



Welcome to Landmark Chambers’ ‘Mixed Use Issues For Commercial Property Lawyers’ webinar

The recording may be accessed [here](#).

Your speakers today are...



Tim Morshead KC (Chair)



Aaron Walder

Topic:
Building Safety Act
2022: what about
mixed use?



Ellodie Gibbons

Topic:
Collective
Enfranchisement:
an introduction for
commercial
property lawyers



Katie Helmore

Topic:
Rights Of First Refusal:
what commercial
property lawyers
need to know

Collective Enfranchisement: an introduction for commercial property lawyers



Ellodie Gibbons

Leasehold Reform, Housing and Urban Development Act 1993 (s.1)

- Grants qualifying tenants
- of flats contained in qualifying premises
- the right to have the freehold of those premises acquired on their behalf
- together with appurtenant property
- and that right is referred to as “the right to collective enfranchisement”

Relevance of Rights

- Making or responding to a claim;
- Site assembly;
- Conveying mixed use premises;
- Consents under covenants in a lease; and
- S. 84, Law of Property Act 1925?

Who Qualifies?

- Pursuant to section 5(1), a tenant is a qualifying tenant of a flat if he is the tenant of the flat under a long lease.

Exceptions include –

- A tenant who is (or is among those constituting), the qualifying tenant of 3 flats;
- a company where it, or an associated company, is (or is among those constituting), the qualifying tenant of 3 flats.

Qualifying Premises (s.3(1))

- They consist of a self-contained building or part of a building;
- they contain two or more flats held by qualifying tenants; and
- the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises

Self-Contained? (s.3(2))

If a building, if it is structurally detached.

If part, if:

- Vertically divided;
- Could be redeveloped independently; and
- Relevant services are provided independently; or
- Could be without significant interruption

Mixed Use Premises (s.4(1)(b))

Mixed use premises - excluded depending on the extent of the non-residential use.

If the floor area of the non-residential parts exceeds 25 % of the internal floor area of the premises as a whole (excluding the common parts), then the premises will be excluded.

Broad Quay

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Split Freehold

Where different persons own the freehold of different parts of the premises, the premises as a whole do not qualify to be collectively enfranchised if any of those parts is a self-contained part of a building (s.4(3A)).

Proposals for Reform

- That the percentage limit on non-residential use in collective freehold acquisitions be increased from 25% to 50%
- that leaseholders making a collective freehold acquisition claim should be able to require the landlord to take a leaseback of any units (other than common parts) which are not let to leaseholders participating in the claim
- when exercising enfranchisement rights, and in order to reduce the premium payable where there is development value, leaseholders could be given the ability to elect to take a restriction on future development of the property

Rights Of First Refusal: what commercial property lawyers need to know



Katie Helmore

Tenants' Right of First Refusal and Mixed Use Premises

- Part 1 Landlord and Tenant Act 1987
- Health warning- not clearest statutory provisions and limited case law
- Focus on 2 particular issues:
 - Does TRFR apply to the premises?
 - Do TRFR apply to a disposal of a solely commercial element?

TRFR: very brief overview

- Triggered by a relevant disposal (s.4) of qualifying premises(s.1) known as the protected interest by an immediate landlord
- Does not apply to ‘excluded disposals’ (s.4(1)(a), (b) and 4(2))
- Must serve a written ‘offer notice’ for relevant disposal (ss.5,5A-5E)
- Period (in offer notice) within which Ts may accept the offer and LL may not dispose of the protected interest except to a NP (s.6(1))

TRFR: very brief overview

- If acceptance notice served and NP nominated LL must either dispose of protected interest to NP or not dispose (s.8)
- If Ts fail to give notice LL may dispose of the protected interest (s.7)
- If LL fails to comply with provisions requisite majority of QT may serve a purchase notice to acquire the protected interest on the terms of the disposal (ss.12A-12C)
- Criminal offence for LL, without reasonable excuse to make a relevant disposal of qualifying premises without serving an offer notice or complying with ss.6-10 (s.10A)

TRFR: does it apply to the Premises?

