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SUPPLEMENT

ENFRANCHISEMENT

CENTRAL LONDON

BUYING YOUR FREEHOLD
EXTENDING YOUR LEASE

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FOREWORD

The supplement in your hands leads you through the process of extending your lease and buying your freehold, otherwise known as enfranchisement.

Divided into four broad areas we look at life before enfranchisement (are you and your building eligible?), the process of enfranchisement, the funding options and what life will be like for those living in your building once the process has successfully concluded. Enfranchisement can be a complicated process requiring support and expertise. In the following pages you will read comments and analyses from the country's leading experts. If you decide with your fellow residents to take this route, and succeed, the rewards will be worth the effort.

The *Enfranchisement 2008: Central London* supplement is published by the people who bring you *News on the Block* – all about flats. *News on the Block* is designed to assist and inform RMC directors, managing agents and all those involved with flats in the UK.

In future issues we will be returning to the subject of enfranchisement through a series of region-specific articles and keeping you up-to-date with the ever-changing legal landscape.

For information about our supplements and magazines, contact us at the details below. Enjoy this launch issue of a very important topic.

We would like to thank all contributors to this supplement, especially Savills as our main sponsor.

The *News on the Block* editorial team

News on the BLOCK All about flats

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COLLECTIVE ENFRANCHISEMENT – A WELCOME NOTE BY PETER HALER MBE

Welcome to this special *NOTB* supplement on enfranchisement. It's a big supplement about a big issue for leaseholders, buying out their landlord and taking control of their assets.

Enfranchisement can be complicated, frequently fraught with problems, but wholly achievable by the ordinary leaseholder; whether a major mansion block, a docklands tower or a simple three-flat conversion the principles and procedures are much the same. A huge level of professional expertise has developed since enfranchisement became a practical reality with the Leasehold Reform, Housing and Urban Development Act 1993 (93 Act) and advice is easy to come by. Substantial numbers of solicitors and valuers practices specialise in enfranchisement and there is a growing industry in enfranchisement facilitators to organise the whole process for you. The formal enfranchisement procedures have been greatly simplified by the Commonhold and Leasehold Reform Act 2002 (2002 Act) amendments to the original legislation and experts agree that the process has never been easier.

Whichever route leaseholders choose to follow in acquiring the freehold and the control of their building there is one outstanding prerequisite – get advice before you begin. This supplement looks at the full range of issues involved in enfranchisement, from qualification and procedures, to finance and future management.

We hope you will find it useful.

Peter Haler

A NOTE FROM MIRA BAR-HILLEL

News on the Block's regular columnist (and one of the original campaigners back in 1993) adds her own unique take on the enfranchisement landscape and recalls the often difficult path that has led us to where we are today.

Leaseholders' rights began in 1993 – but did not bring the desired benefits for a further decade.

Before 1993 there was a strictly limited opportunity for the owners of houses and flats, whose landlord was selling the freehold anyway, to a "right of first refusal". But this feeble law, which was not backed up by any penalties for offenders, ended up more honoured in the breach. Landlords big and small ignored its provisions at will – as did their lawyers.

It was one of these breaches – the sale of the South Kensington Estate by Henry Smith Charity to the Wellcome Trust in 1995 – which brought about the ***Evening Standard*** Leasehold Campaign. The sheer scale and horror of the abuses we uncovered daily over a period of weeks caused the Government and Parliament to revisit not only the "right of first refusal" but also the way in which the enfranchisement options granted in the 1993 Act had been undermined by the House of Lords (mainly by Lords with land and property agendas).

The result was the 1996 Act, which improved the ability of leaseholders to resist the tactics of unscrupulous landlords by establishing the Leasehold Valuation Tribunal (LVT) as the forum for resolving disputes instead of the expensive and intimidating County Courts. It was followed by the 2002 Act, which completed most of the necessary protection for leaseholders including the crucial Right to Manage and abandonment of the residency test for enfranchisement.

What has surprised me personally more than anything has been the degree to which awareness of all these benefits has been slow to trickle through to the general public. I still get calls from people who have not heard of the Leasehold Advisory Service or even the LVT, although happily there are fewer than in the past.

I hope this special supplement sponsored by Savills will help to further increase leaseholders' awareness of what they can do to help themselves and why they should do it.

Mira Bar-Hillel

REASONS TO ENFRANCHISE BY PETER HALER

1 **Taking control** – although the leaseholders often own the majority of the equity in the building (in the value of their flats), the freeholder controls all aspects of its management, maintenance and future. Buying out this minority share places the leaseholders in full management control, to save costs, improve services and manage the building as they choose.

2 **Renewing the leases** – in acquiring the freehold the leaseholders gain the power to extend the term of their leases, ideally to 999 years. The valuation principles of lease extension and freehold purchase are very similar and, if most leaseholders in a building agree on the need to extend their leases, a joint acquisition of the freehold can often provide better value than individual actions to extend.

3 **Exploiting assets** – ownership of the parts of the building or land reserved to the freeholder may provide valuable opportunities, a telecoms aerial on the roof or construction of an additional storey to provide flats to sell, development of unused land or commercial use of unused parking. These can provide substantial sums, either as one-off windfalls to offset costs of acquisition or as future income.
The converse also applies of course, acquisition in order to prevent the present freeholder's exploitation of the assets. There have been many cases where leaseholders have bought their freeholds simply to prevent their landlord building on the roof or otherwise developing the building.

4 **Winding up head leases** – an intermediate lease between the freeholder and the individual flat owners can cause both problems and expense, sometimes imposing unwelcome management arrangements. Acquisition under the 1993 Act delivers an unencumbered freehold, winding up any head lease or intervening leases.

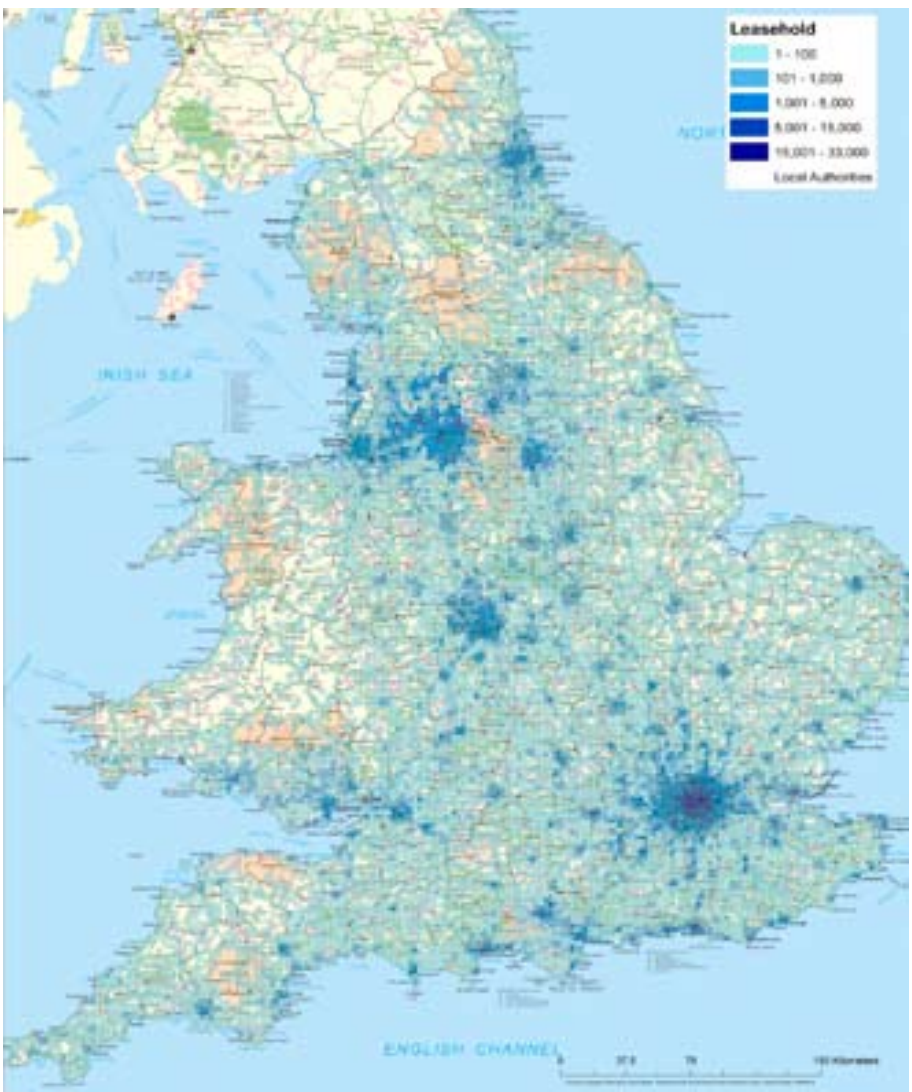
5 **Increasing values** – Savills' and other research seems to confirm that ownership and control of the freehold by the leaseholders places a premium on the values of the flats; purchasers and prepared to pay a little more for the prospect of a well-managed block where they can have their say.

SAVILLS PRIME CENTRAL LONDON INDEX

- Given the increasingly bearish news flow in recent weeks, it is unsurprising that our first quarter figures reflect further weakness in prime central London's residential market. Values fell by 1.5% for PCL in the first quarter of 2008.
- Every part of our prime London indices reported a fall in values in the first quarter with West London (Holland Park, Kensington, Notting Hill) seeing the biggest drop (-2.4%).
- In the last two months, the widespread withdrawal of funding by lending institutions has completely changed the outlook for the UK housing market. The banking sector is under severe pressure and one result of this is a big reduction in the amount of mortgage lending (as well as the cost of borrowing increasing). We are now forecasting a 10% fall in values in prime central London during 2008. Should the economic backdrop worsen, we could envisage falls of up to 15% this year.
- For rentals, the prospects for the City sector and the wider global economy remain uncertain in the light of the ongoing repercussions of the credit crisis and the resultant volatility in financial markets. Nevertheless, the first couple of months of 2008 showed strong demand from tenants with improved business compared to this time last year.

Supplied by Savills research: 1st May 2008

LEASEHOLD DISTRIBUTION IN ENGLAND & WALES



Supplied by the Land Registry, March 2008

AN INTRODUCTION TO ENFRANCHISEMENT

Alastair Stimson, Associate in Savills' Residential Valuation and Litigation Support Department and enfranchisement expert, introduces the subject and explains why it has never been more important to consider purchasing your freehold.

Ignoring the fact that you own a leasehold property, a diminishing interest, could cost you dearly. After all, you probably spend a significant amount of time managing and tracking your other investments; however property is likely to be the most valuable of them all and is often overlooked. There are fewer reasons for this to be excusable, especially as there is so much legislation that affords rights to leaseholders to protect their investments.

Diminishing interest is a leaseholder's major problem, as leases are set for a term of years that, by definition, reduce in length and is outside of anyone's control. In order to essentially buy time leaseholders can either individually extend their leases by a further 90 years on top of the unexpired term paying a peppercorn ground rent going forward, or collectively purchase the freehold with their fellow leaseholders within the building they cohabit. The collective option would transfer the current leasehold tenure of a property to a share of freehold tenure, undoubtedly being the most widely recognised (short of having a freehold) beneficial tenure, thus being the ultimate protection for your investment and making it more desirable and therefore more marketable. Leaseholders of houses have similar options.

There is current legislation that allows these rights, which freeholders cannot escape, subject to the various requirements and qualifications under the current legislation.

> "AS THE RESIDENTIAL MARKET IS CURRENTLY IN A DOCILE STATE, MAKING YOUR PROPERTY MORE ATTRACTIVE IN BOTH PHYSICAL AND LEGAL TENURE FORM HAS NEVER BEEN MORE IMPORTANT"

SO WHY START THE PROCESS?

