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NEWS

FPRA
FEDERATION OF PRIVATE RESIDENTS' ASSOCIATIONS

The rising cost of energy

Written by Shaun O'Sullivan, FPRA Honorary Consultant

The government, in attempting to soften the blow of energy price rises resulting from the increase in wholesale prices and the rise in the energy price cap, has introduced a number of measures to help consumers. However, members may not be aware that such help is in respect of domestic supplies only.

Most electricity used for lighting in communal areas of blocks of flats and, indeed, gas or electricity used to heat some communal areas as well as heating supplied to flats on a communal basis, will not benefit from such support. Contracts for such supplies are normally subject to business contract terms and these do not enjoy the benefit of the price-capping arrangements; in this regard providers can recover from consumers the totality of the rise in the wholesale price.

Service charges will take the hit and particularly so in situations where heating/hot water is supplied on a communal basis.

Agreement with major developers to fund building safety repairs

The government has revealed a wide-ranging agreement that will see industry contribute £5 billion to address the building safety scandal.

- Major homebuilders accounting for half of new homes pledge to fix all unsafe tall buildings they have had a role in developing
- More than £2 billion committed by over 35 developers to make buildings safe
- Extension to the Building Safety Levy will raise a further estimated £3 billion forcing industry to pay and protecting innocent leaseholders

The government has revealed (on 13 April 2022) a wide-ranging agreement that will see industry contribute £5 billion to address the building safety scandal.

In a victory for leaseholders, Levelling Up Secretary Michael Gove has agreed a solution with the housing industry that will see developers commit a minimum of £2 billion to fix their own buildings. Industry will also pay up to a further £3 billion through an expansion to the Building Safety Levy.

Under the new agreement, which will become legally enforceable, over 35 of the UK's biggest homebuilders have pledged to fix all buildings 11 metres+ that they have played a role in developing in the last 30 years.

For the companies yet to make the pledge, the Secretary of State has also confirmed there is little time left for them to sign up, and that those who continue to refuse will face consequences if they fail to do so.

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Agreement with major developers

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As set out in January, a new government scheme will also see industry pay to fix buildings where those responsible cannot be identified or forced to in law. This follows previous confirmation that plans for a 30-year loan scheme paid for by leaseholders would be scrapped.

The new scheme will be funded through an extension to the Building Safety Levy that will be chargeable on all new residential buildings in England. This is expected to raise up to an additional estimated £3 billion over 10 years from developers and ensure no leaseholder in medium-rise buildings faces crippling bills, even when their developer cannot be traced.

Industry to contribute £5 billion to address the building safety scandal

New proposed laws, announced in February under the Building Safety Bill, will ensure qualifying leaseholders are protected from the costs of historical building safety defects, including total protection against cladding costs. Today's deal establishes that the industry responsible – not innocent leaseholders – will pay.

Levelling Up Secretary Michael Gove said: "This marks a significant step towards protecting innocent leaseholders and ensuring those responsible pay to solve the crisis they helped to cause. I welcome the move by many of the largest developers to do the right thing. But this is just the beginning. We will do whatever it takes to hold industry to account, and under our new measures there will be nowhere to hide."

The pledge, published by government in April 2022, commits developers who have signed up to legally binding contracts, and to implement their promises as soon as possible.

The detailed agreement confirms developers will:

- Act as quickly as possible to fix buildings
- Implement new proportionate guidance on building safety
- Regularly report to leaseholders and government on their progress
- Respect an independent dispute resolution process established by government; and
- Refund money already received from the taxpayer to fix their buildings
- More information on how government plans to enforce the agreement in law will be released in due course.

The government is introducing new powers that could be enforced on a developer should they breach the agreement, as well as on any remaining companies who fail to sign up. These new powers would allow the Secretary of State to block those who refuse to sign from building and selling new homes.

The government is clear that building safety is an industry-wide issue. Cladding and insulation manufacturers are yet to accept their share of responsibility and come forward with a proposal. The Secretary of State has also today written to the Construction Products Association and warned he will do whatever it takes to hold cladding and insulation manufacturers to account.

This announcement follows a statement from Mr Gove in January, when he set out a four-point plan to reset the approach to building safety and give leaseholders more protection against unfair costs.

Further Information

The Building Safety Levy will be chargeable on new residential buildings of all heights – see clause 57 in the Building Safety Bill.

Leaseholders will be contacted by their developer in due course to confirm whether their building is covered.

The Building Safety Bill includes far-reaching provisions to protect qualifying leaseholders, in law, from the costs associated with historical building safety defects. Qualifying leaseholders are those living in their own homes or with up to three UK properties in total in medium and high-rise buildings.

The Building Safety Bill will also give government, regulators, and leaseholders and others, new ways to hold to account companies that fail to do the right thing. More information is available here and further details on these measures will be announced in due course.

List of developers who have signed

Pledge letter

Letter to the Construction Products Association

Source: Department for Levelling Up, Housing & Communities

Hello FPRA

A warm welcome to the Summer edition of our newsletter.

Whilst it feels like we've thrown off the shackles of the Coronavirus with many of us now enjoying our freedom again, unfortunately we're now faced with the new challenge of rising costs for our food, fuel and energy, and in fact just about everything.

The impact of rising prices and looking at ways to future-proof your costs are themes picked up in articles in this issue. As always we endeavour to highlight the problem and, with the insight from our experts, offer guidance and best advice. And alongside articles on the funding for building safety, Top Hat Development, what makes a lawful service charge, and of course much more, you will be able to read and enjoy all our regular features.

Please continue to send in your questions, participate in our webinars and post your reviews – we welcome and appreciate all your contributions. If you would like to contact me directly, you can at newsletter@fpra.org.uk

In the year of Queen Elizabeth's Platinum Jubilee, I wish you a warm and happy Summer.

Yours,
Val Moore, Editor – FPRA Newsletter
newsletter@fpra.org.uk

Building safety funding

Clive Betts, Levelling-Up Committee Chair, writes to Secretary of State Michael Gove

Clive Betts, Chair of the Levelling Up, Housing and Communities (LUHC) Committee has written to Michael Gove, Secretary of State, DLUHC, following the Department's announcement on 13 April of an agreement with the housing industry to contribute £5 billion to address the building safety scandal.

The correspondence asks a series of questions in relation to the government's announcement, including whether the funding and building safety levy will cover non-cladding as well as cladding issues, how social housing providers will be affected, and the steps being taken by the government to make other sectors, beyond developers and construction manufacturers, contribute.

The LUHC Committee published their **Building Safety: Remediation and Funding report** on 11 March and made a series of recommendations to government to ensure leaseholders did not pay to rectify faults to make their homes safe.

On Wednesday 20 April, the House of Commons undertook consideration of Lords Amendments to the Building Safety Bill, (see House of Commons Library research briefing).

Clive Betts, Chair of the Levelling Up, Housing and Communities (LUHC) Committee, said: "As a Committee, we welcome the government's announcement of an agreement that will, at long last, see the housing industry contribute £5 billion to help address the building safety scandal. Leaseholders should not be paying a penny to put right faults not of their doing to make their homes safe.

"I hope the Secretary of State is able to provide clarification around what is covered by the funding announcement and the building safety levy, including whether it will apply to non-cladding as well as cladding issues, and the total expected amount that industry and government will together spend on remediation.

"As we recommended in our recent Committee report, social landlords should have full access to funds for building safety remediation and be exempt from the Building Safety Levy. More detail from the Secretary of State on how social landlords will be affected would be welcome.

"It is disappointing the Construction Products Association continues to drag its feet and is yet to make a public funding commitment. We welcome the further steps the Secretary of State indicates he is taking in this area. All relevant parties to the building safety crisis should be required to contribute to the costs of fixing these issues. We hope the Secretary of State will set out what further steps are being taken to make sectors who have not made a public funding commitment, such as construction manufacturers, contribute."

Clive Betts (MP for Sheffield South East, Labour) is Chair of the LUHC Committee. Full Committee membership available here.

Source: Levelling Up, Housing and Communities (LUHC) Select Committee House of Commons Building Safety: Remediation and Funding

Insurance excess – is this a service charge cost?

By Kevin Lever, FPRA Honorary Consultant and Partner at KDL Law

The cost of insuring residential developments has seen some sizable increases over the past few years and we are regularly advising landlords and leaseholders in relation to whether the cost of insurance procured by the landlord RMC or RTM is reasonable.

In addition to the hike in the cost of the overall policy, our clients are reporting sizable increases in excess limits applied for certain types of claim, with water damage and fire being the main culprits. In some cases these excesses are £5k, £10k or even £20k or more depending upon the insurer and the claims history of the block. This is a significant change from the position where excesses have commonly been in the hundreds rather than thousands.

Our clients/agents often report that, historically, insurance excesses have simply been covered by the service charge to which all leaseholders contribute. However, with those excesses now in the thousands or tens of thousands of pounds, scrutiny of that historic approach is necessary to be clear that it is lawful and in order to avoid costly disputes.

So, the question is, **is it lawful to use service charge/reserve fund monies to pay insurances excesses?**

...is it lawful to use service charge/ reserve fund monies to pay insurances excesses?

The answer is that, in most leases, it is probably not (and nor will it ever have been) lawful to use the service charge for such an expense no matter whether that cost was hundreds or thousands.

The different types of claim

There are two main scenarios to consider:

Scenario 1

Where a claim is made upon the insurance policy obtained by the landlord/RMC/RTM ('landlord') for damage to property within the block resulting from **a matter falling within the repairing obligation of the landlord**.

In this scenario the excess applied by the insurer is **more likely to be a cost falling within the service charge** under the lease and to which all leaseholders pay in their respective proportions. This is because the cause of the fault was within the landlord's repairing liability and the repair (in this case limited to the value of the excess) is therefore a service charge item.

