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NEWSLETTER

FPRA
FEDERATION OF PRIVATE RESIDENTS' ASSOCIATIONS

OUR MANIFESTO FOR THE GENERAL ELECTION

The General Election is fast approaching, and if FPRA had a manifesto it would include these issues of great importance to leaseholders. If any members would like to contact their MPs and candidates with any – or all – of our shopping list, please do so.

The Big Issues

Protect Leaseholders' Funds

Leaseholders make advance payments, and contribute to sinking/reserve funds which are held by managing agents, freeholders or others. Sums held by unregulated and unprotected third parties may exceed £1 billion. Anyone, without qualifications and even with a criminal record, can set up in the property management business and take and hold deposits – with obvious risk.

FPRA says it is essential that some system is devised so that such funds are protected by the Financial Insurance Services Compensation Scheme or similar. And where funds are held by financial institutions, the £85,000 limit of protection on individual accounts should be changed, in the case of blocks of flats, to per individual leaseholder.

Section 20

The limit of £250 cost per flat on works before Section 20 comes into force, with consultation/ quotes and other costs for leaseholders, has not been changed for more than a decade. £250 could no longer be described as "major expenditure" and should be increased in line with inflation.

Simplify Legislation for Leaseholders

Leasehold law is unnecessarily complicated. Simplification is required to make it more workable in many areas. Also, the success of enfranchisement means that legislation based on landlord vs tenant is no longer helpful. Unpaid directors of Resident Management Companies are subject to the same requirements as commercial landlords. They should not be required to undertake such detailed and burdensome duties where not appropriate.

Commonhold, introduced in the Commonhold & Leasehold Reform Act 2002, has failed to materialise, due to flaws in the legislation. It should be compulsory in all new developments, and the obstacles to its success removed.

Excessive Insurance Commissions on Blocks of Flats

Unfair commissions should be banned. There should be transparency, with full disclosure, where reasonable commission by legitimate brokers would be allowed.

Regulation of Managing Agents

Self-regulation only applies to leaseholders with an ARMA (The Association of Residential Managing Agents) agent, but all leaseholders need protection from rogue managing agents.

Other Issues

Energy Efficiency

Flat owners are excluded from most legislation encouraging energy efficiency, including the award of grants, because no account is taken of the need for collective action with the landlord's co-operation and where the lease may preclude expenditure on work which in effect amounts to an "improvement".

Retirement Flats

Unfair transfer fees on the sale of retirement flats should be abolished.

Disability

Admirable disability legislation has failed to address the situation in blocks of flats, particularly the conflicting requirements of people sharing the same entrance.

Parking

Car clamping was banned, removing one tool enabling property managers to control parking outside leasehold property in sought-after locations. Now rogues operate in ticketing. Regulation is needed in this area.

Full details of our demands can be found in our leaflet Empowering Leaseholders, a copy of which is enclosed. Further copies are available from the admin office.

INSIDE THIS ISSUE

FURTHER LEASEHOLD REFORM – RADICAL THINKING?

A paper for an all-party meeting on 29th January 2015
By Philip Rainey QC

Philip Rainey QC, head of Tanfield Chambers and a well-known expert in leasehold enfranchisement and service charge cases, gave this stimulating and thought-provoking paper to a recent well-attended meeting at Westminster, organised by Leasehold Knowledge Partnership/Carlex. As he makes clear, he does not necessarily promote each idea, but wants to stimulate debate. Let us have your views!

Introduction

I have been invited to float "radical suggestions" for leasehold reform (other than commonhold which is a separate matter).

I have no political standpoint on any of this. I hope that all shades of opinion would agree that *better* regulation is the objective and is not necessarily synonymous with *more* regulation.

I have taken as a starting point the propositions (1) that the principal reason why flats are leasehold is the unenforceability of positive covenants in freehold land, and (2) that the principal problems to be addressed are (a) "the wasting asset" problem and (b) management control (including control over the levying of service charges by those who have to pay them). For these propositions see *Majorstake v Curtis [2008] 1 AC 787 at §§20.23*.

I have also borne in mind that complex law provides a fertile ground for lawyers and is often less effective than a simpler but less comprehensive solution because ordinary lay people can't get to grips with overly complex provisions.

It should not be assumed that I agree with all or indeed any of the ideas set out below. The intention is to stimulate debate. I would be surprised if any informed reader of this paper agreed with all of it but I would be disappointed if all readers disagreed with the same parts of it. I hope that this paper will be reviewed in that spirit.

I could also provide a much longer list of detailed reforms of existing legislation which would have a significant cumulative impact "at the coal face" but which would make for spectacularly dull reading. I have appended a few bullet points along these lines at the end of this paper.

Radical suggestions

Legislate so that positive covenants can run in respect of freehold land; or at least in respect of residential flats

Observations: This would cut away the reason why long leasehold flats exist in the first place. However, such a reform might still be ignored by developers, who might still prefer to create a leasehold structure for new flats. Management control would remain an issue with larger blocks (hence the idea to create commonhold) but with smaller properties comprising two, three or four flats (of which there are many) a "freehold flats" regime could work well. Devices such as the "Tyneside Lease" would be unnecessary.

Devil in the detail: Not necessarily that much: why not implement the recommendations in *Report on the Law of Positive and Negative Covenants (1984) (Law Com No 127)?*

Prohibit the grant of new long leases of houses

Observations: It is not easy to see why new leasehold houses should be built, except perhaps to preserve estate management which is an issue which can be dealt with by other means.

Devil in the detail: There will be cases where the occupier would not be considered as entitled to a freehold and for which exceptions could be made e.g. the Crown Estate, properties in National Parks etc.). Query shared ownership; although one might ask – why would a trust model not work for houses? As to the issue of maintaining the appearance of estates, and paying for the maintenance and upkeep of common areas, suitable new developments could be the subject of an Estate Management Scheme modelled on the jurisdiction under Ch.IV of Part 1 of the LRHUDA 1993 but with power to vest the management in a representative body of tenants/householders.

OR – to take that thought a stage further – why not set up larger, self-contained developments of houses and flats as a Parish and vest the external common areas, footpaths etc etc. in a Parish Council?

Prohibit the grant of leases of flats for a term of between 21 and 999 years

Observations: i.e. legislate that leases must be either short or very long. For the future, this eliminates the "wasting asset" problem. Many new leases are 999 years in any event.

Given that all long leasehold flats (with very few exceptions – eg flats held on business leases) can be the subject of new lease claims under Ch.II of the LRHUDA 1993, and that such claims can be made any number of times, it is very difficult to see why new long leases should not be very long, such that there is no valuable reversion. Coupled with a prohibition on ground rents, there would be no value in the landlord's reversion, and the norm would be that it is handed over to the lessees. If not, it would cost the lessees nothing to enfranchise.

