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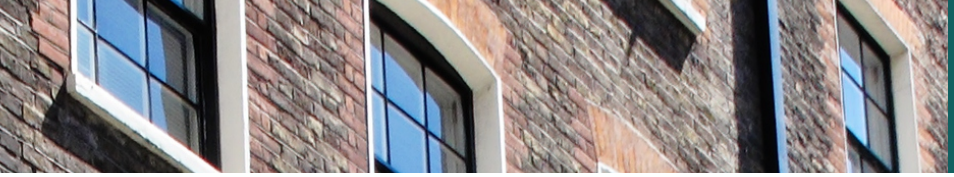

MINI MONTHLY MAGAZINE

ISSUE THREE...

BUYING YOUR FREEHOLD

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MINI MONTHLY MAGAZINE

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We are pleased to introduce the second edition of our Mini Monthly Magazine.

We have taken Flats Living's monthly feature and have prepared it as a hard copy for you to circulate to your team.

This month's issue is all about Buying your Freehold.

For further copies please email us at **magazine@residentsline.co.uk.**

To read a full copy of the latest Flat Living Magazine please visit **www.flat-living.co.uk.**

To contribute in future issues please contact **Rebecca@flat-living.co.uk**

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ALL CHANGE IN RESIDENTIAL LEASEHOLD THE CONSULTATION. ARE WE MOVING TOWARDS SIGNIFICANT REFORMS IN THIS AREA?

On 20th September, the Law Commission published its much-awaited consultation paper on its proposed reforms to enfranchisement legislation.

Entitled 'Leasehold home ownership: buying your freehold or extending your lease' the document is 564 pages long. Throughout, it raises 135 questions relating to the proposed changes, some of which are quite radical.

Who are the Law Commission and what are they doing?

The Law Commission are a publicly funded but independent government body that are set up to review the law and make recommendations for change.

In the Law Commission's 13th Programme of Law Reform, they have chosen to look at the law relating to leasehold and residential property and, as part of this, the law on enfranchisement.

Why look into enfranchisement?

The law relating to this area is complicated and results from a number of Acts of Parliament that have amended the originating legislation. By way of example, there are at least 50 Acts that have amended the Leasehold Reform Act 1967 alone over the last 50 years. The other main statutes are the Leasehold Reform Housing and Urban Development Act 1993 and the Commonhold and Leasehold Reform Act 2002. Both have also seen significant amendments.

To the flat owner looking to extend their lease or purchase their freehold, the process is not straightforward and there are differing regimes for flats and houses; this is to say nothing of the basis on which the price (or premium) that you will pay to exercise these rights is calculated.

So, why all the fuss about this Consultation?

The Government has been aware of the issues building in the leasehold sector for some time. Notably, the issues arising out of the so-called 'leasehold scandal' and the sale of leasehold houses in the North West - sales made (predominantly) by developers who reserved ground rents that rise aggressively; i.e. doubling every ten years on a compounded basis.

Numerous pressure groups have been vocal about this area, not least of which the Leasehold Knowledge Partnership, who have successfully lobbied in Parliament through the creation of an All-Party Parliamentary Group on Leasehold matters.

Last year, the Government published a consultation paper titled 'Tackling Unfair Practices in the Leasehold Market'. One of the outcomes of this paper was a recommendation that the Law Commission look at possible changes in this area, notably to address the issues around leasehold houses, but also to look at reform more generally and the issue of Commonhold.

What does the Consultation mean?

Currently, this means that the Law Commission are looking for views on their proposed changes to the law in this area, and the consultation closes on 20th November 2018. Anyone interested should review this lengthy document and make their views heard.

What are the proposed changes? Are they radical?

As might be expected, there are a lot of reforms based on the detail, but a summary of the key areas are as follows:

- A single unified right of enfranchisement (this is the biggest simplifying and 'reforming' change) seeking to bring together the currently separate regimes for flats and houses. Instead, there will be enfranchisement rights that attach to 'residential units' – in other words, no need to debate at length whether a property is a house or not.
- The right to buy the freehold to a leasehold house even if the lease is not a 'fully repairing' lease of the whole, thereby creating an 'individual right of enfranchisement' for a house.

