

Lease Conferences



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Shared ownership 2016



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What is it all about?



What is a shared ownership lease?



- Leaseholder buys share of equity
- Pays rent on share retained by landlord
- Mainly housing associations or other not-for-profit organisations
- National programme introduced in 1979
- Funding by Homes and Communities Agency

Who qualifies?



- Housing association tenants
- Local authority tenants
- First-time buyer
- Cannot afford now but former home owner
- Priority applicants
- Income limits

Relaxing the criteria



- Government announcement
- From 1 April 2016
- Scheme now open to people of any occupation
- Income caps raised.....

Relaxing the criteria



- Families earning up to £90,000 in London and £80,000 elsewhere eligible.
- Deposit of as little as £1,500 could be needed for potential homeowners to buy
- Existing shared owners can move into another shared ownership property
- No longer a restriction on numbers of bedrooms

Model leases produced by HCA



- Latest versions available for use from 30 April 2015
- HCA Capital Funding Guide
- Recommended format

The model lease



- Houses and flats
- Social Homebuy
- Protected areas

The model flat lease



- Clause 1
 - Definitions and interpretation
- Schedule 9
 - Defined terms
- Appendix
 - 1) Memorandum of staircasing
 - 2) Example of notice of rent increase
 - 3) Key information for shared owners

Fundamental clauses



- Never been compulsory to use model leases
- If not adopted then "fundamental clauses" must still be used
- Must be included if scheme to qualify for public funding
- To facilitate lending to sector
- Preserve supply and characteristics of shared ownership

Fundamental clauses



- Alienation
 - Clause 3.18
- Pre-emption provisions
 - Clause 3.19
- Mortgage protection
 - Clause 8

Fundamental clauses



- Staircasing provisions
 - Schedule 6
- Rent review
 - Schedule 5
- Key information for shared owners
 - Appendix 3

The first fundamental clause



Fundamental clause – alienation



- Clause 3.18 of model lease
- What is not permitted?
 - Assignment or other dealing *with part only*
 - Assignment *of the whole*
 - Before FS
 - Without landlord's consent
 - Consent not to be unreasonably withheld
 - Underletting *of the whole*
 - Before FS
 - Parting with possession *of the whole*
 - Before FS

The second fundamental clause – pre-emption



- Clause 3.19 of model lease
- Triggered during pre-emption period
 - Start of lease and ending on date of Final Staircasing

The model leases changed...



- Removal of pre-emption right post 100% staircasing on 30 April 2015
- Existing leases pre-final staircasing
 - Pro forma deed of variation
- Existing leases post-final staircasing
 - Pro forma deed of variation

Trigger events



Assignment of whole of the Premises during Pre-emption period

Exemptions



- Will/intestacy
- Sections 24/24A of the Matrimonial Causes Act 1973
- Section 2 of Inheritance (Provision for Family and Dependents) Act 1975
- Paragraph 1 of schedule 1 to Children Act 1989
- Part 2/3 of Schedule 5 to Civil Partnership Act 2004

Land Registry entries



- HMLR restriction in the Proprietorship Register
 - Clause 3.19.4
 - Application by landlord and leaseholder
 - Form M

Starting the process



- Offer to surrender lease to landlord
- Written notice accompanied by Valuer's Certificate
 - Associate/Fellow of RICS
 - Stating market value
 - Dated no more than 8 weeks before offer
- Landlord has 8 weeks to either
 - Accept
 - Decline surrender
 - Nominate a buyer (NP)

The process continues



- If landlord nominates a buyer
 - Procedure/timescales in **Schedule 7** apply
- If landlord accepts surrender
 - Procedure/timescales in **Schedule 8** apply
- If landlord does not respond to offer within 8 weeks
 - Time of the essence
 - Proceed with disposal provided completion/exchange within 12 months of service of leaseholder's notice

Assignment to nominated purchaser



- **Schedule 7**
 - Landlord serves notice on leaseholder
 - Leaseholder shall make sale offer to NP
 - As soon as reasonably practicable

Terms of sale offer



- Unconditional
- Vacant possession
- Free from encumbrances
- Open for acceptance for six weeks
- Stipulate completion date not earlier than four weeks after offer accepted
- Subject to current Law Society Standard Conditions of Sale

What does the price comprise?



