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Boodle Hatfield Property Insights

March 2024

With a general election now a certainty for 2024 or the very start of 2025, Spring sees a flurry of activity with the Government keen to see leasehold reform and other initiatives through the committee stage and over the line before the campaigning begins in earnest. Whilst the Government has taken a step back in some areas of sustainability, bio-diversity net gain, a feature of previous Insights, has now been implemented and the publication of a revised set of green lease clauses looks set to encourage landlords and tenants to work together to enhance the environmental performance of commercial premises.

Leasehold reform edges closer

It is perhaps not surprising that many have lost track of quite where we are in terms of leasehold reform. In short, both the Freehold and Leasehold Reform Bill and the Renters (Reform) Bill are progressing their way through the various committee stages required before either become law and there is, therefore, still some way to go before the Government can meet its objectives of seeing both provisions through to the statute books before the next general election.

Freehold and Leasehold Reform Bill

The Freehold and Leasehold Reform Bill, which will introduce a range of measures, outlined in our previous Insights, but including the right for leaseholders to claim longer lease extensions for flats and houses, extended rights for leaseholders to purchase the freehold of their houses, changes to the valuation methods used for enfranchisement claims, collective enfranchisement made available to more mixed-use buildings and greater service charge transparency. Key developments in the last few weeks have included:

- **Ban on leasehold houses:** The publication of previously omitted provisions set to prevent the grant of a new "long residential lease of a house". At the time of writing, these provisions include the significant exclusion of retirement communities and land owned through a lease granted to another organisation prior to December 2017.
- **Ground rent reforms:** There is considerable speculation that, now that the consultation period on the reform of ground rents has now ended, whichever of the five proposed reforms is taken forward will be incorporated into the Freehold and Leasehold Reform Bill (remember 'no change' is not on the table).
- **Forfeiture:** There has also been considerable speculation as to the future and possible abolition of the landlord's remedy of forfeiture of residential tenancies. Whilst this does not appear to have the full backing of the Government, it is possible that an amendment will be introduced limiting if not fully abolishing the forfeiture of long residential leases.
- **Commonhold:** Aside from the much-quoted statement from Michael Gove in which he described leasehold as "an outdated feudal system that needs to go", there seems little evidence that the Government intend to fully "reinvigorate" commonhold as an alternative form of tenure. This can be contrasted with the stated intention of the Labour party to "make commonhold the default tenure for all new properties".

Renters (Reform) Bill

Significantly, the Freehold and Leasehold Reform Bill has now overtaken the Renters (Reform) Bill on the race to the statute books. The Renters (Reform) Bill includes the controversial abolition of section 21 'no fault possessions'. The belated recognition by the Government at the end of 2023 that the court system

would need to be reformed before s21 could be abolished led many to think that the Bill would be quietly put out grass. A subsequent statement in February from Michael Gove maintaining that s21 would be "outlawed" before the general election added fuel back to the fire but was promptly followed by rumours of backbench MPs co-ordinating attempts to water down the reforms.

There is talk of nervousness and uncertainty within the residential market regarding the possible erosion of landlords' interests arising from the Renters (Reform) Bill with tales of some landlords considering withdrawing from the rental market altogether. This uncertainty has not been helped by the rumours of how the Government may tackle the problems. Whilst the intent is clearly to pursue the reforms, it is possible that there may simply not be enough time for the Renters (Reform) Bill to be implemented prior to the general election.

As for the Freehold and Leasehold Reform Bill, ultimately, when it does come into force, it is reasonable to expect a sharp increase in the number of enfranchisement claims, with claimant tenants enjoying the benefit of an expected significant reduction in expense, and landlords facing the consequent significant reduction in their returns. However, for now, matters remain "on hold" as we wait to see the precise detail of just what will be enacted, and when.

With a hard deadline on the near horizon for the present Government clearly intending to bring both Bills into force before a forthcoming election, it feels as though, now more than ever, the market is in the mode of "watch this space". It remains to be seen quite what that means for any pent-up demand in claims if the Government is not able to finalise matters before an election.

Simon Kerrigan, Property Partner

Green Leases: A new era?

The concept of a "green lease" has been with us for some time. At its most basic, a green lease follows the form of a standard commercial lease but includes clauses to encourage engagement and co-operation between landlord and tenant to improve the environmental performance of the building. The Better Building Partnership (BBP) was among the first to put together a set of green lease clauses. Indeed many of the leases in place today incorporate some, or all, of the original BBP clauses.

