary nor why both leaseholders should not pay for the additional cost of a hearing.

Gas Safety Week

Gas Safety Week 2021 was another big success and thousands of supporters within the industry and beyond came together to talk about key gas safety topics. We'd once again like to say a huge thank you for all your support for Gas Safety Week.

The Gas Safety Week Report is now available, containing all the juicy details of what went on during the week, and you can download it via the link below.
READ THE REPORT HERE

Gas Safety Week 2022 will be happening from 12 to 18 September – look out for more details as the week approaches!

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WHAT DO YOU THINK?

We publish our newsletter each quarter and supported by our website, it's our opportunity to share news and information that will benefit you and in turn the community you represent.

But what you think matters.

Click here to let us know your views about what we're doing and how we're doing it.

And in the meantime, see what some of our members are saying:

January 2022

5* Fantastic service, highly valued

We have submitted several questions to the FPRA and their responses have always been comprehensive, easy to understand and timely. We cannot speak more highly of the service we have received.

January 2022

A 'thank you' to Nick Roberts, FRPA's Legal Adviser.

Thank you for your email and the attached reply from Mr Roberts regarding our recent request for advice. Having had the opportunity to read the letter from Mr Roberts it has provided the clarity, and reassurance the directors were seeking. Please pass on our heartfelt thanks to Mr Roberts in taking the time and trouble to assist us with this issue in such a comprehensive and concise way. Please also thank everyone in the FPRA office for their assistance in dealing with this matter on our behalf.

December 2021

5* Best thing we have done since becoming a Residents' Association is joining the FPRA

Until we became aware of the FPRA and joined, our self-managing Residents' Association spent thousands of pounds on legal fees. Every Solicitor's letter seems to cost £500. Looking back on it we have been surprised and shocked at the poor quality of legal advice we have been paying for. We have been members of the FPRA for a month and have already asked five questions and received prompt and practical advice allowing us to deal with issues that Solicitors seem not to have been able to do! We have also downloaded pamphlets, specimen letters from the FPRA members' website. This has saved us time, worry and expense. Joining the FPRA has been the best thing our Residents' Association has done. Brilliant for amateurs like us and brilliant even for the more experienced too I suspect.

October 2021

5* Immediate confirmation

An immediate confirmation that my question had been passed onto an appropriate person.

December 2021

5* Excellent Service

We have been members of FPRA for about five years now. The service and expertise is amazing; it is a vital tool especially if you are in block management to be part of this amazing organisation. On 24 November 2021 I attended a special webinar; it was extremely useful and they answered all my questions. Keep up the great work. Thank you for such a great service.

October 2021

5* Exceptional Advice

Exceptional advice for apartment leaseholders. We have been able to successfully take our useless management company to the First-tier Tribunal and have a new manager appointed, based on advice from the FPRA. All apartment building Residents' Associations should belong.

NEW Honorary Consultant

We welcome Mark Savage, recently appointed to the FPRA's team of Honorary Consultants.

Mark has built his career within the insurance industry. He joined Deacon, a blocks of flats insurance specialist in 2003 and completed a Chartered Management Institute diploma to further advance his management skills. He leads two of Deacons sales teams, providing products and services to both new and existing customers, and is an active member of the senior leadership team.

Mark will now be part of our experienced panel, using his knowledge to answer insurance related questions from FPRA members.

Dates for your diary

1. We have a number of **webinars** planned this year; dates will be announced once confirmed:

Fire Safety – Jonathan Gough
Legal – Shabnam Ali-Khan
Green Energy/Utilities – William Bush
Reforms – Mark Chick
Commonhold – Matt Lewis

2. Leaseholder Expo 2022 Thursday 28 April – the biggest national leaseholder event of the year and will be held in April. Industry experts, Save My Service Charge and News On The Block, have teamed up with Vfairs to help answer your questions about your lease.

Details about all our events, as well as lots more information and useful insights, can be found on our website: www.fpra.org.uk/

3. AGM Wednesday 23 November 2022

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ASK THE FPRA

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

Fire safety

Q I have an enquiry concerning a recommendation in our Fire Risk Action Plan which noted:

