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Boodle Hatfield Property Insights

July 2023

Leasehold reform regains momentum

In our Spring Insight we reported on the announcement from Michael Gove, Secretary of State at the Department for Levelling Up, Housing and Communities outlining an intention to abolish the 'feudal' leasehold system. It was therefore somewhat of a surprise to all, just months later in May, to read a further ministerial announcement that saw these proposals side-lined and leasehold seemingly given a reprieve.

Where does this announcement leave leasehold reform? To have abolished leasehold completely and to have introduced a new tenure in the form of a reinvigorated commonhold in such a short period would undoubtedly have been chaotic and possibly counter-productive and would quite possibly have led to significant disruption and uncertainty for all those familiar with the current leasehold system.

Whilst we still have relatively little detail as to what is planned and exactly when it will happen, leasehold reform is however still on the government agenda, albeit less radical than envisaged at the start of the year, as evidenced by the proposed significant reforms set out in the Renters (Reform) Bill discussed further below.

"Leasehold reform may at times have seemed low on the list of government priorities, leading some to question the considerable time and energy spent to date reviewing the various consultation papers and statements outlining proposed reforms."

Simon Kerrigan, Property Partner

Reforms for residential tenants

The Renters (Reform) Bill was published amid much fanfare in May of this year. Will the Bill live up to its billing as the 'biggest shake-up of the private rental sector for 30 years' comprising 'a once in a generation reform to deliver safer, fairer and higher quality homes' forming part of the commitment to 'bring in a better deal for renters'?

The Bill reflects a desire to protect private residential tenants against 'rogue' landlords perceived to be acting unreasonably or unfairly following a period where there has been much focus on the poor condition of some rental properties and the use of section 21 notices by unscrupulous landlords to end tenancies where a tenant complains about the condition of their property or rent increases.

The Bill is currently being debated in Parliament and could therefore be significantly revised before coming into force. On first sight, the proposals are, however, relatively wide ranging and would indeed trigger key reforms to the current rental system including those detailed below:

- The wholesale reform of the structure of residential tenancies. All new tenancies will be continuous periodic tenancies, rather than coming to an end on notice after a fixed period as is the current practice. Transitional provisions will also provide for existing tenancies to be migrated to the new structure.
- The abolition of the so called 'no fault' section 21 notice evictions, meaning it will no longer be possible for a landlord to evict a tenant at the end of a fixed term simply because it wants to do so. Eviction will only be possible if one of the statutory grounds can be proved.
- The introduction of more comprehensive statutory grounds for landlords to recover their property where tenants are at fault, but only exercisable in what is

described as “reasonable circumstances”.

- Rent reviews will be limited to annual reviews, triggered by a formal notice process with the tenant able to challenge any proposed increase via the First Tier Tribunal with conventional rent review clauses of the type we are used to in practice now being deemed ‘vague’ and ‘unconnected to the market’.

The reforms outlined above will perhaps impact most on the ‘occasional’ landlord perhaps wanting to let a family home whilst overseas, or other temporary relocation. For this group of landlords, the current section 21 regime allows the landlord the certainty that it can terminate a tenancy at the end of the fixed term with minimal fuss or expense and return to their home or indeed choose to sell the property should they wish. Whilst this will be addressed in part by a new statutory ground allowing a landlord to evict a tenant if it can prove it intends to sell the property or allow a family member to move into the property, such a change may prove too risky for some landlords in this sector, who may opt to simply leave a property vacant rather than run the risk of having to take costly and potentially time consuming court proceedings to regain possession of a family home that has been let on a short-term basis.

Another important factor to consider is quite how the court system will deal with the likely increase in possession proceedings under the new statutory grounds once the section 21 notice procedure is no more. Without considerable investment in the current court system, this may mean that it will be slower and more expensive for landlords to evict problem tenants such as those with significant arrears or where there has been a significant breach of the tenancy. This may be addressed by proposals for the creation of a new Ombudsman scheme, tasked with providing cheaper and quicker dispute resolution together with a new online portal.

Reform is still some way off. It is anticipated that the earliest the proposals outlined in the new Bill could come into force is early 2024, subject to first being passed by Parliament. Quite how the changes will impact on existing tenancies, in particular those with a fixed term that will run beyond the likely implementation date in 2024, is currently unclear.

“Whilst these reforms may make the private rental sector less attractive to some landlords, who may see this increased regulation as the final straw, there is in practice little in the new Bill that should concern responsible landlords, given that the focus is to take action against those landlords that act unfairly. The nature of the reforms do however give rise to a question as to quite how and when the courts will find the resources and capacity to deal with disputes where court action is required.”

Colin Young, Property Litigation Partner

Reforms for commercial leasehold renewals

Whilst much of the recent focus has been on residential leasehold reform, there are also proposals afoot to reform commercial leaseholds in the form of a review of the Landlord and Tenant Act 1954.

