Tower Block Refurbishment, Flats and Understandings of Ownership

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ABSTRACT

This article uses the research findings from a study of the refurbishment of council tower blocks to reflect on what it means to be a leaseholder of a flat, and how this relates to ideas associated with property and ownership. The experiences of leaseholders (little input into decision-making, and the fear of crippling bills), together with the challenges for the building owner of upgrading blocks within a prevailing property narrative of exclusion, are also echoed in the unfolding building safety crisis in flats that has emerged following the Grenfell Tower fire. Both reveal the vulnerability of flat owners. Overall, it is shown that the property law regime does not currently meet the ownership expectations of those buying flats, and is poorly designed to provide for the longevity of safe and well maintained buildings.

INTRODUCTION

In 2016, Oxford City Council (OCC) began a major refurbishment project of 5 council owned tower blocks in Oxford, England. This article reports on research that we carried out to learn more about the refurbishment project, and the challenges of renovating mixed-tenure blocks. The resulting data provides rich insights into the nature of ownership and leasehold property, revealing the limited opportunities for leaseholders and tenants to have an effective voice, the vulnerability of flat owners, and the need to question whether the dominant narrative of property as exclusion is appropriate for contemporary living arrangements in blocks of flats.

A decade ago Carr similarly reflected on ownership within tower blocks, in the context of local authority major works carried out under the government's Decent Homes programme.[1] She examined the statutory consultation rights given to those who became flat owners following the exercise of the statutory Right to Buy (RTB) given to council tenants,[2] as well as analysing Tribunal decisions involving applications made by local authorities for 'dispensation' from the consultation requirements. This led her to the view that ownership is stratified and not all owners are equal. She explains how those who have bought into ownership of flats in council blocks have only a limited form of autonomy compared to other flat owners, due to the fact that the freeholder (the building owner) has hybrid functions: it is both the landlord and the local authority with strategic responsibility for housing. The impact on flat owners of receiving massive bills for major works projects, especially when part of estate wide regeneration projects, is 'emotional and physical distress' and Carr, argues, reveals RTB purchasers to have a vulnerable form of ownership.[3]

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[1] H. Carr, 'The Right to Buy, the Leaseholder, and the Impoverishment of Ownership' (2011) 38 *J. of Law and Society* 519.

[2] Housing Act 1980. It has been exercised by nearly 2 million tenants.

[3] Carr, op.cit n.1, p 532-33.

Recently, the issues that Carr identified have become more widespread. Although flat owners should anticipate bills for the on-going day to day costs of looking after a building, they do not envisage service charge bills of five, sometimes six, figure sums. Yet this is now occurring regularly. It is not confined to those in council blocks but also now affects many thousands of flat owners caught up in the building safety crisis that has emerged following the disastrous fire at Grenfell Tower, London, in June 2017.

The data from the case study of the refurbishment of the Oxford Tower Blocks (the OTB study) reinforces much of what Carr argued. The interviews illustrate the (in)effectiveness of the statutory consultation measures that Carr discussed, and how little input both flat owners and council tenants have into the choices made about refurbishment. The OTB study additionally reveals the lack of attention to internal aesthetics and OCC's seeming disregard of the impact that the alterations had inside peoples' homes. As one owner pithily commented in relation to the works: 'It's not pretty'. Further, the findings support the idea that ownership is stratified, although this article first notes that the concept of ownership is itself deeply contested and is especially problematic in the context of leasehold property. Nonetheless, to refer to RTB and other flat purchasers as 'owners' is both convenient and a reflection of everyday parlance. The OTB study suggests, however, that there is stratification even within RTB ownership: not all RTB flat owners are in the same boat. Not only did OCC fail to appreciate this but, surprisingly, the Council did not even distinguish flat owners from council tenants in the way that the non-statutory engagement was approached, notwithstanding the fact that OCC were expecting (or at least hoping) that the flat owners would be liable to pay bills of around £50,000.

The OTB research also provides a lens through which to reflect on what Blandy has referred to as the narratives of property. Drawing on Rose's work on property as persuasion, Blandy explains how narratives provide stories, or explanations.[4] Property regimes, she claims, are held together by two levels of narrative: an abstract 'meta-narrative' and the everyday or ontological narratives that concern how people experience reality. Blandy explains that underpinning property at the 'meta-narrative' level are the ideas of 'exclusion' rather than 'inclusion', and 'dominion' rather than 'co-operation'. Marrying these together explains many of the tensions apparent for those living in council tower blocks. Both dominion and exclusion are at work during the OTB refurbishment. The various formal property rights enjoyed by the building owner (the council), the flat owners (RTB purchasers and successors) and the council tenants are regulated through a combination of statutory measures, common law principles, and title deeds. The council, as building owner, is enabled through the property law regime to 'call the shots', leaving, as already noted, the flat owners and tenants with little voice. The RTB purchaser, as owner, is able to make an exclusionary cry: 'My Apartment is my Castle: Leave me Alone'[5], yet, as will be shown, this provides a poor fit for unit ownership within a larger block of flats.

The article starts with a section outlining how local authority tower blocks are owned, followed by information about the OTB refurbishment and case study. There is then a discussion of ownership as

[4] S. Blandy, 'Narratives of property and the limits of legal reform in the English leasehold system and its counterparts in other jurisdictions' in *Condominium Governance and Law in Global Urban Context*, eds. R Lippert and S Treffers (2021) 13, and referencing referencing C. Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (1994) pp 5-6.

[5] A chapter heading in C. van der Merwe, *European Condominium Law*, 2015.

an ideaand how it relates to leasehold property. The themes emerging from the research data are illustrated, and set in the context of the relevant legal framework. The first theme explores the extent to which the flat owners and council tenants were engaged in discussions about the refurbishment project and the impact that it would have on their homes and investments. Next, and related to this, is the extent to which the flat owners were, and should be, liable to pay towards the work. Area regeneration featured as a high priority in the OTB refurbishment, and leaseholders who owned flats were being asked to pay tens of thousands of pounds. Whether they should pay raises a legal question, turning on the specific contractual provisions of the leases, and a political one given that much of the perceived gain was outward facing to the broader community. The final point of tension in the OTB study relates to the exclusionary powers that accompany the property rights of flat owners. Inevitably this can make it very difficult to carry out refurbishment projects which may require access to flats to make external changes and even involve works internal to flats. The article next discusses how the fire safety crisis that has emerged post-Grenfell following the disastrous fire at Grenfell Tower, London, in June 2017, illustrates similar concerns. As thousands of buildings have been found to have serious fire safety defects this has left flat owners struggling with unaffordable bills, and significant stress. The cause of these problems is a complex mix of poor regulatory building standards and control, shoddy product testing, defective workmanship and shifting perceptions of safety, and the ramifications are hitting flat owners in both social and private blocks. The unfolding drama also illustrates the difficulties created by the exclusionary narrative of property and reveals that it is not only RTB flat owners who have a vulnerable form of ownership and little voice. This, the concluding section suggests, requires us to more critically question how dominion and exclusion play out in blocks of flats.

LOCAL AUTHORITY TOWER BLOCKS

During the 1960s many local authorities built high-rise tower blocks, encouraged by subsidies favouring high-rise buildings that were designed to stimulate redevelopment of inner-city areas[6] and influenced by modernist cultural ideas which saw tower blocks as a mark of architectural and municipal prestige.[7] Council blocks were originally built to provide rental housing at social rents but the introduction of the statutory RTB in 1980, designed to 'encourage home ownership by council tenants; often persons of modest means',[8] changed this. No longer are blocks wholly occupied by rental tenants, but most now contain a mix of council tenants and 'owners'. In turn, many of the original RTB purchasers have sold their flat to new owner-occupiers, or to investor landlords. Indeed, as many lenders will not provide mortgages for flats at higher floors in these building types the resale market is effectively constrained to cash buyers, frequently buy to let investors. Further, because of the structures and practices of English property law, someone buying a flat in a council block will acquire a long (125 year) lease, and these are governed by a different set of regulatory rules than apply to the council tenants. This tenure mix therefore complicates management for the

[6] Under the Housing Subsidies Act 1956; see J.Boughton, *Municipal Dreams: the Rise and Fall of Council Housing* (2018) p. 107; P. Dunleavy, *The Politics of Mass Housing in Britain, 1945-1975: a Study of Corporate Power and Professional Influence in the Welfare State* (1981) p. 37; L. Hanley, *Estates. An Intimate History* (2017) p. 93.

[7] K. Jacobs and T. Manzi, 'Urban Renewal and the Culture of Conservatism: Changing Perceptions of the Tower Block and Implications for Contemporary Renewal Initiatives' (1998) 18 Critical Social Policy 157, p. 160.

