

Keeping Warm Communally

Governments of all political persuasions are keen to encourage home energy conservation as part of the campaign to drive down CO₂ emissions, but little attention has been paid to how difficult this may be for those who live in long leasehold flats. In many cases, however much they may wish to insulate their homes, the legal matrix which they inhabit makes it very difficult to improve the physical structure in which they live.

The typical scenario

The case considered here is that of the owner of the long leasehold flat which is of conventional construction, whether purpose-built or a “conversion”. It is assumed that the legal structure will be the usual “internal box” set-up (i.e. with the foundations, main structure, exterior and roof the responsibility of the ground landlord (“the landlord”), and the leaseholder responsible only for internal repairs and decorations). The priorities for most house owners who wished to insulate their homes would probably be:

- additional loft insulation
- double glazing (probably uPVC sealed units), and
- cavity wall insulation.

The problems facing the individual leaseholder

It seems not to be recognised by the Government, or indeed by commentators generally, how difficult it may be for either the typical leaseholder or the typical landlord to install all or any of these. The extent of the demise to each leaseholder will generally end at the inner surface of the exterior walls, so the cavity between the two skins of brickwork will not belong to him – instead it will form part of the “common parts” and belong to the landlord. The demise of the typical top floor flat usually ends at the ceiling, and so will not include the attic space above it. Although one does encounter leases where the exterior windows either expressly or by necessary implication belong to the leaseholders, more often the exterior windows will form part of the main structure, and so will belong to the landlord. So even if it were *practically* possible for an individual leaseholder to install or improve roof insulation or to install double glazed sealed units (an individual leaseholder will rarely be able effectively to install cavity wall insulation!), it will therefore not generally be *legally* possible for an individual leaseholder to carry out any of these three home energy conservation measures. Indeed, it would technically be an act of trespass against the landlord for a leaseholder to install insulation material in a wall cavity or attic space that did not belong to him, or to replace windows which formed part of the common parts.

The problems facing the ground landlord

If it is not possible for an individual leaseholder to carry out these energy conservation measures because they will impinge on the part of the property vested in the landlord, then one next needs to consider whether the landlord will be able to do so, and to pass the cost on to the individual leaseholders via the service charge. In most cases this would be a far more practicable way of insulating a block of leasehold flats than for leaseholders to attempt any measures themselves. In the case of replacement double glazing, it would also ensure that the external appearance of the block preserved a degree of uniformity. However, in many cases it will be out of the question for the landlord (or for any residents' management company ("RMC") that fulfils its functions) to undertake the works. It is well established that a landlord, or an RMC, is able to incur expenditure and pass it on to the service charge account only if there is clear authority under the lease for it to do so (e.g. (of many cases) *Lloyds Bank Ltd v Bowker Orford* [1992] 2 EGLR 44). In the majority of cases, probably the vast majority, the lease will make no reference to incurring expenditure on energy-saving measures: these will therefore count as "improvements" which go beyond what is authorised by the lease. (Replacement of single glazed metal window frames which were in need of repair with uPVC double glazed units was treated by the Lands Tribunal as a repair rather than an improvement in *Wandsworth LBC v Griffin* [2000] 2 EGLR 105, but the decision in *Mullaney v Maybourne Grange (Croydon) Mgmt Co Ltd* [1986] 1 EGLR 70 is to the contrary). So home insulation measures, however desirable, are likely to be possible only if the landlord – in whom the common parts are vested – is prepared to undertake them and if sufficient leaseholders are willing voluntarily to contribute to the cost in order to make them viable. If there is a separate RMC then that may have to be involved also, either to organise the contributions, or to consent, if the common parts are demised to it.

One does, of course, sometimes come across leases where the service charge provisions contain a "sweeping up" clause which allows the landlord or RMC to incur such expenditure as it sees fit for the benefit of the block, and to pass it on to the leaseholders via the service charge. In such cases it is more likely that the landlord or RMC will be entitled to put in train the home insulation measures, and to pass on the cost to the leaseholders, though purchasers of flats and those advising them remain understandably suspicious of such open-ended provisions, which can be seen as offering the landlord a "blank cheque" to effect improvements which the leaseholders may consider as unnecessary. Further, such clauses tend to be restrictively construed (e.g. *Lloyds Bank Ltd v Bowker Orford* (above)). Suspicions may be partially allayed if the power to incur

such expenditure is given to an RMC rather than to an “outside” landlord, as in that case it is at least likely that the improvements will be acceptable to a majority of the leaseholders. Even then, however, purchasers and their advisers may be suspicious that the majority who control the RMC may wish to effect substantial improvements to an apartment block which the minority do not want and possibly cannot afford.

The failure of leases generally to allow for improvements is inevitable so long as we tend to construe leases according to strict canons of interpretation; however, if this stands in the way of updating blocks of flats so that they comply with modern standards of energy efficiency, we should acknowledge that there is a problem, and that something needs to be done about it. Fortunately, there is a solution readily to hand, if the Government is prepared to make some secondary legislation.

The solution

Part IV of the Landlord and Tenant Act 1987 contains provisions allowing for long leases of flats to be varied. In 2003 this jurisdiction was transferred from the courts to the Leasehold Valuation Tribunals. S 37 allows for all the leases in a block to be varied - apparently in any respect - on the application of a substantial majority of the parties involved (75% of the parties concerned, provided not more than 10% of the parties object, the landlord counting as one of the parties). This section could therefore be used to allow a landlord to carry out insulation measures, and to charge the costs to the service charge, but getting 75% of the parties actively to back an application is an uphill task. The websites of LEASE and of the Residential Property Tribunal Service (of which the LVTs form part) suggest that s 37 is accordingly very little used.

A better alternative would be for it to be possible for a lease to be varied under s 35 of the Act. This section allows the LVT to vary a lease on the application of any leaseholder (or the landlord), in order to ensure that it complies with what may be described as certain “minimum standards” of acceptability which are set out in s 35(2). If it is necessary for all the leases in a block to be varied to give effect to this, all the leaseholders must be given notice, and if they wish they can become parties to the application. If they have been given notice, they will be bound by any variation that may be ordered. Thus it is possible to apply to the LVT for a lease to be varied so that it contains adequate provisions including as to:

- repair or maintenance
- the provision of reasonably necessary services

- insurance arrangements; and
- the computation of the service charge.

What is there to prevent the addition of a further paragraph to s 35(2) relating to “the provision of reasonable insulation measures to improve the energy efficiency of the flat and of the building of which it forms part”? It would not even require primary legislation, as s 35(2)(g) (added by s 162 of the Commonhold and Leasehold Reform Act 2002) allows the Secretary of State to add further paragraphs to s 35(2) by Regulation.

Some leaseholders may no doubt be concerned that they might be called on to pay for unnecessary insulation measures, but provided any new paragraph makes it clear that it covers only “reasonable” measures, then if a lease is varied, and any leaseholder subsequently objects to specific insulation proposals, their reasonableness could be determined by an LVT on a further application under s 19 and/or s 27A LTA 1985. This should afford sufficient safeguard to leaseholders who fear that they may become committed to unnecessary expenditure.

There is, of course, a further difficulty in ensuring that privately-owned leasehold flats are well insulated. The various Government grants for home insulation tend to be based on the status – age and/or disability and/or financial need – of the individual occupants, and are not therefore available to insulate whole buildings, where some but not all of the leaseholders are eligible for assistance. Any amelioration of this is likely to involve additional expenditure, which may not be a priority in the current economic climate. But it should at least be possible for leaseholders who are willing to pay for home insulation to be able to obtain it without finding that the terms of their leases stand in their way.

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