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MINI MONTHLY MAGAZINE

ISSUE FIVE...

ABOUT LEASES

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

We have taken Flat 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 Leases.

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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This month's edition of our Mini Magazine will be discussing leases: lease extensions, lease agreements, and lease terms. We hope you find it useful, and please feel free to contact us with any questions – we're always happy to help.

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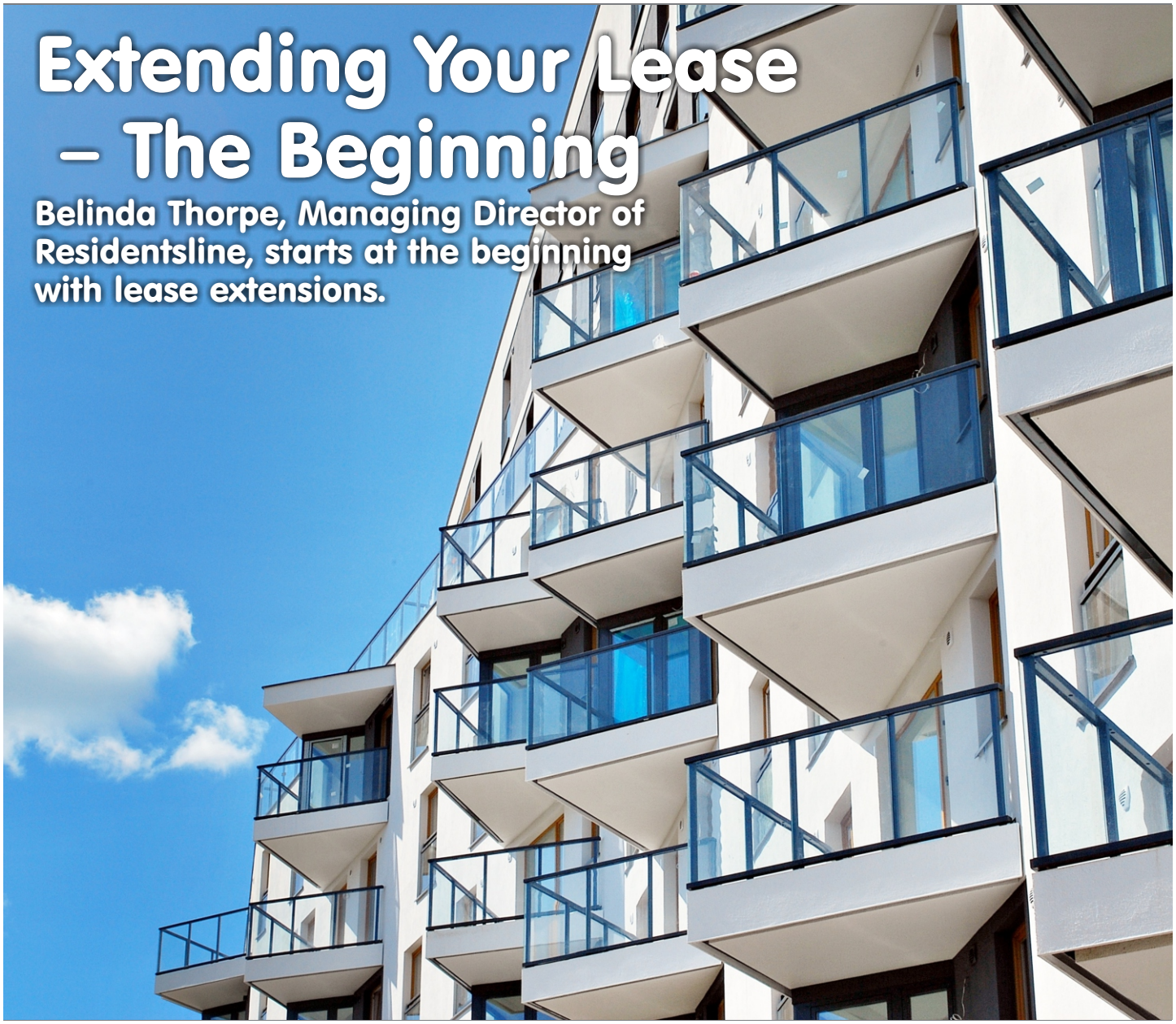
Extending Your Lease – The Beginning

Belinda Thorpe, Managing Director of Residentsline, starts at the beginning with lease extensions.



