

Leasehold Reform (Energy Efficiency) Bill: energy efficient flats

A Bill to make energy upgrades easier in blocks of flats

Legal Advisers: Mark Routley, Partner, TLT Solicitors, and Susan Bright, Professor of Land Law, Oxford University

Introduction

This paper proposes the adoption of the Leasehold Reform (Energy Efficiency) Bill, which will make it easier for freeholders and leaseholders to install energy efficiency measures in both individual flats and whole blocks.

These proposals will impact on homes in England and Wales. Scottish property law is very different and the Scottish Government has already taken steps to address this issue¹.

This paper explains:

- Why we need to change the law in this area
- How our Bill will affect freeholders and leaseholders in blocks of flats
- The text of the Leasehold Reform (Energy Efficiency) Bill

Context

Twenty-one per cent of English homes are flats. Flats are being refurbished with insulation and double glazing at a far slower rate than houses. Considering homes built before 1980²:

	Pre-1980 houses	Pre-1980 flats
No loft insulation (percentage of top-floor flats only)	4.3%	17.9%
No double glazing (all flats)	4.3%	14.5%
Uninsulated cavity walls (cavity walled homes only)	33.8%	50.1%

One in every 8 top floor flat (of all ages) has no loft insulation at all. The oldest flats - notably those in converted houses - are the least energy efficient homes in the housing stock, posing a significant health risk to residents: 26% of flats in converted flats have a serious health and safety hazard, with "serious excess cold risk" (at 11%) being more than twice as prevalent as in the rest of the stock.

This is a problem that will need to be overcome if the Government is to achieve its energy-saving and fuel poverty targets: 23% of the remaining uninsulated cavity wall homes are flats and 26% of the remaining totally uninsulated lofts.³

¹ See Section 2 below

² We focus on pre-1980 construction houses and flats because after this date insulation and double glazing began to be standard features of homes at the point they were constructed.

³ Analysis of English Housing Survey Department for Communities and Local Government. (2015). *English Housing Survey, 2013: Housing Stock Data*. [data collection]. UK Data Service. SN: 7802, <http://dx.doi.org/10.5255/UKDA-SN-7802-1>.

Making energy improvements in blocks of flats

A significant contributor to the low rate of refurbishment in flats is the fact that a large number of different parties can have a title to - or responsibility for - any given block: landlords, leaseholders, short-term tenants, mortgagees and management companies. The current system makes it very difficult for these parties to reach agreement practically and lawfully for energy improvement works to proceed, even where all the parties would like to go ahead.

These problems – which are explained in more detail below – hinder installations of insulation and heating upgrades to communal parts of blocks of flats. They can also prevent the installation of condensing boilers (where holes need to be knocked into walls) and efforts to bring electrically heated blocks of flats on to the gas grid and to retrofit district heating to flat blocks (many flats are heated with very expensive old electric heating systems – this is particularly expensive for households in flats which are also poorly insulated).

Our proposed solutions

In September 2015, leading lawyers, academics, local authorities and energy efficiency practitioners came together to develop possible solutions in this area. We have since discussed these with DECC and DCLG civil servants, who raised no objection in principle to our proposals.

This paper focuses on two solutions that we propose can be effectively taken forward through the mechanism of a Private Member's Bill:

Solution 1: Freeholders' right to recover the cost of qualifying energy efficiency improvements to residential leasehold premises

Currently, leases limit what works freeholders can do to the building – and the charges they can incur – on behalf of leaseholders. The majority of leases do not permit freeholders to recover the cost of improvements. As the installation of energy efficiency measures, e.g. insulation, will generally involve improvement, the freeholder will not carry out such work.

Section 2 of our Bill would overcome this problem by allowing the freeholder of a building (who is already allowed under the terms of the existing lease to recover the costs of repair and maintenance) to undertake and recover the costs of 'qualifying energy efficiency improvements' from the leaseholder.

We are suggesting that these qualifying improvements should include:

- Basic energy efficiency measures:- cavity wall insulation; loft insulation.
- Any improvements required to bring flats in the block out of the lowest (F and G) energy efficiency ratings or to alleviate a Category 1 ['excess cold'] hazard;
- Any measures that meet a cost-effectiveness threshold and/or can be funded through grants.

There may of course be good reasons for a block of flats not to install certain 'qualifying improvements' – high costs, aesthetic concerns, disruption or where leases are about to expire. In these cases, the Landlord and Tenant Act 1985 already includes various forms of protection for leaseholders that provide that the costs must have been reasonably incurred and the freeholder must undertake a consultation exercise with the leaseholders.

Our Bill is a close parallel to the legislation that was successfully introduced in Scotland in 2009⁴.

⁴ Under which "repair and maintenance" in the 2004 Tenements Scotland Act was redefined as also referring to the installation of insulation.

Solution 2: legislating to make it easier for individual leaseholders to carry out improvement works inside their flats.

Currently, leases limit what changes leaseholders can make to the building, even within their own flats.

Section 3 of our Bill would overcome this problem by allowing leaseholders to install improvements in their own flat unless the freeholder can demonstrate that to do so will harm the building, its value, or impact negatively on other leaseholders⁵.

It would apply to cases where a covenant in a long lease prohibits a leaseholder from making alterations, additions or improvements, either absolutely or without the consent of the landlord. Section 3 would restrict such covenants, such that, where the work is an energy efficiency measure, the landlord cannot unreasonably withhold or delay his consent.