- Acquired % of open market value
- Assessed at date of landlord's notice
- By independent qualified valuer
 - (Acting as an expert)
 - FRICS/ARICS/ISVA
 - Follow relevant RICS guidance notes on valuation of land/buildings

Appointment of valuer



- Appointment agreed between parties
- In default by President of RICS
 - Application of either party
- Decision final and binding
- Costs/expenses borne by leaseholder

Assignment to nominated purchaser



- Offer made to NP and refused
- NP does not accept offer within six week period
- NP does not enter into binding contract for purchase within four week period
- Leaseholder may assign whole flat
- Proviso
 - Exchange/completion
 - Within 12 months of leaseholder's offer

Surrender by leaseholder



- **Schedule 8**
 - Landlord serves notice on leaseholder
 - Definition of payment sum
 - Schedule 9
 - Surrender and vacant possession on date to be agreed
 - In default four weeks from date payment sum is determined
 - Landlord pays to mortgagee of leaseholder payment sum less rent etc. arrears owing
 - Receipt of mortgagee as absolute discharge

Pre-emption in a nutshell



- Applies from date of lease
- Limited exceptions
- Restriction at HMLR on leaseholder's title
- Landlord can require
 - For no more than market value of equity share
 - Surrender lease to landlord
 - Assignment to nominee

The third fundamental clause



Mortgagee protection claim



- Clause 8 of model lease
- Ceases to apply on final staircasing
- Deducted from premium payable on final staircasing
- No obligation on mortgagee to accomplish final staircasing
- Purpose
 - Indemnify lender
 - Following default and repossession
 - In event sale proceeds insufficient to cover certain amounts

When can the claim be made?



- Lender has made a loss
- Lender has obtained landlord's consent to terms of each and every loan
- Disposal on arm's length basis at best price reasonably obtainable in the market at the time of the sale
 - Proof onus on landlord
- Leaseholder has not, before any mortgage default, achieved final staircasing

Capping of lender's loss



- The aggregate of
 - Loans secured by a first legal charge
 - Approved by landlord
 - 18 months interest on such loans
 - Any rents and/or service charges which mortgagee paid to preserve security
 - Any fees/costs incurred by mortgagee in enforcing its security
 - Legal, valuation and estate agency fees
 - Capped at 3% of market value of leasehold interest

Steps to mortgagee protection



- Landlord should approve before contracts exchange
 - Lender
 - Amount
 - Mortgage terms
- Lender requires landlord undertakes not to institute forfeiture proceedings without advance notification

Seeking landlord's consent



- Applying for landlord's consent to mortgage terms
- Provide full details of loan terms
- Landlord must
 - Respond promptly
 - Give decision within 28 days
 - Consent must be in writing
 - Written consent to be retained by Mortgagee

Exchanging data



- Leaseholder authorises exchange of information eg
 - Arrears under the lease
 - Mortgage arrears

The fourth fundamental clause



Fundamental clause – staircasing



- Right to buy additional shares
- Up to 100%
 - Exceptions
 - Some rural properties
 - Accommodation intended for the elderly
- Protected area lease
 - Limit to 80%
- Memorandum in the lease
 - Appendix 1

Fundamental clause – staircasing



- Portion of then market value
- Assessed by
 - an independent RICS qualified valuer
 - as at date of service of leaseholder's notice to staircas

Valuation assumptions



- Open market sale
- Willing seller
- Terms and conditions in lease
- SO lease not been granted
- Disregards include
 - Improvements/disrepair

Starting the process



- Schedule 6 of model lease
- Leaseholder serves written notice stating % wishes to acquire
 - Minimum 10%
- Mortgagee of leaseholder can also serve notice

The landlord responds...



- Landlord applies to valuer to decide market value
 - Within 14 days of receiving initial notice
 - Fees payable by leaseholder
- Landlord notifies leaseholder in writing of valuer's determination
 - Within 7 days of receipt
 - Final and binding

The process concludes...



- Leaseholder pays for %
 - Within three months of valuer's determination
 - Shall pay any arrears of rent and service charges
 - Any re-mortgage to be approved by landlord save following final staircasing

Memorandum of staircasing



- Appendix 1
- Specifies
 - Payment date
 - Price paid
 - % acquired
 - Total share now owned
 - Revised rent
- Attached to original and counterpart lease

The fifth fundamental clause



Fundamental clause – rent review



- Rent based on equity retained by landlord
 - 3%
- Annual review
- Review date in the particulars
- Link to RPI
 - With additional 0.5% uplift
- Upwards only
- Expressed as a formula rather than verbally

Fundamental clause – rent review



- Caters for
 - Possible abolition of RPI
 - Rental payments if conclusion of review delayed
 - Interest payable on any balance
 - Barclays Base PLC base rate

Fundamental clause – rent review



- Schedule 5 of model lease
- Appendix 2
 - Example of Notice of Rent Increase

Fundamental clause – rent review



- Index
 - All items retail prices index published by the ONS
- Relevant Month
 - The calendar month which is two calendar months before the relevant review date

Fundamental clause – rent review



- A = monthly figure shown in the Index for Relevant Month in year of the immediately preceding relevant review date
- B = monthly figure shown in the Index for Relevant Month in the year of the relevant review date

What is the reviewed rent?



