

Tenants' Right of First Refusal

Third Edition

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CHAPTER 1

INTRODUCTION

1.1 The Landlord and Tenant Act 1987 ('LTA 1987') was enacted following the Report of the Committee of Inquiry on the Management of Privately Owned Blocks of Flats (October 1985) chaired by Edward Nugee QC. That Report had considered the strong support in the evidence it had gathered for a general right to collective enfranchisement,¹ but had concluded that giving tenants a right of first refusal when the reversion was disposed of by their landlord would suffice,² given that they also proposed a right to have a manager appointed in the event of serious default by the landlord. The Report did not append a draft Bill, but a suggested procedure was outlined in the body of the Report.³ A right to collective enfranchisement would have to wait for 6 more years.⁴

1.2 The LTA 1987 was rushed through Parliament before the 1987 general election by a government keen to be seen to be tackling the well-publicised problems of lessees in large mansion blocks, many in key constituencies in Central London. It was not unusual for freeholds to change hands on more than one occasion without the knowledge of the tenants from one off-shore company to another. In the hurry, many of the provisions in the LTA 1987 were not properly thought through, and there was a view at the time that, once on the statute book, it would be possible to amend the legislation before bringing it into force. As it happened, it came into force unamended and was roundly (and justifiably) criticised by the courts, probably to a greater extent than any other piece of legislation. In *Denetower Ltd v Toop*⁵ Sir Nicolas Browne-Wilkinson V-C referred⁶ to the difficulty 'in construing such an ill-drafted, complicated and confused Act as this'. In *Belvedere Court Management Ltd v Frogmore Developments Ltd*⁷ Sir Thomas Bingham MR (referring to *Denetower*) said:⁸ 'The argument in this case has given new force to this understated criticism'. He continued:

¹ The Report of the Committee of Inquiry on the Management of Privately Owned Blocks of Flats (October 1985), para 7.9.13.

² The Committee were not convinced that management by lease-holders would solve all the problems which had been identified.

³ The Report of the Committee of Inquiry on the Management of Privately Owned Blocks of Flats (October 1985), para 7.9.16.

⁴ See the Leasehold Reform, Housing and Urban Development Act 1993.

⁵ [1991] 1 WLR 945.

⁶ [1991] 1 WLR 945 at 952G.

⁷ [1997] QB 858.

⁸ [1997] QB 858 at 881D.

'... one could wish that the Act provided as many answers as it raised problems. I can readily appreciate the complexity of the task which confronted the draftsman in seeking to give legislative effect to this ambitious scheme. But the history of these proceedings is a dismal commentary on a measure intended to help tenants of mansion blocks, many of them of limited means. As it is, the legal profession would appear to be the main beneficiaries of this obscure statute.'

1.3 In *Kay Green v Twinsectra Ltd* Staughton LJ said:⁹

'This is the most remarkable case of statutory interpretation that I have ever seen. It is as plain as can be what the purpose of Part I of the Landlord and Tenant Act 1987 was – to enable tenants of flats to buy their landlord's interest in the building if the landlord proposed to sell it to someone else, and to buy it from the purchaser if the landlord had actually done so. But nowhere does the statute say expressly that the tenants shall have that right against the new landlord. If that omission is fatal, Part I of the Act is not worth the paper which it is written on.'

1.4 It was, perhaps, not appreciated by the original draftsman just how significant were the changes being made to the law by the LTA 1987. Hitherto, tenants of flats had no right to acquire their landlord's interest. Their only statutory rights concerned service charges, and those had been introduced as recently as 1972.¹⁰ The main difficulties with the right of first refusal, including those identified by the Court of Appeal, were a lack of comprehensive definitions,¹¹ inadequate detail,¹² the existence of loopholes which could easily be exploited by determined landlords,¹³ and no criminal or civil sanction against a defaulting landlord.

1.5 It was not until 1996 that substantial amendments were made to the LTA 1987.¹⁴ This involved the wholesale replacement of most of Part I. Although many problems of interpretation still remain, some of the more serious defects have been tackled successfully. In particular, the introduction of criminal penalties¹⁵ seems to have been an effective deterrent, with no reports of prosecutions to date.

1.6 In November 1998, the government issued a consultation paper on leasehold reform.¹⁶ The only proposals concerning Part I of the LTA 1987 were to widen its scope to include houses within the right of first refusal, and to extend the 6-month time limit for prosecutions for flouting tenants' rights. The

⁹ [1996] 1 WLR 1587, 1603B.

¹⁰ By s 90 of the Housing Finance Act 1972. Those provisions are now contained in the Landlord and Tenant Act 1985, itself amended by the LTA 1987.

¹¹ Eg of 'building': see *Denetower Ltd v Toop* [1991] 1 WLR 945.

¹² Eg concerning sales by auction, or the entry into conditional contracts to sell the reversion.

¹³ Such as the sale of the landlord's interest to a newly formed associated company, as to which see para 3.82ff.

¹⁴ By the Housing Act 1996.

¹⁵ See para 10.15ff.

