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Enfranchisement 2012 Feature

Your essential guide to buying your freehold or extending your lease

SUPPORTED BY ALEP

www.alep.org.uk

Your essential guide to buying your freehold or extending your lease. Independent industry practitioners offer some advice in our comprehensive pull out and keep supplement about the enfranchisement process.

IN ASSOCIATION WITH ALEP

Introduction to the Enfranchisement 2012 Feature

ALEP members offer a badge of assurance to flat owners and freeholders employing leasehold professionals

LEASEHOLD ENFRANCHISEMENT PUT SIMPLY

Recent laws relating to leasehold property - including the 1967 Leasehold Reform Act, the 1987 Landlord and Tenant Act, the 1993 Leasehold Reform, Housing and Urban Development Act and most recently the 2002 Commonhold and Leasehold Reform Act - have made it easier for flat owners to purchase their freeholds collectively, individually extend their leases or replace their managing agents in the case of unsatisfactory management of their properties.

ALEP members are specialists in helping particularly owners of flats to make changes to the tenure of their flats. Some also act for freeholders in these transactions. This broadly falls into three categories:

- Lease extension
- Freehold acquisition
- Right To Manage

WATCH OUT FOR YOUR LEASE LENGTH!

If your lease still has over 80 years remaining, don't delay. Once it falls below 80 years, participation in a lease extension or freehold acquisition transaction will cost significantly more.

Contact an ALEP member

> “If your lease still has over 80 years remaining, don’t delay. Once it falls below 80 years, participation in a lease extension or freehold acquisition transaction will cost significantly more”

now to help you assess your particular situation and opt for the right transaction for you. Visit www.alep.org.uk to locate a practitioner close to you.

WHAT IS ALEP?

ALEP, the not-for-profit Association of Leasehold Enfranchisement Practitioners, celebrates its fifth anniversary in May 2012. The Association was the brainchild of Alex Greenslade and his sister Anna Bailey, directors of Leasehold Solutions, an enfranchisement project management company soon to celebrate its tenth anniversary. Already well experienced in the sector, Greenslade and Bailey were becoming increasingly frustrated with the ‘dabblers’ operating in this highly specialist sector. They approached Peter Haler MBE - then Chief Executive of LEASE (the Leasehold Advisory Service) - with a view to establishing an association for intermediary companies like Leasehold Solutions, and he encouraged them to widen the remit to include all practitioners working in the field such as solicitors, valuers and managing agents.

Now approaching this landmark fifth anniversary, ALEP has 140 members, ranging from sole practitioners to household names, and on 31 January opens its membership doors to barristers. The Association is run by four directors and an Advisory Committee headed by Honorary President Damian Greenish of Pemberton Greenish LLP, who has been involved in many of the landmark cases in the field of leasehold reform in recent years.

ALEP has made a significant step towards self-regulation of this industry, promoting best practice among members through an evolving code of practice. Membership of ALEP acts as a badge of assurance so that flat owners and freeholders can be confident that they are employing professionals with sufficient knowledge and the right level of experience in handling potentially complex transactions.

HOW TO JOIN ALEP

Firms and individuals wishing to become ALEP members need to submit details of their experience in lease extension and freehold acquisition transactions together with copies of their professional indemnity insurance (PII) and references from both a client and a practitioner, which are followed up with telephone interviews. Experience levels are reviewed again on renewal of membership to ensure that the experience still exists within that member.

Once a member, firms are able to use the ALEP logo on their marketing material and receive enquiries from the website. Members also receive substantial discounts on all ALEP events, including the two conferences held per year (usually March and October) and regular networking events. Such events facilitate the exchange of ideas and increase standards throughout the sector. Visit www.alep.org.uk to download an application form.

For further information about ALEP, telephone 0845 225 2277 or visit www.alep.org.uk
Find ALEP on Twitter at: twitter.com/alepofficial

BUY FREEHOLD/ EXTEND LEASE

This year, turn over for a new lease

Alex Greenslade explains why now is the time to check the length of your lease

The value of thousands of flat owners' properties will reduce if they do nothing and hope for the best. Many leases are dated at the end of the quarter, particularly June and December. If your lease is below 85 years, every year the lease reduces, the cost of a lease extension or freehold purchase rises. Under 80 years, the cost rise accelerates. This can be thousands of pounds a year, eroding the underlying value of the flat over time.

It is simple to preserve the value of your investment, if you act in time. Finalising the cost of a lease extension or freehold is best negotiated by valuers and solicitors who specialise in this area. The negotiation depends on a number of factors; the value of the property, the ground rent due for the remainder of the lease and the lease length. For example, a lease extension of 90 years added to the remaining lease length of a flat worth £200,000 with a £100 annual ground rent could cost approximately £5,000 at 85 years, but £18,000 at 65 years.

> "It is simple to preserve the value of your investment, if you act in time"

As the process can take many months a sale can be delayed since the buyer, their solicitor or mortgage lender may insist on a lease extension being in place before completion funds are transferred. If not resolved quickly, the buyer might walk away. Many freeholders rely on flat owners not realising that their lease lengths have slipped to a dangerous level and hope to benefit from the bargaining position this gives them. Be proactive and act now.

Alex Greenslade is Honorary Secretary of ALEP (the Association of Leasehold Enfranchisement Practitioners)

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BUY FREEHOLD/ EXTEND LEASE

Does your building qualify?

