Devonshires

Housing Management Brief

Issue 25

In this issue...

Welcome

We live in extraordinary times and by the time you receive this, reading about housing law may well be the last thing on your list of things to do. Nevertheless, the law has marched on since our last issue and we bring you the latest developments, some or all of which, should be of interest to our housing clients. So, happy reading and please stay safe.

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Property Guardians: Win/Win?

We are currently fielding queries from Registered Providers (RPs) who have enjoyed the services of Property Guardian Companies ("PGCs"). In part this is due to recent negative press, with one Daily Mail headline reading:

"Slum landlord is fined £1,500 for cramming 30 desperate tenants into a crumbling former care home where drains overflowed with sewage and they all shared one kitchen"

That particular headline refers to the prosecution by Colchester Borough Council of the former Camelot Guardian Management Company for, amongst other things, failing to obtain HMO Licences and multiple breaches of HMO regulations.

Whilst this court case and other prosecutions so far have focused on the PGC, unfortunately the fact that the building owners might be identified in the proceedings in cases involving alleged "slum landlords" creates the potential for reputational risk. It is worth noting that the Government itself "does not endorse or encourage the use of property guardianship schemes as a form of housing tenure".

It is understandable that Property Guardian arrangements can be attractive to some Registered Providers ("RPs") where it appears that a property will be vacant for a period of time with the hope that the Guardian's presence will deter squatters and secure the site to ensure it is kept in repair. There is also the financial benefit that RPs may derive from the arrangement.

Before handing over a property to a PGC, RPs should ensure that careful consideration is given to the arrangements to ensure risk is minimised. One aspect that may be overlooked is whether the use of such site as short term residential accommodation may be a breach of planning restrictions or restrictive covenants – which my colleague Hannah Langford discusses in more detail below.

If an RP does decide to engage the services of a PGC, an agreement should be drawn up clearly setting out the obligations of each party. Ideally RPs would also be supplied with a copy of the licence that the occupying Guardians are given and also details of the proposed circumstance of the Guardian's occupation to ensure that they truly are occupying on licences and exclusive possession is not given.

In practice it appears that formally drawn contracts for these schemes are rare to non-existent. Most arrangements seem to involve the RP being provided with a "Proposal" which is often extremely vague and might refer back to a standard terms and conditions.

In our experience, the cited "terms and conditions" may well flatly contradict the Proposal. The worst examples have the Company disclaiming all responsibility for providing the site back with vacant possession and some even disclaim all responsibility for any damage caused by the Guardians during the licence period.

If the occupying Guardians refuse to vacate then the Company or the Building Owner will need to go to Court to recover possession of the building, as the occupying Guardians will at the very least be protected by the Protection from Eviction Act 1977. Depending on the facts, the occupying Guardians may try to argue that they are tenants rather than licencees. If an occupying Guardian is able to show they have exclusive possession of part or whole of a property, and that they are paying rent on a regular basis, then they have a good argument that they are a tenant.

Regardless of the merits of the occupying Guardian's arguments, what this means in practice for the RP will be an inevitable delay in recovery of the site pending the final resolution of the matter in the courts.

Consideration should also be given to what permission is given to the PGC to market the property. Having reviewed some of the larger PGC websites, it is striking that the "Properties available" sections of those sites appear much like any standard lettings Company. The way certain properties are advertised, it is difficult to see how some of the properties on offer would not be for exclusive possession and ultimately give effect to assured shorthold tenancies.

One example seen offered on a "Properties Available" page of website of a Company recently is for "self-contained 1, 2 and 3 bedroom apartments in

Greenwich" for example, specifying monthly licence fees for single occupancy or 2 persons sharing, with a refundable security payment (deposit).

It is worth noting here that since the law on squatters was changed in 2012 making squatting a criminal offence, it is much more straightforward to get possession from squatters. The promise that Guardians being present will deter squatters may be slightly hollow if the PGC has inadvertently created assured shorthold tenancies which are a lot more complex and time consuming to determine.

In summary, whilst there may well be sites for which the use of a PGC arrangement is entirely suitable, we recommend that any agreement between the building owner and Company is checked by solicitors before any contract is entered into. The main risks to RPs in engaging the use of a PGC is reputational, but further there is the risk if not properly managed, it might be harder to recover vacant possession than anticipated. For those already subject to agreements with PGCs who may be experiencing problems, then you may want to seek advice as to how to mitigate any loss.