- Greater of
 - Rent immediately before relevant review date x1.005;and
 - Rent immediately before relevant review date x ((B/A)+ 0.005

If the reviewed rent cannot be agreed...



- Reference to independent expert if no agreement within 3 months of the relevant review date

Notice of review



- Immediately following review date
- Landlord serves written notice on leaseholder
- Appendix 2
 - Amount of reviewed gross rent
 - Amount of specified rent

Service charges



- New leases issued with effect from 22 October 2010
- The service charge clause is no longer treated as a fundamental clause
- Recognised that the form of wording used in the model lease will not be appropriate in all circumstances

Service charges



- Schedule 9 of the model lease
- Account year
 - Year ending 31 March

Service charges



- Specified proportion
 - Particulars
- Service provision
 - Clause 7.4
- Building
 - Defined in Schedule 9
- Common parts
 - Defined in Schedule 9

Service charges



- Clause 7 of the model lease
- Payable by equal payments in advance
- End of year adjustment
 - Certified by landlord
- At times and manner in which the rent is payable
 - Monthly

Service charges



- Reserve fund
- Building insurance
- Maintain/repair/redecorate/renew
 - Roof
 - Foundations
 - Joists
 - External walls
 - Drains/sewers/conduits
 - Common parts

Service charges



- Calculation of service charges
- Clause 7.3 of model lease
 - Estimated expenditure for following year
 - Contributions to the reserve fund

Key information



dreamstime.com

Fundamental clause – key information for shared owners



- Appendix 3 of the model lease
- Key information guide
- Summarises main terms

Variation of Shared ownership leases



- Lease granted on/after 1st October 2008
 - Circular 03/08
 - HCA consent needed to change fundamental clauses
 - Sanctions if changed without HCA consent
 - E.g. withdrawal of grant
 - No such consent needed to changes that do not impact on fundamental clauses

Variation of Shared ownership leases



- HCA receive very few requests for consent to vary fundamental clauses
- HCA will generally agree variations
 - To correct errors in expressing the fundamental clauses
 - That become necessary due to new legislative/regulatory requirements

Richardson v Midland Heart Ltd.



- 12th November 2007 judgment
 - Purchase in 1995
 - Without a mortgage
 - Premium of £29,500
 - 50% SO lease for 99 years
 - Rent of £1,456 pa
 - Indexed increases

Richardson v Midland Heart Ltd.



- Staircasing not exercised
- 2003
 - Husband went to prison
 - R left flat following threats to family
- Feb 2005
 - Housing benefit ended
 - Arrears accumulated

Richardson v Midland Heart Ltd



- 2005:
 - MH agreed to sale
- Valued flat at £151,000
 - Flat did not sell
- 15 September 2005
 - MH issued Notice of Seeking Possession

Richardson v Midland Heart Ltd



- October 2005
 - Possession proceedings issued
 - Ground 8 of Housing Act 1988 cited
 - Two months arrears at date of notice and hearing
 - Mandatory ground
- January 2006
 - Outright Possession order made
 - "Lease" considered an assured tenancy
 - Mandatory ground satisfied

Richardson v Midland Heart Ltd



- R appealed on following grounds-
- 50% "equitable interest" in freehold held in trust for R
 - There were "two tenancies"
 - Long lease that had to be forfeited
 - Assured tenancy

Richardson v Midland Heart Ltd



- What did the High Court say?
 - Only one tenancy and HA 1988 requirements satisfied
 - No long lease as R did not have 100%
 - Amount of arrears meant Section 167 of 2002 Act not applicable
 - 50% payment was premium for lease and did not buy share of freehold
 - No trust relationship just a Landlord/Tenant one

Richardson v Midland Heart Ltd



- R appealed
- Hearing due in March 2011
- Case settled beforehand
- MH gave R 50% original premium back but not increase in equity
- £29,500 less arrears and legal costs

Richardson v Midland Heart Ltd



- Conclusion
- SO leaseholder only tenant with no financial interest in property
 - Could be evicted under assured tenancy
 - Two months rent arrears
 - Premium bought right to staircase when could afford 100%



Questions?

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