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## In-House News

### Brethertons Receives Top 500 Recommendation

Brethertons was celebrating in late September having made huge advances in the Legal 500 Directory. Brethertons is now the largest firm of Solicitors in Banbury and Rugby. We are ranked 322 in position in the UK by size of team, from a possible shortlist of 500 key firms.

We were recommended and praised for our Debt Recovery services in the South East region and are in the Top 20 firms providing debt recovery services in the whole of the South East, ranked alongside much larger law practices.

We were also recommended and praised for our Family legal services in the Thames Valley, Berks and Oxon region and we are ranked in the Top 15 providers in that region.

The Legal 500 Directory is recognised as a "legal Bible" in the analysis, research and ranking of UK law firms. The Legal 500 independent researchers have looked at all firms and ranked their size, capabilities and areas of specialisation. Clients and contacts of the firm were also contacted by the researchers for their personal and independent views.

Senior Partner Richard Pell said: *"We are delighted that our services have been recognised in this way. The Legal 500 is a reputable legal directory, read by many people up and down the country looking to appoint a quality lawyer. Standing up to external scrutiny can be a daunting task, but Brethertons has been praised hugely and recommended in a regional comparison to other firms and we are thrilled."*

## Mediation Week

Brethertons led the way in the Court Service Mediation Week which took place from 9th-13th October. One of our partners, Shaun Jardine, was the lead Mediator for the Banbury County Court scheme. The aim of Mediation Week was to promote the awareness and benefits of Mediation Law as a way of resolving both commercial and personal disputes.

Mediation is a technique to resolve disputes between parties which has been around for a number of years. It is a voluntary "Without Prejudice" process in which a neutral person helps to bring disputing parties to a settlement.

Disputes between freeholders and lessees are matters which may well benefit from an independent Mediator's involvement. After all, both parties usually have a common interest (to have the property maintained) and both parties have a written contract (the lease), which sometimes is not as well drafted as the parties might like, as it does not necessarily cover the situation that has arisen.

At Brethertons we have a number of partners and staff who are qualified and accredited Mediators. For further details about our mediation services contact Shaun Jardine on (01295) 270999.

## London Landlords' Day – a Great Success

Shaun Jardine, the Head of our Banbury Litigation Department, was one of the principal speakers at London Landlords' Day, an event held at the University of London, at which over 1,000 landlords attended.

Shaun, who deals with a lot of property related litigation, conducted a joint presentation with Barrister, Ranjit Bhoose, detailing the "Top Ten Mistakes which landlords make when Undertaking their own Possession Proceedings". The presentation was extremely well received, with Ranjit and Shaun having to continue

taking questions from the delegates outside the lecture theatre some 30 minutes after the presentation finished.

Shaun said: *"I thoroughly enjoyed myself at the event, which was extremely well attended." The lecture theatre only had a capacity for 150 delegates, but they managed to cram in a few more who sat on the steps. After the event had finished, Ranjit and I were mobbed - it was as near as we will ever get to feeling like pop stars!"*  
[Editor's note: Yeah right!]

## Are Your Credit Control Procedures up to Scratch?

We have recently been asked by a number of property management companies to review their internal procedures for collecting ground rent and service charge. This includes looking at the ways in which demands are created, the wording that is used and the follow-up mechanisms that are in place to collect outstanding ground rents and service charges.

It seems as though this service is of interest to a wider number of property companies.

If you would like Shaun Jardine (Head of the Litigation Department) and Caroline Lee (Head of Residential Property Management Department) to visit your offices after your documentation has been reviewed, we are happy to do so for a fixed fee of £295 plus VAT. For further details contact Caroline Lee on (01295) 270999.

## The Latest Case to Rock to the Leasehold Valuation Market

By Yashmin Mistry

Since the introduction of tenants' rights to acquire their freeholds under the Leasehold Reform Act 1967 ('the 1967' Act) and more recently since the introduction of the Leasehold Reform, Housing and Urban Development Act 1993 ('the 1993 Act'), valuers have argued consistently over how to deal with deferment rates.

A number of recent Lands Tribunal Decisions have ensured these arguments are set to continue for some time to come. The decisions and it seems the price to enfranchise is set to increase whilst the value of leasehold property is set to decrease.

