

# Future-proofing flats: overcoming legal barriers to energy improvements in private flats

## Workshop Report

---

### Summary & Contents

This report presents the outcomes of the workshop “Future-proofing flats: overcoming legal barriers to energy improvements in private flats” held in London on the 17<sup>th</sup> March 2015. The report consists of the following sections:

Section 1: An account of the context to the event, aims and attendees

Section 2: An overview of the energy efficiency condition of blocks of flats based on the presentation given by David Weatherall (Future Climate) at the start of the event

Section 3: An explanation for non-lawyers of the legally based barriers to energy improvements in private leasehold blocks. This section is taken from the briefing note written in advance of the workshop by Professor Susan Bright.

Section 4: First thoughts on solutions to the barriers – with text based on Prof Bright’s briefing note and on a presentation at the workshop from Mark Routley, Partner, TLT solicitors

Section 5: A summary of views and ideas presented by delegates in the breakout and plenary discussion sections of the event.

Section 6: Planned next steps from the workshop

Appendices: Information relating to the delivery of the event:

Appendix 1: Agenda for the event

Appendix 2: Stated views in evaluation forms as to priorities for next steps

## Section 1: Objectives and context

This event was planned between Westminster Council, Professor Susan Bright of New College, Oxford and Future Climate to focus on what has hitherto been an under-explored issue: the legal and consent barriers to the promotion of energy saving improvements in blocks of flats, with a particular focus on private sector blocks. Funding for the event was provided by the University of Oxford's Economic and Social Research Council (ESRC) Impact Acceleration Account (IAA) and Higher Education Funding Council for England (HEFCE) Higher Education Innovation Fund (HEIF) block grants, and Westminster City Council.

The objective of this seminar was to:

- Raise awareness and reach a common understanding of if and how freeholder/leaseholder arrangements pose a barrier to energy efficiency upgrades in England
- Identify stakeholders with relevant expertise and interest in identifying solutions to the legal and consents barriers
- Discuss some of the relevant regulatory and legal frameworks and identify how these could be adapted to increase the uptake of energy efficiency measures

Twenty-five delegates attended the event from the following sectors<sup>1</sup> - legal academics and property lawyers; surveyors; several judges from the First Tier Tribunal (Property Chamber) (which has jurisdiction in disputes between landlords and tenants of residential property); representatives of the energy efficiency industry (manufacturers and installers of energy saving measures); the government Department for Energy and Climate Change; local authorities; representatives of property owners – freeholders and leaseholders; academic specialists in energy efficiency.

### Thinking behind the event

As we explore in section 2 below (and while reliable data is hard to obtain) twenty per-cent of UK properties are flats, around half in the private sector. Nearly all flats will be leasehold: some are owner-occupied, some are rented out (there are also a number of 'absentee' leaseholders). In London, over 40% of properties are (probably) leasehold (approximately 90% in Westminster) and the size of the leasehold sector is expanding.

Our evidence in Section 2 below suggests that private blocks of flats have tended to miss out on retrofitted energy saving measures. We believe that is for three reasons:

- The technical challenges and sometimes higher costs of installing insulation, new windows, heating systems or renewable energy measures in multi-dwelling properties. Blocks of flats can pose distinct challenges particularly because the home energy efficiency industry in the UK is primarily directed towards improving houses (the majority dwelling type).
- The consents issues around reaching agreement between multiple parties who have an interest in the block – freeholder, leaseholders and potentially also management companies and private tenants.
- The legal issues which may not provide a framework within which the parties can reach agreement (or over-rule disagreement) in planning energy saving improvements.

---

<sup>1</sup> In feedback delegates identified as attending in the following categories (note, not exclusive categories): Lawyer x2; Building/energy efficiency Industry x5; Advisor x3; Academic x1; Housing x1; Policy organisation x3; Government (inc local government) x4; Trade Association x4; Judge x3; Leasehold Management x1

The view of the organisers of this seminar is that the technical issues around improving blocks of flats are significant but there is increasing knowledge, particularly from the social housing sector, about how these can be overcome. Meanwhile the issues around consents and legal barriers have never been explored in detail. The focus of this seminar was therefore to address the legal and consents issues<sup>2</sup> around energy improvements in blocks of flats.

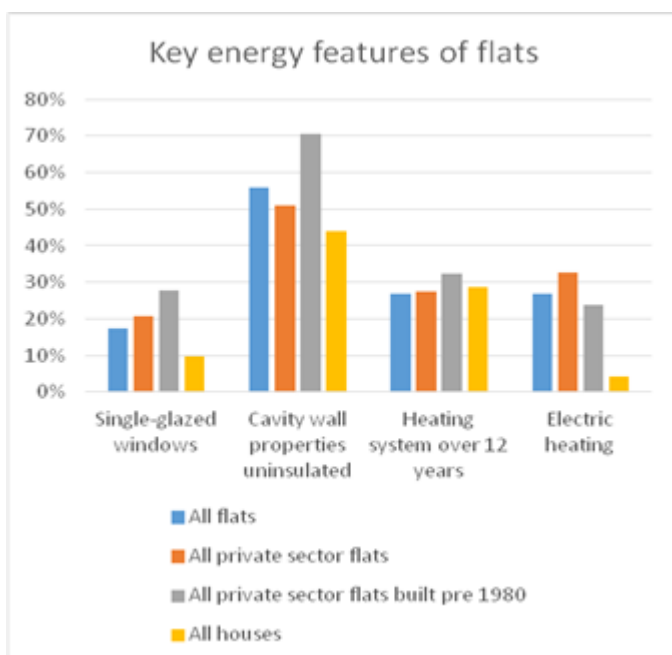
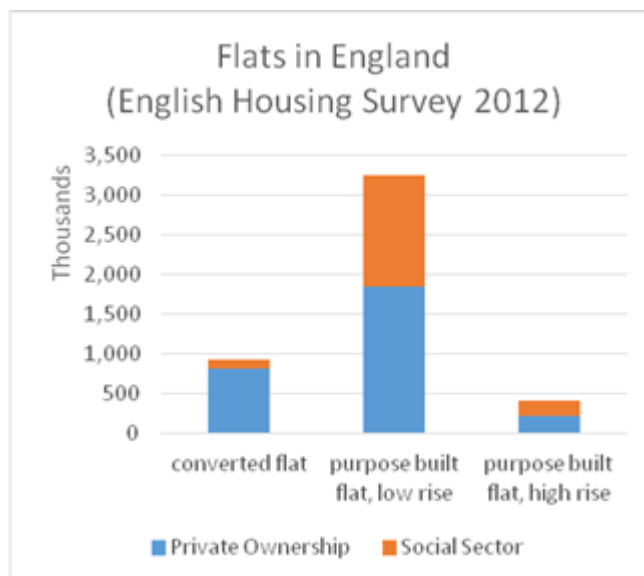
## Section 2: energy efficiency in blocks of flats