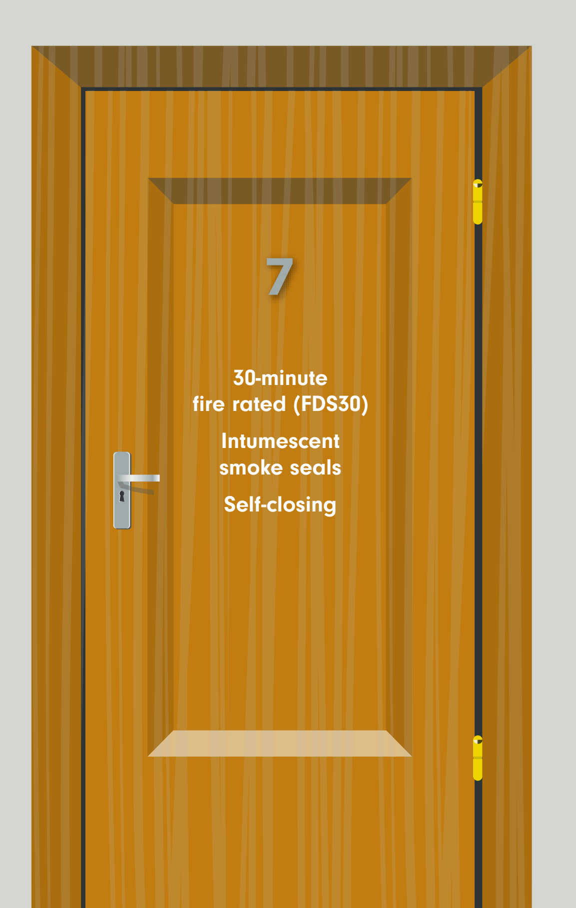
"All doors to individual flats were in good condition and closed at the time of this assessment – individual flat doors must be a minimum of 30-minute fire rated (FDS30) including intumescent smoke seals and self-closing devices in accordance with British Standard 476 –"

The Risk Priority was identified as Medium.

We would like to be very clear about the management company's statutory obligations and how they apply with our lease. I cannot see an obvious mention of the personal front doors to each flat in the lease, so we are not clear whose responsibility they are.

I am happy to arrange an inspection from an accredited fire door installation company using my own front door as the example. My guess is that the doors can be retro-fitted to meet current standards.

However, if they are personal doors, should we be expected to include the costs in next year's service charge budget or should each flat-owner make their own arrangements with the company?



A FPRA Director Jonathan Gough replies:
Original fire doors can remain in situ, provided they are not damaged etc.

When they need replacing they should be done following the latest standards at the cost to the leaseholder unless the lease instructs otherwise.

Front doors in blocks of flats – security versus safety?

This report shares concerns regarding the provision of security doors to flats without due regard being paid to fire safety requirements.

Q In our fire risk assessment the following roles are listed:

1. The Responsible Person for the buildings: The developer company

2. The Responsible Person Management of the buildings: The estate manager

3. Competent Person: For the purposes of this assessment the assessor

4. Competent Person for the organisation: The estate manager health and safety team

Could you please advise us whether these roles have any formal responsibilities and accountabilities and whether they are governed by any legislation etc? Additionally do you know how often an FRA should be carried out?

A FPRA Director Jonathan Gough replies:
The Responsible Person (RP) is accountable for all non-compliances raised in the risk assessment. The RP will change depending upon if the building is occupied.

Unoccupied building

If the building was not occupied when the risk assessment was done then the developer would be the RP and therefore responsible for resolving any issues identified.

Occupied building

If the building has been handed over to a Managing Agent or RMC, due to occupation, they would now hold the role of RP. This role can be shared.

Risk assessment frequency

This depends on how 'risky' the building is and will be determined by the last risk assessor. If the building has lots of problems you would want the risk assessment

done annually. If the opposite occurs (less problems) then you might find the risk assessment settles for a re-assessment every 18 or 24 months.

This is the definition of the RP from The Regulatory Reform (Fire Safety) Order 2005. I've highlighted 3(i) as this should be used to establish who the RP is in an occupied building.

Meaning of 'responsible person'

3. In this Order 'responsible person' means:

(a) in relation to a workplace, the employer, if the workplace is to any extent under his control;

(b) in relation to any premises not falling within paragraph (a)

(i) **the person who has control of the premises (as occupier or otherwise) in connection with the carrying on by him of a trade, business or other undertaking (for profit or not)**; or

(ii) the owner, where the person in control of the premises does not have control in connection with the carrying on by that person of a trade, business or other undertaking.

Legal

Q **1. Could you give a definite answer if one needs a 100 per cent agreement of the Leaseholders before a variation can take place? I have been given conflicting advice by two solicitors whereby one advises 100 per cent and the other one 33 per cent in favour and the rest not against it.**

2. I have also been advised that when a variation of the lease has been approved it is possible for somebody who does not agree later on (maybe when selling, or settling an estate) to go to a tribunal to arrange for the original lease to be re-instated.

3. To operate our building we have created through the years a hand book with regulations for the day-to-day operation of the building and to avoid problems between neighbours (especially where the lease does not cover the situation or is vague). Can this be considered a legal addendum to the lease? We require new owners to acknowledge that they have read and understood the handbook with regulations, before we give landlord consent to the sale. It works in practice but we have no idea what the legal status of such an addendum is.