The Law Commission has announced plans to review how the current right to renew business tenancies works in practice and will consider options for reform, acknowledging that aspects of the 1954 Act are burdensome, unclear and out of date and may be the cause of unnecessary delay and costs to landlords and tenants alike.

The review will form part of a larger exercise aimed at revitalising high streets and town centres and improving the environmental sustainability of commercial properties. A consultation paper, providing more detail on the proposed reforms is anticipated late 2023.

“It is anticipated that the focus will be on creating a leasehold framework that is used, rather than widely contracted out of (as is the case with the present framework), whilst still allowing landlords and tenants to make their own agreements fostering a productive and beneficial commercial relationship between the parties.”

Kellie Jones, Property Litigation Partner

Green lease provisions

Green lease clauses in some form or another have been included in commercial leases, albeit not necessarily commonplace, for some time following the initiatives of organisations such as the Better Building Partnership and the Chancery Lane Project. The City of London Law Society Certificate of Title has also acknowledged green lease clauses in its recently revised Certificate of Title. But what is a 'green lease' and do the clauses that make a green lease merit separate billing or are the clauses in fact now commonly accepted lease terms with both landlord and tenant wanting to invest in and occupy a sustainable property?

The form and content of green lease clauses may vary considerably. In so far as there is a standard, green lease clauses will commonly include obligations on both landlord and tenant to undertake specific responsibilities regarding the sustainable operation and occupation of a property including (for example) energy efficiency, disposal of waste, alterations to the property and the monitoring and sharing of environmental data such as energy consumption.

We are now beginning to see the emergence of 'next generation' green lease provisions such as the promotion of environmental social and governance requirements which may require changes in the behaviour of both landlord and tenant and the way in which buildings are used and occupied rather than relating directly to the structure and energy use of the building.

"Environmental social and governance provisions are increasingly forming part of the green lease suite of provisions in lease negotiations but in practice may sit less comfortably in the established landlord and tenant covenants and need to be drafted carefully to protect value and allow appropriate flexibility."

Kate Symons, Property Senior Associate

Introduction of biodiversity net gain

November 2023 will see the majority of planning permissions subjected to a condition that development is not to begin until a biodiversity gain plan has been submitted and approved by the local planning authority. This change in planning policy reflects the government's aim to ensure that developers leave the natural environment in a much better state than it was in before development commenced.

In the biodiversity gain plan, developers will need to show how they intend to increase biodiversity by at least 10%. They will need to do so by one or more of the following:

- Improving the habitat on the development site
- Improving the habitat on another site owned by the developer
- Buying units from a land manager (who in turn promises to improve the habitat on its land)
- (As a last resort) buying statutory credits from the government who will themselves invest in habitat creation in England.

For developers, this will mean working with a consultant specialising in biodiversity net gain. Developers are likely to factor biodiversity into the design stage, to ensure that on the development site, there will be a habitat on which biodiversity can be improved. It is expected that government will set the price of statutory credits high, so developers will be incentivised to improve biodiversity onsite.

For landowners, the advent of this condition presents an opportunity to become a land manager, selling units to developers and contracting to improve the habitat on their land. Landowners will need to tie up their land for this purpose for 30 years.

Whilst landowners may look favourably on this potential new income stream they will need to consider how the required biodiversity improvement will be delivered and how will it affect the value of the landowner's land over the 30 year period - particularly should the landowner wish to dispose of the land in the 30 year period.

> *"The proposals are a demonstration by the government of their desire to improve our environment and will provide a new opportunity for landowners and developers to work together for their mutual benefit."*
>
> **Sophie Henwood, Property Senior Associate**

Building safety and the compulsory registration of high-rise buildings

The provisions of the Building Safety Act will have a significant impact on the construction and occupation of residential buildings.

A key provision is the requirement requiring all residential high-rise buildings, in this context buildings that are at least 18 metres high or have at least seven floors containing at least two residential units, to be registered with the newly created Building Safety Regulator by 30 September 2023.

The Health and Safety Executive have confirmed that, as at the end of May this year, over 750 properties have been registered, this leaves registration some way short of the total number of 12,500 or so buildings thought to be within scope for registration. Failure to register will be a criminal offence, punishable with a fine or imprisonment.

New buildings completed after 1 October 2023 must have a relevant completion certificate or final notice and must be registered before residents can occupy them.

The registration process should be completed by the Principal Accountable Person for each building, or someone authorised by them. A fee of £251 is payable and the applicant will be required to provide information relating to the building's structure and fire safety measures.