### Deferment Rate??

To enfranchise, lessees must pay a sum representing the aggregate of three elements:

- value of the freeholder's interest in the premises
- freeholder's share of "marriage value"; and
- any compensation payable to the freeholder in respect of losses suffered in respect of other properties.

The statutory provisions for the assessment of the price payable on the purchase of the freehold of a house under the 1967 Act, or the value of the landlord's interest on collective enfranchisement under the 1993 Act are in essentially similar terms.

In each case, calculations are based on a number of assumptions:

- landlord's interest is sold on the open market by willing seller
- the relevant Act does not confer the right to acquire the freehold/extend the lease - "no-Act World" assumption; and
- neither the tenant nor other parties with special interests, are seeking to buy - "exclusion of tenant's bid" assumption.

The landlord's interest in premises subject to a lease is to:

- receive during the term, the rent reserved; and
- on the "no Act" assumption, the right to vacant possession at the end of the term.

These two terms are valued separately; the first by capitalising rent over unexpired years and the second, by assessing the capital value of the premises on the basis no lease has been granted and then applying a deferment rate to reflect the fact that vacant possession will arise in future i.e. the lease expiry date. The deferment rate is therefore the rate of compound interest that would need to be earned on an investment made at the valuation date to produce at the end of the term the capital value that has been determined as being open market value of the interest.

In short, what is being ascertained is a valuation tool to be applied to the current open market vacant possession value, which can be ascertained by market evidence.

### The Background

For more than thirty years since the passing of the 1967 Act, valuers dealing with leasehold enfranchisement in the prime Central London area based valuations on a 6% deferment rate. Then in about 2003 freeholders in Central London started questioning why, when yields on all other investments had been falling, the deferment rate should be assumed to be static.

In 2004 the Tribunal applied a deferment rate of 5.25% in respect of a house located in prime central London. Following this, a number of decisions by the Leasehold Valuation Tribunal ('the LVT') became the subject of appeals to the Lands Tribunals which were all heard together towards the end of last year. They all concerned the price payable on enfranchisement claims for houses and flats in Central London. The lead case was *Arbib v Earl Cadogan*.

The Tribunal's ruling rocked the valuation markets for two reasons:

- Firstly, Judge Rich QC ruled merely treating a figure (6% deferment rate) arrived at by historic convention and successive legal decision as one set in stone, to be a failure to address evidence properly. He followed the Appeal Court's decision in *Curtis v London Rent Assessment Committee* which highlighted the dangers of treating one tribunal valuation as precedent for subsequent decisions, in place of evidence.

- Secondly, the tribunal ruled Gallagher Estates and Walker had been misunderstood; surveyors had interpreted it to mean financial market evidence is inadmissible when determining an accurate leasehold market value. The tribunal ruled this was incorrect and instead held where there is no other suitable evidence financial markets can and must be considered.

By the time the decision in *Arbib* was published there were appeals outstanding in a number of cases where the LVT had followed the established rate the Tribunal in *Arbib* had held to be wrong. The decision therefore left room for further evidence and arguments.

The Lands Tribunal sought to collect up such further cases for hearing together. In the event, the Lands Tribunal heard five further appeal cases together. In each of the cases, the LVT had determined a deferment rate of 6% (incidentally, one of the decision was dated one day after *Arbib*!).

The Lands Tribunal's Decision was published at lunchtime on Friday 15th September 2006. The lead case this time was *Cadogan v Sportelli*.

## Cadogan v Sportelli

The Lands Tribunal was presented with evidence of what are essentially four different methods of reaching the deferment rate. The Tribunal rejected three out of four of these methods. The method the Tribunal adopted was that which the Tribunal adopted in *Arbib*.

## Valuation Method in *Arbib*

In *Arbib*, the Tribunal distinguished between relying upon a conventional figure and adopting a conventional method of valuation. The best approach they concluded was:-

- To consider the money market in the absence of dependable market transactions to provide evidence of value
- The starting point is a risk free investment; they decided index-linked gilts yielding 2% are the best risk-free investment

- For the Cadogan Estate, a deferment yield of 4½% compared to index-linked gilts at 2%, made sufficient allowance for general risks perceived by the market i.e. need for management, the asset being destroyed and/or expensive to realise at the end of the term
- An additional ¼% was applied in the lead case as it was thought to be an unusually large amount to invest in a single house (deferment rate was 4¾%).