Yes, you may think this will all cost money, – it will, but like an hourglass and the sand within, once the length of the lease has started to diminish (and without using your rights) there is nothing that can be done to stop this. The longer it is ignored the cost of either extending the lease or buying the freehold will increase on a daily basis. On the other hand, the professional costs involved remain fairly static. As the residential market is in a docile state, making your property more attractive in physical and legal tenure form has never been more important. Clearly a property with a short lease is far less desirable. The audience for such a small interest is lower; notwithstanding the fact many financial institutions will not offer residential mortgages. Sensitivity to lending is already sharper on the back of the current economic environment. From a potential purchaser's perspective the idea of buying an interest in land, paying a certain price for this land while knowing that a further premium will have to be paid to enhance its interest yet again, the level of which can not be guaranteed, will breed further uncertainty. This could be enough to encourage purchasers to focus on long lease or share of freehold properties.

The law as discussed above, masquerades behind the Leasehold Reform, Housing and Urban Development Act 1993 (1993 Act), as amended by the Commonhold and Leasehold Reform Act 2002 (2002 Act). For an individual lease extension or a collective enfranchisement of the whole building, the process is started by obtaining the professional advice of a valuer to inspect the property in order to undertake all the usual due diligences in part of the valuation to advise the client. The freehold of a house can also be purchased under the Leasehold Reform Act 1967 (1967 Act).

80 years is an important number to remember, as once a lease falls beneath this term, the costs of either extending the lease or buying the freehold increase significantly.

CORRECTLY DRAFTED

If the leaseholders qualify, the premium quoted in the initial notice was not too low, the notice was correctly drafted and served, then in essence the freeholder

cannot escape the leaseholders claim and rights. The freeholder is then in a position where a response must be made to the claim within two months or as stated within the notice served by the leaseholders. The implications for the freeholders not complying with this can be catastrophic, as it is possible for the leaseholder to apply to the courts to obtain the lease extension or freehold at the price contained in their initial notice. Assuming the freeholder is well advised, it is highly unlikely they will fall foul to this. However, they and their legal advisers have in the past overlooked the requested time lines. The freeholder will respond with a similar prescribed notice, being served on the leaseholders, confirming that the freeholder does or does not accept the claim and; does or does not accept the price contained within. Ordinarily the latter is always disputed.

The surveyors representing both parties will then enter into negotiations and exchange valuations to see where the differences lie in the statutory valuation process. There is then a limited period of time for both parties' valuation experts to either agree the premium or move the matter forward to the Leasehold Valuation Tribunal (LVT), where the premium is then determined by a third party who will consider the evidence produced by either side. This process can be expensive and no one can guarantee the outcome. Therefore in order to take this final option there needs to be a significant reason for doing so.

Leasehold enfranchisement surveyors and those with the appropriate experience to deal with the legal notices and conveyance come from a relatively small pool, and it is essential that the chosen advisors have the necessary experience in order that the many pitfalls that surround leasehold reform can be avoided.

Surveyors are regulated by the Royal Institution of Chartered Surveyors (RICS) and this is a world wide recognised qualification as is the Law Society that regulates Solicitors. Savills are proud to announce that we have recently been accepted to be members of the Association of Leasehold Enfranchisement Practitioners (ALEP) who are a new body that Surveyors, Solicitors and Intermediaries, who have the relevant experience, can now choose to be regulated by to demonstrate their experience in this specialist field.

> "DIMINISHING INTEREST IS A LEASEHOLDER'S MAJOR PROBLEM. LEASES ARE SET FOR A TERM OF YEARS THAT, BY DEFINITION, REDUCE IN LENGTH – THIS IS OUTSIDE OF ANYONE'S CONTROL"

PITFALLS

One of the requirements to qualify in order to purchase a lease extension is that the lease must have been owned for two years before a notice can be served. Ownership is determined from the date of registration on the Land Registry (not physical occupation), this can lead to further delays if registration is not dealt with swiftly. We have come across many leaseholders who have been ill-advised when purchasing leasehold property. For example, if the current leaseholders have indeed met this requirement, the incoming purchaser can request the vendor to serve the relevant notice and therefore later assign this, thereby saving two years of a diminishing lease. The financial implications of such a mistake are clearly best well avoided. On the other hand, while this qualification period does exist for individual lease extensions, for collective enfranchisement of whole buildings this does not exist. Therefore, incoming leaseholders can immediately join in any collective enfranchisement activity. While collectively purchasing the freehold from the freeholder is the most ideal scenario, the organisation of such a matter and the effort required in order to start the process can be huge. We have advised many leaseholders within blocks, where the initial idea of enfranchisement has been suggested, however many years can pass before the process actually comes to fruition. This is human nature, as people are not always good at making decisions. For those within the block trying to organise this around their already busy lifestyles, this puts further strain on the matter. If this is the case and as a leaseholder you are frustrated watching your own investment diminish in value, as the costs in order to rectify this rise daily you might be well advised to look after number one for once!

You could individually, or with a group of other leaseholders, apply to extend your lease, thus protecting your interest almost immediately. Once this process is complete, you will at least then have a far longer interest in your residential property. However, it is important to remember that this will not exclude you from any potential leasehold enfranchisement processed at a later stage, it would just mean that your contribution overall would be far lower as your interest would have already been extended. The only downside to this is there maybe some doubling up of costs. Depending on the gap between the two, this is likely to be minimal, compared to the amount that you could have otherwise paid. Furthermore, as soon as the notices are served on the freeholder, this crystallises the position by fixing the valuation date and the diminishing lease term. Savills have a team of Chartered Surveyors who are involved in all aspects of the Central London market and we undertake all types of residential valuation. Furthermore we have a specialist team who focus purely on leasehold enfranchisement, and being supported by our strong residential agents' network we make an expert team providing the highest level of service, advice and therefore results.

We do hope you enjoy the rest of this supplement, of which we are proud sponsors and are delighted to be associated with the many experts within this even more specialist field.

The editor would like to thank Savills for their support of this publication. Please contact Alastair Stimson on +44 (0) 20 7016 3728 or at astimson@savills.com

ARE YOU ELIGIBLE TO ENFRANCHISE?

Before you can successfully file for enfranchisement, it is essential you do your research to make sure your block is eligible. **Nic Shulman** deciphers between those that can, and those that can't.

Collective enfranchisement was first introduced by the Leasehold Reform, Housing and Urban Development Act 1993 and it is the absolute right of leaseholders of 50 per cent or more of the flats in a block to buy the freehold of the building. Collective enfranchisement gives flat owners in a building total control over the property that they own. When leaseholders collectively own the freehold to the building they gain the power of self-determination regarding the issues in their block.

QUALIFYING CRITERIA:

For a building and its leaseholders to qualify for the right:

- It must contain at least two flats;
- At least two-thirds of the flats must be leasehold;
- It must not have more than 25 per cent of the internal floor area used for non-residential purposes
- It must not be a building within a cathedral precinct, a National Trust or Crown property

> "IN ORDER TO SUCCESSFULLY ENFRANCHISE A BLOCK, A GREAT DEAL OF RESEARCH AND PLANNING NEEDS TO BE CARRIED OUT"

LEASEHOLDER QUALIFYING CRITERIA

A qualifying leaseholder must own:

- a lease that, when granted, had an unexpired term of at least 21 years; or
- a lease with an unexpired term of less than 21 years but with a clause providing a right of perpetual renewal; or
- a lease terminable by death or marriage or an unknown date; or
- the communication of a long lease under the Local Government Housing Act 1989 following the expiry of the original term; or
- a shared-ownership lease where the leaseholders' share is 100 per cent.

EXCEPTIONS TO THE RULE

Even if a leaseholder satisfies one of the above conditions there are certain exceptions. For example they will still not qualify if they;

- have a landlord who is a charitable housing trust and the flat is provided as part of the charity's functions; or
- own more than two flats in the building; or
- own a business or commercial lease.

> "ONCE IT HAS BEEN ESTABLISHED THAT THE BUILDING AND ITS TENANTS QUALIFY FOR AND WANT TO ENFRANCHISEMENT THERE ARE A NUMBER OF IMPORTANT STAGES TO CONSIDER"

In order to successfully enfranchise a block, a great deal of research and planning needs to be carried out. For example, lessees will need to know:

- the addresses of the freeholder(s);
- information about intervening or head leases (including contact details);
- contact details for all leaseholders in the building and details about their leases;
- information about any flats in the control of the existing freeholder and let on periodic tenancies.

Once it has been established that the building and its tenants qualify for and want to enfranchise there are a number of important stages to consider:

- **The participation agreement** – advisable to conclude because the purchase of the freehold of a building is a cooperative undertaking between several people and each participating leaseholder is dependent on the other to perform.
- **The nominee purchaser** – is the person named in the initial notice who will acquire the freehold and become the new landlord of the building. It is important to note that although the Commonhold and Leasehold Reform Act 2002 provided that the nominee purchaser would be a "Right to Enfranchise" company, these provisions have yet to come into force.
- **Funding the purchase** – Collective enfranchisement can be a lengthy and expensive procedure. Before serving the initial notice, it is highly advisable the participating leaseholders seek professional advice from a valuer regarding the estimated cost of the procedure and establish a fund.
- **The initial notice** – the process commences by the service of a formal initial notice on the existing landlord by the nominee purchaser. This triggers the moment by which all participating leaseholders are jointly and severally liable for their own costs and those of the landlord.
- **The counter-notice** – this is the notice that must be provided by the freeholder in response to the initial notice. This must be delivered within the time limits set out in the law. By law, the freeholder cannot ignore the initial notice

> "COLLECTIVE ENFRANCHISEMENT CAN BE A LENGTHY AND EXPENSIVE PROCEDURE. BEFORE SERVING THE INITIAL NOTICE, IT IS HIGHLY ADVISABLE THE PARTICIPATING LEASEHOLDERS SEEK PROFESSIONAL ADVICE FROM A VALUER"

FURTHER TIPS

- Never underestimate the procedures, time limits and valuation requirements involved in Collective Enfranchisement.
- While it is possible for the nominee purchaser of a group of leaseholders to administer this legal procedure through to conclusion, the vast majority of cases will require the services of an experienced solicitor and valuer.

- ***Extracted from* Being a Leaseholder – The Essential Guide to Owning a Flat by Nic Shulman. *Order your copy today by calling 08700 600 663 or buy online at www.newsontheblock.com. In the future* News on the Block *will be covering enfranchisement and lease extension on a region-by-region basis. Order your subscription today by logging onto the website as above, or calling our subscription hotline: 08700 600 663.***

LEASEHOLD EXTENSION VS ENFRANCHISEMENT – YOUR OPTIONS EXPLAINED

News on the Block spoke with **Natasha Rees** of leading London law firm Forsters, to discuss the pros and cons of the options available to flat dwellers when their leases are running down.

The Leasehold Reform, Housing and Urban Development Act 1993 (the 1993 Act) gave leasehold owners of flats two important new rights. The first allows a majority of tenants to join together to buy the freehold, exercising the right to collective enfranchisement. The second allows an individual tenant the right to a new lease, for a term 90 years longer than the existing one at a peppercorn rent. In order to decide which route to follow a tenant will first have to assess whether they qualify for a collective claim and, if a collective claim is a possibility, will then need to decide whether the advantages of owning the freehold outweigh the benefits of a 90 year lease extension.

PRO AND CONS OF A COLLECTIVE CLAIM

Pros: Generally, buying the freehold of a residential building collectively delivers the best result for tenants. This is because it results in full ownership and control of the building. Tenants who have acquired the freehold are at liberty to grant 999 year leases and also to take over the management of the building. Although tenants now have a statutory right to take over the management of the building they tend to prefer a collective claim because, as stated above it also gives them the right to grant long leases to themselves at no extra premium and this can significantly enhance the value of their flat.

Cons: Tenants should be aware that taking over the management of a large block can be onerous. Even though the day-to-day management matters can be contracted out to a firm of managing agents, as freeholders, the tenants will be responsible for insurance, repairs, redecoration and such thorny issues. Pursuing neighbours for arrears of service charges or dealing with complaints about unauthorised alterations or noise nuisance is not an easy task. The cost of the freehold could also be high if there are a number of short leases and few participating tenants or if there are expensive commercial premises to be included in the claim.

