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The Hidden Cost of Enfranchising?
Landlord's Costs under the Leasehold Reform, Housing and Urban Development Act 1993

This briefing looks at what costs a landlord might claim from a tenant or tenants in relation to exercising a right to enfranchise, or a right to an extended lease, under the 1993 Act.

Background

The Leasehold Reform, Housing and Urban Development Act 1993 ("The Act") gives long leaseholders the right, in certain circumstances, to buy the freehold of their building, or, alternatively, an individual leaseholder the right to acquire an extension to his or her lease. There have been a great many cases on many aspects of the Act, sometimes because of uncertainties arising from the way it is drafted, or simply because of the inherently confrontational situation which can arise as a result of leaseholders compulsorily acquiring their freehold.

There is one area of the legislation which affects almost all leaseholders and yet about which there is very little court guidance, despite the fact that it can cost leaseholders tens of thousands of pounds. We consider below the costs claimed by landlords from leaseholders as part of the enfranchisement procedure.

Because the costs provisions for enfranchising leaseholders mirror those for a leaseholder extending his lease, for convenience in this briefing we refer throughout to 'the leaseholders' in the plural exercising their rights.

How the Act Works

The procedure under the Act is as follows: a critical mass of enfranchising leaseholders comes together in order to serve a notice upon their landlord of an intention to acquire the freehold of their building. They will, in almost all cases, have taken legal and valuation advice about their claim, because the requirements of the Act are demanding. The landlord has around two months in which to serve a counter-notice to the leaseholders' notice of claim. If terms of acquisition are not agreed in the six months following the counternotice then the leaseholders will need to apply to the Leasehold Valuation Tribunal ("LVT") for a decision as to the purchase price and other terms of the transfer.

Therefore the primary forum for resolution of disputes in relation to the Act is the LVT. Whilst it is clear that applications to the county court might be necessary in limited circumstances, usually an enfranchisement claim will begin at the LVT, and if appealed would then be

considered by the Lands Tribunal ("LT"). Further appeals lie (with permission) to the Court of Appeal, and, ultimately the Supreme Court (formerly the House of Lords).

There is an important point to understand at the outset about two types of costs. Whilst the Act gives a landlord a right to recover certain costs of the enfranchisement process, in the event of a dispute about the terms of acquisition the LVT and the LT have negligible powers to make orders in relation to the litigation costs of proceedings before it. A restriction on costs recovery in the LVT and LT was introduced (and reinforced by later legislation) so that leaseholders would not be intimidated out of an enfranchisement claim because of the threat of having to pay the landlord's litigation fees for its professional advisers (Leaseholders will still need to meet there own costs, whether or not the claim is successful.)

However, the effect of the Act is to deprive a landlord, through no fault of its own, of an asset which it might well have held since long before the introduction of the Act. For leaseholders to be able to exercise such a right of expropriation there must be some price for them to pay.

In practice there are broadly two prices: (1) the price of the legal interest they are buying, for example, the freehold; and (2) sums which, under the terms of the Act, leaseholders are obliged to pay by way of contribution to the landlord's costs of dealing with an application under the Act. The purchase price is usually much larger than the costs figure (but certainly not always), and that might explain why there are many more decisions about enfranchisement prices that about landlords' costs.

Detailed Provisions Relating to Costs

Under section 33 of the Act (section 60 in relation to lease extensions), where leaseholders have served an enfranchisement notice and are proceeding to buy the freehold, then (subject to limited exceptions) the *nominee purchaser* (ie the person or body acquiring the freehold) shall be liable for the landlord's reasonable costs of and incidental to any of the following matters, namely;

(1)

(a) any investigation reasonably undertaken

(i) of the question whether any interest in the specified premises or other property is liable to acquisition in pursuance of the initial notice, or

(ii) of any other question arising out of that notice

(b) deducing, evidencing and verifying the title to any such interest

(c) making out and furnishing such abstracts and copies as the nominee purchaser may require

(d) any valuation of any interest in the specified premises or other property

(e) any conveyance of any such interest.