A FPRA Honorary Consultant Mark Chick replies:
1. As to whether 100 per cent agreement is required or not before a variation can take place would depend upon the nature of the variation of the lease that is intended and, the nature of the covenant in question.

If the covenant is qualified (in other words that permission must be obtained), then there is generally a proviso that this permission should not be unreasonably withheld.

Having looked at the copy lease supplied, the alterations covenant is such a covenant – in other words if a tenant makes an application for consent, then this may not be unreasonably withheld.

If the covenant was absolute, i.e. an absolute prohibition on doing something, then 100 per cent of the leaseholders, whether they are owners of the freehold or not, would have to agree.

2. We dealt with this question during the webinar itself. If there are issues with arrangements relating to the maintenance and repair of the property, which relate to insurance, repair of installations necessary to ensure a reasonable standard of accommodation, the services, or expenditure to be recovered for the computation of service charge, then any one party to the lease may make an application under Section 35 of the 1987 Landlord and Tenant Act, seeking a variation and it would be for the Tribunal to determine whether such a variation should be granted.

The jurisdiction is exercised sparingly.

We also mentioned the alternative route under Section 37 of the 1987 Act under which, provided that more than nine flats were involved and the lease variation in question is not opposed by more than 10 per cent of the total number of parties involved or 75 per cent or more of the flat owners consent to it, then it may be possible to make an application to the Tribunal to order such a variation.

However, variations after the event of the sort which the question envisages are exceedingly rare.

3. We agree that a handbook is useful and as mentioned during the course of the webinar, may be deemed to be incorporated into the lease as a regulation, provided that the lease allows the landlord to make regulations. I can see that the lease requires the tenant to comply with an observed regulation as set out in the second schedule and this covenant goes on to say that the tenant is also to comply with any further reasonable regulations made by the landlord or the company. Accordingly, the landlord may make further reasonable regulations as set out in the handbook; provided that these are publicised to the members/owners then they are likely to be binding.

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Mark Chick, Senior Partner,
Head of Landlord & Tenant
FPRA Honorary Adviser since 2013
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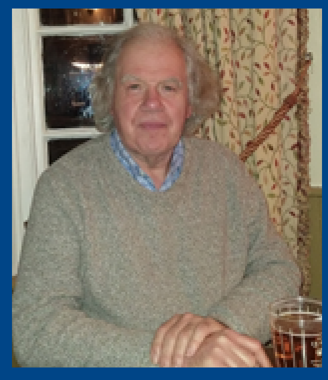
MEET THE FPRA

Five things about…

John Ray



John started with the FPRA Admin office back in Summer 2012 providing IT support. Over the years he's taken on more and his duties now include content management of the FPRA website, IT set up and back-office support for the admin team.

1. John has been a licenced Radio Amateur (ham) for over 50 years.
2. He's worked in industrial electronics with various engineering and support roles over a 35-year period in the UK and overseas.
3. John lives in Theydon Bois and you might see him enjoying a pint at the local pub.
4. He enjoys walking in Epping Forest.
5. He's now looking forward to more holidays outside the UK.

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HAVE YOUR SAY…

Would you like to contribute to our newsletter?

For our 'A member writes...' section, your article could be an opinion piece, something offering insight and advice or a 'pros and cons' or 'for and against' point of view – anything would be welcomed as long as it would be of interest and relevance to our members.

We would very much appreciate your contribution so please get in touch at newsletter@fpra.org.uk

The inclusion of an insert or advertisement in the FPRA newsletter does not imply endorsement by FPRA of any product or service advertised

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Honorary Consultants Adam Smales, Anna Favre, Ann Ellson, Belinda Bagnall, Cassandra Zanelli, Cecelia Brodigan, Emily Shepcar, Ibraheem Dulmeer, Jonathan Channing, Kevin Lever, Leigh Shapiro, Malcolm Linchis, Mark Chick, Mark Savage, Mary-Anne Bowring, Matthew Lewis, Maxine Fothergill, Paul Masterson, Roger Hardwick, Sally Drake, Shabnam Ali-Khan, Shaun O'Sullivan, William Bush, Yashmin Mistry

Legal Adviser Dr Nicholas Roberts

Admin and support Caroline Carroll – *Head of Admin*, Chris Lomas – *e-Shots*, Debbie Nichols – *Admin Wednesday AM and holiday cover*, Diane Caira – *Admin Monday and Tuesday*, Jacqui Abbott – *Admin Thursday and Friday*, James Murphy – *Database Management*, John Ray – *Computer and Website Admin*, Sarah Phillips – *Newsletter and Publications Designer*, Val Moore – *Newsletter Editor*

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Non-members can subscribe to our newsletter at the reduced price of £10 per annum. Please contact the FPRA office (info@fpra.org.uk) to sign up and receive your copies.

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