- An individual house owner to have a choice as to whether to opt to extend the lease, or to buy the freehold on a standalone basis.
- The term of the statutory lease extension to be 125 or 250 years (possibly longer).
- An end to the two-year qualifying period of ownership prior to making a lease extension claim.
- The right to 'buy into' a freehold collective claim after it has completed – subject to payment of a fair price and costs.
- In a collective freehold, to purchase the right for the flat owners to mandate that the freeholder takes leasebacks of non-participating flats and or un-let units so that the overall enfranchisement price is reduced.
- A house owner seeking a lease extension is to be able to obtain 125 or 250 years at a nil ground rent in exchange for a premium – in other words, no more 50 year extensions of houses with lower rateable values that qualify under the 1967 Act. The existing right is limited and criticised as it leaves the house owner with a modern (and much higher) ground rent, as there is no premium to extend in these cases. The right is also little used in practice.
- A right of 'estate enfranchisement' so that houses on an estate can collectively buy the freehold subject to a qualifying number acting together.
- Reform to the valuation calculation so that either a simple multiplier is to be applied to 'straightforward' cases, or so that a government prescribed calculator can be used to determine the outcome.
- The possibility of there being set rates for capitalisation rate, deferment rate and relativity, thereby making the calculation 'easier'.
- Measures to control the costs that can be recovered by landlords – either (controversially) by making each side pay their own costs for all parts of the process, or by setting a cap or 'scale fees' for 'recoverable' work.
- An end to the separate jurisdiction of the County Court in determining disputes over notices; instead, these are to be determined by the First Tier Tribunal.
- A simplification of the notice serving process. There is to be one prescribed form for all enfranchisement rights with guidance on the addresses that can be served, to avoid debate about this.
- The process to be 'front loaded' so that most debate about the transfer terms and or lease terms takes place at the start of the process to 'avoid' the need for lengthy argument later on.
- The parties to be able to correct the position in their notice or counter notice by serving a further notice amending their position at any time before the matter has been determined by the Tribunal.

What happens next?

Once the consultation closes, the Law Commission will review the responses and then work on its paper recommending reform of the law in this area. This is not likely to be finished until the end of 2019.

Once Parliament has this report it is for the politicians to decide whether to act on these recommendations for change. However, the Law Commission will not generally look at an area without an assurance from the government that it seriously wants to consider reforming the law in that area. There is a good chance, therefore, that some or all of the suggestions listed above will come into force one way or another.

SO, IF THE LAW CHANGES, WHEN WILL THIS BE?

Based on the above, the earliest that the Commission's paper will be ready is during 2019 and very probably towards the end of that year.

Assuming that the Government then decides to act on the recommendations, this would mean that the earliest that draft legislation could be proposed will be 2020. Even then, the fact that the Commission has consulted and reported does not mean that the changes will come into effect as proposed.

Experience shows that there have been a lot of very well thought through reports and recommendations to parliament from the Law Commission, not all of which have been acted upon.

Accordingly, there are no guarantees of change. Changing the law is a political business and certainly requires parliamentary time. In the next year to eighteen months, Parliament is going to have a number of other projects to deal with in the shape of Brexit, which may blow some (or all) of this off-course.

That being said, the Consultation represents a real and exciting opportunity for change of the law in this area. I would strongly urge anyone with an interest in this area to read the Consultation and to make comments in response to the questions that have been asked.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/748438/Leasehold_consultation.pdf

For more information, you can contact Bishop and Sewell on 020 7631 4141.

BUYING YOUR FREEHOLD: PREPARATION FOR BUYING YOUR FREEHOLD

Belinda Thorpe, Managing Director of Residentsline advises on how to prepare for buying your freehold with the following steps that need to be followed.

