

# Some Practical Problems Arising Under the Right to Buy

## **Introduction**

Part V of the Housing Act 1985 ("HA 1985") provides a statutory scheme which confers on secure tenants the Right to Buy their homes from their landlord at a discount.

This paper explores some of the practical problems that can arise in this context.

In some cases the Housing Act 2004 ("HA 2004"), parts of which came into force on 18 January 2005, will have an impact on the problems identified.

The paper concludes by addressing some of the other changes introduced by the Housing Act 2004.

## **The Operation of the Right to Buy**

The essentials of the scheme by which the Right to Buy is exercised are as follows:

- (1) the tenant serves a notice under section 122 claiming the Right to Buy;
- (2) by section 124 the landlord must either deny or admit the Right to Buy;
- (3) if the landlord admits the Right to Buy then under section 125 it must state the price at which the house ought to be sold and the terms to be included in the conveyance in a notice;
- (4) the tenant must then serve a notice under section 125D that he intends to pursue his claim to purchase the property;
- (5) the terms of the conveyance are then agreed by the parties or any issue between them must be determined by the County Court under section 181;
- (6) when all matters relating to the grant have been agreed or determined the landlord is under a duty under section 138 to grant the tenant the property and this duty is enforceable by obtaining an injunction from the court

The secure tenant of a house will acquire the freehold. The secure tenant of a flat will acquire a new lease for a term of 125 years.

### **Participation in the Right to Buy**

A common problem relates to the question of who can participate in the Right to Buy.

Very often this problem that arises where the secure tenant (A) has the Right to Buy but another member of their family (B) has the financial resources required to complete the purchase.

The right to participate in the Right to Buy is conferred on all joint tenants. It may be that the tenants were originally A, B and C but that the only person remaining at the property is A. In this case even though C has moved out of property C can participate in the Right to Buy with A and B.

But what if C does not wish to exercise the Right to Buy? By s.118(2) the joint tenants may agree between themselves to whom the Right to Buy shall belong so long as at least one of the persons to whom the right is to belong lives at the property as their principal or only home. Thus A and B can exercise the Right to Buy together with C's agreement. If, however, C will not agree to A and B exercising the Right to Buy their only solution would be to find a way of having C removed from the joint tenancy.

The secure tenant is also permitted to share the Right to Buy with up to 3 family members who are not joint tenants but who occupy the dwelling-house as their principal or only home (s.123). The Right to Buy can be shared only if either the family member is a spouse who has been living in the dwelling for the preceding 12 months or if the landlord consents to the participation of the family member.

Other than spouses, parents, grandparents, children siblings, uncles and aunts, and nephews and nieces are treated as being members of the tenant's family (s.186).

### **Beneficial Ownership Following the Right to Buy**

The provisions concerning participation in the Right to Buy do not solve the problem of the secure tenant (A) who has the Right to Buy but who has a family member (B) with the funds for the purchase but who does not live at the property.

Nor do the provisions permit B to participate if he is a friend rather than a family member.

In these circumstances although B can not formally participate in the exercise of the Right to Buy he may nevertheless make an arrangement with A to fund the purchase.

The problems that arises in this context is whether B has an interest in the property and, if so, what is B nature or extent of B's interest in the dwelling-house after the Right to Buy is exercised.

In some cases the parties will draw up a deed of trust or other form of agreement to deal with the respective rights.

However, in the absence of such an agreement the normal principles of constructive and resulting trusts and proprietary estoppel will be applied by the courts (see *Lloyds Bank plc v Rosset* [1991] 1 AC 107 and *Oxley v Hiscock* [2004] 3 WLR 715).

There are a number of recent cases, summarised below, in which the interests in a property acquired under the Right to Buy have been considered<sup>[1]</sup>. The cases not only cover the situation on the initial purchase of the dwelling-house but also arrangements between members of the family after the purchase:

*Humphreys v Humphreys*: Mother purchased with 60% discount. Transfer of property to son who paid the mortgage. Mother established transfer obtained by undue influence. Parties held beneficial interest 60% for mother (value of discount) and 40% for son (value of payments)

*Kyriakadies v Kyriakadies*; Father and daughter purchased property. After father's death argument about who owned beneficial interest. Court decided that father had

100% of the beneficial interest because daughter had only participated to enable mortgage to be obtained. Presumption of advancement displaced.

