RE: PART 3, TENANTS' ASSOCIATION (PROVISIONS RELATING TO RECOGNITION AND PROVISION OF INFORMATION) REGULATIONS 2018

OPINION

Introduction

1. We are asked to advise the All-Party Parliamentary Group on Leasehold Reform on Part 3 of the Tenants' Association (Provisions Relating to Recognition and Provision of Information) (England) Regulations 2018 ("the Regulations"), which came into force on 1 November 2018.

2. Part 3 of the Regulations was introduced to make it easier for leaseholders to join a Recognised Tenants' Associations ("RTA") by providing a mechanism by which the secretary of an RTA could contact the landlord and request the names of qualifying tenants, so that they could be invited to become members.

3. Unfortunately, the Regulations provide that the landlord can only provide the contact details of qualifying tenants upon receipt of written consent from them. We are critical of this position. We consider that it will likely mean that Part 3 serves little practical purpose and will become simply another right which exists on paper but is rarely, if ever enforced. It appears that this approach was taken in response to concerns about data protection issues but, as we show, such concerns are overstated. Accordingly, we recommend that Part 3 be revisited and reformed so that it becomes a useful tool for RTAs.

Recognised Tenants' Associations

4. Before turning to the new Regulations, it is worth reminding ourselves of the nature and purpose of an RTA and how one establishes an RTA.

What is an RTA?

5. In general terms, an RTA is a group of qualifying tenants (usually long leaseholders) who own properties and are required to pay service charges to the same landlord (the freeholder) under the terms of a similar lease.

6. The statutory definition of an RTA is provided in section 29(1), Landlord and Tenant Act 1985:

> "(1) A recognised tenants' association is an association of qualifying tenants (whether with or without other tenants) which is

recognised for the purposes of the provisions of this Act relating to service charges either—

(a) by notice in writing given by the landlord to the secretary of the association, or

(b) by a certificate—

in relation to dwellings in England, of the First-tier Tribunal; and in relation to dwellings in Wales, of a member of the local rent assessment committee panel."

7. "Qualifying tenants" are defined in section 29(4):

"…for the purposes of this section a number of tenants are qualifying tenants if each of them may be required under the terms of his lease to contribute to the same costs by the payment of a service charge."

8. "Service charges" are defined in section 18:

"…an amount payable by a tenant of a dwelling as part of or in addition to the rent—

(a) which is payable, directly, or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's cost of management, and

(b) the whole or part of which varies or may vary according to the relevant costs."

What powers does an RTA have?

9. RTAs allow the tenants to protect their interests by allowing them to take a collective approach to enforcing their rights and scrutinising the actions of the landlord and management companies. Further, RTAs are granted additional legal powers beyond those available to leaseholders generally. This puts them in a better position to represent the tenants and hold the landlord accountable.

10. These powers include:

(a) the right to appoint a surveyor to advise on any matter relating to, or which may give rise to, service charges payable to the landlord by one or more members of the RTA (s.84 and sch.4, Housing Act 1996); and,

(b) the right to be consulted on matters relating to the appointment or employment of a managing agent for any relevant premises (s.30B, Landlord and Tenant Act 1985).

How does one form an RTA?

11. Section 29(1), Landlord and Tenant Act 1985, provides that there are two ways becoming an RTA. The first is for the landlord to accept that the association should be recognised. This is done by the landlord serving written confirmation. Such written recognition shall continue to be valid indefinitely, until and unless the landlord withdraws their recognition by giving six months' notice.

12. The second method is to submit an application to the First-tier Tribunal (Property Chamber) ("FTT") and obtaining a certificate.

13. An application is made to the FTT by using form TA1. The FTT will issue a certificate of recognition if it is satisfied, *inter alia*, that the members of the proposed RTA are paying a variable service charge to the landlord and membership is not made of less than 50% of qualifying leaseholders.[1]

14. Where an application is successful, the FTT will grant a certificate for a fixed period (usually for four years), after which an application can be made for its renewal. The tribunal may also cancel a certificate pursuant to Reg 5 of the Regulations.

Part 3 of the Regulations

15. Facilitating contact between leaseholders is not always easy, particularly in larger developments or in those buildings where there are considerable numbers of "buy-to-let" leaseholders.

How did we get to Part 3?

