

All change in residential leasehold?

Are we moving towards significant reforms in enfranchisement? Mark Chick examines the key points from the Law Commission's recent consultation paper



The Law Commission's consultation paper on proposed reforms to enfranchisement legislation, published on 20 September, runs to 564 pages and asks for views on 135 questions relating to the proposed changes, some of which are quite radical. A copy of the consultation, *Leasehold home ownership: buying your freehold or extending your lease*, which closes on 20 November 2018 can be found at bit.ly/2OJqzeh.

The proposed reforms, some of which are outlined below, make sweeping changes to the whole process of enfranchisement and also propose radical reform to the basis of valuation aiming 'reduce the price' paid on enfranchisement. There are also suggestions of a fixed or no-costs regime for landlords, and so the proposed changes are therefore in essence political as they seek to reverse the emphasis between landlords and tenants.

The most sweeping suggestion from a technical point of view is the suggestion that there should be a single scheme of enfranchisement rights applying to any residential 'unit', be it a flat or a house. This would do away with the distinction and repeated efforts in case law to determine what constitutes a house, a question that has troubled the highest appeal court on no less than five separate occasions.

Help for houses

It is proposed that the right to enfranchise would apply to all leasehold houses, even if the demise under the lease is an internal repairing obligation only. This would be a departure from the current position under the Leasehold Reform Act 1967 where a leaseholder can only qualify to buy the freehold to their house if their lease is a 'fully repairing' lease of the whole.

In addition, under the new regime house owners will be able to join in, or initiate an 'estate enfranchisement' acting either on their own or with flat owners. This right would allow the common parts of the estate to be purchased.

Lease extensions—houses & flats

Under the proposals, anyone seeking a lease extension would get an extension to 125 or 250 years (to be decided). The basis of valuation would be the new valuation model and house owners could elect whether to enfranchise or to seek a longer lease.

The existing (and little used) right to a 50-year lease extension of a house with a modern ground rent will go.

In addition, the requirement that a leaseholder would have to own their flat or house for two years before exercising these rights will be removed. This would remove a lot of the scope for debate around the service and transfer of notices.

Notices generally

At the moment, the scope for debate about validity of notices is a fertile ground for the production of much case law. The reforms propose a 'unified' approach to bringing a claim with a single prescribed form.

The claim would set out the leaseholders' proposals and would require the landlord by counter notice to propose in detail the transfer or new lease terms so as to cut down the scope for argument about these. The scope for argument would also be reduced removing the 'drop dead' consequences of failing to serve a counter notice allowing the parties to serve a further notice at any time prior to the matter being determined by the tribunal.

The tribunal would have sole jurisdiction over the resolution of questions of validity and would also have the power to award costs.

Valuation

Controversially, the terms of reference that the Law Commission has adopted require them to 'examine the options to reduce the premium (price)' paid on enfranchisement. This is not going to be good news for landlords.

The consultation paper does not come to any firm views about how best to achieve this, but does set out a number of suggestions.

Distinguishing between high & low value claims

The consultation considers whether it might be possible to divide claims up and send them on a particular 'track' dependent on value.

In the case of lower value claims (with a longer lease), the suggestion is that it might be possible to have an online calculator—prescribed by government to 'work out' the defined answer.

However, what the Law Commission seems to be coming down in favour of is prescribing certain elements of the existing regime—such as the capitalisation rate, the deferment rate and relativity—to make the calculation process 'easier' and quicker.

The key question if the law goes down this route will be the question of *who* sets the rates and how to pitch them so that they are 'fair' to both parties. There would also need to be the scope for adjustment if market conditions or long-term investment views required this, but in theory these rates could be set by a government department.

Costs

There are some radical suggestions, including removing the ability of the freeholder to be able to recover costs from the flat owners at all. This does not sit well with the general theme of compulsory purchase legislation, namely that the person whose asset is acquired is normally compensated for the costs incurred in the disposal.

Another suggestion is that there is a scale of fixed costs or prescribed costs, thereby setting a maximum on the amount that can be recovered.

Comment

The nature and extent of the proposals are both far-reaching and radical. This report is only at the consultation stage, but the government has indicated a willingness to make changes in this area. Provided that this political motivation remains, then it is very likely that we will see some wholesale changes in the law relating to enfranchisement.

Mark Chick is head of the landlord & tenant team at Bishop & Sewell LLP (www.bishopandsewell.co.uk), & is also a director of ALEP (the Association of Leasehold Enfranchisement Practitioners).