Further, due to lesser management problems for houses, a further ¼% should be added for flats. The tribunal also noted its discretion to make adjustments for physical differences, size, length of term and location.

Based on the valuation method adopted in *Arbib*, the Tribunal in *Sportelli* determined that deferment rate applicable in each of the appeals relating to flats is 5%. In the case of houses, the Tribunal ruled the appropriate deferment rate to be applied is 4.75%.

The Tribunal in *Sportelli* then went on to conclude that before applying a rate different from this, valuers and/or an LVT should be satisfied that there are particular features that fall outside the matters that are reflected in the vacant possession value of the house or flat or in the deferment rate itself and can be shown to make a departure from the rate appropriate.

## Conclusion

Despite the Tribunal's warning of the danger of treating one tribunals' valuation as a precedent for subsequent decisions in place of evidence in *Arbib*, the Tribunal in *Sportelli* concluded it necessary that deferment rates in future cases should be stable.

On the basis of the Lands Tribunal's latest decision, it seems leaseholders are destined to pay higher prices for their freeholders and higher premiums for extending their leases.

Are tenants now really going to want to enfranchise until it becomes absolutely necessary? The debate looks set to continue for some time to come...

## Case Shows Value of Making Arguments Early

A recent case involving a landlord and a tenant highlights the importance of making sure that possibly contentious points are not agreed by default in negotiations concerning other matters.

The landlord had sought possession of the property occupied by the tenant because of arrears of rent. That action was settled on the basis of a compromise agreement in which an order was made that the tenant was a statutory tenant and would resume its tenancy when the landlord had made certain repairs to the property. The issue of the nature of the tenancy (statutory or non-statutory) was not raised in the original proceedings. However, in the wording of the compromise agreement it was stated that the tenancy was a statutory tenancy and this was not disputed at that time.

A year later, the landlord again sought a possession order on the basis of rent arrears. The judge in the second possession proceedings agreed that had the issue of the nature of the tenancy been raised at the original hearing, he would have denied the tenant the protection that a statutory tenancy gives. However, the issue was not raised then and it would be an abuse of process for it to be raised in subsequent proceedings. The Court of Appeal agreed.

The key issue here is that the point about the nature of the tenancy should have been dealt with at the first hearing. Since it was accepted by the landlord at that time that the tenancy was a statutory tenancy, that point could not be reopened. This case makes it clear that it is important to make one's arguments early in proceedings, or the right to make them later may be lost.

## Right To Enfranchise Companies

### The Right to Enfranchise

It is now easier than ever for lessees to enhance the value of their leases in flats or houses as a result of the Commonhold & Leasehold Reform Act 2002 ('the Act'). The Act, which has effectively watered-down the requirements to

exercise the right to enfranchise, was given Royal Assent in May 2002. Its general intention was to make the Right to Enfranchise and the Right to Manage as similar as possible in their operation, and more particularly, in the context of their formalities.

The commencement timetable in relation to some of the Act's sections has been long and convoluted. The majority of the Act's provisions went live on 26th July 2002 however implementation of the provisions requiring the right to enfranchise be restricted to and exercised through a prescribed form of Right to Enfranchise Company ('RTE'), have been delayed. It was originally anticipated these provisions would come into effect at the same time as those for Right to Manage Companies but the Office of the Deputy Prime Minister has experienced problems with the legislation.

**In this article, Yashmin Mistry, Solicitor in the Property Management/Enfranchisement Department of Brethertons LLP, explains the role and function of Right to Enfranchise Companies.**

## So, what is an RTE?

An RTE is a:

- private company limited by guarantee and not by shares
- its Constitution (Memorandum and Articles of Association) are prescribed by statutory instrument; and
- its Memorandum of Association should state that its objects, or at least some of them are:
  - to exercise the right of collective enfranchisement
  - to acquire, hold, manage and administer the freehold and any other interests acquired

- to maintain, repair and improve the premises and with the consent of the company, to let or license part of the premises
- to exercise the functions of the landlord under the leases including services, repairs, maintenance, improvements, insurance and general management.