Scenario 2

Where the claim upon the insurance policy for damage to property within the Development resulting from **a matter falling within the repairing obligations of a leaseholder** (for example a leaking bath or perhaps an inadequately plumbed in appliance within the leaseholder's demise) or as **a result of default of the leaseholder** (i.e. accidental damage) then the excess to that claim applied by the insurer is almost always **not** going to be a cost that can be lawfully covered by the service charge.

The position at Scenario 2 arises because, in most leases, the leaseholder is responsible for repairing and keeping in repair the flat and all those things and matters within the flat. So if the leaseholder's washing machine leaks or a pipe exclusively serving the demise bursts and causes damage elsewhere in the building, then that issue, the cause of the damage, is likely to be within the repairing obligations of the leaseholder and not the landlord. Most leases will preclude the service charge from being used to address a matter which contractually the leaseholder is bound to repair/resolve.

The same applies where the cause of the leak arises through a genuine accident – the overfilled bath for instance – as, whilst this is an unfortunate, unintended and entirely accidental event and does not result from a lack of repair, it is still an event that occurred through tenant default and thus not a matter falling to the service charge.

Lease specific – check the lease of the relevant properties

It is important to highlight here that the above is subject to the specific provisions of the relevant lease(s) and thus advice should be sought in each case. Whilst the above is more likely to be correct, in most cases, we have seen leases that do enable excesses, even in the case of tenant default or disrepair in the demise, to be funded through the service charge – but those are extremely rare in our experience.

So how is the excess covered and who pays it?

Where an excess has been incurred that is not a service charge cost (see Scenario 2) then it will be for the party claiming on the policy to address that excess causing a shortfall in the payment of the contractor's costs. If so minded, and likely dependent on the level of the excess, the claiming party might then seek to recover any loss from the party responsible for the damage i.e. not the landlord but the defaulting leaseholder.

The is important because, if the landlord covers the excess it then has to consider how, and whether, it has the ability under the lease to recover that sum from the defaulting leaseholder who actually caused the damage. Very few leases will provide a useful provision in this regard and even if they do, the Landlord is still looking at potentially costly litigation to recover that sum if the offending leaseholder is unwilling to volunteer payment.

To avoid this issue the landlord should, where possible, authorise but not conduct, the claim to the insurer in the first instance or at least not be the party who provides instructions to the contractors employed to address the damage. Instead, the landlord should require the leaseholder to make and conduct the claim itself (perhaps with authorised assistance from the managing agent) and, importantly, be the point of contact for the contractor when, at the end of the matter the

contractor is looking to someone for the payment of the excess withheld by the insurer. The shortfall is then for the claiming leaseholder to recover from the party responsible for the damage, a matter between neighbours with which the landlord need have no involvement. Whether or not that is possible or practical will depend on the terms of the lease and the policy (e.g. whether the leaseholder is named and can conduct the claim), as well as the particular circumstances (e.g. whether the damage solely affects the demised premises or also includes the landlord's reserved property).

What if this is not received well by the leaseholders?

Despite being correct, in the case of the majority of leases, it may prove to be unpopular if enforced. Accordingly, what options are available to the landlord, if it is so minded, to enable it to provide an outcome where the excess on any claim against the insurance, whether through tenant default or otherwise, may be a legitimate and lawful service charge cost to which all leaseholders pay in their respective proportions? There are a couple of options.

1. Variation of the leases to enable the cost to lawfully be a service charge

The leases at the relevant development may enable a unilateral amendment that will facilitate such a change. If no such provision is present in the relevant leases then the landlord might offer a voluntary variation to each lease. Note though that, because you would not wish to see some leaseholders liable and some not, this really only works if there is a 100 per cent uptake. The landlord might also look at an application to the Tribunal under s35 or s37 Landlord and Tenant Act 1985 to amend the leases to include a suitable provision. s35 is unlikely to assist as there is no fault here with the lease. s37 would require 75 per cent of the leaseholders to support the amendment and not more than 10 per cent to oppose it, and even then there is no guarantee that the Tribunal would accept the proposed variations.

Our view is that whichever of the above routes are considered, the Landlord should expect an objection from at least some of the more forward-thinking leaseholders for two reasons.

Firstly, there needs to be a consideration of the excesses in question. Most excesses for water leaks, or other regular types of claims leading to large costs, are commonly in the region of £5k, £10k or £20k for many blocks. Where a block has a history of a certain type of claim then those residing in the block need to consider what effect that will have on the annual service charge if the service charge is to absorb those excesses year on year. It should also consider the negative effect of high service charges on the values of the flats.

The second reason relates to the effect of taking the burden away from the defaulting leaseholders. Is a leaseholder going to be worried about the damage that a leak from their incorrectly plumbed in washing machine has caused to two neighbouring flats if, by virtue of the change in the lease, that they were relieved from paying the huge excess on each claim. If the service charge picks up these sums then is the landlord creating a situation where, in fact, it may see more claims as leaseholders appreciate that there is no personal financial liability if they mismanage their home?

2. Treat the excess as 'just part of the overall cost of insuring' the development

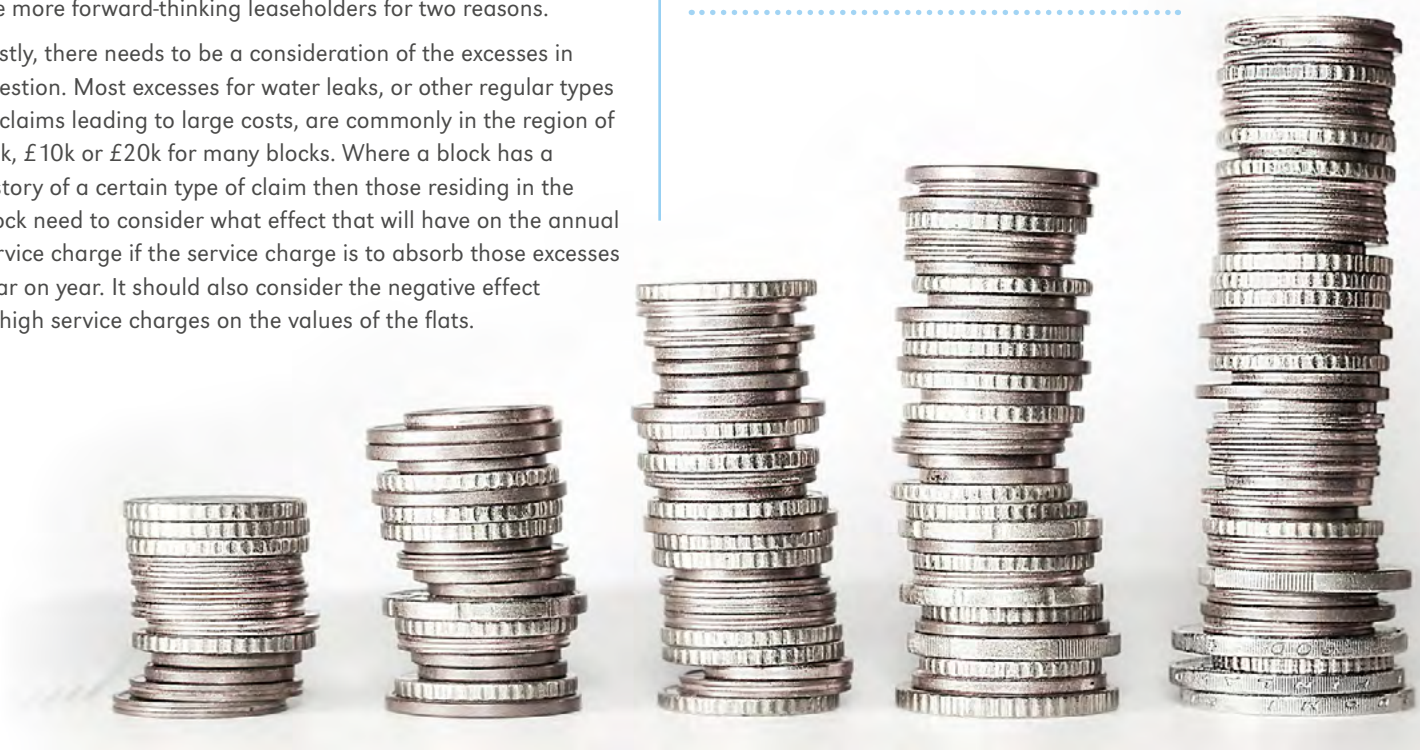
This is a common suggestion and one with some merit depending upon the leases granted in any block. Our view is that, whilst this might apply in Scenario 1, it is less likely to apply in relation to Scenario 2 due to the provisions set in most leases.

Each case needs considering on the terms of the particular leases and the particular circumstances.

The same issues referred to in Scenario 1 apply where the result of this scenario is to remove the burden of excess payment from the defaulting leaseholder and the inevitable effective increase in annual service charge.

Conclusion

Just because something may have always been dealt with in a certain way, it doesn't make it correct then or now. In the past, insurance excesses have often been relatively small and may well have slipped under the radar if they have been applied incorrectly. Now though, with significant increases in the level of those excesses, the potential for dispute is greater as the presence of large individual payments becomes more visible. It is therefore imperative that you check what you are currently doing against what the lease actually permits you to do as a landlord or manager AND that you take steps to ensure that any past incorrect dealings with insurance excesses are not repeated moving forward. In any given case, specialist advice should be taken to avoid any challenges.



Top Hat Development

The FPRA's Legal Adviser, Nicholas T M Roberts, responds to a member's enquiry regarding Top Hat Development.

OUR MEMBER'S QUESTION:

Does the current legislation allow for Top Hat Development as permitted development?

