

## **Is it a bird? Is it a plane? No, it's a house!**

### **Joe Ollech and Jamie Sutherland present an overview of relevant principles and practical tips arising under the enfranchisement legislation**

#### **Introduction**

1. Tonight's seminar focuses on some aspects of, and common issues arising under, the Leasehold Reform Act 1967 ("the 1967 Act") and the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"). These are important and powerful pieces of legislation. They are expropriatory, in that they confer the rights on tenants to acquire freehold interests or renewed long leases from their landlords compulsorily. The 1967 Act relates to houses, and the 1993 Act governs flats. The 1993 Act permits collective enfranchisement, whereby a group of tenants can combine to acquire the freehold of a block, and individual lease enfranchisement by way of 90-year lease extensions. The former right does not form part of the seminar.
2. If procedure is properly followed and the rights are properly exercised then the landlords and the court have no discretion. The tenant is entitled to the freehold or a renewed term of the lease, as the case may be, and all that there is to debate is the value of the interest to be acquired. The policy reasons that lie behind the decision to favour the future rights of the tenant over the private property rights of the landlord are beyond the scope of tonight's seminar, and in any case are largely academic. The essential principle is that Parliament has decided that in certain circumstances particular tenants should be entitled to acquire the freehold or extended leases of their premises.
3. The provisions under both acts are extremely complicated, a minefield for even experienced landlord and tenant practitioners. The interests at stake can often be very valuable, and

litigation is common. Landlords who oppose the application commonly take issue with (a) formality requirements under the required statutory notices; (b) whether the applicant and/or the property qualifies under the terms of the legislation; and (c) the value proposed by the applicant.

4. The seminar is divided as follows:

- An introduction to the 1967 Act
- Spotlight on the recent Supreme Court decision in *Hosebay Ltd v Day* [2012] UKSC 41
- An introduction to the 1993 Act
- A sample of 1993 Act issues that arise in practice

**The 1967 Act – an overview**

5. The 1967 Act applies to **houses**, giving the right to those who rent houses on long leases to acquire the freehold of the property, or a lease extended by 50 years.

6. **House** is defined in section 2(1) as follows:

*“ ‘House’ includes any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was or is not solely designed or adapted for living in, or is divided horizontally into flats or maisonettes; and (a) where a building is divided horizontally, the flats or other units into which it is so divided are not separate ‘houses’ although the building as a whole may be; and (b) where a building is divided vertically the building as a whole is not a ‘house’ though any of the units into which it is divided may be”.*

7. The “notwithstanding” saving introduces a subtle layer of analysis – a building may qualify as a house even if only part of it is designed or adapted for living in – but to do so it must nevertheless overall still be a house “reasonably so called”. The definition excludes flats and maisonettes. It permits semi-detached houses – each half may be a “house” but not the whole. Section 2(2) excludes overlapping premises, which avoids issues of flying freeholds. For lease extensions the right is restricted in its application to properties which are within certain rateable value or other financial limits. The tests vary on whether the lease was granted before or after 01.04.1990, which was the date domestic rates were abolished.
8. The right to enfranchise extends to the **house** and **premises**. “Premises” means any garage, outhouse, garden, yard and appurtenances which, at the date the tenant serves his notice of claim is let to him with the house. This can be either under the same lease or by a supplemental lease. Post 26.07.2002 (and 01.01.2003 in Wales) the requirement that it be “occupied with and used for the purposes of the house or any part of by him or another occupant” has been abolished.
9. The right to enfranchise can only be exercised by a **qualifying tenant**, which means that (a) he must have a long tenancy and (b) he must have been the tenant under that long lease for a period of at least two years before serving a notice of claim. The two years tenancy requirement has replaced what used to be a residency requirement, so that the Act has become more generous in this regard. The tenancy can be a tenancy or a sub-tenancy, but not a tenancy at will, at sufferance, a mortgage term liable to be extinguished by a right of redemption, or a trust interest under a settlement.
10. A “long” tenancy is a tenancy originally granted for a term of **more than 21 years**. It is important to remember that for the purposes of the Act the 21 years is measured from whichever is the later of either the date of the grant of the lease, or the commencement of the term. It is not counted from a commencement date which pre-dates the actual date of grant.

It must be a single term. The tenant cannot add together consecutive terms of less than 21 years. It does not matter if there is a break option, or a right of re-entry.