For more information, please contact Donna McCarthy or Anna Bennett:

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Property Guardians - planning considerations

In entering into Property Guardian arrangements, planning considerations are often overlooked. Under the Town and Country Planning Act 1990 ("the Act") making of any material change in use to buildings and land is development. Section 57 of the Act provides that planning permission is required for development.

This general principle is limited by the terms of section 55 by the Act, which provides that certain changes of use do not require planning permission. The General Permitted Development Order 2015 (GPDO) also grants deemed planning permission or 'permitted development' rights to make certain changes of use.

The Use Classes Order 1987 ("UCO") categorises the use of land and buildings into different classes such as hospitals, nursing homes and residential schools (use class C2), people living together as a single person or a family (use class C3), small houses in multiple occupation of not more than six unrelated occupants sharing basic amenities (use class C4) and offices (use B2).

Alongside the Act and the GPDO, the UCO is a tool to measure and assess: (i) what the existing use of a building is, (ii) whether any proposed change of use of the building is materially different from the existing use, and (iii) whether the new use requires planning permission or has deemed consent. For instance under Schedule 2, Part 3, Class L of the GPDO development consisting of a change of use of a building from a use falling within use C4 to C3, and vice versa, is permitted development and no planning permission is required.

Property guardian companies generally advise that the use of properties for their service does not require planning permission because the primary use of the building does not change. They say that the role of the property guardian is to protect the property and because the living space is considered as ancillary to this role, the primary use of the building never changes.

Uses that are ancillary to the main use do not involve development but they must remain incidental to the main use. If the ancillary use becomes the main use, which is materially different to the previous use, then unless permitted development rights exist, a material change of use may have occurred for which planning permission is required.

For instance whilst the security of an office and residential accommodation linked to that security use may be ancillary to the main office use, if the office use were to cease so that the main use becomes residential, then depending on the nature of the occupation and the relationship between the occupants, a change of use requiring planning permission may occur. If planning permission is required and not secured, there is a risk that the local planning authority may take enforcement action by issuing a planning enforcement notice.

Assessing whether a material change of use of has occurred is complex and will always depend on the particular facts and circumstances.

If you need advice on a potential or existing arrangement please contact Hannah Langford:

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Demystifying Seven Subject Access Request Myths

What is a Subject Access Request?

Under Article 15 of the General Data Protection Regulations 2016 ("GDPR"), individuals have a right to request a copy of their personal data processed by their landlord. It helps individuals understand how and why you are using their data and check you are doing it lawfully. This is known as a Subject Access Request ("SAR").

Your Privacy Policy and internal procedures should specify how SARs should be made and responded to. However, just because an individual has not complied with your procedures, does not mean you're off the hook.

Read on to make sure you do not fall foul of some of the most common misconceptions about SARs.

Myth 1 - a SAR must be made in writing

The GDPR does not specify how to make a valid request. Therefore, an individual can make a request, verbally or in writing. In fact, it can be made to any part of your organisation, including by social media.

Myth 2 - the personal data can be amended before providing a copy

It is not acceptable to amend or delete personal data relating to an individual if you would not otherwise have done so following receipt of a SAR. Under the Data Protection Act 2018 ("DPA 2018"), it is an offence to make any amendment to personal data with the intention of preventing its disclosure.

Myth 3 - we can charge a fee to comply with a SAR

In most cases, you cannot charge a fee to comply with a SAR. However, you can charge a "reasonable fee" for the administrative costs of complying with the request if:

- It is manifestly unfounded or excessive; or
- An individual requests further copies of their personal data following a request that has already been dealt with.

Myth 4 - we have a maximum of one month to comply

You must comply with a SAR request without undue delay and at the latest within one month of receipt of the request or (if later) within one month of receipt of:

- Any information requested to confirm the individual's identity (ID should only be requested where you have

doubts about the identity of the person making the request); or
- A fee (only in certain circumstances, as set out in the answer to Myth 3)

Myth 5 - a third party cannot make a SAR on behalf of an individual

The GDPR does not prevent an individual making a SAR via a third party. This may be a solicitor acting on behalf of their client but it could simply be that an individual feels comfortable allowing someone else to act for them. In these cases, you need to be satisfied that the third party making the request is entitled to act on behalf of the individual, but it is the third party's responsibility to provide evidence of this entitlement. This might be a written authority to make the request or it might be a more general power of attorney.