16. Section 29A, Landlord and Tenant Act 1985, was inserted by s.130, Housing and Planning Act 2016. It is s.130 which provides the basis for the regulations that we are considering.

17. What would become s.130 was initially introduced as Amendment 84G, by Lord Young, when the Housing and Planning Bill was being considered by the House of Lords. Lord Young sought to:[2]

> "…. give leaseholders the right to obtain from their landlord contact information for other leaseholders in a shared block, for the purposes of obtaining statutory recognition of a tenants' association…".

[1] A liberalisation from the previous "rule of thumb" whereby 60% was required. See generally *Rosslyn Mansions Tenants' Association v Winstonworth Limited* [2015] UKUT 11 (LC)

[2] Hansard, House of Lords, 17 March 2016, Vol.769, Col.1969.

18. His reasoning for the amendment was that:

> "… it is apparent that leaseholders are finding it increasingly difficult to obtain the numbers needed to seek recognition, particularly where they require contact information about absent leaseholders. This will not surprise my noble friends, given the well-documented increase in absent leaseholders and the growth of subletting. Putting a note through a letterbox, for example, is not a satisfactory way of achieving contact because there are no guarantees that the subtenant will pass the note on to the landlord. There is also no obligation on the landlord to pass on information. This means that a number of qualifying tenants are not given the opportunity to take part in the formation of an association, which is frustrating and potentially weakens the ability of leaseholders to exercise their statutory right."

19. His amendment was not pursued, but Lord Young returned to it later in the passage of the Bill. Amendment 99ZA was adopted and became s.130. Lord Young described it this way:[3]

> "…The amendment… require[es] a landlord to supply to the secretary of a tenants' association information which would allow contact to be made with absent leaseholders for the purpose of increasing the association's membership and thereby its chances of obtaining recognition..."

20. The final wording was therefore:

> "Tenants' associations: power to request information about tenants
>
> (1)The Secretary of State may by regulations impose duties on a landlord to provide the secretary of a relevant tenants' association with information about relevant qualifying tenants.
>
> (2)The regulations may—
>
> (a) make provision about the tenants about whom information must be provided and what information must be provided;
>
> (b) require a landlord to seek the consent of a tenant to the provision of information about that tenant;
>
> (c) require a landlord to identify how many tenants have not consented.
>
> (3) The regulations may—

[3] Hansard, House of Lords, 20 April 2016, Vol.771, Col.639.

(a) authorise a landlord to charge costs specified in or determined in accordance with the regulations;
(b) impose time limits on a landlord for the taking of any steps under the regulations;
(c) make provision about the form or content of any notices under the regulations (including provision permitting or requiring a person to design the form of a notice);
(d) make other provision as to the procedure in connection with anything authorised or required by the regulations.

(4) The regulations may confer power on a court or tribunal to make an order remedying a failure by a landlord to comply with the regulations.
(5) The regulations may include supplementary, incidental, transitional or saving provision.
(6) Regulations under this section are to be made by statutory instrument.
(7) A statutory instrument containing regulations under this section is subject to annulment in pursuance of a resolution of either House of Parliament.
(8)In this section—

"relevant tenants' association", in relation to a landlord, means an association of tenants of the landlord at least one of whom is a qualifying tenant of a dwelling in England;
"relevant qualifying tenant" means—
(a) a person who is a qualifying tenant of a dwelling in England and a member of the relevant tenants' association, or
(b) a person who is a qualifying tenant of a dwelling in England by virtue of being required to contribute to the same costs as a qualifying tenant who is a member of the relevant tenants' association;
"qualifying tenant" means a tenant who, under the terms of the lease, is required to contribute to the same costs as another tenant by the payment of a service charge."

21. Thus, the detail and content of the new power was all to be dealt with in secondary legislation. That brings us to Part 3, Tenants' Association (Provisions Relating to Recognition and Provision of Information) (England) Regulations 2018.

What does Part 3 do?

22. Reg 7 of the Regulations provides that the secretary may serve a request notice on the landlord to request "known information" about relevant qualifying tenants who are not members of the association.

23. Reg 7(4) provides that the request notice must be accompanied by a signed statement from the secretary declaring that information being requested would only be used to ask the qualifying tenant whether they wished to become a member of the tenants' association.