As you will know our block is purpose built (1930s) with 17 flats. We have a 950 years lease and our ground rent is £40 per annum.

The landlord has had several applications refused by the council already BUT we are concerned post Jenrick. Please advise.

THE FPRA'S RESPONSE

Your email of 9 March has been forwarded to me. I have checked the current law on the issue you raise.

1. To avoid any confusion, the first point that I should make is that the new law, as such, does not apply to your block. This is on the basis that it was built before 1 July 1948.
2. That is the brief answer. However, the 'Jenrick' changes that have been brought in were intended to make it easier to obtain planning permission to add additional storeys to blocks of flats, so this is likely to have some effect on the 'planning climate', and in particular, the way that local authorities approach scenarios like yours which would still require applications for full planning applications. In practice local authorities have little choice but to fall into line when there is a change to the climate for planning applications: if they do not, their decisions are likely to be overturned by the Planning Inspectorate, and they may also end up having to pay developers' legal costs. That said, the change in the 'planning climate' may not be quite as great as is sometimes supposed: see my comments at (a) and (b) in para 10, below.

   The government website which explains the changes is here: When is permission required? GOV.UK (www.gov.uk). The sections relevant to the adding of extra storeys are 'What permitted development rights are there for existing buildings to be extended upwards?' and 'Is prior approval required to extend a building upwards?' The website needs to be read carefully as it deals separately with three different scenarios:

   a) adding storeys to existing houses;

   b) providing additional homes by adding additional storeys to existing blocks of flats; and

   c) providing dwellings over existing commercial buildings. (It also does not mention the point that blocks of flats constructed before 1 July 1948 are not within its scope).
3. The actual law is to be found at The Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020 (legislation.gov.uk), SI 2020 No 632: see A.1 and A.2. This relates specifically to the addition of extra storeys to purpose-built, detached blocks of flats (unless built before 1 July 1948 or after 5 March 2018).
4. A perhaps more 'user friendly' summary of the changes in the law is to be found on the following website of a solicitors' practice: Permitted development rights: upwards extensions (pinsentmasons.com). That, too, does not mention the 1948 cut-off date.
5. Although the changes in the law are described as an extension to the 'General Development Order' (GDO), it seems to me that what is described here as a 'GDO' is rather different from the GDO, as it has traditionally been known to lawyers. The existing GDO dates from 2015, but

there have been previous GDOs dating back at least as far as the 1970s, and I think even from when planning controls were first introduced in 1948. The original idea of a GDO was it gave a sort of 'deemed permission' for minor works (within prescribed limits) which did not require planning permission at all. In the context of dwelling houses (which generally do not include flats) they cover matters such as the building of rear and side extensions, conservatories, small front porches etc. They do not generally require planning permission as such. I believe that those who want to carry out such works can just go ahead and do them; at most, in case of any doubt someone might write to the planning office asking them to confirm that planning permission would not be required.

6. The GDO which covers additional storeys, on the other hand, seems to be something of a hybrid between full planning permission and what was traditionally covered by the GDO. Paragraph A says the addition of extra storeys is 'permitted development' (except in certain circumstances set out in para A.1). Para A.2(1) then requires the developer to obtain prior approval of certain matters.

7. **You say that your block was purpose built in the 1930s. In that case, the Regulations referred to in paragraph 2 do not apply at all.** The ground landlord/developer would still have to make a full planning application in the usual way (see para 22, adding a new para A.1. (c) in the existing GDO).

...is likely to have some effect on the 'planning climate'

8. The existence of the new Regulations will, however, almost certainly 'tilt the scales' more in favour of local authorities (and the Planning Inspectorate) being willing to grant planning permissions for additional storeys. Your ground landlord would doubtless argue that your block would fall within the scope of the GDO if it had been built a decade or so later, and that the planning authority should bear that in mind when dealing with any application for full planning permission.

9. I have said that the new GDO is clearly intended to 'tilt the scales' in favour of there being a presumption that adding storeys will be permitted. But the various matters upon which the planning authority needs to give **prior approval** in cases which **do** fall within the GDO still include the *impact on highways, the privacy of neighbours* (including those in the existing building), and the external appearance of the building. So the various matters listed as still requiring approval are, I suspect, just the sort of considerations which would have led to the rejection of the previous planning applications at your property, and indeed most similar applications. It probably remains to be seen precisely what difference the new GDO will make in practice. This should become clearer as more cases go on appeal to the Planning Inspectorate, and eventually to the courts. Some are beginning to go through the courts already. The Court of Appeal has rejected the argument that the new addition to the GDO is incompatible with legislation intended to reduce climate change. The High Court has also said – in a case involving the addition of storeys to a single dwelling – that 'impact on amenity' was not restricted to overlooking, privacy or loss of light; that 'adjoining premises' included not only those that were immediately contiguous to the relevant property; that 'external appearance' included its entire appearance, not merely its front elevation; and that considerations of 'external appearance of the building' included its impact on the look of neighbouring properties and the locality, and not just the look of the property itself. (I suppose this amounts to saying that, even if a building would look OK on its own, it still has to be viewed as part of a larger streetscape). This case is a very recent (3 March 2022) decision of the High Court, so it could still be appealed, but it is interesting to see the way the High Court has approached the GDO. Although the case is a decision on the Regulation relating to the addition of further storeys to an existing dwelling, the way it has interpreted that Regulation will clearly also be relevant to the very similar wording in the Regulation dealing with an application for prior approval involving the addition of storeys to a block of flats.

10. In cases which fall within Class A (i.e., the Regulation referred to in paragraph 1) a local planning authority cannot now reject an application for prior approval of the addition of storeys to a building **on planning grounds other than those matters which are listed in the GDO as requiring 'prior approval'**. Although (because your building was built before 1 July 1948), an application for permission to add additional storeys would still require a full application, the way that the GDO operates on newer buildings is clearly going to influence how the local authority would now deal with an application for full planning permission relating to your building. However:

    (a) the sort of matters which a local authority can take account of in deciding whether to grant 'prior approval' in GDO cases are almost certainly the matters which have – prior to the GDO – most often resulted in planning applications being rejected; and

    (b) the decision of the High Court which I mention in paragraph 9 of this letter suggests that a broad interpretation will continue to be given to concepts such as 'impact on amenity', 'adjoining premises' and 'external appearance'. This is likely to have the result that the existence of the GDO will not have quite such a wide impact on the law as some commentators initially thought that it would have. For example, the fact that 'impact on amenity' is not restricted to the matters specifically listed in the Regulation ('overlooking, privacy and the loss of light') would, in my view, mean that matters such as lack of parking could also be taken into account. (Bear in mind, however, that in some inner urban areas, the provision of parking may be actively discouraged under local planning policies).

11. I cannot claim to have conducted detailed research on the new GDO, but I came across a website which could be fairly described as 'developer orientated'. It is interesting that this made the point that the conditions for an upwards extension were closely circumscribed, and that it might sometimes be better for a developer to apply for an

ordinary, full planning permission, on the basis that the planning authority would not be constrained by the exact terms of the conditions in the new GDO. In other words, the planning authority would then be able to exercise its discretion more widely.

12. It is also worth noting that the matters requiring prior approval include that **'before beginning the development, the developer must provide the local planning authority with a report for the management of the construction of the development, which sets out the proposed development hours of operation and how any adverse impact of noise, dust, vibration and traffic on occupiers of the building and adjoining owners or occupiers will be mitigated.'**

This is useful, but it is important to note its limitations. The underlying assumption is that the works in question will create 'noise, dust, vibration and traffic', which will disturb neighbours. The report is to ensure that they are mitigated, not avoided entirely. The conditions could include requiring that contractors' vehicles should use only designated routes; that certain equipment should not be used, or used only at certain times; that building work should be screened so as to reduce dust; and that work should not be carried out at certain times (e.g. in the evenings; and perhaps only on Saturday mornings, and not at all on Sundays, though this could well vary, depending on the locality). It may be more beneficial for objectors to press for strict but realistic conditions than to claim that the development should be completely refused on disturbance grounds; the local authority would be likely to disregard the latter.

13. The fact that such a report is required in 'GDO cases' would almost certainly mean that a local authority would feel the need to require a similar report in the case of any application for full planning permission which did not fall within the scope of the GDO.

To summarise: in spite of the balance having been tilted to make it easier for developers to add extra storeys (a) the specific provisions that have been introduced do not apply to your block; (b) the existence of the GDO was intended to change the climate to allow rooftop developments, so will also influence cases to which it does not apply; (c) in cases where the GDO does apply, the main reasons for rejecting applications will still continue to be relevant (as matters requiring 'prior approval'); and (d) the initial indications are that the courts will interpret the matters that require 'prior approval' broadly, so limiting the scope of the GDO. All in all, if there should be another application to add a storey to your building, at least some of the grounds upon which planning permission was refused in the past are likely to remain relevant, so you would be able to make a case for its refusal.

Finally, I should add that 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 either of the maker or of FPRA Ltd.

Can a block maintenance plan change your life?

Shula Rich, Chair of a block of 109 on the seafront at Hove, and FPRA Vice Chair says 'yes'.

Kingsway Court joined FPRA in 1995 when we had a major dispute over maintenance of our block, and I was the leader of the opposition. We had a wonderful group of erudite and dedicated colleagues, all hugely experienced in their occupations and management skills. We still do.

The original demand from our freeholders was £2 million which was even more in 1995 than it is today. Our block had turned into a tip, with what surveyors referred to as an 'undulating eastern elevation.'

In 1996, through the Right of First Refusal, we bought our freehold and have been in control of a successfully maintained block ever since.

The block was fortunate in having lessees who had experience in building maintenance, and through their advice, we commissioned a programme of planned maintenance from qualified surveyors. Our present to ourselves on buying the freehold.

