WHITEHEADS

E:Briefing - Property Matters

In this issue:

- Are you up-to-date with Service Charges?
- Arrears in leasehold schemes
- Collective enfranchisement

If we can help with any of the issues in this E-Briefing then please get in touch on the number or email addresses below.

Steven Daniels
Property Team Leader

Elaine Davies
Solicitor

T: 0844 8731360

E: info@whiteheadsols.co.uk

As with all our E-Briefings, the topics covered reflect what our clients have asked us to cover and this edition of Property Matters is no exception.

Getting it right with service charges is very complex as there are so many issues to consider but in this Briefing, we will look at best practice.

Managing arrears in leasehold schemes is vital to ensure that funds are there for any necessary works to be carried out. Here we will look at some of the challenges income managers face.

Collective enfranchisement

Dates for your diary...

Don't forget to book your place at our free lunchtime seminars coming up in June…….

ASB

17th June - Brighouse (Pennine Housing 2000)

Housing Management

23rd June - Sheffield (Arches Housing)

***NEW*: Damp & Condensation Seminar**

16th July - Leeds Federated HA

(contact Neil Whitehead for further details)

Are you up-to-date with Service Charges?

The framework controlling the relationship between Registered Social Landlords and Leaseholders is determined by the following:

- Lease/Tenancy Agreement
- Common law – Court decisions
- Statutory provisions such as Landlord and Tenants Acts (1985 and 1987)

Commonhold and Leasehold Reform Act (CLARA) 2002.

As you may be aware, legislation affecting service charges has been substantially amended by the CLARA, which has substantially altered the landlord and tenant legislation covering service charges.

If you need to check this, your first point of call would be your Lease/Tenancy Agreement to ensure the contractual provisions marry up with any accounting procedures, e.g. whether it refers to any calculation of service charges, whether they are fixed or variable and the timing of any increase. There is no presumption of full recoupment. Section 18 of the Landlord and Tenant legislation defines a variable service charge as:

'The service charge of which all or part will vary according to the relevant costs which is payable as part of, or in addition to rent by the tenant of the dwelling. Service Charge means payment for services, repairs, maintenance, improvements or insurance or the landlord's costs of management.'

There is no statutory definition for fixed service charges, but this will usually be a specified amount, which does or does not form part of the rent.

So what is in a service charge?

If costs generally relate to the building fabric (see Section 11 of the Landlord and Tenant Act 1985), then these are not usually considered as service charge items. These include:

- Roofs & gutters
- Drainpipes, plumbing & drains
- Windows
- Boundary walls & fences
- Access roads

WHITEHEADS

Are you up-to-date with Service Charges?

A useful list built up over time by Rent Officers is guidance which provides a useful reference point and could potentially be persuasive in any proceedings, but beware, there are some grey areas in respect of repairs and maintenance, for example, repairs to a roof of a block of flats would generally be deemed to be a service charge item.

Back to the Lease!..... If the Lease refers to an apportionment of service charge contributions, then this should marry up with any accounting procedures. If it refers to a reasonable proportion, then RSLs should act fairly. Service charges should be reasonable or could be challenged and RSLs will need to justify that costs are reasonably incurred.

The advantages of a variable service charge is that it allows RSLs to recover the full costs, the downside is that they are subject to stringent statutory obligations under CLARA.

Section 19 (Landlord & Tenant Act 1985), covers the reasonableness of service charges – costs must be reasonably incurred, services/work should be of a reasonable standard and the budget should also be reasonable and follow actual relevant costs. An interesting point to note is that there is an 18 month time limit, so backdated claims will not be allowed where no notification / demand is given.

Details of consultation requirements are in Section 20 (Landlord & Tenant Act 1985), and a failure to comply can limit full recovery of service charges. This includes prescriptive consultation procedures and details of the amounts that can be charged e.g. before carrying out qualifying works which exceed the prescribed limit and before entering a long term agreement.

It is true that CLARA has been quite cumbersome for landlords, but provides advantages to tenants, however, it is worth noting that the Leasehold Valuation Tribunal (LVT) has the discretion to waive consultation requirements, eg, in emergency cases.

WHITEHEADS

Are you up-to-date with Service Charges?

Summary of Rights & other provisions

Since 1st October 2007, a summary of rights and obligations has to be provided to tenants and sent with any payment demand - for service charges. There are regulations in place that prescribe the format of this information and will include details such as:

- The right to a written summary of costs
- The opportunity to inspect the accounts
- The tenant's right to apply to a Leasehold Valuation Tribunal.

If you fail to comply with the legislative provisions, the tenant can withhold the service charge.

