

The Private Rented Sector Energy Efficiency Regulations (Domestic): A consideration of impact in leasehold flats

Prof. Susan Bright

February 2016

1. Introduction

This paper provides a short consideration of the impacts of PRS domestic energy efficiency regulations (PRS EE Regulations) given typical property governance arrangements and lease terms in a private leasehold block of flats. Appendices 1 and 2 contain examples of relevant terms from a sample long lease and an assured shorthold tenancy.

The paper demonstrates that the terms of leases under which flats are sold may prevent the Regulations having the intended impact. Notwithstanding the consent provisions built into the Regulations, there are situations in which it is unclear whether it will be possible to carry out reasonable energy efficiency improvements.

Please note this paper cannot constitute legal advice but is a personal attempt work out how the regulations apply.

Summary of the issues in non-legal language

The PRS EE Regulations require landlords (from April 2016) not to unreasonably refuse requests for energy efficiency improvements from tenants (subject to financing being in place and other conditions met). In the situation of private rented flats, landlords are usually also very long term tenants themselves (i.e. leaseholders) with a freeholder owning the overall title to the block of flats. There are requirements in the regulations that in this situation neither the freeholder nor leaseholder landlord can unreasonably refuse consent to a tenant requesting improvements. But our analysis shows that notwithstanding these requirements the terms of standard leases and short term tenancy agreements may still prevent works going ahead. This can even arise where tenant, landlord and freeholder are all happy in principle for the works to proceed.

A similar problem applies in regard to the minimum EPC “E” standard which is to take effect from April 2018. Here, landlords are obliged to make reasonable effort to obtain consent from freeholders (and all other relevant parties) for works to proceed. But the terms of leases may mean there is no way for consent to be granted.

For some measures – we consider internal solid wall insulation – a key factor affecting how easily it can be installed legally in flats is whether it is seen as a structural or non-structural alteration to the flat. Unfortunately, there is no easy or clear answer to this question.

What next?

We do not see any immediate way these issues can be resolved within the terms of the PRS EE regulations. Instead we suggest this problem needs addressing through changes to the

law around leases to make energy efficiency improvements easier. We have proposed a number of ways this can be achieved in our recent Briefing Note for the All Party Parliamentary Group on Leasehold, available at: <https://www.law.ox.ac.uk/futureproofing-flats>

2. Summary of the regulations, including aspects relevant to leasehold situations

This paper applies the detailed wording in the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 SI 2015 No 962 to three hypothetical scenarios: a) the installation of double glazing in leasehold flats; b) the installation of insulation; and c) renting out a energy inefficient (F rated) flat.

The overall goal of the Regulations was set out in consultation papers which are extracted here.

Extracts from *Private Rented Sector Energy Efficiency Regulations (Domestic) (England and Wales) Consultation on implementation of the Energy Act 2011 provision for energy efficiency regulation of the domestic private rented sector*, DECC, 2014

“The Energy Act 2011 places a duty on the Secretary of State to bring into force regulations to improve the energy efficiency of buildings in the domestic and non-domestic private rented sector in England and Wales. Domestic and non-domestic private rented sector Minimum Energy Efficiency Standard Regulations must be in force by 1 April 2018, and will require all eligible properties in the sector to be improved to a specified minimum standard. Domestic private rented sector Tenant’s Energy Efficiency Improvement Regulations must be in force by 1 April 2016...

“..The tenant’s improvements regulations allow tenants to request consent from their landlord for energy efficiency measures. A tenant is required to obtain an EPC or Green Deal Assessment and to secure quotes for funding the proposed improvements before providing a written request to their landlord. The landlord is not able to unreasonably refuse the tenant’s request but may provide a counter proposal of a similar package of energy efficiency measures. In the event of a dispute over a tenant’s request then the tenant is able to take the matter to a tribunal. An appeal may be made if either party disagrees with the tribunal ruling.

“... Under the minimum standard regulations where a property falls below an E EPC rating, the landlord would only be required to undertake improvements that could be funded without net or upfront cost for the measures, for example, through using the Green Deal finance, ECO or other incentives.

“Neither set of regulations would require improvements which require consent from a third party, such as a freeholder, where that consent is not given. Therefore for the minimum standard regulations, where a landlord is unable to obtain consent to such improvements, or Green Deal finance to pay for them, such works would not be required. Under the tenant’s improvements regulations the fact that required consents had not been obtained would mean the landlord would be able to reasonably refuse the tenant’s request.”

