Workshop 4b: Standardising leaseholder services and tenancy agreements

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Standardising leaseholder services and tenancy agreements
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Scope

- Delivering consistent services and ensuring full recovery of service charges across different tenures
- Historic leases and tenancies
- Inherited leases and tenancies (eg on stock swaps)
- Options for rationalisation
- Legal options and constraints

The problem

- Multiplicity of versions of tenancies and leases
- Acquisition of stock from other RPs
- Different services/service charge provisions
- Leases/tenancies which fail to specify any service charge at all or fail to include management fee
- Shared ownership and RTB leases tweaked and modified over the years
- Tenancies containing fixed service charge provisions and those containing variable provisions

Construction of the lease/tenancy

- Always the starting point
- Court/Tribunal will strive to construe lease/tenancy to enable landlord to recover charges where services are provided - *USS Limited v Marks and Spencer Plc [1999]*: the service charge provisions should be given an effect that fulfils rather than defeats their evident purpose (Mummery LJ)
- Look at specific clauses – are they wide enough to include the services you want to recover for?

Implied terms

- Service charge provisions may be implied: Sch 6 Housing Act 1985
- Implied management fees – Tribunal reluctant to imply in absence of express wording but wording may be sufficient ("provision of services" may include management costs of providing the services)

“Sweeping up” or “sweeper” clauses

- “"expenses incurred for the benefit of the building" or "expenses incurred in the interests of good estate management".
- Tribunals will construe such clauses narrowly but if service falls within the sort of services expressly provided for elsewhere in lease => should be allowed under “sweeper”

Other clauses

- Clauses enabling introduction of regulations or new services “for the better management of the Estate”
- In tenancy agreements:

  - “The landlord may add to, reduce or vary the services provided following consultation with the tenant”

  - “We will provide the services listed within this agreement. If by error or omission this list does not include all of the services which are actually provided to you we reserve the right to give to you a corrected and/or updated list, in substitution for this one”

Unilateral variation clauses in tenancy agreements

- Secure tenancies – s103 Housing Act 1985 (preliminary notice followed by notice of variation)
- Assured tenancies – contractual clauses mimicking effect of s103
- Pre-2008, regularly used to deal with defects in assured tenancies and/or put tenants on similar tenancy terms by mass variations and/or switch from fixed to variable service charges
- Peabody v Reeve (2008): High Court applies OFT Guidance on Unfair Terms in Tenancy Agreements 2005 to deem unilateral variation clause in Peabody tenancy void for unfairness (so that any amendments made using that clause, also void)

Effect of Peabody –v- Reeve

- OFT Guidance: variation clauses less likely to be deemed “unfair” if they do not seek to remove an existing benefit enjoyed by the tenant or impose a disadvantage
- Inherent risk in using any such clause as any change could be construed as being disadvantageous eg switch from fixed to variable service charge or vice versa to bring stock swap tenancies into line
- Unlikely to permit *introduction* of clause allowing variation of services but should not affect ability to vary services under *existing clause* (much narrower impact but no case-law as yet…)

Difficult cases

- Where services provided historically but not contained in tenancy or lease, do not interfere => rely on implied agreement/estoppel
- Ensure lists of services sent out each year on review
- Introducing new services (where construction and implied terms of no assistance and no variation of services clause present) – seek agreement block by block
- Alternatively, but more risky – consult, introduce and charge and hope for best. After 2-3 years with payment and no challenge, rely on implied agreement/estoppel. Problem is if one person refuses…

Major variations

- Introducing new substantive provisions eg service charge clauses for first time; switch from fixed to variable; improvements clauses; removal of services (eg resident warden); putting tenants on all new tenancy terms
- Options: by agreement (deed of variation) or (long leases) statutory variation (LTA 1987)

Deeds of variation - tenancies

- Consultation and persuasion – completely voluntary
- All-new tenancy terms: door-knocking; incentives (prize draws, shopping vouchers)
- Minority will always refuse and tenancies will need updating within 5 years anyway, so is it worth it?
- Live with and manage existing diversity?

Deeds of variation – long leases

- Complete change of lease terms very unlikely to be acceptable (lease as valuable asset and investment)
- Minor changes eg removal of warden service or variation to service charge terms (eg permitting deferred payments) may be acceptable
- Will still require consultation and persuasion
- Deeds will need to be registered at Land Reg.
- Independent legal advice (offer reasonable costs)

Statutory variation of long leases

- LTA 1987 Part IV Variation of Leases
- s35 and s37 applications to First tier Tribunal
- s35 – defective leases (no consent needed)
- s37 - variations by consent
- Long leases only (generally > 21 year terms and including RTB leases)

Section 35 applications (defective leases)

- Application by lessor or lessee
- Grounds: lease fails to make adequate provision with respect to:

  - repair/maintenance of flat or building
  - insurance
  - repair or maintenance of installations reasonably necessary for occupiers to enjoy reasonable standard of accommodation
  - provision of maintenance/services reasonably necessary for…etc
  - recovery of expenditure incurred by one party for benefit of other
  - computation of service charge

Section 35 applications (cont.)

- “reasonably necessary for occupiers to enjoy reasonable standard of accommodation” will include health and safety reasons
- Defective computation of service charge means where incorrect apportionment provisions mean landlord recovers more or less than 100%
- Leases may not all be in same building but must be same landlord
- Either party can apply to add other leases

Section 37 applications (by consent)

- Application by lessor or lessee
- Any variation possible subject to consent and FTT's agreement
- 2 or more leases
- Must be same landlord but can be different building
- Grounds: "object to be achieved by variation cannot be satisfactorily achieved unless all the leases are varied to the same effect"

Section 37 applications (cont.)

- Must have majority consent of lessees
- Where less than 9 leases, all or all but one of parties must consent
- More than 8 leases, variation not opposed by more than 10% of parties and at least 75% must consent
- In calculating “parties”, lessor counts as one party
- Lessee holding more than 1 lease has vote according to number of leases

S35 and s37 applications - general

- 3rd parties (eg mortgagees) must be notified
- Failure to notify could void any order by FTT or lead to damages claim
- Variations are in discretion of FTT – can decide not reasonable to do so
- Power to award compensation (payable by Applicant)
- FTT must not make variation if would cause substantial prejudice to any Respondent or 3rd party which compensation cannot adequately address

S35 and s37 applications (general)

- Effective process for dealing with defective leases or changes where only a minority opposed
- Cheaper than DoVs even where all leaseholders agree (insures against “changes of heart”)
- FTTs used to applications and will invariably allow if in interests of better management and leaseholders not unduly prejudiced
- If application not opposed, no hearing required

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Any questions?

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