11. For various reasons, prior to 26.07.2002, the 1967 Act could extend to leases which were also business tenancies. This has been changed by the Commonhold Leasehold and Reform Act 2002 so that the 1967 Act will not apply to a Landlord and Tenant Act 1954 tenancy unless certain specific conditions apply – see section 1(1ZC) of the 1967 Act.
12. The tenant must serve a **Notice of Tenant’s Claim**. It must be in the prescribed form, or “in a form substantially to the same effect” - Leasehold Reform (Notices) Regulations 1997 paragraph 2. For claims after 26.07.2002 (or 01.01.2003 in Wales) the regulations are the 1997 Regulations as amended by the Leasehold Reform (Notices)(Amendment)(England) 2002 (or (Wales) 2002).
13. Apart from the prescribed form there are primary prescriptive requirements under the 1967 Act, Schedule 3, paragraphs 6(1) and 6(2). Care must be taken when using the prescribed form because it has not always been kept up to date with Schedule 3, paragraph 6 and vice versa. There is a saving provision at Schedule 3, paragraph 6(3) which provides that the notice shall not be invalidated by any inaccuracy in the particulars required by this paragraph or any misdescription of the property to which the claim extends, but it is considered (by the authors of *Hague on Leasehold Enfranchisement*) that this only extends to errors in particulars required under Schedule 3, not in particulars required by the Regulations and the prescribed form.
14. Once notice is served the parties become contractually bound to grant and accept the freehold or the extended lease. The remedies of specific performance, rescission and damages apply. However, the benefit of the notice is assignable, as long as it is not separated from the tenancy of the entire house and premises – section 5(2). This is why one often comes across

the sale of leases in houses where the purchaser requires the vendor to serve a notice before the sale and assign its benefit to the purchaser. This saves the assignee having to wait two years before he can serve notice, which may make a material difference to the price that will be calculated as due to the landlord.

15. The valuation mechanisms for acquiring the freehold or extending the lease are beyond the scope of this seminar.

***Hosebay Ltd v Day, Lexgorge Ltd v Howard de Walden Estates Ltd* (SC(E)) [2012] UKSC 41; [2012] 1 WLR 2884**

16. The mere fact of this Supreme Court decision, 45 years after the passage of the 1967 Act, is an indication of just how complex this area of the law can be, and how it can still generate problematic issues at the highest level. This is even more stark when one notes that the Supreme Court was concerned only with the first part of the definition – “*any building designed or adapted for living in and reasonably so called*”.
17. This was the hearing of conjoined appeals which raised the same issues. *Hosebay* concerned 29, 31 and 29 Rosary Gardens, South Kensington. These were late Victorian buildings, built as separate houses forming part a terrace of town houses. All three had been converted into sets of small flats, which were let out as what the judge at first instance described as a “self-catering hotel”. Each had been fully adapted to provide individual rooms for letting out. Each room had from one to four beds, furniture, some storage space and a small wet room. Fresh linen and room cleaning were provided, but no other services. The judge and then the Court of Appeal held that the buildings had been adapted for living in. They also held that they were houses “reasonably so called”.
18. Lord Neuberger MR’s reason for this was that:

*externally, each of the properties has the appearance of being a relatively large town house; internally, each of the properties has been converted so that almost every room can be used as a self-contained unit for one or more individuals, with cooking and toilet facilities....I find it hard to see how the judge could be faulted for concluding that, even if each of the three properties might be called something else as well, they could each reasonably be called a house.*

19. *Lexgorge* concerned 48 Queen Anne Street, Marylebone. It was also built as a large town house, again part of a terrace. It was built in the late 1700s, and consisted of a basement plus four floors. In 1888 it began to be used for commercial purposes. All four floors were used as offices when the notice was served in 2005. In 2009, at trial, the top two floors were residential, but the lower two were still offices. In this case the landlord conceded that it was, at least still in part, designed or adapted for living in. The landlord disputed that it was a house reasonably so called, but lost at first instance and on appeal.

20. This time Lord Neuberger's reasoning was:

*If the upper two floors of the property had been empty, I have little doubt but that the property could reasonably have been called a house, bearing in mind its external character and appearance (a classic town house in London's West End), its internal character and appearance at least on the upper two floors (which were, as I understand it, substantially as constructed), the description of the property in the lease as 'messuage or residential or professional premises', and, to the extent that it is relevant, the terms of the lease (restricting the use of the upper two floors to residential). I find it hard to see why the fact that the upper two floors had been used (even for many years) as offices (in contravention of the terms of the lease) should wreak such a change that the property could no longer reasonably be called a house.*

21. Lord Carnwath gave the judgment of the Supreme Court on 10.10.2012, and in the course of his judgment he revisited older decisions addressing the definition of a house.

22. *Ashbridge Investments Ltd v Minister of Local Housing and Government* [1965] 1 WLR 1320 was not actually a 1967 Act case at all, but a challenge to a compulsory purchase decision under the Housing Acts for the purposes of slum clearance. Its importance lies in Lord Carnwath's endorsement of the general definition Lord Denning gave of the word "house" in that case, as will be explained in more detail below. The case concerned two adjoining buildings in a terrace, designed as shops with rear living rooms and residential space above. Neither was actually in use for residential purposes. The Minister for Housing and Local Government had decided that because of internal structural alterations one of the two houses had lost its identity as a dwelling. The other one, while still a dwelling, was unfit. Under the Housing Act 1957 there was no definition of "house". Lord Denning MR said that a house was "a building which is constructed or adapted for use as, or for the purposes of, a dwelling". The buildings were not actually in use at the time, so this was an attempt to capture the function of idle building.