The workshop began with a presentation of energy efficiency in flats given by David Weatherall of Future Climate. This section summarises David’s analysis<sup>3</sup>.

According to the 2012/13 English Housing Survey, one in five (20%) English homes is a self-contained flat. The majority of flats are in private ownership and the most common type of flat is in a purpose built, low rise (3 storey or less) block.

Private sector flats generally have overall lower levels of energy efficiency than socially rented flats:

25% of private sector (owned or rented) flats rate “D” or below on an energy performance certificate compare to only 12% of socially rented flats. Older flats are also more likely to be energy inefficient.



Flats, particularly older private sector flats, are less likely than houses to have key energy efficiency measures installed - cavity wall insulation or double glazing. Older flats comprise 8% of housing stock, but one in five (19.4%) of the properties without double glazing; cavity walls are uninsulated in 71% of pre-1980 private sector flats, versus 42% of houses of the same age.

Flats are not significantly more likely to have old heating systems, but are much more likely to be heated by electric heating – generally a more expensive heating fuel than gas. 24% of pre-1980 flats are

electrically heated, compared to 4% of pre-1980 houses.

<sup>2</sup> We were aware of one recent unpublished DECC study into freehold/leasehold barriers to energy efficiency undertaken in 2013 by Mark Routley of TLT solicitors working with the Energy Saving Trust

<sup>3</sup> The analysis principally draws on 2010/11 English Housing Survey data; apart from – where indicated – the latest, not yet fully published, 2012/13 data is used.

**Private sector flats do therefore seem to be falling behind in terms of some of the key energy saving measures – particularly if we look at the pre-1980 built properties.** On average, purpose-built flats are more energy efficient than houses on the basis of the official SAP/Energy Performance Certificate ratings (SAP is based on the cost of heating and lighting a home compared to other properties of the same size<sup>4</sup>). As has been seen, this efficiency rating is not due to flats having more insulation or lower cost/more efficient heating. Instead, the higher SAP rating can be attributed to the inherent energy efficiency of most flats: flats - unlike houses – have at least one (warmed)

dwelling above or below them, and a mid-floor flat can have other dwellings above, below and to the sides.

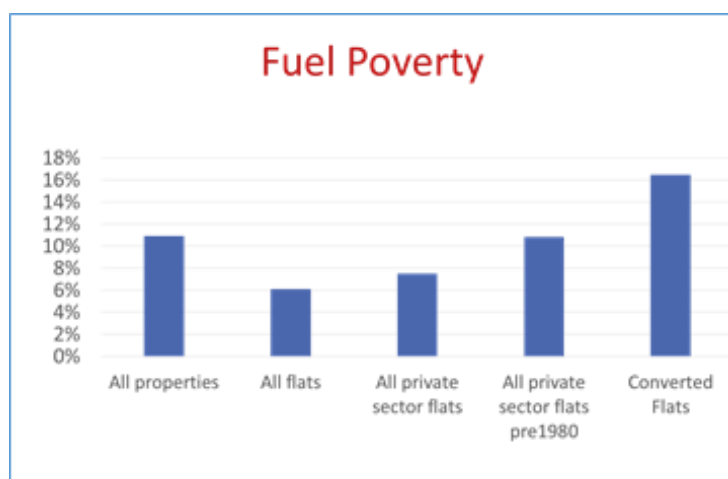
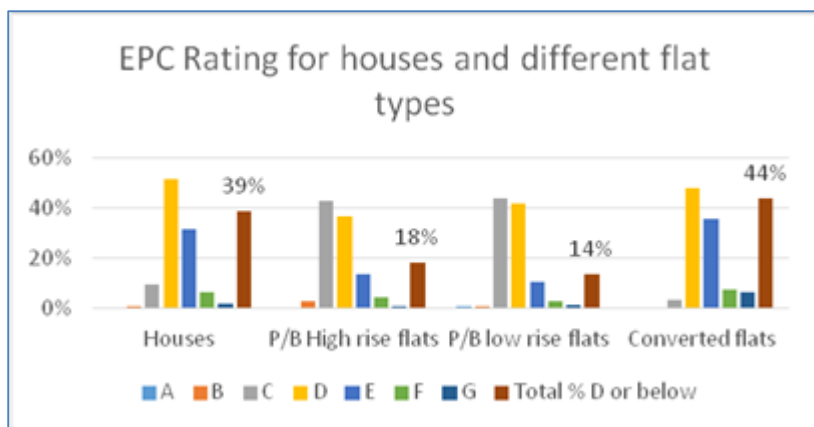
Older flats are much less energy efficient than average, and flats formed out of converted houses are the least energy efficient type of housing in the UK. Converted flats are typically older buildings and often have not been well cared for. They show far higher

damp, disrepair and “non-decency” than any other type of home<sup>5</sup>. Poor levels of energy efficiency therefore link to wider issues of poor maintenance and upkeep.

Linked to overall energy efficiency, levels of fuel poverty are generally lower in flats than in houses, though in older private sector flats and converted flats, levels are higher<sup>6</sup>.

