

Should I claim or should I wait?

Since the property market coronavirus restrictions were lifted on 13 May 2020, there has been a reported rush to buy and sell houses and flats. Where property is leasehold, the sale of the lease is often the trigger which leads to a claim being made for either a new lease or the freehold under the Leasehold Reform Acts. The purchaser will always be concerned to see exactly what term is being acquired. A lessee of a flat wishing to buy a new lease must have owned the lease for two years before serving a notice (s. 39(2)(a) of the Leasehold Reform, Housing and Urban Development Act 1993). The same ownership period applies to a claim to acquire the freehold of a house (s. 1(1)(b) of the Leasehold Reform Act 1967).

In both cases, the vendor who has clocked up two years ownership can serve a notice of claim and assign the benefit of the claim to the purchaser with the lease (s. 43(1) of the 1993 Act, s. 5(2) of the 1967 Act). This will be of particular interest to a purchaser where the unexpired term of the lease is starting to reach an uncomfortably low level. The most obviously important figure is 80 years. Provided the lease has more than 80 years unexpired no marriage value is payable (Paragraph 4(2A) of Schedule 13 to the 1993 Act, s. 9(1E) of the 1967 Act). As soon as it falls to 80 years or less, the premium payable to the landlord includes 50% of the marriage value. To take the example of a house, the marriage value is the difference between (i) the value of the freehold with vacant possession and (ii) the value of the freeholder's present interest (i.e. subject to the existing lease) plus the value of the existing lease. As the unexpired term falls to 30-40 years, the marriage value reaches its highest level, and can be a substantial sum.

Many mortgage lenders are concerned, and won't lend at all, once the unexpired term has dropped to 60-70 years. It might be thought, therefore, that it's a no-brainer, and that in all cases a claim to a new lease or the freehold should be made as soon as possible. However, the answer may not be so straightforward.

The important factor in favour of making a claim as soon as possible is that, as the lease length gets shorter, the price of a new lease (or the freehold) tends to increase. This is because the value of the landlord's reversionary interest – which is part of the price – increases as the date when possession can be recovered at the end of the term approaches. A freehold interest subject to a lease with 50 years unexpired is worth more than a freehold interest subject to a 70 year lease.

In the current climate, however, there are two factors which suggest it might be worth waiting.

First, there are indications that the residential property market is on a downward trend due to the pandemic. In the Sunday Times it was reported (7 June 2020, Legends of the Fall) that the Centre for Economic and Business Research's latest forecast is for a fall of 8.7% this year. The ending of the Government's furlough scheme could lead to further falls. In an enfranchisement/new lease claim the landlord's reversion is calculated by taking the present market value of the landlord's interest and deferring it for the unexpired term of the lease. If the lessee waits for a year before claiming a new lease, and the market value of the landlord's interest has fallen markedly, that might well outweigh the increase caused by the term being shorter.

Secondly, on 9 January 2020 the Law Commission published its Report: "Leasehold home ownership: buying your freehold or extending your lease. Options to reduce the price payable" (Law Com No 387). It will be recalled that the Government asked the Law Commission to review the law on leasehold enfranchisement generally, with a view to make it simpler and cheaper. A Consultation Paper was issued on 20 September 2018, and it is understood led to more responses than any previous consultation, which has caused some delay in the publication of its final report. The Law Commission decided to publish its report on price first. This is an impressive document running to 274 pages, and containing a menu of options for the Government to consider. It is accompanied by a QC's Opinion on the impact of human rights law on reducing the amounts payable to landlords. One of the more radical options is the abolition of the landlord's share of the marriage value as part of the premium. It can be seen that, if that were to be enacted, it would be worth a lessee's while to wait before making their claim where the lease has 80 years or less to run. Other suggestions include the prescribing of lessee-friendly yield rates.

That naturally leads to the issue of when legislative change can be expected. The Law Commission's main report was due to be published in Spring 2020. As its website explains, there will be a short delay to publication in light of the Covid-19 pandemic. Once the Report is published, the Government has 6 months to provide an interim response and 12 months to give a final response (under the terms of the March 2010 Protocol with the Commission). It is apparent from the Consultation document that the Law Commission will recommend wholesale changes to enfranchisement law, which seemingly will involve the repeal of the

1967 and 1993 Acts and their replacement with one comprehensive statute. This will govern both houses and flats, and will introduce a single procedural code for making claims. One change that is likely is the abolition of the two-year ownership requirement, obviating the need for a purchaser to ask a vendor to serve a notice and assign the benefit. It can be reasonably anticipated that at least parts of the legislation will be controversial, particularly those which concern the price to be paid. It is, of course, pure speculation as to how long it will be before a new Act is passed, but it could well be two years or more. In 2017, the Government announced that it would introduce legislation to ban the sale of new leasehold houses. Despite being a popular measure, and not involving particularly complex legislation, a Bill is still awaited (though one has been promised before the Summer recess 2020). Previous Law Commission reports have had mixed fortunes. For instance, the 2011 Report on Easements, Covenants and Profits a Prendre (Law Com No 327), despite being well received, politically uncontroversial, and containing a ready-made draft Bill, has been gathering dust on a shelf ever since. There is political pressure for leasehold reform, so one would not expect delays of that magnitude.

Lessees may well save a lot of money by waiting for a new Act to come into force, but will have to judge whether they may be better off serving notice now, given the likely delay.

As authors of *Hague on Leasehold Enfranchisement*, Damian Greenish and I have decided not to wait before writing a new edition of our book, and are pleased to say that Sweet & Maxwell will be publishing the 7th edition later this year.

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