ALEP ASSOCIATION OF LEASEHOLD ENFRANCHISEMENT PRACTITIONERS

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BY EMAIL AND POST

Dear Ms Maclean,

As you may already be aware, considerable concern has been raised about the impact on the leasehold sector of some of the provisions of the Building Safety Act 2022. By way of example, please see below a link to an online article by Andrew Butler KC on the Tanfield Chambers website looking at some of the problems conveyancers now face when considering the application of Schedule 8:
https://www.tanfieldchambers.co.uk/2023/04/06/property-litigation-a-date-with-schedule-8/

I appreciate that these are principally issues for your colleague Lee Rowley MP as the minister responsible for the building safety regime and he will no doubt wish to address them. However, I want to raise with you one issue within your brief which is causing particular difficulty for our members and for practitioners generally when advising leaseholders who wish to claim a new lease of a flat under Chapter 2 of Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993.

The issue relates to the definition of what constitutes a "qualifying lease" for the purposes of sections 122 to 125 of and Schedule 8 to the 2022 Act. That definition is contained in s.119. Part of that definition is that the lease needs to be granted before 14th February 2022; s.119(2)(c). If it is granted on or after that date, it cannot be a "qualifying lease". The question that arises from that is whether a new lease granted on or after 14th February 2022 under Chapter 2 of Part 1 of the 1993 Act, in substitution for the existing lease, will or will not be a "qualifying lease", in circumstances where the existing lease is a "qualifying lease". As Andrew Butler KC puts it in his article, on the face of it, " …. *this definition will inadvertently exclude leases which have been extended after 14 February 2022….* ". He acknowledges that the point is "untested," but the doubt and uncertainty is there. It is a doubt and uncertainty which advisors to leaseholders are now obliged to address in each individual case.

This doubt and uncertainty is not, I suggest, assisted by the guidance issued by your Department. What the guidance says is this:

26. Leaseholders should seek legal advice to make sure explicitly in their agreements that their protections are extended as part of their lease. It was intended to work like this and freeholders should make sure that lease extensions reflect this position.

By stating that the Act was "intended to work like this" simply compounds the uncertainty over whether the statute does or does not exclude from protection a new lease granted under the 1993 Act on or after 14th February 2022.

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In addition, advising that in order to resolve this uncertainty, the new lease should include an express term to ensure continuing protection, adds a whole new layer of complexity to any claim. It is far from clear in any event as to exactly how a new lease under the 1993 Act can, as matter of law, "reflect this position."

This problem applies to new lease claims notwithstanding the motivation of the leaseholder. However, in many cases, leaseholders with long unexpired terms make a claim for a new lease under the 1993 Act simply to buy out the ground rent; they are not looking to make any other changes to the lease and such transactions are generally simple and straightforward. However, the doubt and uncertainty over whether in such circumstances the new lease can retain the protection under the BSA enjoyed by the existing lease will act as a significant disincentive to making a claim. I do not imagine that was the "intention".

The Government has made it abundantly clear that its overarching policy on reform of the leasehold enfranchisement regime is to make the process simpler, quicker and cheaper for leaseholders. However, the application of s.119 fails on all three counts. It is not made simpler because the issue of whether or not the new lease is a "protected lease" under the BSA is now a complex issue; it is not made quicker because the uncertainty gives rise to a whole area of specialist enquiry to be undertaken before a claim can be made, and it is not made cheaper; not only because it raises the question of whether or not the removal of protected status gives rise to any valuation issues, but also because it necessarily involves incurring additional professional fees.

Given the terms of the Department's guidance on this section, I imagine that it was not the Government's intention to create this doubt and uncertainty. However, it does rather beg the question as to why, if the intention was to ensure that a new lease granted under the 1993 Act could be a "qualifying lease" notwithstanding its date of grant, it was decided not to incorporate an express provision to that effect in the statute. It is particularly surprising in circumstances where there are several other sections of the 2022 Act (and the regulations made thereunder) where the position of acquiring leaseholders has been expressly dealt with. I can also point to the Leasehold Reform (Ground Rent) Act 2022 as another example of where the issue is expressly covered.

All that is required to resolve this problem is a very simple amendment to the legislation to make the Government's stated intention expressly clear. I should be glad to know that this will be done as a matter of urgency. Until then, the doubt and uncertainty over s.119 will continue to the significant detriment of leaseholders.

I look forward to hearing from you.

Yours sincerely

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