In order to guard against competing bids in the same premises, the legislation provides a company cannot be an RTE in relation to premises if there is already another RTE company in existence.

Furthermore, a company cannot be an RTE if it is Commonhold Association under Part 1 of the Act.

## The Role of the RTE

As set out previously, the RTE's prescribed memorandum must envisage it acting as landlord once enfranchisement has been completed.

The RTE Company therefore serves a dual purpose:

- to act as a nominee purchase through which participating leaseholders can pursue the enfranchisement claim; and
- to act as the new landlord after the freehold has been acquired.

## The Right to Participate

Any qualifying leaseholder of a flat in the premises is entitled to become a member. Usually the only members of the RTE will be those leaseholders who have chosen to become members.

One of the first jobs of the RTE therefore is to serve a "Notice of Invitation to Participation" on any leaseholders who are not already members of the company. This notice must be given at least 14 days before the Initial Notice of Claim is served on the Landlord.

The Invitation Notice must state the RTE:

- intends to exercise the right to enfranchise
- give the names of the participating tenants

- explain the rights and obligations of the company
- include an estimate of the price and costs; and
- invite the recipients of the notice to become participating members of the company.

A copy of the RTE's Memorandum and Articles of Association must also accompany the notice.

The Act also makes provision for new assignees and personal representatives of leaseholders to become members of the RTE upon service of a "Participation Notice" i.e. a notice given by a leaseholder stating they wish to be a participating member. Such notice may be given after service of the Initial Notice of Claim but within the "participation period" in other words, within the period between the date on which the Initial Notice of Claim is given and either a period of 6 months or date on which a binding contract is entered into, whichever is earlier.

The Act also envisages Right to Manage Company's ('RTM') mutating into RTE Companies and makes it very easy to do so, although for obvious reasons, a landlord who is a member of the RTM cannot be a member of the RTE as it is acquiring the freehold estate from the landlord.

## Some practical considerations

The Impact on Four or Fewer Participating Leaseholders:

Setting up a company to purchase the freehold is nothing new. In practical terms, participating leaseholders have preferred setting up a company before pursuing the enfranchisement claim. However, this has not always been the case where there are four or fewer leaseholders participating in the claim, as forming a company is not strictly necessary.

On commencement of the RTE provisions in the Act, the enfranchisement notice will have to be given by the RTE Company. This obviously has an immediate impact where four or fewer leaseholders are participating in an enfranchisement claim. RTE's will, in future, have to feature in ALL enfranchisement claims regardless of the number of participating leaseholders involved.

## Service Provisions

The Act fails to deal adequately with service provisions, and in particular there are no provisions in relation to deemed service. This is likely to cause major complications in practical terms especially when it comes to service of the Notice Inviting Participation. For example, if it proves difficult to serve one leaseholder in a block of say, 50 flats, is the initial notice of claim null and void?

## Conclusion

The regulations required for RTE companies to be constituted are not yet in place and it is evidence that the drafting of these regulations has encountered difficulties, thus making the eventual coming into effect of this provision uncertain.

Consequently, any acquisition of the freehold will continue, for the time being at lease, to be by a "nominee purchaser" (either an individual or a corporate body, but in most cases the latter option will be taken due to the liability aspect involved). However, it is hoped, at some point in the future, the enfranchisement process will be operated through the Right to Enfranchise Company.

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## In-Brief

### Information Withheld From Insurers Breaches Contract

Most insurance policies contain clauses which require the policy holder to supply the insurer with relevant information in the event of a claim. Such clauses normally contain words such as 'within a reasonable period of time'. The question of what is a reasonable period of time arose recently in a case in which an insurer sought to avoid liability under a claim on the basis that the policy holder had not supplied the requested information within a reasonable time. In this case there was a delay of two and a half years.

What was somewhat unusual in this instance was that the failure to provide the information did not prejudice the insurer's position and, at the first hearing, the court found that since the insurer's position was not prejudiced by the failure, the delay could not be deemed to be unreasonable. The insurer appealed.