THE COLLECTIVE CLAIM

Acquiring the freehold of a building as a group of tenants is a complex project that requires much organisation and should not be entered into lightly. It is important to form a coherent group headed up by a few enthusiastic residents who can build consensus amongst the participants, and sustain momentum over a long period of time. Once this group has been formed, it is strongly advisable to instruct a solicitor to implement the technical procedure required and also a surveyor who can advise on the likely freehold value. These professionals will wish to deal only with the residents appointed representatives, who can in turn maintain a line of communication with their fellow residents.

The process is started by the service of a Notice of Claim on the landlord that sets out the premium offered for the freehold. The landlord then has to respond within two months with a counter-proposal. If the premium or the terms of the transfer cannot be agreed the parties have a specific time period within which they can apply to the Leasehold Valuation Tribunal who will determine the premium and any other terms that remain in dispute.

PRO AND CONS OF LEASE EXTENSION

Pros: As an alternative to a collective claim, tenants also have the right to demand that their freeholder sell them a 90 year lease extension at a fair market price in accordance with statutory guidelines. Although buying a lease extension does not deliver to the tenant ownership and control of the building it is a much simpler process than enfranchisement, as it is an individual right, and thus often quicker and simpler for a tenant to pursue. The tenant will not

> “ACQUIRING THE FREEHOLD OF A BUILDING AS A GROUP OF TENANTS IS A COMPLEX PROJECT THAT REQUIRES MUCH ORGANISATION AND SHOULD NOT BE ENTERED INTO LIGHTLY”

have to cooperate with neighbours and can protect a diminishing lease without taking on the obligation of managing the building. The financial cost of buying a 90 year lease extension within the 1993 Act is usually similar to the cost of the tenant's share of the freehold of the building although this is not always the case.
Cons: A tenant may find however that they pay slightly more in legal and surveyor's fees because a single lease extension cannot offer the economies of scale that a large collective claim can where there are numerous tenants sharing these costs.

THE LEASE EXTENSION

Generally speaking a tenant will be a qualifying tenant and will be entitled to seek an extended lease if its original lease was granted for a term of more than 21 years and the tenant has owned the lease for two years. It is no longer necessary to reside in the flat in order to qualify. Again, it is strongly advisable to instruct a solicitor to implement the technical procedure required and also a surveyor who can advise on the likely premium payable for the new Lease. The process is started by the service of an initial Notice on the landlord proposing a premium and terms for the extended lease. The Landlord must respond with a counter-proposal within two months. If the premium or the terms cannot be agreed there is a further statutory time limit for both parties to apply to the Leasehold Valuation Tribunal who will determine the premium and any terms that remain in dispute.

CONCLUSION

Tenants who are faced with the question of whether to enfranchise or whether to seek a lease extension need to consider what their main objectives are. If they are suffering from bad management, unsubstantiated service charges and their leases are significantly longer than the statutory limit of 80 years then a collective claim will be of most benefit provided that they have an organised residents association. On the other hand, if the leases are short or are about to reach the 80 year limit and they reside in a well managed block with numerous non-resident tenants a lease extension may well be the better solution. In addition, with a collective claim, time can be an issue. If there are a significant number of tenants, it can take some weeks or even months for them all to agree and sign up to the necessary documentation and to pay towards an established fighting fund. In contrast, a single lease extension claim can be implemented and signed within only a few days of a valuation being obtained.

It is also important to remember that the options are not mutually exclusive. It is possible for a tenant to apply for a lease extension one year and then enter into a collective claim a few years later. The tenant's extended lease will only serve to reduce the premium payable for the freehold. Finally, tenants should also be aware that if the cost of the freehold is a problem it is possible to opt for the Right to Manage as a low cost solution to gaining control over the way that a building is run.

PARTICIPATION AGREEMENTS – GET THEM RIGHT

Justin Bennett, director of the chartered surveyor firm Langley Byers Bennett, emphasises the importance of pulling together and making sure this vital stage in the process is carried out without complication.

You have a flat and you want to protect its value and gain better control of your destiny. But, there are pitfalls and consequences for the unwary.

The participation agreement document sets out the terms under which you (collectively) buy your freehold (enfranchise). The agreement deals with the terms and should be prepared by a competent solicitor. As a surveyor: my view is more practical with less *legalese.*

A surveyors involvement in the process varies as does its timing: it generally stems from a single leaseholder wanting to extend their lease, who then speaks with a neighbour; then another. Eventually someone mentions it is cheaper to act as one and mentions buying the freehold. Someone mentions the price (premium). A surveyor values the freehold.

It is rare in a building for all flats to be the same size, layout, aspect, condition and value. It is not unusual for the lease length and ground rent to be different. Aside from that, price is dictated to an extent by the number of participating tenants: if there are sufficient qualifying and participating tenants.

PITFALL

The common pitfall to the process is overall cost. This broadly falls under two categories: the premium (purchase price) and the fees. Where participants disband is after the valuation, and this can be due to the share of premium that can fluctuate depending on the variables of the parameters of the valuation.

Regardless of the number of participating tenants, the cost of obtaining advice generally is shared equally. If all leaseholders are participating, with leases subject to the same length and terms, flats broadly the same size and condition (unimproved) then make life simple and agree an equal split on all costs as there should be equal outcome.

OUTSIDE ADVICE

If there is not consistency agree that your advisers arbitrate on share of the premium. If your advisers are collectively appointed, you should try to abide by their advice. Often an individual participant will ask for outside advice, but try to do this before the claim.

Bear in mind, the law and values vary and as there are many variables, you must be flexible. If you cannot be at this stage – imagine the situation when the service charge bills increase!

Also think about what will happen afterwards, for instance agree on a managing agent if possible. This avoids confrontation over future bills and ensures that you are up to date with the legal requirements of being a freeholder.

Essentially, structuring your agreement is about dealing with a fair apportionment of cost, current or future. If life is not simple, at the end of the negotiation ask the advisers to arbitrate. In terms of the fees and consequential costs – such as the costs of non-participating lessees – if you can, split costs based on shares to be created, or it may be based on service charge percentages, after all post-enfranchisement maintenance bills are likely to be allocated this way.

PROTECT YOURSELF

You must cover the consequence of unforeseen circumstance such as someone needs to withdraw. This can be a long process. With this in mind, you should speak with your solicitor or surveyor and protect yourself. In the event that the collective cost becomes untenable consider service of protective lease extension applications. If timed correctly (in my view post-service of the enfranchisement notice), this should be less expensive, with the benefit of a fixed valuation, and become active if the collective enfranchisement claim is withdrawn.

Keep an eye out for further enfranchisement features appearing in the future issues of News on the Block *magazine.* News on the Block *is published six times a year in print and throughout the year at www.newsontheblock.com. Call 08700 600 663 to subscribe or to discuss the magazine in more detail.*

IMPORTANT NOTE:

The enfranchisement process can sometimes last several months or even years. When it comes down to collecting the necessary payment you should not rely on a verbal promise. Entering into enfranchisement without a participant agreement is unwise because if a promised payment is not made the whole transaction could collapse.

The purpose of a participant agreement is that you get a binding agreement from your neighbours – when people are signed up they are legally obliged to pay the sums due under that agreement. As with any other contract it is enforceable should they not be forthcoming with the expected payment. The agreement is enforceable through the courts if necessary.

THE LANDLORD'S LOSS

Jamie Reid offers a snapshot of how the landlord's loss is compensated, and the four cornerstones of the valuation process.

Because the landlord is forced to sell his investment, the legislation entitles him to compensation for those main areas of income that he can reasonably expect to receive during the time in which he owns the freehold. Broadly speaking the most important of these are:

A) GROUND RENT

If the tenants had not been empowered to buy their freehold, the landlord would expect to continue receiving ground rent on each of the flats in the block until each of the leases come to an end. Therefore if the tenants buy their freehold at a time when the leases have 60 years left to run, the landlord is being deprived (potentially) of 60 years' worth of ground rent from each flat.

Of course there is a huge benefit to any landlord in being compensated for this loss by way of a lump sum when the purchase goes through, rather than piecemeal over 60 years. The first job of the surveyor will be to 'capitalise' the total loss of ground rent, so that the benefit of having all that money up front is properly recognised. The sum that the surveyor arrives at will be considerably less than the total amount due over the next 60 years, after capitalisation.

B) LOSS OF THE FLAT AT THE END OF THE LEASE

Again, if the tenants weren't able to buy their freehold, at the end of your lease, the flat would become the property of the landlord once again. Needless to say that this is a valuable asset.

"Deferment rate" is the term used by leasehold professionals to define the value to the landlord of repossessing a flat at the end of the lease.

Say that the unimproved value of your flat is £700,000, and that there are 80 years left on your lease. The value of the asset that the landlord expects to be coming his way when the lease ends in 80 years time is £700,000.

In the most simple terms, the job of the surveyor is to take the accepted rate of return expected by landlords (currently 5% as a result of the Lands Tribunal decision) and to calculate how much money the landlord requires as a lump sum today, so that if he invested it at 5%, it would grow to £700,000 in 80 years time.

C) MARRIAGE VALUE

Marriage Value is a complicated concept, and generally speaking is the amount of increase in value in your flat that comes about when the leasehold and freehold interests merge. Another way of expressing this is the loss to the landlord of the right to charge a premium when you need a lease extension. This can be demonstrated as follows.

Where a tenant has 80 years unexpired on is lease, and he and his fellow tenants decide not to buy the freehold, at some point in the near future, he is obliged to approach the landlord for an extension of his lease. When this happens, the landlord will charge a large premium for agreeing to do so.

However, if this tenant decided, with her fellow tenants, to buy her freehold first then she would be able to grant herself a lease extension free of charge when the freehold purchase completed. In this way, she will have deprived the landlord of being able to charge her a premium on the lease extension, and it is this ability that causes an increase in the value of freehold to the tenant and is what we call 'Marriage Value'.

There are two important pieces of information to note and they are firstly that there is no marriage value payable on flats with more than 80 years left to run, and secondly that the landlord is only entitled to one half of this increase in value.

> "THE FIRST JOB OF THE SURVEYOR WILL BE TO 'CAPITALISE' THE TOTAL LOSS OF GROUND RENT, SO THAT THE BENEFIT OF HAVING ALL THAT MONEY UP FRONT IS PROPERLY RECOGNISED"

D) COMPENSATION

There is one final element to the premium calculation and that is called compensation. It is not often payable and will arise where the landlord suffers some detriment to other property owned by him as a result of having to sell the freehold to the tenants.

Of course this is an over simplified view for illustrative purposes. No two flats are the same, even in the same block, on the same lease terms and in a similar condition. For this reason, and many besides, it is always advisable to seek the advice of a well qualified valuations surveyor with a strong track record in leasehold valuations.

Look out for future editions of NOTB as we continue to cover enfranchisement on a regional basis across the next five issues.

WHEN A HOUSE IS NOT A HOME

Anna Favre of Pemberton Greenish recalls how one recent landmark case has outlined the prerequisites to something many already thought they knew – what constitutes a house?

Most people have a reasonably clear idea of what constitutes a house and yet the interpretation of this beguilingly simple word has led to some leading case law over the years. The latest offering in this long line of litigation is from the House of Lords in the case of Boss Holdings Ltd. v Grosvenor West End Properties and others (2008) and concerned the interpretation of the words "designed or adapted for living in" found at section 2(1) of the Leasehold Reform Act 1967.

> "THE FACTS OF THE CASE ARE UNUSUAL. THE PROPERTY IN QUESTION WAS A SIX STOREY TOWN HOUSE IN MAYFAIR THAT WAS BUILT IN THE 18TH CENTURY AS A SINGE PRIVATE RESIDENCE"

The 1967 Act was the first of two major enfranchisement statutes and has been subject to various amendments over the years, the latest under the Commonhold and Leasehold Reform Act 2002. Importantly, this abolished the residence requirement and left in place a simple two-year ownership requirement, allowing company tenants (and indeed second home owners) to enfranchise, provided the property in question was not occupied solely for the purposes of the tenant's business. Broadly speaking, the Act confers two rights on tenants of long leasehold houses; the right to a lease extension (now in limited circumstances) or a right to purchase the freehold.