The BBP has now launched a revised version of its Green Lease Toolkit comprising guidance notes, case studies, green lease clauses, advice on owner and occupier engagement and a green essentials checklist against which to measure the green credentials of a lease. Whilst some of the key provisions from the original Toolkit still feature, including the underlying emphasis on co-operation rather than compulsion, the revised Toolkit includes significant new provisions, notably consideration of the social impact that a building may have on the lives of those interacting with it.

Green Lease Toolkit

The Toolkit includes a set of lease clauses aimed at promoting the environmental performance of a building and provides users with the option to adopt light green, medium green or dark green clauses, taking into account the different levels of engagement and expenditure that may be appropriate for a particular transaction. The use of the Toolkit is entirely optional and it is not a government endorsed or statutory document.

Key Provisions

- **Co-operation:** The success of a green lease relies as much on co-operation between the parties as the existence of strict legal obligations. The option to include light, mid or dark green clauses is key to this spirit of co-operation rather than compulsion.
- **Building Management Group:** Communication is encouraged by the creation of a Building Management Group as a forum to share data, targets and strategies to improve the environmental performance of the building.
- **Social impact:** The growing demand for social provisions in the form of a "responsible lease" is acknowledged. Appropriate social impact measures will depend on the nature of the building, but may include engagement with local communities, the creation of job opportunities and the provision of diversity, inclusion and wellbeing support and resources to employees and users of the building.

- **Sustainable use:** The Toolkit encourages the promotion of the sustainable use and management of the building through behavioural change, without necessarily the requirement for additional expenditure.
- **Metering and data sharing:** The ability to collect and share data relating to energy and water use and waste production is seen as essential to the delivery of an energy and resource efficient building.
- **Landlord's works:** The Toolkit promotes the ability for the landlord to undertake and recover the cost of works to improve the environmental performance of the building (at its own cost or the cost of the tenant).
- **Tenant's alterations:** Tenant's alterations that may have an adverse impact on the environmental performance of a building are not permitted, whereas tenant's alterations that may improve the environmental performance of the building maybe exempt from the standard requirement to obtain landlord's consent.
- **Recycling of waste:** Both landlord and tenant are encouraged to minimise the amount of waste sent to landfill and to increase the amount that can instead be salvaged (recovered, reused, repurposed, reprocessed or recycled) by the use of a Waste Policy including specific targets where appropriate.
- **Reinstatement:** The requirement on a tenant to reinstate any alterations at the end of the lease term has long proved unpopular with tenants due to the financial implications of such a clause, aside from the environmental impact. The potential need for reinstatement (for example where deemed necessary to make a property suitable to relet) is therefore balanced against the potential adverse environmental impact that reinstatement may have on the environmental performance.
- **Circular economy for landlord and tenant works:** Both landlords and tenants are encouraged to take into account the potential for the reuse and regeneration of resources when carrying out maintenance, repair, alterations or reinstatement to the premises and or building.
- **Environmental standards:** Where a building has an environmental rating, such as an EPC, the tenant should not use the premises in such a way as to adversely affect this rating.
- **Renewable energy:** Where a tenant is able to procure its own energy supply, the tenant should be encouraged or required to purchase "green" tariff electricity where the same is available at commercially reasonable rates. Where the energy is supplied by the landlord similar standards should apply.
- **Service charge:** The landlord should be able to recover expenditure via the service charge, notwithstanding that a product or service could have been procured at a lesser cost (where the increase is as a result of the service or product promoting the environmental performance of the building) subject to a suggested cap of a 10% increase.

The relatively innovative nature of the light, mid and dark green clauses means that users of the green lease clauses are actively encouraged to adapt and prepare their own lease clauses based on those set out in the Toolkit. The clauses have been prepared to supplement the Model Commercial Lease and, as such, can be adapted for use in most modern commercial leases relatively easily. Landlords and tenants alike will need to take the time to review the provision of the Toolkit and consider which, if any, of the clauses they wish to include to supplement existing provisions in their own standard documentation and to what extent it may be appropriate to include such clauses on renewal of existing leases.

