

LEASE CONFERENCES



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Right of First Refusal – Dealing with the difficulties



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Procedure – the basics



- Landlord and Tenant Act 1987 Part 1 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*

Section 5A notice - Disposal by way of contract



- Offer notice
 - Minimum of 2 months must be given for acceptance
 - Starting with date of service of the notice
 - Further period of not less than 2 months for nomination of purchaser (the 'nominated person' - NP)
 - Or such longer period as may be agreed between the Landlord & the Requisite Majority of Qualifying Tenants - QT
 - The 'Further Period'
 - Time starts to run from the date of acceptance

Section 5B notice - Disposal by way of auction



- Further period
- Not less than 2 months for nomination of purchaser ('nominated person - NP)
- Starting with the date of acceptance
 - State time, place of auction and name of auctioneers in England & Wales
- Give this information by further notice
 - At least 28 days before the auction

Section 5B notice - Disposal by way of auction



- Offer notice
 - Special time line provisions apply to service
- Must be served
 - Not less than 4 months
 - Not more than 6 months before the auction date
- The period specified for acceptance must end
 - Not less than 2 months before the auction date
- The period for nominating a person must end
 - Not less than 28 days before the auction date

Section 5B notice - Disposal by way of auction



- Within the notice itself
 - Minimum of 2 months must be given for acceptance
 - Starting with date of service of the notice

Section 5C/D notice - Disposal consisting of grant of an option or right of pre-emption



- Offer notice
 - Similar requirements as for contracts
 - Section 5A notices
- Minimum of 2 months must be given for acceptance
 - Starting with date of service of the notice
- Further Period of not less than 2 months for nomination of purchaser ('nominated person' - NP)
 - Starting with the date of acceptance

Section 5C/D notice - Disposal consisting of grant of an option or right of pre-emption



- Disposal proceeding straight to a conveyance
 - Section 5D notice
- Offer notice
 - Similar requirements as for contracts
 - Section 5A notices
- See time limits above

Section 5E notice - Non-monetary disposal



- Offer notice
- Minimum of 2 months must be given for acceptance
 - Starting with date of service of the offer notice
- An election may be made to follow Section 8C procedure
 - Different time limits apply here
 - Modified time limits similar to that for Section 11 Purchaser's Notice
- 'Further period' of not less than 2 months for nomination of purchaser ('nominated person' - NP)
 - Starting with the date of service of the acceptance notice

Acceptance notice



- Given by the requisite majority
 - Qualifying tenants of constituent flats with more than 50% of the available votes
- Must be in writing
- May be sent by post
- Specify the names and addresses of all persons by whom it is served
- Specify the addresses of flats of which qualifying tenants
 - All joint tenants constitute QT
 - Include all their names
 - One vote per flat

Acceptance notice



- A single notice must be served
 - Multiple acceptance notices are not permissible
- Purpose is to inform landlord that requisite majority wish to accept the offer
- No personal signature requirement by requisite majority
 - Sensible to provide it where possible
 - Provide evidence of authority to act on behalf of requisite majority

Acceptance notice



- Two months deadline to serve notice/longer period by agreement
- Notice must accept the terms offered
 - Counter offer is not an acceptance notice

Acceptance notice



- Notice of nominated person
- Public Auction
 - Nominated person must serve notice on landlord at least 28 days before auction confirming wishes to step into shoes of successful bidder
 - Section 8B of the 1987 Act



'Protected period'

- Beginning with the date of service of the acceptance notice and ending with the period for nominating a person (or such longer period as may be agreed between the LL & the Req. Majority of qualifying tenants)
- 'Protected period'
 - Normally a minimum 4-month period



'Protected period'

- Person can be nominated at the same time as the acceptance notice is served - 'Duly Nominated'
- Ensure nomination takes place before end of period specified in the offer notice
- Any legal person may be nominated
 - Limited company/one to four persons
 - Apportionment of price/legal costs etc



Qualifying tenants failure to serve acceptance/nomination notice?

- During this 'protected period'
 - LL can only dispose to NP
- Landlord can dispose to any third party during a 12 month period beginning with the end of the protected period
- If offer notice was served under S5B, subsequent disposal by means of sale at public auction
 - Terms must correspond with initial offer notice
 - Landlord cannot sell by private treaty if no sale achieved at auction

Qualifying tenants failure to serve acceptance/nomination notice?