As one would expect, these rights are curtailed by various qualification criteria relating to the status of the tenancy itself, period of ownership by the tenant and, critically, the nature of the building and accommodation in question.

The wording used in section 2(1) of the Act, the subject of so much legal debate, states that a "...house includes any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was or is not solely designed or adapted for living in, or is divided horizontally into flats or maisonettes...". Previously, the House of Lords gave some guidance on the meaning of a house for the purposes of the Act in Tandon Trustees v Spurgeon Homes (1982) and concluded that mixed-use buildings that comprised part residential and part commercial may qualify, provided the building was also a house "reasonably so called". The rather surprising consequence of this is that the familiar sight of a high street shop with residential accommodation immediately above could constitute a house within the meaning of section 2(1). However, no Court, until the Boss Holdings case, had looked solely at the interpretation of "designed or adapted for living in".

The facts of the case are unusual. The property in question was a six storey town house in Mayfair that was built in the 18th century as a single private residence. In 1942, the property was divided into mixed use, with the upper three floors being retained as residential and the remaining floors commercial. By the time the notice of claim under the Act was served on the freeholders, the Grosvenor Estate, the property had been stripped back to its basic structure. Plaster had been hacked off some of the walls and floorboards removed. The freeholders refused the claim and the County Court agreed that the tenant's claim was not admissible. On appeal, the Court of Appeal upheld this decision arguing, with some logic, that as the building was nothing more than an internal shell and was not physically fit for immediate occupation, it could not, at the time the notice was served, be designed or adapted for living in within the meaning of the Act. One might have assumed that was the end of the road for the tenant but, undeterred, it took the matter to the House of Lords.

SURPRISE

To the surprise of many property practioners, the House of Lords decided that the tests applied by the earlier courts had been incorrect and overturned the decision of the Court of Appeal. The Court's view was that despite the dilapidated and uninhabitable state of the building, this did not necessarily disqualify the building from the outset. The Court's reasoning was that the natural meaning of the word "designed", a past participle, suggested an involvement with the past. This meant that it was necessary to apply a two-tier test and to consider the property as it had been originally built, or originally designed, and then to consider whether it had subsequently been adapted to some other use. If the latter applied, to what use had it been

> "WE CAN EXPECT A NEW GENRE OF CLAIMANT; AMBITIOUS, COMMERCIAL ORGANISATIONS WHO WILL NO DOUBT SEEK TO PUSH THE BOUNDARIES OF ENFRANCHISEMENT CLAIMS STILL FURTHER"

adapted? In every case therefore it was necessary to consider whether the building was originally designed for living in or had subsequently been adapted for that purpose.

The Court also considered that it was unhelpful to ask whether the property was fit for immediate residential occupation at the date of the claim, as the Court of Appeal had done, as the interpretation of the words could lead to uncertainty and confusion. A test in such terms was by its nature subjective and likely to lead to differing opinions of what did and did not qualify for immediate occupation. The Court also thought it was significant that the requirement to reside in the property had been abolished as a condition of enfranchisement. It therefore did not make sense to imply a term into section 2(1) that the building in question must be capable of being lived in at the date of the claim. In light of all of this, it was the original design of the building that mattered and since in this case that was as a house and the internal configuration of the building remained largely as a house, the property qualified under the Act. This was so even though the lower floors of the building were being used for commercial purposes as there was no requirement under the Act that the building be solely designed for living in.

An interesting outcome but where does that leave matters now? Many property practioners feel the decision has hindered rather than helped to clarify matters. This was compounded by comments of Lord Neuberger, who gave the lead judgement, which suggested that a building originally designed for living in but subsequently adapted to non-residential use, such as commercial offices, would nonetheless qualify as a house under the Act. In other words, once a building was constructed as a house, it would remain as a house. Although Lord Neuberger's observations did not form part of the main judgement and as such are not binding law, they mark a departure from the original purpose of the Act, namely, to provide enfranchisement opportunities to ordinary householders in England and Wales. Instead, we can expect a new genre of claimant; ambitious, commercial organisations who will no doubt seek to push the boundaries of enfranchisement claims still further. This is unlikely to be the last word on the subject.

ENFRANCHISEMENT – THE FREEHOLDER'S STORY

Few areas of property law have generated as much opposition or debate as enfranchisement. Referring to the compulsory purchase of a landlord's estate, it is unique in being the only legal means by which a tenant can do that anywhere in the world. Of course, London is unique in the way that its richest areas are owned by aristocratic landlords, but in the 40 years following its introduction, what effect has it had on the freeholders? **Andrew Teacher** finds out.

Compulsory purchase has certainly made a dent in many of the country's most famous and longstanding estates. But while many may see this break up as a good thing, they are potentially ignoring the ill effects it has had on the modern property market and on the level of choice and quality of tenure that landlords can now afford to offer.

When the Leasehold Reform Act gave leaseholders the right to acquire the freehold or a 50-year lease extension to their properties, few would have foreseen the current situation. The act, passed in 1967, was brought in as a way to prevent people from being made homeless, a problem faced by many Welsh miners around that time. But while the original thinking behind it may have been to quite virtuously help the working classes, recent reforms focusing on changing the ownership of Mayfair flats are a long way removed from Welsh cottages. Indeed, the removal of strict residency rules has instead led to a new breed of speculative investor taking well-intended legislation for a ride.

The initial set of rights in 1967 only applied to low value homes (typically £200-£400) and not to flats at all. Ever since, these rights have been extended to a far wider class of tenants and properties, some of which have seen enfranchisements bitterly contested as far as the European Court of Human Rights.

The whole procedure of enfranchisement (as outlined in Savills' introduction in this supplement, pages 4 and 5) is extremely complex, particularly in blocks of flats with a mix of leases where some may not qualify.

RESIGNED ACCEPTANCE

Hugh Seaborn, chief executive of the Portman estate offers a resigned acceptance of the current legislation, yet seems upbeat of the role the large estates still having in creating vibrant communities that people really benefit from.

"The rules have been amended to penalise freeholders, but the principle of it is just a fact of life," he says. "For an estate like ours it provides capital that we would otherwise not have, and in that respect, it's not unattractive. What is unattractive is that we lose freeholds."

And with these freeholds, the highly professional estate management that accompanies them is also lost. Central London estates such as Belgrave Square, Mayfair and Sloane Street look 'fabulous', according to Seaborn because, he continues, "you have the likes of Grosvenor who ensure that just the right shade of paint is used helping them look pristine. You only have to walk through Pimlico to see how things deteriorate."

For anyone taking a walk through locations such as Marylebone Village, owned by Howard de Walden, this is a hard argument to contest. Responsibility for the public realm ensures the whole environment is better. Similarly for the Portman Estate: "We can take a long-term view of things," insists Seaborn.

"It cannot be a coincidence that so many of the better managed and more desirable areas of London are within the Great Estates' control," adds David Ramsell, estates surveyor at Cadogan, which transformed Chelsea into the desirable location that it now is. The estates believe that when a block of property is lost, so is the motive for taking a broader interest. Similarly, the original intent of the enfranchisement also seems to have dissolved somewhat over the years.

Seaborn says: "The residency test was taken away in 2002 so you can buy the freehold even though you don't live in the building. The original ethos was to ensure people weren't made homeless, but the legislation is now a way for speculators to profit. It's not about people's homes."

VERY SENSIBLE

A speculator not in occupation can take the freehold and sell it on, having obtained it from an owner who didn't want to sell it in the first place. This in itself opens up the poorly drafted legislation to further complications, as

'tenants' turn on each other.

"We constantly receive calls from lessees telling us that a collective claim has been made and that they have been excluded from participation," says Ramsell. "It seems to us to be a fundamental part of the process that all lessees should at least have a chance to participate, rather than sometimes being quite deliberately excluded."

Seaborn agrees that the original ethos was "very sensible", but he believes the purpose of the legislation was therefore met by the ability of leaseholders to extend their leases by 90 years.

He continues: "While the estates don't necessarily want to extend the leases," he adds, "at least they retain the freehold and can concentrate on long-term planning. I think what's happened is the legislation has been amended over time with a result that wasn't intended. Taking away the residency test doesn't seem to follow the political thinking behind it."

While neither public nor political sympathy are about to side with the Great Estates, politicians would do well to consider the results of the legislation, which now mean that there are far fewer leases issued for longer than 20 years (as anything longer would enable enfranchisement).

Meanwhile, landlords still intent on looking to the long term will be able to so, although their historic assets are unlikely to remain totally untouched.

"It is ironic that at the very time the great estates are being undermined, much of what they deliver in terms of good management is being both admired and replicated. With the Government's sustainable communities agenda, good estate management and avoidance of cloned high streets all near the top of the political agenda, public and other private sector organisations are casting an eye over what they can learn from these excellent organisations. There is a balancing act to be struck between the rights of the individual and the collective need to ensure a place is well managed. Whether we got that balance right through the 2002 Act is increasingly being questioned," concluded Seaborn.

A CASE STUDY

The Phillimore Kensington Estate is not untypical of London Estates – it came into the Phillimore family around the turn of the 18th century, when it consisted of some 90 acres of largely agricultural land.

Most of the 20 acres that comprise the Estate was developed between 1855 and 1870, with the large apartment blocks on the north side of Kensington High Street constructed in the first half of the 20th century.

Instead of selling off individual parcels of land, the Estate granted building leases, usually of 99 years, to local builders, with the result the Estate retained the freeholds and received small annual ground rents. Since the Second World War, sales have been made both to meet taxes payable on the deaths of the Second and Third Baron Phillimore and under the enfranchisement legislation introduced by various Leasehold Reform Acts. In recent years however, the Trustees' policy has been to reinvest the proceeds received from freehold enfranchisement and lease extension claims by taking in hand and refurbishing certain significant properties in each street within the Estate and managing them through their agents, now Savills. In addition, a Freehold Management Scheme was established by an Order of the Court under the Leasehold Reform Act 1967, as a means of protecting and conserving those properties no longer owned by the Trustees from unsympathetic alterations and development. As a result, the overall quality and appearance of the Estate has been maintained and improved and also the capital and rental values of individual houses and flats have been increased for the benefit of the Trustees and all the residents. The Trustees have always accepted that the legislation introduced by the Leasehold Reform Acts gave leaseholders the right to acquire their freehold or extend their leases; subject only to payment of the compensation assessed under the formula laid down and to meeting the ownership qualifications. Moreover, it has been the policy of the Trustees' agents, wherever possible, to reach agreement by negotiation rather than by seeking a determination at the Leasehold Valuation Tribunal. Thus if lessees are properly advised from the outset, a sensible resolution can be achieved without the delay, expense and uncertainty involved in applying to the Tribunal. *Oliver French, Associate, Savills*

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Our residential property group is one of the most prominent in London, specialising in the buying and selling of freehold and leasehold houses and flats in London and in the country. We have a partner-led approach to guide all of our clients through the process of buying and selling properties. We advise on all legal aspects of tenancies and landlord and tenant issues. We act for overseas clients, regularly advising them on all related tax issues.

We are acknowledged leaders in the field of leasehold reform, and advise individuals and tenants groups on the acquisition of freeholds from landlords and on lease extensions and proceedings in the Leasehold Valuation Tribunal.

We have a number of developers as clients and advise on setting up developments, preparing leases and liaising with managing agents and have a plot sales team to dispose of houses and flats in developments large and small. We also have a specialist service dealing with rural estates and farms.