¹⁶ Residential Leasehold Reform in England and Wales – A Consultation Paper, Department of the Environment, Transport and the Regions.

Analysis of Responses to the Consultation Paper¹⁷ indicated that three-quarters of the respondents favoured extending the right to leaseholders of houses.¹⁸

1.7 However, the Lord Chancellor's Draft Bill and Consultation Paper on Commonhold and Leasehold Reform¹⁹ omitted all reference to including houses within Part I; the problem which has been identified is that many house reversions are sold in large lots and it is not clear how best to deal with them. The Commonhold and Leasehold Reform Bill introduced into the House of Lords on 20 December 2000 contained no proposals to reform Part I. However, in a proposed amendment made at the committee stage in the House of Lords, Baroness Hanham sought to include an individual house in the definition of premises to which the LTA 1987 applies. However, on 22 March 2001 she withdrew the amendment when the government would not support it in the present Bill. There was no further mention of the proposed extension to the prosecution time limit.

1.8 It seems possible that the Commonhold and Leasehold Reform Act 2002, which gave long lessees a right to manage their building without showing fault on the part of the landlord, and extended the right to collective enfranchisement, will be seen as the grant of sufficient tenants' rights for the immediate future; if so, we can expect the present provisions in Part I of the LTA 1987 to remain as they are. It has been suggested that these more extensive rights granted to flat lessees mean that there is no longer a need for the right of first refusal;²⁰ the tenants can, for instance, make a collective enfranchisement claim under the 1993 Act at a time of their choosing. However, we consider that the 1987 Act, which is approaching its thirtieth anniversary, still has an important role to play. It applies to buildings where only half the premises comprises residential accommodation,²¹ whereas premises with more than 25% non-residential accommodation are excluded from the right to collective enfranchisement.²² Moreover, where the landlord sells his reversion to a third party, the purchaser will not pay marriage value,²³ whereas the participating tenants in a collective enfranchisement claim must do so.²⁴ An additional advantage is that the LTA 1987 limits the ability of the landlord to make partial disposals of a building. Thus, for example, if the landlord wishes to grant a lease of the roof for the erection of a phone mast, and the flat lessees object on the grounds of perceived health risks, they are able to exercise the right of first refusal and take the lease themselves. This has happened in practice, where flat lessees have been prepared to pay the rent under the lease, in order to prevent

¹⁷ Published in December 1999.

¹⁸ Analysis of Responses to the Consultation Paper, para 53.

¹⁹ Presented to Parliament in August 2000.

²⁰ The latest being the Property Litigation Association in a submission to the Law Commission, referred to in *The Estates Gazette* (online) 19 November 2016.

²¹ See LTA 1987, s 1(3), discussed in para 2.15.

²² Leasehold Reform, Housing and Urban Development Act 1993, s 4, discussed in *Hague on Leasehold Enfranchisement* (6th edn), para 21-08 et seq.

²³ The purchaser may reflect in his bid the hope of obtaining future marriage value from the flat lessees.

²⁴ Leasehold Reform, Housing and Urban Development Act 1993, Sch 6, para 4.

the erection of a mast. Enfranchisement rights do not give equivalent protection: the lessees may not wish, or be able to afford, to buy the freehold, or a landlord might have granted the roof lease before an enfranchisement notice is served.

1.9 No modern legal textbook would be complete without mentioning the Human Rights Act 1998 which, in October 2000, incorporated the European Convention on Human Rights into our domestic law. However, we consider that no arguable infringement of a landlord's human rights arises as a result of Part I of the LTA 1987. It does not deprive the landlord of his property,²⁵ it merely requires him, if he chooses to sell, to sell to his tenants rather than a third party. It should be noted, in addition, that the European Court of Human Rights has held that the Leasehold Reform Act 1967 (which gives long lessees of houses the more radical right to buy the freehold for less than market value) does not contravene the landlord's human rights.²⁶ In a recent case,²⁷ the High Court held in favour of a landlord on an ordinary construction of the LTA 1987, making it unnecessary for the judge to consider his fallback argument based on Art 1 of the First Protocol.²⁸ The argument was that a statutory requirement which prevents the beneficial owner of a property from acquiring the legal title engages Art 1. The LTA 1987 admittedly has a legitimate aim, but if s 4(2)(g) does not cover disposals by trustees to the beneficial owner, then that restriction is not rationally connected to the aim, the aim could be achieved by a less intrusive measure, and the restriction does not produce a fair balance. Therefore, s 4(2)(g) should be 'read down' so that it does not infringe Art 1. The Judge found that the argument was an attractive one, but its resolution is better left to a case which cannot be determined by applying conventional methods of construction.

²⁵ Contrary to Art 1 of the First Protocol to the Convention.

²⁶ *James v United Kingdom* (1986) 8 EHRR 123.

²⁷ *Artist Court Collective Ltd v Khan* [2016] EWHC 2453 (Ch), [2017] Ch 53. This case is discussed at para 3.55.

²⁸ Henderson J, at para 67.