- In any other case landlord to sell to third party if deposit and consideration are not less than specified in the offer notice and other terms are the same
- Landlord can sell at a higher price on the same terms
- Only disposal of the protected interest during the 12 month period
- Any other disposal subject to a fresh right of first refusal

Once the acceptance notice/nomination notice is served?



- Time limits applicable to section 5A, C, & D offer notices
 - Within 1 month of the date of service of the notice of nomination
 - LL must make an immediate election to either
 - Serve notice of intention not to proceed
 - LL Notice of Withdrawal
 - Be obliged to proceed

Once the acceptance notice/nomination notice is served?



- If proceeding within the 1-month period
 - LL sends a draft contract to the nominated person
 - Section 8A
- Failure to send draft contract within 1 month
 - LL's deemed withdrawal at end of 1-month period

Once the acceptance notice/nomination notice is served?



- NP shall sign the contract and return it with the deposit
 - Within 2 months from the date of service of the draft contract
- Serve a notice of intention to no longer proceed
 - NP Withdrawal Notice
- If NP does neither within 2 months
 - 'NP Deemed Withdrawal'
- LL to exchange contracts
 - Within 7 days of thereafter
- If LL fails to exchange contracts
 - 'LL Deemed Withdrawal'

Section 5B notice - Special time limits apply



- NP serves a notice of intention to step into the shoes of the successful bidder at the auction
 - Not less than 28 days before the auction date
 - Section 8B
- LL must supply a copy of any 'contract for sale' entered into at the auction to the NP
 - Within 7 days of the auction

Section 5B notice - Special time limits apply



- NP to serve a notice on LL accepting the terms of the contract and fulfilling conditions therein
 - Within 28 days from the date LL sends the contract
- NP steps into the shoes of the successful bidder!
- If NP fails to accept the terms of contract and fulfil the conditions therein
 - NP 'Deemed Withdrawal'

Withdrawal by Nominated Person



- Service of notice of withdrawal indicating an intention no longer to proceed
- Number of qualifying tenants less than the requisite majority of qualifying tenants of flats
 - Nominated person to serve notice of withdrawal forthwith

Effects of deemed or express notice of withdrawal



- The LL is free to sell to a third party
 - Within 12- month period beginning from the date of service of the withdrawal notice
 - Subject to certain restrictions
- For disposals by public auction
 - Section 5B Notice
- The actual disposal within the 12-month period must be by public auction in England & Wales
 - On the terms set out in the Section 5B notice
- For disposals not by public auction
 - Sections 5A,C,D & E Notices

Effects of deemed or express notice of withdrawal



- The disposal must be for a consideration which is
 - Not less than that set out in the Offer Notice
 - Any higher amount agreed between LL & NP
- Must have a deposit
 - Not less than that set out in the Offer Notice
 - Any higher amount agreed between LL & NP
- Must be on the terms set out in the Offer Notice
- Lapse of LL's offer?
 - LL serves a notice
 - 1987 Act ceases to have effect

Costs of Landlord



- There is no costs liability if the notice of withdrawal is served before the end of the first four weeks of nomination period specified in the offer notice
- If notice of withdrawal is served later, landlord entitled to recover costs reasonably incurred in connection with the disposal between the end of the four weeks and date of service of notice of withdrawal
 - Nominated person and qualifying tenants jointly and severally liable

Costs of nominated persons/qualifying tenants



- Landlord not liable for costs if notice of withdrawal is served before the end of the first four weeks of the nomination period specified in the offer notice
- Landlord liable for costs reasonably incurred in connection with the disposal between the end of those four weeks and the date of service of the notice of withdrawal

Lapse of landlord's offer



- Where the premises no longer qualify because number of flats held by QT falls below 50%
 - Treat offer notice as not been served
- Not applicable if binding contract entered into between Landlord and Nominated persons
- If binding contract entered into but lawfully rescinded by landlord for failure to complete, then landlord can dispose of protected interest at any price for 12 months from the date of rescission
 - Qualifying tenants ensure they do not give landlord any cause to rescind contract

Purchase notice



- Buy on terms on which the property was sold
- Seek information first
- Important deadlines
- Requisite majority interested?