The Court of Appeal took a different stance, concluding that the insurer had a right to cooperation from the insured and the fact that failure to disclose the information might not prejudice its position was not in point. An insurance contract is one of 'utmost good faith' and so the insurer is within its rights to ask for any reasonable information. Furthermore, a material misrepresentation to an insurer may invalidate the policy, even if it is not directly relevant to a claim under the policy.

#### The Brethertons' view:

**"This case has implications for the management of any insurance claim. Information reasonably sought by the insurer should be provided within a reasonable time, or there is the possibility that a claim may be denied on the basis of the breach."**

### Listed Buildings Targeted for Enforcement

One of the final acts of the Office of the Deputy Prime Minister, before it became the Department for Communities and Local Government, was to issue a guidance document for local authorities on how successfully to pursue prosecutions for unauthorised building works to listed buildings, the aim being to improve the level of enforcement of the planning laws that relate to listed buildings.

The guidance follows an earlier review in which it was concluded that the system as presently operated is an ineffective deterrent to planning breaches in such cases.

Failure to apply for listed building consent or to comply with conditions attaching to a listed building consent are criminal offences, for which the maximum penalty is imprisonment for two years. Being a criminal offence, there is no time limit for the bringing of a prosecution. Furthermore, a subsequent purchaser of a property can be required to remedy any breaches of planning permission by a previous owner.

Listed building consents can specify not only the physical appearance of the building, such as locations of openings, but also the materials which are to be used for the works.

Offences are often only discovered when a planning application is made for new works - at which point the local authority inspector may well notice that earlier works do not comply with the previous conditions, which should be noted on the file. When that occurs, the new owner will be required to rectify any planning breaches unless retrospective listed building consent is obtained.

#### The Brethertons' view:

**"Planning breaches with regard to listed buildings can have serious consequences and can affect the value of a property considerably. If you are considering buying a listed building or one situated in a conservation area, it is worth taking steps to make sure you do not suffer as a result of breaches of planning regulations by a previous owner."**

### Mixed Dwelling Restricts Repossession Terms

Landlords who let out properties to tenants for mixed use (commercial and residential) have been dealt a blow by the Court of Appeal. One of the remedies which landlords have in cases in which a commercial tenant does not pay the rent due is to enforce forfeiture of the lease and to take possession of the premises by peaceable re-entry. This method is not available to residential landlords, who must obtain a court order due to the provisions of the Protection from Eviction Act 1977 which apply to property 'let as a dwelling'.

Recently, a landlord sought to take possession of a shop and flat which were occupied by a tenant who was in arrears with his rent. The tenant lived in the flat above the shop. The landlord argued that he could enforce forfeiture because the premises were not let as a dwelling because of the mixed use.

The tenant claimed that Article 8 of the European Convention on Human Rights, which guarantees respect for the home, required that the interpretation of the relevant law should mean that the definition of 'let as a dwelling' should include a mixed use property in order to be compatible with rights guaranteed under the Convention.

The Court of Appeal agreed with the tenant. Landlords with mixed use properties might consider splitting the leases so that in the event of non-payment of rent, the commercial premises can be recovered by forfeiture by peaceable re-entry.

## Think Before You Build

A builder who slavishly follows an architect's plan without thinking through the consequences cannot 'pass the buck' for problems arising if the drawings are defective, according to a decision of the Court of Appeal.

The case involved problems following the construction of an extension to the flat roof of a residential home. The difficulties arose because the builder retained for the building project failed to spot that the architect's drawings supplied to him, which were used for the construction, were defective.

The home's owners sued the builder regarding the defective roof. In the opinion of the Court of Appeal, the understanding of plans provided by the architect was in effect a part of the work of construction. Failure to appreciate the consequences of building to the plan, and to warn the home's owners, was a breach of the builder's duty to the owners of the home to exercise reasonable skill and care.

This decision has implications for anyone engaged in the building trade who thinks that blame for defective construction cannot fall on them if what they have built follows the architect's plan.

In a document as concise as PropertyManagerFILE it is impossible to give a complete answer to all facets of any legal problem. Treat PropertyManagerFILE as food for thought, but don't take any action based on its advice unless you have seen a solicitor. ©2006.

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