[8] *The Mayor and Commonalty and Citizens of the City of London v Various Leaseholders of Great Arthur House* [2021] EWCA Civ 431 [50].

local authority landlord, and results in blocks that in tenure terms have been described graphically as like 'swiss cheese' by Judge Cooke in *Haringey v Bell*. [9]

With the passage of time, as well as changes in housing policy and financing, many tower blocks became difficult to maintain and manage.[10] For some councils the response to historical problems 'attributable to poor design, including a particular neglect of communal areas [was]…large scale demolition of tower block properties'.[11] Many other councils have opted instead to undertake major works of refurbishment, sometimes because demolition is simply not a viable option; indeed, the Landlord Services Manager at OCC (appointed after the time the decision was made to refurbish rather than demolish) pointed out that it would be very difficult to rehouse 800 or so people if demolition had been chosen. Refurbishment is, however, a highly disruptive moment in the life of these buildings: as Carr observes, the legal landscape is poorly designed to deal with the challenges of mixed-tenure, and a major works project exposes the marginal status of local authority leaseholders as owners.[12]

THE OXFORD TOWER BLOCKS AND THE CASE STUDY

The OTB research, carried out during 2016-2020, was conducted primarily to understand the challenges of refurbishment in mixed-tenure blocks, with a particular focus on energy upgrades. The research involved mixed methods, using multiple sources of data including extensive document analysis,[13] interviews of various stakeholders,[14] observational field notes,[15] attending Tribunal hearings and court cases, and a survey to learn about the wider experiences of social housing providers (this data is presented elsewhere[16]). Additional researchers involved in the project included an energy efficiency expert, a socio-legal researcher specialising in ethnographic methods, and a doctrinal lawyer.[17]

The five tower blocks owned by Oxford City Council (OCC) range from seven to 15 floors with a total of 348 flats. They were built in the mid-1960s and refurbished during 2016-2019 with residents remaining in situ.

As stated by OCC, the refurbishment works to the OTBs include 'repairs to the communal structure; over-cladding and additional insulation; replacement of windows; new heating systems; upgrading

[9] *Haringey v Bell* (Central London Court 6 December 2004) [2].

[10] Jacobs and Manzi, op.cit., n.7, p. 170.

[11] Jacobs and Manzi, op.cit., n.7, p. 170.

[12] H. Carr, 'Utopias, Dystopias and the Changing Lawscapes of Social Housing: A Case Study of the Spa Green Estate London UK' (2013) 38 Australian Feminist Law Journal 109, p. 122.

[13] Council documents, planning applications, legal documents (including leases, case law and statute), and media reports.

[14] 23 in total, with 7 of these being interviewed a second time towards the end of the project. Interviewees were: OCC representatives (n=2), building contractors (n=1), legal professionals (n=4), leaseholders, (n=8), council tenants (n=7), and a spokesperson from Oxfordshire County Council Fire and Rescue Service (n=1). Leaseholders and council tenants were recruited through postal letters, with a moderate-to-low response rate (21% of leaseholders, 8% of council tenants).

[15] Multiple visits to the tower block sites, attending a residents' coffee meeting organised by OCC, two council meetings, three Tribunal hearings, and three court hearings related to access issues.

[16] S. Bright et al, 'Exploring the complexities of energy retrofit in mixed tenure social housing: a case study from England, UK' (2019) 12 *Energy Efficiency* 157.

[17] Respectively: David Weatherall, Roxana Willis, and Phillip Morrison.

of the communal electrics and fire safety systems, and refurbishment of lifts.'[18] OCC gave approval for the project in 2012 at a cost of a little over £16 million, the contractors were appointed in 2015, and costs have since increased to around £20 million, with work substantially completed by the end of 2019. The project was significantly advanced when the fire at Grenfell Tower occurred, and the learnings from the Grenfell fire led to the brand-new cladding at 3 of the tower blocks being replaced when it emerged that this was not fire-resistant.

When bills of between £40,000 and £60,000 were sent in January 2016 to those who had bought a flat in the blocks there was, unsurprisingly, huge disquiet. Within days around 15 to 20 of the flat owners, from different blocks, arranged to meet and act collectively, forming The Oxford Towerblock Leaseholder Association (hereafter, OTLA). The aim of OTLA was to unite leaseholders to challenge the costs charged to them by OCC. Our interviews indicate that OTLA was crucial for giving leaseholders a voice. The role of OTLA was described by one leaseholder as follows:

> I think it's just like a united force really. 'Cus I think there are a lot of us that wanted to do something, and wanted to make our voice heard, but didn't really know how to go about it. … So, it's really just a group action I suppose. Making sure enough of our voices are heard.
>
> (Leaseholder 2, Resident)

In the OTBs the majority of flats are rented by council tenants, but approximately 54 flats (around 15 percent) have been bought under the RTB, some of which are owner-occupied and the remainder (around 60%) are rented out by the private owners.[19] The next section explores what these convenient, binary, but arguably misleading, labels of renting and ownership mean.

OWNERSHIP, PROPERTY RIGHTS, AND NARRATIVE

The idea of 'ownership' carries, as Blandy claims, a 'powerful charge'.[20] It is a significant aspect of how people conceptualise their relationship with land.[21] The term is used in legal reasoning, not only by judges in law reports,[22] but also in statutory provisions enacted to regulate title to land.[23] In everyday conversations we draw a convenient binary line between home ownership and renting.

Yet ownership itself is a surprisingly perplexing and contested concept within property and housing scholarship, particularly in England and Wales with its peculiar concept of the doctrine of estates. This maintains that what is held is an 'estate in the land', that is, land for a time. Since the 1925 property legislation there are two forms of estate that can be legal estates: the 'fee simple absolute in possession' (more commonly referred to as the freehold, and which is for an uncertain period – and

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[18] <www.oxford.gov.uk/news/article/8/willmott_dixon_proposed_as_contractor_for_oxford_tower_blocks_refurbishment> accessed 13 July 2021.

[19] According to the First-Tier Tribunal (Property Chamber), 54 flats are privately owned. We obtained and analysed 44 title deeds.

[20] Blandy, op.cit. n.4, p. 14.

[21] L. Rostill, 'Possession, Relative Title, and Ownership in English Law' (2021) at < https://www.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2021/06/possession-relative-title-and-ownership>

[22] There are endless examples. For one, see *Millgate Developments Ltd and another v Alexander Devine Children's Cancer Trust* [2020] 1 W.L.R. 4783 with repeated references to the owners of land.

[23] For example, the Trusts of Land and Appointment of Trustees Act 1996, s. 6; Agriculture Act 1947, s. 10. Some legislation is careful to offer a definition of 'owner' eg Anti-social Behaviour Act 2003, s.82 (by reference to the person entitled to receive the rack rent) or Marine and Coastal Access Act 2009 s. 302 (the person who holds the fee simple absolute in possession).

may, in practice, last 'forever'), and 'the terms of years absolute' (more commonly known as a leasehold, and which is for a certain period). In a tower block, the Council owns the freehold. The RTB owners have a long lease of up to 125 years. Renters (council and private sector tenants) also have a leasehold, but theirs takes the form of a shorter, constantly renewing, periodic interest. And, of course, an obvious difference between them is that whereas the council tenant generally pays a social rent weekly or monthly, the RTB leaseholder will have paid a substantial premium to purchase the interest, and will also be paying a small annual ground rent (£10) and be liable to pay towards the building's upkeep via a service charge. In the context of property rights created and sculpted by contracts it is also important to pay particular attention to the contractually agreed division of rights, as well as the range of regulatory measures that are layered across the doctrinal rules of property and contract law. So, for example, the rights that a leaseholder has during the term of the lease will be heavily dependent on the wording of the document creating the lease, setting out for example, whether the landlord is able to enter the flat for defined purposes such as to inspect. In addition there are various statutory measures that apply, such as the provision in section 19 of the Landlord and Tenant Act 1985 that costs can only be taken into account for service charges if they are 'reasonably incurred'.

Some doctrinal scholars are 'ownership sceptics' and maintain that because of the doctrine of estates there is no meaningful idea of ownership in English land law, even for freeholders.[24] This is a nonsense for, as Harris claims, the 'truth is that ownership interests in land, of various magnitudes, are and always have been incidents of legal estates in land'.[25] What is crucial is instead to pay attention to how these 'ownership interests' are divvied up between the various estate holders, and whether this distribution of powers, rights and responsibilities matches, or should match, the aspirations of those to whom the RTB has been marketed, and the expectations that those living in blocks of flats have.

Housing and socio-legal scholars tend to approach the issue differently. Blandy and Robinson explain that housing discourse does not distinguish between leaseholders and freeholders but categorizes both as *owner-occupiers*, distinguishing them from tenants who pay a periodic rent to a landlord.[26] Where the line is drawn is unclear, and it may be, as Hopkins and Bright suggest, that 'the distinction that is intuitively made by most people (that enables them to answer the question as to whether they own or rent the property that they live in) is based upon whether they own part of the capital value of the home.'[27]

Whatever the starting point, there is a degree of coalescence around the importance of 'freedom and control' to ownership, although not always articulated in this way, and a general agreement that rental tenants are not owners, notwithstanding the fact that they also have leases.[28] Amongst

[24] See references in L. Rostill, *Possession, Relative Title, and Ownership in English Law* (2020) p. 155 fn. 1.

[25] J. Harris, *Property and Justice* (1996) p.70.

[26] S. Blandy and D. Robinson, 'Reforming Leasehold: Discursive Events and outcomes, 1984-2000' (2001) 28 JLS 384, p. 393.

[27] S. Bright and N. Hopkins, 'Home, Meaning and Identify: Learning from the English Model of Shared Ownership' (2011) 28 Housing, Theory and Society 377, p. 381.