Yashmin Mistry considers whether preliminary investigations are worthwhile in enfranchisement cases.

ONCE LEASEHOLDERS have the desire to pursue the collective enfranchisement process, on occasion, valuable time spent on background investigations into title set up, qualifying criteria etc is often overlooked. The importance of carrying out a thorough preliminary investigation and assessment of the feasibility of a potential collective enfranchisement before service of the initial notice of claim can never be overstated.

An area where time and effort should be spent on pre-investigations is establishing whether or not "premises" qualify.

Section 3 of the Leasehold Reform, Housing and Urban Development 1993 Act defines "qualifying premises". In general, the statutory qualification criteria are:

- A self contained building or part of a building;
- Not more than 25% of the building is non-residential;
- Where there is a resident landlord in a converted purpose built-block building of 4 or fewer flats; and
- Where the premises include the track of an operational railway.

LOOKING AT EACH IN TURN:

A building is a "self-contained building" if it is structurally detached – it is unlikely that there will be difficulty in identifying such buildings. For "part of a building" there needs to be a:

- Vertical division of the structure;
- Which could be redeveloped independently, or could be independent;
- Without interruption to the services for the occupiers of the remainder of the building.

The requirement for a "vertical division" is unqualified and there is no discretion as to whether a building qualifies, nor is it appropriate to consider whether the area which falls outside the vertical line is material. Leaseholders need to draw a hypothetical line vertically through the building.

> "The importance of preliminary investigations and feasibility assessments can never be a waste of resources"

If the division leaves part of the building outside the line, the building does not qualify.

The second and third points are a question of fact and/ or matters requiring expert evidence.

There may also be issues with overhanging buildings or where there is an estate comprising more than one building. Consideration may need to be given to several enfranchisement claims for each building.

Care should be given to what constitutes "non-residential property". The right does not apply if there are non-residential parts (excluding common parts) where the internal floor area exceeds 25% of the whole premises.

Attention should be given to the fact excluded areas are not necessarily commercial per se and the statutory definition relates to premises not occupied or intended to be occupied for residential purposes.

Failure to thoroughly investigate the feasibility of pursing a collective enfranchisement claim prior to service of a notice of claim will expose leaseholders to:

- the risk of incurring unnecessary costs (not only theirs but those of the Landlord(s)); and
- being left in a position whereby a further corrected notice cannot be served for a further 12 months, thereby probably increasingly the likely costs for the entire process.

The importance of preliminary investigations and feasibility assessments can never be a waste of resources.

Yashmin Mistry is a Partner and Solicitor at JPC Law

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ALEP

BUY FREEHOLD/ EXTEND LEASE

SHOULD I BE OFFERED THE RIGHT TO BUY THE FREEHOLD OF MY BUILDING?

Simon Tye explains the statutory Right of First

THE LANDLORD & TENANT ACT 1987 (as amended) can give the leaseholders, and some tenants, of a building the Right of First Refusal (RFR) when the Landlord is selling the freehold. It should be emphasised that the right is not an individual right to buy the freehold of your flat, but a collective right in respect of the whole building.

The right of first refusal only applies if the building qualifies. For the building to qualify:

- It must contain at least two flats
- No more than 50% of the building should be in non-residential use (based on floor area excluding common parts)
- More than 50% of the flats in the building must be held by "qualifying tenants" (basically long leaseholders fixed or periodic tenancies, other than assured shorthold tenancies) Someone who is a leaseholder of three or more flats in the building will not be a qualifying tenant.

If the building qualifies, the obligation on the Landlord to give the leaseholders RFR only applies when there is a "relevant disposal".

Most disposals will trigger RFR, the most common being a straight-forward sale of the freehold. There are a number of exceptions which will not trigger RFR such as the following :

- Grant of single tenancies. The disposal must apply to the whole building so the Landlord is free to grant tenancies /leases of individual flats.
- Disposal to an associated company. This is where the Landlord disposes of his interest to another company which has been associated with the parent company for at least two years.
- Disposals arising from leaseholders exercising their right to buy the freehold under the Leasehold Reform, Housing and Urban Development Act 1993.

> "the right is not an individual right to buy the freehold of your flat, but a collective right in respect of the whole building"

The offer of RFR is given to each individual qualifying tenant by the Landlord by means of section 5 notice. To accept the offer more than 50% of the qualifying tenants must accept the offer, jointly, within 2 months of the notice. Note that the percentage of qualifying tenants is different to that required under the 1993 Act, which only requires 50% to make a claim. Further time limits apply for the procedure that follows acceptance, including the nomination of a purchaser by the qualifying leaseholders.

If the landlord fails to give RFR, when he should have, the leaseholders` must consider remedial measures.

This is a particularly complex area of law and the above is only a summary. For further details please see the "Lease" website or call and speak to an adviser.

Simon Tye is a legal adviser with the Leasehold Advisory Service

Enfranchisement »

THE AVERAGE BRITISH PROPERTY VALUE FALLS TO £221,128, DOWN 3% YEAR-ON-YEAR. Source: Zoopla.co.uk

BUY FREEHOLD/ EXTEND LEASE

Don't let the freehold get sold over your head

Caroline Anstis considers the available remedies when the Right of First Refusal has not been followed.