In many instances several steps will proceed together. What must be considered is that thorough preparation must be carried out before service of the Initial Notice on the landlord as once that has been served – the enfranchisement procedure commences – and the tenants must be ready to respond to demands for information within statutory deadlines. Lack of preparation could cause missed deadlines, delays and defaults.

The landlord's reasonable professional fees become the responsibility of the tenants from the moment of service of the Initial Notice whether the procedure completes or not.

Check the Building and Tenants Qualify

Building

Firstly, the Building which houses the flats must comply with statutory requirements; secondly, there must be sufficient number of tenants who qualify under the statutory requirements.

The test to see if the building qualifies is to check that:

- There is a minimum of 2 flats.
- At least two thirds of the flats are let to Qualifying Tenants.
- No more than 25% of the internal floor area of the building (excluding common parts) is used or intended to be used for non-residential purposes e.g. shops/offices etc. However, note that garages and parking spaces used by flats in the building are classed as residential. (This sort of measurement needs to be carried out by a professionally qualified surveyor.)
- The building is not a conversion into 4 or fewer flats which is not a purpose-built block.
- If the freeholder (or another adult family member) lives in the building for the last 12 months and they lived there before it was converted to flats, you have no right to buy the freehold.
- The freehold of the building does not include any track of an operational railway (overground – as opposed to subway or underground) including a bridge or tunnel or a retaining wall to a railway track.
- The building is not within a cathedral precinct.
- The building is not a National Trust property.
- The building is not a Crown property.

CONSIDER THE FOLLOWING 7 TOP TIPS WHEN YOU CONSIDER BUYING YOUR FREEHOLD:

- Establish clear organisation and leadership among residents
- Keep everyone informed on what is going on
- Be clear as to why you want to buy the freehold and become your own landlord
- Understand your objectives for the building
- Establish a fighting fund; it shows commitment
- Retain solicitors, valuers and managing agents who have experience of the process
- Be realistic in your expectations and timescale

If the building satisfies all the above criteria, you then need to check that the tenants are Qualifying Tenants and that there are enough of them for a successful procedure.

Tenants

There must be sufficient number of tenants who qualify under the statutory requirements.

The test for qualifying tenants is:

Check that the lease is a long lease i.e.:

- Originally granted for more than 21 years; or
- A shorter lease which contains a perpetual right to renew; or
- A lease terminable on death or marriage; or
- A continuation of a long lease under the Local Government Housing Act 1989 following expiry of the original term; or
- A shared ownership lease where the tenant's share is 100%; or
- A lease granted under the Right to Buy legislation.

Note, however, that even if the tenant satisfies the above criteria, he/she will not be a Qualifying Tenant if any of the following applies:

- The landlord is a charitable Housing Trust.
- The tenant owns more than 2 flats in the building (either jointly with others or solely in his/her own name).
- The tenant has a business lease
- The tenant has not owned the flat for 2 years before the service of the Initial Notice.

Exercise the right to buy the freehold

It must then be established that sufficient number of Qualifying Tenants wish to exercise the right to buy the freehold.

The minimum number of tenants needed to participate is equal to half the number of flats in the building e.g. if there are 20 flats in the building then at least 10 Qualifying Tenants must participate in the action.

If, however, there are only 2 flats in the building then both Qualifying Tenants must participate.

As you can see, the checking process is precise, and it may be at this stage that you seek professional advice from a lawyer with the relevant expertise, as well as a surveyor. This is important, as the measurements required to ascertain qualification of the building must be made according to RICS guidelines.

Get organised for Enfranchisement

Once you have ascertained the qualifications as listed above then you will know the minimum number of tenants required to take part in the process. Possibly more than the required minimum will want to take part; alternatively, you may need to actively encourage more people to join in.

Whatever the scenario, the first thing that needs to be sorted out is the organisation of a committee who will facilitate proceedings and liaise with participating tenants. Obviously, where groups of diverse people are involved (and some groups could be very large) then getting agreement on matters can be difficult. Therefore, once the group is formed it is recommended that all participating tenants enter into a formal agreement which governs their joint actions during the enfranchisement procedure e.g. rights of voting, negotiation, agreement of terms and the individual tenant's financial contribution.