Devil in the detail: The inclusion of break clauses would also need to be prohibited. But one conceptual difficulty with such long leases is that it seems unlikely that the flat will exist in 1000 years' time. Break clauses on grounds of redevelopment, with compensation at (say) 90 year intervals (I model this on S.61 and Sch.14 of the LRUDA 1993) could be permitted; indeed could be mandatory to ensure that redevelopment of cities is not strangled. There would also need to be an exception where there is an existing head-lease, out of which such a long term cannot be granted.

Indeed the position of head-leases of blocks of flats generally would have to be carefully considered.

OR

Abolish the rule of common law which prevents the grant of indeterminate leases and legislate for new "long leases" of flats to be indeterminate

Observations: The utility of this rule was queried by the Supreme Court in *Mexfield Housing Co.op v Berisford [2012]* 1 AC 955 (esp at §§33.34). Instead of providing for very long leases, legislation could both permit and require the grant of indeterminate leases of flats at no rent, capable of termination only on strictly limited grounds; most obviously redevelopment (with compensation for value as under Sch.14 of the 1993 Act); possibly also for serious and repeated breach of covenant (but as to this, see below).

Devil in the detail: consistent with an intention to eliminate reversions, there is another disreputable common law rule which could usefully be abolished, namely **abolish the rule which holds that the grant of a sub-lease for the residue of the term of a head-lease operates as an assignment of the head-lease.**

Convert all existing leases with unexpired terms in excess of (say) 125 years into 999 year terms or indeterminate leases with a redevelopment break clause

Observations: Again, to eliminate the wasting asset issue.

Devil in the detail: This would be a deprivation of an asset for the purposes of A1P1 of the ECHR. Compensation would be an issue if value were involved. I picked 125 years because at that lease length the reversion would usually be of negligible value but on very valuable flats this may not be so.

Prohibit the reservation of ground rents on new long leases of flats

Observations: seems inconsistent in principle with modern concept of owning one's own home and that a flat held on a long lease belongs to the lessee. New leases acquired under the 1993 Act are always at a peppercorn rent (S56(1)). There is a market in portfolios of ground rents: why should this investment opportunity exist? It could be argued that banning ground rents would increase the price charged by developers to buyers and thus fuel house-price inflation because they sell on the reversion. That seems logical, provided of course that one assumes that the flats are generally discounted and not sold for the most that the developer can get.

Devil in the detail: Attempts would no doubt be made to disguise rent as something else. Prohibition would have to be widely drafted e.g. prohibit "non-variable" "service charges", prohibit clauses which "indemnify" against a head-rent and so forth. On the other hand, one might wish to except certain types of flat e.g. student accommodation, some social housing, the building of which may be financed in part by reserving a significant income stream on a mid-length lease, which income can be used as a security, or securitised.

Repeal the right to a new lease of houses under the LRA 1967

Observations: To be consistent with a general prohibition on long leasehold houses and the abolition of ground rents. Also this right is limited to low value houses, is little used nowadays, the form of lease includes a high ground rent and is otherwise unsatisfactory. An example of something the statute book could do without.

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Further Leasehold Reform continued from page 3

Amend the LRHUDA 1993 so as to provide for the acquisition of a 999 year lease, or indeterminate leases, and to eliminate head-rents

Observations: Such amendment would be needed for consistency with the other proposals I make. Since repeated new lease claims can be made, acquiring an additional 90 years each time, there seems no sense in limiting the new term to 90 years. Requiring that new leases be 999 years would simplify claims because the freeholder would always be the competent landlord. Commuting head-rents would be consistent with the overall "no ground rent" objective and would eliminate the problem that at present the exercise of rights by the qualifying tenants creates a negative income stream for the head-lessee which in turns leads to difficult valuation issues. In some cases the price goes up, in others the freeholder loses out (see *Nailrile v Cadogan [2009]* 2 EGLR 151 and *Cooper-Dean Trustees v Greensleeves*).

Devil in the detail: If new leases under the Act are 999 years or indeterminate, it would make sense for the grant to be subject to a redevelopment break clause as per the existing section 61 and Sch.14 on every 90th anniversary of the original term. It may make sense to give head-lessees the right to buy down their head-rents.

Abolish the forfeiture of residential long leases

Observations: The notion that a valuable long lease can be extinguished and the value taken by the landlord is anathema to modern concepts of ownership. But the response so far, which is to apply extensive restrictions, can leave landlords (such as tenant management companies) without a clear way to deal with bad tenants. I suggest replacing forfeiture of residential long leases with a procedure whereby a landlord can apply to the court for an order for sale in cases of (serious) breach; akin to a mortgagee's action – so the tenant or tenant's mortgagee receives the proceeds less any provable damages/costs.

Devil in the detail: The above proposal is actually not radical at all: it is a truncated, "lite" version of a comprehensive proposal to abolish and replace forfeiture in respect of all leases as proposed by the Law Commission in *Termination of Tenancies for Tenant Default* (Law Comm 303 (2006)). Why not simply implement that Report and sort out the law more generally? If the reason is resistance borne of deep worry within the commercial sector, where termination of relatively short (eg five-year) tenancies is a much more frequent occurrence, I would suggest implementing the Law Commission proposal in the long-leasehold residential sector first and extend it to commercial leases once it is seen to work.

Enhance existing enfranchisement rights

Observations: The 1993 Act procedure (unlike the 1967 Act) is riddled with "trap" notice requirements and time limits with no power of extension and where non-compliance has catastrophic consequences for landlord or tenant(s). It is nearly 22 years since the Act became law but these provisions cause as much trouble as ever. Experience shows this trouble is far more than these requirements are worth; claims collapse and in some cases are not renewed as the tenants are "burned" by the experience. I suggest a single, simple procedure for all types of claim and with most if not all court jurisdiction transferred to tribunals.

Devil in the detail: If there were to be an overhaul of enfranchisement, there are some quite problematic issues which could usefully be addressed. E.g. amend the LRHUDA 1993 so that tenants who have acquired an intermediate superior interest to their flat cannot have that interest compulsorily acquired on a collective claim. Amend the "no Act" assumption in 1967 and 1993 Acts so that the assumption is that no such leases have Act rights. (At present the no-Act assumption applies only to the building, and an argument is emerging that with universal enfranchisement rights the assumption means that leases are valued at a lower value than they would have had if there had never been an Act when what was intended was simply that the existence of the Act should not increase the value of the tenant's lease/decrease the value of the reversion).

Prevent rights of enfranchisement being exploited by business

Observations: "Marginal" enfranchisement claims breed dissatisfaction with the process. Such claims also by their nature tend to be resisted and occupy court time. It was not intended by Parliament that repeal of any residence requirement would enable businesses to enfranchise but the business lease exception in the 1967 and 1993 Acts is badly drafted and ineffective. Re-draft it so that it actually works – provide that the business at the relevant premises need not be carried on by the qualifying tenant.