ALTHOUGH TENANTS ARE BECOMING INCREASINGLY AWARE of their rights to collectively buy their freehold, it seems to be a well kept secret amongst the tenant world that there is an alternative procedure for doing so, when a landlord decides to sell. Failure by a landlord to provide tenants with the right to first refusal and follow the procedures in the Landlord and Tenant Act 1987 ("the 1987 Act") could be detrimental and in some cases, result in a lucky group of tenants picking up a bargain.

The detail of the Right of First Refusal procedure has been explained by the Leasehold Advisory Service on page 26. The following examines how a disposal may be discovered as well as considering the remedies.

HOW MIGHT A TENANT BE ALERTED TO A RELEVANT DISPOSAL?

Following a disposal of any kind, notice must be given to every tenant to inform them of the disposal, and of the new landlord's name and address There are time limits within which this must be done. Receipt of such notice would evidence a disposal. Alternatively, a rent or service charge demand that suddenly has different payment details or new name and address details for the landlord would be indicative and should be viewed with caution, particularly if the right to first refusal has not been given.

WHAT HAPPENS IF THE RIGHT OF FIRST REFUSAL IS NOT GIVEN?

Where an 'illegal' disposal is discovered, the qualifying tenants can take action against the landlord, or the purchaser – it is their choice. Any action must be taken within six months of discovery. Firstly an information notice can be served to ascertain the position and obtain details of the disposal. If the 'fishing expedition' shows that the statutory requirements were not followed, the tenants (provided that there is a majority acting) may acquire the benefit of the contract. The terms of this are of course non-negotiable but it is not uncommon for tenants in such situations to benefit from transfers made at 'mates-rates'!

Although the process seems to be nicely mapped out, the 1987 Act was rushed through Parliament and unfortunately, many of the provisions were not properly considered. Many commentators have said that the 1987 Act raises more questions than it provides answers! As it is a criminal offence to make a relevant disposal without following the statutory requirements, and a failure to deal properly with evidence of an 'illegal' disposal or indeed, an offer received, could result in the freehold being sold without recourse by the tenants, it is imperative that both landlords and tenants seek specialist advice from a professional advising regularly in this technical area of law.

> "it is imperative that both landlords and tenants seek specialist advice from a professional advising regularly in this technical area of law"

Caroline Anstis is an Associate Solicitor with Piper Smith Watton LLP

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For further information and to talk through the avenues open to you, please contact:

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BUY FREEHOLD/ EXTEND LEASE - CASE STUDY

THE "PING-PONG" FREEHOLD

John Byers describes an unusual enfranchisement situation

THIS INTERESTING CASE INVOLVES A BLOCK OF ELEVEN PURPOSE-BUILT FLATS. Unhappy with their Landlord, a group of 5 Tenants investigated the possibility of enfranchising the block and acquiring the freehold. After hard work on the part of the Tenants, a majority was found having persuaded one initially reluctant lessee to participate, creating a majority.

The original enfranchisement proceeded and the freehold interest in the property passed to the new formed company with six participating Tenants and five non-participants.

Sometime later, new issues arose between the participants and non-participants and the previously group of non-participating Tenants persuaded the 'floating voter' to join them and this new group have now commenced the process to 're-enfranchise' the freehold from the new formed Landlord company. Even at this early stage this raises a number of interesting issues

PARTICIPATION

At present the law includes no obligation on the part of any group of Tenants seeking to enfranchise to invite every Tenant to join in. There are obviously advantages in doing so -the sharing of the costs not being the least of them.

Nevertheless if one particular group of Tenants wished to proceed without others for whatever reason they would be free to do so. Also, the law does not prevent the "re-enfranchisement" of a building previously enfranchised. Conceivably, this can continue to occur creating a 'ping-pong' effect as ownership of the freehold travels back and forth between competing groups of lessees.

SAFETY IN NUMBERS

Where the numbers of participants and non-participants are finely balanced it seems that it might be wise to try and encourage participation beyond the bare minimum numbers.

> "Tenants wishing to enfranchise might be well advised to consider whether in some circumstances only part of the property be enfranchised rather than the property in its entirety"

SETTLING OLD SCORES

It is a popular myth that enfranchising a block of flats deals with Landlord and Tenant disputes once-and-for-all. There is as much scope for the continuance of disputes between Tenants after an enfranchisement as there was before. If anything the disputes can sometimes become more difficult as there is no longer an external faceless Landlord to deal with. The issues can become much more personal and difficult to resolve when they arise between neighbours.

SELF-CONTAINMENT

From experience, issues often arise between different parts of a building or between flats enjoying different levels of service (perhaps those not sharing the common parts, lifts or some other service for example). The decision in the Craftrule Limited v 41-60 Albert Palace Mansions (Freehold) Limited in 2010 illustrates that there is an ability to think imaginatively about which parts of a building to enfranchise if they are capable of self-containment.

Tenants wishing to enfranchise might be well advised to consider whether in some circumstances only part of the property be enfranchised rather than the property in its entirety.

John Byers is a Chartered Building Surveyor and Director of LBB Chartered Surveyors.