Solicitors should be instructed to prepare a formal Participation Agreement which will govern all the above and which can be relied on in the case of a dispute amongst participating tenants. It is especially important in the situation of large blocks of flats where any delays in decision making or disputes could endanger compliance with time limits and damage the enfranchisement procedure.

Decisions need to be made about funding the acquisition. Should payment be made up front? Is a loan or mortgage required? If so, should steps be taken at this stage to obtain loan finance in readiness for procedure? Certainly, a fund will be required from the outset to cover costs of initial steps of gathering information, setting up the Nominee Purchaser Company, formalising future funding arrangements etc; what will happen after the acquisition, will new leases be granted?

As property and conveyancing transactions are involved in the enfranchisement procedure, a property solicitor should be engaged to assist with these matters.

Take a look at the ALEP Directory for find a professional who can help you – www.alep.org.uk or our directory at www.flat-living.co.uk.

FLATS ENFRANCHISEMENT: WHAT YOU SHOULD KNOW

Before you begin

Should you choose to go through the process of enfranchisement (buying your freehold), you need to be aware that the best time to do this is before your lease drops below 80 years. This is due to the fact that by this point there will be an increase in the premium paid for the freehold, and the profit will be shared between you and the landlord.

BEFORE CONSULTING A SURVEYOR OR SOLICITOR, YOU SHOULD CONSIDER THE FOLLOWING:

1. How many flats are there?
2. How many tenants are going to join?
3. Does anyone own more than 3 flats for non qualifying tenants?
4. How much time remains on the lease and is the level of ground rent payable?
5. Summarise the size and type of the flat (i.e. floor area or basic room details)?
6. Summarise the location of the property.
7. Consider the type and nature of building – is it new, old or purpose-built?
8. Is there appurtenant land such as outbuildings, gardens or garages?
9. Know the name and contact details of your landlord.
10. Have any planning applications been submitted for the property?
11. Are you aware of any management issues or service charge disputes?
12. Be clear about the purpose of your valuation.

It is crucial to address these points before you request a quotation. It is also important to be aware of the different types of valuations: informal valuations (these are generally provided by an estate agent); desktop valuations (valuations undertaken without inspection); and formal valuations (a full inspection that should be accompanied with a full written report that is compliant with the RICS regulations).

A full inspection should include each of the following:

- Property location and description.
- Property accommodation.
- Property condition and development potential.
- Planning history and council tax.
- Property tenure summary.
- Factors affecting value.
- Property photographs.
- Schedule of comparable property evidence.
- Valuation premium schedules.

There will be different costs for different types of valuations.

A valuation is usually one of the largest costs when purchasing freehold; it is important that you seek the correct advice prior to making your decision – however expensive.

Choosing Your Advisers:

When choosing advisers, consider the following factors.

You should first assess their:

1. Legal knowledge.
2. Experience of litigation (particularly at First-Tier Tribunal).
3. Area of expertise – geographical as well as the legislation.
4. Experience of dealing with your landlord, (particularly if this is one of the Central London estates or private landlords, such as Freshwater).

For solicitors specifically, you should consider their:

- Knowledge of company law and participation agreements.
- Ability to grant new leases, handle the notices, and any applications required.

For surveyors specifically, you should consider the following questions:

1. Are they a specialist?
2. Are they prepared to offer an initial consultation without charge?
3. Are they able to work to your timescales?
4. What services do they offer? A desktop valuation advice or formal advice by way of inspection and valuation only?

When beginning this process, you need to be sure that you choose an advisor based on your own needs and have a valuation to get the information you need. Remember: always budget on the worst-case scenario.

For more information, you can contact Residentsline on 0800 281 235.

BUYING YOUR FREEHOLD: THE ROLE OF THE SURVEYOR

Justin Bennett of LBB Chartered Surveyors looks at the role of the surveyor when considering the route to enfranchisement.