Repeal Part I of the Landlord and Tenant Act 1987 (right of first refusal)

Observations: This right was the product of the Nugee Report in 1985, which concluded that although there was strong support for enfranchisement of flats, a right of first refusal coupled with the right to appoint a Manager if landlords were in default of their obligations would suffice. Now that we have collective enfranchisement, lease extension rights for all flats and no-fault Right to Manage, the right of first refusal is in principle redundant. In practice, it is worse than redundant, because it is one of the most ill-drafted pieces of legislation ever inflicted on us. To the extent that it applies to properties or tenants who do not have enfranchisement rights, one must query "why should it?" It is easily avoided by those who have the money to pay for expert advice; but generates disputes as to the efficacy of the avoidance. Its existence is a disincentive to mixed use schemes and tends to act as a drag on the ordinary commerce of trading mixed use investment.

Devil in the detail: Very little. It can simply be repealed. Part III (acquisition orders where a landlord is in default) could be merged into the enfranchisement procedures by way of further simplification and rationalisation.

Abolish the vesting of freehold or leasehold reversions in the Crown where a landlord company is struck off the Register of Companies or is dissolved

Observations: At present, reversions vest along with all other property: bona vacantia. There may be a disclaimer on insolvency followed by an escheat to the Crown. Many investment vehicles are offshore; on dissolution of offshore companies there is escheat. It is highly unsatisfactory that long lessees of flats can get dragged into this:

...This case raises a difficult but important point as to the application of the Landlord and Tenant Act 1987 to premises the freehold of which has been disclaimed on the insolvency of the landlord. If the argument of the defendant is well-founded, there is a significant lacuna in the provisions of the Act, resulting from the operation of the medieval doctrine of escheat. I have to say that I was initially amused, but ultimately dismayed, that the rights of the parties under a modern statute reforming the law of landlord and tenant should depend on the vestiges of feudal land law. My dismay grew as it became apparent that my decision in this case involved an examination of fundamental concepts of our land law, and an examination of concepts and authorities dating back several centuries. It was with some relief that I noted that the last authority to be cited in this case was a textbook dating from as recent a date as 1794; but even that referred me back to medieval writs of escheat... (SCMLLA v Gesso, 1995).

Tenants can be left having to apply for vesting orders with unsaleable leases in the meantime (and they are Crown tenants, sometimes losing the protection of statutes inapplicable to the Crown). The Crown can (and sometimes does) sell the reversion to anyone it likes. I suggest that reversions on flats should vest by law in a statutory body, with a simple procedure for vesting at no cost in a company similar to a RTM company set up by the tenants.

Devil in the detail: provision would have to be made for the potential for the company to be restored to the register (with a cut-off date) which would ordinarily re-vest property in the company.

Extend RTM to the interest of residential head-tenants even where the block is unenfranchiseable. Or extend RTM to the residential parts of buildings currently disqualified

Observations: Right to Manage presently only applies to premises which would also qualify for collective enfranchisement. But the exercise of RTM only applies to the residential parts of those premises; so it is not altogether easy to see why RTM cannot be extended to cover the residential parts of all or most mixed-use blocks, many of which are presently managed through a residential head-lease. The equation of RTM with enfranchisement was in part driven by the failed attempt to introduce "Right to Enfranchise" (RTE) companies which were supposed to dovetail with RTM companies. The consultation at the time of the 2002 Act also indicated that once RTM had bedded in, Parliament would look at extending it.

Overhaul, clarify and simplify the procedure for the acquisition of RTM. No longer require 50 per cent participation

Observations: There is currently a cottage industry in resisting RTM because acquisition of the right is beset by technicality and because, if the landlord wins, he gets his costs, but if the tenants win, they don't. Acquisition procedures should be simplified and the effective one-way cost-shifting repealed. More fundamentally, it might be queried why 50 per cent of tenants should have to back RTM (by joining the RTM company) given that once it is acquired, the numbers who are members of the company may drop below 50 per cent without any particular consequence. Perhaps 35 per cent should be the cut-off?

Devil in the detail: If RTM were to be overhauled, there are many detail reforms which ought to be made. RTM is, in practice, not as satisfactory as it seems: the ambit of the RTM company's rights are actually quite unclear. It would be useful to extend the FTT's jurisdiction over disputes with, and within, RTM companies.

Relax the regulatory regime controlling service charges for tenant-owned landlord / management companies

Observations: The panoply of controls on management, service charges and administration charges are designed for an arms' length relationship between landlord and tenants. It is far from obvious why such close regulation should apply where L and T are the same people wearing different hats. If the tenants in a small block meet around the kitchen table and decide to XYZ, why should they have to serve a S.20 LTA 1985 consultation notice? Service charge disputes are a zero-sum game.

Devil in the detail: Those observations are applicable only if the landlord (or management company or RTM company) is representative of the tenants. Enfranchisement can be achieved by a bare 50 per cent of long lessees; that would result in what would be more accurately described as a "neighbour owned" block rather than "tenant owned". There could be a threshold for relaxation: a landlord *wholly* owned by *all* the long lessees in a block (or by an overwhelming majority e.g. all lessees bar one/90 per cent of lessees in blocks with more than 10 flats).

Permit local authority landlords to levy major works service charges separately from the "day-to-day" costs

Observations: This suggestion builds on the 2002 reforms which introduced Qualifying Long Term Agreements, which enable local authorities to enter into Partnering Agreements with contractors. The problem is that major works often straddle many blocks in more than one accounting year; tenants are eligible for loan assistance or a monthly payment plan for such works but not day-to-day charges, councils find it hard to estimate the cost of major works for a tenant for a particular year, tenants often like the transparency of separate estimates and bills for the major works. Yet the Right to Buy leases always require annual accounting and a minority of tenants are challenging the separate bills for major works, causing a huge amount of work (and some loss) for the Councils in producing lease compliant billing. Such losses are met from the Housing Revenue Account, i.e. the secure tenants subsidise those who exercised RTB (many of whom have now sold on to buy-to-let investors). I suggest that a term be implied into all RTB leases legitimising the common billing practice for major works.

Devil in the detail: reform of S.20B of the LLTA 1985 ought to be included; this section is intended to protect tenants from late service charge claims by imposing an 18 month time limit on recovery of costs unless the tenant was notified of the figure. But as part of the cottage industry in challenging local authority service charge billing it is used by tenants as a defence where the local authority re-bills on an annualised basis.

Extend the rights to vary leases under Part IV LTA 1987

Observations: There are several holes in this very useful jurisdiction e.g. it should

Continued on page 6

Further Leasehold Reform continued from page 5

be possible to re-distribute service charges among tenants where in aggregate they add up to 100 per cent but they are skewed, sometimes to favour flats held by entities associated with the landlord; e.g. it should be possible to substitute a new tenant management company where the original company has been dissolved. E.g. it should be possible to vary a clause which renders the lease unsuitable as security for lending.