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RICS

ALEP ASSOCIATION OF LEASEHOLD ENFRANCHISEMENT PRACTITIONERS

FOUR IN FIVE HOMES WORTH OVER £1 MILLION IN BRITAIN ARE LOCATED IN LONDON AND THE SOUTH EAST. Source: Zoopla.co.uk

BUY FREEHOLD/ EXTEND LEASE

Covenants in Enfranchisement Transfers

Roger Hardwick puts leasehold house owners in the spotlight

ONE SIGNIFICANT AREA OF CONTENTION IN ENFRANCHISEMENT is the question of which covenants may be included in the Transfer of a freehold, where a leaseholder exercises his right to acquire the freehold of his house under the Leasehold Reform Act 1967.

Leasehold covenants include an obligation to pay ground rent; various restrictions on the use and enjoyment of their property and possibly the recovery of a service charge. Often, leasehold house owners see enfranchisement as a means of escaping these obligations. The reality is more complicated.

The starting point is that the 1967 Act entitles the leaseholder to acquire the freehold "free from incumbrances". A covenant amounts to an incumbrance, from which the leaseholder should take free. There are certain exceptions.

The landlord may require the continuation of existing or grant of new restrictive covenants. However, those restrictions must be proven to materially enhance the value of other property belonging to the landlord. Additionally, new restrictive covenants must not affect the reasonable use and enjoyment of the leaseholder's property. All such covenants must be reasonable.

The "material enhancement" requirement was considered in Sloane Stanley Estate Trustees v Carey-Morgan. It was decided that "material enhancement" is a matter of general impression; it does not have to be quantified in exact monetary terms; but evidence must establish the restriction will materially enhance the freeholder's property (mere assertions by Counsel are insufficient).Note the "other property" must be sufficiently close to the leaseholder's property to be affected by the covenant (Ackerman v Mooney).

Nothing in the 1967 Act provides the landlord with the right to require the inclusion of positive covenants (a covenant requiring the burdened party to expend money or embark on some other positive act). This is illustrated by two recent LVT cases: Ackerman v Mooney, as above and The Portman Estate Nominees (One) Ltd v Great Peter Nominees Ltd; where the imposition of a covenant to erect and maintain boundary structures and a proposed covenant "not to permit the property to fall into disrepair" were respectively disallowed.

> "we are left to ponder whether the 1967 Act is really capable of addressing the ever evolving needs of a modern leasehold estate"

This creates certain difficulties for the landlord where the house is part of a managed estate and the lease contains service charge provisions. Except where there is an estate management scheme in place, the leaseholder cannot be required to enter into a direct covenant to pay a proportionate part of the expense of maintaining common parts and providing common services and facilities.

Where the leaseholder does agree to enter into such covenants, statutory rights regulating the level of service charges (which do not protect freehold house owners) should be replicated in the Transfer.

Some further judicial consideration would be welcome. In the meantime, we are left to ponder whether the 1967 Act is really capable of addressing the ever evolving needs of a modern leasehold estate.

Roger Hardwick is Head of Enfranchisement at Brethertons LLP

TANFIELD CHAMBERS

THE PROPERTY GROUP

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BUY FREEHOLD/ EXTEND LEASE

ENFRANCHISEMENT CASE LAW

Natasha Rees looks at recent developments from the Courts

THE ON-GOING PROBLEM OF WHAT CONSTITUTES A HOUSE under the 1967 Act is keeping the courts busy. Practitioners await the Supreme Court's decision in Hosebay v Day; Lexgorge v Howard de Walden this year when it is hoped the Supreme Court will give a definitive ruling.

Although a number of house claims are on hold pending the Hosebay outcome, one recently slipped through. In that case, HHJ Hazel Marshal QC decided a purpose built mansion block containing eight self contained flats and three lock up shops could not reasonably be called a house because a building could not be a block of flats and a house at the same time. The tenants are appealing.

In an appeal, Calladine-Smith v Saveorder Ltd 2011, the Court considered the service of notices under the 1993 Act, which itself is governed by the Interpretation Act 1978. The tenant served notice requesting an extended lease and proposing a premium. Although the landlord's solicitor posted the counter-notice to the tenant it was accepted by the Court it had never been received. The tenant claimed the notice had not been served and asked the Court for an order that the lease be granted at the premium in his notice. On appeal, the Judge decided the Interpretation Act meant that even if the counter-notice had been correctly posted, if the tenant was able to prove it had not arrived, there would be no deemed service. This case suggests it is best to serve a counter-notice by hand. Even a recorded delivery may be returned marked undelivered.

In the Court of Appeal decision of Smith and anor v Jafton Properties the meaning of "qualifying tenant" under the 1993 Act was considered. The facts were complex. Essentially the Court decided that where a head lease of a building is assigned in part to two different tenants, each tenant can be a "qualifying tenant" of their part alone. They do not remain joint tenants and therefore qualifying tenants of both parts together. Consequently, where a tenant owns a lease of a whole building that can be assigned in part it may be possible to enfranchise the building.

Finally, in Hertsmere Borough Council v Caroline Anne Lovat, the Court of Appeal considered country houses and an obscure point under the 1967 Act. If a house is situated in a designated rural area and the freehold and adjoining land is owned by the same landlord the tenancy will be excluded from the right to enfranchise. Here, Mrs Lovat was the leasehold owner of a country house surrounded by a garden and then by Shenley Park. The issue was whether the adjoining land had to adjoin the "house" or the "house and garden". The Court decided it should adjoin the "house and garden" and that Mrs Lovat's tenancy was an "excluded tenancy" so she was unable to enfranchise.