**In conclusion, converted flats are the properties in the worst condition in our housing stock, being older buildings**

**generally in poorer states of repair. Because purpose-built flats are inherently energy efficient, overall energy efficiency ratings and levels of fuel poverty are not yet lower than in houses – though as we make progress on improving insulation and heating systems in houses it is likely that flats will increasingly fall behind. Private flats are generally in worse condition than social flats pointing to the additional difficulty of making upgrades in the private sector.**



<sup>4</sup> SAP ratings convert directly into EPC bandings, with A being the most efficient, highest SAP ratings and G the lowest.

<sup>5</sup> Just over 25% of converted flats have a serious (Category 1) health and safety hazard (EHS 2013)

<sup>6</sup> This is using the new official low income high cost (LIHC) fuel poverty definition. It should be noted that this may exclude some flat dwellers who would have been counted as fuel poor under the old “10% of income spent on fuel” definition. Flat dwellers may need to spend a low total amount on fuel because their property is small and they therefore fall outside the LIHC definition – they do not have a “High Cost”. However, if they are on very low incomes, the small amount they need spend on energy bills may still be a very high proportion (greater than 10%) of their income.

## Section 3: Understanding the legally based barriers to energy improvements in private leasehold blocks

Following the presentation on energy efficiency levels in private sector blocks of flats, Professor Susan Bright presented an explanation of why and how freehold/leasehold arrangements can represent a barrier for energy efficiency upgrades. This was based on the briefing note that she had circulated to delegates in advance of the workshop.

This section reproduces the main sections of the briefing note. It is written as a non-technical introduction for a general audience.

### Leasehold: how it works

#### Freeholder/Landlord:

The freeholder retains the freehold ownership of the entire block and grants long leases to leaseholders (commonly 99, 125 or 999 years).

The freeholder covenants (inter alia) that the leaseholder has 'quiet enjoyment' of premises.

#### Leaseholders:

Leaseholders have a long lease of flat. This creates an 'estate in the land' (a property right) and must be registered at HM Land Registry.

There is no such thing as a 'standard lease'. Leases are typically very long documents: complex, often badly drafted, not in plain English, highly individualised and there is no standard wording. Even within the same block, the wording of leases may vary.

The leaseholder has management/responsibility for maintenance of the interior of the flat (but the precise definition of the 'flat' depends on the particular wording of the lease).

Leaseholders are usually prohibited from making structural alterations although certain internal non-structural alterations may be made with the landlord's consent (but consent must not be unreasonably withheld, s 19(2) Landlord and Tenant Act 1927, and the landlord can recover legal fees for giving consent).

#### Block Management:

Responsibility for managing the block will normally be EITHER by the (independent) freeholder/landlord OR by a leaseholder run management company. Management and maintenance duties may be done by the freeholder/landlord or leaseholder or passed on to a managing agent. It is estimated that 60% of blocks are managed by a professional managing agent, and 40% are self managed by lessees in resident management companies.<sup>7</sup>

The block manager typically is responsible for managing and maintaining: the structure (including walls), common parts (entrances, stairs, lifts), roof, joists, service conduits, foundations and amenity land.

Responsibility for windows will depend on the leasehold wording: it may be that the window frames belong to the freeholder/landlord, and the glass to the leaseholder, or that the leaseholder has both (or many variations on this).

---

<sup>7</sup> London Assembly, Highly charged, Residential leasehold service charges in London, March 2012, para 6.2.

## Rented flats

Within a leasehold block there may also be rented flats (shorter tenancies): either rented direct from the freeholder or sub-let from a leaseholder.

A typical short let will not permit the tenant to make any alterations to the property; makes the tenant responsible for utility bills; does not permit the freeholder/landlord to make any alterations to the property (but the freeholder/landlord is responsible by statute for the repair of the structure and exterior, and utility installations etc<sup>8</sup>).

## Mortgages

Many leases will also be mortgaged. The mortgagee will have various rights. Some mortgage documents require lender consent before any alteration can be made to the property, but in practice borrowers appear unaware of this. There will also be a prohibition on varying the wording of leases without lender consent.

## Repair and service charges

Typically, the freeholder/landlord has responsibility to "repair" the structure of the block building. The freeholder/landlord is able to recover the cost of these repairs through the service charge but can only recover those costs that are specifically referred to by the wording of the service charge clause in the lease.

There are strict rules about how leases are 'interpreted' (what the wording means). The repair clause usually does not allow for "improvements" to be made unless the improvement is necessary in order to conduct the repair (for example, if the windows need replacing because they are rotten, then building regulations require replacement of single glazing with double glazed units).<sup>9</sup>

This means that the freeholder/landlord cannot make improvements unless they are permitted by the wording of the lease repairing obligation.

There is a duty to consult all leaseholders before expenditure on items that will cost more than £250 from any one leaseholder (even if this is for an essential repair). This is known as a section 20 consultation and can be time consuming and cumbersome.

If the lease does not permit improvements and/or recovery of the cost it may be possible to vary the lease. Variation can happen EITHER:

- a) by agreement (but this would need to be the agreement of *all* leaseholders, freeholder/landlord and all mortgagees);
- b) pursuant to a statutory right to vary *individual leases* (s 35 Landlord and Tenant Act 1987, s 35). This application can be made by any party to the lease if the lease fails to make satisfactory provision with respect to specified matters. Application cannot be made simply to enable energy improvements to be made. Further, if the variation would affect others then a request may be made by any other party to the lease for all affected leases to be varied (s 36). Application is made to the First Tier Tribunal (Property Chamber).
- c) pursuant to a statutory right to variation of all leases (Landlord And Tenant Act 1987 s 37<sup>10</sup>); provided all, or all but one of the parties (including the landlord) consent (but if it concerns

---

<sup>8</sup> Although this is more complicated when the landlord is a leaseholder subletting a flat that is a part of the a larger building: see *Niazi v Van der Loo* [2004] EWCA Civ 5; *Edwards v Kumarasamy* [2015] EWCA Civ 20

<sup>9</sup> NB: although the law is very different, Climate Change (Scotland) Act 2009 s 69 amends the definition of maintenance for tenements to allow the installation of insulation.

