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TECHNICAL BULLETIN

FOR RESIDENTIAL SURVEYORS

ASH -v- POWELL AND THE NEW HOME SURVEY STANDARD

CONTINUING PROFESSIONAL DEVELOPMENT
60 Minutes

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RADIATORS

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THE TECHNICAL BULLETIN

FOR RESIDENTIAL SURVEYORS

Welcome to the Technical Bulletin. This Bulletin is designed primarily for residential surveyors who are members of RICS and other professional bodies working across all housing sectors. Other professionals may also find the content useful.

Produced by Sava, you will find technical articles, regulation updates and interpretation and best practice. We hope you find this useful in your day-to-day work and we welcome any feedback you may have and suggestions for future publications.

Who we are

We are a team of building physicists and engineers, statisticians, software developers, residential surveyors, gas engineers and business management specialists.

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A LESSON FOR SURVEYORS

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In February 2020 the Evening Standard reported on a case where a couple selling their home in Oxfordshire, and who failed to tell the buyers about the plans for a new motel nearby, were found liable and ended up facing a legal bill of up to £300,000 (source here).

The reason this story hit the Evening Standard, The Telegraph, and the Oxford Mail, among others, was that the property was "a stunning barn conversion with excellent equestrian facilities", worth in excess of £1 million and the new motel in question was Mollies Motel, developed by Soho House, the exclusive members club favoured by celebrities. The opening of Mollies was attended by Jeremy Clarkson, Paloma Faith, and Declan Donnelly, among others.

While this case involved just the sellers and purchasers, it does raise questions about the application of the new RICS Home Survey Standard (HSS) which come into force on 1 March 2021.

In this article, Hilary Grayson and Nik Carle look at the case and consider how the new RICS HSS might have impacted a case such as this (if the HSS had been in force). What if the purchasers had happened to commission a level three service with the HSS in effect?

Philip Ash and his wife Elisabeth advertised their property as located in Oxfordshire and had agreed on a sale with Adrian and Lisa Powell.

However, they did not reveal that plans had been approved for a fifties-style diner and upmarket motel with flood-lit car park and neon signs on adjoining land, despite leading objections to the development themselves.

Background

Lake Barn is a 4-bed barn conversion with a separate home office and just under 4 acres of land situated approximately 5 miles from Farringdon in Oxfordshire. It was described as a "substantial period family house located in an exceptional rural position, with large gardens, far-reaching views and excellent equestrian facilities." On sales particulars drawn up in 2013, it is further described as being set within particularly attractive surrounding countryside, offering many opportunities for walking, riding, and golf.

In this case, the purchasers had been searching for a suitable rural property for some time. They agreed to buy the property in 2017, for just over £1 million. The conveyance proceeded in the normal way. There was an exchange of contracts and the purchasers paid a deposit of £108,500.

However, unbeknown to the purchasers, in 2016 the local authority had granted planning consent for an old roadside property adjacent to Lake Barn to be converted to an American style diner and motel.

The sellers were aware of this development, having objected to it when the planning application was made, but they failed to declare it on the sellers' questionnaire.

Following the exchange of contracts, the purchasers found out about the development and pulled out of the deal. They sued the sellers for the return of their deposit and damages. The sellers refused, and the dispute went to court. The sellers insisted they had filled in the questionnaire truthfully, believing it only applied to the house.
Judge Monty said the sellers had not tried to "cheat or deliberately mislead", but it was clear their answer was wrong. He found that they knowingly put false information on a sellers' questionnaire and found that they were liable to repay the deposit plus costs, expected to be more than £175,000.

The motel, complete with pink neon signs spelling out "Mollie's Motel & Diner", was built and opened in January 2019.

The house eventually sold to another buyer at a reported figure of £985,000.

So, what has this got to do with surveyors?

In this case, no surveyor was employed by the purchasers, but what if a surveyor had been employed and working under the new Home Survey Standard?

When it comes to "knowing your area", the new HSS states at Section 3.1:

> *"RICS members must be familiar with the type of property to be inspected and the area in which it is situated.*
>
> *The depth and breadth of the research will depend on a range of factors including the RICS member's knowledge and experience, the locality and the client's specific requirements. At levels one and two, the amount of research is likely to be similar. Research for level two services on older and/or complex properties, historic buildings and those in a neglected condition, and all level three services is likely to be more extensive, and also if the client has requested additional services."*

This is expanded in Appendix C:

> *"RICS members need to be familiar with the nature and complexity of the area in which the subject property is located. This includes general environmental issues where the information is freely available to the public (usually online). The nature, quality and accuracy of the data varies between suppliers and so RICS members should treat this information with care. Although the range and nature of these issues will change over time, the list currently includes:*
> - *Flooding (surface, river, and sea)*
> - *Radon*
> - *Noise from transportation networks*
> - *Typical geological and soil conditions*
> - *Landfill sites and relevant former industrial activities*
> - *Former mining activities*
> - *Future/proposed infrastructure schemes and proposals*

- *Planning areas (e.g. Conservation areas, areas of outstanding natural beauty and Article 4 direction)*
- *Listed building status and*
- *General information about the site including exposure to wind and rain, risk of frost attack, and unique local features and characteristics that may affect the subject property."*

It goes on to say that the list is not exhaustive and that relevant issues will vary based on location.

Knowing your area is one thing, but what should you be reporting to the client and, how might this vary depending on the level of service offered?

Section 4 of the new HSS deals with what should be included in the report and specifically 4.3.1, 4.3.2 and 4.3.3. cover level one, level two, and level three surveys, respectively. (note: see boxes on the next page)

However, section 4.6 then goes onto cover legal matters. It makes it very clear that the RICS member will be the eyes and ears of the legal adviser appointed by their client. They must highlight the relevant legal matters and remind the client that they should bring these legal matters to the attention of their adviser. Some examples are listed under section 4.6.1:

- conservation areas (especially Article 4 designation), listed building status and the need for consents
- work done under the various 'competent persons' schemes
- planning permission and building regulation approval for alterations and repairs, and any indemnity insurance policies for non-compliance (if known)
- trees and any tree preservation orders
- environmental matters, such as remediation certificates for previously contaminated sites and whether a mining report is required and
- the use of adjacent, significant public or private developments

Section 4.6.2 covers guarantees, but 4.6.3 then covers other matters, stating that "...other features and issues that may have an impact on the property and require further investigation by the legal adviser" should be included. A list of possible topics this might cover is listed in Appendix F:

"RICS members should include other features and issues that may have an impact on the subject property and require further investigation by the legal adviser. The following list (which is not exhaustive) illustrates this variety:

- flying freeholds or submerged freeholds
- evidence of multiple occupation, tenancies, holiday lettings and Airbnb
- future use of property
- signs of possible trespass and rights of way
- arrangements for private services, septic tank registration and so on
- rights of way and maintenance/repairing liabilities for private access roads and/or footways, ownership of verges, village greens and so on
- chancel matters
- other property rights including rights of light, restrictions to occupation, tenancies/vacant possession, easements, servitudes and/or wayleaves
- boundary problems including poorly defined site boundaries, repairs of party walls, party wall agreements and works in progress on adjacent land
- details of any building insurance claims
- parking permits
- presence of protected species (for example bats, badgers, and newts) and
- Green Deal measures, feed-in tariffs and roof leases."

