LAW360

Portfolio Media. Inc. | 101 Park Avenue 24th Floor | New York, NY 10178 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Leasehold Reforms Could Ease Property Deal Hurdles

By **Michael Ellis, Georgina Salt and Claire Hall** (October 14, 2026, 3:21 PM BST)



Michael Ellis



Georgina Salt



Claire Hall

As part of its review of commercial leasehold law, on Sept. 16, the Law Commission closed a consultation on barriers to transactions.

This review sits within the Law Commission's wider consultation on business tenancies and security of tenure, the purpose of which is to consider whether the rules around security of tenure, among other things, complicate commercial property transactions and inflate associated costs, and, if so, how these issues can be resolved. Essentially, does the legislation operate as intended and if not, how can it be fixed?

The latest subproject, "Commercial leasehold: overcoming barriers to transactions," published on June 16, identifies two specific "barriers to transactions":

- The right of first refusal under Part 1 of the Landlord and Tenant Act 1987 and its application to disposals of commercial units in mixed-use premises; and
- The issues with the Landlord and Tenant (Covenants) Act 1995 — in particular its antiavoidance provision.[1]

The Law Commission is now reviewing the consultation responses as part of its wider mandate to consider and put forward appropriate recommendations as to whether the law should change.

Part 1 of the Landlord and Tenant Act 1987

Part 1 of the Landlord and Tenant Act 1987 gives residential leaseholders in blocks of flats the right of first refusal where the landlord wishes to dispose of its interest in it. A disposal can include a sale of the freehold or, in some cases, the grant of a new lease.

The reasoning behind why this statutory right was introduced is simple: to afford leaseholders greater statutory rights and to prevent nontraditional landlords from stepping in and selling off parts of the estate.

In essence, the goal was to give leaseholders the right to acquire their building and ensure continuity of management by the superior estate holder. It should be remembered that when the 1987 act came into force, there was no right to enfranchise a lease of a flat, unlike a lease of a house.

For the right of first refusal to apply, the following criteria must be met:

- There must be "premises" to which the 1987 act applies;
- There must be enough "qualifying tenants";

- There must be a proposed disposal by a "landlord"; and
- The proposed disposal must be of a relevant type.

Furthermore, the 1987 act applies to premises if:

- They consist of the whole or part of a building;
- They contain two or more flats held by qualifying tenants; and
- The number of flats held by qualifying tenants exceeds 50% of the total number of flats contained in the premises.

However, as with all legislation, unforeseen consequences, satellite litigation and interpretation issues can arise. For example, there is no definition of "building" in the act; its interpretation is instead left to case law. This in itself can cause difficulties for practitioners, especially for those facing novel situations. While the consultation acknowledges this particular issue, it unfortunately falls outside the consultation's scope.

It is indisputable that both commercial practices and the built environment have changed since the introduction of the 1987 act, and there are now many more mixed-use commercial and residential units in existence than there were 40 years ago.[2]

The issue specifically being reviewed by the Law Commission is that on the strict interpretation of the 1987 act criteria, disposals of mixed-use residential and commercial units could trigger the right of first refusal.

In other words, disposals of land that were never intended to be caught, and which provide the residential leaseholders with no real benefit, such as of a pure commercial unit, nevertheless must follow the process, prolonging the timescales involved in the disposal, while potentially exposing the landlord to heavy sanctions for noncompliance in the event the procedure is not strictly followed.

On this point, the process under the 1987 act is strict. The landlord must serve notices and follow all subsequent procedural steps and timescales to the letter, even where the tenants might otherwise consent to the disposal.

And where the landlord fails to comply with those steps, it will be exposed to potentially serious consequences, including unraveling of the disposal and, potentially, criminal liability.

Considering the potential costs of litigation and risk of criminal sanctions for noncompliance, most landlords err on the side of caution and take the view that the right of first refusal is triggered, even if it does not strictly apply. The result is that what should be a straightforward transaction can become overly complicated, time-consuming and costly. While some landlords have found various workarounds involving creating an artificial structure of leasehold interests, such workarounds often create increased legal and administrative costs.