Myth 6 - we do not have to comply with a SAR if the data includes information about other people

Responding to a SAR may involve providing information that relates both to the individual making the request and to another individual.

The DPA 2018 says you do not have to comply with the request if it would mean disclosing information about another individual who can be identified from that information, except if:
- The individual has consented to the disclosure; or
- It is reasonable to comply with the request without that individual's consent.

So, although you may sometimes be able to disclose information relating to a third party, you need to consider whether it is appropriate to do so in each case.

Myth 7 - we can never refuse to comply with a request

If an exemption applies, you can refuse to comply with a SAR. The exemptions include communications between you and your legal advisors and also documentation which has come into existence for the purpose of litigation.

You can also refuse to comply with a SAR if it is manifestly unfounded or excessive. An example of a request being manifestly unfounded is where the individual clearly has no intention to exercise their right to access their personal data. For example, an individual makes a request but then offers to withdraw it in return for some form of benefit from the organisation. An example of a request being excessive is where it repeats the substance of previous requests and a reasonable interval has not elapsed.

If you would like advice on SARs or to find out more about our data protection package, please get in touch with Hetal Ruparelia:

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Ask the Expert: Rebecca Brady

Q We need to carry out works to a house that we own but the only way we can do the works is by going on to land belonging to the neighbouring property. We have tried to engage with the neighbour to get their agreement, but they have refused to let us have access so that we can carry out the necessary works. Our tenant is complaining about damage to the inside of our property which we believe would likely be resolved by the external works we want to carry out. What can we do?

A Entering someone else's land or property without their permission is trespass. It is therefore important to either obtain the landowner's consent or establish a legal right to go onto the land, before entering and carrying out the works.

The first thing that you should do is check whether you have an express right of access reserved over the neighbouring land. If you own the freehold of your land this may be reserved within the transfer deed, or if you are a leasehold owner, in the lease itself. You should also check the Land Registry title document to see if this contains any express rights of access.

If you do have such a right then you can exercise this in accordance with any stipulations of notice etc. If the neighbouring owner interferes with your right of access, you could seek an injunction compelling them to allow you access and also seek damages for any loss incurred as a result of the interference.

If you do not have any express right of access reserved over the neighbouring land and they continue to refuse to allow you access, the Access to Neighbouring Land Act 1992 may assist.

This legislation enables persons to obtain access to adjoining or adjacent land ("servient land") for the purposes of carrying out works to their own land ("dominant land") which are reasonably necessary for the preservation of the dominant land.

The legislation does not create a statutory right of access but the court can grant an Access Order under which the works can be carried out. In order for the Court to grant such an order they have to be satisfied;

a. Firstly, that the works are reasonably necessary for the preservation of the whole or any part of the dominant land; and
b. Secondly, that the works cannot be carried out or would be substantially more difficult to carry out without entry upon the servient land.

The Court are required to take into account the degree of interference and disturbance that will be suffered by

the servient land owner as a result of an Access Order being made, and may refuse to make an order if the interference would be unreasonable.

There is no restriction on the types of works that can be included in an Access Order as long as those works can be shown to be reasonably necessary for the preservation of the land. Certain types of work called Basic Preservation Works are automatically considered to be reasonably necessary.

These include things like maintenance and repair of buildings, clearance and repair of any drain, sewer pipe or cable, and works to trees or hedges which are damaged, diseased, dangerous, insecurely rooted or dead.

The Access Order will likely detail various particulars about what works can be carried out and how these are to be carried out. This will include details of what area of servient land can be entered upon, the dates or period of time during which the land may be entered upon, and the manner in which the works are to be carried out i.e. who is going to carry them out, between what hours etc.

The Order may also set out any precautions to be taken by the owner of the dominant land to ensure that no damage is caused to the servient land. This may include an obligation to obtain insurance against any risks identified, or to pay compensation for any loss, damage or injury, or any substantial loss of privacy or other substantial inconvenience caused by the works.

It would be sensible for the dominant land owner to make a record of the of the condition of the servient land before any works care carried out should any question arise as to damage to the land.

For more information, please contact Rebecca Brady:

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London Borough of Haringey -v- Simawi (Secretary of State Housing, Communities and Local Government as an interested party)

The Court of Appeal dismissed Mr Siwami's appeal. It was held that the fact that a secure tenancy assigned to a person on divorce gives rise to succession rights; whereas a tenancy vested on death does not, is not discriminatory and does not breach Article 14 of the European Convention on Human Rights when read with Article 8.