(2) For the purposes of subsection (1) any costs incurred by the reversioner or any other relevant landlord in respect of professional services rendered by any person shall only be regarded as reasonable if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.

(3) Where by virtue of any provision of this Chapter the initial notice ceases to have effect at any time, then (subject to subsection (4)) the nominee purchaser's liability under this section for costs incurred by any person shall be a liability for costs incurred by him down to that time.

There are a number of important points which leaseholders and their advisers need to consider when looking at a demand for costs from a landlord, namely whether those costs;

- *have been incurred* by landlord
- have been incurred *pursuant to a notice*
- are *reasonable (*one test of which is set out in subsection 33(2), that is, are the costs more than the landlord would have been prepared to pay had he been personally liable for the costs rather than passing them on to the nominee purchaser?); and
- fall within the *types of costs* recoverable as set out in subsection 33(1).

It is sometimes the case that, following service of the initial notice, the nominee purchaser does not, in fact, complete the purchase of the property. This might be because of an actual or deemed withdrawal from the process. The Act makes provision for the landlord to be able to recover its costs in this event (ss28 and 29), largely adopting the same criteria as applies under section 33, except that the liability will be that of the individual leaseholders, not the nominee purchaser.

Problems Which Can Arise

There are a number of problems which flow from the costs provisions. Perhaps the most important of these is that the LVT is not a specialist costs tribunal, and therefore there is little in the way of binding authority about costs. Advisers looking for certainty might be disappointed that there is not a larger body of decisions as to the likely costs which an LVT will determine in any particular situation. Questions which might be of particular importance are whether a landlord is entitled to involve more than one specialist surveyor to advise him on a response to the leaseholders' initial notice; whether 'conveyancing' costs are recoverable by a landlord under ss28 and 29 even when no conveyance actually takes place; the potential for an overlap, or lack of clarity, about when costs are incurred in relation to section 33 work, and when they are in fact litigation/tribunal costs and therefore irrecoverable; whether it is relevant that a surveyor is working on a 'success fee' or percentage basis; and the appropriate seniority (and charge out rate) of those advising the landlord.

Landlord's Costs – Challenge or Compromise?

In practice, the question of a landlord's costs is often compromised, albeit not necessarily to the leaseholders' satisfaction. Leaseholders might be required to access funding of tens or hundreds of thousands, or even millions, of pounds to acquire their buildings and there can be a distinct lack of appetite to litigate over the 'mere' hundreds or thousands of pounds being requested by the landlord in relation to costs. In smaller cases it is not unusual for the costs involved in bringing the litigation to outweigh the benefit which would be gained. Even where the leaseholders' notice is withdrawn, (in which case the leaseholders will be personally liable for the landlord's costs under ss28 and 29), there are reasons not to fight a claim for a landlord's costs. The question of costs would need to be decided by the LVT. Considering the 'reasonableness' of costs is something on which people might understandably want to take professional advice, but in the LVT they will not get their costs back of so doing even if they are successful.

Leaseholders who are prepared to challenge a landlord's claim for costs should make sure that they have considered all the necessary aspects of section 33, including whether the costs claimed have actually been incurred. Leaseholders should be entitled to full details of how the costs claimed have been incurred, by whom, and on what basis. Landlords and those advising them should, therefore, keep scrupulous records of their basis of charging, including time incurred, because in the absence of detailed evidence the LVT probably will not give them the benefit of the doubt. A successful challenge by leaseholders can save them thousands (or in one case on which we acted tens of thousands) of pounds.

Leaseholders concerned about a landlord's claim for costs should consider whether to take advice, or whether they are prepared to do the work themselves in the LVT to challenge those costs. The Residential Property Tribunal Service website has details of many LVT decisions, and a patient review of these can give some guidance about the sorts of decisions the LVT makes about costs. There are also 'paper only' procedures at the LVT, designed with the aim of minimising costs, which might be appropriate. Even if a hearing is necessary the structure of the LVT is such that it is quite used to hearing submissions from members of the public and it makes the necessary allowances by having a more relaxed procedural approach than the courts.

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