Where once green lease clauses were included at the behest of the landlord, and often deemed to place an onerous and unwelcome burden on tenants, we are now seeing the spirit of co-operation promoted in the Toolkit prevail, with many tenants actively seeking, and prepared to pay for premises that can illustrate a commitment towards sustainability and social engagement and wellbeing.

The BBP Toolkit can be viewed in full here: https://www.betterbuildingspartnership.co.uk/green-lease-toolkit-0

Kate Symons, Real Estate Senior Associate

Control Contracts: Transparency the what, where and who?

The Government consultation Contractual Controls on Land published earlier this year sets out proposed regulations that will require the publication of certain information relating to 'contractual control agreements' such as option agreements used to control and secure land for development in an aim to provide greater transparency as provided in the Levelling Up and Regeneration Act 2023,

Such agreements are commonly protected by a notice or restriction on the Land Registry title to which they relate, but are not currently required to be registered or recorded in any central accessible public register.

Whilst landowners and developers currently benefit from a degree of confidentiality afforded by the current regime, the new regulations are intended to promote increased transparency, allowing interested persons to find out more about where land is being brought forward for development and promoting a greater understanding of where and how land is under control. This is to be achieved by the publication of a publicly accessible data set detailing the "what", "where", "who" and "when" of each control agreement.

It is anticipated that the new regulations will come into force in April 2026 and will affect all new control agreements entered into after that date as well as having retrospective effect, requiring the disclosure of information relating to existing control agreements entered into after April 2021. Details of the draft regulations are summarised below.

- **Accessible data:** The collated information relating to control agreements will be be published in a single, user friendly, fully accessible dataset.
- **Control Agreements:** The term control agreement will include option agreements, pre-emption agreements, conditional contracts and promotion agreements in each case where the agreement is in writing, relates to registered land and is intended to facilitate the future development of land. The regulations will apply to control agreements that bind the parties for 12 months or more or (if less than 12 months) include provision for the grantee to extend the agreement. Overage and clawback agreements, restrictive covenants, agreements to facilitate finance and loan agreements, and agreements entered into for the purpose of national security will not be control agreements.
- **Transparency:** Unlike the current position, where a developer with the benefit of a control agreement can choose whether or not to note its interest on the Land Registry title to the subject property, the new regulations will apply to all control agreements removing the ability to opt to stay 'off the record'.
- **Timing:** Once the regulations are in force, the party with the benefit of the agreement (the grantee) will be required to register details of the new control agreements within 60 days of the date of the agreement. The draft regulations also require the compulsory registration of any existing control agreements entered into, varied or assigned after 6 April 2021 (subject to a 12-month transition period to allow data to be collated).
- **Information to be provided:** The information to be recorded must be provided by the grantee's solicitor within 60 days of the grant of a new control agreement. The information includes the type of control agreement, the names and registration numbers of the contracting parties, the start and end dates of the agreement (and details of any provision to extend), the Land Registry title number of the subject property and the SRA details of the solicitors acting on behalf of the grantee and grantor.
- **Confidentiality:** The regulations do not require the publication of the full control agreement and commercially sensitive information beyond the mandatory information outlined above will not be disclosable or available on the public record.

- **Compliance:** The mandatory information must be provided regardless of whether the grantee chooses to protect the agreement by way of a Land Registry notice or restriction. The Land Registry will however require the mandatory information to have been provided before, and as a condition of, the registration of a notice or restriction. Non-compliance will be a criminal offence, ultimately leading to a fine or imprisonment.

- **Guidance:** The consultation promises further guidance, to be published 6 months before commencement, including clear examples of the information to be collected and in what format it is to be provided and further clarity on penalties and defences.

- **Costs:** The requirement that a conveyancer provides the mandatory information will mean that legal costs will be incurred, the proposals do not however include a charge to register or access the mandatory information.

The regulations are currently in draft form. Whilst it is possible that regulations may change in response to the concern expressed in response to the consultation, this is perhaps unlikely given the current Government commitment towards greater transparency.

In their current form the draft regulations do present potential areas for concern. In the short term there is the potential impact of the retrospective application of the regulations, requiring developers to pay advisors to review and disclose information relating to potentially sensitive control contracts entered into as far back as 2021. Longer term, the availability of sensitive information that would previously been confidential or more onerous to extract from existing sources, may result in higher land prices and other hurdles for those looking to develop sites, whilst perhaps strengthening the hand of those that may be looking to sell land or looking to prevent and or object to a development.