In 1996 having spent a million pounds on block maintenance (we dissolved the other million pounds by obtaining better quotes than the freeholders) we have been determined never to let this happen to us again. Part of our success can be seen in that we still have two original directors on the board today and lessees who have lived here for 30 or more years.

The shock of this huge bill led to a devaluation in the flats, illness, breakdowns and family tragedy.

I remember when the freeholders obtained an order to take money we were disputing from my mother's building society account. She was in her late 70s and opened a letter saying "they've taken eighteen hundred pounds from my account". It was called a garnishee order.

This whole crisis was precipitated by stitch in time maintenance rather than a programme of planned maintenance and sufficient reserves to meet our needs as we have today. Together with our managing agents, also surveyors, we now modify and update our plan, making allowance within each annual budget for present and foreseeable expenditure.

Now freeholders, we have never had a dispute, never had a surcharge for lessees because we have always had a **programme of planned maintenance**. With this in mind I have updated a comprehensive check list, originally published by the FPRA in 2012.

I cannot urge you strongly enough to have a qualified surveyor produce a plan for up to 15 years looking at named elements of the building. Estimating their likely life and apportioning the likely replacement costs over the years they have left.

This way people will know what they could be liable for and the block will be able to have sufficient reserve to avoid a surcharge. This is always hoping the lease allows for a reserve. If not a lease variation may be considered.

There is a perennial question of leases which give exact intervals for maintenance in particular of the exterior. I am often asked why this has to be done if it's not really needed.

Older leases will not have allowed for modern and better materials. If the work is not needed then the concept of reasonableness can over-ride any arbitrary intervals in a lease. The guiding principle should be a surveyor's opinion and the programme of planned maintenance.

On the check list there are some building elements listed. The life span can be completed from the maintenance plan. Many maintenance elements are now controlled through regulation such as electric checks, health and safety, asbestos and legionella for communal water supplies. Others can be usefully controlled through a maintenance plan.

Pre-planning is one of the great benefits of lessees controlling their own blocks – find your updated check list on the following page.

Checklist

FREQUENCY	REVIEW DATE	TASK	ESTIMATED COST
Maintenance plan		Internal decorations	
Maintenance plan		External decorations	
Maintenance plan (as advised)		Roof inspection - tiles/flat roofs	
Regulations on major change		Communal electrics Major health and safety review	
Regulations		Health and safety update Water tank review	
Every six months		Inspect/clear gutters	
Spring & Autumn		Jet wash paths	
Annually		Tree inspection	
Annually (if still present)		Fire extinguisher service	
Annually		Garden review	
Annually		Cleaning contract review	
Annually		Porter/staff reviews	
Annually		Window cleaning contract	
Annually		Review this list!	
Annually		Block insurance valuation	
Annually		Members of Board Committee	
Annually		Bank accounts/Interest rates	
Annually		Communal electricity supplier	
Asbestos regulations		Review asbestos report	
At least every three years		Alternative quotations for block insurance	
At least every three years		Accountants	
At least every three years		Solicitors	
At least every three years		Managing agent	

EXTERNAL BUILDINGS	LIFESPAN (YEARS)	ESTIMATED COST	ANNUAL COST (LIFE SPAN DIVIDED BY YEARS)
Roof tiles			
Flat roofs			
Brickwork			
Render			
Pointing			
UVPC windows			
Communal internal carpets			
Fire equipment			
Electrical			
Plumbing			
Lift – major refurbishment			
Life – replacement			

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:

March 2022 – 5*
This organisation is always very helpful in responding to members questions and I would recommend it to anyone who is managing their blocks.

March 2022 – Thank you
We raised a question regarding the head lease for our building – your response was extremely comprehensive and very helpful. Please thank Mr Roberts for his valuable analysis of the issue, which we will work on to get a solution. One day, thanks to FPRA and its splendid advisers, we will have a trouble-free apartment building!

March 2022 – 5*
I serve on the management board for the apartment block in which I live. I emailed the FPRA with some queries on the interpretation of clauses in our leases. They provided a quick and detailed response. Membership of the FPRA is worthwhile.

March 2022 – 5*
The FPRA legal adviser has helped our RMC numerous times by clarifying several separate matters. This has been invaluable to our little company. Many thanks.

April 2022 – 5*
I sought advice on testing emergency lighting. The response was quick and very clear and helpful, which I appreciated very much.

March 2022 – 4*
Excellent advice. the only thing stopping me giving 5 stars was the slow initial response. Sometimes that can be important, I think. However, it is a sign of the times post pandemic, I guess, and when it came, further responses were speedy and most helpful.

April 2022 – 5*
Very helpful, thorough, informed and considered responses received. Excellent and wide ranging professional support provided.

April 2022
Asked a question about the Section 20 Consultation process and scope. Received a reply within 24 hours.
Perfick!!

Time to re-think block lighting?

By Jordan Begg, Director of Future Lighting, part of the Future Group.

"Huge hikes in energy prices mean it's now critical to review lighting efficiency in the blocks you manage".

When did you last check the efficiency of your block lighting? Energy prices are only going one way so it's crucial to ensure that residents aren't paying more than they need to for lighting. In a typical residential block, lighting communal areas accounts for more than 70 per cent of electricity usage. With recent hikes in costs, and more to come this spring, residents could be facing eye-watering bills.

According to Jordan Begg, Director of Future Lighting, even if you are managing a block with low energy LEDs fitted in lobbies and stairwells, you should seriously consider reviewing your lighting installations.

"We have witnessed an 80 per cent rise in commercial-grade electricity costs over the last 10 years," says Jordan "and prices won't come down any time soon." Future Lighting was launched in 2014 with a mission to improve energy efficiency in residential blocks at a time when LEDs were new technology. The world has moved on in the last eight years and LEDs are now standard. However, due to increasing electricity prices, even where old, inefficient block lighting has been replaced with LEDs, lighting costs are becoming prohibitive.

"Sadly, energy prices are now creating vast operating costs for leasehold blocks simply due to the rapid growth in kWh rates," Jordan says. "Even in blocks with LED lights, energy prices can now make these expensive to run. As we were in 2015, we are back to average running costs of £20pa with old technology fittings," he says.

And if you have blocks in your portfolio that still have old fluorescent lighting, the problem is far worse. "Imagine having 1000 fluorescent or halogen light fittings across your development today," says Jordan. "This could equate to £50,000-plus each year without adding maintenance costs."

Car parks are even more concerning. Most still use old tech light sources while having limited footfall, so there is huge potential to create mind-blowing savings with simple modifications.

Another point that property managers may not always appreciate is that using new technology lighting gives blocks the opportunity to reduce the number of fittings that may have been installed at developer stage. Jordan explains that, with simple LUX calculations and the benefits of new lighting, reducing fittings is a simple and effective way to slash wasted energy. "We often witness this on staircases where we find wall mounted bulkhead lights facing each other from opposite sides of the stairs and in corridors where the spacing can normally be easily extended," he says.

At one project completed in a London block back in 2020, Future managed to reduce fitting numbers by almost 30 per cent. "With controls and LED lights installed, the ROI was incredible and was achieved in less than 18 months," says Jordan. The block now benefits from a saving of +£7000pa and is paying for zero lighting maintenance costs.

Take control of your lighting

Another important point to note is that lighting controls are paramount – lighting should be controlled at every opportunity.

Smart controls switch off lights when they are not required during daylight hours. Glazed walkways and lobbies, which are flooded with natural light, should be fitted with occupancy detection to control areas during used certain periods only.

Lighting sensors can switch on lights only when needed and this is particularly useful in areas such as stairwells and car parks which may be dark but don't need lights blazing 24/7.

"There are many new and wonderful technologies launching every day that can retrofit into existing systems limiting investment costs," says Jordan. His advice is to have blocks surveyed by a lighting expert. Regardless of whether or not you are already using LEDs, let them analyse your current system and provide solutions to prevent wasted energy, improve aesthetics and eradicate ongoing maintenance costs.

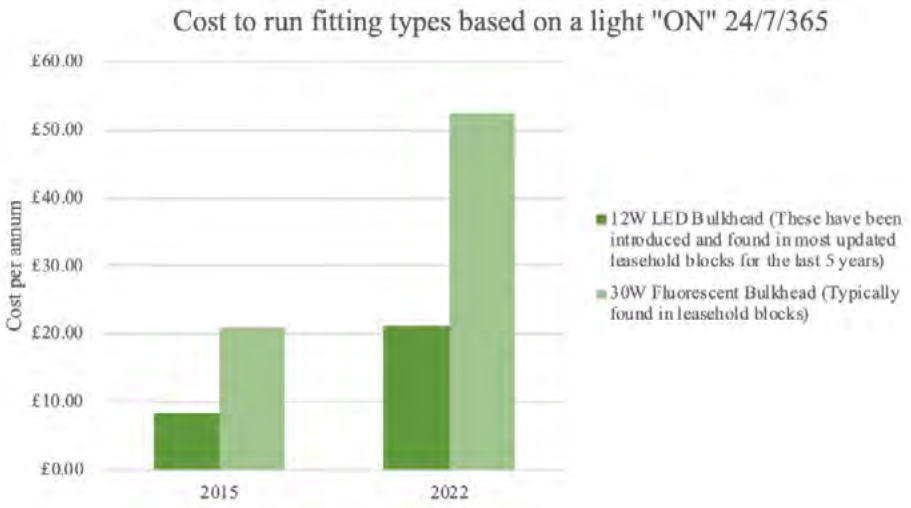
Continued on page 13

The return on investment could be an eye-opener. This is something not to be ignored as the example here shows.