If this is something that you haven't considered or even heard of before, this will be a comprehensive refresher of the basics.

Why do I have to extend my lease?

A lease gives you the right to use a property for a set period of time. As your lease gets shorter, it becomes more expensive to extend it, and therefore the value of both your lease and your home decreases.

As well as this, as the length of the unexpired term of a lease gets shorter, the premium payable to your landlord to extend the lease increases. If a lease has less than 80 years unexpired then the marriage value that is payable to the landlord could be significant.

A lessee may encounter difficulties if they want to sell their flat if the unexpired term is considered unmortgageable. Different lenders have different criteria but generally require an unexpired term of at least 70 years.

Another way of obtaining a long lease is to collaborate with other flat owners living in the property to exercise the right of collective enfranchisement. Once the freehold has been acquired an extended lease (usually 999 years) will generally be granted to the participants.

How long can I extend my lease for?

The right under the Leasehold Reform, Housing and Urban Development Act 1993 is to add 90 years to what is left on your existing lease.

For example, if you currently have 60 years left until your lease expires, when you extend your lease you new lease will be for a period of 150 years.

If you are looking to extend your lease to an alternative number of years you will need to negotiate this with your freeholder/landlord.

When is the best time to extend my lease?

Unfortunately, your lease is a wasting asset as whilst its term reduces so does the value of your flat.

However, when the term reaches 70 years or less it is more difficult to obtain a mortgage and it becomes difficult to sell, meaning a reduction in value.

By extending your lease you will prevent the value from decreasing and this is the main reason why leaseholders extend their leases. Unfortunately, the longer you leave it to extend your lease the more expensive it becomes, so timing is very important.

The value of a lease extension is based on a number of factors, including the current value of your asset. It is worth noting that low property values will enable you to obtain a lower price to extend your lease as opposed to higher prices when property values are on an increase.

How is my lease extension calculated?

The valuation formulae are complex but are primarily based on compensation for loss of ground rent and the length of the unexpired term. As specified above, it is very important to be aware if the lease has less than 80 years left at the date the Notice is served on the competent landlord, the lessee must also pay Marriage Value which will increase the premium.

Who is involved with a lease extension?

This is key to extending your lease. It is essential that the solicitor and surveyor engaged have proven expertise in leasehold enfranchisement. The professionals listed will need to work as part of a team to achieve the common goal of extending the lease on the best possible terms.

What do you pay when you extend your lease?

The lessee will pay their own legal and valuer's costs and, in complex cases, often those of the Barrister.

There will be Stamp Duty Land Tax payable if the premium is over £125,000, as well as Land Registry fees and other disbursements such as search fees. The ultimate cost will depend on a number of factors including the complexity of the transaction and how long it takes, and importantly whether or not it is necessary for the matter to be referred to the First-tier Tribunal.

Section 60 of the 1993 Act sets out those costs that are recoverable from the lessee on completion.

The lessee is also liable to pay the landlord's reasonable legal and valuation fees. Legal fees are limited to the costs associated with considering the Notice, requesting deduction of title and the statutory deposit, requesting access details for the purposes of the valuation and dealing with all aspects of the conveyance through to completion. Also, the surveyor's fee for carrying out the valuation is recoverable from the lessee.

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How to Extend Your Lease

This brief guide will equip you with a basic knowledge of the process, where to start, and help you figure how what questions to be asking along the way.

Firstly, if you have owned your flat for more than 2 years, subject to your solicitor's confirmation, you are legally entitled to a lease extension of 90 additional years (that is, 90 years on top of the current unexpired lease term), with the ground rent for the entire new term being reduced to a "peppercorn" (nil).

In other words, the Landlord is compelled to grant you this lease extension. The only issue to be agreed is how much you pay.

STEP 1: VALUATION

How do you know how much a lease extension will cost? Or how much to offer as a starting point? You will need a Chartered Surveyor to undertake a valuation. It is always advisable to instruct a specialist Surveyor in this area of work. A comprehensive list of specialist surveyors and solicitors can be found in the ALEP directory. https://www.alep.org.uk/

Valuation

Choose your valuer

Valuation report received

Choose a solicitor

There is a calculation set out in the law as to how a lease extension should be valued. The calculation is, however, subject to a number of variables.

As a result, the price paid is subject to negotiation. Typically, the tenant will make an offer to the landlord at a lower level, and the landlord will respond with a counter-offer at a higher level. From there both parties (usually via their surveyors) negotiate a fair premium.