The Chartered Surveyor or valuer's role in an enfranchisement can vary. When seeking enfranchisement or lease extension advice, the typical leaseholder will revert to the conveyancing solicitor who dealt with the purchase of their flat. The solicitor will discuss the legal issues and advise on the process of serving any Notice, and will probably advise their client that they need a surveyor.

The circumstance may vary but the surveyor, will usually become the project manager of any enfranchisement process. The surveyor organises property access, inspection and aids in deciding a suitable price to pay for the freehold.

The surveyor is responsible for identifying the parts of the property that relate to the building and what relates to appurtenant land (such as outbuildings, gardens or garages); this will then be confirmed with a solicitor.

Vertical Division

The surveyor will confirm the vertical division in terraces of flats to ensure that the building can be enfranchised. The solicitor will mark this to the plan and ask the surveyor to approve it. Essentially, the surveyor is involved at all stages.

Once a Notice is served and the landlord obtains his valuation advice from his surveyor, the solicitor has a reduced involvement apart from procedural matters, which, although crucial, do not ultimately affect how much the leaseholder pays.

The solicitor's role is crucial but procedural, they are as the person responsible for ensuring deadlines are met to ensure that the tenants' Notices are not deemed invalid or withdrawn; for the landlord they make sure the counter-notice is served and the initial notice is valid. Their role is vital. Before beginning the process either a solicitor or surveyor will establish: how many flats there are; how many tenants will join in; if there are any non-qualifying tenants (those who own three flats or more); how long is left on the leases; and, the level of ground rent. Normally a surveyor will prepare the tenancy schedule and a schedule of ground rents. Where there are commercial parts, the surveyor determines if in fact the building qualifies with the 25% rule.

Beyond the initial exchange of Notices, the surveyor is actively involved in all elements of the negotiation of the price to be paid. Once the price is agreed, the surveyor is again involved in the apportionment of any premium amongst the various flats. In certain circumstances this may have already been determined by the participation agreement (the contract which all leaseholders join up to buy the freehold). The surveyor will have assisted in the preparation of the percentage allocation based on his assessment of value of each flat and the level of ground rent.

Expert Advice

In the event of dispute and if the matter goes to a Tribunal, the surveyor often coordinates the expert evidence (that he or she is giving). In most circumstances, the surveyor is the sole expert acting on behalf of the leaseholders or the landlord. The solicitor will prepare the background documents for the Tribunal. A barrister may be employed to advocate at any Tribunal Hearing or the surveyor acts as advocate and expert.

Essentially, the solicitor's role and surveyor's role are distinct. However, the cost savings made by liaising directly with the surveyor in the first instance as opposed to the solicitor may be substantial.

A competent surveyor understands enfranchisement law and can recommend a solicitor, and vice versa. However, if the first point of contact is a conveyancing solicitor, increased costs may be incurred too early as they do not always have the specialist enfranchisement knowledge to avoid this.

BUYING YOUR FREEHOLD - FAQs.
Here are some of the questions we get asked...

We have served a Section 13 notice on our landlord and have not received a counter-notice. What can we do?
In the Section 13 notice you must specify a date for response of at least 2 months from the date of service of the notice. If your freeholder does not respond or responds late then you can apply to the County Court to acquire the freehold on the terms of the Section 13 notice within 6 months from the date the counter-notice was supposed to be given.

We are in the process of trying to buy our freehold but we can't agree the premium or other terms. What can we do?
You can apply to the FTT for them to determine the terms. This application must be made within 6 months from the date of the counter-notice. There is no fee for such an application.

We are buying the freehold of our building collectively. How do we split the costs between us?
The Leasehold Reform, Housing and Urban Development Act 1993 does not address this point and so it is a matter for agreement between the leaseholders. It is important to agree on this point prior to starting the process. You may wish to enter into a Participation Agreement to make sure all of you provide funds in the agreed proportions.