*Jiggins v Brisley*; Father and mother purchased the property. Purchase wholly funded by son and his wife. Intention initially to transfer to son and his wife at a future date but the father and mother would be allowed to remain in the property for life. Later promises were made to leave property to the son and his wife by will. A resulting trust/estoppel arose in favour of the son's wife in respect of the property (the father, mother and son having died).

*McKenzie v McKenzie*; Purchase by father and mother together with son. No express declaration of trust. Son only made a party to the transfer to enable his parents to get mortgage. The son made no repayments of mortgage referable to the purchase (the son had made payments related to his own borrowings on the security of the property). Son had no interest.

*McCreeaney v McCreeaney*; Purchase by mother. The children (1 son and 2 daughters) paid off outgoings (including the mortgage) in the expectation that the property would be left to them but not with intention to acquire any interest in the property. Daughters later ceased to contribute. Mortgage later discharged by son to prevent mortgagee possession proceedings. Mother transferred property to son on basis that she would be allowed to remain for life paying son a rent under an oral agreement. On mother's death daughters argued transfer to son should be set aside for undue influence. Mother had taken legal advice prior to transfer to son. Mother was free to do as she pleased with property. There was no basis for setting transfer aside.

*Driver v Yorke*; Father bought the property. In his will father left property for 3 children (2 boys, one girl) equally. Boys arguing that their sister was not entitled to a share because one brother had stood as a surety for the mortgage and they had paid the mortgage instalments. Brothers failed to establish on the evidence the payments of the mortgage they alleged or an express understanding that they would inherit the property to the exclusion of the daughter children.

Some points emerge these cases that are worth bearing in mind:

- (1) the starting point when analysing the position between the parties is to identify what the common intentions of the parties was as to the beneficial ownership of the property;
- (2) the fact that a someone is a party to the transfer is not conclusive that they were intended to have beneficial interest (see *Kyriakadies and McKenzie*). They may only be party to the transfer to enable a mortgage to be obtained;
- (3) Where the court is considering the amount of the parties' interest in the property on the basis of their contribution the "discount" will be treated as a monetary contribution made to the purchase price by the secure tenant (see e.g. *Humphreys*);
- (4) Where someone with the benefit of the discount is transferring their interest to a third party the transaction may be to their disadvantage and there is the risk of undue influence. They should receive independent legal advice (contrast *Humphreys and McCreanney*);
- (5) A contribution to the purchase price will not always be made with the intention of acquiring a beneficial interest in the property (*McCreanney*)

In the context of these sorts of family arrangements an important consideration for the parties will be to avoid the provisions by which the Right to Buy discount is repayable being triggered (an express consideration underlying the arrangements in *Jiggins v Brisley*).

Tenants who exercise the Right to Buy and then make a 'relevant disposal' which is not an exempt disposal (generally a resale) within the discount repayment period<sup>[2]</sup> must repay on demand some or all of the discount for which they qualified (see s.155). The meaning of a 'relevant disposal' was originally drafted as being any of:

- (1) a further conveyance of the freehold or an assignment of the lease; or
- (2) the grant of a lease for a term of more than 21 years.

This definition of 'relevant disposal' would not catch an express trust created to protect a third party not participating in the Right to Buy but who was nevertheless funding the purchase.

However, section 187 of the Housing Act 2004 inserts a new section 163A into the HA 1985 which expands the meaning a 'relevant disposal' to include an arrangement if (i) it is made in contemplation of the tenant exercising the Right to Buy (ii) it is made before the end of the discount repayment period and (iii) it is an arrangement by which a relevant disposal (other than an exempted disposal) is or may be required to be made to any person after the end of that period.

The new section would catch an arrangement that created a bare trust in favour of the person funding the purchase (B) because the B could compel the trustees to transfer the property to him.