Visit www.myleasehold.co.uk/lease-extension-calculator/ to use the free Extension Calculator for a quick and easy indication of the likely cost of your lease extension.

STEP 2: MAKING AN OFFER

Once you have read your surveyor's report, you will be in an informed position to enter into negotiations with the Landlord. It is at this stage you would want to look at instructing a solicitor. Making an offer can be done in one of two ways:

1. **Formally, by instructing a solicitor to serve a Notice of Claim.**
   This offers your Landlord a premium and claims your right to a 90-year lease extension without a ground rent. The Landlord then responds by way of Counter Notice, including the counter offer premium proposal, and must do so within 2 months of the date your Notice of Claim was issued.

2. **Informally, by way of written correspondence.**
   Outside of the provisions of the relevant legislation, you and your Landlord can come to whatever agreement you decide. You could make a written offer for the equivalent of a "statutory" lease extension (i.e. 90 additional years without a ground rent), or you could propose different terms. However, the Landlord is not obliged to negotiate informally with you – it is at their discretion whether they want to negotiate or respond to an informal approach.

These types of negotiations should always be entered into after having taken professional advice, and with caution. Things to look out for are, among others, new ground rents or ground rents that double, new leases of less than 125 years, or changes to the covenants within the lease. Your surveyor and solicitor can assist during this process.

FORMAL OFFER

Solicitor serves notice

Counter notice received

STEP 3: NEGOTIATION

Once the Landlord's counter offer has been made, either by way of a formal Counter Notice or by informal correspondence, the negotiations commence. The negotiation of the premium payable usually takes place between the Surveyors of the two parties (Landlord and Tenant).

Negotiation

Premium agreed

Don't agree

STEP 4: PREMIUM AGREED, LEASE EXTENDED

Once a premium has been agreed, the new lease will be granted through yours and the Landlord's solicitors. Your solicitor will agree the terms of the new lease.

Premium not agreed - tribunal determines premium
In cases where Notices have been served and the parties are unable to agree, Tenants are able to apply to First Tier Tribunal (Property Chamber) for them to determine the premium that should be paid.

In the event that the matter was to proceed to the FtT, neither side is usually capable of recovering their costs. This is always an important negotiating point, because it places the onus on each party to be realistic. Recourse to a tribunal can be a costly way of settling the premium and should always be entered into as a last resort and having undertaken an analysis of the cost compared to the benefit.

For more information, please visit www.myleasehold.co.uk

Buying or Selling?

Leigh Shapiro, Partner at Irwin Mitchell providesus with top tips to remember when buying or selling a flat with a short lease.

If you have a short lease, you may feel trapped, unable to sell your property and move up the property ladder as you wish. You may qualify for the statutory claim, but unable to afford the lease extension.

Equally, if you are a buyer, you may be put off buying a property with a short lease if you have to wait two years to qualify for a statutory lease extension.

Leaseholders and buyers should take heart. The Leasehold Reform, Housing and Urban Development Act 1993 contains provisions enabling a buyer to continue a statutory claim initiated by the seller. In doing so, the buyer takes the benefit of the seller's period of ownership. However, this is a complex leasehold conveyancing transaction which requires strong communication amongst all the parties and expert knowledge in the field.

The Process

According to the Leasehold Reform, Housing and Urban Development Act 1993, a leaseholder qualifies to claim a lease extension if they have owned the property for at least two years (other qualification criteria apply). The leaseholder can assign the benefit of the claim to the buyer as part of the conveyancing transaction. Continuing the claim, the buyer will negotiate with the Landlord and complete the lease extension after the completion of the purchase.

The Claim

Serving a notice on the Landlord (known as the Section 42 Notice) begins the statutory claim. The notice must specify a premium which the leaseholder proposes. The leaseholder should engage a qualified surveyor to recommend the premium for the notice.

In a conveyancing transaction, a seller can assign the benefit of the claim. The leaseholder/seller and the buyer should agree the premium for the notice and who is responsible for appointing and paying the surveyor. After completing the sale, the buyer will continue the lease extension claim and may engage the surveyor again in the negotiations with the Landlord.

The notice must be in the lease holder/seller's name, as they qualify to make the claim. The question of who serves the notice and pays the costs involved is down to the negotiation between the seller and the buyer.