Regulate managing agency

Observations: hardly a radical suggestion; probably one for political judgment. Drafting would be easy – just copy the Housing (Wales) Act 2014.

Prohibit cross-ownership or control of managing agents

Observations: It is currently lawful for a landlord to have a managing agency arm, or subsidiary, and to use that arm to manage its own portfolio while recovering management fees under the leases. Lessees often complain that such agents favour their parent landlord. This complaint would be eliminated if cross-ownership were prohibited, or if such "in house" agents could not recover management fees under leases.

Devil in the detail: One would have to specify carefully what forms of cross-ownership were prohibited; attempts at getting around the restrictions should be anticipated. But models controlling cross-ownership exist in other fields e.g. the media.

Prohibit managing agents from carrying out claims management or insurance broking services; require consultation under S.20 LTA 1985 on insurance

Observations: Retention of insurance commissions or discounts by landlords or their agents is a major concern. One recognised justification for retention of such payments is where they are, on paper at least, consideration for claims management services or where the agent is also registered as an insurance broker. Requiring that third party brokers or claims managers must be employed would cut off this justification. Imposing a consultation requirement similar to that which applies to qualifying works and QLTAs would include requirements for disclosure of the premium, commission payments and discount structures, increasing transparency.

Devil in the detail: Again one would have to specify carefully what forms of cross-ownership were prohibited; attempts at getting around the restrictions should be anticipated. Landlords might simply set up an insurance broking business. Query what the consequences would be of inadequate consultation following *Daejan v Benson*.

Substitute a civil penalty regime for the various criminal penalties for non-compliance with statutory provisions

Observations: The principle of criminalising things like failure to provide a statement of account on time must be questionable. Whether the criminal courts are the most effective vehicle for enforcement by local housing authorities is equally questionable.
Devil in the detail: Not much: see the Consumer Rights Bill Schedule 9 for a model.

Limit the effect of rent and covenant-compliance conditions on break clauses

Observations: more of an issue in commercial leases than residential, but something of a scandal nonetheless (in my view). The "trap" into which the uninitiated fall is that they see a break clause, and they see that it requires payment of rent up to the break date and that covenants must be complied with. But they don't realise that requirements of the content of a notice must be strictly complied with so that any error or omission is fatal, that paying rent due up to the break date may involve making a payment in advance for a period beyond the break date, and they don't realise that even if a trivial breach of covenant can be proven (e.g. they failed to repair a cracked tile in the WC) the exercise of the break is invalid. None of this is business common sense.

Devil in the detail: Suggest legislating
(1) to override lease clauses requiring break notices to be in a precise form, so that unmeritorious process points could not succeed where it could be shown
(a) that the notice, however served, reached its target; and (b) that the purport of the notice was reasonably obvious – no matter what additional complexity the lease might require
(2) to allow for apportionment on the payment of rent and other monies up to the break date
(3) restitution of overpayments for rent etc. beyond the break date and
(4) implying a term into all such break conditions that a clause which requires that a tenant must have complied with covenants in order to break the lease requires substantial compliance only (abrogate "complete covenant compliance" or "CCC" clauses).

Exit fees

I have steered clear of the issue of "exit fees" and related charges, found often in leases of retirement homes, because the Law Commission has now begun a project concerning this issue. However, any final recommendations are unlikely to emerge until March 2017 and any legislation based on those recommendations would not take effect until a somewhat later date. But in 2013 the OFT noted that a number of forms of exit fee clause are likely to be unlawful under existing consumer protection laws such as the Unfair Terms in Consumer Contracts Regulations 1999 (which will be replaced by the Consumer Rights Bill currently before Parliament). Problems with the status quo are (among others) that they are often paid albeit under protest in order to allow a transaction to proceed and that the only forum for challenge is to sue in court. A modest, non-radical suggestion for immediate reform, and which would not pre-empt the Law Commission – would be (a) to confer on the FTT a new *jurisdiction* to consider challenges to exit fees brought under *existing substantive law* and (b) (subject to a short Limitation Period) to permit challenge to and recovery of exit fees after payment if they are found not have been due.

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19th January 2015
(revised 23rd January 2015).

Legal Jottings

Compiled by Philippa Turner

LVT Leasehold Valuation Tribunal
FTT First Tier Tribunal (successor to the LVT)
UT Upper Tribunal
UKUT United Kingdom Upper Tribunal
EWCA England Wales Court of Appeal

Residents' Associations

S.29 of the Landlord & Tenant Act 1985 confers the right on "tenants" (which term encompasses long leaseholders) to apply to what is now the FTT for a certificate of recognition of a tenants' association. In *Rosslyn Mansions Tenants Association v Winstonworth Ltd. (2015 UKUT 11)* such an application was made by six residents comprising four leaseholders in a block of 13 flats paying variable service charges and two tenants not paying variable service charges; of the other flats, three were occupied by tenants and the other four by long leaseholders, one of whom was a director of the landlord, who did not wish to join the Association. The Constitution provided that the leaseholders were to be admitted as full members but the tenants only as honorary members without voting powers. The application was on the grounds that (i) the management was archaic; (ii) the landlord refused to communicate with the leaseholders; (iii) the landlord failed to consult; (iv) the procedure for awarding contracts was opaque and (v) there were issues about financial management.

Government guidance refers to 60 per cent of residents as being the appropriate proportion to justify recognition of an Association. The decision of the FTT was to decline recognition because (i) the percentage of membership fell short of the recommended figure; (ii) it was usual for both tenants and leaseholders to be members even if voting rights were only to be exercised by those paying a variable service charge and (iii) that, in any event, the complaints by the leaseholders against the landlord would not be resolved by the grant of a certificate. On appeal the UT held that it, although it was correct that the FTT had complete discretion in making its decision, it should have regard to all the relevant circumstances and S.29 did not provide that 60 per cent membership was a requirement. In this case, the FTT had not taken adequate account of the following factors: that 50 per cent of the leaseholders were members and that, because of the way service charges were calculated, they were liable for 68 per cent of the total due; furthermore, the poor relationship between landlord and leaseholders was a relevant factor. The matter was therefore remitted to the FTT for a fresh determination.

For those who are interested, a full account of this case can be found at www.lawandlandlease.co.uk 2015/01/19/rosslyn-mansions-tenants-association.

