ENFRANCHISEMENT

COMMONHOLD AND LEASEHOLD REFORM ACT 2002

The Commonhold and Leasehold Reform Act 2002 received Royal Assent on 1st May 2002. The provisions of the Act will be phased in from July.

The Act's main headings can be summarised as follows:

Part I	-	Commonhold
Part 2		
Chapter I	-	Right to manage
Chapter II	-	Collective enfranchisement
Chapter III	-	Flat claims
Chapter IV	-	House claims
Chapter V	-	Service charges etc.
Chapter VI	-	Leasehold valuation tribunals
Chapter VII	-	General

Pemberton Greenish are producing a number of briefing papers on the Act. In this briefing paper we look at Chapters II, III, IV and VI in Part 2.

Collective Enfranchisement

The Leasehold Reform, Housing and Urban Development Act 1993 (as amended by the Housing Act 1996) allows the qualifying tenants of blocks of flats, acting collectively, to purchase the freehold of their building. The building, the leases of the flats and the tenants must currently each fulfil certain qualifying conditions, brief details of which are set out in "A short guide to Enfranchisement and Lease Extension" which is available free on our website – www.pglaw.co.uk.

The new Act makes amendments, not only to the qualifying conditions, but also to the procedures for a claim and the valuation.

Qualifying Conditions

At present, the right to enfranchise collectively does not apply where the building has non-residential parts with a floor area exceeding 10 per cent of the total floor area of the building. Under the new Act the non-residential floor area will be increased to 25 per cent.

At present, in order to be a qualifying tenant, it is necessary for the tenant to hold a "long lease" (i.e. for an original term exceeding 21 years), which must be either at a "low rent" or for a "particularly long term" (i.e. an original term exceeding 35 years). Under the new Act the low rent test will be abolished in its entirety for collective claims so that the only condition required to be a qualifying tenant is that the lease be a "long lease".

The right to enfranchise collectively does not apply where the premises contain not more than 4 units and have a "resident landlord". The Act makes changes to the definition of "resident landlord". A building will only have a "resident landlord" if (a) it is not a purpose-built block of flats, (b) the same person has owned the building since before the conversion and (c) that person (or an adult member of his family) has occupied the premises as his only or principal home for at least the last twelve months. There are corresponding changes proposed to the trust provisions relating to the "resident landlord".

Currently, it is a qualifying condition that at least one-half of the qualifying tenants who give a notice of collective claim (known as "the Initial Notice") must fulfil the "residence condition". The new Act states that this requirement is abolished so that there will be no residency conditions attached to a collective claim.

At a late stage, a further provision was introduced to exclude from the right of collective enfranchisement any building which includes track of an operational railway. In this context, "track" means any land or other property comprising the permanent way of a railway, including for example a tunnel.

In summary therefore, the new Act provides: -

1. **that buildings with a non-residential floor area of up to 25% will be enfranchiseable**

2. **for the abolition of the low rent test**

3. **changes to the definition of a "resident landlord"**

4. **for the abolition of the residency test**

5. **for the exclusion of buildings which include railway track**

Procedure

The new Act will make substantial amendments to the procedure for making a claim. At present a claim is made by the requisite number of qualifying tenants who appoint a "nominee purchaser" (usually a company) to conduct the claim and take the conveyance. The 1993 Act currently makes no provision as to how the qualifying tenants structure the claim between themselves; in particular, an individual tenant has no right to become a participating tenant – even if he is a qualifying tenant. In consequence, tenants can be left out if they are not needed to make up the numbers.

Under the 2002 Act, an Initial Notice must be given by a company which is a private company limited by guarantee and one of whose objects must be the exercise of the right to collective enfranchisement of the building. This company is referred to as the "RTE company". All the qualifying tenants of flats in the building are entitled to be members of the RTE company.

A "participating member" of an RTE company means any member of the company who has given a "participation notice" (i.e. a notice containing prescribed particulars stating that he wishes to become a participating member) during the "participation period" (a period of six months from the date of the Initial Notice or the date of the sale contract – whichever is the earlier). Provision is to be made for assignees of leases and personal representatives of deceased tenants also to become participating members by giving a participation notice within a specified period.

