Fire safety post-Grenfell

Article

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Nicholas Roberts explores the practicalities of assigning responsibility for fire safety in multi-storey blocks

IN BRIEF

- Legislative reform on fire safety is likely to be introduced in response to the Grenfell Tower disaster.
- Technical legal difficulties arise when deciding who is responsible for what.
- Under the 'light touch' regulations introduced in 2005, risks are usually exposed by an independent risk assessment, which does not have the status of a statutory authority.

The tragedy at Grenfell Tower has focused attention on the fire risks involved with multi-storey blocks of flats, and it seems likely that stronger legislative measures will be introduced to address the fire safety issues. This may, therefore, be an appropriate time to consider some of the ways in which the current legal provisions relating to fire safety measures are either failing to address the problems of long leasehold flats, or make it difficult for those with the responsibility for managing flats to make recommended changes. The problems seem to originate from two main sources:

- Any survey of fire precautions will rightly look at the building as a whole, but the recommendations will necessarily relate partly to the common parts, and partly to individual flats, and it will not necessarily be clear who is responsible for taking any recommended action; it may be that responsibility for compliance falls partly on the ground landlord or management company, and partly on individual leaseholders; and
- Recommendations for improvements are most likely to arise out of a fire risk assessment commissioned from an independent company, whereas the terminology of covenants in older leases may still require compliance with such wording as 'the provisions of any statute statutory instrument rule order or regulation and of any order direction or requirement made or given by any authority or the appropriate minister or court'. More recent leases may well use more apposite terminology, but one observes a tendency for precedents to lag behind legislative changes in this area.

Who can carry out any works?

This article is based on several cases where I have been called on to advise. Typically a report has been commissioned from experts in the field, either by the managing agents, or by the directors of a self-managed block, as part of a fire risk assessment. The building has been inspected, both the common parts, and all the flats, or a representative selection. Various measures may be recommended to bring the block up to current safety levels. These may include:

- replacing the existing 'front' doors to individual flats with fire-resistant doors;
- installing closer mechanisms on fire doors; and
- installing a building-wide fire detection and alarm system.

Measures which would—at least from a legal perspective—be straightforward to install in, say, a block of rented social housing may present technical legal difficulties if they are to be installed in a block of long leasehold flats. The entrance doors to each flat will typically fall within the area demised to each leaseholder; the ground landlord (GL) (including here and throughout any residents' management company (RMC)) will not generally have power to replace them, and indeed it would technically amount to a trespass against the leaseholder to do so. Automatic closer mechanisms will amount to a similar intrusion into the demise. Many leases will reserve the right for the GL to run new power cables, etc through each flat, but whether this would extend to the sensors and any wiring required for an alarm system would depend on the wording of the lease.

One may, with some justification, ask who is likely to oppose the installation of such fire precautions. Perhaps surprisingly, the writer's experience is that some leaseholders do. Automatic door closers, in particular, can pose a problem to those who are growing forgetful. Some leaseholders express the fear that they will be disturbed unnecessarily when someone cooking in another flat sets off the fire alarm. Others simply object to any alterations which may cause mess and disturbance. GLs may find that they simply do not have the power to implement all the recommendations in the risk assessment. This may then put their fire insurance policy in jeopardy, as well as endangering the safety of residents.

Paying for the works

Even assuming that a lease gives power to the GL to make the necessary interventions within a part of the property that has been demised to an individual leaseholder, it may be unclear as to whether the necessary works fall within the scope of the relevant service charge provisions. None of the examples given above will generally count as 'repairs', and most leases make limited or no provision for improvements to be charged to the account. More modern leases may be somewhat more permissive in this regard,

particularly if the block is to be managed by the leaseholders themselves via an RMC, either under a tripartite lease, or because it owns the freehold. GLs are understandably reluctant to incur expenditure unless they are sure of being entitled to recover it from the leaseholders via the service charge.

The obligation to comply with, eg 'the provisions of any statute statutory instrument rule order or regulation and of any order direction or requirement made or given by any authority or the appropriate minister or court' is normally cast upon the lessee in a long residential lease, and less frequently is the GL required to comply with such provisions. However, even if the GL does not covenant with the leaseholders to comply, the service charge provisions may well enable the GL to pass the cost of such compliance on to the leaseholders. This may, however, not be sufficient, as:

- while such provisions would very probably cover a requirement that a GL improve the common parts (eg by installing push-bar mechanisms to open a fire door), it is less clear that such provisions would always cover proposed improvements to individual flats which fall within the demise; and
- while the lease provisions previously quoted may have been appropriate in the days when Acts of Parliament and Regulations made under them imposed unequivocal requirements, and local authorities required compliance with by-laws, under the 'light-touch' regime introduced by reforms such as the Regulatory Reform (Fire Safety) Order 2005, (SI 2005/1541), the fact that a building falls short of modern fire safety requirements will most often be revealed by a risk assessment carried out by an independent company commissioned by the GL (including, as previously stated, an RMC), as the person in control of the premises. It is difficult to see that the recommendations of such a report are the equivalent of statutory authority or even of a notice or direction from a competent authority.

Requiring individual leaseholders to comply with a risk assessment

For reasons similar to those set out in the previous paragraph, the recommendations of a risk assessment are unlikely to impose an obligation directly on individual leaseholders who have covenanted to comply with statutory, etc requirements.

Possible 'workarounds'?

In those cases where leaseholders are reluctant to allow works to be carried out within their flats, a couple of potential solutions have occurred to the writer.

Most flat leases give the GL/RMC the power to make 'house rules': regulations for the wellbeing and good order of the block. The scope of these seems to have been little tested in case law, though the consensus seems to be that these may supplement the lease, but not expressly contradict its provisions. Making a house rule requiring compliance with reasonable fire safety requirements might be effective, particularly if it were cast in terms of requiring the individual leaseholder to comply (eg by installing a door closer), rather than giving the GL or RMC a right of entry that they would not otherwise enjoy: that could be seen as conflicting with the express terms of the lease. One would hope that the First-tier Tribunal or County Court would have a degree of sympathy for the GL's objectives here.

As a long shot, therefore, provided the improvements to fire safety had the backing of the requisite majority of leaseholders, one might have to consider the variation of the leases under s 37 of the Landlord and Tenant Act 1987 (LTA 1987), though such applications are notoriously cumbersome, and therefore rare. A case could be made for making compliance with fire safety requirements a ground for the 'mandatory' variation of leases under s 35 of LTA 1987 (which could be achieved by statutory instrument under s 35(2)(g)).

Conclusions & recommendations

If, as seems likely, legislation is introduced in the wake of the Grenfell Tower disaster, it is important that the position of long leaseholders is considered. Parliament does not have a good record here: in several legislative areas, the position of long leaseholders has not been appropriately addressed, as it is often not appropriate either to give them the full range of legislative exemptions given to residential owner-occupiers of freehold houses, or to treat blocks of flats—particularly smaller blocks—as though they were out-and-out commercial enterprises. Specifically, it will have to be recognised that:

- the person in control of the block may not necessarily have the power to implement all recommendations or requirements;
- there may need to be some general provision—overriding the express terms of leases—that permits GLs and RMCs to recover the cost of fire safety works via the service charge; and
- if the 'light touch' approach is to be modified, and the pendulum swings back so that safety measures become the subject of directions and requirements made with statutory backing, it will have to be recognised either that GLs and RMCs will need greater powers to enter and do works within the demised premises than they may have been given under the express terms of the lease; or alternatively, any directions and requirements may need to be addressed to individual leaseholders as well as to the GL and/or RMC. NLJ

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