EXAMPLE:

Cost to run light fitting types based on a light 'ON' 24/7/365

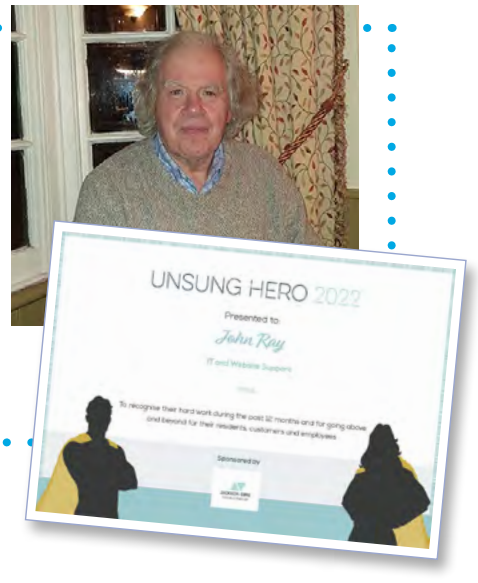
Fitting Type	Cost to run in 2015	Cost to run in 2022
30W Fluorescent Bulkhead – typically found in leasehold blocks	£21.00	£52.50
12W LED Bulkhead – these have been introduced and found in most updated leasehold blocks for the last five years	£8.40	£21.20



Consciously re-thinking lighting-spend is something all property managers can do. It's a simple way to ensure residents aren't paying over the odds while keeping energy use to a minimum. In the drive to net zero, we all need to do our bit and we can improve the bottom line for leaseholders at the same time.

Unsung Hero

Many congratulations to **FPRA's John Ray** who won the **Unsung Hero Award 2022**. His work to support FPRA's IT and website, which in turn supports our members and the FPRA team, is greatly appreciated. Well done John.



'A Member Writes'....

FIRE SAFETY LOOPHOLE

By Chris Warne, Nailzee Point RA and FPRA member

Fire safety has always been an important issue but after Grenfell it has rightly been given even more attention. Our 19 flats are in a converted 1920's seaside hotel with wooden floors between levels.

Whilst undertaking a fire safety inspection, I thought that the weakest points were the flat doors leading onto communal landings. Some had fire doors but the majority had doors which offered little or no fire protection.

Obviously, it would be better if all the flats had proper fire rated front doors. After researching the regulations and contacting FPRA for advice, I was surprised by the answer. Fire rated doors are a statutory regulation in new build flats. Flats such as ours only need resident's flat doors to be fire rated to the required standard if the door is replaced.

This seems a loophole in the fire regulations in my view. Containing a fire in a flat for 30 minutes gives time for evacuation of all residents and time for the fire brigade to arrive.

We see new regulations regarding insulation standards for landlords coming. A simple first step could be a requirement that for any flat that is a letting, the door must be fire rated. Next step could then be all flats are required to meet the regulation.

We are encouraging our leaseholders to upgrade their doors (cost about £500 per door) but with little success.

The distinction between what is and what is not a lawful service charge

By Kevin Lever, FPRA Honorary Consultant and Partner at KDL Law

With escalating costs in every direction at the moment, watching the pennies has taken on a greater emphasis. When it comes to management charges at any development it is important to charge only those costs which are lawfully due under the leases. The following are two examples of when management charges levied are not always lawful.

Can the costs of running the company be paid through the service charge?

This is a really common event and question and, fortuitously, a question that came before the Upper Tribunal at the very end of last year Collingwood v Carillon House Eastbourne Ltd [2021] UKUT 246 (LC).

The short answer to the question is that it all depends on the content of the specific leases at the development. Given that many leases are similar on this point, the following is worth considering and comparing with those leases in your building(s) as it may be that you plainly are, or are not, entitled to recover the costs in the manner that you/your landlord is presently doing.

The landlord in the present case had historically paid, as a service charge expense, the costs of the accounting for the company's accounts and the fees payable to Companies House in respect of the same (as occurs in many cases). The leaseholders sought a determination under s.19 LTA 1985 as to whether those costs were payable or reasonable under the lease provisions in relation to service charges. The lease contained Clauses 6 and 7 to the Fourth Schedule which required the tenants to pay the following costs:

Clause 6
All other proper expenses (if any) incurred by the lessor in and about the maintenance and proper and convenient management and running of the property.

Clause 7
The fees and disbursements paid to any managing agent accountants and auditors appointed by the lessor in respect of the property.

Take note of the wording of these clauses as it is likely that they are very similar to covenants contained in most leases.

The landlord claimed that Clause 7 allowed the cost of the running of the company to be paid from the service charge because the charges listed there included in the costs of the accountant and so that encompassed the accountant's fees in preparation of the company's annual return and accounts (as distinct from the service charge accounts). The Tribunal was predictably not convinced by the landlord's arguments, holding that the wording of Clauses 6 and 7 related to costs incurred in the management of the property and not the landlord company.

The company's expenses incurred in the production of the company's accounts (as distinct from the service charge accounts) were therefore not a lawful service charge expense and were disallowed.

Can a landlord (or its agent) charge me, the leaseholder, for the act of demanding ground rent?

Earlier this year, the Upper Tribunal considered an interesting point of lease construction on what used to be an unusual question but something that we are seeing a lot more of as landlords, or their agents, looking to maximise income streams. The case was Stampfer -v- Avon Ground Rents Limited [2022] UKUT 68 (LC) and related to the above question.

Background

Mr Stampfer was the long-leaseholder of a flat. The landlord was Avon Ground Rents Limited and the block was managed by a RTM company, who collected the service charges. Avon Ground Rents Limited continued to deal with the ground rents in the usual way.

Under the terms of Mr Stampfer's lease, an annual ground rent was payable in half-yearly instalments. When issuing the prescribed Section 166 ground rent demands, Avon Ground Rents Limited applied a £30 plus VAT 'Ground Rent Collection Fee', seemingly for preparing the Section 166 demand. Mr Stampfer challenged the payability and reasonableness of the 'collection fee' in the FTT.

The lease

The lease contained a fairly standard covenant when it came to additional fees payable, over and above the service charge and ground rent (e.g. administration charges), as below:

"The Tenant must pay to the Landlord the full amount of all costs, fees, charges, [etc etc]... incurred by the Landlord in relation to or incidental to...

5-10.2 the contemplation, preparation and service of notice under the Law of Property Act 1925 Section 146, or the contemplation or taking of proceedings under Sections 146 or 147 of that Act...

5-10.3 the recovery or attempted recovery of arrears of rent or other sums due under this Lease..."

...it is important to charge only those costs which are lawfully due under the leases

The following costs were also included as 'deemed expenses' under the lease, to be re-charged to leaseholders as service charges in their respective service charge proportions :

"If the Landlord or a person connected with the Landlord or employed by the Landlord attends (where permitted by law) to:

7-2.3.2.1 the supervision and management of the provision of services for the Building,

7-2.3.2.2 the preparation of statements or certificates of the Landlord's Expenses,

7-2.3.2.3 the auditing of the Landlord's Expenses, or

7-2.3.2.4 the collection of rents from the Building

then an expense is deemed to be paid or a cost incurred by the Landlord, being a reasonable fee not exceeding that which independent agents might properly have charged for the same work."

The Upper Tribunal's decision

Ground rent cannot be collected until it is due, and giving a Section 166 demand in order to make it due is NOT the same as collecting it. Therefore, in disagreeing with the earlier decision of the FTT, the Upper Tribunal decided that the 'Ground Rent Collection Fee' charged by the landlord was not payable under the terms of the lease.

There was no provision in the lease enabling the landlord to charge for issuing Section 166 demands. Whilst it was open to the parties to agree and include such a provision in the lease, that provision would need either to be expressed or at the very least to take the form of a reference to ancillary or incidental costs. There was no such reference in Mr Stampfer's lease.

Conclusion

The Upper Tribunal's decision was plainly right based on the particular wording of Mr Stampfer's lease. Indeed, in our experience, it would be unusual for such a provision to be included which would enable the landlord's time for issuing a Section 166 demand to be charged as a separate expense, as opposed to the costs incurred in pursuing arrears. Whilst a managing agent might charge a landlord for such work within their management fee, whether those costs can be passed on to the leaseholders (either as a direct re-charge or as a service charge expense), will require careful consideration. Each case has to be considered individually based on the exact wording of the lease in question. If in doubt, legal advice should be sought in order to avoid a potentially costly FTT challenge.

Legal Jottings

Compiled by Nicholas Kissen, Senior Legal Adviser at LEASE

UPPER TRIBUNAL (LANDS CHAMBER)

Marshall v. Northumberland and Durham Property Trust Limited [2022] UKUT 92(LC)

The Upper Tribunal (Lands Chamber) has considered how to deal with the statutory power to dispense with consultation where major works are urgently required.

The law

Sections 18 to 23A of the Landlord and Tenant Act 1985 ('the 1985 Act') comprised provisions intended to protect residential leaseholders from having to pay excessive, unreasonable, unexplained, or unexpected service charges.

By Section 20 of the 1985 Act, a freeholder or manager of a building containing flats will, in certain circumstances, have to consult with the leaseholders of those flats before carrying out any work on the building which is called 'qualifying works' such as repairs, maintenance, or improvements.

With respect to qualifying works, the consultation requirements apply where the costs result in the service charge contribution to those works of any one leaseholder being more than £250. If the consultation requirements are not complied with or a dispensation order granted by the 'Appropriate Tribunal', then the relevant contribution of each leaseholder will be capped at £250.

By Section 20ZA (1) of the 1985 Act, the Appropriate Tribunal may dispense with all or any of the consultation requirements where it considers it reasonable to do so.