When an RTE company exercises its right to enfranchise, it must have such number of participating members who are qualifying tenants of flats in the building, which amounts to not less than one-half of all the flats in the building – save that in the case of a building with only two qualifying tenants, both must be participating members.

Before an RTE company can give an Initial Notice, it must invite (by notice containing prescribed particulars) each and every qualifying tenant of a flat in the building who is not already a participating member to become a participating member. The notice must (inter alia) state that the RTE company intends to exercise the right to collective enfranchisement, explain the rights and obligations of membership, include an estimate of the price and costs of enfranchisement and invite the recipient to become a participating member. A period of least fourteen days must elapse after the giving of the invitation notice

to each and every person entitled to receive one before the RTE company can give the Initial Notice.

When the conveyance of the building to the RTE company is completed, any member of the RTE company who is not then a participating member, will cease to be a member.

In summary therefore, the new Act provides that:-

1. **an Initial Notice can only be given by an RTE company, being a company limited by guarantee whose membership is limited to qualifying tenants of flats in the building**

2. **before an Initial Notice is given, all qualifying tenants in the building must be invited to become participating members of the RTE company**

3. **when the Initial Notice is given the participating membership of the RTE company must include such number of qualifying tenants of flats in the building, which is not less than one-half of the total number of flats in the building**

4. **any qualifying tenant of a flat in the building is entitled to be a member of the RTE company and, once a member, has the right to become a participating member at any time during a specified period, but will cease to be a member on completion of the conveyance, if not then a participating member.**

One other small amendment to the procedure is that the landlord's right of access for the purpose of a valuation is to be widened to include any other matter arising out of the claim which would make it reasonable to allow the landlord to inspect.

Valuation

The current definition of the "valuation date" for the purpose of a collective claim is the date "….when it is determined ……….what freehold interest in the specified premises is to be acquired by the nominee purchaser." Under the new Act the valuation date will be changed to the "relevant date" i.e. the date on which the Initial Notice is given. This makes it consistent with claims under the Leasehold Reform Act 1967.

At present, where marriage value forms part of the purchase price, a landlord is entitled to receive not less than 50 per cent of that marriage value. Under the new Act the landlord's share of any marriage value will be fixed at 50 per cent.

At present, marriage value forms part of the valuation calculation in all cases. The new Act states that, where a lease held by a participating member of the RTE company has an unexpired term of more than 80 years on the relevant date, then no value will be attributed to the potential ability of that participating member to extend his lease; i.e. there will be deemed to be no marriage value.

In summary, therefore, the new Act will bring into effect:-

1. a fixed valuation date as at the date of the claim

2. the share of marriage value to be fixed at 50/50

3. no marriage value where the lease has an unexpired term in excess of 80 years.

New Lease Claims

The Leasehold Reform, Housing and Urban Development Act 1993 (as amended by the Housing Act 1996) allows the qualifying tenant of a flat to purchase an extended lease of the flat for a term of 90 years to expire after the term date of the existing lease at a peppercorn rent throughout the term. The premises, the lease and the tenant must currently each fulfil certain qualifying conditions, brief details of which are set out in "A short guide to Enfranchisement and Lease Extension" which is available free on our website – www.pglaw.co.uk.

The new Act will make amendments, not only to the qualifying conditions, but also to the valuation.

Qualifying Conditions

At present, in order to be a qualifying tenant, it is necessary for the tenant to hold a "long lease" (i.e. for an original term exceeding 21 years), which must be either at a "low rent" or for a "particularly long term" (i.e. an original term exceeding 35 years). The new Act states that the low rent test should be abolished in its entirety for new lease claims so that the only condition required to be a qualifying tenant is that the lease be a "long lease".