Seeking information



- Section 11A of the 1987 Act
 - Notice served on new landlord by requisite majority
 - Seeking particulars of terms on which the disposal was made (including price and deposit), and the date of the disposal
 - Request copy of contract, where applicable
 - Intention is to provide qualifying tenants with information they need to decide whether to exercise their rights under SS 12A/12B/12C
 - Time starts to run against QT for the service of the purchase notice
 - Six months within which to serve a purchase notice

Seeking information



- Notice in writing served by the requisite majority
- Name and address of person to whom particulars and copy contract are to be given (on behalf of the tenants)
- Must specify names of all the persons by whom it is served and the addresses of their flats
- "Tudor v M25 Group Limited" [2004] 1 WLR 2319 CA
 - Failure to specify the addresses of the QT in the S11A notice did not invalidate it
 - Requirement was directory rather than mandatory

Seeking information



- Notice to be served before the end of four months beginning with the date by which
 - Notices under S3A LTA 1985 relating to original disposal was served ; or
 - Where S3A not applicable, documents of any other description
 - Indicating original disposal had taken place, and
 - Alerting tenants to the existence of their rights under Part I LTA 1987, and
 - The time within which such rights must be exercised
 - Have been served on the requisite majority of QT

Section 3A LTA 1985



- Notice required to be served if new purchaser is required to serve notice under S3 LTA 1985
- New landlord required to serve notice under S3 if the interest includes a dwelling
 - Give notice of the assignment, name, address not later than the next day on which rent is due/within end of the two months of the assignment

Section 3A LTA 1985



- Notice in writing
- Notify tenant that they may have the right under Part 1
 - To obtain information about the disposal, and
 - To acquire the purchaser's interest in the whole/part of the premises
 - Of the time to exercise the right
 - Time to exercise rights would run from the date of receipt of notice under S3A
- Criminal sanctions for failure to serve notice

Service of notice in response



- Landlord/duly authorised agent required to comply with request for information
 - Within a 1-month period
 - Beginning with the date on which it was served on him
- “Service” means some act of physical delivery bringing to tenants’ attention that LTA 1987 rights have arisen
- Savva V Galway Cooper [2005] 3 EGLR 40, CA
 - Insufficient for information to be received from recipient’s solicitor /another tenant
 - Solicitor forwarded HMLR OCE to his client
 - Information derived from reading a newspaper

Taking benefit of contract



- Section 12A of the 1987 Act
 - Where contract entered into but disposal not yet taken place
 - Notice served by requisite majority requiring landlord to treat contract as if entered into with nominated person
 - What if contract included other property in addition to the relevant premises?
 - Notice has effect only in relation to Part I premises
 - Show names and addresses of requisite majority on whose behalf notice is served

Right to compel re-sale



- Section 12B of the 1987 Act
 - Where contract entered into and led to a disposal or original disposal did not involve exchange of contracts
 - Notice served by requisite majority requiring new landlord to sell on to nominated person on terms the disposal was made
 - Show names and addresses of requisite majority on whose behalf notice is served

Right to compel re-sale



- What if sale included other property in addition to the relevant property?
 - Purchaser required to make disposal relating to qualifying premises
 - Same terms with possible severing of original transaction
 - Note involvement of the First-tier Tribunal (Property Chamber)
 - Apportion consideration to ascertain amount on a redisposal
 - Tribunal carry out independent valuation exercise
 - Apportion consideration for original disposal

Requiring grant of a tenancy



- Section 12C of the 1987 Act
- Where original disposal consisted of surrender of tenancy by landlord
 - Notice served by requisite majority requiring grant of new tenancy to nominated person of the premises on same terms as surrendered tenancy
 - Show names and addresses of requisite majority on whose behalf notice is served

Requiring grant of a tenancy



- Nominated person to pay any amount that was consideration for the surrender
- What if surrender included other property in addition to the relevant property?
 - Nominee require purchaser to grant new tenancy of qualifying premises

A cautionary tale...



- Do serve the right purchase notice
 - "Kensington Heights Commercial Company Limited v Campden Hill Developments Limited" [2007] Ch.318,CA
- Do not serve Section 12B notice if what you intend is a Section 12C notice
- The correct form of notice to have served was a S12C was for the surrender of the original headlease as distinct from notice under S12C requiring the grant of a new head lease under S12B
 - Leaseholders failed to achieve anything

Where the vendor has made a relevant disposal & failed to comply with the act?