Interpreting the Home Survey Standard

Thinking about the Lake Barn case from a surveyor's liability perspective, it is important to consider how the new RICS Home Survey Standard might have been interpreted and how such interpretation might have impacted in a case such as this. What if the purchasers had commissioned an HSS level three service, or even a level two service without a valuation?

Surveyor knowledge of the locality is key. There MUST be familiarity with the area. As we have seen, the HSS is clear on this: surveyors MUST undertake appropriate pre-inspection research.

Historically, it is the authors' view that many "building surveyors" would argue that a condition report (or traditionally a building survey) is just about the physical aspects of the property. Yes, they have always needed local knowledge, for example, to cover issues such as flooding or mining etc. but this knowledge is just about identifying things that could affect the property physically. However, when it comes to something such as neighbouring land use which has no impact on the physical aspects of the property (though it could have an impact on value), then many traditional surveyors would insist that this was not part of their remit.

Whatever historically has been accepted practice relating to level two or three condition surveys, considering the HSS in the context of this particular case suggests that a surveyor should take into account local planning consents when delivering a condition report at level two or three. This is particularly pertinent where, as with this case, the planning intention "nearby" was publicly available information. Conveyancing practitioners are unlikely to be subject to requirements of "familiarity" and "knowledge" of the area/locality to the same degree as surveyors. The responsibility will sit squarely with the surveyor.

Additionally, surveyors may also now need to consider matters on "land nearby" as well as on "neighbouring properties". "Land nearby" is a significantly more extensive responsibility than merely neighbouring property.

Appendix C of the HSS covers environmental factors or those which have potential physical impact. However, as we have seen, it does also include knowledge of proposed/future "infrastructure schemes" and by implication the knowledge of "planning areas" (particularly as Appendix C is clearly stated to be not prescriptive or exhaustive).

There also appears to be an emphasis in the HSS on whether or not relevant data is publicly available. Where key information IS publicly available, it may be more difficult for surveyors to justify excluding this from their pre-inspection research or

the report even if the knowledge in question has no potential impact on the physical aspects of the subject property.

Our conclusion is unequivocal: even if previously surveyors have only been used to reporting on the "bricks and mortar" alone, in future they will have a responsibility to bring environmental/location matters to the attention of their clients (at least for further investigation by the legal representative), even if the potential impact of such matters is only on value and not the ongoing physical performance of the property.

4.3.1 Survey level one
For each element of the building, the RICS member should:

- describe the part or element in enough detail so it can be properly identified by the client
- describe the condition of the part or element that justifies the RICS member's judgement and
- provide a clear and concise expression of the RICS member's professional assessment of each part or element.

This assessment should help the client gain an objective view of the condition of the property, make a decision and, once in ownership (if the client is a buyer), establish appropriate repair/improvement priorities. A condition rating system is one way of achieving this, although RICS members may use their own prioritisation methodology.

Whatever the choice, any system must be clearly defined in the information given to the client.

4.3.2 Survey level two
A survey level two service should follow a similar structure and format to level one.
Although it will provide more information, it should still be short and to the point, avoiding irrelevant or unhelpful details and jargon. Material defects should be described and the identifiable risk of those that may be hidden should be stated. A level two report will have the following additional characteristics:

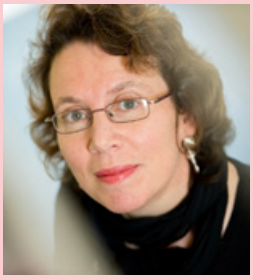
- it should include comments where the design or materials used in the construction of a building element may result in more frequent and/or more costly maintenance and repairs than would normally be expected
- the likely remedial work should be broadly outlined and what needs to be done by whom and by when should be identified
- concise explanations of the implications of not addressing the identified problems should be given and
- cross-references to the RICS member's overall assessment should be included.

Survey level two reports should also make it clear that the client should obtain any further advice and quotations recommended by the RICS member before they enter into a legal commitment.

4.3.3 Survey level three
A level three service should reflect the thoroughness and detail of the investigation. It should address the following matters:

- the form of construction and materials used for each part of the building should be described in detail, outlining any performance characteristics. This is especially important for older and historic buildings where the movement of moisture through building materials can be critical to how the building performs
- obvious defects should be described and the identifiable risk of those that may be hidden should be stated
- remedial options should be outlined along with, if considered to be serious, the likely consequences if the repairs are not done
- a timescale for the necessary work should be proposed, including (where appropriate and necessary) recommendations for further investigation
- future maintenance of the property should be discussed, identifying those elements
- that may result in more frequent and/or more costly maintenance and repairs than would normally be expected
- the nature of risks of the parts that have not been inspected should be identified and prioritisation of issues should be outlined.

Hilary Grayson BSc EST MAN (Hons)



Hilary is focused on developing new qualifications, as well as Sava's activities within residential surveying. Hilary has a wealth of experience within the built environment, including commercial property, local government and working at RICS. As well as her work at Sava, she is a Trustee at Westbury Arts Centre, a listed farmhouse dating from the Jacobean period, and has inadvertently become a custodian of a colony of bats.

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THE DRAFT BUILDING SAFETY BILL AND HIGHER-RISK BUILDINGS

OVERVIEW AND DEFINITIONS, KEY DUTIES, COSTS AND COMPLEX BUILDINGS

SUSAN BRIGHT PROFESSOR OF LAND LAW, MCGREGOR FELLOW, UNIVERSITY OF OXFORD

In this article, Professor of Land Law at Oxford University, Susan Bright, focuses on the provisions that relate to the occupation phase of residential buildings, contained in Part 4 of the draft Building Safety Bill, and sets out her initial, tentative, understandings of how they will work.