> "HHJ Hazel Marshal QC decided a purpose built mansion block containing eight self contained flats and three lock up shops could not reasonably be called a house because a building could not be a block of flats and a house at the same time"

Natasha Rees is a Partner at Forsters LLP.

BUY FREEHOLD/ EXTEND LEASE

A NEVER ENDING STORY

Damian Greenish and **Anna Favre** revisit deferment rates – and more.

THE RECENT UPPER TRIBUNAL (LANDS CHAMBER) DECISION

in the case of Sloane Stanley Estate v Carey-Morgan concerned an appeal from the Leasehold Valuation Tribunal on a collective claim under the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 and provides helpful guidance on several topical enfranchisement issues. The valuation date of the claim was 24 September 2007 and so years had elapsed by the time the Upper Tribunal considered the matter.

Vale Court is a small purpose-built mansion block in the heart of Chelsea, London, comprising 25 flats. Given the location, the building was of significant value to both parties.

The tribunals were asked to consider a number of issues:

a. The existing leasehold vacant possession values of the flats that have less than 5 years unexpired.
b. Whether there was potential to undertake additional residential development on the roof; if so, whether there is a prospect of obtaining planning consent, and, if so, the value of that potential.
c. Hope value in respect of the 5 non-participating flats with terms of less than 80 years unexpired.
d. Deferment rate relating to those flats with less than 5 years unexpired.
e. Landlord's proposed terms of transfer.

THE FIRST ISSUE – RELATIVITY

The Upper Tribunal again rejected the use of past LVT decisions as evidence of relativity in subsequent proceedings. For a lease with an unexpired term of 4.74 years, the landlord's valuer had identified an unimproved rental value for the flat and then capitalised it to the end of the term to calculate the appropriate relativity. The Upper Tribunal agreed with this approach in accordance with paragraph 4.6 of RICS Research Report: Leasehold Reform: Graphs of Relativity (2009). It therefore determined relativity at 8% for an unexpired term of 4.74 years and, significantly, decided that graphs of relativity were not appropriate for such short terms.

THE SECOND ISSUE - DEVELOPMENT VALUE

This element of the decision is largely dependent on the particular facts. Despite evidence from the landlord's expert witnesses suggesting a 60% plus chance of obtaining a planning consent for a roof development, it is clear tribunals remain reluctant to award anything other than a nominal sum for potential development value, unless there is a planning consent in place. Alternatively, it seems there must be a positive view from the planning authority on the development prospects.

THE THIRD ISSUE – HOPE VALUE

The leases considered had unexpired terms of 70.25 years (1 flat) and 4.74 years (4 flats). The Upper Tribunal expressed hope value as a percentage of the overall marriage value (as opposed to a percentage of the landlord's share). A purchaser will weigh up the circumstances relating to each non-participator, and the percentage of hope value that he would apply would reflect those circumstances. Here, the tribunal determined hope value for flat 1 (70.25 years unexpired) at 10% of overall marriage value (following Culley) and for the other four flats (4.74 years unexpired) at 20%.

continued on page 38>>

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Enfranchisement »

> "The decision provides useful guidance for the determination of a deferment rate, relativity and hope value for short-term reversions"

THE FOURTH ISSUE – DEFERMENT RATE

The tribunal decided that the widely publicised Sportelli formula is not to be applied to very short-term reversions because they have different characteristics. Long-term reversions were comparable to financial interests and should be valued as such. However, short-term interests are more akin to freehold interests. Accordingly the starting point should be the value of the freehold interest, to which explicit adjustments are made to reflect the fact the right of possession is deferred.

The potential for the three elements of adjustment are as follows:

a. The value of possession that is lost during the currency of the lease. This can be allowed for by discounting (applying Present Value) at the net rental yield
b. Loss of control until possession. This can be reflected by either an end allowance or an adjustment to the yield.
c. Real growth. The Tribunal accepted the time horizon of a purchaser of a short-term reversion will go beyond the reversion itself with the expectation of retaining the freehold, possibly for a long time after the reversion. The purchaser can look forward to being able, within a short time, to let, occupy, keep vacant or redevelop (as he chooses) the property. Freehold vacant possession prices will always reflect market sentiment about short-term future price levels. The tribunal concluded that the purchaser of a short term reversion would, as regards growth and future price movement, take no different view from that of a purchaser of the freehold in possession and consequently would not make any allowance for possible movements during the period of the reversion.

The Tribunal concluded on the evidence there should be a deferment rate of 4.37% based on a net rental yield of 3.25% (the first element of adjustment) with a 5% end allowance for lack of control (the second element of adjustment).

Importantly, as a matter of valuation guidance, the Tribunal concluded that the deferment rate for reversions of less than 5 years should be the net rental yield that the evidence shows to be appropriate for the property in question. In addition there should be an end allowance which, in the absence of evidence establishing some other percentage, should be 5%.

THE FIFTH ISSUE – THE TERMS OF TRANSFER

The landlord sought to include in the transfer deed a qualified covenant against alterations and a declaration regarding rights of light and air. However, it was unsuccessful retaining these provisions. It was held that evidence is required to establish a restriction will materially enhance the value of other property being retained, although quantification of such enhancement in value is not needed. A party cannot rely solely on submissions of Counsel.