[28] Harris, op. cit, n.25 provides an exception in arguing that even a periodic tenant has rights falling within the 'ownership spectrum' p.73. Even if this is so, Rostill rightly observes that a periodic tenant would not ordinarily be said to own the land, Rostill op.cit. n.24, p. 162.

theorists, certain issues emerge as important to property ownership. For many, the right to exclude others from a thing is essential.[29] More recently, attention has been drawn to the fact that 'owners have, with respect to their things, a special sphere of practical authority over others', an idea that Katz captures in the phrase 'agenda-setter'.[30] Empirical research, such as Blandy's, similarly illustrates that the 'themes of control and being "in charge of your destiny"' are associated with the narrative of property as homeownership.[31] RTB was, as Carr notes, 'never a neutral project'.[32] It taps into these links between freedoms and individualism, forming part of the 1980s Thatcherism that saw a 'property-owning democracy' as an article of faith.

The reality of the lived experience of leaseholders is, however, commonly one of powerlessness and exclusion from the norms of control and responsibility associated with home ownership".[33] Although they consider themselves owner occupiers, leaseholders often feel shortchanged and the limited freedom and control they have is reflected in the aphorism used by Cole and Robinson: 'Owners, yet tenants'.[34]

Given the contested nature of ownership, the remainder of this article refers to those who have bought flats as leaseholders, not, as previously, flat owners. Those renting direct from the local authority are referred to as council tenants. As shown next, the restriction of autonomy is particularly acute for both RTB leaseholders and council tenants when it comes to major works projects.

MAJOR WORKS AND CONSULTATION

There is an obvious political and practical necessity for a local authority to engage with residents and others when undertaking major works. But there is no legal requirement for the local authority to consult leaseholders unless it intends to recharge costs to them as service charges under the terms of their leases. A flash point during the OTB refurbishment followed the shock receipt of massive bills by the leaseholders; bills that some could not pay, and others did not want to. Whether they had to pay was a narrow (but important) legal question: it turned on whether the wording of the service charge provisions in their leases entitled OCC to recover money spent on the particular works carried out. This question was ultimately resolved following a referral of the issue to the First-Tier Tribunal (Property Chamber) (hereafter, the Tribunal).

Liability to pay towards major works will always involve issues of contractual interpretation but additionally it operates within a broader statutory regime which, as Lewison LJ remarks, includes a 'measure of consumer protection'.[35] This protection is limited, however. Lewison LJ was referring to a particular provision that caps the leaseholder's liability to pay towards making good structural defects for a period of five years from the grant of the lease. Another source of protection is the

[29] For example, S. Douglas and B. McFarlane 'Defining Property Rights' in *Philosophical Foundations of Property Law*, eds. J. Penner and H. Smith (2013) ch. 10.

[30] Rostill, op.cit, n. 24, p. 157; L. Katz 'Exclusion and Exclusivity in Property Law' (2008) 58 U Toronto LJ 275, 278.

[31] Blandy, op.cit., n.4, p. 22.

[32] Carr, op.cit., n.1, p 521.

[33] Blandy and Robinson, op.cit., n.26, p. 396.

[34] I. Cole and D. Robinson, 'Owners yet Tenants: The Position of Leaseholders in Flats in England and Wales' (2000) 15 Housing Studies 595, p. 608.

[35] *The Mayor and Commonalty and Citizens of the City of London v Various Leaseholders of Great Arthur House* [2021] EWCA Civ 431 [50].

requirement to consult: if a local authority landlord wants to recover costs of more than £100 from a tenant in relation to major works which involve entering a 'qualifying long term agreement' there is also a light-touch statutory consultation process required by section 20 of the Landlord and Tenant Act 1985.[36] In essence, section 20 requires that the landlord must notify leaseholders initially of its intention to appoint a contractor, and later in relation to the proposed 'works', and in both instances give the leaseholders an opportunity to make observations. This, as Carr explains, is a much more limited form of consultation than required when a private landlord undertakes works, and the outcome is that RTB leaseholders 'have a minimum input into decision about repair and refurbishment despite the serious financial outlay that may be required of them'. [37]

It is always open, and the norm, for a local authority to go beyond the statutory requirements, as OCC did. They arranged multiple meetings with council tenants and leaseholders, permitting them to have input on some design aspects of the work, such as the colour of the outside cladding to be added to the buildings. As the Landlord Service Manager for OOC said in our interview:

> In terms of the overall consultation, we've held the best part of 60-odd events trying to get people involved, so I think we've gone way over the top. We've done the general consultation, as well as complying with our legislation.

OCC's Leaseholder Services Manager likewise considered that the approach to consultation had been open and inclusive. Asked about the section 20 consultation he replied:

> It shows and demonstrates that we are open with our customers, this is what we are planning to do. It allows them to give us their observations. It allows us to tweak the process of the major works if necessary. And it shows and demonstrates that we want to include our customers in the process.
>
> It is their homes at the end of the day and I think the ultimate way is to include them in that process, if they so wish to be.

In leaseholder interviews we asked a specific question as to what they recalled of the section 20 consultation. Most appeared unaware of this ('I don't remember'[38]), perhaps because the information in it is not generally very informative or clearly signalled. Answers tended to focus on more general matters involving the public consultations but again did not consider them meaningful, as shown in the following interview extracts.

> you can protest as much as you wish, they can move on with the project of whatever scale they wish anyway.
>
> So, I don't know what's the point of consulting. I mean, they can just basically send me a letter saying that, "Tomorrow, you pay me £20m, thank you very much", (Leaseholder 1, resident)
>
> You didn't have your say in what they were actually going to do, they'd already decided what was going in, so there wasn't any consultation for leaseholders to say:

[36] A qualifying long term agreement is one with a contractor for more than 12 months: see Service Charges (Consultation Requirement) (England) Regulations 2003 SI 2003/1987.

[37] Carr, op.cit., n.1, p. 535.

[38] Leaseholder 5, an investor.

> ‘is there an alternative to this sprinkler system because it's very cumbersome and looks horrible’. (OLTA Chair, investor)

When we asked the OCC Leaseholder Services Manager about the observations that OCC received from leaseholders, he said that the feedback was invariably not about the works, or the costs, but: ‘“Will you buy my property back?”…(They) just wanted out’.

This is surprising. From our interviews we got the impression that the leaseholders would have welcomed meaningful engagement about the works, and about the costs, and they certainly did not ‘feel’ consulted. One leaseholder we interviewed explained the confusion and inconsistency about the costs in the following way:

> I sat with a guy [from OCC] before the work started. I said, ‘well what do you think I’m going to be in for?’ And he said, ‘well probably about £15,000’. … I said, ‘I’ve spent £7,000 on my flat, I’ve done a new bathroom, a new kitchen, new doors, painted it all and all the rest of it, and a new heater’, so I said, ‘my flat’s completely [done up], you know’. And he said, ‘oh you’ll probably get that knocked off of the £15,000 then.’ (OLTA Chair, investor)

The shortcomings of the section 20 consultation process in local authority major works programmes is acknowledged in the OTB Tribunal decision where it notes that it ‘is not as rigorous as with “ordinary” service charge regimes’,[39] as well as commenting that,

> ‘the chances of a long leaseholder fully understanding the consultation process in the circumstances of this case where any costings are not known until the process is over are unlikely’.[40]

The issue of there being no meaningful consultation is not confined to leaseholders expected to pay the bills. Nonetheless, it is surprising that OCC took a purposive decision not to treat council tenants or leaseholders differently given the financial impact on leaseholders and the general perception of them as owners. According to OCC’s Leaseholder Services Manager:

> They’re all residents in the same way… we tried not to treat them any differently… we’ve not tailored an approach to depend on whether you’re a tenant or a leaseholder. It’s about having a consistent approach for all.

But leaseholders are in a very different position: they are expected to pay towards the works. For the leaseholders, the bills came out of the blue. Asked whether there should be more forewarning of potential costs down the line, the OCC Leaseholder Services Manager saw this as a mixed blessing:

> I think it could be a double-edged sword, in that as we’re finding, as part of the re-sale process, we’re asked, ‘What are the major works planned in the next two years?” How much information do we give? And if we say, “We’ve got this planned, and it could take this amount.”

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[39] *Oxford City Council v Leaseholders of 54 flats* CAM/38UC/LSC/2016/0064 CAM/38UC/LSC/2016/0064 Decision 27 February 2017 [47] (this decision no longer appears to be available online).

[40] *Oxford City Council v Leaseholders of 54 flats* CAM/38UC/LSC/2016/0064 < https://decisions.lease-advice.org//app/uploads/decisions/act85/12001-13000/12425.pdf> [25].

> Are we then beholden to stick to that? Because I know plans change, and I have conversation with our Planned Services, and there may be some slippage in doing the external re-decoration programme, cyclical programme. And we may not be doing it in the same year that we've actually advised, or programmed it it in when I'd sent the re-sale information. So it's very difficult. So a very cynical mind-set would be, "Follow the legislation that we have to."