24. "Known information" is defined in Reg 7(6) and means any of the following information that is in possession of the landlord or landlord's managing agent: the tenant's name, the address of the dwelling for which the tenant pays service charge, any address to which service charge demands are sent, and the tenant's email address.

25. Upon receipt of a valid request notice, Reg 9 provides that the landlord must, "as soon as practicable" after the request notice is received, give an information form to each relevant qualifying tenant in relation to whom known information is requested. An information form is defined at Reg 9(2) as follows:

> "(2) An "information form" is a written document which—
> (a) informs T that a relevant tenants' association has requested that the landlord provide known information relating to T;
> (b) sets out what known information has been requested in relation to T;
> (c) identifies the relevant tenants' association that has made the request;
> (d) includes (i) the postal address of the relevant tenants' association; and
> (ii) an email address for the relevant tenants' association, if it has one;
> (e) asks T for written consent to disclose the known information to the relevant tenants' association;
> (f) informs T that the known information will not be disclosed without that consent;
> (g) informs T that the relevant tenant's association has stated in its request that the known information will be used only to ask T if T wishes to become a member of the relevant tenants' association;
> (h) informs T that any queries relating to the relevant tenants' association should be directed to the relevant tenants' association;
> (i) asks T to reply within 28 days beginning with the date of receipt of the information form—
>
> > (i) confirming that T consents to all of the known information being disclosed to the relevant tenants' association;

(ii) confirming that T consents to some of the known information being disclosed to the relevant tenants' association, and stating the known information that may be disclosed; or

(iii) confirming that T does not consent to any of the known information being disclosed to the relevant tenants' association;

(j) gives a postal address and, if the landlord has one, an email address, which can be used to reply to the landlord; and

(k) is signed and dated by the landlord."

26. Reg 10 states that the landlord must provide a substantive response to any valid requests within 4 months beginning with the date on which the notice was received. A substantive response is defined as follows:

"(2) A "substantive response" is a written document which—

(a) states—

(i) all known information requested in the request notice which the landlord has consent to disclose; or

(ii) that there is no such known information;

(b) states the number of relevant qualifying tenants to whom the landlord sent an information form in connection with the request notice;

(c) states the number of relevant qualifying tenants in relation to whom known information was requested who did not give written consent for known information to be disclosed by the landlord; and

(d) is signed and dated by the landlord."

27. Reg 10(4) provides that, where the landlord receives consent from a qualifying tenant after the 4 month period, their known information must be disclosed as soon as reasonably practicable after the consent is received.

Criticisms of Part 3

28. Our primary criticism concerns the convoluted process whereby the RTA must make a request to the landlord who, in turn, must make a request of the leaseholder (and, it seems, only one request – there does not appear to be any requirement to send "chaser" messages or to respond to any questions that the leaseholder might ask) before eventually passing on any information to the RTA.

29. The government has recognised for several years that forming RTAs is a desirable objective and appreciated the difficulties faced by secretaries when attempting to make initial contact with qualifying tenants. However, requiring the landlord to seek written consent from potential members before

passing on their information has the effect of creating a piece of legislation which will make very little practical impact on the current state of affairs.

30. A qualifying tenant cannot be compelled to respond and may simply choose to ignore the landlord's information form, especially if the tenant does not live at their property or lives abroad and therefore has little interest in the association and their powers. Moreover, there is no requirement for the landlord to draw attention to the information form or to explain the benefits of being a member of an RTA.[4] In practice, we would expect recalcitrant landlords just to include the form as another document in a wider bundle of documents being sent to the leaseholder (*e.g.* service charge demand, accounts, direct debit mandate, s.20 consultation notice) and rely on apathy and confusion to ensure that no meaningful reply is received.

31. If this power is to be efficacious then there should not be any requirement for the landlord to obtain written consent of the leaseholders before providing these contact details. The landlord should just be required to provide them to the Secretary of the RTA within a short period of time.[5]

Policy and legislative intent

32. The policy and legislative history, as set out above, makes clear that Parliament and the Government regards the formation of an RTA as a desirable objective. Indeed, it allows a collective approach to be taken by tenants and provides leaseholders with statutory powers to protect their rights and hold a landlord accountable. The key point of introducing new legislation was to make it easier for secretaries of an association to contact non-members. Having a filter stage which requires written consent fails to achieve that objective.

