

# Professional advice

■ This week: right to buy, completion notices and subletting 'outside the act'

**QUESTION:** I am buying a mixed retail and residential scheme. Under what circumstances do I need to be concerned about the residential tenants having a right to buy? Is this the seller's problem rather than mine?



CHARLES HORSFIELD, PARTNER IN THE PROPERTY DEPARTMENT AT MACFARLANES, RESPONDS

THE PROPERTY IS RETAIL WITH RESIDENTIAL accommodation above, although the flats have been sold on 999-year leases. The Landlord and Tenant Act 1987 requires a seller to offer the interest that is being sold to qualifying residential tenants where the internal floor area of the flats exceeds 50% of the internal floor area of the building being sold.

The internal floor area of the commercial premises is more than 50% of the internal floor area of the flats – but that is not the end of the matter. The configuration of this property would enable a part to be severed vertically from the remainder and treated as a separate building.

The property will therefore be treated as several buildings and the act will potentially apply to each. Your seller must act with care as it is a criminal offence not to offer a building to the qualifying tenants. The obligation falls upon the seller and it is liable for non-compliance. If the seller does nothing, the tenants' rights are not extinguished on completion of your purchase. You and your lender must be alert to the possible remedies available to the tenants.

There may be circumstances where, notwithstanding the possible application of the act to a part of the property, it can be argued that the act should not apply. If the whole property operates as a single building, with common parts that benefit the whole property and a common service charge, severing one part from the remainder would cause a problem. There is a defence under the 1987 act of reasonable excuse, being a genuine belief that the act does not apply. This will prevent the criminal sanction being applied but, if the seller is wrong and the act does apply, the tenants' remedies remain.

**QUESTION:** I am selling a property and following exchange the purchaser was unable to complete. If I want to serve a notice to complete, do I need to be able to complete immediately and can I forfeit the deposit?



MICHAEL KILNER, ASSISTANT SOLICITOR AT MAPLES TEESDALE, RESPONDS

EARLIER THIS YEAR THE HIGH COURT EXAMINED the meaning of 'ready, able and willing' to complete in the case of *Midill v Park Lane Estates and Gomba International Investments* (2008).

It depends on the contract and the action taken. Assuming that you are using the Standard Commercial Property Conditions, you need to be 'ready, able and willing' to complete in order to validly serve a notice to complete. If the purchaser then fails to complete, you can terminate the contract and forfeit the deposit.

The claimant purchaser agreed to buy shares in a company that owned property on Park Lane from the defendant for £4m. The purchaser paid a 10% deposit on exchange but failed to complete. The agreement for sale required the vendor to deliver to the purchaser various documents, including signed stock transfer forms. The vendor served a notice to complete and, when the purchaser failed to do so, terminated the agreement and sold the property to another buyer at a profit.

The purchaser argued that the notice to complete was invalid as the vendor had not delivered the above documents and could not immediately complete. The vendor argued that it only had to be able, within a reasonable time, to set up the necessary administrative arrangements in order to complete.

The court confirmed that a vendor could still be 'ready, able and willing' to complete, even if minor administrative tasks were outstanding and held that the vendor's notice was valid.

Nevertheless, you should still prepare fully, as the less you have to do, the more likely a court is to find you 'ready, able and willing' to complete and that notice to complete is valid.

**QUESTION:** My tenant wants to sublet its property. I have said it can, provided the sublease excludes the 1954 act. It has threatened to sue me for unreasonably withholding consent. Do I have to agree?



DAVID GOLTEN, PARTNER AT LAW FIRM CANNING'S CONNOLLY, RESPONDS

IT DEPENDS ON WHETHER YOUR TENANT CURRENTLY has security of tenure under the Landlord and Tenant Act 1954. While you are entitled to make consent to a subletting subject to conditions, those conditions must be reasonable or they will be unlawful. It would not be reasonable to impose conditions that were effectively an attempt to take commercial advantage of the subletting – for example, by requiring the act to be excluded if currently it is not.

If the existing lease excludes the security of tenure provisions of the act, you are entitled to require that any sublease does the same, as that would have a neutral commercial effect on you. If the existing lease does not exclude the act and its security of tenure provisions, then to impose a condition that the sublease must exclude the act would be unreasonable.

The position would be different again if your tenant's existing lease did not exclude the act but your tenant was otherwise prevented from enjoying its provisions because, for example, it was not in actual occupation. If that were the case here, you would be entitled to require that any sublease excludes the act.

You should also be aware that once any conditions you have imposed are satisfied, you cannot then reasonably withhold your consent. In the event of a claim being made by your tenant, the burden will be on you to prove that the condition you have imposed is reasonable.

To ask our experts for professional advice, please email your questions to [mjansen@cmpl.biz](mailto:mjansen@cmpl.biz). All queries will be dealt with in the strictest confidence. It is recommended that parties always seek independent legal advice.