CASE STUDY

We were asked to advise the tenants of a block of flats in prime Central London on a collective freehold claim. The unexpired lease length, of the flats, varied between 20 and 110 years and the freehold included a block of garages, parking spaces, 4 shops, a disused basement area and a caretakers flat. The tenants knew the freehold price could be several million pounds. More importantly the tenants were unsure if the building, the leases and the tenants qualified to make a statutory claim.

The firm advised on all aspects of the claim including finance, management and qualification. This advice included drafting an agreement to document the obligations of the various parties to the claim. Clauses were required in respect of the financing of the purchase, the management of the freehold company, management of the building, share ownership and the management of the non residential parts of the building.

We were able to offer advice on the new owner's obligations to the caretaker under the TUPE employment regulations and advise on the structuring of the purchase. It was agreed to grant 999 year leases of each flat, a head lease of the commercial premises, to a third party, at a premium (thereby offsetting some of the purchase price) enter into short term tenancy agreements in respect of the car parking spaces to provide the company with a steady income and take out a mortgage over the caretaker's flat.

Negotiations were successful and following completion the tenants are now occupying flats which have increased substantially in value and as a bonus benefit from the income received from the non residential premises which funds the ongoing management of the building.

FOR FURTHER INFORMATION, PLEASE CONTACT ELAINE DOBSON ON 020 7170 0307. OR VISIT www.bdb-law.co.uk

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Residential property has been at the heart of Forsters' business since it was formed 10 summers ago. Based in Mayfair, Forsters' property practice is highly respected throughout the London property world and we have developed a team with impressive expertise in leasehold enfranchisement matters, from the simple to the very complex.

While this area of the law initially may seem straightforward, the myriad rules and regulations can easily create complications. Our specialist knowledge means we can assist in driving claims to completion and also deliver a clear advantage in terms of the valuation of the premium.

Our team, which acts primarily for tenants, is proactive, efficient and "user friendly" and acts on a range of matters, including single flat lease extensions, collective freehold enfranchisement claims, and house enfranchisement claims.

Our specialist property litigation team is known for its involvement in many of the leading enfranchisement cases, and can handle complex matters that proceed to the Leasehold Valuation Tribunal, the Lands Tribunal, the Court of Appeal or even the House of Lords.

CASE STUDY – RAPID ACTION AS 80 YEAR DEADLINE LOOMED

For the residents of a converted church in North London, their case was significant because the lease length of the 30 or so flats in the property were about to drop below the 80 year mark. Once lease lengths fall below 80 years, the amount that has to be paid for the freehold increases significantly because of the inclusion in the valuation of a concept called "marriage value".

Supported by one very active resident, Forsters at short notice organised the necessary papers, attended a meeting in the resident's front room with about 25 of his neighbours, explained the relevant procedure, costs, and possible time involved and, within one week, had obtained the necessary signatures. We were able to serve the notice of claim just before the lease lengths dipped below the 80 year period and the residents are now the proud owners of their freehold, granting to themselves 999 year leases of their individual flats.

CASE STUDY – GET THE RIGHT ADVICE

A group of residents in a block of flats in south-west London had employed an apparently-specialist organisation to assist with their collective enfranchisement claim. Notice was served on two occasions but in each case was rejected by a landlord who had experienced advisors. Seeing that both claims to the freehold were likely to fail, the residents decided to seek Forsters' advice. Proceedings were issued seeking a declaration that the first notice was in fact valid. As a result the landlord's objections were set aside, the claim was accepted and the matter is now moving towards a hearing at the Leasehold Valuation Tribunal for determination as to price.

FOR FURTHER INFORMATION, PLEASE CONTACT PAUL NEVILLE OR NATASHA REES ON 020 7863 8333 OR MAIL@FORSTERS.CO.UK. OR VISIT www.forsters.co.uk

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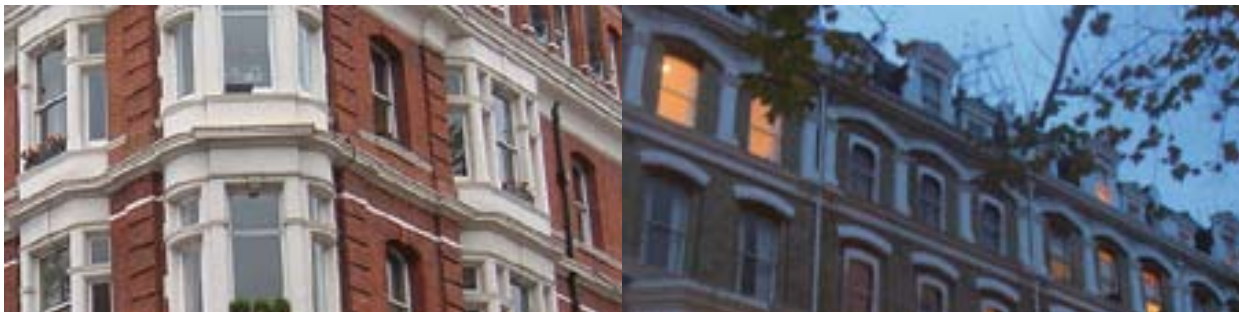

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- GENERAL VALUATION ADVICE
- BUILDING SURVEYING
- SPECIFICATION AND MANAGEMENT OF EXTERNAL AND INTERNAL DECORATIONS AND REPAIRS

Company history and overview

LBB Chartered Surveyors was formed in 1994. Our practice specialises in Leasehold Enfranchisement and Leasehold Reform and Building Surveying: we also provide advice relating to commercial landlord and tenant (mainly dilapidations, lease renewals and rent reviews) and property management.

Justin Bennett has a wealth of experience relating to residential freehold acquisition of both houses (under the 1967 Act) and blocks of flats; and offers lease extension valuation advice becoming involved in the field in 1997. He acted on behalf of the tenants in one of the first cases under the Leasehold Reform Housing and Urban Development Act 1993 of Willingale v Globalgrange Limited [2000] 2 EGLR 55, relating to the price payable for the acquisition of the freehold following the landlord's failure to serve counter-notice within the required time limits. As such Justin has great experience of acting as Expert Witness.

He practises throughout and specialises in central London but also represents parties throughout large tracts of Greater London and the surrounding counties, particularly within the southern suburbs.

Our building surveyors, headed by John Byers, provide top quality professional advice in matters relating to the refurbishment, repair, maintenance, improvement, extension and alteration of properties. They have a detailed knowledge of up-to-date construction methods, legislation and expertise in building contracts. They are involved with large and small scale commercial and residential refurbishment projects, often acting on behalf of residents associations or for managing agents. They also undertake building inspection reports (surveys) on behalf of individuals and corporate clients. John regularly provides expert advice and evidence for clients in building-related disputes and litigation matters, appearing at court or in the LVT.

CASE STUDY

First and second floor flats, a Prime Street, Chelsea

In late 2006 Justin Bennett was contacted by the tenants of two flats within a block of five flats, four of which where underlet, with the fifth flat (caretaker's) held under a headlease. The leases had 38 years unexpired; had been granted with reasonable ground rents, but had onerous rent review provisions to 1/200th of value, in this case each paying circa £2,500 per annum post review: the rent review was outstanding.

As a result of the advice given, lease extension notices were served in the region of £300,000. The landlord quoted at a figure close to 70% over the quoting premium. In 2007, through negotiation: although extended, and protracted by the landlord until close to the date for the Tribunal hearing, Justin negotiated settlement at a substantially reduced premium. The landlord had relied on evidence on what was proved to be based on inflated lease values and applied Estate evidence on adjustments to price. By careful and reasoned analysis Justin was able to prove divergence from the Estate evidence and prove both short and extended lease values to the extent that savings were substantial. Justin is currently dealing with the claim for the collective enfranchisement of the freehold of the building on behalf of the lessees.

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Unlike large firms that promise a team of specialists who duplicate work and multiply charges to clients, our service is provided through a single expert. We work closely with specialist valuers, barristers and other consultants to deliver solutions.

Although much of our work is with lease owners, we also advise landlords, which gives us a clear understanding of the aims of all parties.

The best solutions are not always found in textbooks and are not always the ones we are initially asked to provide. By reviewing the whole problem we find answers that solve problems economically and sensibly.

For further information contact John May Law and Justin Shingles on the numbers above.

CASE STUDY – JOHN MAY LAW

We were asked by the owners of 80 flats to obtain the freehold of their building in Chelsea and to dispose of a 999 year lease of the shops within it at what was expected to be considerable cost. After discussions with the freeholder and the owners of the intermediate leases – and working closely with our clients' surveyors – we instead negotiated a complex deal that gave our clients a 999 year lease of the flats and left the freehold with its previous owner – and nothing was paid for it. This involved buying in and extinguishing a head lease of the building and a lease of the flat occupied by the resident caretaker from a property investment company that had a history of poor relations with the flat owners and had refused to sell its interests to them. At the same time we negotiated with the freeholder which owns many other properties in the area and wanted to retain control of the shops in this building. Although they could have insisted on having this area leased back if we had made them sell the freehold, we discovered that they would not have had all of the areas they wanted if our clients had enforced their rights in full. We then negotiated with the owners of the one flat that would have been affected by the freeholder's plans and secured an addition to their property without payment in return for their consent to the overall transaction.

Keeping participants together is the critical part of the art of handling cases such as this and here, with the aid of the committee of residents, it was possible to have and retain the support of over 60 of the 80 owners in the building. Experience shows that the turning point of a deal is often found outside the envelope of the immediate transaction, on this occasion it proved to be offering the freeholder an improvement in the frontage of the building which he wanted to obtain a letting of another retail unit.

A deal was then put together using all of these elements and as a result:

- The freeholder has improved the commercial parts of the building and retained a freehold that is of strategic significance to it;
- The investment company has been paid off and has no further interest in the building;
- Our clients have removed a head lease which restricted their management of the building; secured their caretaker's flat in perpetuity; obtained control of the whole building (excepting the shops that they had always planned to sell) for virtually a thousand years and reduced their rents;
- Nothing was paid for the new lease;
- The costs of the deal have been lower than estimated for a conventional enfranchisement.

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JUSTIN SHINGLES

Spotting the emerging market in Leasehold Reform following the passing of the Leasehold Reform, Housing and Urban Development act in 1993 (that enfranchised all large houses and flats), I set up a separate department alongside the Central London Agency Department that I then ran for a national firm of Estate Agents. By summer 2000, I resigned my partnership to incorporate myself as a sole practicioner able to offer an individual bespoke service to tenant clients residing on the large Central London Landed Estates. Each case is individual and the valuation arguments are complex. That said, the ability to see the wider picture is also paramount in order to reach a successful negotiated settlement wherever possible. For this reason, my company is constantly instructed to argue and negotiate complex valuation cases with Landlords' valuers working alongside specialist solicitors such as John May Law who are also expert in the niche area of Leasehold Reform.

CASE STUDY – JUSTIN SHINGLES LTD

We were instructed to negotiate the extended 90 year lease by a local firm of solicitors acting on behalf an offshore trust that acquired a 26 year remaining lease with the assigned right to the extended lease on the Grosvenor Estate. Realising the wider issues in play going before the Lands Tribunal and the complex escalator provisions of the headlease granted by the freeholder to an associated company to avoid inheritance tax back in 1984, we were able to negotiate a substantial saving for our client of over £500,000. If we were not aware of the complex valuation issues of the escalator provisions of the head lease, the actual saving negotiated would have been around £280,000.

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RICS

Bishop & Sewell LLP

Bishop & Sewell LLP are a commercial firm based in Central London specialising in residential and commercial property. The firm provides a wide range of other legal services including company and commercial, litigation, family, private client and employment.

The landlord and tenant department deal with all aspects of the leasehold reform legislation, service charge disputes and other property litigation. The team has a particular focus on larger projects, complex transactions and Central London properties.

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MARLER & MARLER

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THE FLATS THAT MADE THE LAW

Jonathon Gavaghan, a barrister at Ten Old Square and an expert on enfranchisement, looks back at some of the decisions that formed the enfranchisement landscape and some of the lessons learnt along the way. *See page 46 for further analysis of the flats that made the law.*

In 1993, after a quarter of a century of being treated like second-class citizens in comparison to their counterparts in houses, long-leaseholders of flats finally got proper rights of enfranchisement[1] .