Misunderstanding of Data Protection position

33. It is clear that data protection was a key concern in the mind of the government when they decided to require express consent from tenants. In both the July 2017[6] consultation and October 2018[7] consultations which preceded

[4] *Cf* s.21B, Landlord and Tenant Act 1985 and the prescribed information about tenant rights which a landlord must provide with each service charge demand.

[5] As would have been the case had the original amendment proposed by Lord Young been adopted.

[6] *Consultation on recognising residents' associations, and their power to request information about tenants*, available here: https://www.gov.uk/government/consultations/recognising-residents-associations-and-their-power-to-request-information-about-tenants.

[7] *Summary of consultation response and Government Response*, available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746926/Recognising_residents_associations_-_consultation_response.pdf.pdf

these reforms, the government referred to the Data Protection Act 2018 ("DPA 2018") and the EU General Data Protection Regulation ("GDPR") and concluded that express consent must be sought from tenants before disclosing their information to the secretary of an association.

34. We disagree. Consent is not always required before disclosing this sort of information.

Consent not needed

35. Assuming in favour of the government that the name and correspondence detail of a tenant is "personal data" for the purposes of the DPA 2018 and the GDPR then the "processing" of that data needs to be in accordance with s.2(1)(a), DPA 2018. This provides that personal data can be processed on the basis of the "data subject's consent *or another specified basis*" (emphasis added). Similarly, Art.6(1) of the GDPR provides that personal data can be lawfully processed if one of the following applies – consent, contract, legal obligation, vital interests, public interest, and legitimate interest (Schedule 9 of the 2018 Act provides a similar provision).

36. What, then, is the "other specified basis" or other lawful basis? In our view, the permitted basis could be the wider public benefit identified in primary legislation.

37. We cannot improve on the position taken by the Information Commissioner when commenting on this legislation in its response to the government[8]:

> "Under data protection legislation, consent is just one basis for processing personal data. In this instance the ICO does not consider that consent is necessarily required, as explained further below.
> […]
> It is a common misconception that, in order to share personal data, consent is always required for data protection purposes. This is inaccurate; consent is just one of the potential conditions for sharing personal data under the DPA and this will remain the case under the GDPR regime post-May 2018. There are a number of other conditions that can often be satisfied, for example, Schedule 2(3) of the DPA which provides a condition where the

[8] https://ico.org.uk/media/about-the-ico/consultation-responses/2017/2014927/ico-response-dclg-consultation-residents-associations-powers-20170926.pdf

processing is necessary for compliance with any legal obligation to which the controller is subject.

[…]

The consultation paper advises that the Housing and Planning Act 2016 inserts a new section at 29A of the Landlord and Tenant Act 1985… It is our understanding that the reasoning behind the amendment was to assist tenants' associations in their efforts to establish recognised status. If the regulation obliged landlords to provide the information it would satisfy Schedule 2(3)[9] of the DPA and provide landlords with a lawful basis for processing the tenant's information in this way. If the landlord were to provide any sensitive personal data, as per the definition in section 2 of the DPA, then a Schedule 3 condition would also need to be satisfied. However, we have presumed in this instance that sensitive personal data is not required for the purposes intended by the tenants' association."

38. Thus, we agree with the ICO's position that it was open to the government to introduce legislation obliging landlords to provide the information to the secretary of the tenants' association without first obtaining consent.

Alternative basis: legitimate interest

39. Under paragraph 6 of schedule 9 to the DPA 2018, landlords may disclose information where the processing is necessary for the purposes of legitimate interests pursued by the controller, or the third party or parties to whom the data is disclosed. When considering the legitimate interest ground, there are three elements that must be considered: (a) identify a legitimate interest, (b) show that the processing is necessary to achieve it, and (c) balance it against the individual's interests, rights and freedoms.[10]

40. Creating an RTA is a legitimate interest. Legitimate interests can be the interests of the landlord or third parties (*i.e.* the other tenants). Legitimate interest can include commercial interests, individual interests or broader societal benefits.

41. Processing must be necessary. It is necessary in the present case because the tenants cannot achieve the same result through alternative means. Although service addresses can be obtained by obtaining Land Registry titles, it would lead to potentially significant costs (*i.e.* in large developments). It would be unfair to

[9] Schedule 2(3) of the DPA 1998 is now Schedule 9(3) of the DPA 2018.
[10] Article 6(1)(f) of the GDPR provides a similar provision.

require the secretary to incur such costs to achieve the commendable aim of forming an RTA.