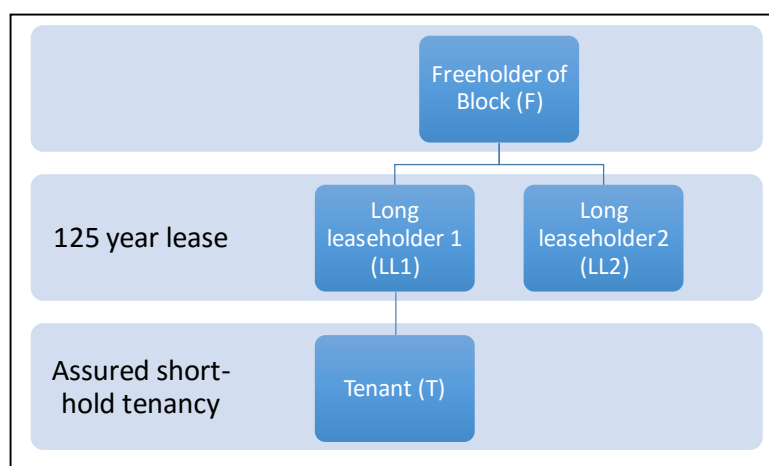
From: *Private Rented Sector Energy Efficiency Regulations (Domestic): Government response to 22 July 2014 Consultation on the domestic regulations (England and Wales)*, DECC, 2015

“The regulations will place both immediate landlords and any superior landlords under a duty not to unreasonably refuse consent to requests for energy efficiency measures. Private rented sector landlords, who are themselves leaseholders, will be empowered to make request for consent to energy efficiency improvements from the freeholder.”

3. An example of how the Energy Efficiency (Private Rented Property) (England & Wales) Regulations 2015 work in relation to leasehold flats

The example below explores how the regulations would apply in a situation in a private block of flats. The way in which the Regulations apply to the hypotheticals is tested using the wording taken from a sample long lease and a sample tenancy agreement, the relevant terms of which are set out in Appendix 1 and 2.

The example assumes a block which is owned by the freeholder, F, and includes Flats 1 and 2, sold on 125 years to Long Leaseholder 1 (LL1) and Long Leaseholder 2 (LL2). LL1 has let her flat under an assured short-hold tenancy to T, a private tenant. LL2 (in Flat 2) is an owner occupier.



Energy Upgrades

For comfort reasons T wants to upgrade to double glazing (changing the glass and frames) – the current windows are in a reasonable state of repair but are single glazed. T is willing to bear the cost of this measure him/her self.

LL1 also wants to put in internal insulation (internal wall insulation is done by fitting rigid insulation boards to the wall, or by building a stud wall filled in with insulation material such as mineral wool fibre).

In the absence of the PRS EE regulations, the relevant considerations regarding what is allowed under the lease and tenancy are:

- Tenant installing double glazing in Flat 1: Under the terms of the tenancy agreement (see Appendix 2) T is unable to install double glazing. Under the tenancy the tenant cannot in any way alter the property and the landlord has an absolute right to refuse consent for any alterations or improvements. If, instead, it is LL1 who wants to install double glazing this is not allowed under the lease as the glass is let to LL1 but the frames remain with F.
- Landlord leaseholder installing internal Insulation in Flat 1: The key considerations are: i) whether it requires any work to ‘structural walls or partitions’; and ii) whether

the work would disturb T's 'quiet enjoyment' of the property. As to i) there is no hard and fast definition of what is structural but an alteration will be structural if it interferes with the basic structure of the building, as distinct from the decorations and fittings. Provided that fitting the internal insulation is not structural LL1's long lease will allow the work to be done with F's consent, which is not to be unreasonably withheld (but if it is structural LL1 is not permitted to do the work). As to ii), even if there is no express covenant of quiet enjoyment in T's tenancy, this will usually be implied into landlord and tenant relationships. Physical interferences and substantial interference with the tenant's enjoyment are likely to involve a breach of this covenant. This means that, unless T consents, LL1 is unlikely to be able to install insulation until T leaves.

Note that where either of the long lease or the freehold has been purchased under a mortgage, the mortgage is also likely to impose constraints on alterations to the flat or building without the mortgage company's consent. This can impose a further restriction on possible action, which we do not consider here as the issue goes more widely than leasehold situations – it can apply to any home bought under a mortgage.

