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Right of First Refusal Part 1- Dealing with the difficulties

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9 May 2017



Legislation

- Report of committee of inquiry on the management of privately owned blocks of flats (October 1985)
- Landlord and Tenant Act 1987 Part I
 - "Ill-drafted, complicated and confused"
 - V-C Browne-Wilkinson in Denetower Limited v Toop [1991] 1 WLR 945
- Housing Act 1996



What is affected

- A relevant disposal by the landlord affecting any premises to which at the time of the disposal the Act applies....





What to do?

- Serve offer notice on qualifying tenants of flats contained in the premises
- Do not sell to third party until subsequent procedural requirements are exhausted





Important definitions

- Premises
- Landlord
- Qualifying tenants
- Relevant disposal



Flat

- A separate set of premises whether or not on the same floor (includes maisonettes)
 - Forms part of the building
 - Divided horizontally from some other part of the building
 - Constructed/adapted for the purpose of a dwelling



Flat

- Tenancy of a single room with shared amenities such as a kitchen with others in the same building is not a flat
 - Premises are not a separate dwelling



Premises

- Consist of whole or part of a building
- Contain two or more flats held by qualifying tenants
- The number of flats held by qualifying tenants exceeds 50 per cent of the total number of flats contained in the premises
 - (Section 1(2) of the 1987 Act)



Premises - continued

- Some premises are excepted namely
 - Exempt landlord - Public bodies
 - District, County, London borough councils etc
 - Commission for the New Towns/Order made under the New Towns Act 1981
 - National Park Authority,
 - Housing trust which is a charity
 - Registered social landlord



Premises - continued

- **Resident Landlord**
 - Premises not form part of a purpose built block of flats
 - Landlord in occupation as his only/principal residence
 - Excludes a company
 - Landlord in occupation for a period not less than 12 months ending with date of disposal



Premises - continued

- Mixed use building
 - Part of the premises is occupied/intended to be occupied otherwise than for residential purposes
 - The internal floor area of the part taken together exceeds 50% of the internal floor area of the premises taken as a whole
 - Disregard internal floor areas of any common parts
 - Test of intention is objective
 - Existence of planning consents
 - Structural adaptation for proposed use
 - Previous use of the premises



Landlord

- Immediate landlord of qualifying tenants of flats
 - Freeholder, intermediate landlord, sublessee
 - Intermediate landlord is landlord
 - Disposal of intermediate lease is a relevant disposal
 - Disposal of freehold not a relevant disposal



Exceptions

- Intermediate landlord's lease for a term of less than 7 years/longer but with option for superior landlord to terminate within first seven years
- Disposal by mortgagee
 - Exercising power of sale
- The Crown
 - No Parliamentary declaration that 1987 Act binds the Crown
 - In practice - will offer right to lessees



Qualifying tenant

- Any tenant of a flat under a tenancy
 - Includes fixed term /periodic tenancy
 - Rent Act 1977 protected tenants
 - Joint tenants





Qualifying tenant

- Except
 - Business tenancy
 - Part II LTA 1954
 - Assured tenancy
 - Part I Housing Act 1988
 - Three flats held by one tenant/company or associated companies
 - Section 3 of the 1987 Act
 - Sub tenant whose landlord is the QT



Relevant disposal

- “Disposal by the landlord of any estate or interest, legal or equitable, in any such premises, including the disposal of any such estate or interest in any common parts...”
- (Section 4 (1) of the 1987 Act)
- Disposal includes any passing of legal or equitable interest
 - Entering into a contract
 - An option/right of pre-emption
 - A lease
 - A transfer



Relevant disposal

- Should be disposal by immediate landlord
 - Excludes
 - CPO
 - Collective enfranchisement
 - Gift to a family member or a charity
 - Disposals between companies associated for at least two years
 - Disposal to the Crown
 - Grant of tenancy of a single flat



Relevant disposal?

- Lease of airspace
 - "Dartmouth Court Blackheath Limited v Berisworth Limited [2008] EWHC (Ch.) 350"
 - "All the airspace above the roof including the space from roof level occupied by the mansard roof and above..."
 - Airspace extending to the height of the chimneys which projected several feet above the roof level
- Lease of a mobile telephone mast



Relevant disposal?