The decision provides useful guidance for the determination of a deferment rate, relativity and hope value for short-term reversions. It also bears testament to the continuing debate on these issues and the important financial consequences they elicit.

The nominee purchaser has applied to the Upper Tribunal for permission to appeal to the Court of Appeal on those parts of the decision concerning relativity, deferment rate and hope value.

Damian Greenish is Senior Partner and Anna Favre a Solicitor at Pemberton Greenish LLP

Are you thinking of extending your lease or buying the freehold of your property?

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BUY FREEHOLD/ EXTEND LEASE – CASE STUDY

Don't forget the bit on the side!

Roger Nelson reminds us what to include when valuing a freehold

APPROACHING THE COST OF YOUR FREEHOLD PURCHASE on the basis of a collective amount based on the number of flats in the building may give a fairly accurate figure where there is little additional land, such as flats in a converted terraced house. This is not always the case where the building sits in its own grounds.

The freeholder will often seek an additional amount for this area - "the bit on the side" - which could be quite substantial.

The 1993 Act gives qualifying flat owners the right to purchase the freehold of the building in which the flats are situated. They are likewise entitled to purchase say a garage or a parking space included in their lease and where they have exclusive use, sometimes this ownership is by way of separate long lease(s). Finally they are entitled to purchase the garden and grounds over which there are communal or shared rights in the flat leases. The problem lies with this third category where it can be shown there is an additional value which the enfranchising group benefit from having bought the freehold and which may not be apparent before the purchase.

Let's take some examples. The most obvious one is where the garden and grounds over which there are shared amenity rights is somewhat larger than may be simply for the enjoyment of the flat owners. It may already have planning permission for additional similar residential development, or it may have hope value for this at some time in the future. In either case this will show a value higher than as amenity land. It will be part of your valuation surveyor's duty to flag this possibility for you although a clue can often be seen in the "landlords retained rights" section of the leases.

> "The moral is avoid the DIY valuation, get proper and experienced professional help; preferably an ALEP valuer – and tell them not to forget the bit on the side!"

The wording of leases is often helpful in indicating where there might be an additional bit on the side! For example, the effect of wording such as "rights of access on foot only" will disappear with the purchase of the freehold and in an area with limited on street parking the grant of vehicular rights with the freehold transfer is of additional value.

Another example concerns an amenity area, duly noted in the lease, but which over the years had become used by the flat owners to park cars. The lease did not prohibit parking but the Tribunal nevertheless valued this as such.

The moral is avoid the DIY valuation, get proper and experienced professional help; preferably an ALEP valuer - and tell them not to forget the bit on the side!

Roger Nelson FRICS, IRRV (Hons) is a Director of Each Side Leasehold

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BUY FREEHOLD /EXTEND LEASE

The Marriage after the Wedding

Jonathan Channing provides a Post-Enfranchisement Checklist

NOW THE COLLECTIVE PURCHASE OF YOUR FREEHOLD IS COMPLETE; the hard work does not stop. Here is a list of post-enfranchisement action points:

a. Service charges – Have all service charges payable to the outgoing freeholder been cleared? Have arrangements for service charge funds to be transferred been made?

b. Notifying all leaseholders – All leaseholders should be informed of the successful completion, whether or not they participated in the freehold purchase. Managing Agents – Will we retain the freeholder's agents, choose our own or manage the building ourselves?

c. Bank accounts – All bank accounts holding service charge monies must have 'trust/client account' status to comply with section 42 of the Landlord & Tenant Act 1987. If in doubt, speak to our agent and/or bank. Company Admin - Our freehold is vested in our newly established Company. We need to prepare and file statutory accounts and annual returns, appoint Directors, deal with share certificates when a lease is assigned and other 'company secretarial' duties. We need to deal with this in house, or ask our managing agents, accountants or solicitors (or a combination) if they can assist. Decision making – How should Directors interact with each other and the managing agent? Should one Director liaise with the managing agent? Should an expenditure limit be fixed beyond which the agent needs to contact us?

d. Contracts – Existing contracts may be frustrated because the outgoing freeholder's management functions have come to an end on completion or there could be a breach of contract. Consult our agents about this.

e. Lease Extensions – We can grant ourselves new, long leases – we just need to pay legal fees. Should the terms of the leases be varied – e.g. to allow wooden floors, or permit subletting? Consult our solicitor about this.

f. Major works – Now we are in control of our building, we need start planning for future capital works such as cyclical external repairs and redecorations, internal common parts refurbishment, communal garden overhaul, etc. Our agents can help prepare a 10 year plan and annual reserve fund contributions. Improvements – We now have the opportunity to enhance the aesthetics of the building beyond what the leases allow us to do – so we need to formulate an action plan and decide on how these non-service charge items of expenditure are going to be paid for.

g. Insurance – We can now choose our own buildings insurer. Check the renewal date and use our managing agent's buying power – they or one of their brokers could save money. We need to decide if we want terrorism and directors & officers liability cover. Consider a reinstatement cost assessment of the building.

h. Income Generation – Is there under used space (such as our under-pavement vaults and basement storage cupboards) ripe for development/ allocation, which could generate income or capital for the shareholders?