Furthermore the section appears to be drafted sufficiently widely to catch an arrangement under which B acquires an interest less than the whole beneficial interest. This is because B could apply to the court for an order for sale under s.14 of the Trust of Land and Appointment of Trustees Act 1996. If the court were to make an order for sale then a 'relevant disposal' would occur on the sale pursuant to the court order. Thus the original arrangement would be one by which "a relevant disposal (other than an exempted disposal<sup>[3]</sup>) is or *may be required to be made to any person.*"

In order to avoid the risk of triggering the discount repayment provisions a party financing a Right to Buy might instead provide the finance by way of a loan.

### **Concurrent possession proceedings**

Under section 121(1) of the HA 1985 the tenant may not exercise the Right to Buy if the he is obliged to give up possession of the dwelling-house in pursuance of an order of the court or will be so obliged at a date specified in the order.

The effect of this provision is that where the landlord has commenced or is considering possession proceedings there can be a 'race' between the Right to Buy application and the possession claim. If the Right to Buy application reaches the state where the tenant can apply for an injunction to require completion under s.138 first then the tenant wins (as in *Dance v Welwyn Hatfield D.C.* [1990] 1 WLR 1097). If

the order for possession is made first then the landlord wins (see *London Borough of Enfield v Mckeon* [1986] 1 WLR 1007).

However, where there are both claims for possession and for completion of the Right to Buy conveyance the court has a discretion as to which application it will consider first (see *Bristol City Council v Lovell* [1998] 1 WLR 446).

In such a case it is appropriate for either party to raise at an interlocutory stage the sequence in which the possession proceedings and the Right to Buy application should be dealt with.

If the possession claim is based on a breach of the tenancy it will be hard to criticise a decision to resolve the possession claim first because if the tenant has behaved properly there will be no prejudice.

If the landlord has failed to process the Right to Buy application in accordance with the statutory timetable that may be a factor in favour of hearing the Right to Buy claim first.

If the court can not decide at an interlocutory stage which claim to hear first it may be appropriate to hear the 2 claims together.

Where the Right to Buy application has not reached a position where an injunction might be granted under s.138, the existence of the Right to Buy claim can still be a factor going to whether or not it is reasonable to make an order for possession (see *Royal Borough of Kensington & Chelsea v Hislop* [2004] HLR 26). The following factors will be relevant to the court's decision

- whether the tenant is long established in the premises
- whether it would be unusually disruptive for the tenant to move
- whether the tenant is in breach of the terms of the tenancy and if so whether the breaches are persistent or serious
- whether the Right to Buy application has a genuine prospect of being carried through to completion rather than just being a device to avoid possession being ordered

- whether the landlord has deliberately failed to process the tenant's application
- whether the object behind seeking possession is to prevent the Right to Buy being exercised
- whether the landlord is seeking possession and offering alternative accommodation in order to better deploy its housing stock
- whether the tenant would have the Right to Buy in relation to any alternative accommodation offered
- whether the Right to Buy would create an "enfranchised pocket" in an area ordinarily rented so as to raise the possibility of management problems
- whether if the Right to Buy were exercised the tenant might inflict nuisance or annoyance on his neighbours

### **The Problem of Anti-Social Behaviour**

The problem of a 'race' to complete a Right to Buy application is particularly serious where there are allegations of anti-social behaviour because once the Right to Buy application is completed the range of remedies available to the local authority is reduced.

Where the dwelling is a flat rather than a house the landlord will still be able to forfeit the lease but the right to forfeit will be subject to the right to relief from forfeiture and, in cases other than the non-payment of rent, the breach of the lease will have to be admitted by the tenant or determined by a tribunal (see section 81 of the Housing Act 1996 and section 168 of the Commonhold and Leasehold Reform Act 2002).

Where the dwelling is a house there will be no possibility of evicting the tenants once the Right to Buy is exercised. The local authority will however be able to enforce any restrictive covenants in the conveyance against the purchaser. The local authority will also be able to enforce the restrictive covenants against the purchasers' assignees or sub-tenants so long as the restrictive covenants have been registered at HM Land Registry and the local authority retains land benefited by the covenants (see *White v Bijou Mansions Ltd* [1937] Ch. 610).