Moreover, OCC failed to distinguish between owner-occupiers and buy-to-let leaseholders, yet the needs of these ownership groups was also markedly different. For the owner-occupiers, the flats are their homes, and some could not pay. Consideration was given to setting up a loan scheme according to one OCC official interviewed, and three leaseholders appear to have sold back their flats to OCC (before the outcome of the Tribunal case was known). One was a young first-time buyer, who found it all too difficult to cope with, and sold her flat back to a council subsidiary for a price she believed to be below market rate. For others, paying the bills would put at risk personal retirement savings. The investor leaseholders we interviewed informed us that they were in a position not to worry about paying the full costs if required. Several investor landlords acknowledged, however, the stress it was causing to some owner-occupiers, particularly elderly owners who had bought as the original RTB purchasers (perhaps Carr's most marginal of 'marginal owners'):

> I think people are going to either be made very very ill by it because they're just not going to know where to go, you know it's a proper scary thought for people to have to raise £50,000. (OLTA Chair, investor)

> I think it's worse for owner-occupiers. I feel very sorry for a lot of those people. They've lived their life paying some council rent, and they've got themselves in the position where they could buy it for maybe £8000. I've seen some of the leases and they haven't paid very much for these properties. They probably don't earn very much, because they're still probably doing the job they were doing. How on earth are they going to raise that money? (leaseholder 5, investor)

> I found it quite disheartening that the older generation were being asked for this amount of money for something that they know very little about, I am happy to have an argument with the council about my side of things. I guess my fight is for a few other people that really are in a very bad way with it, and you know they are very very scared. (OLTA Chair, investor)

Beyond the issue of paying for the works both council tenants and leaseholders almost universally decried the quality and aesthetics of the works internal to the flats. Changes had to be made to the fitting and size of windows to accommodate the external insulation and cladding, with one leaseholder claiming that this resulted in a 28% decrease in the glass surface (affecting internal light, and perspective). He also said it is now dangerous to store things on windowsills, and that the new opening mechanism makes window cleaning difficult.[41] A common bone of contention in the OTBs was the newly installed ventilation system that was said by OCC to be necessary to avoid condensation now that the building was thermally clad. It required unattractive surface mounted trunking (as did the retrofitted sprinklers) and a large, blue, unit that interviewees variously referred to as 'unsightly', 'horrible', 'atrocious' 'hideous', and 'industrial'. After complaining about the noise level one

[41] Leaseholder Witness statement dated 9 September 2017, in relation to a case at the Oxford County Court.

leaseholder had been shown by the contractor how to switch the ventilation unit off (thereby defeating its function). Comments include:

> The ugly ventilation system in the one bedroom property is a great example of somebody not actually using their brain really (leaseholder 5, investor)

> The quality of the workmanship is shoddy. The aesthetic nature of the things that they put within the flat are industrial. And you wouldn't put those things in your own house. If you had a choice, you certainly would not install the systems that they've installed. They're industrial, they're unsightly, and they have not been done with any aesthetic sympathy what so ever. .. Could you actually sit in your living room watching your television with a 6-inch trenching running across your ceiling with a sprinkler head poking out of it, and not be distracted by that every time you go into your living room? Because I know I would be…

> But if I was living in it, as an owner occupier, I would be pretty cheesed off with what's gone on. It's not pretty. (OLTA Chair, investor)

The council tenants were more accepting, even though they noted that living through the works was disruptive and noisy:

> I'm not happy. You will probably go with that anyway. But it's a question of, you can't do nothing so what's the point of bucking the system, whatever's going to happen, it's going to happen, regardless of what you say. If you refuse to pay your rent, they'll quick you out and put someone else in, you know so what's the point. Just accept it, and sit back, it's all you can do. (Council Tenant 6)

Some were grateful:

> I'm happy with what they're doing. It's marvellous really…(Council Tenant 3, during the works)

> Yeah, excellent. Brilliant. .(Council Tenant 3, after completion)

As will be discussed in the next section, a key driver for the refurbishment was the focus on the external appearance of the blocks to support area regeneration. The residents were not asked what mattered most to them, and the consultations were never designed to enable residents to be actively involved in the core decisions about whether to carry out the projects, how the multi-million pound funding should be allocated within the projects, and what the scope of the works should be. The absence of attention to what residents wanted is epitomised by the remark of one council tenant we interviewed who described the works as akin to 'putting lipstick on a pig'.[42] Whilst the project addressed some aspects of live-ability within the OTBs – making them safer, warmer, and less prone to mould - it overlooked other fundamental issues. In response to the question 'Was there any work that you thought needed to be done?', the following responses were given:

> Definitely the drainage, 'cus I've had nothing but problems. 'Cus I'm on the ground floor, I get first port of call of any blockages of water waste [. . .] So, I'm always having council access into

[42] Council Tenant 7.

> the bedroom to get into the unblocking pipes and whatever it is that they need to do [. . .] It's been quite regular to be honest, for me at least once every six months.
>
> (Council Tenant 2)

> The plumbing [. . .] It's old. It's not really fit for purpose. We've still got all the old copper pipes in there that are 60 years old, and they really should have ripped them out and started again [. . .] They just block. I mean, the bloke upstairs keeps flooding my kitchen through no fault of his own. I keep flooding the bloke downstairs through no fault of mine. One of my neighbours can't use her washing machine because otherwise it all blocks up.
>
> (Council Tenant 7)

> When the neighbour does his laundry, it comes through to this flat […] so the sink floods and goes on the floor […] It happened just this morning, before you came. And it was like a volcanic eruption […] So it's a bit like fixing the external, but not the internal.
>
> (Council Tenant 1)

Our follow up interviews and observational visits indicate that these problems remain following the refurbishment. Notably, these were answers from the council tenants. Leaseholders are able to do work internal to their flats:

> my one had been brought by somebody a couple of years before, and he'd obviously spent quite a lot of money on it, and it was in pristine order, new kitchen, new bathroom, new furnishings. (Leaseholder 3, investor)

The fact that much of the work was external leads to the question of whether leaseholders should be expected to pay for work that is, to a significant extent, led by regeneration concerns.

WHAT SHOULD LEASEHOLDERS HAVE TO PAY FOR?

As owner of the block, the council is the 'agenda-setter'. Work needed to be done to the Oxford tower blocks. The external concrete needed repair, and a report in 2007 also noted problems with condensation and black mould, the failure of some double-glazed units in windows, and that the existing storage heaters were dated.[43] The energy efficiency improvements – external insulation, cladding, replacement windows and (for social tenants) new heaters – could address these concerns and lead to warmer flats.[44]

But OCC also has broader political and placemaking roles which undoubtedly influenced decisions made about the scope of the refurbishment project. The benefits to the occupiers appear to be almost incidental to what were essentially regeneration projects where the key drivers shaping the scope of the works were regeneration, external aesthetics, and environmental objectives rather than improving the internal living environment. This is evident in the public narratives. Planning documents supporting the OTB project contain repeated reference to the 'regeneration' and 'improvement' aims of the refurbishment. For example, an OCC Committee Report concludes that

[43] 'Strategy for Tower Blocks' (December 2007), prepared by the Head of Oxford City Homes for the Councils Executive Board.

[44] Two council tenants interviewed confirmed this was their experience after the work.

'the proposals engage with key City Council objectives to regenerate key housing areas and give added life to the Council's housing stock'.[45] Moreover, early documents made repeated references to external 'improvement', such as improvements to recycling',[46] 'improvements to car and cycle parking',[47] 'removal of garages to improve parking arrangements',[48] and 'improvements to the entrances of the building'.[49] Outward facing aesthetics were central; the project aimed to make the Towers look better. One document states: 'The development will improve the visual appearance of the building[s] in nearby and intermediate views.'[50] The plans also highlighted energy efficiency aims, placing an emphasis on pursuing a 'low carbon future'.[51] The OCC Landlord Services Manager similarly emphasised the environmental aspirations of the OTB refurbishment in our interview:

> We had a very strong focus on energy. Oxford City Council is a very green council, does an awful lot to provide energy efficiency. [. . .] energy efficiency was one of the main drivers.

The enthusiastic tone of OCC's regeneration and environmental narratives was reflected in media reports, that referred to a project designed to 'spruce up tower blocks'[52] and the 'ambitious' regeneration and environmental aims of the project.[53]

This regeneration focus created a difficulty for OCC when seeking to recover the five figure sums from leaseholders. RTB leases contain wording making leaseholders liable to pay a service charge towards the costs of repair and maintenance; but not all leases enable landlords to recover the costs of improvements.[54] The important line between 'repair and maintenance' and 'improvement' is, however, rather fuzzy in case law. Broadly speaking repair is to do with fixing things that have gone wrong, and maintenance is doing work to stop it going wrong; improvements, on the other hand, are new things. Although some of the OTB works clearly constituted repair and maintenance, other items (such as external cladding, and the installation of sprinklers) would not come within this but would instead be seen as improvements - and this is where the major cost components were. The OTB leases follow the format of early RTB leases, which enable recovery of repair and maintenance expenses, but not improvements.[55] Indeed, OCC had always been aware of the possibility that

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[45] OCC, 'East Area Planning Committee Report' (Agenda item 3, p11, 5th November 2014) at: <http://mycouncil.oxford.gov.uk/documents/s19848/Tower%20blocks%20five%20sites.pdf> .

[46] OCC, 'Notice of Grant of Planning Permission' (14/0264/CT3) 1.

[47] OCC, 'East Area Planning Committee Report' (Agenda item 3, p11, 5th November 2014) at: <http://mycouncil.oxford.gov.uk/documents/s19848/Tower%20blocks%20five%20sites.pdf> .

[48] OCC, op. cit., n. 38, 10.

[49] Id, 1.

[50] Id, 1.

[51] Id, 1.

[52] Oxford Mail, 'Few Attend Consultation on New-look Tower Blocks' (Oxford Main, 20 November 2013) at: <http://www.oxfordmail.co.uk/NEWS/10821624.Few_attend_consultation_on_new_look_tower_blocks/> .

[53] BBC, 'Oxford tower blocks set for £15m makeover' (BBC News, 10 Oct 2013) < www.bbc.co.uk/news/uk-england-oxfordshire-24475324> .