<sup>10</sup> NB: this does not apply to commercial leases and so will not help with mixed use blocks.

more than 8 leases - 75% of parties consent and no more than 10% object). Application is made to the First Tier Tribunal (Property Chamber).

### Energy efficiency improvements (the EE wish-list)

Typical desired energy improvements include: double glazing, insulation (walls – cavity, solid; loft space), better heating system. Below these are referred to the EE wish-list. These improvements will often require (at least some) work to be done to the ‘common parts’, the parts of the building that the freeholder/landlord owns. Studies show that there are particular/common "hard to treat" problems with flats: dwellings with solid walls or hard-to-insulate cavity walls, dwellings off the gas network, properties without an effective gas distribution network to individual flats, dwellings with no loft, and high-rise flats where access and installation becomes difficult.

### Key legal and practical barriers to the EE wish-list

#### Contractual barriers: neither the leaseholder nor the freeholder/landlord has any right to make improvements

Typically, the following belong to the freeholder/landlord and not to the leaseholder: the wall cavity (usually only the interior belongs to the leaseholder); loft/attic space; external windows. Because the repair clause typically does not permit improvements the freeholder/landlord will not normally have any right to carry out the EE wish-list.

Further, even if improvement work is permitted it *may* breach the covenant of quiet enjoyment if there is physical interference or substantial interference with comfort.

The leaseholder will not normally have any ability/right to conduct any of the EE wish-list unless it involves work wholly within the leaseholder’s flat and is non-structural. Any action by the leaseholder in relation to the freeholder/landlord’s property will be trespass and breach of covenant. Internal wall insulation: *may* be possible by leaseholder.

#### Conservation area barriers: Planning constraints

A study by Westminster City Council reporting in 2010 reconfirmed that due to planning constraints there would be the following difficulties with upgrades in conservation areas: replacement windows, and solar panels not permissible if visible from the street; external insulation not acceptable; dry lining not possible in listed properties.

#### Conflicting Incentives: utility costs and comfort

Utility bills for individual flats are usually paid for by individual leaseholders (or their tenants) (sometimes there is common provision, eg of heating, and bills are split but this may not be according to individual usage).

Bills for the common parts are usually shared between leaseholders (the freeholder/landlord recovers the incurred costs through the service charge mechanism in the lease).

If block management is by an independent freeholder/landlord, there is no financial or comfort incentive for the freeholder/landlord to carry out the EE wish-list unless the upgrade improves the value of the freehold reversion (this is unlikely to have significant value for the freeholder/landlord).

If block management is by a tenant owned management company then leaseholders *may* have both a financial and comfort based incentive to carry out the EE wish-list. In practice, however, there will remain other issues: absentee leaseholders, leaseholders who rent out the flat to tenants, and leaseholders intending to sell.



## Consent barriers

The Energy Act 2011 s 46 enables regulations to be passed to prevent a landlord of certain rented properties from unreasonably refusing a request from the tenant to be able to make energy efficiency improvements.

The Government has indicated that this obligation should be seen as extending to the superior landlord.<sup>11</sup>

Although this alleviates the ‘consent barrier’ it does not address the other barriers identified in this paper.

## Consensus barriers

Neither freeholder/landlord nor leaseholder will usually have the *right to upgrade*.

If there is *all party consensus* it may be possible to implement the EE wish-list notwithstanding the terms of the leases, but in order to do this there should be formalised consent.<sup>12</sup> This will involve costs (instructing lawyers); potentially requiring the consent of mortgagees. If leases are varied there will also be Land Registry costs.

As mentioned above, it might be possible to vary leases to allow the works to be carried out and costs recovered via the service charge (using s 37 LTA 1987).<sup>13</sup> It will not usually be possible to vary *some* only of the leases in a block.

## The ‘Hassle’ factor

‘One size does not fit all’.

The complexities of doing anything make action very unlikely:

- i) some flats are ‘hard to treat’ (a technical challenge, and no ‘affordable’ retrofit options) and some are hard to treat because works need to be done to both the leaseholder’s flat and the freeholder/landlord’s property;
- ii) there may be block ‘title complexity’: within blocks, there may be a mix of leasehold and renting; leases may have different wording; leases are often badly drafted; there may be a mix of residential and commercial property.
- iii) contacting parties: it may be difficult to identify and obtain contact information for: freeholders, leaseholders, renters, managing agents, and mortgagees.
- iv) achieving consensus will be difficult: even assuming all parties can be contacted, they will have differing goals in relation to budgets, acceptable payback periods, commitment to environmental goals, acceptance of inevitable disruption.
- v) costs: it may be necessary for individual leaseholders to instruct lawyers, agents, and for mortgagees, plus there may be Land Registry costs.

---

<sup>11</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/346767/Domestic\\_PRS\\_Regulations\\_Consultation\\_Draft\\_v1\\_6\\_No\\_tracks\\_final\\_version.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/346767/Domestic_PRS_Regulations_Consultation_Draft_v1_6_No_tracks_final_version.pdf)

<sup>12</sup> Is it necessary to *vary* (formally) all leases? In practice, however, it is likely that work is done ‘unofficially’ by agreement without mortgagees knowing anything about it, and the costs are shared.

<sup>13</sup> In practice, there are not many applications made to vary leases. There are fees for these applications, currently £190 for 5 or fewer dwellings, rising to £440 if more than 10 dwellings. In addition, there could be significant legal fees.



## Section 4: Future-Proofing Flats? First thinking on solutions to the freehold/leasehold barrier

This section provides first thinking on solutions to tackling the legal barriers to energy efficiency in private sector blocks of flats. It is based on the briefing note circulated by Professor Bright and on a presentation given by Mark Routley, Partner, TLT solicitors at the workshop.