The draft Building Safety Bill was published on 20 July 2020. The intention of the Bill is to "deliver the principles and recommendations for reform set out by Dame Judith Hackitt's Independent Review of Building Regulations and Fire Safety." with the stated outcome that the "overall effect of the Bill will be to deliver a stronger regulatory system and a stronger voice for residents which delivers better performance of all buildings across the built environment and better management of fire and structural safety risks in new and existing buildings."

It is a big document, with 119 clauses in five parts, plus eight schedules and as is often the case, much of the detail on application will be contained in regulations which have yet to be produced. There are, therefore, many uncertainties, although the direction of thinking for some of this is mapped out in the accompanying Explanatory Notes (EN) and Impact Assessment (IA).

The broad outline has been known for some time. The idea is that the "golden thread" of fire safety and building information that Hackitt spoke of will be digitally held to specific standards and carry through from the design and construction stages into the occupation and management phase. At the occupation stage there will be duties imposed on the "accountable person" and "building safety manager" to ensure that the building is safe and that any risks are thought about in advance and, where possible, steps are taken to reduce them. The Hackitt review noted potential complexities with how some of the practical measures would map onto the law and management of leasehold properties but eschewed detailed discussion. With the publication of the Bill, it is clear that implementation will be challenging, and several issues remain obscure, but also that there will be new and significant costs falling on leaseholders in higher-risk buildings.

Reference to "golden thread"

Dame Judith Hackitt's final report explained that

there was "almost unanimous concern surrounding the ineffective operation of the current rules around the creation, maintenance and handover of building and fire safety information. Where building information is present, it is often incomplete or held in paper form and is not accessible to the people who need to see it. "The interim report identified the need for a 'golden thread' of information for all higher-risk residential buildings (HRRBs) so that their original design intent is preserved, and changes can be managed through a formal review process. Equally, access to up-to-date information is crucial when effectively carrying out a fire risk assessment of a building and determining whether any action is required."

The Bill does not say anything specific to the issue that has concerned many leaseholders: how will the cost of defects stemming from historical regulatory and build failures be met? The IA provides estimates of costs of bringing existing buildings up to standard. Further, the EN report a policy intention that "as far as possible leaseholders should not have to face unaffordable costs" and that the government is "conducting further work to explore appropriate funding models that would mitigate" these, with the promise of an update before the final Bill is introduced. Nor does the Bill address the potential liability of those responsible for defects, or do anything to remove some of the key obstacles to bringing litigation to hold them to account (such as removing the common law bar to recovery of "pure economic loss" for negligence based building defect actions or extending the inappropriately short limitation period under the Defective Premises Act 1972).

There is a number of key terms that are crucial to the application of part 4.

In scope higher-risk buildings

The first is to explain those buildings in scope (i.e. covered by the regulations), referred to as 'higher-risk' buildings.

Clause 19 simply refers to the "prescribed description" in regulations yet to be seen, but the (initial) proposed use of this power is set out in para 228 EN. This explains that there will be both a height and use condition. A higher risk building will be one which:

- meets the "height condition" (the floor surface of the building's top storey is 18 metres or more above ground level or where the building contains more than 6 storeys) AND:
- is a building that has two or more dwellings, or 2 or more rooms used for residential purposes, or student accommodation.

The EN explain that other buildings may be brought within the definition in the future. The definition of building (cl 35(3)) includes "any ... structure or erection of any kind" and can also include movable objects, which means that even a boat or caravan could come within it. Examples of what might later come within scope given in the EN are purpose-built blocks of flats regardless of height (para 230), and office blocks which meet the trigger height threshold (para 248). The approach is based on levels of risk, yet events in the last 18 months have shown that buildings housing people who would not count under the EN approach as using rooms for residential purposes also present high risks to the occupiers (as shown in the Crewe care home fire), as well as buildings not meeting the height threshold (as with the Worcester Park fire, and the Bolton 'Cube' student block). Indeed, the benchmark spoken about now for many purposes is not 18m but 11m (based on Fire Service external access capability), see for example the ADB changes in May 2020.

Residents

Another key concept is the idea of "resident of a dwelling". As mentioned further down, residents are subject to duties but are also owed duties by the accountable person, for example in relation to information that will help them feel safe. The definition of resident is almost non-existent, however. Cl 60 (3) simply says that a resident is a "person who lawfully resides there". Other housing legislation tends to focus protection around the question of whether the property is an "only or principal home" (for example, the Housing Act 1988). Hopefully "resident" would be understood much more broadly in the context of higher-risk buildings: there are many classes of occupiers who will be lawfully present but for whom this will not be the main home (such as commuter using the flat as pied-à-terre), and, of course, occupancy can be fluctuating, intermittent or short term.

The accountable person

The accountable person (AP) will be responsible for meeting the various statutory obligations for occupied higher-risk buildings. The effect of the somewhat complex definition in cl 61 is that this will be the person who "holds a legal estate in possession in any part of the common parts" (let's call this person L) unless another person is under an obligation to repair or maintain common parts in long leases (of more than 21 years) to which L is lessor, in which case that other

person will be the AP. The common parts are defined in cl 61(3) as meaning the "structure and exterior of the building" except those included in the demise of a single dwelling or occupied for business purposes, or "any part of the building provided for the use, benefit and enjoyment of the residents of more than one dwelling".

It is not, therefore, always the freeholder who will be the AP and it may be a long leaseholder (for example a housing association) or, seemingly, a management company under a tripartite lease. In the IA (para 61) it is said that for most buildings the AP is the "individual, partnership or corporate body with the legal right to receive funds through service charges or rent from leaseholders and tenants in the building". However, the reference to legal responsibility for the upkeep and maintenance of the building, given complex ownership structures, means that the AP may include: "freeholders, the head lessees, management companies, commonhold associations or a (sic) Right to Manage Companies".

AP duties

The AP is placed under a number of key duties:

- to register the building with the Building Safety Regulator (cl 62)
- to appoint a Building Safety Manager (BSM) with appropriate skills, knowledge, and experience (cl 67)
- to assess building safety risks (cl 72)
- to take steps to prevent a major incident (cl 73)
- to prepare a "safety case report" that both assesses the building safety risk (cl 74) and frames how the BSM is to manage the building (cl 76)
- to produce a residents' engagement strategy that promotes "the participation of relevant persons in the making of building safety decisions" (cl 82)
- to provide prescribed information (to the regulator, residents, and flat owners – cl 80)
- to establish a system for investigating complaints (cl 84).