Sections 192 and 193 of the HA 2004, which are not presently in force, will provide new mechanisms to deal with Right to Buy applications where the tenant has been responsible for anti-social behaviour.

Section 192 will enable the landlord to apply to the court for an order suspending the Right to Buy for a specified period in respect of the tenancy on the grounds of anti-social behaviour. The court may only grant such an order if it is satisfied that the tenant or a person residing in or visiting the property has engaged or threatened to engage in anti-social behaviour (which includes using the premises for unlawful purposes), and that it is reasonable to make the order.

When deciding if it is reasonable to make the order, the court must consider, in particular, whether it is desirable for the property to be managed by the landlord during the suspension period, and the effect the behaviour has had, or would have if repeated, on other people.

The landlord may request an extension to the suspension period but the court may not extend period of the order unless there has been further anti-social behaviour since the making of the original order and it is reasonable to make the further order.

Section 193 will prevent a tenant from being able to compel the landlord to complete a Right to Buy sale whilst certain proceedings are underway. The proceedings which have this effect are the application for a suspension order (see above), a possession order on the basis of Ground 2 of Schedule 2 of the Housing Act 1985 (anti-social behaviour) or a demotion order under section 82A of the Housing Act 1985.

If a demotion order or outright possession order is later made, the tenant will lose their secure tenancy and thus also lose the Right to Buy.

### **Problems arising out from disrepair of the dwelling**

Whilst the tenant is a secure tenant he will have the benefit of the landlords repairing covenant under section 11 of the Landlord and Tenant Act 1985.

Where a tenant is seeking to exercise the Right to Buy in respect of a dilapidated property there are a number of issues that can arise.

Usually the tenant would prefer the landlord to remedy the defects or disrepair before purchasing the property. If necessary the tenant can bring proceedings for specific performance to require the landlord to carry out the work required to remedy the disrepair.

However, there may be circumstances where the tenant finds that he must complete the purchase before he can require the landlord to carry out the work, for example, if he has put in an application under the Right to Buy before the available discount is reduced by regulation<sup>[4]</sup>.

In such circumstances the tenant will be able to argue that the value of the dwelling should be reduced to take account of the disrepair. The valuation for Right to Buy purposes disregards disrepair that is the responsibility of the tenant but not disrepair that is the responsibility of the landlord (see s.127(1)(b)).

The problems for the tenant will then be establishing that (a) the landlord's valuer has taken the disrepair into account and that (b) the valuer has applied an appropriate discount.

Where the tenant has the Right to Buy in respect of a flat the landlord's s.125 notice will provide some information relevant to the second consideration. By s.125A(2) the landlord's s.125 notice must contain estimates for service charges in respect of repairs (including works for the making good of structural defects). The effect of s.125A and para 16B to Schedule 6 of the Housing Act 1985 is that the landlord can not subsequently recover more than the estimated costs (plus an allowance for inflation) in the 'reference period' (a period of between 5 from an assumed date of conveyance -see s.125C). From these estimated costs the tenant will know the maximum amount that

he can be required to pay under the service charge for the necessary repairs during the reference period.

The tenant of a flat will also retain a landlord's covenant to repair in his Right to Buy lease on which he can sue (see para 14 of Schedule 16). The tenant of the flat will therefore still be able to sue for damages for losses (including general damages) arising after the grant of the Right to Buy lease. There is therefore a good argument that when exercising the Right to Buy the value of the flat in disrepair should be the value of the flat in good repair less the costs recoverable under the service charge for carrying the repair works.

Where the tenant has the Right to Buy in respect of a house there will be no service charges payable and no landlord's repairing covenant following the Right to Buy. It may therefore be desirable for the tenant to instruct his own surveyor to ensure that the valuation is correct. In theory the reasonable costs of obtaining such advice could be a head of loss in the tenant's claim for damages under his secure tenancy.

The problems of disrepair can also cause problems for the landlord, especially if the landlord considers it desirable to demolish the premises. Although the Housing Act 1985 provides a ground for possession in such a case (see para 10 of Schedule 2) the Right to Buy under the HA 1985 remains exercisable by the tenant, potentially giving rise to a 'race' between the Right to Buy application and the claim for possession.

