

The Landlord and Tenant Act 1987 and mixed use properties



Owners of mixed use properties must consider whether the Landlord & Tenant Act 1987 (the “1987 Act”) will apply when proposing to dispose of their interest in the property. Subject to certain qualifying criteria, the 1987 Act provides qualifying tenants with the right of first refusal, enabling them to purchase the interest that the landlord intends to dispose of at the price and on the terms proposed. If the 1987 Act does apply, then the statutory procedure must be followed, which could potentially delay any proposed sale by several months, even if the qualifying tenants ultimately decide not to acquire the interest. As such, it is important to identify whether the right of first refusal applies as early as possible.

Whilst only qualifying tenants of residential flats can exercise the right, the 1987 Act expressly refers to properties containing non-residential elements, so it is important not to fall into the trap of thinking that the right only applies to blocks of flats. Below we set out the qualifying requirements and the issues particularly relevant to mixed use properties.

Qualifying criteria

In order for the right of first refusal to arise, the qualifying criteria set out in the 1987 Act must be satisfied. For ease, these qualifying criteria can be divided into four sections:

The premises

The right of first refusal only applies to qualifying premises. In order to qualify, the premises must be a self-contained building or part of a building. The issues to consider will depend on the construction of the premises



and whether there are any shared services or multiple buildings.

Qualifying tenants

The definition of a “qualifying tenant” is a tenant of a flat under a tenancy except for a list of excluded tenancies such as an assured shorthold tenancy. A flat is a separate set of premises which is divided horizontally from some other part of the building and is constructed or adapted for the purposes of a dwelling. The subject building must contain two or more flats held by qualifying tenants and the number of flats held by qualifying tenants must exceed 50% of the total number of flats contained in the building. However, if a tenant holds a tenancy of three or more flats in the building, they will not be a qualifying tenant of any of them.

The landlord

The individual(s) or company making the disposal must be the qualifying tenants’ “landlord”. The general rule is that the “landlord” is the qualifying tenants’ immediate landlord. Therefore, in situations where there is a headlease, the headlessee will be the qualifying tenants’ immediate landlord, rather than the freehold owner. This means that in that situation a disposal by the freehold owner would not be subject to the right of first refusal.

Relevant disposal

The proposed disposal must be a “relevant disposal”, which is defined as a disposal of any estate or interest in the building except a list of excluded transactions. The sale of the building would clearly be subject to the right, as would other less obvious transactions, such as leases of common parts. However, there are important exempt disposals, such as the grant of the lease of a single flat and a disposal to a company that has been an associated company for at least two years.

Mixed use premises

When considering the qualifying criteria, there are several issues that are of particular relevance for mixed use premises.

Percentage of non-residential areas

The most important issue is generally the percentages of commercial and residential areas. Where the internal floor area of non-residential parts exceeds 50% of the total internal floor area of the premises, the building will not be subject to the right of first refusal. This will be a factual calculation, although it is important to disregard any common parts areas from all parts of the calculation. This may seem like a simple exclusion, but case law has determined that areas such as a caretaker’s flat are to be deemed common parts. Therefore, especially in buildings where the percentages are close, it is important to consider very carefully what is and what is not deemed to be common parts.

Residential headlease

The residential elements of mixed use properties are often subject to a headlease. Usually, this will result in the headlessee being the “landlord” and allows the freehold owner to deal with the freehold without triggering the right of first refusal. However, it has been suggested that if the headlessee has been granted rights over an area rather than it being demised and the qualifying tenants’ leases include rights over that area, the immediate landlord of that area remains the freeholder. If this is the case, then the right of first refusal would be triggered by any disposal of that part of the building by the freeholder. Therefore, if there is a headlease of the flats only, it is important to check the demise of the headlease carefully and review the rights granted in the flat leases.



Leases of commercial units

A lease of a flat is expressly excluded from the right of first refusal, but there is no such exemption for a lease of a commercial unit. It would be surprising if Parliament intended for residential flat owners to be given the opportunity to take leases of commercial units each time they were let, just because they were located in the same building. Indeed, for some time the prevailing view in practice was that the right did not apply to leases of commercial units. However, the case of *Dartmouth Court Blackheath Limited v Various Worth Limited (2008)* cast doubt on this approach and it does appear that technically a grant of a commercial lease could be subject to the right of first refusal. As such, owners of mixed use buildings will need to consider the right of first refusal when granting leases of commercial units.

Conclusion

The qualifying requirements set out in the 1987 Act must be considered carefully in relation to any disposal of mixed use premises. There are serious consequences for non-compliance, such as potential criminal charges, and late identification of whether the right applies could result in significant delay or disruption to the proposed transaction. There are various exceptions and exclusions to the right and also steps that can be taken to bring the proposed transaction outside the scope of the right of first refusal. As such, mixed use property owners may wish to take a proactive approach and seek advice during the early stages of a proposed transaction, or even when a development is being designed.

If you require help or advice on mixed use premises or other related matters, please contact our expert [real estate team](#).



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