- Lease of Common Parts
 - Include the structure and exterior of the building or part of the building and any common facilities within it
 - Eg the grant of the freehold/lease of part of the qualifying premises
 - Roof/ outside walls



Procedure - the basics

- Landlord and Tenant Act 1987 Part I Private Treaty
- Housing Act 1996 - Public Auction Procedure
- Offer notice
- Acceptance notice
- Notice of nominee purchaser
- Contract
- Completion

Important

- No prescribed forms but important to ensure contents are correct



The Offer Notice (general)

- Copy of the Notice to be served on the RTM Co. (if applicable)
- No provision in the Act for the withdrawal (prior to its acceptance) by the landlord of the offer notice once served
- Landlord to serve offer notice on each building separately if transaction involves disposal of an estate/interest in more than one building
 - *Kay Green V Twinsectra Ltd [1996] 1WLR 1587*



The Offer Notice (general)

- Landlord to serve offer notice on all qualifying tenants
 - Complies if served on not less than 90% of the QT/service on all but one where total number of QT is less than ten
- Offer notice is made subject to contract



Offer notice - contract for disposal



- Section 5A of the 1987 Act
 - Property and Estate/interest
 - Principal terms of the intended contract (including deposit and price)
 - State notice constitutes an offer to enter into a contract on the terms set out, which may be accepted by the requisite majority of qualifying tenants

Offer notice - contract for disposal



- State a period within which the offer may be accepted, being not less than two months
- State a further period of not less than two months within which the tenants may nominate a person(s) to buy the property

Offer notice - public auction



- Section 5B of the 1987 Act
 - Sale by public auction in England and Wales
 - Property and Estate/interest
 - Other principal terms of the disposal
 - Reserve price need not be specified



Offer notice - public auction

- State notice constitutes an offer to enter into the contract, if any, entered into at auction, to have effect as if a nominee of the qualifying tenants, and not the buyer, had entered into it on behalf of the requisite majority of qualifying tenant
- State a period within which the offer may be accepted being not less than two months
 - Period specified for acceptance of offer must end not less than two months before auction date



Offer notice - public auction

- State a further period of not less than twenty eight days within which the tenants may nominate a person(s) to buy the property
 - Period for nominating a purchaser must end not less than 28 days before auction date
- State disposal by sale at public auction
- State time, place of auction and name of auctioneers or give this information by further notice to requisite majority at least 28 days before the auction



Offer notice - public auction

- Serve notice not less than four months and not more than six months before the auction date
- Right is to step into the shoes of the successful bidder at the auction
 - No separate right to acquire before/after the auction

Offer notice - option/pre-emption



- Section 5C of the 1987 Act
 - Property and Estate/interest
 - Other principal terms of the disposal
 - Consideration required for granting the option/pre-emption
 - Principal terms on which the option would be exercisable (including consideration payable on its exercise)

Offer notice - option/pre-emption



- State notice constitutes an offer to grant option/pre-emption on the terms set out, which may be accepted by the requisite majority of qualifying tenants
- State periods of two months respectively within which the offer may be accepted and notice of nomination served

Offer notice - straight to transfer



- Section 5D of the 1987 Act
 - Property
 - Estate/interest
 - Other principal terms of the disposal (including price) - other terms?
 - State notice constitutes an offer to dispose of the property on the terms set out, which may be accepted by the requisite majority of qualifying tenants

Offer notice - straight to transfer



- State a period within which the offer may be accepted, being not less than two months
- State a further period of not less than two months within which the tenants may nominate a person(s) to buy the property

Offer notice - no money involved



- Section 5E of the 1987 Act
 - Exchange of land/gift
 - Other than to family member/charity
- Relevant information applying to Sections 5A to 5D
- Stating an election may be made under Section 8C and explain its effect
 - QT not in a position to offer the landlord same consideration as the proposed purchaser, so they elect to pay an equivalent monetary consideration to the purchaser
 - Equivalent to the monetary value received by the landlord

Offer notice - no money involved



- State notice constitutes an offer to acquire the property on the terms set out, which may be accepted by the requisite majority of qualifying tenants
- State a period within which the offer may be accepted, being not less than two months



Questions?

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Upcoming Webinar 7 June 2017

- Right of First Refusal (part 2)
 - Acceptance of Offer notice
 - Procedure from offer notice to completion
 - Breaches of the right of first refusal process