The full consultation can be viewed here: Contractual controls on land: consultation - GOV.UK (www.gov.uk)

Andrew Wilmot-Smith, Head of Property

Bio-diversity Net Gain comes into force

The publication of final regulations at the start of the year marked the final steps required to introduce mandatory biodiversity net gain (BNG). From 12 February 2024 most developers will need to provide a BNG of at least 10% on new planning applications for development that result in a loss or degradation of habitat.

Planning consents granted pursuant to applications made after 12 February 2024 will be subject to a condition that development may not begin until a biodiversity gain plan (BNG plan) has been submitted to and approved by the Local Planning Authority. There are limited exceptions, including householder applications and developments of below 25 square meters of habitat. "Small" sites will not be subject to the new requirements until 2 April 2024.

The BNG plan will only be approved if the biodiversity value attributable to the development exceeds the pre-development biodiversity value of habitat on the land to which the plan relates by at least 10%. Developers will therefore want to ensure that a BNG plan is prepared and assessed at any early stage in the acquisition / planning process.

BNG requirements can be met by enhancing the biodiversity of the development site itself, or offsite on land owned by the developer. Alternatively, where this is not possible or practicable the developer may satisfy its BNG requirements offsite on land owned and operated by a BNG land manager and listed on a public BNG register, or by the purchase of statutory biodiversity credits.

Where the BNG plan details onsite or offsite biodiversity enhancement, the enhancement must be maintained for at least 30 years after the development is completed, with such obligation secured by a s106 planning agreement or a conservation covenant (as appropriate). When calculating the mandatory 10% BNG, a statutory "biodiversity metric" will be used, and will give greater weight to improvements onsite, or within the same local authority (if off site), as a result disincentivising the purchase of statutory biodiversity credits.

BNG is a mandatory requirement and, accordingly, will be an essential consideration on site acquisition and development. BNG can also provide a potential source of revenue for landowners, particularly those with rural and / or biodiverse sites. Whilst there are still considerable areas of uncertainty, particularly surrounding the form of conservation covenants and enforcement, we are seeing the market respond, with the development of products to assist developers ascertain the current and projected ecological status of a site by way of a cost-effective screening report.

Sophie Henwood, Real Estate Senior Associate

Charities Act 2022 and disposals

The Charities Act 2022 amends the Charities Act 2011. The 2022 Act has come into force in stages, with Phase 3 being introduced on 7 March 2024. Phase 3 includes changes affecting land dispositions and mortgages, in particular, changes to the wording required in the statutory statements required on a disposal or mortgage. These changes were originally due to come into force in 2023.

The revisions in the 2022 Act will mean that, going forward, where Part 7 of the 2022 Act applies, the statutory statements required to be made by the charity making a disposal will need to be included in both the contract (if any) and the actual disposition (EG transfer, lease or mortgage) rather than just the disposition itself. In addition, the purchaser and mortgagee protection rules are amended with the effect that the statutory statement made by the charity in a contract will be deemed to be true in favour of the person enforcing the contract and, if no statement is given, the contract will still be enforceable by a person entering into the contract in good faith. The latter provision meaning that a charity cannot rely on its own failure to comply with the Charities Act requirements to avoid completing a contract for sale.

Saskia Arthur, Residential Property Partner

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Spring Budget and residential property

Chancellor Jeremy Hunt's Spring Budget included the announcement that Stamp Duty Land Tax multiple dwellings relief (MDR) will be abolished with effect from 1 June 2024. MDR will continue to apply to transactions completed or substantially performed before 1 June 2024, and to transactions contracted on or before 6 March but completed on or after 1 June, as long as the contract is not varied after 6 March.

MDR was a valuable relief for both investors and private individuals buying several residential properties at the same time, where the opportunity to split SDLT liability between the multiple dwellings when calculating the SDLT payable on a transaction (rather than paying at escalating rates on the whole consideration) could result in significant SDLT savings. The lower SDLT rates for non-residential property will, however, continue to apply to "mixed" transactions which contain both residential and non-residential elements.

More welcome, the higher 28% rate of Capital Gains Tax (CGT) on sales of residential properties will be cut to 24% from 6 April 2024. Other rates of CGT will remain the same, including the lower rate of CGT on residential property which remains at 18%, the 18% and 28% rates for carried interest, and the main 10% and 20% rates, substantially below the equivalent rates of income tax.

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