This builds on the principle established in the 2011 Energy Act that landlords and freeholders should not unreasonably withhold consent for energy efficiency improvements. It would extend the principle to apply to all leasehold properties, not just – as is currently the case – to properties let under an assured shorthold tenancy. It would remove blanket prohibitions on alterations in leases that can make it impossible for freeholders to give consent for energy efficiency works.

This proposal would also remove a barrier to the achievement of the minimum energy efficiency standard (of Energy Performance Certificate Band E) that will be required for privately rented properties from April 2018.⁶ Currently a blanket prohibition on alterations in a lease would represent reasonable grounds for the landlord not to undertake the necessary works.

For more information: jenny@ukace.org

⁵ The second proposal has no Scottish equivalent because other owners of the building cannot restrict the improvements that a Scottish flat owner wishes to make within their own flat.

⁶ Pursuant to the Energy Act 2011

APPENDIX 1:

Text of LEASEHOLD REFORM (ENERGY EFFICIENCY) BILL

1 Definitions

- (a) The following definitions apply to the sections of this Act set out below.
- (b) "Long Lease" means any long tenancy, whether made before or after the commencement of this Act, of a dwelling-house within the meaning of Section 2(4) of Part 1 of the Landlord and Tenant Act 1954
- (c) "Building" means a building comprising one or more dwellinghouses.
- (d) "Dwelling-house" means a dwelling-house within the meaning of Section 45(1) of the Landlord and Tenant Act 1988
- (e) "Qualifying improvement" means any one or more of the following:
 - (i) Basic energy efficiency measures.
 - (ii) Any improvements required to improve the Energy Performance Certificate rating for dwellinghouses in the Building from band F or G or any improvement to windows, heating systems or insulation that will alleviate a Category 1 hazard (within the meaning the Housing Act 2004).
 - (iii) Any measures that either meet the cost-effectiveness threshold or can be funded through grants.
- (f) "Basic energy efficiency measures" means cavity wall insulation and/or loft insulation.
- (g) "Energy Performance Certificate" means an energy performance certificate within the meaning of the Energy Performance of Buildings (England and Wales) Regulations 2012.
- (h) "Cost-effectiveness threshold" shall have the meaning ascribed to it by the Secretary of State for Communities and Local Government in regulations.
- (i) "Landlord" includes any superior landlord or management company.
- (j) "Energy efficiency improvement(s)" has the meaning given within Section 2 of the Energy Act 2011 and may include but is not limited to:
 - (i) Installation or replacement of insulation of any type;
 - (ii) Replacement of windows or any element of a window unit or installation of secondary glazing;
 - (iii) Installation of replacement heating or cooling units, components or systems;
 - (iv) Installation of systems to enable control or management of energy use in the home.

2 Right to recover the cost of qualifying improvements to residential leasehold premises

- (a) This section applies in any case where a long lease contains a covenant on the part of the landlord to maintain and/or repair the building.
- (b) In any such long lease, any provision which entitles the landlord to recover the cost of maintaining and/or repairing the building shall, notwithstanding any express provision to the contrary, be deemed to include the cost of undertaking qualifying improvements to the building provided that nothing in this subsection will create any separate obligation on the part of the Landlord to undertake qualifying improvements.

3 Qualified duty to consent to energy efficiency improvements to residential leasehold premises

- (a) This section applies in any case where the long lease is subject to a covenant on the part of the tenant with a prohibition not to make any alterations, additions or improvements to the premises comprised in the lease and either:
 - (i) the prohibition is unqualified; or
 - (ii) the covenant is subject to a qualification the alteration and/or addition is subject to the consent of the landlord.
- (b) References to the person who may consent to such a transaction are to the person who under the covenant may consent to the tenant undertaking the alteration, addition or improvement.
- (c) In all leases containing such a covenant, such covenant shall, notwithstanding any express provision to the contrary, be deemed to be subject to a qualification that, where the proposed alteration, addition or improvement is an energy efficiency improvement, it is permitted subject to the prior written consent of the landlord and such consent is not to be unreasonably withheld or delayed but this proviso does not preclude the landlord from requiring payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such consent.
- (d) Where there is served on the landlord a written application by the tenant for consent to carrying out the energy efficiency improvements, he owes a duty to the tenant within a reasonable time--
 - (i) to give consent, except in a case where it is reasonable not to give consent,
 - (ii) to serve on the tenant written notice of his decision whether or not to give consent specifying in addition--
 - (a) if the consent is given subject to conditions, the conditions,
 - (b) if the consent is withheld, the reasons for withholding it.
- (e) Giving consent subject to any condition that is not a reasonable condition does not satisfy the duty under this section.
- (f) It will not be reasonable to refuse consent if the energy efficiency improvement does not cause any structural or other harm to the building or substantially interfere with the rights of others in the building or parts thereof
- (g) It is for the person who owed any duty under this section--
 - (i) if he gave consent and the question arises whether he gave it within a reasonable time, show that he did,

- (ii) if he gave consent subject to any condition and the question arises whether the condition was a reasonable condition, to show that it was,
- (iii) if he did not give consent and the question arises whether it was reasonable for him not to do so, to show that it was reasonable,

and, if the question arises whether he served notice under that section within a reasonable time, to show that he did.