To the Law Commission

Response of City of London Law Society Land Law Committee to the Law Commission Consultation Paper 276 on "Commercial Leasehold – Overcoming barriers to transactions"

This is a response to the Law Commission's Consultation Paper on Commercial Leasehold - Overcoming barriers to transactions - Law Commission Consultation Paper 276, provided on behalf of the City of London Law Society Land Law Committee.

About the City of London Law Society ("CLLS")

The CLLS represents nearly 23,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 22 specialist committees. This response to the Consultation has been prepared by the CLLS Land Law Committee. The current members of the Land Law Committee are listed at https://clls.org/committees/land.html.

Response

The CLLS Land Law Committee ("Committee") is delighted to respond to the Law Commission's consultation on Commercial Leasehold - Overcoming barriers to transactions - Law Commission Consultation Paper 276. The Committee congratulates the Law Commission on the quality of the consultation paper including its statement of the current legal position and its considered proposals for reform, many of which would have a significant and positive impact on business tenancies and related transactions.

The Committee sets out below some thoughts on the proposals in the consultation and would be very happy to discuss its thinking with the Law Commission. The Committee has not responded to every question and, instead, focused on those of greatest interest to the Committee. Where the word "we" or "our" is used in this response, this refers to the Committee.

Consultation Question 4.

1.41 We invite consultees' views on whether the issues considered in Chapters 2 to 5 are, in the context of the 1987 Act and the 1995 Act, the issues most in need of being addressed by law reform from the perspective of commercial leasehold law.

Answer

We agree that the issues considered in Chapters 2 to 5 are the issues most in need of reform.

There is another issue, not addressed in Chapters 2 to 5, that we consider merits attention in the reform proposals for the 1987 Act. A residential tenancy granted to a company cannot be an assured tenancy (under the Housing Act 1988, the tenant has to be an individual) and, therefore, will be a common law tenancy, meaning that the company may benefit from the right of first refusal. Following the Renters' Rights Act 2025 ("RRA"), landlords may be more likely to grant residential tenancies to companies to avoid the impact of the RRA. The flipside is that the company will potentially benefit from the right of first refusal. While corporate tenants of residential space have previously had the potential to benefit from the right of first refusal, this will in future become more of an issue for landlords with the increased likelihood of companies being granted residential tenancies.

We would ask the Law Commission to consider, as part of its reform of the 1987 Act, whether a lease of residential property granted to a corporate tenant should fall outside the right of first refusal regime.

Consultation Question 5.

2.121 We provisionally propose that:

(1) a disposal by way of the grant of a lease by a landlord of a part of the premises that is:

(a) exclusively occupied or used, or

(b) intended to be exclusively occupied or used;

for non-residential purposes should not trigger the Right of First Refusal; and

(2) where one or more residential tenants of the premises share, or have a right to share, the use of parts of the premises (the "Shared Premises"), and the sharing of those Shared Premises is ancillary to their own residential use of part of the premises (that is, their flat), then a disposal of the whole or part of the Shared Premises shall in no circumstances satisfy the test in (1) above.

Do consultees agree? Please explain why.

Answer

We agree that a disposal by way of grant of a lease of non-residential premises should not trigger the Right of First Refusal. The Right of First Refusal should not allow residential tenants to become commercial landlords. This is rarely what residential tenants want and is not consistent with the purpose of the 1987 Act. It also leads to delays in what are purely commercial property transactions.

We do not agree that Shared Premises should remain subject to the Right of First Refusal, if this is intended to apply to commercial premises over which residential tenants might have rights (for example to enter to carry our repairs or for escape in emergency). The rights granted to the tenants do not change the fact that these are commercial premises and do not prejudice the tenants since, if they have the benefit of easements over the Shared Premises, any buyer of the Shared Premises would take subject to them. Otherwise, this exception could significantly limit the practical application of the change being proposed.

Consultation Question 6.

4.142 We provisionally propose that the 1995 Act should clearly facilitate assignments and guarantees between members of the same group of companies as set out in the Consultation Paper at paragraphs 4.132 to 4.141.

Do consultees agree? Please explain why.

Answer

We agree with this proposal. There are often very good commercial reasons why a lease should be freely transferable within a group structure. This was common practice prior to the introduction of the 1995 Act. If the landlord, tenant and guarantor are all happy with the proposed transaction then we do not see why it should not be possible for the parties to be liable to the landlord under the lease as agreed. Corporate structures often mean that only one suitable guarantor is available within a group and there are often a number of good commercial and financial reasons why the holding of commercial leasehold property within a group structure needs to change.