### An overview of possible solutions – text from Professor Bright’s briefing note

The nature of the current problem is so complex that it has been ignored. Policy initiatives pay little attention to the complexities of legal titles, approaches tending to draw simple distinctions between ‘owner-occupation’ and ‘renting’.

New leases continue to be granted for (very) long terms without taking account of environmental and sustainability issues.

### Possible ways forward

- i) Introduce primary legislation for retrospective insertion of EE clauses into existing leases
- ii) Introduce primary legislation for compulsory insertion of EE clauses into future leases
- iii) Provide for standardisation of leases<sup>14</sup>
- iv) Promote guidance on cost-benefit of EE measures specifically addressing issues in leasehold flats
- v) Provide central government funded support (eg legal and practical advice; advice on dealing with mortgage providers) to block owners and tenants who do want to proceed with works but may be put off by the legal barriers.
- vi) Review the consent barriers and reduce the situations in which consent to reasonable requests can be turned down
- vii) Amend secondary legislation to allow individual leaseholders to apply for lease variation to enable reasonable EE measures to be carried out;<sup>15</sup>
- viii) Improve data about property ownership to enable distinctions to be made between leaseholder, freehold and rental property (which may also require changes to the ‘searchability’ of the Land Registry);
- ix) Conduct a detailed review of leasehold and mortgage law (and contracts) with regard to EE (long leasehold, tenancy, and their interaction; and interaction with mortgage terms);
- x) Consider the human rights implications of overriding lease terms.

### Analysis of some options (Mark Routley, TLT solicitors)

This section is based on the presentation given at the workshop by Mark Routley.

### Standard lease terms

One way of enabling action on energy efficiency is to introduce standard leases which contain clauses which:

- Enable the landlord/freehold owner to carry out EE measures and recover the costs and/or
- Impose duties on the landlord/freehold owner to consider undertaking EE measures and/or

---

<sup>14</sup> The legal profession is generally resistant to ideas of adopting model leases, generally preferring to use more familiar precedents. Compare the advantage of ‘commonhold’: although commonhold has failed, one of its heralded advantages was standardising maintenance provisions.

<sup>15</sup> This suggestion was made by N Roberts, in *Keeping warm communally* 160 NLJ 987. This would require an amendment to s 35 of the Landlord and Tenant Act 1987. It would avoid the difficulties with reaching consensus (or a 75% majority) but in practice, it would be likely to have limited impact due the ‘hassle’ factor (one individual would have to apply to the Tribunal, give notice to all leaseholders etc).

- Permit the tenant/lessee to undertake EE measures with landlord's consent and/or
- Impose a statutory duty on the landlord/freehold owner to give consent unless it is reasonable not to do so (reverse burden of proof).
- Impose a statutory duty to consider whether EE measures could be undertaken to the property. This duty could be discharged by the obtaining of independent advice (see below) periodically (not necessarily annually). It could also be linked to the ability to recover ground rent/service charges so that the person under the duty would not be able to recover these sums unless it could prove it had discharged the duty. The burden of proof would be on the landlord/freehold owner to prove this. The landlord/freehold owner would not be obliged to carry out the EE measures but it is likely to be the best person to start the process.

How might leases be revised in this way?

- Through primary legislation - similar provisions which imply terms into lease and impose statutory duties can be found in the Landlord and Tenant Acts 1927 and 1988 controlling improvements, assignment and underletting.
- Or through secondary legislation, e.g. under Sections 35 – 38 of the LTA 87 in the context of variations (see above and footnote 18).
- Or voluntarily – by consent and by use of codes of practice.

New legislation could be confined to new leases/buildings. This has the benefit of “no surprises” – freeholders and leaseholders know what they are getting into, but it does not address the biggest problem here – which is low levels of energy efficiency in the pre-existing, ageing housing stock.

### Human Rights Act 1998 and Article 1 of the First Protocol

Before considering options for legal and regulatory changes in this area it is important to consider the protections afforded under Article 1 of the First Protocol of the Human Rights Act. This provides for no interference with possessions and deprivation of property except in the public interest. Property includes leases and interests in land. However, the state may control the use of property by law where it is in the general interest.

In considering how these protections might relate to changes of rules or practice around energy improvements in leased properties, it is important to bear in mind:

- That the rights are relative not absolute
- That a fair balance must be struck
- The need for proportionality
- Control over property is more readily justifiable than deprivation
- So too where compensation is payable
- Control by a court or tribunal is usually required

Would legislation that could result in requiring some form of action on energy efficiency in existing buildings contravene these protections? Relevant considerations may be:

- Wholesale replacement with standardised leases may be difficult to justify as proportionate.
- However, more limited "surgical intervention" may well be justifiable.
- A number of these concepts are not new.
- On social policy the ECHR affords national legislatures a wide "margin of appreciation."

- The Court/tribunal will have a significant role. Data shows applications to the LVT/First Tier Tribunal for lease variations are low. Would this change? And what are the implications in terms of complexity and cost. Would the government put the necessary resource into the court/tribunal service

### Voluntary options

Voluntary options may also represent a way forward and are clearly preferable when viable. These options might include

- Use of "model" leases wherever possible [eg in new build or lease re-negotiations]. These could be promoted by Council of Mortgage Lenders and Building Societies Association
- Voluntary codes of practice
- Promoting awareness of benefits of energy efficiency measures
- Improving access to information
- Use of alternative dispute resolution procedures - arbitration/mediation

## Section 5: Summary of views expressed/identified by delegates at the event

We took notes of views in the breakout sessions and in the plenary sessions of the event. We also asked delegates to record their view of the most important ideas which they were keen to take forward on the event feedback forms (see Appendix 2). These issues have been divided broadly as follows:

- Overarching barriers and challenges for action in tackling the legal/consents issues
- Ideas for raising interest and enthusiasm among owners and occupiers of flats
- Overcoming consents barriers within existing legal/regulatory framework
- Adjusting current regulatory framework
- Ideas for wider demand drivers to stimulate action on energy efficiency in flats

### Barriers and challenges for tackling the legal/consents issues

We found many barriers to action on energy efficiency in private blocks of flats.