> **"Lease extensions can seem daunting, but with sound advice and good communication, a short leasehold property is not necessarily the trap, many fear it could be."**

Assigning the benefit

The conveyancing transaction requires careful management. The sale contract must contain additional provisions for the service of the notice. The leaseholders/seller will want to wait to serve the notice until the buyer is legally bound to complete the purchase (after the exchange of contracts). An invalid notice will be a concern for the buyer, who may want serve the notice themselves, or may delay the completion of the sale until the Landlord's has served the counter-notice, accepting the validity of the notice.

It is paramount that the assignment of the notice and the sale of the property occur simultaneously. The Transfer Deed should include a provision to this effect. Following completion of the sale, the buyer should serve a notice on the Landlord to confirm the assignment of the claim.

The Risks

Assigning the benefit of the claim to the buyer is a complex transaction with various risks involved for the seller and the buyer.

If the buyer fails to complete the sale (after the service of the Section 42 notice), the seller will have to choose to either complete the lease extension themselves (paying the costs and premium involved) or withdraw the notice of claim. If the latter, they will be unable to issue a fresh claim

for twelve months which may prejudice a future sale. To mitigate this risk, a seller could hold off serving the notice until after the exchange of contracts.

Lease extensions operate within a strict time limit and missing a deadline may result in a claim being 'deemed withdrawn'. In turn, this may bar the leaseholder from making a fresh application for twelve months. Worse still, the recent buyer would lose the benefit of the seller's qualification and must wait to qualify themselves or pursue a lease extension by way of an informal agreement with the Landlord. However, the Landlord's knowledge of the leaseholder's position is likely to prejudice any informal negotiations.

The buyer is taking the benefit of the claim, but the proposed premium is subject to negotiations. Beginning with the Landlord's Counter-Notice, negotiations will be on-going and may require an application to the First Tier Tribunal (Property Chamber) to settle outstanding terms. The buyer will only know the exact price they will have to pay in respect of the premium and costs once these have been agreed or determined by the Tribunal.

Furthermore, the Landlord may try to get the buyer to agree to terms outside the statutory claim. A buyer should be cautious when accepting this and make sure any deal is done and the new lease completed before withdrawing any statutory claims so as to avoid the same consequences as detailed above. When agreeing to proceed outside of the statutory basis, any deal should be considered against that available under the statute to ensure that a good deal is being achieved. In particular, leaseholders should consider the level of any ground rent that they may be required to continue paying in return for a reduced premium.

> **"Establishing the buyer's method of funding the purchase is also important."**

If the conveyancing procedure identifies a problem with the lease, the Landlord may agree amendments during the lease extension. However, only in limited circumstances is the Landlord obliged to do so. It may be beneficial to check other extended leases within the block to assess what the Landlord is willing to change.

Establishing the buyer's method of funding the purchase is also important. Does the buyer require a mortgage? If so, the mortgage lender must know about the proposed lease extension and the assignment of the benefit of the claim. They may decline to lend, retain some of the loan amount or attach additional terms to the mortgage offer. This may affect the buyer's ability to proceed with the purchase.

Getting the right advice

Whether you are qualifying leaseholder selling a short lease or a buyer obtaining the benefit of the notice, it is essential that you receive the best advice. You require a surveyor experienced with lease extension valuations and a solicitor with extensive knowledge and experience of lease extension and the conveyancing process.

Lease extensions can seem daunting, especially when this involves a conveyancing transaction, but with sound advice and good communication with all the parties, a short leasehold property can still be sold and is not necessarily the trap, many fear it could be.

For more information, please contact Irwin Mitchell on 0370 1500 100.

Get the Lease Terms Right

Mark Chick, Partner at Bishop & Sewell explains why you need to watch out or the detail when extending your lease.

Everyone knows the key reasons behind extending your lease is: 1) the lease itself is a wasting asset, and 2) a diminishing term needs to be made longer.

There are two ways that this can be done – either under the statute ('the 1993 Act') or by voluntary agreement with the landlord.

If you extend under statute there are certain inherent advantages – the term is made 90 years longer and the ground rent is cancelled. Sometimes an agreed deal can be just as good, but you do have to watch out for the detail in the lease terms, particularly in relation to the ground rent.

The Lease terms

However, what people do not always realise is that, whilst extending the lease term itself is very important, it is also crucial that you and your solicitor consider the actual terms of the lease itself.

The renewal of a lease represents a 'one off' opportunity to change the lease terms and conditions and also to put right any defects or omissions.

There are some important points to bear in mind and this article looks at some of the key things to think about.