Consultation Question 7.

4.143 We provisionally propose that the rule proposed in Consultation Question 6 should apply to both the assignment itself and any agreement to enter into the assignment (including allowing for it to be made a condition of a landlord giving consent to assign). However, where there is an agreement to enter into the assignment and a later assignment, the relevant parties to both should be – at the time each is entered into (or consent to an assignment is given) – members of the same group of companies.

Do consultees agree? Please explain why.

Answer

We agree that, provided the parties are members of the same group of companies at all relevant times, the proposed rule should apply. There may be good reasons why an agreement needs to be entered into before the transaction is completed, including the need for landlord's consent. The consent of any relevant mortgagee may also be required.

Consultation Question 8.

4.152 We provisionally propose that what constitutes a group of companies for the purpose of facilitating more transactions involving them to be valid for the purposes of the 1995 Act should be based on section 42 of the Landlord and Tenant Act 1954. Do consultees agree? Please explain why.

4.153 In particular, we invite views from consultees on the possibility of using the definition in section 42 of the Landlord and Tenant Act 1954 and whether there is a more appropriate definition that might be employed.

Answer

While the Companies Act 2006 provides a more modern and comprehensive definition, in real estate transactions there is greater familiarity with the section 42 definition and we would agree with the Law Commission's proposal in paragraph 4.152 and to use the section 42 definition.

Consultation Question 9.

4.193 We provisionally propose that the 1995 Act should clearly facilitate assignments within partnerships as set out in the Consultation Paper at paragraphs 4.154 to 4.192 and for repeat guarantees to be valid in such circumstances.

The above would require that the partners comprising the assignor and assignee to be in substantially the same partnership. This would be met where:

(1) the component partners making up the assignee tenant and the component partners making up the assignor tenant were engaged in substantially the same business; and

(2) at least one of the component partners in the assignee and assignor is the same.

Do consultees agree? Please explain why.

Answer

We agree that assignments between partners in the same partnership should be possible. It is part and parcel of partnerships that partners will leave the partnership and new partners will be appointed. Any commercial leasehold property owned by the partnership should be capable of being held by up to four current partners.

Consultation Question 12.

4.210 We provisionally propose that, where a tenant (T) under a lease has the performance of its obligations guaranteed by a guarantor (G), the 1995 Act should facilitate the assignment of the lease by T to G. This proposal would not extend to any agreement entered into in advance by G to complete that assignment.

Do consultees agree? Please explain why.

Answer

We agreed that the tenant should be able to assign the lease to the guarantor. There are often good commercial reasons why this should occur and in most instances the landlord is likely to be happy to consent to the guarantor becoming its tenant. As with Consultation Question 7, we believe that this should also allow an agreement to assign to a guarantor. Whether or not a landlord is able to require a guarantor to take an assignment of a commercial lease in particular circumstances is a matter of negotiation between the parties and should not be prevented by the 1995 Act.

Consultation Question 13.

5.13 Chapter 5 considers five issues with the 1995 Act as follows:

(1) Concurrent leases.

(2) Covenants with management companies.

(3) Agreements for leases.

(4) The registration gap.

(5) Geographical limitations on the service of notices.

5.14 We invite consultees' views, together with evidence where possible, on the following:

(1) Are the issues considered in this chapter causing difficulties?

(2) Are there any other issues with the 1995 Act which are not considered in this chapter (or in the previous chapter) which are causing difficulties?

5.15 To what extent are the issues identified above causing difficulties specifically in commercial leasehold transactions?

5.16 To what extent would reform of any of the issues identified above also impact upon residential leasehold transactions?

Answer

We agree with your conclusions in relation to the issues addressed, in so far as they relate to commercial leasehold. Although we acknowledge that the proposals only apply to the commercial leasehold sector, we deal with an increasing number of transactions involving mixed-use properties. It is, therefore, not always easy to separate the commercial and leasehold regimes in practice.

We agree that there is no need to remove the distinction between old and new leases. We also agree that an AGA should not be the default option on an assignment.

We believe that the best way to avoid issues associated with the registration gap is to focus on the land registration process, including the long-awaited introduction of electronic conveyancing and the allocation of more resources, to reduce delays in completing registration applications and to include a dedicated high-value commercial property team at the Land Registry to deal with complex applications.

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