Sections 182 and 183 of the HA 2004 resolve this problem by permitting the landlord to serve initial and final demolition notices.

Section 182 adds a further exception to the schedule 5 to the HA 1985 to the Right to Buy. The new exception applies if the property is to be demolished during the next 24 months, the landlord has served a final demolition notice and has followed the prescribed notification process. Under the notification process the landlord is required to notify tenants affected by the decision to demolish, giving reasons and the intended timetable for demolition and also to publicise decisions. The landlord must also inform the affected tenants of their right to compensation under the new section

138C HA 1985 for any reasonable costs incurred in respect of the conveyancing process - for example, the costs of legal advice and survey and search fees.

If the landlord subsequently decides not to demolish the property, he must serve a revocation notice upon affected tenants as soon as is reasonably practicable. If it appears to the Secretary of State that a landlord has no intention of demolishing properties subject to a final demolition notice, he may serve a revocation notice on affected tenants. The Secretary of State may also extend the 24-month period on application by the landlord.

Once the final demolition notice has been served a new section 138B provides that existing Right to Buy claims are terminated.

A final demolition notice cannot be served until the arrangements for acquisition of any premises to be demolished alongside the properties as part of a demolition scheme are finalised. This means that compulsory purchase issues must have been resolved before a final demolition notice can be served.

The steps leading to the service of a final demolition notice may take some time. Section 183 of the HA 2004 inserts a new s.138A HA 1985 which provides for existing Right to Buy claims to be suspended where an initial demolition notice has been served, following the prescribed notification process. The initial notice only has the effect of suspending claims. The tenant is still able to make a new Right to Buy application.

The content, period of validity, and the provisions concerning the termination and revocation of initial demolition notices are contained in a new Schedule 5A to the HA 1985. Such notices may be served in respect of properties that the landlord intends to demolish within five years. This period may not be extended.

If the landlord subsequently decides not to demolish the property, he must serve a revocation notice upon affected tenants as soon as is reasonably practicable. If it appears to the Secretary of State that a landlord has no intention of demolishing properties subject to an initial demolition notice, he may serve a revocation notice on affected tenants.

If an initial demolition notice or final demolition notice expires and demolition has not taken place, no further demolition notice can be served on that property for a period of five years.

### **The premises conveyed**

One problem that can arise on right to buy purchases is the area of the land to be conveyed to the tenant. This problem is most likely to arise in relation to a shared garden or other unbuilt land near the tenant's home.

The Right to Buy is a right to acquire the tenant's "dwelling-house" (see s.118 HA 1985). It is clear from the definitions of "house", "flat" and "dwelling-house" in s.183 that the "dwelling-house", in the first instance, applies only to the structure.

By s.184(1) of the HA 1985, however, any "land let together with a dwelling-house" is treated as forming part of the dwelling-house (unless the land is agricultural land and exceeds 2 acres). Thus a garden or other land forming part of the premises let to the secure tenant will be conveyed under the right to buy. It will therefore be necessary to look at the tenancy agreement to determine what land is comprised in the secure tenancy.

By section 184(2) land not let to a secure tenant may nevertheless pass under the Right to Buy if the land is or has been used for the purposes of the dwelling-house and

- (1) the tenant, by a written notice served on the landlord at any time before he exercises the Right to Buy or the right to acquire on rent to mortgage terms, requires the land to be included in the dwelling-house and
- (2) it is reasonable in all the circumstances for the land to be so included.

The question of whether a shared garden or other land can be conveyed under a right to buy claim will therefore turn on the issue of whether it is reasonable to include such land in the conveyance.