Jonathan Channing FIRPM is a Director of Farrar Property Management

BUY FREEHOLD/ EXTEND LEASE

Lease Extension or Enfranchisement?

Michael Lee helps inform the decision

A LEASE EXTENSION WHICH ADDS 90 YEARS to your lease should be the most straightforward way to increase the term and protect the value of your flat which otherwise is a wasting asset. Over time, the premium payable to extend the lease will increase as the lease shortens. Unfortunately, many people only think of extending their lease when they are planning to sell their flat or, worse still, when their flat is under offer. Purchasers' solicitors increasingly advise their clients to obtain a lease extension before completing their purchase to avoid uncertainty, costs and being subject to the two year qualifying period.

The cost of extending a lease increases when the remainder of the term is less than 80 years. This is due to the inclusion of marriage value which is half the net gain in value from extending the lease or enfranchising. Typically, purchasers are demanding the inclusion of lease extensions when leases have 80-90 years unexpired term, even longer in some cases.

The downside, if you are in the process of selling a flat with a short lease, is that the lease extension is likely to be purchased in a hurry and landlords will tend to take advantage of this by seeking a higher premium. It is far more sensible to obtain a lease extension well before selling your flat. However, this process can take between four and 12 months, or longer if it needs to go to a Tribunal.

An alternative to lease extension is purchasing the freehold.

If over 50% of the owners in your block wish to buy the freehold, the added advantage is that you will protect the value of your flat and transfer the management to the residents, as opposed to a landlord who may not be managing the building cost effectively or efficiently. The purchase of the freehold may, however, include other parts of the property, such as those flats not participating in the purchase or those parts of the building which could be re-developed, e.g. roof spaces, basements or grounds. The latter, in particular, are highly subjective elements which may well deter many from joining in with the freehold purchase. In this situation you should first serve a lease extension notice and then a collective notice so that if the latter is unsuccessful you can pursue the lease extension route, particularly if the remainder of the term is close to 80 years.

If control of management is the main reason for buying the freehold, there are other options available such as Right to Manage or the Appointment of a Manager.

Whilst the relevant legislation is nearly 19 years old and the valuation principles are fairly well established, the enfranchisement industry is still very imaginative in identifying new valuation and legal arguments which keep the Tribunal service and professionals busy. Even those principles which are established are now subject to change.

Getting the right professional help early on is essential for a number of reasons:

1. So that all issues may be identified
2. So that a good indication of the total costs can be provided
3. To identify whether any valuation or legal includes issues may arise which are likely to go to a Tribunal or beyond
4. To provide a realistic time frame for completion
5. This is a specialised area in terms of valuation, legal issues and representation before the Tribunals, with the key to success being the appointment of a legal and valuation team which work well together.

Michael Lee is Managing Director, Shaw & Company (Surveyors) Ltd

> "A lease extension which adds 90 years to your lease should be the most straightforward way to increase the term and protect the value of your flat ..."

BUY FREEHOLD/ EXTEND LEASE

SOMETHING GOING ON UP TOP?

Mark Chick provides an insight into air space

"THE ONLY WAY IS UP!" - that certainly seems to be the view of landlords seeking to claim development value as part of the compensation payable to them as part of a freehold purchase under the 1993 Act.

As part of the sums payable under the 1993 Act, the landlord is entitled to claim in addition to what might traditionally be called the 'term and reversion' and any marriage value – something 'extra,' in respect of lost development value.

Often the roof is an area where it is at least arguable in a built up property that there is the scope for further addition to the property.

Some landlords take things a stage further and seek to create other property interests that are designed to protect their interests in such a situation. One such device is a lease of the 'air space' above the building as ownership of this is key to unlocking any future development potential.

So what happens on enfranchisement? Can this additional area be acquired? Or indeed, must it be? And if so, what price will be attributed to it?

These were the questions in the case of Durrels House (Hemphurst Limited v Durrels House Limited [2011] UKUT 6 (LC)).

In this case there was just such an airspace lease in place. The potential – it was said – for future development was huge and as a flat of significant value could be created. In fact a planning permission for just such a development had been obtained – which is a highly relevant point from the point of view of valuation.

The fact that planning permission had been obtained and that the airspace lease had been granted meant that the tribunal had to accept that the potential for the development of the upper part of the property clearly existed.

The tenants sought to evade the problem of having to purchase the whole of the airspace lease (at significant cost) by seeking to purchase only those parts of the surface of the roof and not the remainder of the lease that would have formed part of the potential development above.

On a collective enfranchisement, the tenants may acquire leases of other parts of the property if they comprise part of the common parts, or if the area is used in common but reasonably necessary for the management or maintenance of the property. At first instance the LVT had decided that any such lease must be acquired in its entirety.

On appeal, in Durrels House, the Upper Tribunal confirmed that the nominee purchaser is was not obliged to acquire the whole of the airspace lease but could select to acquire (at a lesser cost) simply those parts of the roof and the 'envelope' of the building that were that were necessary for maintenance and repair.

The case establishes an important principle, which is that the nominee purchaser may acquire part of any additional leasehold interest that forms part of the common parts or a common area rather than being obliged to buy the whole area.

Mark Chick is a solicitor specialising in lease extension and freehold purchase and is a partner at Bishop & Sewell LLP. He is also a Committee member of ALEP and regularly writes and lectures on this area.