23. *Lake v Bennett* [1970] 1 QB 663 was another Lord Denning decision, this time under the 1967 Act, concerning a three storey house, with ground floor converted into a shop. Here it is – 61 Gayton Road, Hampstead:



24. There was no debate that the building qualified for “adapted for use for living in”, and the Court of Appeal held that despite the ground floor shop the building was a house reasonably so called. This required reference to the proviso which qualifies the building even if it is “not solely adapted” for use for living in. The balancing act is between its partial use for living and whether it can nevertheless be a house reasonably so called overall.

25. *Tandon v Trustees of Spurgeons Home* [1982] AC 755 was a decision of the House of Lords about this building – 116 Mitcham Road, London:





26. Again, it was a case about a mixed use building, as you can see, and it divided the House of Lords. The majority adopted the Court of Appeal's approach in *Lake v Bennett*. The fact that it could either be called "a shop with a dwelling above" or a "house with a shop below" was enough to permit one to consider it a house reasonably so called. But there was minority view that (Lord Wilberforce) that this was not a house at all – it was a mixed unit which put it into a category beyond the intended scope of the Act. In that case the majority discounted the importance of physical appearance, and emphasised the importance of actual use - if there was "substantial" use for the purposes of living in, and/or if the tenant was actually in occupation. "Substantial" could be satisfied by e.g. 25% use as a residence.
27. The *Tandon* emphasis on actual use and internal design was demonstrated by the Court of Appeal in *Prospect Estates Ltd v Grosvenor Estate Belgravia* [2009] 1 WLR 1313.



28. The building had been built as a house in the 1850s, but a hundred years later it was used mostly as offices. The lease which the tenant sought to enfranchise permitted commercial use only apart from a top floor flat which could be used by a director or senior employee. The judge held that it was nevertheless a house reasonably so called, based to a large extent on the fact that the structure and appearance had largely remained unchanged. The Court of Appeal reversed that decision, on the basis that too little weight had been given to (*inter alia*) the actual use of the building and the proportion of residential use.

29. Although this is taking the case law slightly out of order, the *Prospect Estates* decision came after another House of Lords decision in *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2008] 1 WLR 289. This was Lord Neuberger's first take on the subject in the House of Lords. In that case the building had been designed or adapted for living in, but it was disused and in parts had been stripped back to shell. In this case it was accepted that as long it could be still be described as designed or adapted for living in then it would qualify as a house reasonably so called. The House of Lords held that it did count as "designed or adapted for living in". The important part of Lord Neuberger's reasoning was his approach to construction of section 2(1) (emphasis added) – "*any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was and is not solely designed or adapted for living in....*".
30. Lord Neuberger expressed the opinion that "designed" and "adapted" were separate concepts – "designed" was backward looking – what had the building been designed for, "adapted" was present/forward looking – what has the building been adapted to post its original design. He broke down the phrase "or was and is not solely etc..." in the same way, linking the "was" to "designed" and "is" to "adapted". He said that the phrase was to be construed distributively. This would mean that if a building was originally designed for living in, but later adapted for commercial purposes, it would still be within the 1967 Act.
31. In *Hosebay* Lord Neuberger, now sitting as Master of the Rolls, changed his mind on this point. The tenants in this case relied upon his *Boss Holdings* analysis, and argued that since the buildings had originally been designed for living it did not matter that they were now a self-catering hotel, if that use was itself not considered to be adapted for living in. Lord Neuberger now regretted his earlier construction. Although it made sense in a strictly literal sense he now felt that was not what the words were intended to convey naturally. He considers that he had been over-literalist. His revised view was that if a building had been adapted so that it was no longer for living in, it would fall outside the Act until it was re-

adapted. If it was designed as for living in then it must still be so designed, or if it was designed for living in it must have been adapted for that purpose.

32. In *Hosebay* Lord Carnwath agreed that Lord Neuberger MR was right to have revised his opinion, and noted that if the literalist approach is rejected, then that takes the court back to the more impressionistic approach of Lord Denning in *Ashbridge* - a building which is constructed or adapted for use as, or for the purposes of, a dwelling. This is simply looking at its current function. Incidentally, Lord Neuberger's change of heart did not undermine his decision in *Boss Holdings* because in that case it was considered that the building remained adapted for living in even if as a matter of fact it had fallen into disuse.
33. Despite his change of heart Lord Neuberger nevertheless considered that (a) the self-catering hotel was "adapted for living in", and (b), that it was a house reasonably so called. In reaching the latter conclusion he expressed negative views of the decision in *Prospect Estates*, because he considered that the assessment did need to be made essentially by reference to external and internal physical characteristic and appearance. He did not have to consider the question of designed or adapted for living on the commercial *Lexgorge* property because the landlord had conceded the first limb of the test; but for the same reason he held that it was a house reasonably so called.
34. It was on this latter point that the House of Lords allowed the appeal in *Hosebay* and *Lexgorge*, and in doing so confirmed its view that *Tandon* placed a greater emphasis on actual and proportional use than on outward appearance. Appearance is relevant but it is not the most important criteria. In *Hosebay*, a self-catering hotel is not a house reasonably so called, even if it does look like a house from the outside. That is not determinative. Similarly in *Lexgorge* "*a building used wholly for offices, whatever its original design or current appearance, is not a house reasonably so called*".

