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Landlord's steps related to the disapplication of the presumption of qualifying lease

Paragraph 13 of Schedule 8 BSA and regulation 6 of the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 contain short time limits and detailed prescribed requirements for landlords to comply with in seeking leaseholder deeds of certificate.

Landlords should be aware of, and be in a position to take steps to comply at short notice with, the requirements.

If the statutory presumption in para 13(2) is disapplied, it appears that whether a lease is a qualifying lease will be a matter of evidence as to whether the conditions in s.119(2)(d) are satisfied, although there may be scope to argue for an implied statutory counter-presumption.

A qualifying lease is one meeting each of the criteria in s.119(2) of the Building Safety Act 2022 ("BSA").

However, the requirement in s.119(2)(d) might be treated as satisfied in specified circumstances. When that presumption will apply or be displaced is the subject of a series of detailed provisions, which require various steps to be taken by landlords within relatively tight time limits.

By paragraph 13 of Schedule 8 to the BSA, a long lease of a single dwelling in a relevant building granted before 14 February 2022 the tenant under which is liable to pay a service charge is to be treated for the purposes of that Schedule as a qualifying lease unless:

(a) the landlord under the lease has taken all reasonable steps (and any prescribed steps) to obtain a qualifying lease certificate from a tenant under the lease, and
(b) no such certificate has been provided to the landlord.

Steps are prescribed by regulation 6 of the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022.

Before the notification date, a landlord under a lease that meets the conditions in s.119(2)(a) to (c) must (unless they have already received a leaseholder deed of certificate in respect of the lease before the notification date) give a notice in writing to the leaseholder which complies with the various requirements of regulation 6(4).

The notification date is the day five days after the day on which the landlord becomes aware that the leaseholder's interest in the property owned by the leaseholder is being sold or that there is a relevant defect in relation to the building in question.

The notice must, among other things, specify the reply date by which a reply to the notice must be received (which must be no less than eight weeks from the date of receipt of the notice under reg 6(5)(a)).

Reg 6(5)(a) provides for service requirements for the landlord's notice, namely that the landlord must give the leaseholder the notice:

(a) by leaving it at the address of the leaseholder or sending it to that address by prepaid first class letter; and
(b) where the leaseholder has provided the landlord with an email address, by transmitting it to that email address.

Those requirements are cumulative, not alternatives.

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If the landlord manages to validly give the notice, that is not the end of the story. That is because, should there be 14 days left before the reply date, if the landlord has not yet received a reply from the leaseholder, the landlord must chase, by giving a further notice no later than seven days before the reply date (also satisfying the service requirements of reg 6(5)(a) among other formal requirements).

The landlord may not charge the leaseholder for sending any notice under regulation 6: reg 6(10).

Not only that, but where the landlord has a telephone number for the leaseholder, the landlord must telephone the leaseholder to draw the further notice to the leaseholder's attention.

The leaseholder then has an opportunity to request an additional four weeks to respond.

Supposing the landlord has gone through all of the palaver of complying with the prescribed steps, para 13(2)(a) also requires that he have taken "all reasonable steps" to obtain a qualifying lease certificate from a tenant under the lease.

One might think that taking the detailed prescribed steps should be enough in most cases, but if, say, the landlord is aware of some other reasonable means that might be used to draw the notices to the leaseholder's attention and the landlord fails to use it, he may find the presumption of qualifying lease is not displaced.

If the landlord receives a leaseholder deed of certificate, there is a further important step for him to take under reg 6(10A), namely that the current landlord must provide a copy of it within one week to any RMC, RTM Company or named manager in relation to the building to which the certificate relates.

Should he fail to do so, the consequences, provided for by reg 6(10B), are serious: the costs of a relevant measure relating to a relevant defect in the building to which the leaseholder deed of certificate relates are prescribed costs under paragraph 16(4) of Schedule 8 BSA and so are not to be regarded as relevant costs to be taken into account in determining the amount of a service charge payable under a relevant lease of premises in that building and must not be met from a relevant reserve fund.

As the Deputy President of the Upper Tribunal put it in *Lehner v Lant Street Management Company Limited*:

> "The complexity of the new statutory provisions is obvious, but it is essential that they be grappled with in any case where liability to pay a service charge relating to building safety defects is in issue."

By now, many landlords will already have given notices to their leaseholders, or failed properly to do so in time.

But landlords should be aware of, and ensure that they will be in a position to take steps to be able to comply with, the short time limits and prescriptive requirements applicable, which can be triggered upon the landlord becoming aware of disposals of leasehold interests or relevant defects.

Of course, should the landlord take all reasonable and prescribed steps and should the leaseholder not supply a leaseholder deed of certificate, the landlord may still find itself in an evidential dispute as to whether s.119(2)(d) applies (as to which see further https://www.falcon-chambers.com/publications/articles/certified-for-broader-protection-landlord-deed-of-certificate-requirements-and-qualifying-leases-under-sch-8-of-the-building-safety-act-2022).

This is because although the deeming provision in para 13(2) does not apply, there is no express statutory counter-presumption.

In *Lehner v Lant Street Management Company Limited*, the Deputy President appears to have taken the view at paragraph 45.10 that where no certificate has been provided, whether a lease satisfies the s.119(2)(d) condition is then a matter for evidence.

However, there may remain some scope for argument about that in view of (inter alia):

(a) the guidance notes in the prescribed form of leaseholder certificate in Schedule 1, which state:

    "Failure to return a completed, signed deed of certificate to your landlord will result in the lease to which the deed of certificate relates being treated as if it were not a qualifying lease under the BSA"; and

(b) reg 6(4)(c)(i), which states that a landlord's notice under reg 6(2) must include a statement to the effect that failure to provide a leaseholder deed of certificate and supporting evidence "will result in the lease being treated… as if it were not a qualifying lease."

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