BUY FREEHOLD/ EXTEND LEASE

Issues with Headleases

Piers Harrison explains which headlease interests are acquired on enfranchisement

IMAGINE A HEADLEASE OF A BLOCK which consists of ground floor commercial premises, common parts, and 20 flats, 15 of which are held by qualifying tenants, four of which are occupied by assured shorthold tenants and one of which is a caretaker's flat.

The nominee purchaser is obliged to acquire the interest of the headlessee insofar as it extends to the 15 flats held by qualifying tenants. It is entitled to acquire the common parts, assuming that the acquisition of the same is reasonably necessary for proper management of the building. They are not entitled to acquire the leasehold interest in the commercial premises (s. 2 (4) applies as it is not a flat held by qualifying tenant, a common part or appurtenant property).

In that case the headlease must be severed and the rent apportioned. If the terms of severance cannot be agreed they would have to be determined by the Leasehold Valuation Tribunal under s. 24 of the Act. In such a case, the tenants need to be careful to word paragraph 5 of the initial notice appropriately e.g. "The leasehold interest(s) proposed to be acquired under or by virtue of section 2(1)(a) or (b) of the 1993 Act is the leasehold interest of XYZ under the lease dated [ ] save insofar as the same relates to the commercial premises shaded blue on the attached plan".

The headlessee is to be regarded as a qualifying tenant of a flat let out on a shorthold tenancy in the headlease – that is as a result of the decision of the House of Lords in Howard de Walden Estates Ltd v Les Aggio [2009] 1 AC 39. However, on the facts of this example the headlessee owns more than 2 flats and is therefore excluded from being a qualifying tenant of any flat by section 5 (5), which provides that a person who own three or more flats ceases to be a qualifying tenant of any of them.

In Cadogan v Panagopoulos [2010] EWHC 422 (Ch) Roth J held that, on the facts of that case a caretaker's flat was within the common parts. Roth J's decision was upheld by the Court of Appeal [2010] EWCA Civ 1259. On that basis the NP could still acquire the headlease interest in the caretaker's flat.

Suppose the facts of the above example had been slightly different and there had been no flats within the headlease held on an assured shorthold tenancy. In that case section 5 (5) (i.e. the rule that the qualifying tenant of three or more flats ceases to be a qualifying tenant) would not apply. The headlessee would then be a qualifying tenant and arguably the caretaker's flat would fall within s. 2 (4) (a) and thus would be property that the qualifying tenants would be obliged to acquire. It seems improbable that this was the draftsman's intention and that this is more the result of the lifting of the residence requirement and the unforeseen decision in Les Aggio that a headlessee is a qualifying tenant in respect of each of the flats in the headlease.

Piers Harrison is a barrister at Tanfield Chambers

CASE STUDY

Be Well Advised

Andrew Cohen explains why valuation advice upfront can avoid costs later

IT'S VERY IMPORTANT TO GET INDEPENDENT ADVICE from a chartered surveyor prior to starting the process.

Before commencing the lease extension or enfranchisement process, it is always prudent to obtain advice from an independent chartered surveyor as to likely costs.

Indeed, it could be a costly error if you discovered once agreement had been reached that you could not afford the premium and the associated costs, which would include your own legal and valuation fees and the reasonable legal and valuation fees of the landlord.

Your surveyor should be able to provide you with a report with his professional opinion of the likely cost of a lease extension or the acquisition of the freehold.

There is little to be gained by a surveyor valuing the premium too low at a figure which has little chance of being agreed and could not be justified should the matter be heard at a Tribunal.

Equally a prospective leaseholder who wishes to extend their lease would rather be given a realistic cost rather than one so low that it is not reasonable and has little chance of being agreed.

There have been numerous cases over the past few years where surveyors have substantially under estimated the cost of a lease extension.

One particular case which comes to mind was when an overseas buyer purchased a flat in W1 with a very short lease but with the benefit of a valid Section 42 Notice having been served prior to completion.

The purchaser instructed a firm of chartered surveyors recommended by the estate agent to prepare a valuation as to the likely cost prior to purchasing the flat.

Unfortunately, the surveyor did not have much experience with lease extension valuations and advised that the likely cost of the extension would be in the region of £600,000.

The buyer made an offer based on this amount and was shocked to hear after completion that the landlord served a Counter-Notice requiring a premium of just over £1,000,000.

An independent valuation was required to help the purchaser reach an opinion as to which valuation was more accurate.

Following inspection, the opinion formed was that the correct figure was approximately £950,000 and after lengthy negotiations, this figure was subsequently agreed.

The client was angry at the low valuation provided by the original valuer and quite reasonably made the point that had he been aware of the true cost of the lease extension, he would have made a substantially lower offer for the flat and would not have lost over £350,000!

Quite clearly the purchaser received poor advice which proved very costly.

The moral of this story is that it is vital to obtain independent advice prior to commencing proceedings and to ensure that your surveyor has proper expertise.

Andrew Cohen, MRICS RICS Registered Valuer and Alan Cohen, Bsc IRRV HONS RICS Registered Valuer who are chartered surveyors at Talbots Surveying Services

NEWS ON THE BLOCK ENFRANCHISEMENT & RIGHT TO MANAGE AWARDS 2012

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