35. To complete the photo album – here is what the buildings in question looked like:

Hosebay - Rosary Gardens



Lexgorge – 48 Queen Anne Street





36. The good news for practitioners is that this decision should simplify the analysis of whether the Act applies or not. The assessment is influenced less by appearance and history, which may be subjective, and more by actual use, permitted use, and the proportion of use. The decision brings the interpretation of the Act back in to line with what seems to have been its main aim - to allow owners of residential property (which by and large are likely to be homeowners, although they need not be) under long leases to acquire the freehold or renewed leases of their dwellings.

### **The 1993 Act – Introduction**

37. The discussion of *Hosebay v Day* in the first part of this seminar has demonstrated how, 45 years after the passing of the 1967 Act, the proper interpretation of arguably the most fundamental definition in the Act – that of a house – remained open to dispute before the Supreme Court. Enfranchisement legislation is not straightforward, and this is as true of the

1993 Act as of the 1967 Act. In the foreword to the Fifth Edition of *Hague on Leasehold Enfranchisement*, Lord Neuberger said:

*The drafting of the 1993 Act, particularly as a result of subsequent amendments, has frequently been commented on adversely by Judges: indeed, I described it as “inept” in para 11 of my opinion in Earl Cadogan v Pitts [2008] UKHL 71. It is only fair to mention that the 1993 Act deals with a much more tricky area than the 1967 Act – enfranchisement of flats or blocks of flats, rather than of houses. Nonetheless, the relatively casual and superficial attitude to much of the original drafting of the 1993 Act, and, perhaps even more, to subsequent amendments... is more than regrettable. It does no favours to the people the legislation is intended to help, it is unfair on those whose rights are to be compulsorily acquired, and the fact that it leads to litigation means that it has unfortunate implications in terms of cost, effort and delay.*

38. This part of the seminar focuses on several of the quirks in the practical operation of the 1993 Act as it relates to lease extensions – and also several of the traps which the Act sets for the unwary. In what can be a high-stakes game for both sides, there are perhaps too many opportunities for a tenant to lose his or her right to a new lease and for a landlord to lose their say as to the terms on which the new lease is to be granted. This part of the seminar begins with a general overview of the lease extension provisions of the Act.

#### **The 1993 Act – an overview (lease extensions only)**

39. Chapter II of the 1993 Act confers on tenants of individual flats the right to acquire a new lease of their flat for a term expiring 90 years after the term date of their current lease, at a peppercorn rent, for a premium determined in accordance with the Act (sections 39 and 56). The applicant must be a **qualifying tenant** of the flat, i.e. a tenant of the **flat** under a **long lease** (sections 5, 7 and 39). This does not include business leases; leases where the landlord

is a charitable housing trust; or cases where the lease was granted out of a sub-demise of a superior lease other than a long lease, the grant was in breach, and the breach has not been waived. There can only be one qualifying tenant so joint tenants jointly constitute the qualifying tenant.

40. A **long lease** is (most commonly, although there are some alternative possibilities) a lease for more than 21 years (section 7). The ownership condition, since its amendment by the Commonhold and Leasehold Reform Act 2002, is much less onerous than it once was. It used to be necessary for the tenant to have occupied the flat as his only or principal home for three years; now it is sufficient that he has been the tenant under the lease for two years prior to the service of the notice (section 39) – the residency requirement is no more.

41. A **flat** is defined (section 101) as

*a separate set of premises (whether or not on the same floor)—*

- (a) which forms part of a building, and*
- (b) which is constructed or adapted for use for the purposes of a dwelling, and*
- (c) either the whole or a material part of which lies above or below some other part of the building...*

It includes (section 62) any garage, outhouse, garden, yard and appurtenances belonging to or usually enjoyed with the flat and let to the tenant on the date when the tenant's notice claiming the right to a new lease is served.