[54] S. Bright et al, 'Exploring the complexities of energy retrofit in mixed tenure social housing: a case study from England, UK' (2019) 12 *Energy Efficiency* 157, 169-170.. The explanation may be that until a legislative change in 1986, RTB leases could not permit recovery for improvements; and anecdotally 'recovery for improvements' clauses did not become 'more common' in RTB leases until the late 1990s.

[55] 'For some inexplicable reason, the leases in this case do not contain such a provision even though they seem to have commenced after the Housing Act 1985' : *Oxford City Council v Leaseholders of 54 flats*

leaseholders would challenge any attempt to recover substantial costs due to the wording of the leases.[56] Rather than face a series of individual legal challenges, OCC decided proactively to refer the matter to the Tribunal for resolution. In total there were three Tribunal sittings and the outcome was that the majority of the cost in the leaseholder bills was found to be attributable to improvements for which the leaseholders were not liable.[57] The bills were therefore reduced to between £2,500 -£4,000, depending on the block.[58]

Although the OTB leaseholders were largely successful in resisting paying towards the regeneration works, many RTB leases do, however, permit recovery of improvement costs, and for them the outcome could be very different.[59] The framework within which major regeneration works are carried does not fit easily within the private law framework applied to leaseholders and the expectations that they typically have when buying flats.[60] The size of the bills that leaseholders are receiving in some areas illustrate, as Carr claimed,[61] just how vulnerable this form of ownership is. Recently, leaseholders in Southwark have received staggering bills of up to £151,000 for work being carried out as part of the regeneration of Tustin estate in Peckham.[62]

Should leaseholders have to pay for the wider social benefits to the community? This question was raised in a 2016 statement from an OTB leaseholder to a meeting of the Council:

> … Oxford City has … widely advertised improvements and regeneration aspects under slogans such as 'Building a world class city for everyone' [but]…. neither improvements or 'building cities' are chargeable leaseholder obligations…. [63]

Leaseholders may, of course, find that the value of their flats increases because of these works. If this is the case, it still does not mean that they can afford the bills, or would elect to spend money this way. Further, the leaseholders in the OTB study were not all convinced of a value increase. The Chair of OLTA, an experienced property investor and manager, was doubtful:

CAM/38UC/LSC/2016/0064 < https://decisions.lease-advice.org//app/uploads/decisions/act85/12001-13000/12425.pdf> [49].

[56] 'The costs of repair/renewal are covered within the leases but legal advice is that the cost of some improvements, such as insulation, upgrading communal areas and even the installation of new lifts may not be rechargeable. Even without these, leaseholders charges are likely to be high and therefore resisted by the leaseholder' :'Strategy for Tower Blocks' (December 2007), prepared by the Head of Oxford City Homes for the Councils Executive Board.

[57] *OCC v Leaseholders of 54 flats* CAM/38UC/LSC/2016/0064 <https://decisions.lease-advice.org//app/uploads/decisions/act85/12001-13000/12425.pdf> .

[58] Id.

[59] As in, eg, *Sheffield CC v Hazel St Clare Oliver* [2017] 1 WLR 4473 and see Bright et al op.cit. n.54, 170 Table 1.

[60] M. Humphreys, 'Leaseholder charges and urban regeneration' (2006) *J. of Planning & Environment Law* 1625.

[61] Carr, op.cit., n.1.

[62] E. Lunn, 'A terrible shock': council hands flat owner £146,000 bill' *Guardian* 18 May 2019 <https://www.theguardian.com/money/2019/may/18/a-terrible-shock-council-flat-owner-bill-tustin-estate> . See also: <https://www.leaseholdknowledge.com/highest-major-works-bill-ever/>

[63] 'Public addresses and questions that do not relate to matters for decision—as submitted by the speakers and with written responses', 18 April 2016 <https://mycouncil.oxford.gov.uk/documents/s29439/Council%20180416%20Publicquestionsandaddresses%20 for%20briefing%20note.pdf> .

> I think it's had a negative impact on the value of the flat in relation to what they've done internally. I think in the future it may have a positive impact on the value of the flat, but it still won't change the fact that you can't borrow any money on your flat [*stemming from the fact that lenders wouldn't lend for high-rise flats in these types of buildings*]
>
> And as far as resale, I think you're only really going to appeal to an investor, and they'll only want to pay what they can to get the yield, if the yield is there, then they will pay what they expect to get from that. But as far as resale value, or for sort of owner occupiers going in, I don't think it's going to change it massively. I think it's going to stay value similar, regardless of the fur coat that you put on it. I think it will stay pretty much the same.

Others were more hopeful, particularly an investor leaseholder with a flat in a block attached to a shopping centre that was also expected to undergo major renovation in the future. But even for some of the hopeful leaseholders, the appearance of the internal works was a worry:

> '….it looks terrible inside the flat, but from the outside it looks great.' (leaseholder 5, investor)

Even council tenants with 'no skin in the game' were doubtful that it would increase the value of flats:

> I mean, it's an eyesore, would you really want to buy a flat with all this in it (pointing to the sprinklers on the ceiling). If you owned your own flat, surely they should have been allowed to fit false ceilings in them ones, or chase this water works and electric works into the actual ceiling. If you were going to charge someone 50 grand, they should have had a better finish than what they've got. (Council Tenant 2)

At one point historically it had been widely assumed that local authorities were not required to recover expenditure from leaseholders, particularly where the council was receiving government grant funding to carry out the regeneration project (as was commonly the case in the past). However, this was challenged. Following Counsel's opinion being obtained by Haringey Council,[64] and given that the council's status as a local authority means that they 'owe a duty analogous to a fiduciary duty' to their ratepayers, [65] the current law is understood to place councils under a duty to recoup expenditure from leaseholders if they have the contractual power to do so. This change in understanding caused widespread concern, and led to statutory provisions enabling the Secretary of State to issue directions enabling service charges to be waived or reduced in certain specified circumstances.[66] Two sets of directions have been published, the first in 1997 permitted local authorities to operate a discretionary cap (which does not appear to have been used)[67] and then amended directions were issued in 2014.

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[64] Referred to in *Haringey v Bell* (Central London Court 6 December 2004).

[65] *Charles Terence Estates Ltd v Cornwall CC* [2013] 1 WLR 466 [17], referring to *Prescott v Birmingham Corporation* [1955] Ch 210. See also *Bromley LBC v Greater London Council* [1983] 1 AC 768, 815. Some commentators are somewhat circumspect about the stringency of this principle and suggest that this idea has now been subsumed 'within the ordinary principles of judicial review.': Encyclopaedia of Local Government Law (Sweet & Maxwell) [1.4-39]. See also J. Goudie et al, *Judicial Review* (2017) [13.23]; P. Craig, *Administrative Law* (2016, 8th ed) [19-013]; F. Patterson et al, *Judicial Review* (2019, 3rd ed,) [12.101-120].

[66] Housing Act 1996 sections 219-220.

[67] For the political and economic difficulties for local authorities in deciding whether to operate reductions using discretion they were given under the 2007 directions, see *The Spa Green Estate* LON/00AU/LSC2006/0269 <https://decisions.lease-advice.org//app/uploads/decisions/act85/3001-4000/3933.pdf>. Research published in 2006 found none of the researched local authorities operated a discretionary cap and all sought to fully recover charges rather than waive them: Communities and Local Government, *Assessment of the impact of the cost of repairs for Right to Buy leaseholders* November 2006

Under the 2014 directions, a mandatory cap that became known as 'Florrie's law' was introduced on the total amount of service charge that could be levied in a 5 year period where works were wholly or partly funded by particular government schemes.[68] The Directions also enabled waiver or reduction in individual cases if reasonable. In practice, the impact of the Directions appears to have been relatively minor and case law and media stories show that leaseholders now frequently receive five figure bills for major works,[69] and recently a huge bill of £217,000 has been reported.

Even in relation to a RTB lease that clearly provides that the service charge includes not only repair and maintenance but also improvements, existing case law accepts that there is a distinction between when it is reasonable to recover regeneration costs in contrast to repair costs. Perhaps this is a nod to the limited voice that leaseholders have, and which was referred to in *Sheffield CC v Oliver* where the President of the Lands Tribunal remarked that it was 'somewhat surprising that ... under the terms of this 125-year lease, if the council are of opinion that a particular improvement is desirable, they are able to carry out the works of improvement and to charge the lessee for them even though the lessee does not want them carried out'.[70]

The argument that a council's ability to recover regeneration costs is constrained, even when the contractual wording permits recovery for improvements, stems from the reasoning of the Court of Appeal in the *Waaler* decision.[71] There a RTB leaseholder challenged a bill for £55,195.95. The lease permitted the Council to recover improvement costs, but this was not the end of the matter. There is also a statutory mechanism in section 19 of the Landlord and Tenant Act 1985 for Tribunals to determine if the sums levied are payable that turns on whether the costs have been 'reasonably incurred'. Lewison LJ accepted there is a difference between repair costs (the lessee entering the lease can 'form a view about what kind of works will be involved, and consequently what the scale of cost is likely to be') and 'discretionary improvements' ('it would be quite impossible for the lessee to form any idea of the extent of his potential liability').[72] With some qualifications, he accepted what had been said in the Upper Tribunal:

> I appreciate that the council has responsibility for its secure [council] tenants. However, it also has a responsibility as a landlord to the leaseholders. I do not underestimate the challenges that are faced by a public authority managing a mixed tenure estate where funding is offered

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<https://webarchive.nationalarchives.gov.uk/20120919225404/http://www.communities.gov.uk/documents/housing/pdf/153086.pdf> para 2.30. There were also mandatory directions in 1997 that imposed a cap where funding came from specific schemes.