Further provisions exist regarding administration charges and prescribed information with any demand, so you may require more details if you deal with these type of charges. In respect of the tenant withholding service charges, contractual provisions relating to payment, do not have effect.

Failure to comply (without reasonable excuse) with some parts of the legislation is a criminal offence if convicted, there could be a fine of around £2,500. There is little case law to indicate what would be a reasonable excuse.

Practical Points

1. Firstly is the importance of sign-up – details of service charge costs and services **must** be included in the Tenancy Agreement, otherwise this could affect future recovery.
2. Marry up Tenancy Agreements and accounting procedures, the Tenancy Agreement may dictate the calculation of service charges, the timing, a breakdown of services and this should be reflected in any
3. proceedings.
4. Be transparent! There is guidance on this when disaggregating rent and services charges.
5. Give breakdowns of the amount of each service provided – this provides tenants with fewer
6. opportunities to object in the future.

WHITEHEADS

Are you up-to-date with Service Charges?

1. If you add or implement new services and recover costs in accordance with contractual provisions. you may be open to a potential challenge (see The Peabody Trust v Reeve [2008])
2. Does the new service charge constitute a variation of the tenancy agreement? If so, is consultation needed?
3. Tenancy Agreements are usually drafted in advance and therefore not individually negotiated with tenants, which may mean some provisions could be considered unfair.
4. The Office of Fair Trading provides guidance on clauses they would consider to be unfair

   The financial consequences of getting it wrong can be quite wide ranging and significant to RSLs.

And now for the detail!!!............

Please contact me if you have any queries.

Elaine Davies

01257 266008

elaine.davies@whiteheadsols.co.uk

WHITEHEADS

Arrears in Leasehold Schemes

Getting it right

It is evident, that as Registered Social Landlords, you will need robust policies in place when tackling arrears in all types of tenure and we would always suggest that the Pre-Action Protocol for rent arrears is incorporated into a policy that promotes early intervention and affordable repayment agreements.

For shared Owners specifically, additional considerations will be the role of the lender and as a starting point you may want to check any Undertaking given at the grant or assignment of the Lease, as many include provisions that prescribe the involvement of the Lender. One point to note, is that there is now a Pre-Action Protocol that is to be followed by lenders and borrowers and is similar to the one for rent arrears, as it promotes early intervention and suggests notice periods and extensions that the lender should give to the lessee. Importantly, many leases include provisions that prescribe the involvement of the Lender.

If you do contact the mortgage lender, who then settles the debt on the account, they will add the amount to any mortgage, meaning that the borrower will be subject to further interest. This may be contrary to any anti-poverty initiatives or your financial inclusion programme. The Government expects lenders and borrowers to work together to try and resolve any debt issues so please get in touch if you would like a copy of or to discuss the mortgage Pre Action Protocol.

Your own policy may be part of a wider series of arrears policies, but there are some differences of note and you would need to ensure that a check is made in the individual Lease for a forfeiture clause, which would allow you to pursue possession proceedings. You must also check the obligations under the lease, with regard to involving the Lender and your ability to take Possession proceedings. Below, we have set out an example forfeiture clause:

Arrears in Leasehold Schemes

Example Forfeiture Clause

"If the rents hereby reserved or any part of them shall be unpaid for twenty-one days after becoming payable (whether formally demanded or not) or if any covenant on the part of the Leaseholder shall not be performed or observed then and in any such case it shall be lawful for the Landlord at any time thereafter to re-enter upon the Premises or any part of them in the name of the whole and thereupon this demise shall absolutely determine but without prejudice to any right of action or remedy of the Landlord in respect of any antecedent breach of any of the Leaseholder's covenants or conditions contained in this Lease provided always and without prejudiced to the Landlord's rights hereunder the Landlord shall give reasonable notice to any mortgagee of the Leaseholder of whom the Landlord has received proper notice pursuant to Clause 3(16) hereof before commencing any proceedings for forfeiture of this Lease or for possession under Clause 5(1)(b) and if within such a period of 28 days (or such other period specified on the Notice as the notice period if longer) the lender indicates in writing to the landlord that it wishes to remedy such breach and/or is going to take such action as may be necessary to resolve the problem complained of by the Landlord the Landlord shall allow the Lender such time as may be reasonable (in view of the nature and extent of the breach) to remedy such breach and take the action necessary to resolve such problem".

A shared ownership Lease is subject to the rules and restrictions around residential Leases, but is also a fixed term Assured Tenancy which, as long as there is a forfeiture clause, you should be able to rely on Grounds 8, 10 and 11, in the Housing Act 1988 (as amended). For further details on these grounds, please contact us.