The Parliamentary intention was to provide an informal and user-friendly system where flat owners and landlords could represent themselves before the Leasehold Valuation Tribunal. That was the plan. Unfortunately it didn't quite turn out that way: the procedure and law are convoluted and opaque.

> "THE FLATS THAT HAVE MADE THE LAW ALL TEND TO BE LONDON: HIGH VALUES MAKING FIGHTING ISSUES IN COURT COMMERCIALLY WORTH THE RISK"

If one theme were to emerge from the subsequent cases, it was that, without an experienced guide, the enfranchisement landscape is barren and depressing and one where it is only too easy to lose your footing.

The flats that have made the law all tend to be London: high values making fighting issues in court commercially worth the risk. Many of the cases deal with whether notices satisfied the precise technical requirements of the Act. (Layman could be forgiven for thinking such disputes were wholly divorced from the substantive merits of a case.)

INITIAL NOTICE

Mr Morris, of Flat 32, 5 Sloane Court East had the dubious honour of being the losing party in one of the most significant of these cases[2]. In his initial notice for a lease extension, Mr Morris suggested a premium of £100. The Court of Appeal held that the tenant's notice should state a realistic figure. £100 was not a genuine proposal: Mr Morris' notice was therefore invalid and his whole claim struck out.

Tenants also need to avoid the fate of the tenants of 94 Carlton Hill, London NW8. Their notice specified a date one day too short for the landlord's counternotice: the Court of Appeal held this was a fatal flaw[3].

APPEAL

The Court of Appeal has more recently been less harsh when it comes to notices: but in respect of errors by landlords. The tenants of the flats of 7 Strathray Gardens lost their argument before the Court of Appeal that the landlords' failure to state whether the building was within an estate management scheme invalidated the counternotice[4]. The Court held that if the area was not in a scheme, it was not fatal to a counternotice to fail to spell that out.

The Court of Appeal also showed a more lenient view than in Mr Morris' case in respect of the counternotice of the landlord of the flats at 9 Cornwall Crescent[5]. The Court held that the test for the counternotice was not whether the figure given was objectively realistic – but simply whether it was given in good faith even if it turned out not to be realistic. The Court hinted that the *Cadogan v Morris* case should not be interpreted as setting any other test but nevertheless confined their views to the problem before them i.e. the question of the landlord's counternotice.

The moral of the story? Despite a little recent leniency, landlords and tenants must never forget the golden rule when traversing this treacherous landscape: *get your notices right!*

[1] Leasehold Reform and Urban Development Act 1993.
[2] *Cadogan v Morris* [1999] 1 EGLR 59.
[3] *Keepers and Governors of John Lyon Grammar School v Secchi* [1999] 3 EGLR 49.
[4] *7 Strathray Gardens Ltd v Pointstar Shipping & Finance Ltd* [2005] 1 EGLR 53.
[5] *9 Cornwall Crescent London Ltd v Kensington & Chelsea LBC* [2005] 2 EGLR 131.

ENFRANCHISEMENT VALUATIONS POST SPORTELLI

Kenneth Munro is one of the leading barristers in leasehold enfranchisement and was Counsel for the Church Commissioners in the Blendcrown case, for two of the three landlords in Sportelli and for the landlord in Hildron judgement. Here he provides an update post Sportelli.

Everyone with a practice involving enfranchisement, whether of houses under the Leasehold Reform Act 1967 or flats under the Leasehold Housing and Urban Redevelopment Act 1993 will have heard of the decision of the Lands Tribunal in *Cadogan v Sportelli* and the Court of Appeal's dismissal of appeals by both the landlords and the tenants.

There were two issues in the Court of Appeal, the deferment rate to be applied to valuing the reversion and whether the value of the reversion included "hope value", i.e. the hope of doing a deal with the tenant or the tenant's successor in title at some date after the valuation date.

The deferment rate issue had been exercising valuers since before the 2004 decision of the Lands Tribunal in *Blendcrown v The Church Commissioners* in which the Lands Tribunal first recognised that commonly applied deferment rates were too high.

The importance of the decision in Sportelli was reinforced by the Lands Tribunal's gathering together of a number of appeals involving a house, individual lease extensions and collective enfranchisements of blocks of flats, with the intention of giving guidance to practitioners and Leasehold Valuation Tribunals. It was clear before and during the hearing that the Lands Tribunal wanted to give guidance on enfranchisement valuations that would limit the number of disputed claims (and appeals) for a goodly period of time.

In the Court of Appeal counsel for one of the tenants mounted a vigorous attack on the right of the Lands Tribunal to give guidance. The Court of Appeal had no hesitation in rejecting that attack. Carnwarth LJ (now the President of the new Superior Tribunals) said that "It was entirely appropriate for the Tribunal to offer guidance as they have done in this case, and, unless and until the legislature intervenes, to expect leasehold valuation tribunals to follow generally that lead." That statement was made subject to one caveat: most of the evidence before the Lands Tribunal had concerned prime Central London property. Nevertheless, the Lands Tribunal had said that the same deferment rate should be applied right across the country.

PRIME CENTRAL LONDON

The Court noted that the cases related entirely to properties within the Prime Central London area (PCL) and the evidence had been directed principally to the market within that area. Unfortunately the Court did not identify what it meant by PCL.

The Court of Appeal rejected a tenants' appeal against the choice of deferment rate, 4.75% for houses and 5% for flats. It was clearly concerned that there might be evidence to justify different rates outside PCL and left open the possibility of different deferment rates in different parts of the country. The result is that for reversions of between 20 years and something over 70 years (effectively the length of reversions in issue in Sportelli) the deferment rate is fixed for some indeterminate future unless there is credible evidence showing that the rate should be different.

HOPE VALUE

The Lands Tribunal had decided that although hope value existed as part of the value of a reversion it was irrecoverable under the statutory valuations. The Court of Appeal agreed. Although strictly obiter (because there was no appeal involving a house), the Court opined that it was also irrecoverable under the 1967 Act.

Whither now ? A few weeks after the decision in Sportelli the Court of Appeal had to rule on two appeals involving hope value and houses. Given the indication already given, the result was inevitable: the Court of Appeal dismissed the Landlords' appeal. The Landlords petitioned the House of Lords for leave to appeal in both *Sportelli and Cadogan v Pitts & Wang*. The House of Lords has granted the petition in *Cadogan v Pitts & Wang* and indicated that it is minded to grant leave to appeal the hope value issue in Sportelli. Hope value is therefore very much back on the agenda.

The issue of the correct deferment rate is even more difficult. Unsurprisingly, outside London, landlords have used

Sportelli to support what are often very substantial drops in the deferment rate and equally substantial increases in the premium or price payable. The reactions of LVTs outside London has been mixed. Some have followed loyally the Sportelli guidance. Some have looked for evidence to justify a departure from it, either finding or not finding the evidence. Some seem to have come perilously close to ignoring Sportelli altogether. Where LVTs outside London have found evidence to justify a departure from Sportelli, the evidence appears less than convincing.

In London there have been three main debates. They are: can tenants' valuers show that there is evidence justifying a departure from Sportelli? What is PCL? What, if any, adjustment should be made where the reversion has less than 20 years unexpired?

The results have been mixed. With some exceptions the LVTs have followed Sportelli. Where they have departed from Sportelli the evidence and reasoning has been less than convincing.

> "SPORTELLI ANSWERED A NUMBER OF QUESTIONS. IT LEFT SOME UNANSWERED. IT RAISED YET OTHERS"

NO COMMON DEFINITION

The question of what is PCL is important because the Court of Appeal did not define it. There is no common definition, though FPD Savills' research department's is probably the most widely used. The Lands Tribunal had to revisit the subject in a claim relating to a large block of flats in Hampstead. The Lands Tribunal concluded that Hampstead was not within PCL but rejected the tenants' evidence in support of a deferment rate of more than 5%.

The adjustment, if any, to be made where the reversion has less than 20 years unexpired has been equally problematic. There is now another series of appeals waiting for hearing dates in the Lands Tribunal. The adjustment is one of the issues in those appeals. Like Sportelli, there will be financial evidence as well as evidence from property valuers.

An essential element of any deferment rate is the real growth rate assumed from valuation date to term. In Sportelli the Lands Tribunal assumed that over time the same real growth rate will apply across the country. It is likely that the appeals will be used to examine whether that assumption was correct and whether it is right to assume different growth rates for different unexpired terms. It is possible that that will involve revisiting the Sportelli deferment rate and considering whether it was too high.

Sportelli answered a number of questions. It left some unanswered. It raised yet others. It can only be hoped that the House of Lords and the Lands Tribunal provide the answers sooner rather than later.

See future issues of News on the Block *magazine for legal updates. Log onto www.newsontheblock.com to subscribe.*

DEATH, TAXES AND CHILDBIRTH – THERE'S NEVER A CONVENIENT TIME FOR ANY OF THEM!

Anyone acquiring the freehold to their house under the Leasehold Reform Act 1967 or claiming a lease extension for their flat or exercising their rights to collective enfranchisement under the Leasehold Reform Housing and Urban Development Act 1993 will need to think about two taxes in particular, stamp duty land tax (SDLT) and capital gains tax (CGT). **Martin Codd** of Dawsons LLP reports.

SDLT is imposed on a sliding scale starting at 1% of the purchase price on the purchase of an interest in residential land in the UK for a consideration in excess of £125,000 unless the purchaser can claim an exemption or relief. If you are paying a premium in excess of £125,000 for your freehold or a lease extension, in all likelihood SDLT will be payable at the relevant rate. SDLT reliefs and exemptions are tightly policed and a tenant should take legal advice before claiming any relief or exemption.

When participating flat tenants acquire the freehold to their building by bringing a collective claim under the 1993 Act via their nominee company it will be taxed on any premium paid in excess of the SDLT threshold. The rate at which SDLT is taxed varies according to the acquisition price of the property – there are tax rates of 1%, 3% and 4% – and perhaps one of the more iniquitous aspects of the SDLT legislation is that participating tenants in effect have to pay SDLT on the price which the nominee company pays.

When SDLT was first introduced in 2003 Parliament clearly intended that each participating tenant should end up paying tax at the rate their individual contribution attracted. This would possibly attract a lower rate of tax or in most cases no tax at all as the individual tenant's contribution would be below £125,000. To widespread disapproval the Revenue consider this relief is not available because of a technicality. Some practitioners have argued that the nominee company acts as bare trustee for the individual tenant for SDLT purposes and therefore the relevant tax event is the individual participating tenant's acquisition of a beneficial interest in the freehold and so the relief is de facto in place. This view is disputed by the Revenue.

The surrender of an existing lease for a new lease technically constitutes a CGT disposal and accordingly CGT may arise on any gain a tenant makes on their old lease. This is unlikely to cause concern where the property is the tenant's main residence – there is an exemption available. The position is more complex however where the property is not a main residence. The Revenue do operate an extra-statutory concession here but the phrasing of the concession casts doubt on its availability in some instances, especially where the new lease is by a nominee company for little or no consideration. It is worth considering whether the new extended lease is taken subject to the old lease rather than the old lease being surrendered. Once the new lease is registered at the Land Registry then the old lease can be merged into the superior title

> "WHAT APPEARS ON THE SURFACE TO BE STRAIGHTFORWARD IS IN FACT QUITE COMPLICATED"

QUIET COMPLICATED

As with most aspects of enfranchisement law what appears on the surface to be straightforward is in fact quite complicated and professional advice should be obtained at the earliest possible opportunity particularly in collective claims to ensure that you achieve the most tax efficient structure for your purchase.

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- How much will it cost?

