The Law Commission's 13th Programme of Law Reform

Proposals on behalf of the Property Litigation Association

What follows is prepared by the Law Reform Committee of the Property Litigation Association (PLA) with the benefit of contributions from the wider membership. Some of the proposals are fundamental and/or wide ranging whilst others relate to more discrete areas of legislation and cause difficulties for those we represent.

Landlord and Tenant (Covenants) Act 1995

It is considered that this piece of legislation is most in need of urgent reform. Problems arising as a result of the way in which the anti-avoidance provisions of the 1995 Act have been construed in recent cases are explained and proposed amendments to address them are set out in a detailed briefing note prepared on behalf of the PLA for the Department of Communities and Local Government dated 18th May. Reference should be made to this document a copy of which is attached.

Leasehold Enfranchisement

We have read and considered the paper submitted to you by Damian Greenish, one of the editors of Hague. His detailed review of the relevant legislation (principally the Leasehold Reform Act 1967 and the Leasehold Reform, Housing and Urban Development Act 1993) identifies errors, omissions and anomalies both within each statute and in the relationship between them.

Piecemeal and ill-considered reform and amendment over many years has resulted in unnecessary complexity and continuing litigation. Further amendment will only add to the problems identified. Accordingly we support his call for the replacement of this legislation by a new statute providing universal rights of enfranchisement covering all residential property with a single procedure and a single valuation regime.

Landlord and Tenant Act 1987, Section 2 - Right of First Refusal

This statute has been widely and correctly criticised for its poor drafting. A specific issue that has caused problems is the lack of a definition of what is meant by a "building" for the purpose of exercising the right of first refusal in cases where the premises are part of an estate comprised of several buildings. This was last considered in the case of *Long Acre Securities Ltd v Karet* [2004] EWHC 442 but the decision has served only to cause further problems rather than much needed clarification.

Although specific issues, such as the one referred to above, could be addressed by amendment a more radical solution should be considered. If the proposal relating to enfranchisement is adopted, or perhaps in any event, given the extensive enfranchisement rights that tenants of residential premises now have as well as the right, collectively, to acquire the right to manage them under the provisions of the Commonhold and Leasehold Reform Act 2002, there would seem to be little need to preserve the right of first refusal conferred by this unsatisfactory Act.

Commonhold and Leasehold Reform Act 2002, Part 2 Chapter 1 - Right to Manage

We would welcome the amendment of the above statute so as to clarify that, once the right to manage is acquired, the RTM company becomes the "Responsible Person" in respect of compliance with Health & Safety/Fire Safety legislation in the premises and is the entity that should be the subject of any enforcement proceedings, not the freeholder, even though the freeholder remains the legal owner.

Similarly, with regard to planning/listed building consents, responsibility for compliance should be upon the RTM company and any necessary enforcement action taken against the RTM company. Once RTM has been acquired the freeholder is unable to enforce the management covenants in the lease and powerless to ensure compliance.

Landlord and Tenant Act 1985, Section 20 - Consultation Requirements

Our first proposal regarding the above is specific and seeks to address a practical problem arising from the Upper Tribunal's decision in *Foundling Court v London Borough of Camden* [2016] UKUT366 which imposes a duty upon head landlords to consult with sub-tenants as well as with their direct tenants when they are contemplating major works or entering into qualifying long term agreements.

It would be helpful to include, by amendment, a right on the part of the head landlord to give notice to its tenant requiring details of the subtenants with whom it has to consult and an obligation upon the tenant to provide such information within a specific time period.

More generally consideration should be given to relaxing the consultation requirements where the landlord is a company owned by the leaseholders of the building. The cost and complexity of complying with section 20 is becoming an unnecessary burden upon such entities.

Law of property Act 1925 Section 121 - Rentcharges

The recent decision of the Upper Tribunal in *Roberts v Lawton* [2016] UKUT 395 has drawn attention to the problems that can arise with a property that is subject to a rentcharge. Rentcharges typically raise modest sums per property and are payable whether or not they have been demanded.

Where rent charges are unpaid, a rentcharge owner is entitled to grant a long lease of the relevant property to trustees for the purpose of raising income to cover the arrears and the costs referable to both the non-payment and the grant of the rentcharge lease. In *Roberts* such costs considerably outweighed the arrears. The rentcharge lease can be protected by registration thus making the property unsaleable until payment is made.

The Upper Tribunal, with some reluctance, found that this was lawful.

Although the Rentcharges Act 1977 will abolish existing rentcharges in 2037 it is possible that the result in *Roberts* will encourage others to follow a similar business model in the interim. Sensible reform could involve making the right to recover (and the registration of a rentcharge lease) conditional on a demand having been properly made. The demand should set out required information alerting the property owner of the statutory right of redemption.

Options

A great deal of case law has developed in recent years concerning the construction of break options in leases and continues to be fraught with traps for those seeking to exercise one. When parties agree to the inclusion of an option in a contract they do so in the knowledge that is may be exercised. To allow one party to renege on an agreement based on technical breaches which cause no prejudice results in unfairness. It seems to us to be wrong in principle that in some cases even trivial non- compliance with the requirements of a break clause should deprive a party of a valuable right; the case of *Siemens Hearing Instruments v Friends Life* [2014] 2 P&CR 5 is an example.

Contractual freedom is already constrained by statute in a number of respects eg Contracts (Rights of Third Parties) Act 1995 and, as mentioned above, the Landlord and Tenant (Covenants) Act 1995. Our proposal is that any reform would be limited to contractual options and would, in substance confer on the courts a discretion to grant relief where the non-compliance has caused no material prejudice is suffered to the party seeking to enforce and even, perhaps, a rebuttable presumption of compliance by the party exercising the option.

Property Litigation Association

31 October 2016