Note: As you will be aware, Ground 8 is a mandatory ground, but you will need to be sure of your organizational policy when using this Ground. Generally, you will require board and management team approval and be able to demonstrate that you have considered alternatives and ensure safeguards when using Ground 8, such as vulnerability checks, independent advice referral and the use of the current rent Pre Action Protocol to demonstrate reasonableness.

WHITEHEADS

Arrears in Leasehold Schemes

Other points to check….

- Does the lease include any contractual Notice periods? If so, you must ensure the lender is informed prior to the Notice Seeking Possession being served if appropriate and again, you will probably want to
- reflect this within your policy.
- The rent provisions – is the amount lawfully due? What could be the possible challenges?

Is there a relevant rent clause in the lease? If so, this will have to be included when drafting the Notice Seeking Possession.

Particulars of Claim

When drafting the PoC, you will need to observe the Civil Procedure Rules 55 and 16 i.e. information that should be detailed in the Particulars, including:

- The amount due at the start of proceedings
- A schedule of dates and amounts of all payments due under the Lease for the preceding 2 years or from the first date, daily rate of rent and interest.
- The interest rate referred to within your Lease should be used and added to arrears, if you decide to pursue interest on the debt. (If the Lease is silent, then an amount of interest can be added at 8%, pursuant to Section 69, County Court Act 1984.)
- Details of previous reasonable steps taken to recover arrears
- Any information on the Defendant's circumstances, particularly income details, whether they are in receipt of any benefits or whether any direct deductions have been made

The grounds that you intend to rely on.

WHITEHEADS

Arrears in Leasehold Schemes

Possession

If you get an outright Possession Order, this applies to the **whole** of the property. This means that the shared owner would lose their interest (share) in the property and would not be entitled to any payment in respect of the share they originally purchased. Shared owners have a leasehold interest and the way the Lease is drafted means that they lose their interest (share). This would seem to give Registered Social Landlords a potential windfall.

There is case law in this area such as Richardson v Midland Heart Limited (2007), where, following Possession Proceedings Miss Richardson sought a declaration to the extent of her 50% interest (share). It was held that she was not entitled to any interest (share) but the RSL, Midland Heart, agreed to pay back the initial premium, minus arrears and legal costs.

One of our clients had similar proceedings, but they decided to pay the interest (share) back at the increased value to the shared owner, but did deduct arrears, legal costs and other associated costs e.g. repairs rectifying damage, shuttering of property etc.

RSLs may want to check with their Regulator, the Tenant Services Authority on this point for guidance and to incorporate it into the policy and share this information with leaseholders so they understand the possible financial consequences of getting into arrears.

However, it is a fact that shared owners have a lot to lose if they default on their provisions within their Lease, not only their home, but any potential investment. For further information or to discuss any specific cases, please do not hesitate to contact us at Whiteheads.

As always, get in touch should you have any queries.

Elaine Davies

01257 266008

elaine.davies@whiteheadsols.co.uk

WHITEHEADS

Collective Enfranchisement

In May of this year CLG published a consultation paper on the right to enfranchisement provisions contained in the Commonhold and Leasehold Reform Act 2002.

Pursuant to the Leasehold Reform, Housing and Urban Development Act 1993 (as amended), flat owners were given a right to collectively purchase the Freehold of the building which contained their flats.

The criteria for eligibility to collectively enfranchise included establishing:

- That there were two or more flats.
- $^2/_3$ of the flats in the building were qualifying Leaseholders.
- 25% of the building was used for non-residential purpose.

Furthermore, there was a minimum requirement that those Leaseholders wishing to engage in the collective enfranchisement amounted to 50% of the total number of flats in the building.

The process could be moved forward by the appointment of a nominee purchaser, which could be the company whose shares are owned by participating flat owners, and thereafter an initial Notice could be served upon the Freeholder.

However, the Commonhold and Leasehold Reform Act 2002 also included in sections 121 to 124 provisions to introduce a right to enfranchise. These provisions were aimed at preventing qualifying tenants from being excluded from the enfranchisement process but have not been introduced because of concerns as to how effective they will work.

This being the case, a consultation process has been commenced to ask questions in relation to Sections 121 to 124 of the Commonhold and Leasehold Reform Act 2002 in relation to the right to enfranchise and whether they should be introduced in their current form with amendment or whether in fact they should not be introduced and the provision should be repealed.

The consultation paper can be viewed and downloaded from the Communities and Local Government website and any views in response can be made by e-mail or in writing.

Please get in touch if you have any queries.

Stephen Daniels

01257 266008
stephen.daniels@whiteheadsols.co.uk

Contact us

T: 01257 266008 E: info@whiteheadsols.co.uk W: www.whiteheadsols.co.uk