Leasehold Reform Housing & Urban Development Act 1993

In *Natt v Osman (2014 EWCA Civ 1520)* three tenants served a notice under S.13 of the Act of intention to acquire the freehold. There was a fourth tenant who was not included because it was mistakenly thought he did not qualify by reason of the design of the building. The Court refused the claim since the fourth flat, although being only accessible by a staircase over part of one of the other flats, was nevertheless eligible and that therefore there had been a failure to comply with the requirement of S.13(3)(e) that the names and addresses of all the qualifying tenants (whether or not participating) should be included in the notice. The Court of Appeal agreed that holding that the information was necessary to ascertain that the number of flats amounted to the required two-thirds of the total and there were not less than 50 per cent of the tenants supporting the application. "Substantial compliance" with the Statute was not sufficient – it must be complete – and the state of mind and knowledge of the parties was irrelevant.

Merie Bin Mahfouz(UK) Ltd. v Barrie House Freehold Ltd. (2014 UKUT 9th Dec.) was another case in which the tenants served notice under the Act of intention to purchase the freehold. The property included in the notice contained the common parts of the building, comprising a porter's flat, an entrance hall and a basement area available for use of tenants' storage. The landlord's counter notice proposed a leaseback (under S.36 and Schedule ix) of the porter's flat, part of the entrance hall and the basement in order to create a new 2-bedroomed flat, an extension of the porter's flat and an office in the basement. The LVT refused to allow the landlord's leasebacks and the UT agreed: the purpose of the Act was to clarify exactly what was to be acquired at the time of the initial notice; units which were not in existence at that stage could not be valued at that date because they were not capable of existing as a leasehold interest. Furthermore, the landlord could not be granted a leaseback of an area which was or was included in a common part of the building at the relevant date. The Act entitled tenants to acquire common parts by way of collective enfranchisement; at the time of the initial notice, the porter's flat was a common part, the new flat required construction which interfered with tenants' rights and the basement did not exist as a "unit". The landlord was, however, entitled to leasebacks of two commercial units already let to mobile phone companies, one on the roof space and one in the basement since these were units in existence at the time of the service of the notice.

Service charges

It was held in *Garrick v Balchin (2014 UKUT 407)* by the UT that, where the lease provided for expenditure "incurred or to be incurred" to be included in the service charge the landlord could claim for costs falling outside the current accounting year.

Nuisance

Lawrence v Coventry (HLR 2014 617-778) was a case that found its way all the way to the Supreme Court on the question of landlord's responsibility for a nuisance caused by a tenant. Without describing the facts in any detail (which involved the noise caused by a motor racetrack) suffice to say that it was held that a landlord could not escape liability relying on a covenant which prohibited the tenant from causing a nuisance where, to his knowledge, it was inevitable or likely that a nuisance would occur. On the other hand, it could not be inferred, because the landlord attempted to alleviate the nuisance, that he was authorising it or in any way participating.

Friendly Reminder
Subs are due for renewal!

An Ask the FPRA Special

PARKING PROBLEMS

As car ownership increases, and parking becomes more restricted, managers of blocks are encountering more difficulty in controlling their available spaces. Here our FPRA experts answer two tricky questions.

Q Squatters' rights?

To date, our management company has followed a pragmatic, informal solution to parking that works in that provided all residents stick to their legal entitlement – houses have two and apartments one, plus an extra space if there is a genuine second dweller in the apartment – there remains sufficient parking spaces for visitors and all is peace and light! My concern is that, with the non-marked spaces and, indeed, all land belonging to the management company, if leaseholders continue to use a non-marked space for several years, would they be able to prove adverse possession? Should the management company publish some formal terms or a system which sets out clearly that the current arrangement is at their discretion and insist that this is acknowledged in writing? No charge is made for any parking at present. One freehold house is separate from the others and while subject to the same transfer and management deed, the owners park on a road illegally. Due to the particular position of the house and road we may not wish to stop this parking, but again I am concerned to prevent any acquisition of any rights to park.

A FPRA Legal Adviser Nicholas Roberts replies:

You are right to be wary of the possible implications of allowing unofficial arrangements to continue, or of turning a blind eye to such arrangements, because for the time being they do not cause problems. I think, however, that, as a matter of strict law, you are probably being over-cautious, at least so far as the owners of leasehold flats are concerned (the position with the owners of the freehold houses would be different).

There are in fact two legal principles which you need to be aware of: they are often confused, though the legal rules are different. The first one is adverse possession, sometimes called "squatter's rights". This allows someone who is not the real owner to acquire ownership rights by long-term possession. The other one is prescription. This allows the owner of a property to acquire rights less than ownership in a neighbouring property by long usage. These rights – known to lawyers as easements – are such things as rights of way, rights to run a pipe or cable over another's land, rights of drainage etc. Fortunately, when it comes to the owners of leasehold flats, the distinction mentioned above, and the complications outlined below, are largely irrelevant. It is simply not possible for a leaseholder to acquire title by adverse possession (i.e. "squatter's rights") against his or her landlord; and neither is it possible for a leaseholder to acquire an easement against his or her landlord by long usage. So, as far as your leaseholders are concerned, you do not need to worry.

I therefore need to look at the situation in more detail only in respect of possible claims by the owners of the freehold houses which form part of your estate. Because the houses, and the retained land (i.e. the land which forms the 'common parts' retained by the Management Company), are now in different freehold ownership, it would in theory be possible for the owners of the houses to acquire either title by adverse possession, or rights by long usage.

Parking of vehicles, depending on the degree of use, may engage either adverse possession or prescription (as outlined above). If one has a parking space and one controls who may use it by a lockable folding post, then there are reported cases which suggest that use of such a post may be sufficient to give one adverse possession of the space.

In most cases of parking, however, one is more likely to be claiming a right to park. This right is still highly problematic in English law. The challenge to legal principle that it poses is that, in theory, if A enjoys an easement over B's land, B can still use the land provided he does not prevent A from enjoying the easement. Allowing A to use B's path or drain does not prevent B from also using it. But if A is entitled to park on B's land, B effectively loses the use of it. The present position, under the case law, is that English law clearly accepts that one may have a valid easement to park a vehicle in a larger car parking area (e.g. to park one vehicle in any one of several communal spaces). What English law still has difficulty with is the idea that one can have the exclusive right to park a vehicle in a designated space. The case law has nearly gone as far as accepting this, but it is still a bit of a grey area, though I think it is only a matter of time before it is more generally accepted. It is clear that a lease may expressly grant an express right to park; but if it is not a 'proper' easement, it makes it difficult to see how it can be acquired by long usage.

Persistent parking seems unlikely to be capable of grounding a claim to adverse possession, unless the person doing the parking excludes others from the land with chains, lockable, posts, etc. There is more of a danger that parking could give rise to an easement to park. Perhaps counter-intuitively, given the current state of the law this seems more likely to be made out if the claim is on the lines of "I always park my car somewhere along this roadway" rather than "I always park my car in this particular space" (though I think the law could well develop so that the latter would also be recognised as a valid claim before long). In either case the parking would have to go on for 20 years before it would be recognised as a claim by long usage.