- "An unauthorised disposal"
- **Maloney & Ors -v- Gosal [2011] PLSCS 233 ("GOSAL" case)**
- This case highlights the perils of LL ignoring the provisions of the 1987 Act – in particular importance of complying with the requirement to serve a S3A notice under the LTA 1985
- The residents were able to issue a Purchaser's notice 12 years after the original disposition and acquired the property at the original price (more or less)
- A Cautionary Tale in compliance and due diligence

Where the vendor has made a relevant disposal & failed to comply with the act?



- Artist Court Collective Ltd V Khan [2016] EWHC 2453(Ch)
- Question that arose was whether the transfer of a freehold interest in favour of a sole beneficiary under a trust leading to the termination of the trust and discharge of the trustee was a relevant disposal?
- Mixed use building consisting of leasehold flats and commercial units
- Landlord transferred his freehold interest to a company controlled by him for £225,000
- Lessees not notified

Where the vendor has made a relevant disposal & failed to comply with the act?



- Lessees formed a company and served a purchase notice seeking transfer of the freehold to their company at the same price
- Landlord transferred freehold interest back to his name for nothing
- County court judge held subsequent transfer was a breach
- Lessees entitled to acquire the freehold for nothing
-

Where the vendor has made a relevant disposal & failed to comply with the act?



- On appeal, High court held that the subsequent disposal was exempt under S4(2)(g) because it consisted of the transfer of an estate/interest held on trust for any person where the disposal is made in connection with the appointment of a new trustee or in connection with the discharge of any trustee

Where the vendor has made a relevant disposal & failed to comply with the act?



- Company was holding the freehold on trust for landlord
- Disposal of the freehold by the company as trustee to him as sole beneficiary brought the trust to an end
- Transfer of the freehold back to landlord was in connection with the discharge of a trustee
- No need to serve offer notices/nor did they have a right to serve a purchase notice if transfer went ahead without service of offer notices

Prospective Purchasers – Section 18



- Protection from breach is given to a prospective purchaser where two conditions apply
 - Disposal of whole/part of a building is proposed to be made by the landlord
 - Disposal to the Transferee would/might be a relevant disposal

Prospective Purchasers – Section 18



- Purchaser serves notice on at least 80% of tenants of flats contained in the premises
 - Inform them about the general nature of the principal terms of the proposed disposal
 - Invite the recipient to serve a notice on the purchaser stating
 - Whether the landlord has served a S5 notice
 - Whether he is aware of any reason why he is not entitled to be served with a S5 notice
 - Whether he would wish to avail himself of the right of first refusal if S5 notice were served
 - Inform the recipient of the remaining provisions of S18

Prospective Purchasers – Section 18



- Premises affected by the disposal are treated as if Part I LTA 1987 do not apply if one of two conditions is fulfilled
 - If not more than 50% of the recipients have served notices on the purchaser by the end of two months or
 - Where more than 50% of the recipients have served notices indicating that they do not regard themselves as being entitled to be served with a S5 notice/would not wish to avail themselves of the right of first refusal if S5 notice was served
- Notice under S18 is intended to protect a prospective purchaser



Prosecution

- Housing Act 1996
- Not really an alternative since prosecution is a sanction
- Criminal offence to fail to serve offer notice or contravene any prohibition or restriction imposed by the Act without reasonable excuse
- Summary offence-magistrates court-level 5 fine maximum
- Power of local authorities-time/resources/awareness



Alternatives to Right of Refusal

- Collective Enfranchisement
 - Leasehold Reform Housing & Urban Development Act 1993
 - 'LRHUDA 1993'
- Section 24 Appointment of a Manager & Compulsory Acquisition Orders
 - Landlord & Tenant Act 1987
 - 'LTA 1987'
- The Right To Manage
 - The Commonhold & Leasehold Reform Act 2002
 - 'CLRA 2002'



Questions?

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Upcoming LEASE training



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Classroom training – Fighting fit for the Tribunal – rules, costs and consequences

- This course covers
 - New rules that came into force in 2003 – introduction to each of them
 - Case law to illustrate the rules where possible
 - Cases in relation to Rule 13 costs order and recent decisions
 - Practical tips from a barrister on how to take the case to the FTT
