

Assignment of tenants' rights

Niall Carey examines the key authorities and legislation, and the potential separation of legal title and beneficial interests



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It is acknowledged among enfranchisement practitioners that the path to an extended lease is littered with pitfalls awaiting an inexperienced party, whether they are tenant or landlord. One example is the requirement that any transfer of a claim for an extended lease of a residential flat must take place at the same time as the assignment of the lease to which the claim relates. This is because the enfranchisement claim cannot be owned independently from the lease. It is therefore timely, with the recent improvement in the residential property market and the increase in enfranchisement activity, to remind ourselves what constitutes best practice when assigning lease extension claims, and the potential difficulties that may arise.

Statutory right to assign

Chapter II of Part I to the Leasehold Reform, Housing and Urban Development Act 1993 (the 1993 Act) grants a qualifying tenant of a flat the right to claim an extended lease. To do so the tenant must serve a notice of claim, pursuant to s42 of the 1993 Act, on the landlord, setting out the tenant's proposals for the terms of the new lease and the premium to be paid. In response, the landlord must serve a counter-notice, pursuant to s45 of the 1993 Act, on the tenant within two months, containing counter-proposals.

Section 43(3) of the 1993 Act allows a tenant that has served a notice of claim to assign their right to an extended lease to a successor in title. This is important because s39(2) of the 1993 Act requires that a qualifying tenant must have held the lease for a minimum of two years before having the right to claim an extension. Therefore, rather than waiting two

years before qualifying to make a claim, it is common for a potential purchaser of a flat to insist that the vendor serves a notice of claim before the sale, and transfers the benefit of the claim to them, along with ownership of the flat itself. This allows the purchaser to benefit from an earlier valuation date and usually a reduced premium.

Difficulties with assignments

Section 43(3) of the 1993 Act provides that:

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.

Landlords have used the wording of this section to argue that any transfer of a claim for an extended lease must take place simultaneously with the transfer of the legal title to the lease. This may sound simple, but in practice many tenants have failed to satisfy this test when trying to assign their rights. This is because the deed of assignment between the tenant and the purchaser for the transfer of the claim is usually completed at the same time as the deed of assignment for transfer of the lease, and will often state that the legal title to the claim passes immediately. However, although the beneficial title to lease passes as soon as the deed of assignment is complete, both the Land Registration Act 1925 and the Land Registration Act 2002 state that the legal title in a lease will only pass once the purchaser is registered at the

Land Registry. Therefore, following completion, the purchaser will have full title to the lease extension claim but only beneficial title to the lease. The legal title to the lease remains vested in the vendor and will only pass on registration. Landlords have used this situation to argue that there has been a separation of the legal titles to the lease extension claim and the lease and that, as a result, the lease extension claim is automatically deemed withdrawn.

Case law

For a number of years the leading case on this point was *Aldavon Co Ltd v Deverill* [1999], which supported the landlords' argument. In that case, a tenant claimed an extended lease of a flat under the 1993 Act and subsequently exchanged contracts for the transfer of his existing lease. The contract for sale included a provision that the lease extension claim would also be transferred, but when the assignment of the existing lease was completed, the parties omitted to complete a deed assigning the lease extension claim. Shortly after the transfer of the lease was registered the parties attempted to perfect the transfer of the claim by completing a subsequent assignment.

The landlord argued that the titles had become separated and that the claim was deemed withdrawn. The new tenant argued that the beneficial interest in the claim had passed on exchange of the contracts and that the subsequent assignment only regularised the position. The dispute went to the County Court where, ruling in the landlord's favour, it was held that the 1993 Act was only concerned with legal interests in the lease and in the claim, not the beneficial interests. Therefore, the right to an extended lease had been lost because s43(3) of 1993 Act specified that the rights under the Act were only capable of subsisting together with, and not independently from, the lease and the assignment of the lease, without the benefit of the claim had resulted in the legal interests being separated.

In 2007 the case law swung in favour of the tenants, following *Typeteam Ltd v Acton & Lea*. The facts of that case were similar to those of *Aldavon*, except the vendor and purchaser did enter into a deed of

assignment for the transfer of the lease extension claim, which provided for the title to the claim to pass immediately, rather than on registration of the lease. However, the recitals in that deed of assignment made it clear that the vendor had agreed to sell the lease of the flat to the purchaser, together with the benefit of its claim for an extended lease. In the initial County Court hearing, HHJ Cowell departed from the decision in *Aldavon* and found, in the tenant's favour, that it was permissible to read s43(3) as referring to an assignment taking effect at law or in equity. He held that s43(3) was principally concerned with the intention of the parties and was mainly there to protect against a situation where the vendor of a lease of a flat

be an intention to transfer the existing lease and the lease extension claim, but has given no guidance on when the transfer of the legal title to the lease needs to be perfected. This may lead to a situation where both legal interests could be separately owned, which, in turn, raises questions concerning the identity of the tenant for the purpose of serving the landlord's counter-notice. Is it the owner of the legal title or the owner of the beneficial interest in the lease that should be served? If it is the owner of the equitable interest, the landlord may have no means of identifying that party unless it is aware that the tenant entered into a contract to sell the lease, since the landlord will no longer be able to rely on the registered title as being

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might serve a tenant's notice of claim, but then choose to sell the flat without the benefit of that notice. It was not there to prevent a tenant assigning a claim with the existing lease when that was clearly what was intended, as indicated in the recitals of the deed of assignment for the claim. The landlord appealed to the Chancery Division of the High Court but the judge, Sir Donald Rattee, dismissed the appeal and upheld the original decision, stating:

In my judgment, the clear intention of the parties to the assignment of the rights under the s42 notice was that those rights should pass to the respondents, together with the benefit of the lease. The assignment simply could not take effect in any other way. There is no difficulty, in my judgment, in effecting that intent by construing the assignment as a transfer of the s42 rights to take effect, together with the transfer of the legal title to the lease, which was perfected on registration of the latter, and I do so construe it.

Conclusion

Typeteam has given tenants welcome relief. However, the decision may cause difficulties. For example, the court has indicated that there must

conclusive. This creates some risk for landlords since failure to serve a counter-notice on the correct party will leave the landlord bound by the initial terms of acquisition proposed in the tenant's notice of claim.

Advice

If assigning the benefit of a tenant's lease extension claim, the deed of assignment should clearly state the parties' intention in the recitals, and the transfer of the title to the claim should be expressed to take effect on the registration of the purchaser as proprietor of the existing lease at the Land Registry. This ensures that the assignments of the legal and beneficial interests in both the claim and the lease take effect simultaneously. Landlords and their advisers should also expressly enquire whether the tenant has transferred or intends to transfer the lease and claim before serving a counter-notice and, where the party to be served is unclear, serve both the original tenant and the assignee of the lease. ■

Aldavon Co Ltd v Deverill
[1999] 2 EGLR 69

Typeteam Ltd v Acton & Lea
[2007] EWHC 2963 (Ch)