[68] <https://www.gov.uk/government/publications/social-landlords-reduction-of-service-charges-mandatory-and-discretionary-directions-2014> . For an explanation of Florrie's law, see <https://www.gov.uk/government/news/flos-law-new-cap-for-council-house-repairs-comes-into-force>. The cap was £10,000 outside London and £15,000 in London.

[69] N. Barker, 'Council seeking to charge leaseholders up to £217,000 each for repair works' *Inside Housing* 20.05.21 <https://www.insidehousing.co.uk/news/news/council-seeking-to-charge-leaseholders-up-to-217000-each-for-repair-works-70769>. Research published in 2006 stated that the number of leaseholders faced with bills in excess of £10,000:Communities and Local Government, *Assessment of the impact of the cost of repairs for Right to Buy leaseholders* November 2006, Executive Summary, para 10 <https://webarchive.nationalarchives.gov.uk/20120919225404/http://www.communities.gov.uk/documents/housing/pdf/153086.pdf>.

[70] *Sheffield City Council v Hazel St Clare Oliver* [2008] LRX/146/2007 (Land Tr) para 27. The case went to the Court of Appeal: *Sheffield CC v Hazel St Clare Oliver* [2017] 1 WLR 4473.

[71] *LB of Hounslow v Waaler* [2017] 1 W.L.R. 2817.

[72] Id [42].

> to raise the quality of the housing provided to a decent standard. But in deciding what works to carry out it is not sufficient simply to rely on the right to recover the cost of improvements as a justification in itself for embarking on a scheme of very expensive works.[73]

Lewison LJ explained that there is a spectrum of discretionary improvements. The examples he gave were improvements intended to eradicate a future failure of some building feature, an improvement benefiting all tenants (such as CCTV), or purely aesthetic changes such as a water feature. The further along the scale one goes the greater the weight that should be given to 'the lessees' views and the financial impact on them'.[74] As part of its decision making the local authority should take account of the term remaining on the leases, views expressed during the statutory consultation, and – importantly – 'the financial impact of the works' taking account of the class of lessees:

> in broad terms the landlord is likely to know what kinds of people are lessees in a particular block or on a particular estate. Lessees of flats in a luxury block of flats in Knightsbridge may find it easier to cope with a bill for £50,000 than lessees of former council flats in Isleworth.[75]

In the *Waaler* case the works challenged by the leaseholder involved the replacement of a flat roof with a pitched roof and of the original wooden-framed windows with new metal framed units, which in turn required the replacement of the external cladding and removal of asbestos. The Court of Appeal upheld the decision of the Upper Tribunal that the roof costs were recoverable, but the replacement windows and cladding were only partially so. The works were being carried out as part of 'a wholesale renovation of the' Estate[76] and the changes would benefit both council tenants and leaseholders. But, in reaching this decision on the windows and associated cladding the Upper Tribunal had taken account that the costs were 'very significant' and that more effort should have been made to find an alternative and less expensive solution, particularly given the financial impact on the lessees.

Whether costs are recoverable will always, therefore, turn on three factors. First, as a matter of contractual interpretation, is recovery permitted under the wording of the service charge provisions? In the OTB case many of the works were classed by the Tribunal as improvements, and not recoverable under the particular form of RTB lease. Secondly, even if within the lease wording, there must also have been the appropriate statutory consultation, or else an application to dispense from this.[77] And thirdly, costs must be reasonably incurred, and post-*Waaler* it is clear that in the case of discretionary improvements the degree of leaseholder consultation is important, as well as what the works will cost, and the relationship this has to the financial means of the class of tenants.[78] This must make it doubtful whether some of the massive major works bills sent out, such as that for the Tustin Estate, would be found to be reasonable, maybe especially so if the leaseholders do not consider, as in the OTB case, that they have been given any meaningful opportunities to feed into the agenda-setting. But it does not mean that leaseholders will not be required to pay very high bills where work has to be done. In *LB of Southwark v Baharier*, for example, the Upper Tribunal found the leaseholder liable to pay almost

[73] Id, quoted at [40].

[74] Id [43]

[75] Id [45]

[76] *Waaler v Hounslow LBC* [2015] UKUT 17 (LC) [57].

[77] For an overview of how dispensation from the need to consult works, see <https://www.lease-advice.org/article/major-works-and-consultation-under-section-20-of-the-landlord-tenant-act-1985-a-brief-guide-to-your-rights/>

[78] *LB of Hounslow v Waaler* [2017] 1 W.L.R. 2817.

£25,000 for replacing a worn-out central heating and hot water system serving a block of flats, whilst noting that: 'in human terms it is another example of the serious problems that can befall tenants of modest financial means who, having exercised their statutory right to buy their homes are later faced with very large service charge bills when their local authority landlord carries out major works projects to the building.' [79]

The next section moves from issues of agenda-setting and the complexities that flow from the hybrid role of councils to look at another common practical problem for local authorities undertaking major works, access.

EXCLUSION

In our interview with OCC's Leaseholder Services Manager we asked whether there had been difficulties in getting access to individual flats. Yes, he replied:

> It's about, obviously, we're intruding into somebody's home to carry out the work. And my view is, it's short-term loss for long-term gain. But obviously some residents are reluctant, and the access issues is a mixed bag between tenants and leaseholders.

Indeed, this is a commonly reported problem amongst social landlords, not only for building works but for complying with regulatory standards such as annual gas safety inspections. If these cases cannot be resolved amicably then court action may be necessary in order to secure entry.

There may, however, be a crucial difference between council tenants and leaseholders. Some council tenants at the OTBs who were unhappy with the works resisted access,[80] but it is unlikely that they could legally refuse entry to the contractors. This is because the standard rental tenancy agreement used by OCC gives broad rights of entry to the landlord and expressly allows access to 'carry out' not only repairs but also 'modernisation improvements'.[81]

RTB leases are differently worded from council tenancies, and the landlord has much more limited rights to enter the flat. We asked a lawyer we interviewed about how common it is for leaseholders to refuse access; he replied,

> Very common. I would say that every single major works project I've ever done for a local authority has required at least one threat of injunction to get in. (lawyer 1)

In our interview with the OCC Landlord Services Manager, we asked whether there had been any problems with access. There were, he said, 'a couple who are sticking their feet in the mud quite a bit about access' and:

> …there comes a point, and depending on which block, that point will be reached relatively quickly, beyond which the contractors' penalty cost to us will be absolutely massive. If it involves scaffolding staying up for an extra two months, then we'll have to recover the whole costs, and could be talking about six-figure sums from an individual if we're penalised to that point. We'd seek to recover that from an individual leaseholder for not giving us access.

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[79] [2019] UKUT 73 (LC) [5].

[80] According to the OCC Leaseholder Services Manager interview.

[81] <www.oxford.gov.uk/downloads/file/1311/tenancy_agreement_terms_and_conditions> see cl 6.2.

Although he considered that OCC was entitled to enter to do the work, he noted that there are those who might say, "It's demised to me, so you can't do anything"'.

One of the leaseholders resisting was Dr Piechnik. He did not want the internal work done to his flat and refused access to the contractors. This led OCC to apply in July 2016 for an interim injunction seeking access.

Following a consent order, the contractors were allowed in and completed the works, but the matter later returned to the County Court, and was followed by appeal to the High Court in 2020.[82] The question before the court focussed on the scope of the reserved right of entry in the OTB lease, and whether the works carried out to Dr Piechnik's flat went beyond what was permitted. Notwithstanding several court hearings, this question is not fully answered yet. The High Court decision was focussed on the width of the rights of entry under the lease, overturning the aspect of the county court decision where it had been held that a right to enter could be implied (using para 2(2)(b), Schedule 6, Housing Act 1985) to exercise powers to avoid the risk of death or personal injury or to remedy a state of affairs which is injurious to health. Following the High Court case no such right is implied into the lease[83] but whether the actual entry and works involved a breach has not yet been decided, and the case is due to be heard again in the County Court, probably in 2022.

BEYOND THE OTB: GRENFELL AND THE FIRE SAFETY CRISIS

The themes identified from the OTB study resonate more broadly with leasehold ownership in blocks of flats: the vulnerability of ownership, the absence of voice, and the inappropriateness of strong exclusionary rights. What we are learning from the Grenfell Tower Enquiry and the unfolding fire safety crisis provide vivid examples.

There were similarities between Grenfell Tower and the Oxford Tower Blocks. Grenfell Tower was a 24-storey block with 120[84] flats owned by The Royal Borough of Kensington and Chelsea (RBKC). It was originally built in 1974 and underwent major refurbishment during 2015-2016. Although Grenfell Tower also had leaseholders, in around 10 per cent of the flats,[85] they were not required to pay towards the work. As is now well known, Grenfell Tower was destroyed by a devasting fire on 14 June 2017 leading to the loss of 72 lives. Since then the Grenfell Tower Inquiry has been set up to examine the circumstances leading up to and surrounding the fire. Phase 1 of that Inquiry focussed on the factual narrative of the events on the night of the fire, and reported on 30 October 2019.[86] Phase 2 of the Inquiry, beset with various delays, is underway and examines the cause of these

[82] *Piechnik v Oxford CC* [2020] EWHC 960 (QB).