Analysis of impact of regulations on energy upgrades

We wish to focus on how 'consent' and the wording of leases and tenancies affect the application of the Regulations. For this reason, to remove further potential limitations on the Regulations, we assume:

1. The tenant T in example 1, and the leaseholder LL1 in example 2, is willing to pay for the upgrades. This means that the work can count as a 'relevant energy efficient improvement' (REEI).
2. The upgrades do not have a 'potential negative impact on the fabric or structure of the domestic private rented property, or the building of which it forms part' (Reg 10(4)) and would not 'result in a reduction of more than 5% in the market value of the' flat or building (Reg 16). If the upgrades had either impact this would mean that refusal to consent is not unreasonable.

Flat 1: Short-hold tenant T wants to install and fund installation of double glazing under "Tenant's Energy Efficiency Improvement Regulations"

- T is a 'tenant' (reg 7(a)(i));
- T can request LL1's consent to a 'relevant energy efficient improvement' (reg 8)
- LL1 must not unreasonably refuse consent (Reg 10)
- Reg 12(4)(5): where LL1 consents to a REEI 'which may not be made without the consent of a superior landlord' then LL1 must serve a copy of T1's request and LL1's response on F. F must not then unreasonably refuse consent (reg 11(1)).

How do these provisions apply?

The answers are not straightforward.

LL1 must not unreasonably refuse consent to T's request but as LL1's lease does not allow LL1 to install double glazing, it appears reasonable for LL1 to refuse the request. If consent were given, this would involve LL1 being in breach of her own lease. By Reg 15 a landlord is not required to consent where, 'despite reasonable efforts by the landlord...any third party consent has been refused'. **As LL1's lease does not include the window frames there is no**

lease mechanism for LL1 to apply for F's consent for LL1 to replace the windows and LL1 does not therefore have an obligation to seek F's consent. The Regulations do not impose a duty on LL1 to seek consent from F as the reg 12(4) duty only applies if the landlord (LL1) consents.

If LL1 chooses to apply to F for consent, F must not unreasonably refuse consent. However, it may be that F is not able to consent to the window upgrade. Leases commonly provide that F will enforce covenants against leaseholders; if F were to allow LL1 to change the windows it may be that other leaseholders could argue that F is thereby failing to enforce the covenant against alteration. F may therefore reasonably refuse consent (unless it is apparent that all leaseholders want to change the windows).

Flat 1: Leaseholder LL1 wants to install and fund installation of internal wall insulation under "Tenant's Energy Efficiency Improvement Regulations"

- Reg 7a ii : LL1 is a Tenant (though note that LL1 is only a Tenant as defined in these regulations because the property is occupied by T who is on a short-hold tenancy);
- LL1 can request F's consent to a 'relevant energy efficient improvement' (reg 8)
- F must not unreasonably refuse consent (Reg 10)

Because her property is let under a short-hold tenancy, LL1 can use the regulations to request F's consent to reasonable EE improvements. Note that this right depends on the fact that LL1's flat is occupied by a tenant on an Assured Shorthold tenancy. In our example above, LL2 – who occupies his own leasehold flat – does not have this right under the regulations.

As we describe above, if the internal wall insulation is defined as non-structural LL1 can install with F's consent not to be unreasonably withheld even without the aid of the Regulations.

If the installation of the insulation is structural, F must not unreasonably refuse consent. However, the lease contains an absolute prohibition on structural alterations and if F has promised in other leases to enforce covenants against leaseholders it may not be unreasonable to refuse consent on the grounds that other leaseholders could argue that approval would be a breach of this promise.

In practice, the fact that there is no clear standard answer as to whether this measure may or may not be considered structural, the lease is likely to act as a barrier to action.

There is also the additional problem, not covered by the Regulations, that carrying out the work is likely to be a breach of LL1's covenant of quiet enjoyment with T.

Flat 2: Renting out an "F" banded flat after April 2018: Impact of regulations Part 3 (minimum energy efficiency standards)

- In July 2018 LL2 wants to let to a new tenant - T2 - but the flat has an EPC of F.
- By Reg 23: LL2 must not let the property unless reg 25 or a Ch 4 exemption applies.
- Reg 25 applies if LL2 has either made all REEIs or there are no relevant energy efficiency improvements that could be made, and the property is registered as exempt.
- In Ch 4, Reg 31(1)(b) provides that the prohibition on letting does not apply if LL2 has been unable to increase the energy performance as a result of 'despite reasonable efforts by the landlord to obtain third party consent, that consent has been refused.'