We want to buy the freehold of our building. Are there costs to pay, other than the price of the freehold?
You will be responsible for your landlord's reasonable costs. This is limited to legal and valuation costs, for example the landlord's valuation, legal costs of transferring the freehold and checking your right to buy the freehold. You do not have to pay the landlord's costs in connection with any FTT proceedings. If you are privately negotiating to buy the freehold outside the 1993 Act there are no rules regarding costs. It is a matter of agreement between the parties.

What happens if any of the participating residents wish to withdraw after the initial notice has been served on the freeholder?
The withdrawal of an individual participating resident does not affect the acquisition and the initial notice will continue to be valid. The remaining participating residents will continue to be liable for all costs incurred in connection with the acquisition. It is therefore advisable that the participation agreement sets out the terms on which participating residents agree to conduct the acquisition of the freehold.

For more information on buying your freehold go to www.lease-advice.org

FORFEITURE: LEASEHOLD UNFAIRNESS?

Anastasia Mavroudis, a Solicitor at Bishop & Sewell, looks at the recent news story of Charles McCadden and the forfeiture of his north London flat and explores what could have been done differently.

We have recently seen yet another news story focusing on leasehold unfairness. On this particular occasion, the news reported on Charles McCadden and the forfeiture of his north London flat, stated to be worth £600,000.

Mr McCadden purchased his property outright in 2016 using inheritance funds. He subsequently carried out substantial renovations including fitting a new bathroom, kitchen and central heating system. Unfortunately, Mr McCadden did not seek the freeholder's permission to carry out any of the works in direct breach of his lease.

Dr Asfan Malik, the freeholder who lived in the flat below Mr McCadden, issued proceedings in the First-Tier Tribunal for a declaration that Mr McCadden had breached the terms of his lease. Mr McCadden failed to grant the Tribunal access to inspect the flat (seemingly on several occasions) and otherwise did not engage in the proceedings. When the Tribunal attended the property, however, it could see that holes had been drilled into the external walls to service the new flues, but that redundant holes from the old flues remained. The Tribunal also found that Mr McCadden had rendered the front wall of the property. The external walls were not part of Mr McCadden's demise and he had no right to make any alterations to them.

In Mr McCadden's absence, the Tribunal found that the lease had been breached in that Mr McCadden had made structural alterations without Dr Malik's consent. Furthermore, he had caused nuisance to Dr Malik, presumably during the course of the works, and also owed to Dr Malik service charges.

Dr Malik thereafter looked to forfeit the lease on the basis of Mr McCadden's breach of covenants. Unfortunately, Mr McCadden did not engage with those proceedings either and the order for forfeiture was granted. Mr McCadden's lease was terminated and reverted back to Dr Malik as the landlord. Dr Malik is now at liberty to create a new lease, sell the same, and retain the proceeds of sale. She will no doubt receive a substantial windfall.

What Mr McCadden could have done, perhaps even after enforcement of the forfeiture order, was apply to the Court for relief. It is likely that any such application would have been granted if he agreed either to reinstate the works or to otherwise compensate Dr Malik for having carried out the works wrongfully. Unfortunately, Mr McCadden failed to engage in the proceedings and suffered substantial losses.

Forfeiture is certainly a draconian remedy but remains an extremely useful tool for landlords with defaulting lessees and is therefore threatened often. In practice, it is a relatively long, drawn out and costly process fraught with potential problems. Tribunal proceedings to ascertain whether or not the breach has occurred can typically take 4-6 months and the forfeiture proceedings thereafter in the county court can take much longer. Only in relatively extreme situations will an order for forfeiture be granted.

Having said that, there are now calls for the law on forfeiture to be revised to ensure that landlords do not receive such a windfall at the expense of the defaulting leaseholder. Only parliament can legislate for such an amendment and that is not going to happen any time soon.

In the meantime, lessees need to read their leases carefully, make sure they are fully aware of their obligations, and never ignore a landlord/tenant issue that arises.

For more information, you can contact Bishop and Sewell on 020 7631 4141.

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