

# ASSIGNMENT OF LEASE EXTENSION RIGHTS - ONE LESS CONCERN?

It is acknowledged amongst enfranchisement practitioners that the path to an extended lease is littered with pitfalls. An 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. It is therefore timely, with the recent improvement in the residential property market and the increase in enfranchisement activity, to remind ourselves of how to deal with the assignment of lease extension claims.

## STATUTORY RIGHT TO ASSIGN

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. In order to do so the tenant must serve a Notice of Claim on his landlord setting out the his proposals as to the terms of the new lease and the premium to be paid. In response, his landlord must serve a Counter-Notice on the tenant within two months containing his counter-proposals. Section 43(3) of the 1993 Act also allows a tenant that has served a Notice of Claim to assign his right to an extended lease to a successor in title. This is important because the 1993 Act requires that a qualifying tenant must have held his lease for a minimum of two years before having the right to claim an extended lease. Therefore, it is common for a potential purchaser of a flat to insist that the vendor serves a Notice of Claim prior to the sale and transfers the benefit of the claim to him 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:

*"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the tenant's lease is assigned without the benefit of the notice, the notice shall accordingly be deemed to have been withdrawn by the tenant as at the date of the assignment."*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 the 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 sounds simple enough but in practice many tenants have failed to satisfy this test when trying to assign their rights. This is because they often use a deed to assign the lease extension claim and the lease. The deeds are usually completed at the same time and often provide for ownership of both interests to pass immediately. Both the Land Registration Act 1925 and the Land Registration Act 2002, however, state that the *legal* title in a lease will only pass once the purchaser is registered at H.M. Land Registry.

Therefore, following completion, the purchaser will have full title to the lease extension claim but only *beneficial* title to the lease, since 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. Limited v. Deverill* [1999], which supported the landlords' argument. In that case, a tenant agreed to transfer his existing lease along with his claim for a new lease. When the assignment of the existing lease was completed, however, the parties omitted to assign the lease extension claim. Shortly after they attempted to perfect the transfer of the claim by completing a subsequent assignment but the landlord argued that the titles had become separated and that the claim was deemed withdrawn. 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 and not the beneficial interests. Therefore, the right to an extended lease had been lost since the legal interest had become separated.

In 2007 the case law swung in favour of the tenants following the case of *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. The recitals in that Deed of Assignment, however, 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, His Honour Judge Cowell departed from the decision in *Aldavon* and found in the tenant's favour. He held that section 43(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 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 his claim with his existing lease when that was clearly what was intended. The landlord appealed to the Chancery Division of the High Court which upheld the original decision.

## CONCLUSION

The *Typeteam* case has given tenants welcome relief. The decision, however, could cause difficulties. If section 43(3) permits an assignment of the equitable interest in the lease, it 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 he is aware that his tenant entered into a contract to sell the lease since he will no longer be able to rely on the registered title as being conclusive. This creates some risk for landlords since failure to serve a Counter-Notice on the correct party will leave the landlord bound by initial terms of acquisition proposed by the tenant.

## 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 upon the registration of the purchaser as proprietor of the existing lease at H.M. Land Registry. This ensures that the assignments of the legal and beneficial interests in both the claim and the lease take effect simultaneously. Landlords should also expressly enquire whether the tenant has 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.

This article offers general guidance, it reflects the law as at January 2010. The circumstances of each case vary and this article should not be relied upon in place of specific legal advice.

For further information, please contact:

[Niall Carey](mailto:niall.carey@forsters.co.uk) on 020 7863 8385 or [niall.carey@forsters.co.uk](mailto:niall.carey@forsters.co.uk)