Currently, in order to make a claim for a new lease, a tenant must be a qualifying tenant at the date of the claim and must have occupied the flat as his only or principal home for a continuous period of three years or for periods amounting in aggregate to three years out of the last ten years. The new Act will abolish the residency condition in its entirety. It will, however, be necessary for the claimant to have been a qualifying tenant of the flat for a period of at least two years before the claim is made.

At present, the personal representatives of a deceased tenant have no right to make a claim, even where the deceased tenant was able to fulfil the qualifying conditions. Under the new Act the personal representatives of a deceased qualifying tenant (i.e. a tenant who has owned a long lease for a period of at least two years before his death) will be able to make a claim provided that the right is exercised within a period of two years from the date of the grant of probate or letters of administration.

In summary therefore, the new Act will:-

1. **abolish the low rent test**

2. **abolish the residency test**

3. **introduce a new two year ownership test**

4. **give personal representatives of a deceased qualifying tenant the right to make a claim**

Valuation

The current definition of the "valuation date" for the purpose of a new lease claim is the date on which all the terms of acquisition (other than the price) have been agreed or determined. Under the new Act the valuation date will be changed to the "relevant date" i.e. the date on which the Tenant's Notice of Claim is given. This will make it consistent with claims under the Leasehold Reform Act 1967.

At present, where marriage value forms part of the purchase price, a landlord is entitled to receive not less than 50 per cent of that marriage value. The new Act provides that the landlord's share of any marriage value will be fixed at 50 per cent.

At present, marriage value forms part of the valuation calculation in all cases. The new Act states that, where, on the "relevant date", a lease held by a qualifying tenant has an unexpired term of more than 80 years, then the marriage value shall be deemed to be nil.

In summary, therefore, the new Act will provide:-

1. **a fixed valuation date as at the date of the claim**

2. **the share of marriage value to be fixed at 50/50**

3. **no marriage value where the lease has an unexpired term in excess of 80 years.**

Houses

The Leasehold Reform Act 1967 (as amended by the Housing Act 1974, the Leasehold Reform, Housing and Urban Development Act 1993 and the Housing Act 1996) allows the qualifying tenant of a house to purchase the freehold of the house. The premises, the lease and the tenant must each fulfil certain qualifying conditions, brief details of which are set out in "A short guide to Enfranchisement and Lease Extension" which is available free on our website – www.pglaw.co.uk.

The Act introduces amendments, not only to the qualifying conditions, but also to the valuation.

Qualifying Conditions

At present, in order to be a qualifying tenant, it is necessary for the tenant to hold a "long lease" (i.e. for an original term exceeding 21 years), which must be either at a "low rent" or for a "particularly long term" (i.e. an original term exceeding 35 years). The new Act provides for the low rent test to be abolished almost in its entirety for freehold house claims so that the only condition required to be a qualifying tenant is that the lease be a "long lease". It will however be retained for "excluded tenancies"; broadly, certain tenancies granted in specified rural areas.

Currently, in order to make a claim for the freehold, a tenant must hold a long lease at the date of the claim and must have occupied the house as his only or main residence both at the date of the claim and for a continuous period of three years or for periods amounting in aggregate to three years out of the ten year period preceding the claim. The new Act will abolish the residency condition almost in its entirety. It will, however, be necessary for the claimant to have been the tenant of the house for a period of at least two years before the claim is made.

There are limited circumstances where the residency test is retained, albeit with different conditions. If the tenancy of the house is a tenancy to which Part 2 of the 1954 Act applies (business tenancies), then the tenant must occupy the whole or some part of the house as his only or main residence for a continuous period of two years or for periods amounting in aggregate to two years out of the ten year period preceding the claim. The same two year rule will apply to the tenant of a house if there is a flat within that house which is subject to a tenancy held by a qualifying tenant within the meaning of the 1993 Act.

The new Act will exclude in their entirety tenancies which are subject to Part 2 of the 1954 Act (business tenancies) unless they fulfil one of several conditions, the most significant being that the tenancy was granted for an original term in excess of thirty five years.