The Background

The case concerned the rules limiting succession to secure council tenancies, governed by the Housing Act 1985, to one succession per tenancy. Mr Simawi was unable to succeed to his mother's 1994 secure tenancy as she had become the secure sole tenant as a result of his father's death in 2011.

Mr Simawi claimed that the one succession rule discriminated against him as the family member of a widow. This was on the basis that if his mother had become the secure sole tenant as a the result of the joint tenancy being transferred to her under the section 24 of the Matrimonial Causes Act 1973 on divorce, Mr Simawi would have been eligible to succeed.

Mr Simawi's mother was deemed to be a successor on the death of her husband but a person who becomes the tenant pursuant to a property transfer order is not deemed to be a successor, and therefore the one succession right in respect of their tenancy is preserved.

Mr Simawi relied on Article 14 of the European Convention on Human Rights, which prohibits discrimination on the grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The Decision

In summary:

- The Judge's conclusion in the first instance that being the child of a widowed parent rather than a divorced parent is capable of amounting to an "other status" was a "tenable conclusion".
- However, is the difference in treatment in relation to the succession rules discrimination on the ground of that "other status"? The Court held that there was no direct discrimination against Mr Simawi because the difference in treatment in relation to the succession rules between the child of a widowed parent and the child of a divorced parent did not arise as a result of that status.
- The succession rules do not amount to indirect discrimination against women. In fact, women were more likely to benefit from the succession rules and the rights and assignments under Section 24 of the Matrimonial Causes Act 1973.
- The Court went on to consider whether there is any justification for the difference in treatment. It was held that the difference in treatment in this situation was justified as being not "manifestly without reasonable foundation".

Permission to the Supreme Court has been sought.

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Spotlight on...
Ayesha Herath

How did you get into law?

I began working for Devonshires in June 2019 after graduating from the University of Law. While studying for my Masters and the LPC, I worked as a paralegal at another firm in their mental health department and whilst I knew that I wanted to pursue a career in law, I wanted to experience a different type of law in a more client-facing role.

What do you enjoy about your current role?

As a Paralegal in the Housing Management and Property Litigation department my role is varied and fast paced. One day I'll be working on an urgent injunction whereby I'll be needed to draft all paperwork and then be ready to attend court later that day. Other days I might be required to prepare witness statements in readiness for hearings, review a series of lengthy documents or draft claim documents to send to Court for issue.

One of the things that I enjoy the most about my role is working with our clients. Over the months of my service here at Devonshires, I have developed a strong rapport with our clients and it has been a real honour to say that I have been able to help them.

What do you like to do outside of work?

Outside work, I like to keep active and regularly head to the gym when I can to keep fit but also to de-stress. I have a 4 year old beagle named Sophie who keeps me on my toes most days. When I can, I do like to socialise with my friends and spend time with my family.

What is a fact about you that might surprise people?

A fact that sometimes surprises people is that I used to live abroad in Qatar - a small island peninsula in the Middle East. Living out there was quite an experience but it was great to be able to immerse myself in a completely new culture and learn about different traditions and customs.

For more information, please contact Ayesha Herath:

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Electrical safety inspections and private registered providers: why it matters

Private registered providers (PRPs) breathed a collective sigh of relief on 31 October last year when the draft Regulations relating to electrical inspections of residential premises where published.

The Regulations specifically exclude tenancies where the landlord is a PRP. However, even though the Regulations may not apply to PRPs, the Regulator continues to take the issue of electrical inspections seriously, and has imposed its own expectations in relation to compliance with the Home Standard as seen in a number of recent Regulatory Judgments and Notices.

The Background

On 31 October last year the Government published the Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020. Subject to approval by Parliament, the Regulations will require private residential landlords to carry out electrical installation inspections for all new tenancies in England from 1 July 2020 or from 1 April 2021 for existing tenancies.

Testing will have to take place prior to the tenancy starting and at five yearly intervals thereafter, with copies of inspection reports being provided to residents. Non-compliance may result in fines of up to £30,000 levied by the local authority.

The Regulations are made under s.122 of the Housing & Planning Act 2016 which defines “private landlord” as any landlord outside the landlord condition of section 80 Housing Act 1985. Private registered providers are not within section 80 and have not been since the Housing Act 1988, so we were fully expecting PRPs to be caught

by the new Regulations. They are not because the new Regulations specifically exclude any tenancy where the landlord is a PRP.