How does this apply?

If it is possible to increase the energy performance of the flat by 'internal non-structural alterations', which are permitted under LL2's lease, with F's consent 'which shall not be unreasonably withheld' then LL2 will need to apply for consent and do the relevant works.

If, however, the works required to increase the energy performance require 'structural alterations to be made to the premises' or improvements to be made to the shared parts of the building these are not actions which LL2 can undertake under the terms of LL2's lease and therefore there is no mechanism for LL2 obtaining consent. In this circumstance, it appears that the flat may be rented out with the F rating.

APPENDIX 1: Relevant Terms in a typical long lease (based on a real example)

Lease term

999 year lease

The Premises

“The apartment shown edged red on the Plan including:

1 the internal plastered coverings and plaster work of the walls bounding the demise and the doors and door frames fitted in such walls (other than the external painted or treated surfaces of such doors and door frames) and window glass and

2 the internal walls (other than structural walls) and partitions and the plastered coverings and plaster work thereof lying wholly within the demise and the doors and door frames fitted in such walls and partitions....

But excluding:..

(b) All of the window frames main walls timbers and joists and exterior walls of the Building and any of the internal walls partitions or columns where such walls partitions or columns are either structural or separate the Premises from the other parts of the Building...”

Obligations on leaseholder:

“Not to make any structural alterations or additions to the Premises or any part therefore or any alterations to the exterior of the Premises and not to alter the colour texture or appearance of any glass in the windows”

“Not to make any internal non-structural alterations or additions without first having received the Landlord’s written consent which shall not be unreasonably withheld”.

“Repair maintain renew uphold and keep the Premises and all parts thereof including so far as the same form part of or are within the Premises all window glass and doors.....in good and substantial repair and condition...”

Obligation on Freeholder:

“Renewing repairing maintaining lighting decorating or otherwise treating rebuilding replacing and keeping free from and remedying all defects whatsoever and cleaning the main structureroof foundations and exterior of the Building.....”

APPENDIX 2: Relevant Terms in a typical assured shorthold tenancy agreement (based on a real example)

Length of term of Tenancy Agreement C:

12 month

Relevant terms

4.2 The Tenant cannot in any way alter the Property or items in it, injure the property.

The Tenant cannot:make an improvement or alteration to the Property without the written consent of the Landlord (the Landlord has an absolute right to refuse consent for any alterations or improvements but, if accepted, any fixtures become the property of the Landlord -this includes the erection of a satellite dish or television aerial and the carrying out of external redecoration); spend money on repairs without the Landlord's written permission (the Tenant does not have authority to commission workmen on the Landlord's behalf and the Tenant will have to pay for them unless they were acting reasonably to effect emergency repairs for which the Landlord is liable).

5.1 The Tenant must allow the Landlord/Agent access to the Property at any reasonable time.

The Landlord may enter the Property at any reasonable time ... to carry out works or repairs needed to comply with his repairing obligations, ...In exercising this power the Landlord may authorize someone to do it on his behalf.

7 OBLIGATION TO REPAIR

7.1 The Landlord must ensure that there is no Category 1 hazard in the Property (except where such hazard is wholly or mainly attributable to lack of care by the Tenant or a permitted occupier of the Property). A Category 1 hazard is one which has a score of 1000 points or more on the Housing Health & Safety Rating System. If the Property forms only part of a building the Landlord must ensure there is no Category 1 hazard on the structure or exterior of the building or of the common parts.

7.2 The Landlord must keep in repair the structure and exterior of the Property (including drains, gutters and external pipes) and keep in repair and proper working order the service installations and heating and hot water systems in the Property.

7.3 The Landlord's obligations under this heading do not arise until he becomes aware that works or repairs are necessary. The landlord complies with his obligations if he carries out the necessary works or repairs within a reasonable time after the day on which he becomes aware they are necessary.

7.4 The Landlord undertakes to have a Landlord Gas Safety Certificate in place at the start of this Agreement and to have it renewed annually by a 'GAS SAFE' registered engineer.

7.5 The Landlord undertakes to ensure that there is a valid Energy Performance Certificate at the start of the Tenancy and have it renewed every 10 years thereafter.