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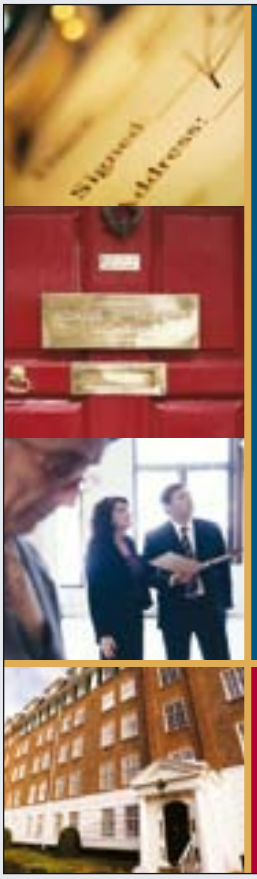

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HOW TO MAKE SURE YOUR FREEHOLD PROJECT TAKES OFF

Alex Greenslade writes that a flat owner does not need to know about lease length, freeholders, reversions and marriage values… until the day they receive a letter informing them of their right of first refusal or a neighbour says, "Hey, why don't we buy the block's freehold?"

Here I will give you a few useful tips to help choose the people to make the process of extending your lease, buying your share of freehold or exercising your right to manage.

While many solicitors will be technically qualified to help with leasehold enfranchisement, you may opt for a firm or individual experienced in the area. The Association of Leasehold Enfranchisement Practitioners (ALEP) vets members to establish their pedigree, so look for the ALEP logo or look up a member on the website at www.alep.org.uk.

You will need the services of a surveyor as part of the valuation exercise. Again, valuing a freehold or lease extension is a highly specialist area. Don't feel obliged to use a local surveyor.

Many projects fail, money is lost, costs escalate and frustrations rise among neighbours when flat owners try to coordinate a project themselves. Consider using an experienced enfranchisement manager. They can help keep down costs, keep the project on track and have done this many times before.

Check the professionals' pedigree. Ask to speak to satisfied customers, examine their accreditations and consider how many other blocks they have worked with and their customer service commitments.

MAKE CONTACT

Don't use the first adviser or professional you speak to. Make the effort to contact three and ensure they have the same values as you, that they understand your preferences and that you are satisfied with their prices and fee structures.

The temptation may be to learn all there is to know about leasehold enfranchisement first. Certainly you can find out a lot on the Leasehold Advisory Service website (www.lease-advice.org) or read several of the excellent books on the subject. It is at worthwhile to equip yourself with a basic understanding, at least to appreciate the critical deadlines that must not be missed, the most common cause of failure of enfranchisement projects.

But you may be better asking yourself whether you want your neighbours ringing you at all hours to ask about progress with the project and being blamed for every little holdup engineered by an obstructive freeholder! If the project is to succeed, make sure you retain the best advisers you can afford.

COMMENT FROM RICS:

The experience of RICS members is that enfranchising a block of flats can be a long and painful experience, sometimes caused by the complexity of the process and the advisers to the freeholder. It is important to get the right advice at the outset. Chartered surveyors who are experienced in this area of work can help lessees with many aspects of enfranchisement, not just the valuation. They can advise on the basic requirements, and on whether the block and the lessees will pass the tests laid down by the Act. They can also recommend the most cost-effective process; advise on the likely cost, the opening offer, and negotiate the price payable; and can negotiate an equitable apportionment of the costs and professional fees.

David Tuffin, President, RICS

COMMENT FROM THE LAW SOCIETY:

Buying a property of any kind is a big commitment, so it is essential you get it right. Using a solicitor when buying any freehold is a must. Solicitors are a safe bet when it comes to handling the conveyancing process from start to finish. From checking all the relevant documents, handling searches, through to completion, the solicitor will be able to advise, assist and explain any problems along the way and take on much of the work for you.

Solicitors are essential in enfranchisement. The collective nature of the interests and liabilities involved can make it a more complicated process with the potential for problems arising being high. Solicitors can ensure those problems are kept to a minimum and they can act as the point of contact for queries and concerns raised by those involved, rather than leaving that responsibility to one of the parties to handle.

Andrew Holroyd, Law Society President

THE ROLE OF THE BARRISTER

Phillip Rainey of Tanfield Chambers emphasises the importance of seeking professional advice, and outlines the role a barrister should play in the enfranchisement of a block.

The third member of the team of professionals at your disposal is the Barrister (Counsel). Counsel can "add value" in specialist advice and specialist advocacy skills.

Straightforward or lower value enfranchisement or lease extension claims may not require the services of Counsel, but property values in the Prime Central London area are so high that the sum in dispute may easily exceed £100,000 on a lease extension, and can run into £ millions on a large collective claim. In the more complex or higher value cases, parties may wish to instruct Counsel to advise on difficult issues that arise during the progress of the claim. The law of enfranchisement is not straightforward, and taking Counsel's advice early may save a great deal of pain and expense at later stages in the process. "Early" may be long before a notice of claim is served – for instance it may not be clear whether a particular property qualifies for collective enfranchisement or as to which leasehold interests may be acquired. In complex cases, it often makes sense to have Counsel advise as to the content of an initial notice, perhaps after a site visit.

Counsel are frequently instructed to appear before the Leasehold Valuation Tribunal (LVT). Counsel are specialist advocates and those who deal with enfranchisement work also have a deep understanding of the valuation process and how the Acts should be applied. Cross-examining expert surveyor witnesses can be difficult and employing Counsel can make a real difference to the result. The Tribunal itself will usually appreciate the assistance it will obtain from having Counsel argue the case. The LVT may adopt an informal procedure but the members appreciate that (in PCL cases particularly) they are making decisions about large amounts of real money, and they expect the parties to present their case in a manner that reflects the amount at stake.

> "PROPERTY VALUES IN THE PRIME CENTRAL LONDON AREA ARE SO HIGH THAT THE SUM IN DISPUTE MAY EASILY EXCEED £100,000 ON A LEASE EXTENSION, AND CAN RUN INTO £ MILLIONS ON A LARGE COLLECTIVE CLAIM"

In some cases, the enfranchisement process does not proceed smoothly, for example where a dispute arises as to validity of a notice, or as to whether a building qualifies for collective enfranchisement, and the claim may in those circumstances go before a court. In other cases, the result of the LVT determination may be disappointing and an appeal is brought to the Lands Tribunal, and in rare cases (e.g. Sportelli) from there to the Court of Appeal and House of Lords. In these circumstances, retaining Counsel is not a luxury.

FLEXIBILITY

There is a degree of flexibility as to how Counsel may be instructed. The traditional basis where a Barrister is instructed by a Solicitor remains the norm, but subject to limitations Counsel may be instructed direct by the public (Direct Public Access), or by a Surveyor or other professional (Licensed Access). If what is required is a piece of advice on one or two issues, then Direct Access may be efficient. Instructing Counsel is not however a substitute for a Solicitor; for example, a Barrister cannot handle client money, deal with correspondence or do the conveyancing.

In the field of enfranchisement, Counsel probably works best as the third member of the professional team, providing specialist advice and advocacy as and when required.

THE ROLE OF THE LEASEHOLD VALUATION TRIBUNAL IN ENFRANCHISEMENT CASES

Justin Bates explains the important role the LVT can play in both enfranchisement and lease extensions.

The respective jurisdictions of county court and the Leasehold Valuation Tribunal ("LVT") are apt to give rise to much confusion. *The Leasehold Reform, Housing and Urban Development Act 1993* provides that any reference in the Act to "the court" is to the county court and that any matter not within the jurisdiction of the LVT is to be dealt with in the county court. Thus, one cannot understand the role of the LVT without also understanding the role of the county court.

In general terms, the county court has jurisdiction over all procedural issues and matters concerning the validity of clams under the (both to collective enfranchisement and to individual lease extension). The most common form of county court dispute is about the validity of the initial notice although, confusingly, disputes about whether or not a particular piece of land can be acquired as part of an enfranchisement claim is a matter for the LVT.

COMMON DISPUTES

In equally general terms, the LVT is empowered to determine any of the following matters, (unless they are agreed by the parties). The most common disputes are:

(a) the terms of the acquisition, both of a new lease and of collective enfranchisement. This includes the price to be paid;
(b) the terms of any lease back to the freeholder;
(c) the liability, apportionment and quantum of costs incurred as part of the process.

> "THE MOST COMMON FORM OF COUNTY COURT DISPUTE IS ABOUT THE VALIDITY OF THE INITIAL NOTICE ALTHOUGH, CONFUSINGLY, DISPUTES ABOUT WHETHER OR NOT A PARTICULAR PIECE OF LAND CAN BE ACQUIRED AS PART OF AN ENFRANCHISEMENT CLAIM IS A MATTER FOR THE LVT"

LESS COMMON

Less common disputes, but ones still within the jurisdiction of the LVT are:

(a) the amount payable as a result as a result of non-disclosure of any agreements between the participating and non-participating tenants;
(b) compensation for delayed claims;
(c) the form of conveyance of any vesting order made by the court;
(d) the compensation to be paid to the tenant where the landlord obtains possession on the basis of redevelopment.

The Leasehold Reform Housing and Urban Development Act 1993 is not happily drafted and people do make mistakes about the correct forum. If court proceedings are issued and it appears that an issue has arisen which should be dealt with by the LVT, then the court may transfer that question to the LVT to decide.

Justin Bates is a barrister at Arden Chambers and the author of "Leasehold Disputes, a guide to the LVT" (2nd Edition, LAG, 2008) and "The LVT Bulletin". www.ardenchambers.com

CONTROLLING COSTS – WHAT YOU NEED TO KNOW

Mike Boles, director at Savills Private Finance, talks through the importance of budget planning, and outlines the long-term financial benefits associated with collective enfranchisement.

The advantage of collective enfranchisement is that for a relatively small outlay you can significantly increase the value of your property. But getting the funding just right is crucial in all collective enfranchisement cases.

Unless you have the necessary cash available, flat owners will need to raise money to finance the purchase of the lease extension or share of freehold. Traditionally, the easiest way of doing this was to contact your existing mortgage lender and either take a further advance or re-mortgage your existing loan, increasing it to raise the extra cash.

However, the liquidity squeeze means lenders are favouring lower loan-to-value (LTV) business over high LTVs of 90 per cent or more, which they regard as higher risk. If the cost of extending the lease takes your total LTV to unacceptable levels as far as the lender is concerned, you could consider simultaneously extending the lease when you draw the re-mortgage so that it is based on the value of the property with the lease extended and not the value of the property pre-lease extension.

In an ideal world, every flat owner would participate in the enfranchisement of the block but quite often there are lessees who won't want to take part. The price payable for the freehold is the sum of the premiums for all the flats, even those who choose not to participate. This means participants have to cover the cost of non-participants, which can be prohibitively expensive and threaten the enfranchisement taking place at all.

In happier times, various specialist funds were available providing non-participant finance at no cost to participants or non-participants. These options have now narrowed but there is still the opportunity for participants to raise finance to purchase the additional share against their own properties.

You can contact Mike on 0207 409 9900

HOW DO WE CONTROL THE COSTS? BY JAMIE REID

The first thing to understand is which costs you are certainly going to be liable for as a group. These are the foreseeable costs you'll need to budget for:

- **Set up of the nominee purchaser company** – you will have to pay a company formation fee and have to pay for the services of an accountant to submit annual accounts.
- **Stamp Duty Land Tax** – your surveyor, solicitor or company accountant will be able to offer advice on whether or not (and how much) tax is likely to be payable, on a case-by-case basis. This is a good example of how money spent on good expert advice early will give all participants a better idea of the expected costs and benefits.
- **Freeholders costs** – you must be aware that you are responsible to bear the freeholders (reasonable) costs (solicitors and surveyors fees, mostly) even if you do not complete the freehold purchase. The legislation also identifies the costs of an intermediate landlord as qualifying. Admissible costs include statutory procedure, dealing with the notice(s) and surveyors handling fees.
- **Solicitors fees** – Solicitors fees may seem high in isolation, but in larger blocks the economies of scale enjoyed can heavily diminish the cost attributed to each flat. Many reputable solicitors will charge on a fixed-fee structure up until the point of representations at the LVT, at which point an hourly fee to represent the case at court is applied. Be sure to understand the fee structure from the outset and although most enfranchisement claims are settled without the need for the case being heard by the tribunal, this eventuality should be planned for from the outset.
- **Surveyors fees** – You will of course have selected a surveyor who has good local knowledge and who has had identifiable success on similar enfranchisement claims in the recent past. They may also have worked for a freeholder, and so be able to apply this expertise and experience for a group of lessees. But how much should you pay? Surveyors will have a range of fees for the varied work they carry out, from an initial consultation fee through to fees to present their findings at a tribunal, as expert witness. The benefits of being represented by an experienced enfranchisement surveyor are generally demonstrated on by how much of a saving can be made from the freeholders' surveyor's valuation. In Central London this valuation and negotiation expertise can save a great deal. The lowest fees, therefore, aren't necessarily the best option. There may be costs incurred in tracing a freeholder, bringing new witnesses to tribunal (building surveyors, by way of example) closing down the nominee purchaser company and setting up a new controlling company.