One issue that affects the overall promotion of action in this area is **the lack of data on private sector blocks of flats** – how many there are and their condition. The English Housing Survey analyses dwellings so provides a picture of the condition of flats but not of the overall building. There is no overall count of the number of leasehold/freehold properties. Similarly Energy Performance Certificates for dwellings do not provide information about the characteristics of flats in terms of the type of building that they sit within.

Some delegates highlighted how **little financial interest freeholders have in the property** and this poses a challenge for any initiative to raise their interest and enthusiasm in this area: is the ground landlord the best place to start given how little financial stake they have in the property?

A key challenge is the **variety of different types of tenure** that can exist within blocks. This is a problem that is likely to grow with the plan to allow right to buy from housing associations. Blocks with sublets, mixed tenure, and private rentals (short tenancies) are a real issue. How do we make it

easier for people to come together? You will never get 100% agreement in a democratic process. 75% agreement is needed to vary a lease (see Footnote 36 above) by majority 'vote'.

The Issue of **poorly worded leases** is a major challenge.

Broadly, **private sector housing is an under-regulated sector**. For example, it was identified that Managing agents are operating outside of voluntary code. Further, the new Conservative government are unlikely to be keen on new regulations.

### Interest and enthusiasm

Several delegates highlighted that – prior to thinking about legal issues - the question is how we can get both freeholders and leaseholders **interested in undertaking energy efficiency improvements**. The biggest obstacle is inertia – money is not always the problem, the hassle factor is massive. Generally, where all parties are in favour of improvements there is much of less of barrier (but in some cases legal issues can still pose a barrier even when 100% of parties want to carry out improvements).

It is clear that **many buildings have been improved even where they all the legal and consents barriers haven't been – in strict terms – overcome**. For example many home upgrades are made without permission of the mortgage company which may be required. And an active group of self-managing leaseholders may agree to proceed with improvements works even without the full formal consent of the more disengaged leaseholders in their block. This non-legally authorised action is risky though: the statutory context makes it possible for leaseholders to challenge expenditure incurred.

It was highlighted that we can **encourage flat owners to concentrate on works inside the dwelling** - change boilers and windows<sup>16</sup> – do the 'easy' bits first. It was suggested that internal works are practically possible under any lease- we need to focus our efforts on motivating action within the dwelling alongside other refurbishment (eg kitchen refits). However, some other delegates questioned whether this will lead to sufficient large scale action on blocks as a whole. Further, even window replacement may not count as internal works under many leases.

### Information on costs and benefits

It was agreed that the first step is to enable freeholders and leaseholders to have **easy access to information** about how much different measures cost and what benefits they may bring for the building owners and occupiers [this could link to the idea of encouraging or making mandatory energy saving building surveys for freeholders – see below]

This information needs to be ready at the right trigger point (see below) and it needs to focus in detail on the business case and the cost scenario. This needs to be specific to the property and even individual flats (a top floor flat has a better payback and so forth). Leaseholders should be – and in some of our delegates' experience - are generally prepared to pay when they can see the benefits.

Similarly, a reasonable service charge to cover the cost of EE works is agreeable when it is well explained. We discussed an example from one delegate of an insulation company that came up with

---

<sup>16</sup> Though NB both these measures can require the consent of the building owner

a proposal for an upgrade which was communicated to right-to-manage leaseholders through block AGM – including via presentation to the leaseholders from the installer.

There are **trigger points** at which freeholders and leaseholders may be more responsive to the message about energy saving upgrades. The most obvious of these is **the point of sale or rental** of individual flats or buildings. These trigger points are important because they might not only be an opportunity to take the message about energy savings but also (where it is a lease that changes hands) to make revisions to leases.

Delegates also mentioned regulatory trigger points such as the introduction of new metering and billing arrangements as a result of the **Metering and Billing Directive** which will affect blocks with communal heating arrangements. Government is communicating with stakeholders about these new requirements, and in turn block owners and managers will be communicating with leaseholders and tenants.

A further example of a trigger point where building owners and occupiers can be informed of their opportunities for energy upgrades is when there is **bulk conveyancing of leasehold properties**. The **role of conveyancing solicitors** is important here. However, there may be knowledge and skills gaps among solicitors – do they know enough to communicate to freeholders and leaseholders the opportunities to make revisions to leases and to suggest that energy efficiency upgrades are made as new owners and leaseholders take possession?

### Delivering within existing legal/regulatory framework

Delegates pointed to several routes within the existing regulatory framework in which we could seek to address the legal and consents barriers.

Looking forward, **leases should be future proofed** by requiring all new leases to include provisions for energy efficiency upgrades'

It was identified that **self-managed blocks or when leaseholders collectively own freehold will be easier to tackle**. **Leasehold management companies** have articles of association that can be revised to make action easier: this is easier than revising leases themselves.

Tenants (leaseholders) in a block have the right to join with other tenants in a **recognised tenants association (RTA)** which must be formally recognised by the landlord. This RTA has the right to appoint its own surveyor and to be consulted about works. RTAs can therefore provide a route for engagement on energy efficiency upgrades.

The obligation to consult with leaseholders over improvements that are allowed under leases - under **Section 20 of the Landlord and Tenant Act 1985** - provides an existing mechanism that operates well, when leases allow it; we need greater awareness on how to use these powers effectively.

### Adjusting current regulatory framework

Alongside the ideas presented by Mark Routley (see section 4) and other ideas, delegates particularly discussed:

- Requiring, at **the point that leaseholders begin to exercise their right to manage, the inclusion in the clause a new clause in favour of energy efficiency upgrades;**

- Nick Roberts' idea of **amending secondary legislation to allow individual leaseholders to apply for lease variation** to enable reasonable EE measures to be carried out (it was noted that currently tribunals are seeing very few cases for revisions to leases coming through).
- Several delegates were particularly interested in **the idea of requiring freehold landlords to undertake an energy efficiency survey**. It was noted that this would parallel the introduction of the Energy Saving Obligation Scheme which will require larger businesses to carry out energy surveys. It was also pointed out that installation companies will do free surveys in properties that are likely to be suitable for particular measures. Question – would obligation fall to leasehold management company where there is one? [An alternative view was that imposing this obligation on the freeholder is problematic as they don't have enough interest in the property]

The issue was raised that to achieve these changes, amendments to secondary or primary legislation are required. If primary legislation is required or is the preferred option what other issues should we look at / push for simultaneously? It won't be just regulations around EE work that are outdated so potentially the issue around energy efficiency upgrades should be linked to a "bigger picture" issue.