- 3 conditions: s.1(2) Premises must:
 - Consist of the whole or part of a building;
 - Contain 2 or more flats held by QT; and
 - Total number of flats held by QT must exceed 50% of total number of flats
- Does not apply if: s.1(3)
 - A part or parts of the premises is or are occupied or intended to be occupied otherwise than for residential purposes; and
 - The internal area of that part exceeds 50% of the total internal floor area (disregarding common parts)
- Common parts include “the structure and exterior of that buildings and any common facilities within it” (s.60(1))

TRFR: does it apply to the Premises?

- Building (s.1(2)) includes appurtenances to it: ***Denetower Ltd v Toop*** [1991] 1 WLR 945
- Appurtenances include:
 - Areas over which Ts have rights under their leases;
 - Areas usually enjoyed with the building, including those to which access is required by the LL to comply with its obligations to repair and maintain the building: ***York House Ltd v Thompson*** [2019] EWHC 2203
- Common parts same meaning as for the 1993 Act: ***York House Ltd v Thompson*** [2019]

TRFR: disposal of commercial element only

- Does the disposal of a solely commercial element trigger TRFR?
- Relevant Disposal = a disposal of any part of the qualifying building and not just of a part which is common parts or subject to rights held by 2 or more QT:
York House Ltd v Thompson [2019], ***Dartmouth Court v Berisworth*** [2008] EWHC 350
- Relevant premises are identified objectively without reference to the subject matter of the disposal
- NB para 99 ***York House Ltd v Thompson*** ‘the point does not directly arise for decision in this case’

TRFR: disposal of commercial element only

Various arguments for and against in Radevsky & Clark TRFF 4th Ed para 3.12

Disposal of commercial element not caught

- A disposal pursuant to 1993 Act is not a relevant disposal (s.4(1)(da)) would be very odd if a renewal pursuant to LTA 1954 was a relevant disposal
- Tenant of a business tenancy not a QT as he is not the T of a flat
- A tenancy of a single flat is not a relevant disposal (s.4(1)(a)) but a lease of a single unit specifically designed for business purposes would be?

Disposal of commercial element is caught

- Act applies to buildings which are essentially residential in character, Ts should have some control over commercial element
- Contemplated that the Act could apply to buildings with a commercial element (s.1(3))

Building Safety Act 2022: what about mixed use?



Aaron Walder

Dame Judith Hackitt Review

“the evidence has demonstrated that there has been a “race to the bottom” in the construction industry. It is clear that competence, and ability and desire to comply with building regulations, has been “patchy”, with profit the overwhelming priority, leading to cost-cutting at every turn. Underpinning this has been a regulatory system that is not fit for purpose and which has failed to identify systemic issues in the building sector or appropriately enforce building regulations. The manufacturers of construction products have also played their part, with the evidence to the review of both deliberate gaming of the testing regime and questionable marketing practices”.

Bad guys

- The Construction Industry
- Construction Products (Cladding etc)
- The Government?



no leaseholder living in a
building above 11 metres
will have to pay to fix
dangerous cladding



Building Safety Act 2022

An Act to make provision about the safety of people in or about buildings and the standard of buildings, to amend the Architects Act 1997, and to amend provision about complaints made to a housing ombudsman.

[28th April 2022]



Who pays?

Schedule 8 (in a nutshell)

- Para 8 – No qualifying tenant pays service charge in any circumstance for “cladding remediation”
- Para 2 – No tenant pays service charge for relevant defect where the Landlord, or an associated company, is responsible for the defect in question (“the Developer condition”)
- Para 3 – No qualifying tenant pays service charge for relevant defect where the Landlord, or the Landlord’s group of companies, have over a certain net worth (“the Contribution condition”)
- Para 4 – No qualifying tenant pays service charge for a relevant defect where the value of the flats is less than £325,000 in greater London (“the tenants flat value condition”)

Limit on service charge in other cases

- Para 5(1) A service charge which would otherwise be payable under a qualifying lease in respect of a relevant measure relating to any relevant defect is payable only if (and so far as) the sum of—
 - (a) the amount of the service charge, and
 - (b) the total amount of relevant service charges which fell due before the service charge fell due,

does not exceed the permitted maximum.