A building safety risk (cl 16) is a risk to the safety of persons arising from fire or structural failure (and other matters that may be prescribed). A major incident is one occurring as a result of a building safety risk which results in a significant number of deaths or serious injury to a significant number of people (cl 17(6); note, "people" here is not limited to residents). The duty placed on the AP is to take "all reasonable steps" to prevent a major incident happening and to reduce the severity of any such incident. The definition of "major incident" is critical and yet linked to the non-defined term "significant". Why only trigger the duty if a "significant" number of people are affected? The risk-based Housing, Health and Safety Rating System (discussed here) looks at both likelihood of occurrence and degree of harm: is one death not always sufficient harm?

The IA explains (para 263) that the safety case report will "broadly include a full building description, a hazard and risk assessment, a summary of mitigation measures, and the approach to risk management. Compiling this might require contracting a team of technical experts such as structural engineers, fire engineers and safety experts."
An illustration is given (para 560 EN) of how clauses 72-74 work: the AP needs to identify hazards (perhaps changes to front doors reducing fire resistance, combustible materials in the common corridors, etc.) and decide what measures are needed to lower the risks to an acceptable level and to mitigate the risk of harm to residents in the event of a major incident. The relationship between the AP duties and the responsibilities of the BSM is important: it is the AP who is placed under the clause 62-75 duties, and the BSM who has to "manage the building" in accordance with the safety case report and provide prescribed information to the regulator; the AP has to establish a complaints system, the BSM operates it.
Collectively, the things that the AP is required to do appear to be referred to as the "building safety measures" (cl 88, inserting s 17G(4) into the Landlord and Tenant Act 1985).

Duties to engage with residents

Often there can be a hostile relationship between the freeholder (or their appointed agent) and leaseholders; little information reaches those whose lives are most affected. For example, there have been cases where residents have been refused copies of the Fire Risk Assessments for their homes (against the specific advice of UK Information Commissioner, Elizabeth Denham). Within days of the Grenfell tragedy, stories emerged of tenants being ignored by the management company.

The draft Building Safety Bill attempts to address these concerns:

- The Building Safety Regulator must work with a residents' panel to provide advice on strategy, policy systems and guidance of particular relevance to residents of higher-risk buildings (Cl 11). This panel must include occupiers and may also include non-resident leaseholders and groups representative of residents and/or non-occupying leaseholders.
- The AP must prepare a residents' engagement strategy for promoting "the participation of relevant persons in the making of building safety decisions" (cl 82). This strategy must explain what information will be provided and how consultation will occur. A copy of the strategy must be given to each resident (back to the problematic question of who is a resident).
- Residents and flat owners can request "prescribed information" (cl 83; note that an "owner" is defined in cl 105). The list of what this is likely to cover, given in para 638 EN, is long (e.g. "full, current and historical fire risk assessments", "information on the maintenance of fire safety systems" etc.). This duty to supply the long list of information listed may appear onerous but being available digitally should make this easier.

Delivering these goals will not be easy. Residents come and go: how can the AP be certain who the "residents" are? Should the same term, "resident", be used to cover the scope of all of the duties owed by the AP (and also owed by residents, see next heading) or does there need to be more nuance within the Bill? Will these proposals be effective: what will participation look like, will it be a tick box exercise much like the s20 consultations?

Duties on residents (cl 86)

Residents are also subject to duties: to keep in "repair and proper working order" all relevant resident's items (any electrical or gas safety installation or appliance in

the dwelling), to take reasonable care to avoid damaging safety items in the common parts, and to comply with requests from the AP for information in connection with the AP's duties relating to building safety risks and to prevent a major incident. If it appears to the AP that a resident breaches one of these duties, the AP can serve a notice on the resident requiring it to be remedied, and this can, in turn, be enforced by an order from the county court.

There appears, however, to be a mismatch between the wording of the Bill and the explanation of what these duties will cover (and remember, it is the wording of the legislation only that matters). Echoing wording found in the Hackitt review, both the EN and IA state that leaseholders are to cooperate with the AP (para 661, and 20 respectively) but, the legislation refers more narrowly to these specific duties, not a general duty of cooperation. Further, the IA states that "residents have legal responsibilities to avoid actions that could pose a risk to the fire and structural safety of the building, for instance removing or replacing compliant fire doors or windows" (para 84). This is not what cl 86 states: unless the fire doors or windows are "common parts" and regarded as "safety items" there is no such duty. It is often unclear in leases whether flat entry doors are demised to tenants or not, likewise windows. Internal doors would clearly not be "common parts". Further, although it is clear from the Grenfell Tower Inquiry that windows (and the surrounds) can be important for fire safety, it may be better to be explicit than run the risk of arguments as to what counts as a "safety item".

Access to dwellings (cl87)

As I have pointed out in my previous publications here and here, access has been a big problem, particularly for social landlords seeking to enter flats in order to inspect for potential building safety risks, and also in order to carry out works to improve fire safety. Under most existing leases rights of entry are limited and often unclear.

Cl 88 inserts new sections into the Landlord and Tenant Act 1985 that will imply various terms into a long lease (more than 21 years) of a dwelling in a higher-risk building. These include an implied covenant by the tenant to allow entry for the purposes of "carrying out prescribed building safety measures". Cl 87 enables the AP to apply to the county court for access to dwellings (at a reasonable time on a specified date or within a specified period) where the resident has been asked to give entry but refused. The reason for access is tied to the need either to perform a cl 72 or 73 duty (assessing risks, preventing a major incident) or where the AP considers the resident's duties have been breached (to keep electrical/gas items in repair). A crucial question which is not at all clear from my reading of the Bill or the EN is whether this right is limited only to access or whether it is more extensive and carries with it a right to do work to the flat itself (cl 73 says that steps may involve works to any part of the building). This could include, perhaps, replacing fire doors, installing new fire detection sprinklers, and retrofitting sprinklers.

Access is often strongly resisted by residents; it is their home, their privacy, that is being intruded on. Yet there is clearly a need for a balanced approach, recognising the complexity of shared buildings which entail interconnectedness and interdependency, and that the safety of the whole depends on the safety of the individual parts. If entry rights do include a power to do works, there should be checks and balances to ensure the work is necessary and that it is of high quality, including meeting aesthetic concerns. For example, as photos in this post show, some of the work done by Oxford City Council as part of major refurbishment includes deeply unattractive sprinklers. But there is nothing in the Bill about any of this so, perhaps, the right is the more limited one of simple access.