The reference to “any tenancy” means the exemption will apply to both social and non-social housing tenancies (eg market rent) granted by a PRP.

However, the Regulations will apply to tenancies granted by non-PRP subsidiaries. “Tenancy” does not include any fixed term tenancy for an initial term of 7 years or more and shared ownership leases and long leases are also excluded. There is also an exemption for hostels managed by PRPs (where the owner might be a private landlord).

So, that is the good news…

And what about the Regulator?

The Regulator has issued a number of Regulatory Judgments and Notices over the past year which have involved breaches of the Home Standard due to lack of assurance over electrical safety.

It is evident from those Judgments and Notices that the Regulator expects PRPs to be undertaking regular electrical safety inspections during the course of a tenancy, as well as at the start.

In one particular case, the Regulator indicated that relying on certificates older than 10 years would be considered non-compliant. Current advice to PRPs is therefore to ensure regular ongoing testing and certification of existing tenants’ properties at least every 10 years, as well as testing at the tenancy start.

It remains to be seen whether the Regulator’s expectations become more stringent in the future to reflect the five yearly inspections required by the new Regulations. However, it is worth highlighting the Code of Practice published by a group of social landlords last year (the ‘Electrical Safety Roundtable’) which recommends that social landlords adopt a five yearly inspection programme.

If that Code becomes widely adopted by PRPs, then we can certainly expect the Regulator to take note and its position may well become more robust when enforcing the Home Standard.

For more information on electrical safety inspections and the Electrical Standards in the Private Rented Sector (England) Regulations 2020, please contact Nick Billingham.

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Faces behind the Devonshires Team:

What we've been up to...

Nick Billingham - "The arrival of a new Rent Standard and reverting back to Section 13 rent increases after 4 years of rent reduction has kept me well and truly occupied for the last few months".

Aston Kazlauskas - "I have been busy dealing with a number of disrepair matters and preparing for trials in April 2020".

Hetal Ruparelia - "I have been busy preparing for my session at our seminar on Data Protection and Information Law".

Donna McCarthy - "I have been kept busy advising a number of clients on issues arising from Property Guardian arrangements".

Regina Dillon - "I have been travelling back and forth to Portsmouth obtaining injunctions on a without notice basis against tenants who have been engaging in anti-social behaviour".

Thomas Molony - "I have been dealing with a number of disrepair matters alongside preparing anti-social behaviour injunctions and possession claims".

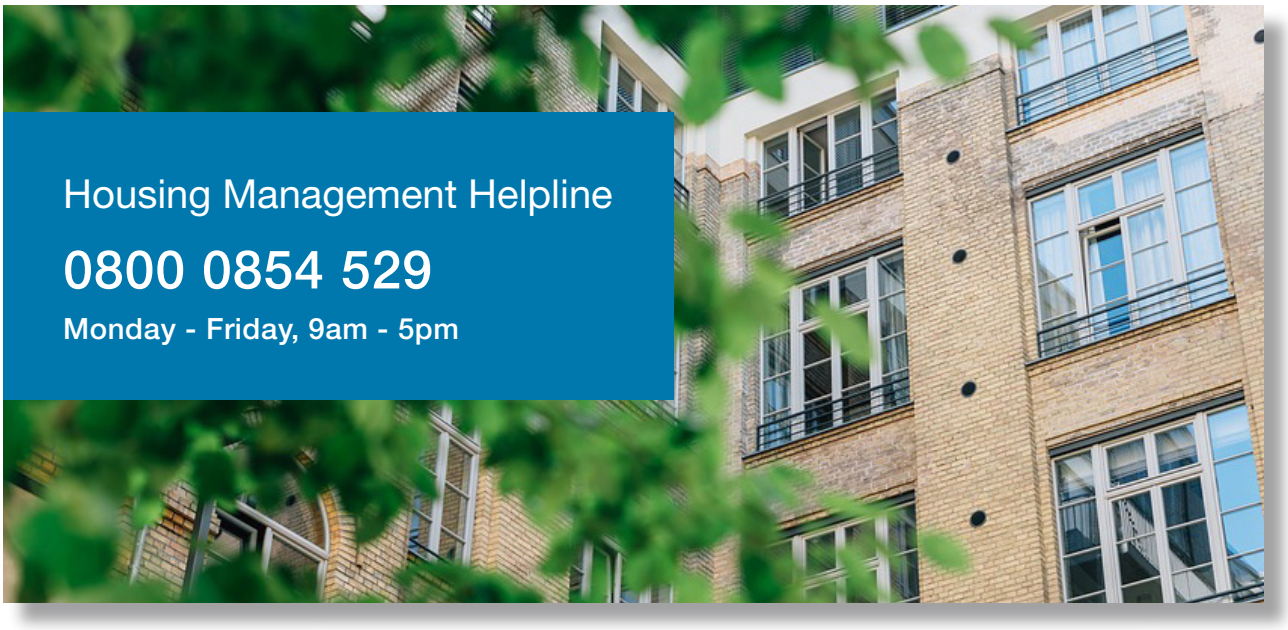
Abbie Grimwood - "I have been assisting Donna with her caseload including working on disrepair matters, possession claims and anti-social behaviour injunctions".