In England, the Appropriate Tribunal is the First-tier Tribunal (Property Chamber) ('the FTT'). By its judgment of March 2013 in the case of *Daejan Investments Limited v. Benson* and others, the Supreme Court stated that when considering a dispensation application, the FTT should have regard to the degree of prejudice suffered by the leaseholders. The FTT may grant dispensation with conditions attached such as requiring the freeholder to pay the professional costs of the leaseholders in opposing the dispensation application and taking advice about the works.

The facts

Mr.M was the leaseholder of one of 16 flats in a block at 40/42 Kensington Park Road, London W11.

Notice of his purchase of the lease was given on 7 January 2020 but the managing agents for the block omitted to add him to future communications intended for leaseholders.

The freeholder to the block applied to the FTT for retrospective dispensation having undertaken urgent boiler works without having complied with the statutory consultation requirements.

What did the FTT decide?

In respect of the consultation requirements, the FTT granted unconditional dispensation to the freeholder regarding the replacement of two boilers and associated works.

The FTT was satisfied that the freeholder had started the statutory consultation process and had kept the leaseholders of flats in the block informed until the works became urgent enough that they had to press on with them without waiting for the consultation to be completed.

Mr.M was granted permission to appeal to the Upper Tribunal (Lands Chamber) on 14 separate grounds.

The most important ground was the following:
"... that the FTT has made a fundamental error in not focusing on the issue of prejudice to the leaseholders. Rather than asking how far the leaseholders were prejudiced by the freeholder's failure to comply with the consultation requirements as Daejan required, the FTT had determined that dispensation should be granted because, in view of the urgency of the situation, the freeholder had acted reasonably."

Mr.M argued that he was not consulted at all, and that dispensation should have been refused by the FTT in view of the prejudice caused to him by the freeholder's failure to comply with the consultation requirements.

What did the Upper Tribunal (Lands Chamber) decide?

The Upper Tribunal set aside the decision of the FTT and determined afresh the dispensation application.

Dispensation was granted on the following conditions:

- The relevant costs to be reclaimed through the service charge should be limited to £13,000 plus VAT being a reduction of around 15 per cent.
- The freeholder must pay Mr.M's costs of responding to the dispensation application together with the reimbursement of the Upper Tribunal fees that he had paid.

What were the reasons for the Upper Tribunal's decision?

In considering an application for dispensation, the FTT had to identify systematically the steps which the freeholder had taken and those which it had omitted and for which it required dispensation.

The FTT then had to ask itself what was the consequence of non-compliance with those steps.

The FTT then had to say whether it considered that any of the leaseholders had been caused prejudice by the failure of consultation. The Upper Tribunal decided that the FTT's failure to follow each of those steps was a serious omission.

Missing from the FTT's analysis was the question of prejudice to the leaseholders.

An absence of prejudice could not be assumed simply because there was a need to undertake work urgently. A proper assessment was required of the consequences of failing to take the steps which had been omitted.

The freeholder was likely to be under contractual or regulatory obligations to provide an essential service or to carry out works to make premises or service installations safe, as in this case. But such obligations were part of the background to the whole of the statutory regulation of service charges and could not be a reason for disregarding the safeguards provided for leaseholders or granting blanket dispensation simply because work was urgent.

If in this case the FTT concluded that any possible prejudice was negated by the need to carry out works urgently, it did not say so. Even assuming this was the FTT's unstated conclusion, it was not able to make such an assessment, because it had not first considered what prejudice may have been caused or what, if anything, could now be done to mitigate it.

The FTT had failed to consider the question of prejudice and so its decision had to be set aside with the Upper Tribunal able to decide the case itself. The evidence demonstrated that, had Mr.M been consulted he would have been able to put forward an alternative package of works which appeared to be just as effective and to some degree cheaper.

The appropriate order was to grant dispensation but on conditions which reflected the likely outcome had the statutory consultation process been followed. The reduction of around 15 per cent represented a price that might have realistically been negotiated 'in the more competitive environment which proper consultation may have created'.

ASK THE FPRA

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

Model code of practice

Q Our block of 24 flats is operated as a residents' association. Each flat owner has one share. Approximately half of our flats are sublet to tenants, the rest are owner occupied. From time to time the directors are approached by owners and tenants because there is a problem over noise, or parking or some anti-social behaviour. We have a set of rules for residents that includes parking, noise and not being anti-social.

We usually expect residents to speak to the problem neighbour to see if the issue can be resolved by face-to-face contact. Sometimes this doesn't work either because it has already been tried or because the complainant is reluctant to raise the issue personally with the person they are complaining about. They then ask the directors of the association to resolve the matter.

Our question is: do you have a model code of practice as to how such complaints should be best handled?

A FPRA Chairman Bob Smytherman replies:
Thank you for your question about residents' disputes which has been passed to me as I have a similar situation in my block where the directors run the company and residents refer complaints about neighbours to me. In terms of a Code of Practice, this is not something we have, simply because no one-size fits all and no one has produced anything; the approach I adopt in my block depends on the nature of the dispute.

For example:

Parking – This is a big issue for us as our estate doesn't have enough spaces to meet the demand of residents and visitors. We have a contract with a private parking company who manage this on a 24-hour basis with the use of parking permits. Any parking complaints are sent to and dealt with by the company – we don't get involved at all.

Noise nuisance – We refer complainants to the environmental health team at the local council who have powers under the Environmental Health Act to deal with 'statutory noise nuisance' if this can't be resolved amicably.

Anti-social behaviour – We try to resolve this amicably but if this continues, we engage the police or community safety team from our local council.

If the culprits are short-term tenants, we would involve their letting agent and the flat owner which usually results in a change of behaviour and things improve.

With the long-leasehold flat owners the last resort is the LEASE but from our experience this is just costly, and interpreting clauses in the lease can often result in further confusion and more tension between the parties!

I hope this helps but if you have further details of the situation, please let us know and we can get some advice from the best possible expert.

Health and safety

Q Could someone help with the following? In brief, how can we ensure exhaust ducting through our building is safe?

I chair the residents' association of a block of 51 flats. Exhaust ducting from a restaurant on the ground floor runs up 11 floors inside our block. The ducting has no access ports – we think it has never been cleaned and is therefore a fire risk. It certainly emits horrible smells which waft down from the roof.

The fire risk assessment of our block specifically excluded the two commercial premises. The ducting running through the residential floors is not mentioned in the FRA.

We have not been able to get the freeholder to act. We know the restaurant has obligations to clean the duct, and presumably get an FRA. How can we force this? And will their FRA cover the ducting through 'our' building?

This seems to me to be exactly what the Hackett report criticised. No single party seems responsible for the fire safety of the whole building. A piecemeal approach leaves gaps.

A FPRA Director Jonathan Gough replies:
This is a common problem when you have two parties responsible for looking after fire safety in a building. I would suggest the following.

- Our member writes to the owner of the commercial unit, with the duct, asking them to share their current fire risk assessment and maintenance certificates for the extraction system. In the letter, it should be made clear that the ducting is passing through their area and the hazard needs assessing.
- If the commercial unit supplies the information, our member should check the risk assessment for any outstanding actions relating to the extraction system. I hope this will open a channel of communication so the item can be inspected and maintained for the benefit of both parties.
- Meanwhile, our member should review their fire risk assessment and make sure that any actions have been addressed with evidence. Our member does not want to put themselves into a difficult position if they then decide to follow the last point.
- If no response is forthcoming from the commercial unit, our member could contact their local fire officer and ask for help under article 22 of the fire safety order. This article places a duty on responsible persons to share information, to stop what is happening here.

Lease variation

Q We recently had a new owner query our stance on pets in the apartments as he quite rightly said it was not in the lease. One of our directors then found a document from 2004 – something I had not seen before, having bought my property in 2006/7. I'm curious about how legal this is given it was debated and decided by the directors of the company and it seems that nobody who bought an apartment after this time got notification of these rules, and a few of us now have a pet.

As a director I thought I was responsible for the running of the company and for ensuring that the building is maintained. I did not think I could, with my fellow directors, simply change the rules of the lease without consultation with all leaseholders. It would be really interesting to hear from an expert as to whether this was a) legal and b) enforceable.

A FPRA Honorary Consultant Shabnam Ali-Khan replies: I reviewed the terms of the lease which do not specifically exclude the keeping of animals. However, it can be contested if it breaches any other terms of the lease including causing a nuisance. The 2004 documents seek to amend the lease to actually restrict rights. I could not see anything in the articles to allow the company to do this. However, I would strongly advise you take specialist company law advice and have someone review the articles to provide a clearer answer.

Bank accounts

Q We are about to open a bank account. Please advise on how we should identify ourselves for this purpose. Do we have, for example, a membership number?

A FPRA Chairman Bob Smytherman replies: Setting up bank accounts can often be a real nightmare for residents' groups, but I suggest the best way is to go to the bank where your treasurer banks personally and ask to set up a 'Community' account, NOT a business account, in the name of your RA.

You will then need to decide how many signatures you require for the account. I would recommend including ALL the committee on the account but with ANY two able to sign on the account; this can now be done online with e-signatures so you may decide you want more to sign to withdraw money.

The bank will require all of you to undertake a robust process of identification which is more straight forward if you are an existing customer of the bank you choose.

I hope this helps and best of luck. It's always worth shopping around for the best account that meets your needs and discussing them in branch, to ensure you get what you actually need and don't end up paying unnecessary fees and charges.

Listed building

Q We are interested to know whether you can suggest whom we might speak to in connection with managing listed buildings. Our association is not entirely happy with our current managers and would like to talk to some established property management companies who have direct experience of successfully managing listed buildings, preferably in the South East area. With your experience I would hope that you know of such companies or relevant associations that I might contact.