Recovery of costs (clauses 88 and 89)

These clauses have caused considerable disquiet amongst lawyers and leaseholders. In outline they provide that the tenant of a long lease must pay the "building safety charge" (BSC) within 28 days of demand. It works by inserting the new sections into the Landlord and Tenant Act 1985, mirroring much of the existing machinery that apply to variable service charges. So it requires consultation if the costs exceed a specified amount (not yet prescribed) with the possibility of dispensation (and seemingly no requirement of consultation if it is urgent or the building is in "special measures"), enables the payability to be challenged (costs must be reasonably incurred, works done to a reasonable standard), and there can be no recovery if there is no demand for payment, or notification, within 18 months of costs being incurred. The application of these limits will presumably draw on the case law already developed in relation to service charges, but this does not provide much protection against potentially major charges landing on leaseholders, as can be seen with how leaseholders in social housing have faced massive bills for major work programmes.

The BSC covers the costs of the building safety measures, including overheads. The EN explain (para 674) this could include producing the safety case, appointing the Building Safety Manager, building safety works, compliance costs etc., although recovery of some costs are excluded (for example, penalties etc. imposed on the AP by the regulator, and where the AP is getting "financial support" for those works, such as a grant). It is the IA that highlights just how extensive these charges could be.
Collectively this is all going to be very costly. First, putting together the safety case. IA para 241 explains that information must be held digitally and it is assumed that buildings that don't currently have plans will "carry out a two-dimensional Computer-Aided Design (CAD) plan and evacuation drawing, costing between £10,000-£19,000 per building." (this is the least costly option). In other circumstances the creation of the key dataset will be between £600 and £1200 per building (para 244). Keeping the building information up to date is estimated to cost £300-£500 per annum (para 242), and keeping the key dataset updated £200-£300 per annum (para 244). These costs fall within the building safety charge.

Secondly, the appointment of the Building Safety Manager (BSM). The appointment itself is estimated at around £3000. In relation to the tasks of the BSM the IA states (para 321) that if the BSM was to undertake all designated activities (reviewing supporting evidence, writing the safety case and reviewing and checking the safety cases) the cost per building is between £6,400-£10,000 per annum. It is estimated that a BSM can manage between 7-11 buildings, and that on average it will take 28 days of BSM time per building, per year.

Later in the IA the impact on leaseholders is explained. Para 312 states that the costs of compliance (presumably the items discussed above, plus registration and other duties) are estimated, using a range of 35-100 leaseholders per building, as averaging £100-£400 per leaseholder, noting that there will be considerable differences between buildings, depending on the complexity and the number of leaseholders.

There is, however, the big-ticket item of the cost of any new building safety measures required. As noted earlier, there is nothing protecting leaseholders from the costs of measures necessary to put things right where there has been a failure by others (whether the government due to the lack of clarity in the Approved Document B, and a poor building control regulatory system, or developers breaching building regulations). The IA notes that there will be costs of bringing existing buildings up to standard. Table 36 on page 64 contains some eye-watering estimates, with the maximum cost per leaseholder shown as being £78,000. It is also noted at para 314 that it is the government's intention that leaseholders should not face unaffordable costs and that they are exploring options to mitigate these. It has been suggested by some that the current wording of the Bill, in the new 170(3) to be inserted into the 1985 Act, indicates that the costs of remedying construction defects cannot be passed on. This is not what that clause says: it prevents only costs attributable to misconduct by the current AP. So, leaseholders therefore may have to bear the costs of remedying misconduct by others, such as the developer, the builder, or those producing the government's own advisory documents.

Mixed-use and complex buildings

Another area of difficulty is understanding how the Bill will apply to mixed-use buildings. In relation to the recovery of costs, it is said that the building safety charge is to be split "between all dwellings in the building in accordance" with any specific provisions in the lease, failing which, following the method used in the lease for other service charges "or" any methods agreed in writing with the tenant for apportioning building safety costs. There can be an appeal to the First Tier Tribunal if the approach adopted is not considered a "fair method". But what happens if the building contains other dwellings not let on "long leases" or other non-residential units? A higher risk building need only have 2 dwellings in it, and yet there appears to be no mention of how costs are apportioned to other users of the building. This is really important and yet very unclear on the current wording.

Elsewhere the Bill does make some provision for mixed-use buildings. To support the "whole building" approach cl 102 requires the AP to "cooperate" with a "responsible person" (as defined under Art 3 of the Regulatory Reform (Fires Safety) Order 2005) who, within the same building, also has responsibilities for fire safety. In practice, how these two regimes interact is likely to be extremely complex, yet there is little provision for it. Under the current regulatory system there has been a distinct lack of clarity about jurisdictional boundaries between the Fire Service and local authorities in relation to enforcement. Indeed, the complexity is acknowledged in the IA which notes that the government intends to consult on how the duties of cooperation will work (para 62).

Thoughts

This article has been a quick reflection on some of the key issues in the Bill, and obviously, there is much that is very good in the Bill. No-one can doubt the importance of making people safe in their homes. But there are potentially deeply problematic areas which hopefully will be clarified and addressed during the Parliamentary process. There must be very careful scrutiny of the Bill, and hopefully, the offer made by Clive Betts MP that the Housing, Communities and Local Government Committee will undertake this task will be taken up.

You can find this article and other useful articles on our Housing After Grenfell blog, here: https://www.law.ox.ac.uk/housing-after-grenfell/blog

Susan Bright

Sue teaches land law, contract law, regulation, and housing and human rights. She has been teaching at Oxford University since 1992, after a period as a solicitor in London and teaching at Essex University. She is also a Fellow of the Academy of Social Sciences, Fellow of the South African Research Chair in Property Law, and an academic member of the Chancery Bar Association, Property Bar Association and Property Litigation Association.