You might be able to defeat any claim to a right to park by long usage if the transfer of the house in question contains Clause 8.2 of the Continuation Sheet to the (freehold) Transfer Deed which you previously sent in. This reads "the Transferee shall not be or become entitled to any right of light or air or other easement (except as by this Transfer expressly granted) over any adjoining or neighbouring land now or late of the

Transferor so as to prejudice the use of the land for building or other purposes obstructive or otherwise". On its literal reading it would seem to prevent the owners of the houses from ever acquiring rights by prescription (long usage) against the Management Company; though it might possibly be construed as having a narrower meaning.

Under the present state of the law you can quite easily prevent the owners of any of the houses from gaining rights by prescription (i.e. long usage) over the common parts simply by writing to them, saying that they are doing so with your permission (you would of course have to send it by the 'Signed For' service which replaces Recorded Delivery, and make sure that you kept a record of the receipt). This is on the basis that, if use is by express permission, it can never ripen into a claim by long usage. At the risk of complicating matters further, however, I should perhaps mention that the decision that an unsolicited grant of permission can defeat prescription was controversial, and it is possible that it could be overruled if another case went on appeal.

You will have gathered from the foregoing that I think it would be virtually impossible for leaseholders to acquire rights to park, and difficult for the owners of the freehold houses to do so. Trying to get both leaseholders and freeholders to sign up to some sort of agreed parking scheme would seem to be a good idea, in the interests of harmonious relationships and so that everyone knows where they stands. I do, however, think it is important that the Management Company clearly reserves the right to change the arrangements at its complete discretion.

I have said that it would be virtually impossible for leaseholders to acquire new rights by long usage over the common parts. In the interests of completeness (but again, at the risk of unnecessarily complicating matters) I ought perhaps to mention that the only way in which I could envisage such a claim being established is by the legal principle known as Estoppel. This is where (in this case) you in some way encourage someone (i.e. the leaseholder of a flat or the owner of a house) to think that they have a right, they act in reliance upon this, and in doing so then do something to their detriment: in practice this usually involves them incurring some kind of expenditure. This can support either a claim to title, or a claim to a right. There was, for example, a recent case where a Council encouraged a landowner to think that they had a right of way which they did not in fact have, and the landowner relied on this and incurred the expenditure of having a garage built. The Council could not go back on their assurance that a right of way existed. It seems unlikely that anything that the Management Company might do would go as far as this, but the point should be watched. It could allow either a freehold owner or a leaseholder to claim some right.

I am sorry if this answer has become rather long, but the position, especially as regards the freehold houses, is potentially complicated.

Q More parking problems

Following decades of uncertainty, we have recently secured ownership of the freehold, and are in the process of scrutinizing leases. All four leases are currently charged to lenders, though one is for a nominal sum in order to provide safe storage for deeds.

Our Victorian semi comprising four flats, is fronted by a paved forecourt, with space for parking four vehicles; one per flat. The lower two flats share a garage, with their forecourt parking immediately in front: the remaining two parking spaces are immediately in front of, and to the right of the main front door.

While there have been no practical issues over the years, it has long been understood that current leases outlaw forecourt parking. Purchasing the freehold has gone part way towards resolving the issue. As we stand however, the forecourt is currently demised with the lease of the basement flat, while no one (including the basement lessee) has the right to park on it.

With the local authority about to introduce a residents' parking zone, parking locally will become increasingly challenging: we need to resolve our existing anomaly in order to satisfy future potential buyers. In 2011, a prospective sale fell through; the buyer citing uncertainty surrounding the freehold and parking entitlement.

Proposed solutions include:

Transferring ownership of the forecourt to the freeholder; presumably this will entail variations to one or more leases? OR

Introducing a peppercorn rent, payable to the basement lessee, in return for permitted forecourt parking.

Our question is: how to achieve a cost effective and workable solution to meet existing needs whilst, at the same time, offering protection against possible exploitation from successors in title to the basement lease. Your assistance would be much appreciated.

A

FPRA Hon Consultant Yashmin Mistry replies:

Looking at the plan we hold in the office, we believe the forecourt belongs to the basement flat lease, although we are not entirely clear as to where exactly the "forecourt area" is. Would it be possible for you to send us the plan back with the forecourt area coloured in please?

Subject to you returning the plan coloured in, from what we can establish looking at the plan we have – there are two forecourt areas. One of which has demised to the basement flat and the other – we assume demised to another flat possibly or even retained in the freehold title? We have not had sight of all the leases and the plans and therefore cannot be sure on the position.

In any case, the landlord has an obligation to "keep the forecourt in good condition" however we cannot see the tenants have an obligation to pay for such up-keep via the service charge.

The tenant of the basement flat has the right to "pass and repass along the forecourt with or without a hand propelled vehicle". We cannot be sure as to whether this right exists in the other leases as we have not had sight of them.

We would suggest the first thing however is to establish the exact location of the forecourt you refer to and also to have sight of all four the leases and they plans.

What is clear however if that if the forecourt area has been demised to the flats individually the landlord cannot "force" that flat to transfer the forecourt areas to the freehold company nor can the freehold company impose a "rent" for that area as effectively the area is already demised to a flat.

ASK THE FPRA

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

Train noise and vibration

Q **In the last year there have been serious noise and vibration problem affecting the residents of our block in South West London.**
We have been in correspondence for some weeks with a London Underground Community Relations Manager, about the extremely loud noise and severe vibration caused on recent weekends by trains from Gloucester Road to Kensington High Street using a different track from usual. The track is nearer our flats than the normally-used track, which runs under the overhang of Point West. Although trains that use it travel at low speed, the noise is much louder than the noise of trains using the usual track (or the track carrying trains in the opposite direction, even though it is nearer still – the noisy track is the middle one), and the vibration we feel in our flats is much stronger. We have taken measurements with a noise meter to document.
TFL has not been able to offer a solution. In particular, it is unable to guarantee that the offending section of track, which it says is likely to be used from time to time including in October, will be included in "rail grinding" scheduled for July. I have been in touch with other concerned residents and we feel strongly that if further use of this section of track is unavoidable, LU should carry out without delay whatever work is necessary to reduce the noise and vibration to an acceptable level.
Question to FPRA: What is your experience of other similar situations and can you recommend legal counsel?

A FPRA Committee Member Simon Haswell replies:
My recommendation firstly would be before any legal advice, is contacting the Government agency below.
www.gov.uk/noise-pollution-road-train-plane/railway-noise
Regretfully contacting any council would be of little use. Bedford council, as an example, said: "It is not possible for the local authority to take action in relation to noise from trains."