[83] Id [63].

[84] The RBKC Housing and Property Scrutiny Committee July 2014 (HPSC 2014) mentions 120 flats, whereas a reply to a FOI request states there are 129 properties <www.whatdotheyknow.com/request/how_many_tenants_at_grenfell_tow> accessed 22 October 2020

[85] The HPSC 2014 meeting reports 12 leaseholders in 120 flats, whereas a 2017 reply to FOI request states there are 129 properties at Grenfell Tower, of which 115 of these are social rented properties, 14 are privately owned: <www.whatdotheyknow.com/request/how_many_tenants_at_grenfell_tow> accessed 22 October 2020

[86] <https://www.grenfelltowerinquiry.org.uk/phase-1-report>.

events, including how Grenfell Tower came to be in a condition which allowed the fire to spread so dramatically; it is provisionally expected to complete the hearings for this stage in February 2022.[87]

Since the Grenfell Tower fire thousands of other high-rise blocks have been found to have fire safety defects of various kinds: combustible cladding or insulation, timber cladding on balconies, missing fire breaks, , and problems with internal compartmentation. There is an absence of robust data as no audit of buildings has taken place. There are some government funds available to assist in remediation but they are limited in scope and amount. For most buildings, the costs of remediation is falling to leaseholders, and two Tribunal cases have confirmed that, on the terms of those particular leases, the costs of remediation can be passed on through the wording of the service charge provisions.[88] These costs are eye-watering: individual flat owners are being sent bills of five figure sums, many considerably in excess of £50,000.[89]

The Vulnerability of Ownership

The position of leaseholders of flats in unsafe buildings exposes how vulnerable their ownership is. Many living in flats are first time purchasers who are financially stretched, or retirees will no future earning prospects. Fixing blocks of flats is complex and expensive, and the costs are outside the control of the leaseholders. The human cost of all of this is horrific.[90] There have been suicides; the mental health of flat owners has plummeted, life decisions are on-hold as flats cannot be sold, some leaseholders are now bankrupt,[91] and it is expected that forfeiture of leases will begin soon. It is hard on everyone, but perhaps the most vulnerable are those who were an especially marginal group, those who had bought into a government promoted low-cost home ownership scheme known as 'shared ownership', commonly described as 'part buy, part rent'. In shared ownership the purchaser buys a 'share' in the value of the flat and pays rent on the balance. Critically, the shared owner is responsible for 100% of the repair and maintenance costs, whatever the size of their 'share'.[92] So this means 100% of the fire remediation costs even for those who only have 25% share in the

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[87] <https://assets.grenfelltowerinquiry.org.uk/inline-files/Phase%202%20provisional%20timetable_0.pdf>

[88] *Citiscape* LON/00AH/LSC/2017/0435 <https://decisions.lease-advice.org//app/uploads/decisions/act85/12001-13000/12667> and *Cypress Place* MAN/00BR/LSC/2018/0016 < https://decisions.lease-advice.org//app/uploads/decisions/act85/12001-13000/12914.pdf> (and S. Bright, (2018) 'The Green Quarter decision: leaseholders have to pay', at: https://www.law.ox.ac.uk/housing-after-grenfell/blog/2018/07/green-quarter-decision).

[89] A small scale survey of 1342 leaseholders by Inside Housing found that 15.4% face bills of more than £100,000: P.Apps, 'What does Inside Housing's survey of leaseholders impacted by the cladding crisis show?' 10.02.21 *Inside Housing* <https://www.insidehousing.co.uk/insight/what-does-inside-housings-survey-of-leaseholders-impacted-by-the-cladding-crisis-show-69476>. Example of £156,00 bill: M. Dilworth, *Daily Mail,* https://www.dailymail.co.uk/news/article-9412733/Fire-risk-flats-repairs-cost-resident-156k.html.

[90] W. Martin and J. Preece, 'Understanding the impacts of the UK "cladding scandal": Leaseholders' perspectives' 15 People, Place and Policy, 46: < https://extra.shu.ac.uk/ppp-online/understanding-the-impacts-of-the-uk-cladding-scandal-leaseholders-perspectives/>

[91] The first publicised bankruptcy was Hayley, a 28 year old who had bought through an affordable housing scheme: https://www.theguardian.com/lifeandstyle/2021/jan/22/experience-my-dream-flat-became-a-nightmare. The Inside Housing survey, op.cit, n. 89, found that 17.2% of respondents had begun to explore bankruptcy proceedings.

[92] See D. Cowan et al (eds), *Ownership, Narrative, Things*, (2018); on repair see pp 83-84.

property.[93] Whereas the vulnerability of RTB leaseholders that Carr wrote of stemmed from the ability of local authorities with funding to undertake major works and to recharge the costs, the vulnerability of leaseholders post-Grenfell stems from decades of regulatory failure, poor building practices and the expense of fixing high-rise multi-unit buildings.

The absence of voice

In the context of Grenfell Tower resident voices have been referred to as being muted.[94] As with the OTB refurbishment there had been open meetings, newsletters, drop in sessions, door knocking, and opportunities to comment on the proposed work and materials.[95] However, the absence of *effective* tenant engagement is particularly evident here, as was brutally exposed following the Grenfell Tower fire. It turned out that the tragedy did not come out of the blue; within days, stories emerged of the 'unheard and unseen' voices of Grenfell residents. Prior to the refurbishment there had been a petition from 94 residents concerned about frequent, and serious, power surges, and project delays.[96] The Grenfell Action Group had posted a prophetic warning on a blog 'that only a catastrophic event will expose the ineptitude and incompetence of our landlord'.[97] Residents had petitioned MPs, councillors, held meetings, and formed groups, but, allegedly, the "TMO treated the residents and ward councillors with a *fair amount of disdain*…",[98] and those behind the blog were described as 'antagonists'.[99]

In some ways, tenants' voices have been elevated following the collective trauma of the Grenfell fire. Before then the tenants of Grenfell Tower appeared to be speaking into something of a void, but following the fatal event survivors and affected communities have increasingly been able to access platforms to speak out and, at least to some degree, influence public discourse.[100] The government's green paper on social housing hints at the need for more listening and engagement when it acknowledges the importance of 'empowering residents and making sure their voices are heard' and recognises the desire for 'genuine engagement with residents, to ensure they have influence over

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[93] For example, I. Aikman, 'Shared ownership homeowners fear taking on the full cost of cladding remediation bills' *Which* 19 Feb 2021 < https://www.which.co.uk/news/2021/02/shared-ownership-homeowners-fear-taking-on-the-full-cost-of-cladding-remediation-bills/>.

[94] D. Renwick, 'Organising on Mute' in, *After Grenfell : Violence, Resistance and Response,* D.Bulley et al (eds) (2019) 19.

[95] RBKC Housing and Property Scrutiny Committee 2014 <https://assets.grenfelltowerinquiry.org.uk/TMO10001401_Exhibit%20PD_6%2C%20Exhibit%20SR_3%20-%20Grenfell%20Tower%20Engagement%20Statement_1%200.pdf> .

[96] Petition from the Residents of Grenfell Tower <https://assets.grenfelltowerinquiry.org.uk/RBK00002270_Exhibit%20RFM_71%2C%20Exhibit%20LJ_53%20-%20Petition%20by%20Residents%20of%20Grenfell%20Tower%20at%20Lancaster%20West%20Estate%2C%2016%20July%202013.pdf> .

[97] Grenfell Action Group, 'KCTMO-Playing with fire!' 20 November 2016 <https://grenfellactiongroup.wordpress.com/2016/11/20/kctmo-playing-with-fire/> .

[98] Councillor Blakeman's email, referred to in Phase 2, Module 1: Team 1, Opening Submissions on Behalf of The BSR page 7 fn 33 <https://assets.grenfelltowerinquiry.org.uk/BSR%20Team%201%20Mod%201%20Opening%20subs.pdf> .

[99] Transcript from Grenfell Tower Inquiry, 12 October2020, 116 <https://assets.grenfelltowerinquiry.org.uk/documents/transcript/GTI%20-%20Day%2051.pdf> .

[100] This includes speaking out in the news media, press, and at organised events, as well as through protests, vigils, and art forms. For more on how the actions of those who lack access to formal forms of power might nevertheless influence political discussions through action and acts of resistance see P. Gopal, *Insurgent empire: anticolonial resistance and British dissent* (Verso Books, 2019).

decisions that affect their lives'.[101] At a minimal level, there surely should be mechanisms that facilitate effective 'alarm raising', but as we have seen, at Grenfell Tower even this was absent. After the Grenfell fire there have been renewed calls for residents to be given stronger voices in relation to safety issues,[102] but the OTB study shows that there is a need to rethink the participation rights of all property holders more broadly.[103]

Exclusion

In the post-Grenfell world, the exclusion narrative has created enormous difficulties for local authority landlords seeking to enter flats to carry out fire safety works. In Wandsworth, for example, the local authority decided to retrofit sprinklers to 99 high-rise blocks.[104] Over 1/3 of the flats are leasehold, of which 55% are owner-occupied. The council took the decision to retrofit in June 2017, but 5 residents' associations objected – together with a small number of individuals from other blocks and one non-resident leaseholder – indicating they were opposed to the Council's decision to impose the retrofitting of works and recharge leaseholders. Some argued they were not necessary, as 'many of the blocks have two staircases, no cladding and are designed to contain fires within the property', and others were opposed 'whether they have to pay for them or not on grounds of disruption and aesthetics'. In the face of leaseholder resistance Wandsworth referred various questions to the Tribunal, similarly to OCC. In the event, the application was struck out,[105] but the substantive issues remain unresolved, and the sprinklers have not been fitted.

