

Rights of first refusal under the Landlord and Tenant Act 1987

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CATEGORY:
ARTICLE

A foil to development?

Part 1 of the Landlord and Tenant Act 1987 applies to premises which consist of the whole of or part of a building. It provides that any landlord wishing to dispose of his interest in a building containing two or more flats must first offer the interest to 'qualifying tenants'. If the tenants do not exercise their right, the landlord has 12 months to proceed with the disposal, which must be at the same or a higher price than that offered previously to the tenants. If the tenants do exercise their right, the landlord must either transfer the interest to the tenants' nominee purchaser, or withdraw from the sale.

For the Act to apply to premises, the 'building' must (in broad terms) contain two or more flats held by 'qualifying tenants', and more than 50% of the flats must be held by qualifying tenants. However, the Act does not define the term 'building', which has led to much litigation. 'Qualifying tenants' are (again, in broad terms) tenants with long leases as opposed to tenants holding on short-term lets.

Whilst the provisions of the Act are somewhat thorny and often criticised by practitioners for their poor drafting, failure to comply with them, without reasonable excuse, will have the following consequences:

1. The landlord will commit a criminal offence, for which it can currently be fined up to £5,000; and
2. A third party purchaser may also be required, on an application to the Court by the tenants, to transfer the interest acquired from the landlord to the tenants on the same terms as those on which it was acquired.

'Relevant disposal'

The procedure set out in the Act must be followed when there is a relevant disposal, unless the 'disposal' is expressly excluded by the Act.

As well as sales, relevant disposals include:

- The grant of an option
- A disposal of part of the common parts
- A disposal by a mortgagee exercising its power of sale or lease

Landlord in default

A recent case, *Artist Court Collective Limited v Khan* (2015), is a salutary example of the court exercising its discretion to order a purchaser to transfer an interest it had acquired to the tenants.

In that case, the landlord, Mr Khan, sold the freehold interest in a block of 8 residential flats and 3 commercial units for £225,000 to a company owned and controlled by him. The company opened one of the units as a fish and shop, which upset the tenants in the block. The tenants therefore explored their rights, and became aware of the transfer to the company. They served a 'purchase order' on the company requiring it to transfer the property to them. In response, the company transferred the freehold back to Mr Khan for no consideration. The tenants then served a second purchase order on Mr Khan. The court held that Mr Kahn was obliged by the Act to transfer absolute title to the property to the tenants for no consideration.

Demising 'airspace'

Dartmouth Court Blackheath Limited v Berisworth Limited, a 2008 case, is one which will be of interest where there are premises which could be developed 'upwards'.

In that case, the Court held that the tenants of a block of 72 flats were entitled to a lease of the roof and airspace above the block. The intention had been for a developer to acquire the roof and airspace and to build new flats on the roof. The Court held that the airspace, at least to the height of the chimneys, was 'appurtenant' to the building, and that even if that was wrong, the airspace was a 'common part' of the building, because it was used now and then to facilitate repairs to the building. Therefore, the tenants were entitled to first refusal in relation to the lease of the roof and airspace (subject to resolution of how far above the roof the airspace extended).

Exercising caution: disposal of an exclusively commercial part of premises

The Act has some unexpected outcomes: when an exclusively commercial part of premises, such as a shop in a mixed-use building containing two or more flats, is to be disposed of, a notice should be served giving tenants in the building a right to refuse the terms of the proposed transaction. In practice, conveyancers almost universally omit this step. Of course, even if notice is served, it would be rare for residential tenants to take up the offer in this scenario but, strictly, it must be done and it will lead to a very significant delay in the context of granting a shop lease. Bearing in mind that non-compliance with the Act's statutory duties can lead to draconian consequences, we recommend that you take advice if you are in any doubt as to whether notice should in fact be served.

[Please click here for our briefing note on the Landlord and Tenant Act 1987.](#)