A FPRA Chairman Bob Smytherman replies: Thank you for your email. I think the best starting point for maintaining a listed building is the local authority. If they have a number of listed buildings and conservation areas within their area, the planning department will usually have a dedicated 'Conservation Officer'.

English Heritage also has a dedicated team to ensure the 'listed stock' is maintained to the correct standard.

Finally, many local 'historic' areas have a civic society set up to preserve the character of an area, and these groups are often consultees with the council on listed building applications. Do you have one in your area?

The lease should also be a guide for maintaining a listed building, so if you have concerns that the lease is not being followed, let us know and we can ask our legal team to advise on this further.

Bicycle store security

Q We have a bicycle store where we have had ongoing thefts since the building was built in 2011. In addition to the thefts it is used as a dumping ground when people move out. The latest thefts were in January this year.

Access is via an external door that is opened with a key fob. The store is shared with the private leaseholders block of flats and with the social housing section of the adjoining building. The key fob is issued to both the private block and the social housing block. The social housing block fob does not have access to the private block but does have access to the cycle store.

The doors to the main building, which operate by magnet type connection, were recently strengthened so the doors could not be forced. We have suggested the external door to the cycle store also be strengthened in this way. Alternatively, we suggested those people who wish to use the cycle shed should be issued with a different fob for access. The managing agent is not addressing our concerns on this issue.

We need your guidance on the following points to help us find an amicable solution:

- **Whose responsibility is it (and who pays) to provide adequate security for the building and store; freeholder or leaseholders?**

- **Who would bear the costs of increasing the security of the store – freeholder or leaseholders?**
- **What type of security options does the industry use to secure such external stores that we could consider?**
- **Would the cost of repair of the external door, which has been damaged, be claimable on the building insurance? If so, would the managing agent handle the claim?**

Your guidance on the industry best practice would be appreciated.

A FPRA Honorary Consultant Shaun O'Sullivan replies: Regrettably it is difficult/almost impossible to offer definitive or objective advice without sight of the full lease, the relative arrangements between the private and social housing elements of the development and, in particular, the arrangements between these two elements with regard to the apportionment of service charges. However, that notwithstanding, I will attempt to offer some general advice based on some basic principles applying to leasehold property.

Other than that part of the building which has been demised (effectively the flat and first floor mezzanine locker) the remainder of the building is retained by the landlord/freeholder. The landlord will grant certain rights over the retained part of the property and, in this regard, there appears to be a 'Right to use a space in the bike store (if any)'. And, on the basis that similar entry fobs have been issued to both elements of the block, I would expect similar rights to have been granted to social housing tenants also.

Equally the landlord will have a responsibility to maintain the building and leaseholders will have an obligation to meet the costs of so doing by way of a service charge (which, in your case, also includes a reserve fund).
In this regard 'The Apartment Services' costs include 'Maintaining security equipment' and the 'Building Services' costs include an obligation to insure the building.

As a general rule most leases do not allow the landlord to make improvements as such to the property and to recover the costs from the service charge (the obligation is to maintain, repair and renew) and in your case the requirement is to maintain security equipment, which I would expect to include door locks on any doors on the retained part of the property. However if it is necessary to renew or replace something and, as the result of that, some level of enhancement results, that is acceptable and the costs can be recovered. I suspect that this is the case with the doors to the main building and that the costs will be reflected in the service charge. Arguably, a similar approach could be adopted with the bike store. At the end of the day, however, it largely comes down to whether the landlord (to whom the managing agent is responsible) is willing to respond to what would appear to be quite a reasonable request/concerns about security from an association which seems to represent just in excess of 25 per cent of residents.

So far as an insurance claim is concerned, it would be for the agent, on behalf of the landlord, to manage any claim. However, as with all insurance claims, the agent would have to weigh up the implications of any claim – such as excess charge and any potential increase in premiums – against meeting the costs from the service charge. Often the latter is the most beneficial.

Section 20

Q **We have recently issued S20 notices and invited six firms to tender for the works including those advised by owners to be included.**

Whilst the majority have shown an initial interest in the works in question (redecoration of hallways), we have only had one firm completing our formalities. We have chased all firms which showed an initial interest.

As there appears to be a lack of interest, under S20 can we accept and appoint the only firm bothered to quote or do we need to continue to obtain quotations for the work until we have a minimum of say three quotes?

A FPRA Honorary Consultant Sally Drake replies: There is a minimum requirement for two quotes where the work is required to be carried out by a specialist/expert contractor. Where it isn't specialist, a minimum of three quotes should be obtained to ensure no challenges can be made.

Redecorations are not a specialist job. You are therefore obliged to seek the minimum quotes and only in extreme circumstances where attempts to engage multiple contractors who declined/didn't respond can be evidenced (to substantiate why less than three estimates have been obtained) can two estimates be accepted as minimum for any non-specialist jobs such as redecoration works.

My advice... there are lots of companies out there. Don't take the risk of not getting the minimum requirement; it leaves you open to leaseholders disputes and First-tier Tribunal cases!

Firstly, do chase on the original first round of contractors you invited one more time. Do it by email so you can evidence your attempts to engage them and, secondly, invite another few companies to tender on the same basis as the first round (i.e. same specified works) but with a new 'tender returned by' date of course! Keep the first tender closed (unshared) until the second round of invitations date has expired so that the first can still be included.

Health and Safety

Q **We are looking to press ahead with step-edge highlighting on our sole access stairwell/fire escape in our block – something only delayed by protracted stairwell full decoration consultation but**

which lacked support (and on which the FPRA kindly shared flooring advice – thank you).

Given the HSE significance, the large range of options on the market, context and respective advantages/disadvantages, and that edge highlighting must be a common thing given the need to retrofit similar stair-wells, we were wondering whether the FPRA may have any guidance on the best way(s) to edge highlight?

The individual concrete steps are 26cm going, 20cm rise, 100cm wide, and while in decent condition have some local chips or wear that may need factoring into preparation. From preliminary reading online, we anticipate a 50-65mm wide strip at least on the top tread edge (must it be both vertical and horizontal?), good colour contrast (e.g. yellow) and we are mindful of the need for adequate anti-slip performance or risk of catching/stumbling.

While this research has been helpful, it does not help choose a solution easily. We are aware of a few options including painted edges, epoxy grip strip and various nosing including corner vertical/horizontal nosing. Companies like Watco do paint/resin and GRP edge strips that also protect the stairs somewhat, and the technical datasheet details are interesting.

However, each method has respective advantages/disadvantages such as contextual detail (internal/external; use), wear/slip potential, catch/trip, short/long application times, implementation and maintenance costs, or fire performance (whether a fire-rated product is required, or the discrete nature of the strips minimise risk and/or tackling the minimal visual contrast risk and anti-slip both taking precedence?

We would welcome any clarification/confirmation or guidance the FPRA might have on the matter, new awareness of other options or what would be considered reasonable solution(s).

A FPRA Director Jonathan Gough replies:

I cannot advise what solution is best; as has been identified, they all have advantages and disadvantages (I am not a specialist in stair nosings).

You could ask the contractor providing the solutions to narrow down the choices to two from which the most suitable could be chosen. The selection could be based upon:

- Budget
- Local factors – for example, if the building has lots of elderly residents a strip attached to the step edge may create a new trip hazard if they cannot lift their foot over it (older people tend to slide their feet forwards). So, a painted line may be the best answer

Whatever selection is made, I would consider signage that encourages people to hold the handrail when going up and down the stairs, so if a slip occurs the consequence is not as severe.

Emergency lighting

Q **The small complex of flats managed by the association has had emergency lighting installed this week.**

I am writing to ask if you can advise as to how often we should test the lights i.e. weekly or monthly etc and for how long we should leave the emergency lights on during the testing.

I understand that an annual test is also needed for up to three or four hours.

I would appreciate any advice you can give.

A FPRA Director Jonathan Gough replies:

Monthly testing – Can be done by the management company (if they know how) or a competent contractor with results recorded in the onsite fire logbook. A key switch device should be put into each test point and the light visually checked to ensure it is operational.

Annual testing – Required for each light every year after installation. This must be done by a competent contractor with all results recorded in the on-site fire logbook. This test will involve removing the power to all lights to test the battery length; this will range from one to three hours depending upon the system installed. The system must also be checked to ensure they have all returned to normal charging mode afterwards.

Section 20 consultation

Q This query is about the applicability of a Section 20 Consultation.

It does not appear clear in the information I have read so far about Section 20 Consultations if they are applicable to professional fees – e.g. the engagement of a surveyor to produce a report on a listed building – or perhaps the provision of legal advice if required.

I can only see reference to contractors rather than consultants' advice.

Hope this describes the query sufficiently!

A FPRA Honorary Consultant Jonathan Channing replies:

Section 20 applies to:

1. Qualifying WORKS.

2. Qualifying LONG TERM AGREEMENTS.

Professional fees are outside of the scope of Section 20.

For instance, a landlord, RMC or RTM may be contemplating major works. They can raise money for the works without serving s20 notices and they can engage professionals such as a building surveyor **and** pay them without serving s20 notices. BUT they cannot spend money on the WORKS themselves if the s20 expenditure limit is going to be breached.

Managing agents

Q We are currently being told that our managing agent will be changed by our freeholder without any consultation with our recognised residents' association. The planned change will be to our detriment.

We are happy with our current management agent, however, the freeholder is in the process of consolidating their various buildings under the same managing agent to streamline their processes.

The proposed managing agent is remote, unlike our current managing agent who is locally based.

Ten years ago we went through the process of changing our managing agent as the incumbent was a remote operation that failed to offer our required level of service – this was agreed by the freeholder at that time. The freehold has since been sold onto another company.

We wanted to know, in your view of consultation rights, if this would include the change in managing agents?

Also, we are looking into going down the right to manage option and I wondered if you were able to provide any guidance on this?