Whist the registration requirement relates only to buildings over 18 metres or seven floors, the Building Safety Act also contains significant provisions relating to 'relevant buildings' and 'higher risk buildings', brief details of which are set out below:

- **Leaseholder protection for relevant buildings:** Buildings that are at least 11 metres high or have at least five floors containing at least two residential units will (save for limited exceptions) be relevant buildings for the purpose of the Building Safety Act and may, depending on the qualifying status of the lease, fall within the leaseholder protection provisions in the Act which require landlords to undertake and pay for remediation works for relevant defects in relevant buildings and may prevent the recovery of the cost of such sums from tenants via the service charge. The Developer Pledge and Developer Remediation Contracts signed by nearly 50 housing developers committing to remediate historic defects also applies to buildings of at least 11 metres or at least five floors.
- **Implied lease terms for higher-risk buildings:** Buildings that are at least 18 metres high or have at least seven floors containing at least two residential units will (save for limited exceptions) be high-risk buildings for the purpose of the Building Safety Act and will be subject to additional obligations for the management of building safety risks with in the building and the recovery of the cost of complying with these obligations. These provisions are implemented by amendments to the Landlord and Tenant Act 1985 with the effect that terms will be implied

into all new and existing leases of higher-risk buildings allowing landlords to recover the costs of specified building safety measures via the service charge and setting out obligations on the part of both landlord and tenant regarding building safety.

"Registration is a crucial part of the new regime and our efforts to ensure residents of high-rise buildings feel protected and safe in their homes."

Sarah Rock, Construction Partner

Developer Remediation Contract

The Developer Remediation Contract (DRC) was produced by the government last Summer and reflects the pledge made by 49 developers to commit to remediate life-critical fire safety works in buildings over 11 metres high on which they had played a role in developing or refurbishing in the last 30 years. The DRC has now been heavily negotiated and, as of May this year, 47 developers have signed up to the DRC committing themselves to the government scheme. Developers that refuse to sign the contract will face significant consequences.

The DRC sets out an agreement on the part of each developer to take responsibility for work to address life-critical fire-safety defects (including but not limited to external cladding) arising from the design and construction of buildings 11 metres and over in height that they developed or refurbished in England over the 30 years prior to April 2022, keep residents in those buildings informed as to progress towards meeting this commitment and reimburse taxpayers for funding spent on remediating the unsafe buildings.

Some buildings that were initially assessed under the criteria set out in the now withdrawn Consolidated Advice Note and issued with unsatisfactory EWS1 forms, have now been reassessed under the more proportionate PAS9980 system. In some cases, this has produced differing results. As a result, many managing agents and landlords are understandably confused by which fire risk assessment result applies, and whether in fact their building requires remediation at all.

The DRC does little to alleviate this confusion and may in fact open the door for the developers to reassess the buildings once again. As a result many leaseholders now face a further wait as developers carry out further tests.

"Whilst the intention was that leaseholders would benefit from a common framework, the DRC only places a "reasonable endeavours" obligation on the developer to enter into a works contract with the responsible entity (the owner of the superior leasehold or freehold) rather than an absolute obligation. In practice this means that leaseholders and responsible entities are at the mercy of the developers with no legal recourse unless and until a works contract is entered into."

Sarah Rock, Construction Partner

Exclusivity Agreements

With demand for prime and super prime properties in London currently outstripping availability, we are seeing an increase in demand for our residential team to assist both buyer and seller clients to secure deals with the use of sealed bids and the return of requests to prepare exclusivity or 'lock out' agreements.

An exclusivity agreement will typically give the buyer time to undertake their due diligence on the property without competition from third parties. The buyer has the benefit of knowing that it has an agreed and clearly defined period of time when they are incurring costs, but can review the property title, have a survey or valuation done and

make other appropriate investigations without the risk that the seller will contract with a third party. Typically, the terms of the exclusivity agreement will prevent the seller from issuing a contract or other papers relating to the property to a third party or indeed dealing with third parties.

The exclusivity period is often granted in return for the payment by the buyer of a "non-refundable deposit" to set off against the purchase price should the buyer proceed to complete the sale, but not otherwise. Importantly, the agreement does not bind the parties beyond the exclusivity period, at the end of which either party may walk away from the proposed transaction and it does not force either party to have to exchange contracts even if they are ready to do so within the exclusivity period.

Such agreements can potentially present more problems than they solve. The documents are often heavily negotiated, itself sometimes a costly and time-consuming practice, this is particularly the case with the circumstances in which any "non-refundable deposit" and associated costs will be repaid should the buyer decline to proceed with the purchase. In practice sums that are deposited are rarely on a fully "non-refundable" basis and a well advised buyer will ensure that there are circumstances where any deposit under an exclusivity agreement will be refunded should they decide not to proceed for one of the reasons defined in the agreement.

"A well drafted exclusivity agreement will set out to serve the interests of both parties and ensure that so far as is possible the parties work together in good faith, seemingly giving buyers comfort and peace of mind in a hectic market."

Saskia Arthur, Residential Property Partner

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