42. A tenant begins a claim for a lease extension by serving on his landlord a **tenant's notice** under section 42, specifying the premium he proposes to pay for the new lease and the terms which the tenant proposes should be contained in the new lease. The landlord must then give



a **counter-notice** within two months of service upon him of the tenant's notice, either admitting the tenant's right to a new lease; denying that right, with reasons; or, whether admitting or denying the right, stating also that he intends to oppose the grant of a new lease on the ground that he intends to redevelop the premises in which the flat is contained (section 45). If the landlord admits the right, he must state which of the proposals in the tenant's counter-notice he accepts and which he does not accept; in relation to those which are not accepted, the counter-notice must specify the landlord's counter-proposals. Where the landlord denies the tenant's right to a new lease, he may make an application to the court for a declaration that the tenant is not entitled to a new lease under section 46. The grounds for such opposition would be that the flat or the lease does not qualify for the right to a lease extension under the Act.

43. A landlord who has been served with a claim notice is given various rights under the Act. Firstly, he and anyone authorised by him has a right to access the flat at any reasonable time on not less than three days' written notice in order to obtain a valuation (section 44). Secondly, as soon as the tenant's notice is served on him and for as long as it remains in force, the landlord is entitled to require payment of a deposit on account of the premium, being the greater of £250 or 10% of the premium proposed in the tenant's notice (Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993 ("the 1993 Regulations") Sch. 2 para 2(1)). Thirdly, within 21 days of service of the section 42 notice, the landlord may give notice to the tenant requiring him to deduce his title.
44. Where the right to a new lease is admitted by the landlord, or where the court declares that the tenant has a right to a new lease following a landlord's unsuccessful opposition, the landlord must grant the tenant a new lease. The premium payable is to be determined in accordance with Schedule 13 and the terms of the new lease are to be as provided by section 57. If the premium or the terms of acquisition cannot be agreed within two months of service

of the counter-notice, then either party may apply to the Leasehold Valuation Tribunal for a determination of the premium and / or the other outstanding terms of the acquisition (section 48). Such an application must be made within six months of the date of the landlord's counter-notice.

45. If the landlord fails to give a counter-notice, or fails to give a counter-notice on time, then the court may, on the application of the tenant, make an order determining, in accordance with the proposals contained in the tenant's notice, the terms of the acquisition (section 50).

### **The 1993 Act – Practical tips**

46. The preceding section summarises the basic workings of Chapter II of the 1993 Act. However, in practice, acting for landlord or tenant can be a lot more complex than the summary may suggest. The remainder of this seminar looks at several issues that may arise when acting for either a landlord or a tenant under the 1993 Act.

#### *Identifying the landlord*

47. Firstly, there arises the question of who is the **competent landlord** for the purposes of the 1993 Act. This will not necessarily be the tenant's immediate landlord under the lease of the flat. Section 40 provides:

- (1) *In this Chapter, "the landlord", in relation to the lease held by a qualifying tenant of a flat, means the person who is the owner of that interest in the flat which for the time being fulfils the following conditions, namely—*
- (a) *it is an interest in reversion expectant (whether immediately or not) on the termination of the tenant's lease, and*

*(b) it is either a freehold interest or a leasehold interest whose duration is such as to enable that person to grant a new lease of that flat in accordance with this Chapter, and is not itself expectant (whether immediately or not) on an interest which fulfils those conditions.*

48. Section 40(4) defines the landlord who fulfils the section 40(1) criteria as the competent landlord and section 40(2) provides that, where the competent landlord is not the tenant's immediate landlord, the competent landlord shall nevertheless conduct all proceedings arising out of a tenant's claim notice on behalf of all the other landlords.

49. The rationale of section 40 is clear: often a tenant's immediate landlord will have a reversionary interest expiring a short time – often only a few days – after the tenant's own lease and so is not in a position to grant a 90-year lease extension. The tenant must go up the ladder of proprietary interests until he reaches the first party with a sufficient reversionary interest – either freehold or leasehold – to grant such an extension. In some cases, there can be quite a few steps in the ladder: the tenant's immediate landlord may have a lease of the flat alone, while his landlord has a lease of the particular building, and his landlord in turn has a lease of the whole block of buildings – before eventually the freeholder is reached, in London, often one of the big estates. The competent landlord will be the first landlord on this ladder who meets the section 40(1) criteria and there may be one or more intermediate landlords between the qualifying tenant and the competent landlord.

50. When acting for a tenant, therefore, it is important to identify the competent landlord and each intermediate landlord. Where the relevant interests are registered, this can relatively easily be done by examining the property register of the registered title to each of the superior leasehold interests and identifying the expiry date of superior leasehold interests, to

see which, if any, has a sufficient reversionary interest to grant a 90-year lease extension. If none does, then the competent landlord will be the freeholder.