SAVA LAUNCHES NEW CERTIFICATE IN IDENTIFICATION OF INVASIVE NON-NATIVE PLANTS

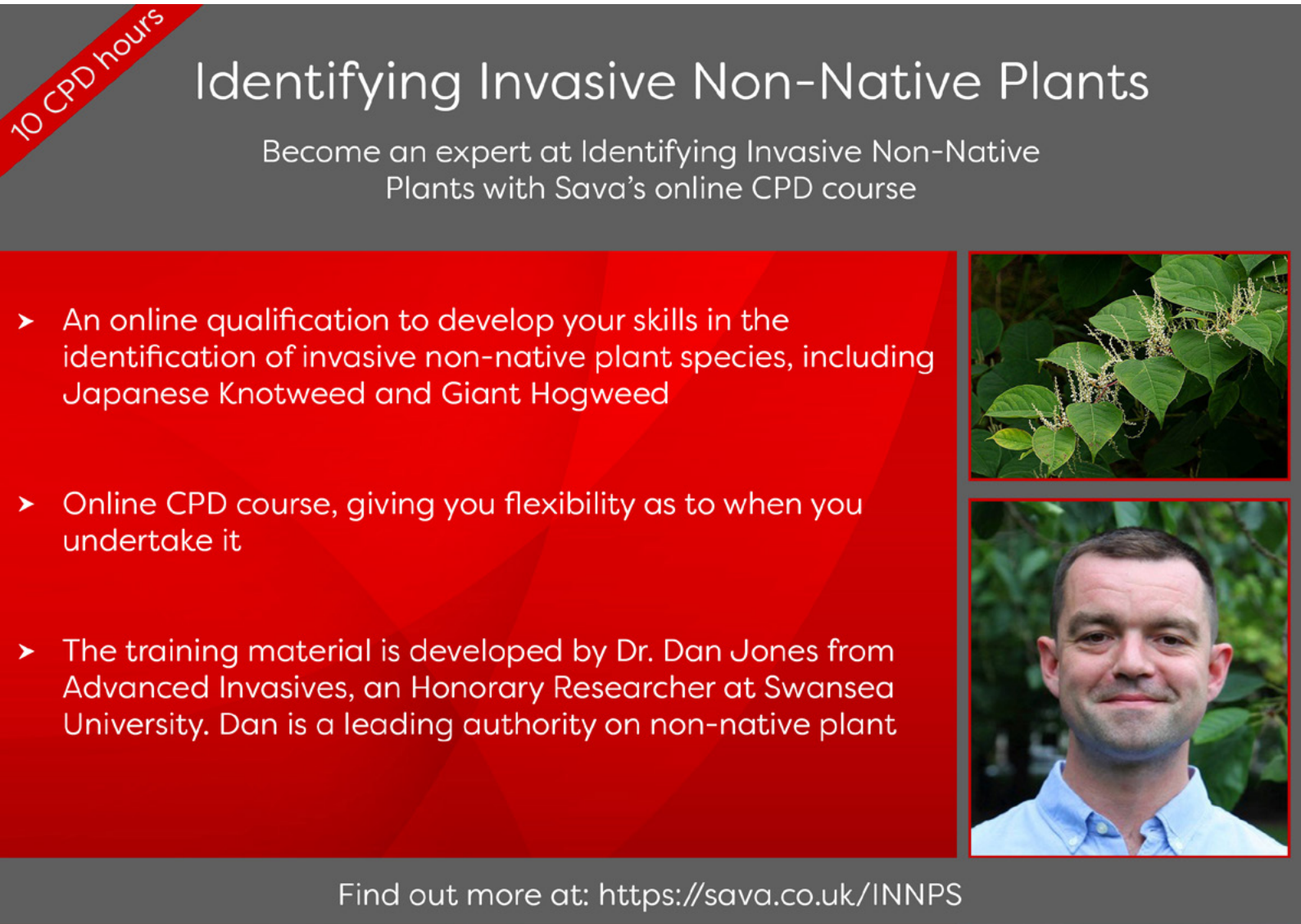
Sava has launched a new online training course designed to develop skills in identifying invasive non-native plant species, including Japanese Knotweed and Giant Hogweed.

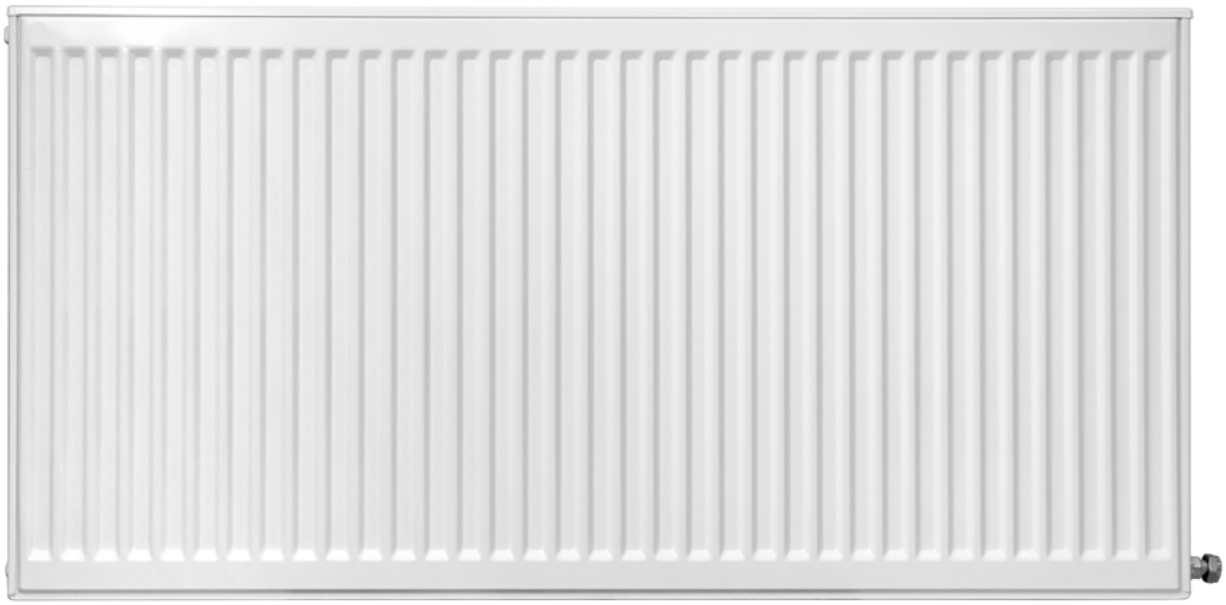
The course, which is suitable for anyone working in property or land management, is delivered through an online learning platform giving flexibility as to where and when the learning is undertaken.

Hilary Grayson, Director of Surveying Services says:
"We know that Japanese Knotweed can give residential surveyors and others a real headache. It can be difficult to spot and to identify out of the main growing season. But while it is probably the plant that most captures the public's imagination, there are other plants which all property and land professionals should be aware of."

The training content has been developed by **Dr Dan Jones from Advanced Invasives** and an Honorary Researcher at Swansea University. Dan is a leading authority on non-native plant species and Sava is delighted to have been able to partner with him on the development of this qualification.