In this context the rights of third parties will be important. In the case of a shared garden there will be 2 important considerations:

- (1) the third parties may have rights to use the land which will be binding on anyone acquiring the land under the Right to Buy. An easement to use a communal garden can exist at law (see *Re Ellenborough Park* [1956] Ch and *Mulvaney v Gough* [2003] 1 WLR 360) and will bind a purchaser as an overriding interest (see paras 3 of Schedules 1 and 3 to the Land Registration Act 2002). The rights of a person in actual occupation of land are also binding as an overriding interest (see paras 2 of Schedules 1 and 3 to the Land Registration Act 2002);
- (2) the third parties may themselves be able to apply to exercise the Right to Buy in which case the local authority may be compelled to grant them rights to continue to use the land. Paragraph 13 of Schedule 6 to HA 1985 provides that "where the dwelling-house is a flat and the tenant enjoyed, during the secure tenancy, the use in common with others of any premises, facilities or services, the lease shall include rights to the like enjoyment, so far as the landlord is capable of granting them, unless otherwise agreed between the landlord and the tenant". If the third party has made an application to exercise the Right to Buy it may not be reasonable for the landlord to deprive itself of the ability to grant such rights by disposing of the land over which the third party previously enjoyed rights.

### **Changes under the Housing Act 2004**

A number of changes to the Right to Buy regime are made by Part VI of the Housing Act 2004. Some of these have been outlined above. Other changes of note are described below and came into force on 18 January 2005.

### **Extension of qualifying period for Right to Buy**

At present, the Right to Buy does not arise unless the tenant has occupied accommodation under a public sector tenancy for a period of at least two years. S.180 will extend the qualifying period from 2 years to 5 years. However, although tenants will in future have to wait 5 years instead of 2 years to qualify for the Right to Buy, the amount of discount for which they will qualify under section 129 of the 1985 Act will be equal to their current discount entitlement after 5 years.

This section will only apply to wholly new tenancies that begin on or after 18 January 2005.

### **Time for Landlord's notice to complete**

Under section 140 of the Housing Act 1985, a landlord may serve a 'first notice to complete' no earlier than 12 months after serving a notice under section 125 of the Housing Act 1985 (notice of purchase price etc). This requires the tenant to complete the Right to Buy sale within a period stated in the notice, which must be at least 56 days, and must be reasonable in the circumstances. However, if any relevant matters are still outstanding, the tenant may serve on the landlord within the specified period a written notice specifying those matters, and he does not then have to complete the sale within the specified period.

If the tenant does not comply with a notice under section 140, the landlord may serve on him a further written notice requiring him to complete the transaction within a further period stated in the notice, which must be at least 56 days, and must be reasonable in the circumstances. The landlord has discretion to extend this period. If the tenant does not comply with a notice under section 141 within the period specified by the landlord, his Right to Buy application is deemed to be withdrawn.

Section 184 shortens the period before which a landlord may serve a first notice to complete under section 140 from 12 months to three months. The new total time limit

is considered to be comparable to the time taken by private sellers and buyers to complete sales.

#### Repayment of discount: periods and amounts applicable

As explained above, if a person who has exercised their Right to Buy wishes to resell the property within a certain period, he or she is required to repay to the former landlord all or some of the Right to Buy discount which they received.

Section 185 extended the period from 3 years to 5 years.

Section 185 also:

- (1) makes clear that former landlords have discretion as to whether or not to demand repayment of discount on early resale (e.g. where a buyer wishes to resell for reasons of severe illness, or sudden bereavement, or relationship breakdown (especially in cases of domestic violence)).
- (2) changes the calculation of the amount of discount to be repaid from a flat-rate basis to a percentage basis, in relation to the Right to Buy. In this way any change in the value of the property since the Right to Buy was exercised is taken into account.
- (3) changes the repayment taper (i.e., the amount by which the level of discount which has to be repaid is reduced after each complete year since purchase) from one third per year to one fifth per year

Section 186 is designed to ensure that an owner who resells during the five-year period during which discount may be recovered retains the value of improvements he or she has made to a property after acquiring it, either under the Right to Buy or as a successor in title to the original purchaser.

#### Right of first refusal for landlord

Section 188 requires that a covenant be inserted into all conveyances or grants to tenants requiring that, during the period of 10 years from the date of the conveyance

or grant, the tenant purchaser (or any successor in title) must make an offer of first refusal to his former landlord, or such other person as the Secretary of State prescribes, before he can make a relevant disposal of the property (other than an exempted disposal) – this generally means a resale.

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