A FPRA Director Colin Cohen replies:

My answer to this member would be that it is best to form a right to manage company (RTM) if possible and then they would have control on appointing the managing agent.

In the meantime, the appointment can only be made by the freeholder, for a year less one day, unless they serve Section 20 consultation notices on the lessees, and then the member would be able to nominate a preferred agent to tender. If the new agent is appointed and they do not perform satisfactorily then the member could apply to First-tier Tribunal (FTT) to appoint a new agent.

Service charge

Q The service charge levied on us by the superior landlord has increased by 100 per cent in a year – we wish to challenge the basis of the figures. The apportionment of estate costs by the freeholder looks out of date and does not reflect changes to the estate. The security charge is ludicrous as the security staff do nothing to prevent unwanted intruders entering the blocks.

We would like your advice on how to proceed to challenge the basis of their service charge.

A FPRA Honorary Consultant Sally Drake replies:

There has to be a reasonable justification for such large increases. Has the superior landlord given a proper explanation of the areas which have significantly increased? If not you should absolutely demand that information from them.

Service charges are to be set as 'fair and reasonable'. Whilst the lease sets the way, a service charge is apportioned, although some are vague and some very specific in regards to setting the appointment. It's also true to say if the apportionments (percentage) being used to split the charges across the relevant units (payers of service charge) no longer reflects the current amount of units or they are not being correctly 'weighted', you could challenge this at FTT based on the lease (covenants pertaining to service charge per cent) being defective now, and requesting correct divination of charges based on those who are perceived to derive 'benefit' from the services in question.

If the lease is vague and the developer/landlord has set them, it's probably on a square footage basis, as rateable values stopped being used years ago. Potentially if this doesn't fairly reflect the services and benefits to each property, there is potential for lessees to challenge the appointments at FTT.

I would be happy to review your lease and check what it says about how much is charged and how specific or vague covenants are.

However, if you are being charged a 'wider estate' charge on top of your internal block, external block and external grounds (estate) charges then it may not be so easy to challenge. This is because the charges are levied to an intermediate party between superior landlord and the lessees. If you send me a budget I can have a look at how it's comprised so I can advise further.

The last point is that you can dispute elements of costs for services that are not being upheld/delivered, whilst the landlord resolves the issues or you apply to the

First-tier Tribunal for a determination on the fairness and reasonableness of the estate charges being set.

Increasing the service charge

Q We are a block of six flats, five of us purchased the freehold two years ago. We set up the company with two directors, myself and one other freeholder who rents his flat to a tenant. At the time we were all keen to make improvements as the building was in a poor state. I have been here 20 years and no redecoration has taken place.

The annual service charge has always been £1,000 per flat per year, which is very low and meant there was never any 'reserves' and the management agent would serve Section 20 notices for 'maintenance' funds that we paid and then never saw any work undertaken (we did take the landlord to FTT).

Having become the landlord we addressed urgent issues such as fire door closure and boundary fencing. We now have quotes for redecoration which would cost £1,000 per flat.

The one leaseholder is happy to pay his contribution. Of the five freeholders the 'absent landlord' is now declining to pay towards the cost. Those living in the flats are frustrated that he doesn't see the poor condition of the flats on a daily basis as they do because he never visits so can see no benefit to him to paying the costs.

I cannot see that we can 'compel' him (the other director) to contribute. Am I correct? So my question is, can we increase the service charge without his agreement as this would build up funds to undertake the work, albeit further down the line than we would have liked? To clarify: four freeholders out of five agree to increase service charge.

A FPRA Honorary Consultant Jonathan Channing replies:

For any decision-making in the real world, directors of RMCs ought to reach a majority consensus to press ahead with raising service charges, if works are to proceed etc.

It looks like four out of five share-of-freeholders are in agreement, so if I was one of them, I would proceed to increase the service charges to the necessary level.

Gas charges

Q The heat in our apartments is supplied via communal gas fired boilers. The management company invoice leaseholders based on the total gas supplied; cost is allocated to each apartment based on their individual meter readings. These charges are separate from our service charges and the management company are not allowed to make a profit.

We have felt for some time that the charges per kWh are too high, but the management company has always denied this. We have now discovered that two commercial premises on the communal system have never supplied meter readings since they moved in (c5 years ago) and the management company have never charged them. We estimate the bills would total in excess of £150,000.

As the management company have recovered the cost of the gas by charging the residents who have supplied readings, this means that they have been overcharged by £150k – approximately £1,000 per apartment.

We have raised this with the management company and they have not responded at all.

Could you please advise us of any action we can take if they do not correct this situation?

A FPRA Director Colin Cohen replies:

I would suggest to this member they insist that the managing agent replies about the commercial element not being charged for their heating supply. If they do not answer within a short period, then ask for their complaints procedure (if they belong to a regulated body such as ARMA or RICS then they are accountable to respond within a limited period).

It may be advisable also to put in a claim through the First-tier Tribunal (FTT) for reasonableness of the charges levied to the flats for heating for this period.

Dogs in flats

Q We have come across a problem where there is evidence of a dog being present in a flat.

The leases state that animals are not permitted to be kept and we are being told that the dog is just a frequent visitor rather than a permanent resident.

Have you come across such a dispute previously and do you have any examples (good/bad) of how they were handled?

A FPRA Vice-Chair Shula Rich replies:

There are frequent issues arising due to dogs in flats. Your choices are as follows:

1. If the dog is not a disturbance accept that it's a visitor, and do not interfere.
2. If it's genuinely a disturbance, then threaten to report it to the council as an environmental health issue.
3. Warning the leaseholder first, may achieve your aims.

It's difficult to see how you can prove the dog is resident so I hope the suggestions above succeed. If the lease allows dogs 'with permission', then I suggest you use the 'lets with pets' agreement from the dog charity Dogs Trust. We charge £125 for permission, subject to the Dogs Trust agreement, and have never had a problem. If the dog is resident then a good behaviour agreement may be all that's needed.

EV Charge-point Grant for Landlords – Update

Notwithstanding the hope, as reported in Issue 139 of the Newsletter, that the grant available to landlords for the installation of charge-points and supporting infrastructure would be set at a level beyond the current 75 per cent, frustratingly it remains at this level.

Unless a process is developed to provide for full grant funding, it is unlikely, unless leases contain an improvement clause, that many landlords will be able to take advantage of the grant.

However, the FPRA met again with the Office of Zero Emission Vehicles (OZEV) on 1 April.

We remain hopeful that when the process is digitised in Summer 2022, the underlying policy may have changed to allow many more landlords to take advantage of the grant, not least to try and ensure that the government's aspirations for home charging are met.

FPRA at the IRPM

For those of you attending this year's IRPM Annual Seminar on 12 May, you will have seen Jacqui Abbott and Debbie Nichols from FPRA's Admin team, manning our stand. Delegates enjoyed a packed programme which included a number of guest speakers, a drinks reception and awards ceremony.

We'd like to pass on our thanks to the IRPM, and the event organisers, for giving us the opportunity to be part of this key event.

Dates for your diary

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

Webinar - Block Management on 22 June 2022

Hosted by Bob Smytherman, FPRA Chairman and two of our Block Management specialists Colin Cohen (FPRA Director) and Maxine Fothergill (FPRA Honorary Consultant, current president for ARLA PropertyMark).

Webinar – Commonhold on 16 November 2022

With Honorary Consultant Matt Lewis

FPRA Annual General Meeting on 23 November 2022

We're still in the early stages of planning the agenda for this year's AGM, but we're delighted to announce that Lord Stephen Greenhalgh, will be joining us to give a short presentation followed by a Q&A session. Stephen Greenhalgh was appointed as an unpaid Minister of State for Building Safety and Fire jointly at the Department for Levelling Up, Housing and Communities and the Home Office on 19 September 2021.

FPRA Honorary Consultants

Meet Benjamin Hume and Lisa Warren, our newest Honorary Consultants. I'm sure you will all join me in welcoming them both to the FPRA team.

Benjamin Hume

Benjamin's first job after university was as a Police Officer followed by a stint in banking and retail. But having rented a property for several years and become aware of the many issues faced by tenants and landlords, as well as realising his ability to solve property related issues, Benjamin started in his first property management role as Lettings Administrator in a national agency call centre.

His career progressed to running the property management departments in a number of high street lettings agencies across Hampshire and to achieving his MARLA status. Benjamin's experience further extended to residential leasehold management agents, or block management, and onto the next stage of the residential property management ladder. Benjamin is an associate of RICS and now managing director of his own leasehold managing agency and leasehold training organisation.

In his spare time, Benjamin rides motorcycles, enjoys kayaking as well as soaking up the different atmospheres of the many European cities he loves to explore.

Lisa Warren

Lisa brings over 17 years' experience in the residential sector of block management to the FPRA.

She is an Associate Director for Client Finances within a nationwide property management firm, is a director of ARMA and chairs their Technical Committee that is responsible for delivering guidance and advice to both ARMA members and other stakeholders.

In addition, Lisa facilitates ARMA's Service Charge Accounts training courses and works with IRPM through their Leasehold Working Group.

MEET THE FPRA

Five things about…

Caroline Carroll

Caroline is FPRA's Head of Admin. She's been running the Admin office since she joined three years ago…

1. I worked as Graduate Recruitment Manager for one of the Big 4 Accounting Firms, prior to taking a career break and having my three children.

2. Alongside my role at the FPRA, I'm also responsible for the finances of my local Parish Council.

3. For a year during the millennium, I lived and worked in Sydney, Australia.

4. I have a passion for interiors and design, and spend a lot of my time decorating and buying for my home!

5. I enjoy long walks with my dog and playing tennis, and I'm just about to learn how to row.

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

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