*Serving and drafting a section 42 notice*

51. The 1993 Act requires the tenant's notice to be served on the competent landlord (section 42(2)(a)), as well as on any intermediate landlord (Schedule 11, para 2.1). In addition, it must be served on any third party to the lease (section 42(2)). Third parties are defined in section 62 as any person who is party to the lease who is not the tenant or his immediate landlord. Third parties are not to be confused with intermediate landlords – rather, third parties will be management companies, or sureties, who are parties to the tenant's lease of the flat.
52. Section 42 makes detailed provision as to what a tenant's notice must contain and careful reference should be made to it when drafting a tenant's notice. Unhelpfully, there is no prescribed form for a tenant's notice under section 42 and so especial care should be taken to ensure that nothing is missed out.
53. Section 42(3)(b) requires sufficient particulars to be given of the flat and the lease respectively to identify them: beyond giving the postal address of the flat and the date, term and parties to the lease, it is helpful also to give the title number of the registered leasehold interest and to identify the floor on which the flat is located. The particulars in section 42(3)(b) are required to show that the tenant has the right to acquire a lease extension. Oddly, however, despite the abolition of the residence test and the introduction of the two-year ownership test by the Commonhold and Leasehold Reform Act 2002, there is no requirement that the tenant's notice state that the tenant has been qualifying tenant of the flat for the last two years. It is to be recommended that a statement to this effect is included, however, to show that this test is satisfied: rather than simply state that the tenant has been a qualifying

tenant for at least two years, it is best to state when the qualifying tenant acquired the lease and thus for how long he or she has been a qualifying tenant. If acting for a landlord who receives a tenant's notice which does not state that the two-year qualifying tenancy condition is met, the tenant should be asked to confirm this point: this is the most obvious reason for the landlord to exercise his right to require the tenant to deduce his title under the 1993 Regulations.

54. The tenant's notice must state the premium to be paid to the competent landlord and must also state the premium proposed to be paid to any intermediate landlord (section 42(3)(c) and Schedule 13). The premiums to be paid are to be calculated in accordance with Schedule 13 – Part III deals with the valuation of premiums to be paid to competent landlords. The premiums proposed to be paid must be realistic, or else the notice will be invalidated: thus, in *Cadogan v Morris* [1999] 1 EGLR 59, the Court of Appeal held that a proposed premium of £100 where the actual premium payable would exceed £100,000 invalidated the notice. The appropriate test suggested by Stuart-Smith LJ in that case was the 'well known elephant test. It is difficult to describe but you know it when you see it'.
55. It is vital that a tenant's notice specify a premium to be paid to each intermediate landlord – it was held by HHJ Peter Cowell in *Wellcome Trust v Fenwick* (Unreported, Central London County Court, 2001) that the tenant's notice would otherwise be invalid. Following his own decision in that case, HHJ Cowell later held in *Howard de Walden Estates Limited v Subhanberdin* (Unreported, 2008, Central London County Court) that a tenant's notice which proposed 'none' as the payment to be made to an intermediate landlord was invalid. Despite these serious consequences, failure to specify a premium payable to intermediate landlords is a common mistake in tenant's notices.
56. Section 42 requires a tenant's notice to specify the date by which the landlord must respond by giving a section 45 counter-notice; this date must be not less than two months after the

date of giving the tenant's notice. To allow time for service of the tenant's notice on the landlord, the date specified should allow a few days' leeway beyond the minimum two months.

57. Para 9.1 of Schedule 12 to the 1993 Act provides that the tenant's notice shall not be invalidated by any inaccuracy in any of the particulars required by section 42(3). This saving provision has a narrow scope, however. The particulars covered are those in section 42(3)(b) – particulars of the flat and the lease which show that the tenant is entitled to acquire a new lease – and not the requirements elsewhere in section 42, for instance, that the notice specify proposed premiums or terms of the new lease (*Cadogan v Morris* [1999] EGLR 59 CA) or a date by which the counter-notice must be served by the landlord (*Free Grammar School of John Lyon v Secchi* [1999] 3 EGLR 49 CA). Failure to include any of the section 42(3)(b) particulars at all will invalidate the notice and if the date given for service of a landlord's counter-notice is too early, or the premium proposed is unrealistic, the saving provision will not help.

58. Given the importance of getting a tenant's notice right, it is advisable, if at all possible, to have any draft checked by a second pair of eyes.

#### *Succession and assignment*

59. Often a tenant living in his flat with no plans to move homes is relatively little perturbed by the fact that his existing lease has an ever-decreasing finite term. It is commonly when other parties become involved, either through the tenant seeking to sell his flat, or through the tenant dying and his flat passing to his personal representatives, that the right to acquire an extended lease becomes important – and in these cases its importance may be chiefly to third parties, such as the tenant's personal representatives or a prospective purchaser of the flat. However, section 39(2) provides that the right to acquire an extended lease is exercisable

where the tenant ‘has for the last two years been the qualifying tenant of the flat’. How, then, are purchasers and personal representatives to exercise the right?