42. As for balance competing interests, we consider no hardship would be caused and disclosure would in fact be beneficial to the data subject as it is disclosed for the very limited purpose of forming an RTA.

Fairness

43. Regardless of which basis is used, disclosure must be "fair". Section 2 of the DPA 2018 (and Article 5 of the GDPR) state that information must be processed lawfully and fairly (and transparently). For the avoidance of doubt, we consider that disclosure without consent would be fair.

44. We have various reasons for this view.

(a) First, it would address the concerns raised by the government and Parliament for many years regarding the difficulties faced by leaseholders who wish to form an RTA.

(b) Secondly, the information is not disclosed openly to the general public or to all members of an association; it is only disclosed to the secretary of an RTA. The secretary of an RTA must provide a signed statement declaring that they would only use the information for the purpose of inviting the tenant to become a member of the tenants' association.

(c) Thirdly, the secretary holds a position of responsibility and they, or the association, are also data controllers or processers. Any abuse or misuse of such information would therefore have serious consequences. Fourthly, the purpose of disclosing the data is to enable associations to form RTAs, which is clearly a desirable objective. It would therefore benefit the data subject as well as other leaseholders. This wider benefit must be balanced against the very small risk that information may be misused. Finally, the names and service address of tenants are publicly available as Land Registry titles can be purchased by any member of the public.

45. But what about abuses? The ICO considers a scenario where an RTA is used to enable a violent spouse to trace the contact details of his former (victim) spouse. The wider benefits of allowing disclosure heavily outweighs the minute possibility that the violent secretary of an association would use his position to locate his ex-wife. As discussed above, the secretary is also in a position of responsibility and would have provided a signed statement not to use the information for any other purpose. Secondly, the solution suggested

by the ICO was not to require express consent from every tenant before disclosing known information. The suggestion made was to provide tenants with an opportunity to object before sharing their information. The ICO go on to state that "we would recommend that any reference to consent within the regulation is avoided".

46. In all the circumstances, it would therefore be fair to disclose the correspondence information of non-member leaseholders to the secretary of a tenants' association.

Conclusion

47. In conclusion, the overly cautious approach taken to the data protection legislation is unnecessary and unjustified and is not supported by the Information Commissioner. As a result of requiring express consent, Part 3 has the effect of achieving none of the objectives that it had set out to address.

Other disclosure scenarios

48. Having already explained that the "consent filter" is inconsistent with the legislative and policy intent and that it is not required under Data Protection law, we also (and finally) consider it to be wrong because it fails to recognise the myriad of ways in which this information is already available or is processed and transmitted to third parties without any consent being given.

(a) the name of the leaseholders and an address for service is usually available on the Land Registry;

(b) if a tenant issues a case against the landlord at the property tribunal, the landlord is under an obligation to provide details of any interested persons, as defined in The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules"), pursuant to Paragraph 30 of the Rules. Paragraph 30(4) provides that, in certain cases, the respondent's response must state "the name and address of every person who appears to the respondent to be an interested person, with reason for that person's interest". For example, in cases concerning a service charge dispute against the landlord, this would include other leaseholders in respect of the same development;

(c) similarly, contact details of leaseholders may be provided to facilitate collective enfranchisement under s.11, Leasehold, Reform Housing and Urban Development Act 1993;

(d) s.82, Commonhold and Leasehold Reform Act 2002 provides the right to obtain information in the context of the right to manage;

(e) on a transfer of the freehold reversion, the new freeholder will inevitably receive the names and correspondence address of the leaseholders;
(f) similarly, such information will (or should) be transferred where there is a change of managing agent (see the RICS Code of Practice[11]);

49. These all involve the processing of personal information, yet no consent is required. Why, then, has a consent filter been introduced for the RTA?

Conclusion

50. For the reasons set out above, Part 3 of the Regulations should be amended so as to remove the consent filter. The purpose of the legislation was to make it easier for tenants' associations to obtain contact details of leaseholders in order to form RTAs. Requiring written consent means that this objective has not been met. Part 3 should be liberalised and this barrier should be removed.

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[11] RICS Code of Practice: Service charge residential management Code.

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