What sort of terms can I change?

Under the 1993 Act a 'statutory' lease extension there are controls over what can and cannot be changed. Section 57 of the 1993 Act says that a "defect" in the existing lease can be cured. So, if the service charge arrangements are defective leading to a shortfall in recovery for the landlord, then this can usually be fixed. There is also scope for making some other changes.

For example, changes that are needed as a result of other changes in legislation that have taken place since the lease was granted can also be made.

The good thing with a statutory lease extension is that if agreement cannot be reached on a permitted variation then this can be referred to the First Tier Tribunal for a determination on the issue. However, it is important to realise that you cannot simply ask for any change that you might like as, under the 1993 Act, only certain types of changes will be permitted. Therefore, you should take specific advice if you are aware of an issue with the existing lease.

Changes under a voluntary lease extension

With a voluntary lease extension there are no statutory constraints - it is simply up to the parties to agree. This often becomes relevant when a lease has, for example, an absolute restriction on doing something and the tenant wants to vary this. Often the restriction can be 'bought out' – and what would technically otherwise be a breach can be permitted on a one-off basis. But beware, this usually costs money! Also, be aware that there may be limits on how far the landlord can go in making any one-off changes.

What constraints might there be on the changes?

In a statutory case, the position is that the parties can agree what they like, but outside of agreement on a point the change must fit within the justification in section 57.

What does section 57 say?

In essence, a change may be permitted if it cures a defect. If not, it would be unreasonable to include the change due to changes that have happened since the commencement of the original lease.

This sounds simple but, in practice, identifying or arguing over some changes can be incredibly time-consuming.

What about a voluntary extension?

In a voluntary extension, in theory, the parties can agree whatever terms they like. However, in practice this can often be a bit one-sided as the landlord does not have to grant the extension at all and it therefore comes down to negotiation.

How far can the landlord go?

It is also important to realise that the landlord's hands may be tied too. The freeholder has an implied obligation to keep all the leases on similar terms and not to move too far away from the rights granted to each individual leaseholder. There could, therefore, also be legal grounds for challenge to the landlord from other tenants if he agrees a particular concession to one flat owner that is not available to others.

For example, a recent case on alterations (Duval v 11-13 Randolph Crescent [2018] EWCA Civ 2298), demonstrated that the landlord cannot always vary an absolute prohibition on doing works if the other leases do not have similar provisions in them.

What sort of defects might there be in my lease?

This is a short article and so we don't have time to list all the possible areas of concern here.

Some particular areas of concern would be:

- Clauses allowing the landlord to forfeit on the insolvency of the tenant.
- An absolute restriction on assignment.
- Missing obligations – such as landlord's repairing covenants.
- Typographical errors and omissions leading to defects e.g. a missing schedule or the wrong block being referred to.
- A limited or outdated service charge obligation (for instance where the amount to be paid is an historic fixed amount to be paid on account that might have seemed huge at the time but isn't now because of inflation).

What about other clauses I might be worried about – like subletting?

In another recent case (Jones v Roundlistic EWCA Civ 2284), the court of appeal has shown us the critical importance of getting the lease terms right on renewal.

In this case, the flat owner had bought a lease that had been extended under the 1993 Act. The lease contained a provision stating that the property could not be used by anyone other than the tenant and members of his immediate family.

The wording of the clause was as follows: "...not to use the premises hereby demised or permit the same to be used for any purpose whatsoever other than as a single private dwelling house in the occupation of the lessee and his family".

The tenant wanted to let the property out, the landlord objected and brought proceedings under Section 168 (4) of the Commonhold and Leasehold Reform Act 2002 seeking a declaration that the tenant was in breach of covenant.

The First Tier Tribunal held that the landlord was not entitled to enforce the covenant, but the landlord appealed. On appeal, the landlord won. The outcome was that the tenant was not permitted to sublet.

The court also considered several other points such as the unfair contracts legislation but decided that these did not apply to leases renewed under the 1993 Act.

Summary

Extending your lease should be seen as a one-off opportunity to review the current lease terms and to make any necessary changes. As the above case shows, if this is not done the property may not be 'fit for purpose' and there is very little that can be done about making amendments after the event.

You should therefore make sure that any known issues are considered carefully before embarking on the lease extension process and that the professionals guiding you through the process have the experience and ability to review the current lease terms and comment on points that may not immediately stand out to you as the owner, but which could (if not addressed) cost you dearly in the long run.

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

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