CONCLUDING REFLECTIONS ON PROPERTY, OWNERSHIP AND LEASES

Three key themes emerge from this study – the absence of effective voice and control for leaseholders and tenants in relation to important decisions made about their property, the risk of flat owners being liable to pay huge financial sums towards the upkeep and improvement of the block, and the failure of the narrative of property to acknowledge the interdependency of spaces in blocks of flats.

In many respects the OTB leaseholders had a 'lucky escape' in that the costs they were liable to pay were much reduced following the Tribunal decision. But in so far as ownership is associated with freedom and control the study shows that neither tenants nor leaseholders had much say in what happened, and that there was almost universal unhappiness with what had been done to the inside of their flats. Dominion, in the agenda-setting sense, lies with the freeholder, not with leaseholders, and certainly not with the council tenants. As one council tenant put it:

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[101] Ministry of Housing Communities & Local Government, 'A new deal for social housing' Aug 2018, Cm 9671, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/733605/A_new_deal_for_social_housing_web_accessible.pdf> para 71.

[102] The draft Building Safety Bill contains provisions for resident engagement, <www.gov.uk/government/publications/draft-building-safety-bill> clauses 91-94.

[103] In the private sector issues are different but there is likewise a clamour from leaseholders to have their voices heard. See Law Commission, *Reinvigorating commonhold: the alternative to leasehold ownership* (Law Com No 394) paras 1.35 and 1.36.

[104] S. Bright, 'The Wandsworth Sprinkler Decision: Property as Power and Resistance' (2020) < https://www.law.ox.ac.uk/housing-after-grenfell/blog/2020/01/wandsworth-sprinkler-decision-property-power-and-resistance>

[105] *High Rise Blocks within the LB of Wandsworth* LON/OOBJ/LSC/2018/0286 <https://wandsworth.gov.uk/media/5896/first_tier_property_tribunal_final_decision.pdf>

> I mean, it doesn't matter if you own one of these or rent or lease one of these, you're going to have no say in what they do, 'cus it's their [OCC's] property. You've got to sit and take whatever they dish out … You still got your flat, but you got restrictions that have been forced on you I suppose 'cus you got no choice in the matter. (Council Tenant 6)

In relation to leaseholders it is commonly accepted that the section 20 process is an expensive exercise that does not achieve effective consultation.[106] The landlord simply has to 'take into account' any observations received but, as Judge Cooke remarked in *Haringey v Bell*, 'there is no machinery provided for the landlord to communicate the fact that he has considered the tenants' observations…all the landlord has to say is "I read his letter. I considered it, I rejected it, I started work next morning….One is left wondering about the utility or purpose of this'.[107] There was a move to reform section 20 following the Competition and Markets Authority's recommendation of review in 2014; but this came to nothing notwithstanding some initial work done by relevant government departments, and appears no longer to be on the agenda.[108]

Both council tenants and leaseholders would value greater involvement in decision-making. It is, of course, difficult to accommodate multiple viewpoints but this does not mean that tenants and leaseholders should have no voice, as is largely the case at present. In the context of long leasehold in private blocks, the Law Commissioner Nicholas Hopkins has argued that we need to move 'from a management system based on 'us and them' to one based on 'we and ourselves'.[109] Currently there is no-alignment of voice and power between those with decision-making autonomy (the freeholder), those who own the collective value of the building (which will include leaseholders) and those who use, enjoy, and inhabit the space as home (the leaseholders and tenants). Even though greater attention is being given to the idea of resident engagement post-Grenfell the formal legal position has not yet changed.

The vulnerability of leaseholders in council blocks has historically been exposed at times of major works. Whereas landlords of private blocks will effectively restrict work to what can be funded through service charge recovery councils are likely to have additional funding sources, and the duality of their role as both building owner and strategic local authority means that block specific work is often part of a broad (and expensive) regeneration project. This goes well beyond necessary repair and maintenance into the realm of what was referred to in the *Waaler* case as discretionary improvements.[110] The suggestion in the *Waaler* judgment that service charges may not be reasonable (and thus not payable) where the bills are large, and the leaseholders as a group are unlikely to have deep pockets, may help constrain attempts to recover five figure sums, but the scope and potential of that argument has not yet been fully tested.

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[106] A survey of 756 leaseholders by the organisation TPAS in 2015 found that 59% had been unhappy with information provided to them on major works, and 71% rated value for money poor or very poor in the most recently completed works: K. Newbolt, 'Leasehold Engagement' (2017) <http://futureclimate.org.uk/wp-content/uploads/2017/07/LholdersRefurbEventKNewbolt.pdf> .

[107] *Haringey v Bell* (Central London Court 6 December 2004) [36].

[108] M. Boyd, 'Building Safety Bill: Made by officials. By themselves. Talking to themselves. Will the cogs turn' 6 July 2021, Leasehold Knowledge Partnership < https://www.leaseholdknowledge.com/building-safety-bill-made-by-officials-by-themselves-talking-to-themselves-will-the-cogs-turn/>

[109] N. Hopkins and J. Mellor, '*A change is gonna come': reformging residential leasehold and commonhold* [2019] Conv 321; and see Law Commission, *Reinvigorating commonhold,* op.cit, n. 103, p.13.

[110] *LB of Hounslow v Waaler* [2017] 1 W.L.R. 2817.

Stepping back from the particular context of local authority refurbishments, these are themes that are more widely problematic for flat owners. Blocks of flats, especially high-rise ones, are complex buildings. The post-Grenfell fire safety crisis has created a new, and widespread, form of vulnerability stemming from decades of regulatory failure in relation to construction standards and oversight. The focus may currently be on costs stemming from inadequate fire protection within buildings, but the recent tragic collapse of an apartment block in Miami shows that there are even broader fundamental questions that need to be addressed about how long-term maintenance, and unforeseen building risk, is paid for in blocks of flats.[111] At present, our property law regime does not make sufficient provision for the on-going, major, costs that will be required. Nor are the expectations of home owners in relation to what it may be necessary to pay to keep the building smart and safe realistic; few anticipate the scale of bills that are likely to be needed in the long term, even without the massive regulatory failures exposed post-Grenfell. This issue has to be grasped.

Finally, as part of the complexity of shared buildings there must also be adjustment to the prevailing narrative of property as exclusion, to take account of the necessary interdependency of the spaces and the community of users. There is a strong association between property and privacy and control, which Alexander refers to as an 'intuition that private ownership of property protects people insofar as they have the right to exclude others out from their personal dwelling'.[112] But this will not do when one person's property security puts at risk others living in the building; there must be give and take. If work needs to be done in individual flats to better the well-being of the community of those living in the tower block, perhaps by carrying out safety work, then property law must adjust. Yet here too there must be checks and balances: privacy must be respected, and the freeholder should not be at liberty to carry out shoddy work, but it must be of good quality, including meeting aesthetic concerns.

There is a tendency amongst property scholars to focus on big picture questions and classifications: what is property? what is ownership? In the context of blocks of flats, it is also important to look at what matters on the ground, that is, how our contractual division of rights, and our regulatory measures, affect the rights and expectations of those with 'property' within the building. The OTB study, and the emerging post-Grenfell struggles, reveal many failings of our current property law regime. Blandy and Goodchild have suggested that what matters is not so much a focus on the binary labels of ownership and renting but instead 'a consideration of rights rather than tenure refocuses attention on issues of real importance'.[113] In their study of shared ownership Hopkins and Bright made a similar observation:

> What our study of shared ownership shows, we suggest, is the inadequacies of tenure classification: it is ill suited to acknowledge the heterogeneity that exists within housing; or

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[111] C. Sherry, 'Defects are rife: Miami-style building collapse could happen in Australia' *The Sydney Morning Herald* 28 June 2021 < https://www.smh.com.au/national/defects-are-rife-miami-style-building-collapse-could-happen-in-australia-20210628-p584yp.html>; P. Coy, 'Aging Condos are a "Ticking Time Bomb" and Need more Oversight' *Bloomsberg Businessweek* 6 July 2021 < https://www.bloomberg.com/news/articles/2021-07-06/aging-condos-are-a-ticking-time-bomb-and-need-more-oversight>

[112] G.S. Alexander, *Property and Human Flourishing* (2018, OUP) p. 64.

[113] S. Blandy and B. Goodchild, 'From Tenure to Rights: Conceptualizing the Changing Focus of Housing Law in England' (1999) Housing, Theory and Society 31, p.41.

> to provide a meaningful account of the rights and responsibilities that exist between people and their housing.[114]

The complex web of property law relationships in tower blocks is mediated by choices made, consciously or not, about responsibility, vulnerability, engagement, power, and disempowerment and that are reflected in the way that leases are written, and regulatory measures are designed. There are no easy answers to balancing agenda-setting and effective management against giving voice to all property holders, or to balancing the territorial autonomy of the individual flat-owner against broader building needs. But if we focus attention away from tenure labels and question the prevailing meta-narrative of property as exclusion and dominion, by paying closer attention to the rights and responsibilities of the various property interest holders within a tower block we can then start addressing some critical questions to do with participation, voice, autonomy and control.

[114] Bright and Hopkins, op.cit., n. 27, p.392.