### Wider demand drivers for energy efficiency in private blocks of flats

Many delegates argued that there are not sufficient **demand drivers** to get things going and this goes much wider than the legal and consents issues. Some delegates argued that addressing these wider demand drivers was a higher priority than focusing on the consents and legal issues.

Ideas for additional demand drivers were:

- Additional grants and subsidies
- Consequential improvements (ie legal requirements to make energy efficiency improvements when doing other works)
- Stamp duty based incentives/penalties linked to the energy efficiency rating of homes - eg every SAP point below x = £50 charge per point.

It was identified that these additional demand drivers needed to be introduced within a structured long term framework/programme. Delegates argued that there was a need for government to set a target for energy efficiency standards with a reasonable timeframe and funding to reach the goal. Others argued for minimum standards for buildings.

Building owners need to trust the measures. We need more monitoring/lessons learnt - 10 year investment plan alongside monitoring of real performance and there could be a role for kitemarking in quality assuring improvement measures.

### Issues and questions

- Some measures continue to be expensive: for example there is great potential for district heating in London/lots of waste heat. However, it is difficult to recharge DH to leaseholder when the charge is high and the pay back is over a long period of time. Similarly some types of blocks of flats are expensive to insulate (Wimpey homes low rise flats were cited as an example) costs of upgrade can be high.

- There are supply side barriers and skills issues - contractors are not keen on delivering whole house “packages” and want to bid for delivery of single and/or specific measures.
- What about properties left empty?

## Section 6: Next steps

In this section we summarise the key ideas and discussion points for tackling the legal/consents barriers that we have presented in sections 4 and 5 above. We propose what follow up work could be taken forward to develop or address these ideas and issues.

In section 6.2 the event organisers lay out their own proposals for moving this agenda forward based on the ideas identified.

### Section 6.1 A set of priorities for policy makers and wider stakeholders

In summary, the table below proposes the following recommended actions to take this agenda forward:

1. A review of the data available about the condition and leases in private blocks England and Wales and discussion with government to identify what new data might become available
2. A qualitative research study to understand freeholders, leaseholders and tenants and other parties with a title to flat blocks – what are their attitudes to energy efficiency upgrades and what might motivate them to take action (trigger points).
3. A review of the leases across several private blocks of flats. What is allowed under the leases and what would be the possibilities and barriers to action on energy efficiency? How can we improve and standardise leases when opportunities for their revision come up?
4. This could lead into detailed review of leasehold and mortgage law (and contracts) with regard to EE (long leasehold, tenancy, and their interaction; and interaction with mortgage terms) including considering the human rights implications of overriding lease terms;
5. Work with (representatives of) leasehold management companies and recognised tenants organisations to identify how they can help their members make energy efficiency upgrades
6. Develop best practice examples of freeholders who have made lease revisions and used Section 20 powers to be able to make energy efficiency upgrades; promote these through trade associations
7. A detailed review with legal experts and stakeholders to fully assess the likely impact of proposals for amending primary and secondary legislation to make action on energy efficiency easier for owners and occupiers of private flat blocks
8. We recommend that organisations putting forward policy ideas to build demand for energy efficiency more generally to better include private flats in their analyses

BARRIERS, OPPORTUNITIES AND IDEAS IDENTIFIED IN THIS PROJECT (see section 4 & 5 for detailed discussion)	RECOMMENDATION FOR FURTHER ANALYSIS OR ACTION
ADDRESSING BARRIERS TO ACTION	



<b>The lack of data on private sector blocks of flats</b>	A review of what data about private blocks of flats is required to understand the full state of the energy efficiency challenge.
<b>The limited financial interest freeholders have in the property which makes them uninterested in energy efficiency</b>	Evidence is very limited here. To understand this problem we need better understanding of freeholders and their attitudes to upgrading their property – this could form part of a wider qualitative research study into attitudes to EE of freeholders/leaseholders and tenants living in private blocks of flats
<b>The challenge of multiple different types of tenure in different buildings</b>	No specific action
<b>The issue of wide variation in leases and poorly worded leases</b>	<p>We need to understand what typical provisions leases do contain – a review of a series of leases from different ages and types of building would allow much greater insight into what is – and what is not – typically possible on different blocks of flats.</p> <p>This project would also explore and propose ideas for introducing standard terms for new leases</p>
<b>PROMOTING ACTION WITHIN THE CURRENT REGULATORY FRAMEWORK</b>	
<b>Raising interest in energy efficiency and the right information, including understanding the key trigger points for reaching parties with the right message.</b>	A wider qualitative research study into attitudes to EE of freeholders/leaseholders and tenants living in private blocks of flats would allow a better understanding of how they can be motivated to take action.
<b>Role and understanding of conveyancing solicitors in guiding parties to address energy efficiency at sale and rental, including promoting lease revisions to allow EE upgrades at time of lease renewal.</b>	Dialogue with representatives of legal industry. Dialogue and promotion of concept through landlord and freeholder representative bodies.
<b>Encourage leaseholder management companies to address EE including by revising articles of association and developing systems to promote to their members</b>	Review with representatives of this sector and create a plan of action
<b>Encourage recognised tenants associations (RTA) to address EE</b>	Review with representatives of this sector and create a plan of action
<b>Promote best practice in using powers under Section 20 of the Landlord and Tenant Act 1985</b>	Develop case studies and promote to landlords through trade associations