At present, the personal representatives of a deceased tenant have no right to make a claim, even where the deceased tenant was able to fulfil the qualifying conditions. Under the new Act the personal representatives of a deceased qualifying tenant (i.e. a tenant who has owned a long lease for a period of at

least two years before his death) will be able to make a claim provided that the right is exercised within a period of two years from the date of the grant of probate or letters of administration.

In summary therefore, the new Act will:-

1. **abolish the low rent test**

2. **abolish the residency test but with savings for business tenancies and certain headlessees on the basis of two year residency**

3. **introduce a new two year ownership test**

4. **exclude from enfranchisement business tenancies for a term of 35 years or less**

5. **introduce the right for personal representatives of a deceased qualifying tenant to make a claim**

Valuation

At present, where marriage value forms part of the purchase price, a landlord is entitled to receive not less than 50 per cent of that marriage value. The new Act provides that the landlord's share of any marriage value should be fixed at 50 per cent.

At present, marriage value forms part of the valuation calculation in all cases under sections 9(1A) and 9(1C). Under the new Act, where, on the "relevant date", a lease held by a qualifying tenant has an unexpired term of more than 80 years, then in those cases the marriage value shall be deemed to be nil.

In summary, therefore, the new Act provides :-

1. **the share of marriage value to be fixed at 50/50**

2. **no marriage value where the lease has an unexpired term in excess of 80 years.**

The new Act also makes some amendments to the procedure for dealing with claims against absentee landlords. Jurisdiction for such applications is to be transferred from the High Court to the county court and the price to be paid by the tenant is to be determined by the leasehold valuation tribunal as opposed to a single expert surveyor appointed by the President of the Lands Tribunal.

At present, if a tenant withdraws a claim, then he cannot make another claim for a period of three years. Similarly, it is possible to agree that a claim notice shall cease to have effect and, as part of that agreement, prohibit the service of a new notice for a similar period. The new Act states that in each case the period should be reduced to twelve months.

The Leasehold Reform Act 1967 (as amended by the Housing Act 1974) also allows the qualifying tenant of a house to take an extended lease of the house for a term of 50 years to expire after the term date of the existing lease at a modern ground rent throughout the extended term. This right is now little exercised not least because none of the amendments introduced by the 1993 Act and the 1996 Act apply to it. Furthermore, the extended lease has no statutory protection and carries no right to acquire the freehold. The new Act addresses these two particular issues.

First, the new Act stipulates that Schedule 10 to the Local Government and Housing Act 1989 will apply to all tenancies extended under the 1967 Act, so that such tenants will have security of tenure. Secondly, the new Act specifies that the tenant under an extended lease will have the right to acquire the freehold, if he otherwise fulfils the qualifying conditions; in such cases, the purchase price would be determined in accordance with section 9(1C) of the 1967 Act but with modified assumptions.

Leasehold Valuation Tribunals

Leasehold valuation tribunals have already been given a much more significant role in the resolution of residential landlord and tenant disputes. This trend appears set to continue. The regulatory framework governing the tribunals has not kept pace with the increased workload and extension of jurisdiction. The new Act therefore sets out a revised procedural framework covering such areas as information, pre-trial reviews, dismissal of applications, transfer of applications, determinations without hearing, costs, enforcement etc. The intention is clearly to improve the workings of the tribunals and to give them greater powers to ensure that applications are dealt with more speedily and effectively. The new Act provides that most of these matters will be dealt with by Regulations to be made by the Secretary of State (England) or the National Assembly for Wales (Wales).

The new Act also contains provisions relating to appeals from a leasehold valuation tribunal. At present, there is an automatic right of appeal to the Lands Tribunal against a decision of the leasehold valuation tribunal subject only to complying with the time limits. However, under the new Act an appeal may only be made with the permission of either the leasehold valuation tribunal or the Lands Tribunal.

The new Act also states that the Lands Tribunal should not be able to award costs against any party unless that party has acted ".....frivolously vexatiously abusively disruptively or otherwise unreasonably in connection with the appeal........". Even in those circumstances the award is to be limited to £500

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