Billy Moxley - "I have been settling several disrepair cases and been dealing with a number of access injunctions to carry out a Gas Safety check".

Lee Russell - "I have had a busy few months updating clients on the Renters' Reform Bill and expected changes to section 21 and helping clients prepare for the roll out of the Homes (Fitness for Human Habitation) Act".

Rebecca Brady - "As well as my usual housing management and property litigation caseload, I have been advising registered providers on a number of inquest cases".

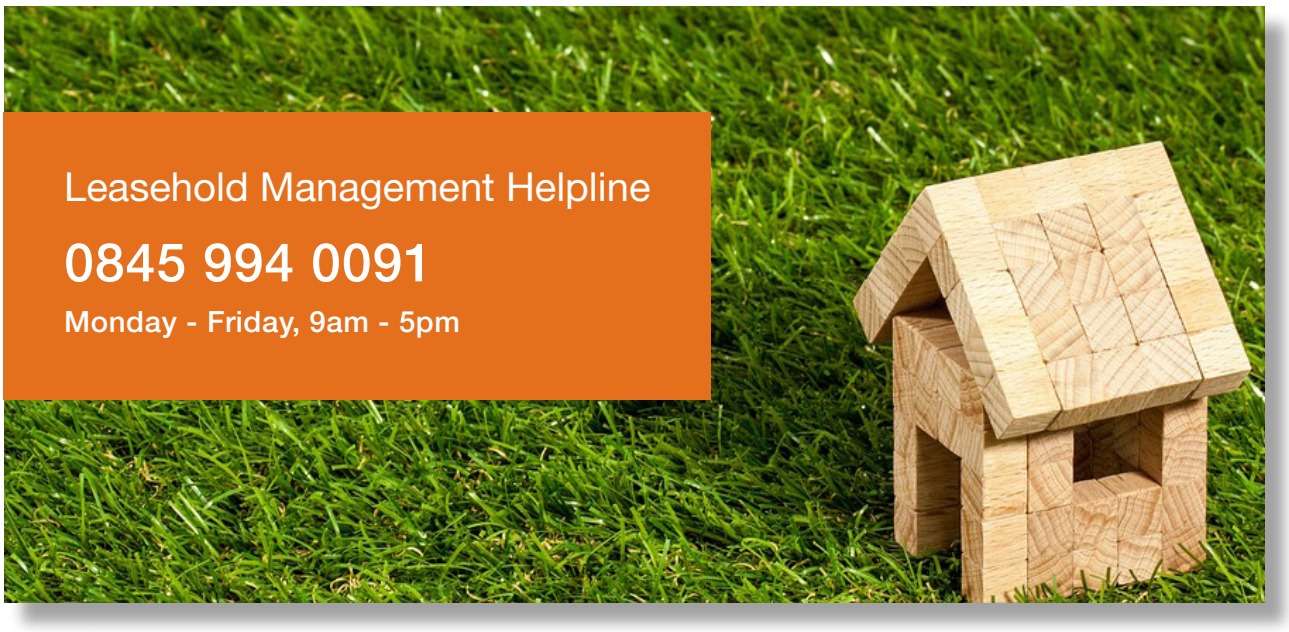
Helplines:
Why not give us a call?



Housing Management Helpline

0800 0854 529

Monday - Friday, 9am - 5pm



Leasehold Management Helpline

0845 994 0091

Monday - Friday, 9am - 5pm

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