to allow works to go ahead	
<b>IDEAS FOR CHANGES TO SECONDARY AND PRIMARY LEGISLATION</b>	
<p><b>Amending primary or secondary legislation - to imply terms into leases to allow or require:</b></p> <ul style="list-style-type: none"> <li>• Enable the landlord/freehold owner to carry out EE measures and recover the costs and/or</li> <li>• Impose duties on the landlord/freehold owner to consider undertaking EE measures* and/or</li> <li>• Permit the tenant/lessee to undertake EE measures with landlord's consent and/or</li> <li>• Impose a statutory duty on the landlord/freehold owner to give consent</li> </ul> <p>Impose a statutory duty to consider whether EE measures could be undertaken to the property</p> <p><b>Requiring, at the point that leaseholders begin to exercise their right to manage, the inclusion clauses such as the above in favour of energy efficiency upgrades;</b></p> <p><b>Amending secondary legislation to allow individual leaseholders to apply for lease variation</b> to enable reasonable EE measures to be carried out (it was noted that currently tribunals are seeing very few cases for revisions to leases coming through).</p> <p><b>*Note that this idea of requiring freehold landlords to undertake an energy efficiency survey attracted considerable interest among delegates.</b></p>	<p>It is proposed that each of these ideas is explored in more detail with relevant stakeholders and legal experts to address:</p> <ul style="list-style-type: none"> <li>• How could the legislation work in practice</li> <li>• What might be any unintended consequences</li> <li>• What estimate could we make of the scale of the impact of the change</li> </ul> <p>and a more detailed paper prepared on their viability for submission to government</p>
<b>IDEAS FOR WIDER DEMAND DRIVERS FOR ENERGY EFFICIENCY</b>	
<p>Ideas for additional demand drivers:</p> <ul style="list-style-type: none"> <li>• Additional grants and subsidies</li> <li>• Consequential improvements</li> <li>• Stamp duty based incentives/penalties</li> </ul>	<p>A number of groups (e.g. UK Green Building Council) do on-going work on this area. These groups should be encouraged to focus on the issues for flats in particular.</p>

## Section 6.2 Immediate next steps by organisers of this seminar

Following the workshop the organisers have reviewed the views and expressed interest for future action on the part of delegates. The planned next steps on this basis are:

1. A study assessing - particularly in health terms – the impacts of poor energy efficiency in flats which will justify a focus on this area.
2. A technical working group – probably to be co-ordinated by Westminster Council – which will look at best practice in delivering improvements in flats in the current regulatory/technical framework – this will begin work on tasks 4 & 5 identified in section 6.1 above
3. A legal working group to focus on changes that could be made to primary or secondary regulations – this will begin work on task 6 identified in section 6.1
4. To investigate a larger academic research project looking at the larger scale issues relating to carbon emissions and property ownership arrangements

## APPENDIX 1: Event Agenda

### Future Proofing Flats

#### *overcoming legal barriers to energy improvements in private flats*

The Foundry, Oval Way, 17<sup>th</sup> March 2015 12:30 – 4:45

AGENDA
1. LUNCH 12:30 – 1:15
2. Introduction & Objectives: Professor Susan Bright, University of Oxford
3. Energy efficiency in leasehold blocks: the problem – David Weatherall, Future Climate
4. The practical experience of trying to improve blocks – Irene Fernow, Westminster City Council & James Traynor, ECD Architects
5. The issues (presentation of briefing note) – Susan Bright
6. Ideas for ways forward – Mark Routley, TLT Solicitors
7. Instructions for the breakout – Irene Fernow, Westminster City Council
8. COFFEE
9. Breakout groups – mixed groups discuss solutions to the issues
10. Panel discussions – feedback and discussion from breakout groups Susan Bright (chair); Siobahn McGrath (First Tier Tribunal); Bob Smytherman (FPRA); Nick Roberts (Univ. of Reading); Victoria Herring (Grosvenor)
11. Conclusions and next steps – David Weatherall, Future Climate

## APPENDIX 2: List of issues of greatest interest by category

As part of feedback, participants were asked to identify the two issues of greatest interest to them to take forward

- Integrated policy to stimulate action – market forces etc
- Lease obligation – implied covenants re ee improvements – to 1987 Act
- Get energy efficiency surveys
- Amend legislation to enable landlords/managers to do works & recover costs
- Lease issues
- Requirement for freeholders to carry out whole building audits
- How to put together the full package to make energy efficiency improvements attractive?
- Look at what's possible without regulatory change
- Energy surveys – make legal for freeholders (ESOS for residential)
- Lobby for more ? incentives
- Use all the existing legislation + steps available to take action
- Good idea to have small working group + lobby Government
- Better communicating the benefits of EE to householders
- Improve understanding of existing mechanisms
- Identify what's possible in existing framework
- How to tackle step changes in regulation to allow leases to cover EE
- Support to promote what is available
- Recommendations to bring EE to leases
- Legislation to allow EE measures
- Improve and resource RA, RMC and other leasehold groups
- Requirement for landlord to undertake a survey to identify potential works.
- Making the best use of powers/duties that already exist.
- Overcoming legal regulatory barriers, but if necessary increase in legislation or "by stealth"
- Using current legal framework + suggestions for reform
- Legislation & permit overriding of leases within strictly regulated regime to permit EE improvements
- Presumption of change on statutory lease renewal
- Need for a reformed leasehold framework and obligations/? policy framework
- Need to consider existing solutions
- Clear drivers for stakeholders to actively out EE
- Pay as you save mechanism that works for all
- Mapping of interest groups

- To treat the legal barriers as part of a wider set of challenges/opportunities
- To create a trigger point to start the process of retrofit – ESOS example.
  
- Regulation
- EPC
  
- Need a really good set of asks on regulation
- It is time to accept that freeholdres and PRS landlords will need to put their hands in their pockets to improve this stock!(& must be obligations to do so).
  
- Get all parties to want it – what’s the (business) case for doing it
- Resource to carry out works (will come through