Landlord profiting from us

Q **We have a fixed lease with a very high service charge, currently approaching £4,000 pa, for which we receive very few services. The landlord has said she takes a profit from this, and it is her pension pot. My query is: do we have to pay VAT on the whole amount? I understood VAT was a tax on a service, not on profit or anything else. The services we receive would cost approximately £500 pa, although the accounts are sketchy, because as it is a fixed lease the landlord does not have to provide them to us. We are asking if we really have to pay VAT on the whole amount of £4,000 as the tax is obviously a considerable sum.**

A FPRA Hon Consultant Gordon Whelan replies:
I have checked this and also discussed the matter with a VAT consultant. Unfortunately, there is nothing the lessees can do about this. As long as there is an option to tax then VAT is payable on the full amount of the charge that this detailed in the lease. The profit element in the charge is not relevant for determining the VAT payable.

Share certificates

Q **I am handling three sales of properties this year for the first time for since becoming the management company's administrator. Please can you clarify for me these issues regarding share certificates in relation to ordinary shares for residents management companies:**
Do I have to have a share transfer document to issue a new certificate?
Who should hold the certificate? Owner or mortgage company if property mortgaged?
Does the solicitor need to be involved to handle this process or can I deal direct with the owner or mortgage company if Q2 is mortgage company?
What date should be on the certificate? Date of completion, or date when transfer carried out and registered in the share transfer register?
Do I have to register these transfers anywhere on line, eg Companies House? I cannot seem to find anything online.

A FPRA Hon Consultant Martin Redman replies:

1. The most important document for you is the share transfer. Once you have it signed by the old lessee, you can act and issue a new share certificate.
2. I suggest that the share certificate should go to the new lessee.
3. It seems to me that solicitors tend to regard transfer of a flat as a very routine matter, so I suggest that the certificate go to the owner.
4. I see no reason for using any date on the certificate other than the date on which you do the paper work.
5. Yes, you must report the change to Companies House, so that the record there includes the current membership of the company.

Change of managing agent

Q **Our current managing agents have sold out to another managing agent. Is it usual practise for the current agreement between the ground landlords and the managing agents to automatically transfers to the new managing agents? Or is it the case that the ground landlords will sign a fresh agreement with the new managing agents – in which case the residents association will want some input?**

FPRA Hon Consultant Colin Cohen replies:
There is no usual practice when managing agents sell their business. It would depend on the terms of the sale, which of

course you are unlikely to find out. If they sold the company name and therefore the existing management agreements, these may continue without the landlord signing new agreements, otherwise if the new company has entered into any new long term agreement with the landlord for more than a year in excess of £100 per annum per flat, then they should serve Section 20 notices on all the leaseholders and consult. In any event, if you are not happy with the management or the new agent you can always form a Right to Manage Company and take over the management and then appoint your own agent, providing you can seek a consensus of 50 per cent or more of the leaseholders.

Responsibility for service conduits

Q **I'm trying to establish whether the company has any responsibility to repair service conduits such as phone lines (obstructed by trees or broken) and mains water pipes that serve the individual flats buried under the common land. Anglian Water will inspect but not undertake any repair of the mains supply from the meters to the individual flats. On reading the lease the "Tenants Covenants with Landlord clause 3.3 Repair" states "to keep the Premises and all Service Conduits exclusively serving the Premises in good repair". However, the "Company Covenants clause 7.1" states "Keep the Common Parts and the Service Conduits (other than those which are the sole responsibility of the Owner of any of the relevant flats) in good condition and repair and to maintain rebuild or replace any parts that require to be maintained rebuilt or replaced".**

A FPRA Hon Consultant Bernie Wales replies:

The water company normally has responsibility for maintenance of the pipework up to and including the water meter. (This is non leasehold law.)

The First Schedule of the lease details what comprises 'the flat'. This includes "...all Service Conduits used solely for the purposes of the flat but no others..."

Consequently, if the is pipework from a communal meter serving several flats, then that pipework should be maintain by the landlord... and the costs included within service charge expenditure.

Alternatively, if the pipework from the meter serves only one flat... the leaseholder of that flat is responsible for maintaining their pipework.

Company status

Q **Our company manages a small block of ten residential flats. When the flats were first occupied the solicitor, acting for the sales, advised owners to form a limited Company, registered at Companies House, to manage the block. The company was incorporated in November 1994. Recently, some of our new owners have queried why we are a limited company because most of thee flats in the area are managed by residents' associations.**

We are now considering changing our designation to a residents' association and striking off our company with Companies House. It is appreciated that this latter action is a simple procedure, but as each owner is a shareholder in our company, the latter being the freeholder, I would appreciate any advice you can give as regards managing under the new designation.

A FPRA Hon Consultant Mark Chick replies:

We see that you intend to strike off the limited company which appears to be the "third party management company" to your lease and which you also state is the freehold owner of the property.

We would recommend that you do not take this course of action without further advice as this is likely to have unfortunate consequences for the property.

Firstly, the freehold is owned by the company. If the company is dissolved its assets will vest in the crown. As a consequence, there will be an argument that there is no one to enforce the covenants under the leases and the flats will become un-mortgagable.

Secondly, the management company limited covenants to provide services under the terms of the lease and it is a party to the lease, then if the company ceases to exist there will also be a failure on the part of the management company to perform the relevant covenants for repair etc under the terms of the lease.

Under the terms of the lease, if the management company does fail to perform its obligations, then the landlord is under an obligation to perform these covenants on its behalf. However, if the company is also the freehold owner then the problems mentioned above will arise.

Our view therefore would be that the company should be maintained and the position investigated further.

Should you wish to transfer the freehold to an unincorporated vehicle (we would not recommend that you do this) then the residents' association could appoint trustees and have a declaration of trust allowing an unincorporated structure to hold the freehold.

However, before this can be done the freehold would have to be transferred and the provisions of the Landlord and Tenant Act 1987 would apply and all of the tenants would have to be notified under the 'right of first refusal' under that Act. The costs of doing this are likely to be prohibitive.

Further, an unincorporated structure is highly unwieldy, as were there to be any changes in the co-position of the owners, then it is likely that the declaration of trust would need to be amended.

FIGHTING FOR RECOGNITION

Success in the Upper Tribunal: Recognised Tenants' Association (RTA) Update: Rosslyn Mansions Tenants Association v Winstonworth [2015] UKUT 0011 (LC)

by FPRA Consultant Yashmin Mistry

A Recognised Tenant's Association (RTA) is a group of 'qualifying tenants' (i.e. tenants who contribute to service charges) who have come together to represent their common interest so that the association can act on the tenants' behalf and which has been recognised for the purposes of section 29 of the Landlord and Tenant Act 1985. An association is recognised either by notice in writing from the landlord to the secretary of the association or by an application to the First Tier Tribunal (Property Chamber) (FTT).

An RTA is one of the few methods by which lessees can obtain extensive rights without being burdened by weighty obligations. In particular they have additional rights concerning inspections of the landlord's costs and accounting procedures and consultation in relation to major works to the building.

