



IN THE BEGINNING: GET PROPER ADVICE

Justin Bennett of Langley Byers Bennett writes that it is not surprising if the general public is confused by enfranchisement, even some professionals find the subject hard to grasp. Contrasting information available can lead to misunderstanding and the feeling of being overwhelmed. This does not need to be the case if you are properly advised.



Contacting a specialist surveyor or solicitor can ease your burden on day one. Most solicitors and surveyors will offer an initial consultation without charge. With large

claims on blocks of flats it is not unusual for your prospective future surveyor or solicitor to visit the property to meet with the prospective clients in order to present a pitch for their future employment. A leaseholder is in the position of being the employer or customer and therefore can expect this initial service.

Recent experience on a Central London block of flats with commercial premises below, illustrated the extent of the confusion that for example a number of residents associations have in respect of the process. Following my meeting with them I left them in the position where they had the benefit of contacts in relation to the respective parts that they will need to manage, such as the participation agreement, and the step-by-step process that they should go through in order to manage their fellow leaseholders to achieve the required qualification criteria.

INTRODUCTION TO THE LEGISLATION

2007 saw the 40th birthday of the Leasehold Reform Act 1967. This is the Act that allows a leaseholder to acquire the freehold of their house. 2008 sees the 15-year anniversary of the Leasehold Reform Housing and Urban Development Act 1993 relating to flats. Both Acts have been amended considerably during the

past 15 years with the most significant amendments coming into force in 2002 with the introduction of the Commonhold and Leasehold Reform Act.

The 2002 Act made qualification much simpler for leaseholders. Residency requirements were removed allowing the owners of second homes or corporate owners to become qualifying tenants. For flat owners seeking lease extensions you now require two years ownership of the property. A common misconception is when the two years starts. It is not the date of completion of your purchase, but the date it is registered at the Land Registry. In most instances this qualification is the same under the 1967 Act. The 1993 Act of course also allows the freehold of a block of flats, rather than a house, to be purchased. The qualification criteria for this is much simpler. A leaseholder will qualify so long as they have registered ownership, even for one day. However, qualification under the 1993 Act, requires a minimum number of participants - 50% of the total number of flats. There are other more technical issues as to whether or not a leaseholder is a qualifying tenant, but this is not for this forum.

Part of establishing whether a block of flats qualifies, requires you to consider other parts of the building. For example it is not uncommon for there to be, say, five flats over a shop. The 2002 Act simplified the process to the extent that as long as less than 25% of the floor area is commercial the freehold can be bought by the leaseholders provided that at least 50% of them apply. In this example you would require at least three of the five

flats. Recently there have been a number of cases before the Court of Appeal on issues of qualification, the most recent being that of *Aggio*. *Note: Aggio, like Sportelli, is a common name for a series of cases.*

COURT OF APPEAL

The cases of *Earl of Cadogan and others v. 26 Cadogan Square Limited and Howard de Walden Estates Limited and Aggio and others* were determined at the same time. There were two issues before the Court. The first was whether the head-leaseholder was a qualifying tenant and the second was whether the caretaker's flat in a block can be acquired along with the freehold. The Court of Appeal decided that in both instances the head-leaseholder was a qualifying tenant so therefore could participate in an enfranchisement and also decided that a caretaker's flat could be acquired when acquiring the freehold.

This effectively means that, subject to payment of a premium, the tenants were not left in the position where their freeholder had an interest in the building once the property was acquired. It does not force leaseholders who have limited funds to acquire these parts because most landlords will negotiate a reduction in the premium to retain valuable parts.

With the previous example relating to a block of flats with a shop underneath, there is an optional leaseback provision within the legislation for the landlord to elect to take a 999-year lease on the commercial premises at a peppercorn ground rent (£nil) and pay service charges for that element. Tenants when applying for the freehold have to offer to purchase the commercial parts but are not left in a position where they necessarily have to pay for it because the landlord will normally have bought the property principally for the commercial element rather than the ground rent income.



SIGNIFICANT ISSUES

This article so far has hopefully clarified the process for you and, subject to proper advice taken at correct times, should mean that the difficulties faced with what is a very technical and legal situation can be overcome.

The most significant issue that you as a leaseholder should consider is the length of your lease, particularly in this uncertain market. The 2002 Act introduced for the first time the issue of 80 years. If your lease has more than 80 years the landlord is not entitled to marriage value or share of the profit released from extending a lease or buying in the freehold. 79 years and 364 days remaining, unfortunately means now that you have to pay the landlord a share of the profits. In most cases that would mean the premium doubles effectively overnight. Therefore, as a leaseholder, it is very important that you remember this date. My advice, and undoubtedly a number of professionals will also agree, is that a leaseholder must be certain to have extended their lease or bought the freehold of their property before this date.

Buying the freehold or acquiring a lease extension requires the service of Notices and, in my view, should always be dealt with by a specialist solicitor. The significance of all the dates involved means that if improperly advised both the tenants and landlords interests can be substantially affected. A tenant will serve an initial Notice and a landlord has two month's from that Notice to serve a Counter-Notice. The initial Notice contains the tenant's offer. Case law states that this must be a realistic offer.

The landlord's Notice will contain the landlord's counter offer of the premium that they require. As yet there is no case law to say that this must be a realistic offer so it is not necessary to be shocked by the price quoted.

If a landlord does not respond to your initial Notice then the price that you will pay is that stated in your original Notice, and therefore the reason why it needs to be realistic. You have to issue proceedings in Court for an Order so that the landlord sells at the price stated. If your landlord responds with a Counter-Notice, the Act then allows for two months for you to negotiate. The negotiation may of course just be a telephone conversation between both parties' advisers to say: "this is our offer, we are not moving". However, before those two months expires it is not possible to apply to the Leasehold Valuation Tribunal (LVT) who are ultimately there to determine a fair price for the freehold or lease extension if the parties cannot agree. The window for this application is another four-month period following on from the expiry of the negotiation period.

This date is crucial for a tenant. If the application is not made in time (six months after the Counter-Notice) then the Notice from the tenant or tenants is deemed to be withdrawn and you will be in a position where you will have to wait a further year before reapplying. If you have just bought a flat and the seller applied on your behalf, this can be very significant as it could mean up to a two-year wait.

It is for this reason, in my view, that a specialist solicitor must deal with the

Notices. For houses the situation is slightly different and the dates and missing the dates is less significant, although not to the extent that they can be ignored.

COSTS AND SUMMARY

It is important to remember when applying for a lease extension that a leaseholder or group of tenants are responsible for costs. As you are forcing a landlord to sell the Act allows for the recovery of the landlord's costs for dealing with the process. A landlord is allowed to recover his reasonable valuation costs in preparing the Counter-Notice premium and for his dealing with the application and ultimately for dealing with the lease extension or transfer of the freehold. You must remember you are also paying your own costs for your own surveyor and your own solicitor. In most instances the price paid, added to the price of your existing leasehold property, together with the costs of the process should be less than the value of the property after the lease extension or freehold acquisition. In a falling market, however, this may not necessarily be easy but you should remember that a longer lease or part ownership of the freehold will make your flat easier to sell if you wish to move. At LVT each party bears their own costs. This means that most cases are settled as the LVT can be an expensive experience.

The process, as you will see, can be technical and complicated but, if you organise yourself and take advice at a very early stage, a competent solicitor or surveyor can make the process less stressful and assist you in all respects. ■