You can find out more about the new course here https://sava.co.uk/INNPS





RADIATORS

WHAT YOU CAN CHECK FOR DURING A SURVEY

ANDY FLOOK, BUSINESS DEVELOPMENT DIRECTOR, SAVA

Radiators are the most common heat emitter in residential dwellings and they play an important role in heating our homes yet generally, radiators are not reported on in surveys. Older, unmaintained radiators can be inefficient, and this article explains the reasons why and simple checks you can make during a survey to provide clients with useful information with regards to the often-overlooked radiator.

How radiators work

Radiators in domestic dwellings are designed to heat the surrounding space through both radiation and convection. A radiator is generally heated through a primary heat source such as a central heating boiler or heat pump. The primary heat source creates heat (ordinarily by burning a fuel such as natural gas, oil, or LPG) which is then pumped around a heating circuit through each radiator.

A conventional radiator will have an inlet and outlet to enable hot water to run through the radiator and a closable air vent towards the top which allows the periodic release of any air that may have entered the system.

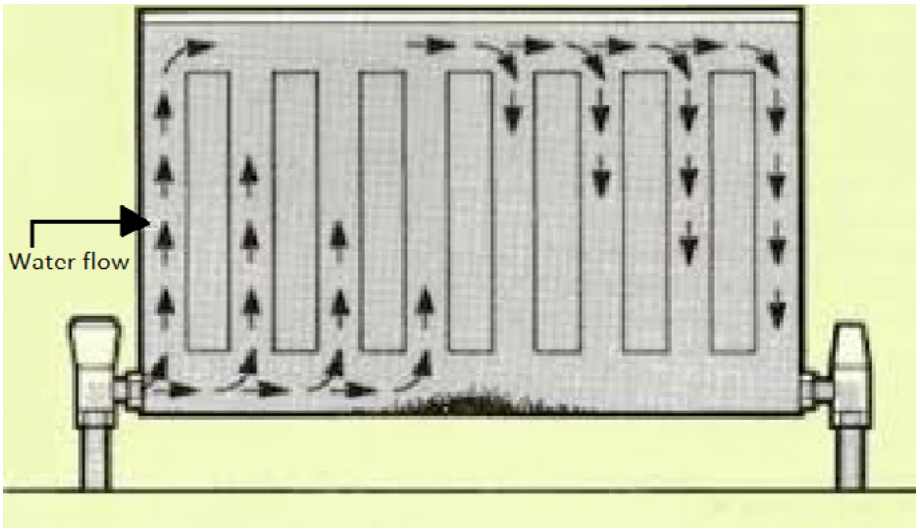


Figure 1 – direction of water flow through a radiator

Modern v old

Radiator technology has quietly gone about a complete revolution in recent years. Huge efficiency gains have been made in modern radiators due to improved manufacturing technology, enabling lower content waterways and improved convection fins to maximise emitted heat.

Whilst many individuals regularly upgrade the boiler in their home, it is far less common to install new radiators; this is probably down to cost, property disruption and even a lack of understanding of the benefits. However, the impact of new radiators should not be underestimated: a heating system could be achieving up to a 50% improvement in efficiency, just by installing new radiators.

Older radiators will have much less convection technology and they will require a higher water content in order to achieve the same output as a modern radiator meaning that a boiler is likely to have to work much harder and burn more fuel.

Years of use can also result in a build-up of sludge and scale deposits which cause inefficiency.

- Sludge can affect the functionality of the radiator as it can prevent water flowing freely and instead water will enter the inlet and almost immediately exit, not heating the radiator properly.
- Scale deposits absorb heat and thus diminish the level of heat being emitted into the room.

Figure 2 – old radiator

Modern radiators which hold low water content will be much more efficient, with the rear panel having much better heat retention and the front panel having higher heat emittance through a thinner and better-engineered fascia.

Figure 3 – modern radiator

What you can check

One of the challenges to inspecting a radiator is that it is difficult to determine much at all unless the heating system is fired-up, which may not be achievable as part of a survey. However, here are some simple checks you can carry out as part of a non-invasive survey:

1. Check for leaks

Run a dry kitchen towel around the valves on both sides of the radiator to check for any signs of existing leakage. If there is a scaly deposit (like the image below) it is a sign there has been previous leakage.

Figure 4 – example of scaly deposit on radiator valve

2. Check for signs of sludge

Feel around the radiator (whilst heated), and if you find that there are colder spots around the bottom half of the radiator, it is likely due to the presence of scale and/or sludge. Bear in mind that one blocked radiator can have a knock-on effect on the other radiators in the system. You can try to establish which radiator could be blocked by working your way from the boiler to the first radiator in the system and if this radiator is heating up fine, move on to the next one. If the first radiator is cold, it is likely that this radiator is preventing the others from heating up correctly so this should be fixed first.

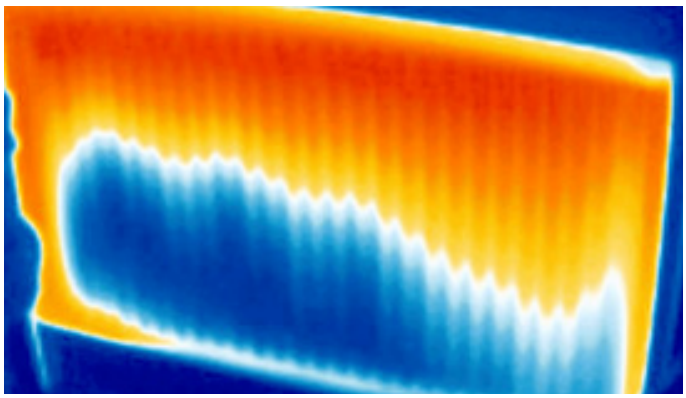


Figure 5 – thermal image showing sludge blocking a radiator

3. Check for trapped air
Feel around the radiator (whilst heated), and if you find cold spots across the top of the radiator it may be signs of trapped air which can be released by using an air vent key.

Trapped air in a radiator can be caused by several reasons, such as:

- A central heating pump installed above the supply tank
- An open tank in the loft used for immersion heaters
- A build-up of hydrogen in the heating system. This can be caused by rust or a build-up of sludge
- Small pinhole leaks in the system which often means regularly topping up boiler pressure.

Figure 6 – bleeding a radiator

Other things to consider

Size of radiators

When installing radiators, a calculation should be made as to what size is required to give the optimum heat output. If the radiators are too small, then the desired temperature will not be reached, and if the radiators are too big, then the system will "overshoot" the desired temperature which would not be economical. Many online calculators can help to establish the "BTU" (British thermal unit) requirement for a room.