With all of this you might be thinking "is it really worth it?" Yes, in most cases the benefits do outweigh the costs. Last, who, in your building is best qualified to keep control of the costs?

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BEYOND ENFRANCHISEMENT

Mary Anne Bowring of Ringley outlines some of the issues newly enfranchised blocks are likely to face in the future.

Post enfranchisement the four main issues to deal with are likely to be:

- Extending leases to 999 years;
- Realising asset value by (a) selling parts of the title (lofts, porters flats, etc) and (b) selling shares in the Freehold Company to flats who did not participate initially;
- Distribution of any proceeds raised;
- Reviewing contracts with managing agents, cleaners, gardeners, porters and other services.

Ringley's consumer interface www.leaseholdguidance.com's team comprises valuers and lawyers. A complete service to include enfranchisement, conveyance, lease extensions is available, but you only commit on a fixed-fee basis to each stage you want, when you want it.

The ever increasing legislation bearing on the property management industry from compulsory fire risk assessments and asbestos audits to prescribed wording on service charge demands means self managing is a rather daunting task. So you are a new director, unless you happen to be lucky enough to have a job in public sector procurement, knowing how to select best value and choose a reputable agent may be a minefield in itself but help is at hand, visit www.leaseholdersupport.co.uk and download the "Tender pack for changing managing agents" which you can then use on any agent you wish.

You could also visit the Association of Managing Agents (ARMA – the trade body for the industry) that has a list of members and other useful information at www.arma.org.uk.

Cross reference these against the Royal Institution of Chartered Surveyors members (RICS) at rics.org.uk. A good agent then should completely manage the handover process.

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ENFRANCHISEMENT MOVING FORWARD

The CEO of the Leasehold Advisory Service, **Anthony Essien**, looks at some of the cases that shaped today's enfranchisement landscape, and asks 'what of life after enfranchisement?' *See page 29 for further analysis of the flats that made the law*

The Leasehold Reform Act 1967 was the product of the 26th Bill since 1887 dealing with enfranchisement of leasehold houses. Apart from being an interesting piece of legal and parliamentary history what does that tell us? Well, when one also considers that almost 40 years to the day since it commenced, the House of Lords recently, determined what is a 'house' for the purposes of that legislation, one sees that enfranchisement sits comfortably on the right hand side of father time as he slowly and deliberately irons out its wrinkles.

That case, Boss Holdings v Grosvenor West End Properties had, of course, more to it than I suggest, but it does show that enfranchisement, for all the efforts of amendment to clarify and simplify remains complex and apt to reveal as many new issues as it resolves, as time goes on.

> "READERS OF *NEWS ON THE BLOCK* WILL ALREADY HAVE READ THE EXTENSIVE COVERAGE OF THIS LANDMARK CASE. IN SHORT IT ESTABLISHES FOR ALL ENFRANCHISEMENT VALUATIONS A NATIONAL DEFERMENT RATE AND A RATE FOR PRIME CENTRAL LONDON (PCL)"

Three other recent cases, this time under the 1967 Act's offspring, the Leasehold Reform Housing and Urban Development Act 1993, also present issues to ponder for the future.

LANDMARK CASE

First, Sportelli. Readers of *News on the Block* will already have read the extensive coverage of this landmark case. In short it establishes for all enfranchisement valuations a national deferment rate and a rate for Prime Central London (PCL). It makes clear that the PCL is a specialised market, something that few would argue. But, does this open the door to other specialised areas? Even an amateur valuer understands that the three most prominent considerations to valuation are location, location and location. So, will cases come forward where there are arguments that other specialised markets in England and Wales deserve treatment akin to the PCL?

COMMON PARTS

The second case, one where there was little case law on the substantive issue, concerned qualification for collective enfranchisement, specifically the 25 per cent rule. This is detailed in section 4 of the 1993 Act, and basically it requires that a building can have no more than 25 per cent of its internal floor space in non-residential use in order to qualify for collective enfranchisement. That calculation excludes common parts. In Marine Court (St Leonards on Sea) Freeholders Ltd v Rother District Investments, a case decided in the County Court, the landlord sought to challenge collective enfranchisement on the basis that the communal areas used exclusively by the commercial occupiers were non-residential and not "common parts". It followed that, as part of the non-residential area, it made the aggregate of these areas more than 25 per cent of the total internal floorspace of the premises. The judge thought otherwise feeling that the language of the 1993 Act did not support the view that for an area to form a common part it had to be used by all the occupants.

What is eye-catching about Marine Court is that it is a mixed-use property. PPG3 – the government guidance to planning authorities on the treatment of housing within the planning process – gives a clear steer towards, among other things, mixed-use developments. Thus, as hard-pressed planners approve the

increased use of mixed-use premises the 25 per cent rule may be the subject of increased debate.

LIFE AFTER

But what of life after enfranchisement? Commentators, naturally, have tended to focus on the motivation for it and the ups and downs of the process. Those who enfranchise no doubt hope all their fellow flat owners will share their vision, but that is not always the case. In Carver v Burnham Court Ltd, the third case for discussion, and a recent decision of the London LVT, that is precisely what occurred. The basic facts were that in the midst of Carver's application for a new lease under the 1993 Act, Burnham Court Ltd (BCL) – the nominee purchaser – served an Initial Notice to acquire the freehold of the building. The result was the suspension of Carver's notice pending the freehold acquisition. In due course this was resolved and BCL, as the new landlord, served Carver, a counter notice. That made plain that BCL sought to grant a lease on the same terms as those granted to the tenants who participated in the freehold purchase. It included provisions for a reserved fund, the spending of which would be voted for a by majority of tenants, and a contribution by the tenants to directors' and officers liability insurance taken out by BCL. BCL wanted to achieve uniform and contemporary leases for all tenants in the block; and felt director's insurance was necessary to prevent discouraging the able from volunteering to manage the block. Carver did not agree and the matter proceeded to the London LVT, where it too, for the most part, did not agree.

BCL's aim was "to inaugurate a new era in the block's history." A fine ambition, but one that on the facts of the case was not compatible with the 1993 Act. The effect of the decision is limited to just these parties – as LVTs do not make precedent – but another enfranchised group could make a similar application. One wonders if this too may become more common – blocks of flats that enfranchised some years ago and without full lessee participation, seeking to redress historic problems with their leases by grasping the opportunity when it presents itself in lease extension applications. No doubt time will tell.

> "WHAT OF LIFE AFTER ENFRANCHISEMENT? COMMENTATORS, NATURALLY, HAVE TENDED TO FOCUS ON THE MOTIVATION FOR IT AND THE UPS AND DOWNS OF THE PROCESS. THOSE WHO ENFRANCHISE NO DOUBT HOPE ALL THEIR FELLOW FLAT OWNERS WILL SHARE THEIR VISION, BUT THAT IS NOT ALWAYS THE CASE"

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ENFRANCHISEMENT JARGON BUSTER

The law of leasehold enfranchisement has come to assume major importance as an area of law which affects many residential properties. Some knowledge of leasehold law is essential for those who deal and live in residential property let on long leases. **Yashmin Mistry** of Brethertons explains some key terms used in leasehold legislation in plain-English.

LEASEHOLD PROPERTY Ownership of leasehold property means that the leaseholder has a right to use and enjoy that property for a defined period of time i.e. 99 years, 125 years or 999 years.

LEASE A Lease is a legal term used to describe a particular type of contract. A Lease is therefore a written agreement between two or more parties setting out the terms/agreement that has been reached between those parties.

LONG LEASE In general a lease granted for a term certain of more than 21 years. There are other definitions, these are likely to be of significance under the right-to-buy legislation.

LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993 The Act received Royal Assent on 20th July 1993. It is the radical piece of legislation that introduced the right for leaseholders to extend their leases and the right for leaseholders to purchase the freeholds of their buildings ('collective enfranchisement').

COMMONHOLD AND LEASEHOLD REFORMACT 2002 The Leasehold Reform, Housing and Urban Development Act 1993 has been subject to amendment since its introduction. The most significant changes were contained in the Housing Act 1996 and the Commonhold and Leasehold Reform Act 2002.

COLLECTIVE ENFRANCHISEMENT The right of a group of leaseholders of 50% or more of a particular block of flats to buy the freehold of the building from their landlord. The right is a group right, as opposed to say, an individual's right to have a lease extended.

RELEVANT PREMISES The Building, the freehold of which is to be acquired.

QUALIFYING TENANT A leaseholder who fulfils the qualifying criteria i.e. a leaseholder of a flat under a long lease and does not own three of more flats in the building.

PARTICIPATING TENANT A Qualifying Tenant who participates in the collective enfranchisement process.

R.T.E A right to Enfranchise Company. The Commonhold and Leasehold Reform Act 2002 states that a claim for a right to collective enfranchisement can only be made through a RTE. These provisions relating to RTEs have been highly criticised and have yet to come into force.

NOMINEE PURCHASER Person(s) or entity named in the initial notice who will acquire the freehold and become the new landlord of the building (this will be the RTE when and if those provisions come into force).

INITIAL NOTICE Notice informing the Landlord of the leaseholder's claim for the purchase of the freehold. This notice must contain certain prescribed information as set out by legislation. Service of the initial notice formally commences the enfranchisement process.

RELEVANT DATE This is the date the Initial Notice is served. It is also the valuation date i.e. the date at which the valuation is made for the purpose of calculating the price to be paid for the freehold.

MARRIAGE VALUE Is the extra value brought about by the freehold and leasehold interests being under the same control, merged or "married" i.e. the ability of participating tenants to grant themselves long leases at no premium. These interests are often worth more together than apart.

HOPE VALUE It is presumed the only person who will ever want to bring the freehold and leasehold interests together is the leaseholder. The leaseholder is therefore usually willing to offer a higher price than others may do and hope value is that "overbid" i.e. the additional payment that the leaseholder would make in order to ensure that they, and no-one else, would get the freehold.

COUNTER NOTICE The landlord's response to the initial notice served by the participating leaseholders.

LEASEBACK The right of the freeholder to a leaseback of certain parts of the premises on completion of the purchase of the freehold by the participating tenants. In some cases the leaseback is mandatory; in other the leaseback is optional.

SPORTELLI CASE Earl Cadogan and Cadogan Estates Ltd v Sportelli and others - the case that rocked the Leasehold Valuation Markets! The case went from the Leasehold Valuation Tribunal all the way up to the Court of Appeal. The Court of Appeal's Judgment was handed down on 25th October 2007 and the Appeal Judges decided that:

- Hope Value should not be included in the price payable for collective enfranchisement or lease extensions;
- The Lands Tribunal were entitled to reject market evidence; and
- It was totally appropriate for the Lands Tribunal to offer guidance and for the Leasehold Valuation Tribunals generally to follow such guidance as there is a public interest in avoiding wasted expenditure and the risk of inconsistent results in successive appeals from its decision.

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- Residential possession proceedings
- Party wall disputes
- Breaches of covenant

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A sharper edge

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