Permitted maximum is £15,000 in London (£10,000 elsewhere) unless value of flat is over £1million

Annual limit – $1/10^{\text{th}}$ the Permitted maximum.

Issues Arising in Mixed use Properties

- Is your client the Freeholder, or does it hold an intermediate lease, which includes repair obligations, or entitlement to collect service charges?
- Is your client a commercial tenant, letting space in a mixed use building?
- Does your client have management responsibilities for a mixed use building?

Does the Act apply to my (Mixed Use) Building?

(2) “Relevant building” means a self-contained building, or self-contained part of a building, in England that contains at least two dwellings and—

- (a) is at least 11 metres high, or
- (b) has at least 5 storeys.

(3) “Relevant building” does not include a self-contained building or self-contained part of a building—

(a) in relation to which a right under Part 1 of the Landlord and Tenant Act 1987 (tenants’ right of first refusal) or Part 3 of that Act (compulsory acquisition by tenants of landlord’s interest) has been exercised,

(b) in relation to which the right to collective enfranchisement (within the meaning of Chapter 1 of Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993) has been exercised,

(c) if the freehold estate in the building or part of the building is leaseholder owned (within the meaning of regulations made by the Secretary of State), or

(d) which is on commonhold land.

What is a “Qualifying Lease”

- (2) A lease is a “qualifying lease” if—
- (a) it is a long lease of a single dwelling in a relevant building,
 - (b) the tenant under the lease is liable to pay a service charge,
 - (c) the lease was granted before 14 February 2022, and
 - (d) at the beginning of 14 February 2022 (“the qualifying time”)—
 - (i) the dwelling was a relevant tenant’s only or principal home,
 - (ii) a relevant tenant did not own any other dwelling in the United Kingdom, or
 - (iii) a relevant tenant owned no more than two dwellings in the United Kingdom apart from their interest under the lease.

So, it doesn't apply to Commercial Tenants?

- In fact, it does.
- If there is a relevant defect, in a relevant building, and the landlord meets the “Developer Condition”, schedule 8 para 2 applies to “a lease of any premises”.
- Government felt the need to spell it out in Regulations
 - (2) For the purposes of paragraph 2 of Schedule 8 to the Act—
 - (a) no service charge is payable under a non-residential lease in a relevant building where the conditions set out in paragraph 2(2) of the Act are met; and
 - (b) the reference in paragraph 10(2) of Schedule 8 to the Act applies to non-residential leases.

Any additional duties on Commercial Tenants?

- Part 4 of the Act applies to “Higher Risk Buildings”, ie those over 18 metres in height or 7 stories, with 2 or more residential units.
- Additional duties on Landlord. An “accountable person” responsible for common parts.
- In order to facilitate role as “accountable person” additional obligations, including registration with a regulator; reporting requirements about risks; and, enforcing duties on residents.
- Duties on all owners and residents of residential units, so if commercial unit also owns some residential stock on short lets, additional duties.
- No express powers of entry for non residential property (yet).

Meaning of “relevant defect”

A Defect that

- (a) arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works, and
- (b) causes a building safety risk.

“relevant works” means any of the following—

- (a) works relating to the construction or conversion of the building, if the construction or conversion was completed in the relevant period;
- (b) works undertaken or commissioned by or on behalf of a relevant landlord or management company, if the works were completed in the relevant period;
- (c) works undertaken after the end of the relevant period to remedy a relevant defect (including a defect that is a relevant defect by virtue of this paragraph).

“The relevant period” here means the period of 30 years ending with the time this section comes into force.

“building safety risk”, in relation to a building, means a risk to the safety of people in or about the building arising from—

- (a) the spread of fire, or
- (b) the collapse of the building or any part of it;

Question to consider – does this definition take the Act well outside its initial intended scope? What might this mean for commercial tenants in mixed use buildings?

My client is the freeholder/head lessee/manager – do they bear the cost of all the remediation?

- Simple answer is that all leasehold obligations remain the same, save for liability on lessees to pay service charge. So, if part of repairing obligation, then yes.
- Building Safety (Leaseholder Protection)(Information etc)(England) Regulations 2022 SI 859/2022 provides a complex statutory liability to pass costs “along the chain” of interest holders

Thank you for listening

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