Sensibly, one of the Law Commission's provisional proposals is to clarify that disposals of parts of premises that are, or are intended to be, used for nonresidential purposes should be excluded from the right of first refusal. While this will be a welcome change for many landlords of mixed-use premises, the question is whether the proposed reforms go far enough, and whether there is further scope during this consultation to provide further clarity.

The Law Commission does not intend to introduce a new test to determine, or otherwise define, what is and what is not considered residential. This is because although the Law Commission specifically acknowledges that the lack of definition may cause difficulties in practice, it considers that a change in the law would invite fresh uncertainty and litigation. Despite the proposed changes, if implemented it seems we may still have uncertainty and satellite litigation either way.

Landlord and Tenant (Covenants) Act 1995

The Landlord and Tenant (Covenants) Act 1995 had a fundamental positive impact on tenant leasehold liabilities when it was brought in over 30 years ago. Its purpose was to abolish the privity of contract between the landlord and original tenant on all leases entered into on or after Jan. 1, 1996, therefore preventing landlords from pursuing current arrears claims against the original tenant where the lease had undergone various assignments.

However, to ensure that the landlord's interests are protected, the incoming tenant is, along with any guarantor, required to agree to comply with the tenant's covenants when the lease is assigned.

The Law Commission notes in its consultation that several key cases have been brought in respect of the anti-avoidance provisions. It has also highlighted some of the unintended consequences of the 1995 act. For example, only a former tenant (i.e. not the guarantor) can give a guarantee under an authorized guarantee agreement, which directly guarantees the obligation of an assignee under the lease, as held in the 2010 High Court decision Good Harvest Partnership LLP v. Centaur Services Ltd.[3]

This was subsequently clarified in the Court of Appeal in 2011 in K/S Victoria Street v. House of Fraser (Stores Management) Ltd., such that a guarantor may nevertheless enter into a subguarantee of the tenant's obligations when the tenant becomes the guarantor under an authorized guarantee agreement following an assignment of the lease.[4]

In addition, the High Court in 2016 confirmed in EMI Group Limited v. O & H Q1 Ltd. that a tenant may not assign its lease to its own guarantor.[5]

These principles can cause various issues in commercial transactions, including parent companies being unable to act as a guarantor where the existing tenant (a subsidiary) is assigning to another company within the same company group. This in particular could frustrate matters where the parent company is the only party suitable to provide the guarantee.

There can also be difficulties in other types of business restructuring, such as partnerships and other joint ventures becoming unnecessarily complicated, expensive or, worse, ineffective.

What's Next

Even now, with the consultation responses under review, reform is not likely to take place for some time. A key takeaway for practitioners and landlords is to follow the process closely. If there is further opportunity to comment on the consultation, or the proposed bill in due time, then interested parties should take advantage of such opportunities.

Parties to property transactions need to consider the potential time frame and impact the change in law might have and plan their transactions accordingly.

The Law Commission's consultation shows that it intends to provide clarity and further flexibility by facilitating the agreements set out. This would certainly be a welcome change and would alleviate the issues caused by the 1995 act.

While it is true that the Law Commission's review of the first subproject is relatively small in that it is only reviewing two specific barriers in a sea of legislative issues, these small changes are likely to have a large impact. If implemented, the changes will provide landlords and tenants with a greater degree of certainty and commercial freedom and undoubtedly will save costs and time dealing with transactions which, but for uncertain legislation, should be straightforward.

Michael Ellis is a partner, Georgina Salt is an associate and Claire Hall is a paralegal at Wilsons Solicitors LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is

for general information purposes and is not intended to be and should not be taken as legal advice.

[1] https://lawcom.gov.uk/publication/commercial-leasehold-overcoming-barriers-to-transactions-consultation-paper/.

[2] https://www.savills.co.uk/insight-and-opinion/savills-news/392809/uk-cities-entering-a-new-era-of-mixed-use-development--says-savills.

[3] Good Harvest Partnership LLP v. Centaur Services Ltd. [2010] EWHC 330.

[4] K/S Victoria Street v. House of Fraser (Stores Management) Ltd. [2011] EWCA Civ 904.

[5] EMI Group Limited v. O & H Q1 Ltd [2016] EWHC 529 (Ch).

All Content © 2003-2026, Portfolio Media, Inc.