JPC Law represented the successful tenants in Rosslyn Tenants Association v Winstonworth, where the Upper Tribunal allowed the RTA's appeal against the FTT's refusal to grant a certificate of recognition and remitted the case back to the FTT to be determined afresh.

The case facts

The RTA made an application to the FTT for a certificate of recognition. In support of their application they set out the difficulties that they had with communicating with the landlord concerning his management of the building, especially in relation to his failure to consult and tendency to award major contracts to himself or members of his family. The application was rejected on the papers. One of the main reasons for its rejection was that only 57 per cent of the lessees liable to pay a variable service charge supported recognition of the RTA. However, the supporters were also responsible for paying out a significantly higher contribution of the service charges than the other lessees.

The Department of Communities and Local Government and the HM Courts and Tribunals Service guidance on applying for a certificate of recognition both state that as a general rule, an RTA should not be less than 60 per cent of the variable service charge payers.

The Upper Tribunal held that:

- The FTT had failed to take into account the service charge contributions of the RTA's supporters;
- It had effectively used 60 per cent as the threshold below which its discretion could only be exercised in exceptional circumstances, and
- It did not assess the relevance of what appeared to be a poor relationship between the supporting lessees and the landlord.

What this means for tenants?

In future the FTT will need to consider not just the percentage of qualifying tenants who are seeking a certificate of recognition, but the proportions of the service charges they pay. This means that more tenants' associations will be able to apply for certificates of recognition as a result and benefit from the additional rights afforded to them.

(See also Legal Jottings on page 7).

WATCH YOUR STEP!

An important new decision has emerged from the Court of Appeal which will have an impact on many landlords and the way they manage their properties, writes FPRA Hon Consultant Yashmin Mistry.

The case is called: Edward v Kumarasamy

Facts of the case:

In this case the tenant was occupying a flat owned by the landlord. The landlord had a long lease of the flat concerned but he did not own the block. The tenant tripped on a path outside which the landlord did not own but which served the block and took a disrepair claim under Section 11 of The Landlord and Tenant Act 1985 ('LTA 1985')

The question to be considered by the judges was whether the paved area is part of the structure of the building or the exterior part of the building in which Mr Kumarasamy had an interest.

What was considered?

In the case the Court found itself considering Section 11 of the LTA 1985. This piece of legislation inserts a clause into any tenancy agreement specifying the repairing obligations of the landlord. This is usually replicated in most tenancy agreements for reasons of clarity but the basic obligation comes from Section 11. It has been a general assumption among landlords that Section 11 only applied to the parts of a property which were actually rented to the tenant and also only to the main property and not exterior areas such as gardens. The view was that until such time as a landlord has been notified of the need for repair, they would not be not liable.

It appears that this interpretation is not strictly correct!

The First Issue:

Section 11 states that it applies to the structure and exterior and also to any area which the landlord has an "estate or interest" in. Here the landlord must have held an easement (a right of way) over the path and indeed over parking areas and such other parts as served the

The Pitfalls of Right to Manage

FPRA Consultant Yashmin Mistry gives us a Right to Manage (RTM) Case Update

The Right to Manage (RTM) is a process available to long leaseholders of flats. The Commonhold and Leasehold Reform Act 2002 (CLRA 2002) created the new right to manage provisions.

Leaseholders can force the landlord to transfer its management functions to a special kind of company called a "RTM company". The benefits of the RTM are that leaseholders take over the management functions under their leases. However, not all buildings qualify for the right to manage and whilst the process seems fairly straightforward there are many pitfalls! The cases of *St Stephens Mansions RTM Co Ltd v (1) Fairhold NW Ltd (2) OM Property Management Ltd and (1) Fairhold NW Ltd (2) OM Property Management Ltd v St James Mansions RTM Co Ltd* demonstrate some of the pitfalls.

The cases:

These cases concerns a development of two adjoining residential blocks of flats, St James Mansions and St Stephens Mansions.

Each RTM company gave a separate Notice Inviting Participation. The landlords of both blocks served counter-notice objections to the RTM companies acquiring the right to manage. The RTM companies made applications to the Leasehold Valuation Tribunal (LVT) and the LVT found that the right to manage had been acquired for St James Mansions, but not for St Stephens Mansions.

In the case of St James Mansions, the LVT held a valid counter-notice, which had not been served, as there were errors made in it. In the case of St Stephens Mansions, the LVT found it was not a self- contained part of a building because the water supply to that building was not independent.

Appeals were made on both cases; in the case of St James Mansions the appeal was allowed. It was held that the errors made in the counter-notice were minor, and any reasonable person receiving the notice would have understood this.

In the case of St Stephens Mansions, it was held that the LVT had been correct to conclude the water supply was not independent.

property to allow him to access it. Therefore he did indeed have an interest in the property. That meant that he had an obligation to ensure that it was kept in repair.

The Second Issue:

The second issue was notice. The landlord argued that he had not been notified of the problem with the path. Section 11 says nothing about notice. Case law has implied a requirement of notice into S.11 for reasons of practicality where the disrepair is inside the parts of the property which are actually rented to the tenant.

The Court actually questioned whether such a requirement continued to be necessary but did not interfere with it. There is no case law which implies such a requirement of notice for areas not rented to the tenant and the Court was not prepared to create such an implied requirement. This is presumably on the basis that the landlord could access these areas without the tenant's consent anyway and so could ensure that they were kept in good repair.

HEALTH WARNING: What does this mean for landlords and agents?

Clearly the case has serious consequences. Any landlord can now be sued for disrepair to areas that serve his or her property irrespective of ownership. This may be a private drive serving a property over which the landlord has a right of access or common areas of a block of flats. This will mean that landlords will need to actively pursue and chase those they have easements from such as their superior landlords to ensure they keep items in repair in common areas. Agents who are doing property inspections should also widen their inspection to include areas over which the landlord has rights such as paths and driveways as well as the property itself. There is no obligation on the tenant to report disrepair so it is up to the landlord or his agent to identify it and act to get it resolved!

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ALL CHANGE: NEW AND UPDATED PUBLICATIONS

We are in the final stages of bringing out our new publications and redesign of the old ones. These are the publications that will be available shortly:

Insurance for Blocks of Flats, Residential Management Companies and Right to Manage Companies

Summary of Rights

Tenants' Collective Rights to Buy the Freehold

Transferring Essential Documents when Changing Agents

Variation of Leases

The Prevention of Mould, Damp and Condensation

PLUS NEW, REVAMPED FPRA WEBSITE!

Please have a look at the new-look site which is designed and run by Rebecca Kelly and John Ray. Do check it out and give us your views. If you need help, please contact the admin office. And please forgive us for any teething troubles!

www.fpra.org.uk

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