Number of radiators in a room

Usually, one radiator is sufficient (if it is the appropriate size); however, for rooms 6 metres or longer, it may be worth considering distributing several radiators to minimise the thermal gradient (the ratio of the temperature difference and the distance between two points) within the room.

TRVs

Are there thermostatic radiator valves which enable better control over a radiator's heat output? TRVs are used to adjust the flow of water into the radiator, depending on the setting, and thus control the heat output of an individual radiator. It may be that TRVs have been used to overcome the incorrect sizing of radiators to manage overheating.

Position

Traditionally, radiators were placed underneath windows because it was colder there; however, this was not the most efficient place for them since a lot of heat would escape through the single-glazed window. These days, modern double glazing is much more efficient, and less heat will escape through the window.
Also, bear in mind that if a radiator is within 1 metre of a room thermostat, it may confuse the system into thinking the temperature is adequate although the rest of the room may not have reached an adequate temperature.

To conclude

These are just some simple checks and considerations that can be used by surveyors and other property professionals when providing information to a homeowner.

Hopefully, you find these pointers useful and if you are in a position where you can conduct these checks during a survey and give the client feedback, we see it as excellent service and good value for money for a customer.

Andy Flook

Andy heads up our market development and customer management team at Sava. Andy's career started as an apprentice engineer with British Gas, after which he set up his own nationwide engineering training company and certification body for the Energy and Utility industry before joining Sava in 2013.

CORPORATE GOVERNANCE -v- LEASEHOLD MANAGEMENT

THE RIGHTS OF BOTH A LEASEHOLDER AND A PROPERTY MANAGEMENT SHAREHOLDER

CASSANDRA ZANELLI, SOLICITOR AND SPECIALIST IN RESIDENTIAL LEASEHOLD

In this article we consider the recent case of *Houldsworth Village Management Co v Barton* which explored when a leaseholder is also a shareholder and the correct approach to requests made to lessee-owned property management companies under s.116 Companies Act 2006.

I often talk about the different "hats" individuals wear. This is because an individual can (and often does) have two roles: as lessee and as a member of a management company.

There are lots of examples of lessee owned and controlled companies; residents' management companies in tripartite leases, right to manage companies, and lessee owned freehold companies. These companies are like any other company; their "rules" are their memorandum and articles of association, and the provisions of the Companies Act 2006 apply to them.

Those hat-wearing individuals, therefore, have two sets of rights and obligations. One set under the lease in their capacity as lessee. And the second set in their capacity as member of the lessee-owned company.

In *Houldsworth Village Management Company Limited v Barton [2020] EWCA Civ 980*, the Court of Appeal were called upon to consider the distinction between an individual's rights as a lessee and member in the context of whether the individual's request to inspect the register of members for the company was for a proper purpose.

Together with Justin Bates (of Landmark Chambers) and Alice Richardson (of Trinity Chambers), I acted on behalf of the management company.

The requirement to keep a register of members

Section 113 of the Companies Act 2006 requires every company in England and Wales to keep a register of its members.

Whilst there is no prescribed form of register, there's certain information that must be contained within the register, including:

1. the names and addresses of the members of the company
2. the date on which they became a member
3. the date on which they ceased to be a member

And it is an offence committed by:

1. the company; and
2. every officer in default if the company does not comply with this requirement.

Inspection of the register

Section 114 of the Companies Act requires that a company's register of members must be kept available for inspection.

Section 116 builds on this and requires the register of members to be open and available to inspection by its members without charge. To inspect the register of members, a member must make a request to the company. Section 116 sets out the information that must be contained in that request. This information includes, amongst other things, the purpose for which the information is to be used.

Where a company receives a request to inspect the register, it must **within 5 working days,** either:

1. comply with the request; or
2. apply to the Court

Essentially, an application is made to the Court by the company to withhold the register if the purpose for which the inspection is sought is not a proper purpose.

The Court, in those circumstances, has the power to direct that the company should not comply with the request. The Court will make this order if it is satisfied that the purpose is not a proper purpose.

What happened in Houldsworth?

Victoria Mill is a building in Stockport with 180 residential flats. The flats are let on long leases which are tripartite agreements between the landlord, the leaseholders and the lessee-owned management company, Houldsworth Village Management Company Limited. The management company is therefore a residents' management company.

Under the occupational leases for Victoria Mill, the management company is required to discharge a raft of management functions relating to the block. This includes the usual provision of services, repairs, maintenance etc. As is common practice, it appointed a managing agent to assist in discharging those functions on its behalf. The leases required each lessee to pay service charges to the management company.

Each lessee was also a member of the management company. And the company's board of directors were all members of the company (and by extension all lessees too).

The individual in question, Barton, made a request under section 116 to inspect the register of members. The purpose behind the request was so that he could seek to persuade the other members to:

1. support the removal of the current directors; and
2. support the removal of the managing agents

The management company took the view that the request made by Barton was not for a proper purpose. This was because the request related to the removal of managing agents. The instruction (and removal) of managing agents relates to matters of leasehold management, not corporate governance. Asking for the register for those reasons was an attempt on Barton's part to further his rights as a lessee and not a proper exercise of his company law rights.

Accordingly, the management company applied to the High Court for an order that they did not have to comply with the section 116 request made. The High Court rejected the arguments put forward by the management company. Accordingly, the management company appealed to the Court of Appeal.

The Court of Appeal's judgment was handed down on 29 August 2020.

Decision of the Court of Appeal

The Court of Appeal dismissed the appeal. It was recognised by the Court of Appeal that there is a distinction to be drawn between rights as a member and rights as a lessee. However, in the context of a lessee owned and controlled company (which exists to provide services under the occupational leases), it's difficult to draw a dividing line between those matters of leasehold management (i.e. the discharge of functions under leases) and the governance of the company.

Accordingly, the Court of Appeal decided that seeking inspection of the register of members for the purpose of garnering support to remove the managing agent **was** a proper purpose for the purposes of section 116 of the Companies Act.

Commentary

Although this case deals with section 116 in the context of residents' management companies, it applies to every company in England and Wales.

In the context of lessee owned and controlled companies, it's a significant decision, with the Court deciding that the purpose behind a request under section 116 does not necessarily have to relate to an individual's interests as a member of the company.

Cassandra Zanelli

Cassandra is widely recognised for her expertise in the industry and listed among the 100 most influential people in residential leasehold management. Passionate about education and sharing knowledge, she is a regular speaker at conferences, events, and seminars, having worked with leading organisations in the property management industry.

Sava

MAKING BUILDINGS BETTER

TECHNICAL BULLETIN FOR RESIDENTIAL SURVEYORS