60. The Act makes provision for both these situations. Section 43 provides:

- (1) *Where a notice has been given under section 42 with respect to any flat, the rights and obligations of the landlord and the tenant arising from the notice shall enure for the benefit of and be enforceable against them, their personal representatives and assigns to the like extent (but no further) as rights and obligations arising under a contract for leasing freely entered into between the landlord and the tenant.*
- (2) *Accordingly, in relation to matters arising out of any such notice, references in this Chapter to the landlord and the tenant shall, in so far as the context permits, include their respective personal representatives and assigns.*

61. Thus, under section 43(1), where a qualifying tenant has given a tenant’s notice before his death, the claim to a new lease may be continued by his personal representatives. Furthermore, where a qualifying tenant has not given a tenant’s notice before his death, section 39(3A) provides that his personal representatives may do so:

*On the death of a person who has for the two years before his death been a qualifying tenant of a flat, the right conferred by this Chapter is exercisable, subject to and in accordance with this Chapter, by his personal representatives;*

*and, accordingly, in such a case references to the tenant shall, in so far as the context permits, be to the personal representatives.*

62. Section 42(4A) provides that ‘a notice under this section may not be given by the personal representatives of a tenant later than two years after the grant of probate or letters of administration’.

63. The rationale of these provisions is clear: on the death of a tenant, his personal representatives need not wait two years until they have themselves acquired the right to claim a new lease under section 39(2); they can claim immediately on the strength of the deceased tenant’s accrued entitlement.

64. *Inter vivos*, as contemplated by section 43(1), a qualifying tenant may assign the benefit of a tenant’s notice which he has served: this is commonly done where a qualifying tenant wishes to sell his flat. Generally, it will be in the purchaser’s interest to acquire the flat with the benefit of a lease extension claim pending, rather than wait two years until he can himself exercise the right, by which time the premium payable may have increased. The vendor, in turn, may expect a higher purchase price if his flat is sold with the benefit of a lease extension claim. The specific statutory provision permitting assignment is section 43(3):

(3) *Notwithstanding anything in subsection (1), the rights and obligations of the tenant shall be assignable with, but shall not be capable of subsisting apart from, the lease of the entire flat; and, if the tenant’s lease is assigned without the benefit of the notice, the notice shall accordingly be deemed to have been withdrawn by the tenant as at the date of the assignment.*



65. An assignment of the rights and obligations under the tenant's notice is commonly effected by a separate deed of assignment, executed contemporaneously with the transfer of the leasehold interest in the flat itself. Great care must be taken when acting on the assignment of a tenant's notice, for either assignor or assignee. The need for caution stems chiefly from the fact that the rights and obligations under the notice are 'assignable with, but shall not be capable of subsisting apart from, the lease of the entire flat' and from the provision that if the lease is assigned without the benefit of the tenant's notice, the notice will be deemed to have been withdrawn as at the date of the assignment. It has been held that the references to assignment in section 42(3) must be construed as referring to legal assignments only and not equitable assignments (*Typeteam Limited v Acton* [2007] EWHC 2963 (Ch.); *Aldavon Company Limited v Deverill* [1999] 2 EGLR 69, Bromley CC). Of course, where the leasehold interest is registered, the legal assignment of the estate only takes place upon registration, not upon the earlier completion of the transfer.
66. Accordingly, if a deed of assignment of a tenant's notice is executed contemporaneously with execution of the transfer of the lease, and is worded in such a way as to assign the rights and obligations under the tenant's notice immediately upon execution, then the assignment of the notice will be ineffective: at that stage there will have been only an equitable assignment of the lease, but a purported full legal assignment of the tenant's notice, such that the notice will have been assigned apart from the lease. In order to circumvent this problem, deeds of assignment should be drafted so as to effect the legal transfer of the rights and obligations under the tenant's notice at the moment of registration, when the legal transfer of the lease itself is perfected. Possible wording would be:

*the Assignor hereby assigns all the Assignor's rights and obligations in the Tenant's Notice to the Assignee (with effect from the vesting of the Lease in the Assignee by virtue of the registration of the transfer to the Assignee of that leasehold interest).*

67. Similarly, a deed of assignment cannot be effectively executed following the legal assignment of the lease. This was decided in *Aldavon Company Limited v Deverill* [1999] 2 EGLR 69, Bromley CC. In that case, a purported deed of assignment of the tenant's notice was executed following transfer and registration of the lease, but backdated to the date of completion of the transfer of the lease. This purported assignment was held to be invalid: the tenant's notice was deemed withdrawn and the assignee could not continue the claim for a new lease begun by the assignor's notice.
68. As well as ensuring that the timing is right, other points should also be covered in a deed of assignment. It should provide that the assignor will co-operate in the event that the right to a new lease is challenged by the landlord. If a deposit has already been paid to the landlord, the deed of assignment should make provision as to who is to have the benefit of it. In a case where this was not provided for, the assignor was held entitled to recover the deposit from the assignee, the assignee having received the benefit of it on completion of the acquisition of the new lease (*Money v Westholme Investments Limited* [2003] EWCA Civ 1659).
69. A deed of assignment should also make provision for the assignor to give notice to the landlord of the assignment of the benefit of the notice, preferably with the deed of assignment itself attached. Besides anything else, this shows the landlord that the assignment has been properly effected, being executed and taking effect at the right times. When acting for a landlord and no notice of assignment is received, it may not be discovered that there has been an assignment of the benefit of the notice until the assignee makes an application to the LVT for determination of the terms in dispute: the landlord's counter-notice might, in the meantime, have been served on the assignor. In these circumstances, enquiries should immediately be made as to how the assignment of the benefit of the tenant's notice was effected and a copy of the deed of assignment should be requested. If there are reasonable grounds for doubt on the landlord's side that the notice was properly assigned, and the landlord wishes to challenge the assignee's right to pursue the claim to a lease extension on

the basis that the tenant's notice has been deemed withdrawn, then even if an LVT application is already afoot, the proper forum for determination of this issue is the county court: the landlord should seek a stay of the LVT proceedings and make an application to the county court for a declaration.

*Terms of the new lease*

70. Section 56(1) of the 1993 Act provides that a new lease shall be for a term expiring 90 years after the term date of the existing lease and shall be at a peppercorn rent. What of the other terms of the new lease?

71. Section 57 makes detailed provision as to the terms on which the new lease is to be granted. Some of its key features can be seen in the following extracts:

(1) *Subject to the provisions of this Chapter (and in particular to the provisions as to rent and duration contained in section 56(1), the new lease to be granted to a tenant under section 56 shall be a lease on the same terms as those of the existing lease...*

...

(6) *Subsections (1) to (5) shall have effect subject to any agreement between the landlord and tenant as to the terms of the new lease or any agreement collateral thereto; and either of them may require that for the purposes of*

*the new lease any term of the existing lease shall be excluded or modified in so far as—*

- (a) it is necessary to do so in order to remedy a defect in the existing lease; or*
- (b) it would be unreasonable in the circumstances to include, or include without modification, the term in question in view of changes occurring since the date of commencement of the existing lease which affect the suitability on the relevant date of the provisions of that lease.*

72. As can be seen, the starting point in determining the terms of the new lease is that it shall be on the same terms as the existing lease. In many cases, however, simply to grant a new lease on the same terms would be a missed opportunity: a lease extension gives the chance to modernise or remedy an out-dated or unsatisfactory lease. There are reasons why both sides may wish to do this. A large landlord may wish to grant a lease extension in its own modern standard form, to regularise the administration of the building or its broader estate. A tenant may seek an improved lease that will be more marketable or mortgageable.

73. The happiest circumstance, therefore, would be that landlord and tenant agree on the terms to be included in the new lease. If they are agreed, then save for the inclusion of several mandatory terms set down in the 1993 Act, there is no limit to what they can do: the lease can be entirely rewritten.

74. In the absence of agreement, however, there is relatively limited scope for modifying the terms of the existing lease. Either party may require the exclusion or modification of any existing term of the lease either on the grounds that it is necessary to remedy a defect in the existing lease (section 57(6)(a)), or that it would be unreasonable to include the term, or include it without modification, in view of changes occurring since the date of

commencement of the existing lease (section 57(6)(b)). If these requirements are disputed, then either party may apply to the LVT for a determination of the terms of acquisition (section 48).

75. Section 57(6)(a) is narrow in scope: where satisfied, it allows the exclusion or modification of existing terms, not the introduction of wholly new terms: this was held by H.H. Judge Huskinson in the Lands Tribunal in *Gordon v Church Commissioners for England* (Unreported, 2007). Accordingly, in that case, the tenant's attempt to introduce a new covenant obliging the landlord to enforce covenants against other tenants in the estate was unsuccessful. Furthermore, it only allows exclusion or modification where "necessary" to correct a "defect". "Defect" is not defined in the 1993 Act, but both "defect" and "necessary" are narrowly and strictly construed. In *Waite v Morris* [1994] 2 EGLR 224, a term requested by a tenant requiring the landlord to give the tenant's mortgagee 21 days' notice of forfeiture proceedings was refused as not being necessary. In *Davies v Howard de Walden Estates Limited* (Unreported, 1998, LVT), it was held that a provision in the existing lease, making performance of the landlord's covenants conditional upon payment of the rent and performance of the tenant's covenants, was not a defect.

76. Given the limited opportunities to modify the lease in the face of opposition, it is helpful to agree as much as possible. When acting for either side, particularly when the other side are representing themselves, it should be remembered that it is never too late to obtain the other side's agreement to proposed new terms. A landlord or tenant who, in correspondence, has firmly opposed all of the other side's proposed modifications, may be talked round at the door of the Tribunal hearing room to agree terms which, when fully explained face-to-face, are in fact reasonable, but which the Tribunal would have no jurisdiction to order under section 57. The Tribunal itself will often welcome such a narrowing of the issues in dispute on the day of the hearing.