

Carter Lemon Camerons LLP

Solicitors



Dispute Resolution Department

Guide to Ground Rent Professional Negligence Claims

What is ground rent?

Ground rent is something that most people who own a leasehold property in England and Wales may have to pay to their landlord or freeholder. If your property is leasehold then you have temporary ownership of the flat, or house, subject to the terms of the lease. Leases are usually granted for periods of at least 99 years (and are commonly for 125, 250, or even 999 years). The freehold interest in the land continues to be owned by the landlord and as a leaseholder you will usually have to pay ground rent to the owner of the freehold land. Flats are normally sold on leases and so ground rent is usually payable by owners of apartments, whereas houses are most commonly sold as freehold, meaning you permanently own the land and the building on it. If a property is freehold there is no ground rent payable.

If you own a leasehold property, the terms of your lease will set out how much ground rent you have to pay and when the rent is due.

Sometimes the rent will be paid in one annual instalment, while other leases may require the rent to be paid at more frequent intervals, such as half yearly, or even quarterly.

There are two types of ground rent; (a) fixed and (b) escalating. If it is fixed, then the ground rent you have to pay will remain the same for the duration of your lease. If it is escalating then the ground rent will increase over the term of the lease. The lease will set out when the increases will take effect and by how much the ground rent will rise.

Sometimes the clauses in the lease dealing with the ground rent are less than straightforward and therefore difficult to understand. This can be the case when the ground rent does not increase by a specific amount such as say £100 per year, but instead is required to be fixed by reference to some other uncertain measure. For example, by reference to a percentage of the sale price of the property, the capital value of the property, the rentable value of the property, or the consumer or retail price index. In any of these cases the amount of ground rent payable in the future will be very uncertain and for unwary lessees that can mean unexpectedly large increases in the amount of ground rent payable.

Paying ground rent

You do not have to pay ground rent if the landlord or freeholder has not sent you a formal request. Any demand for payment will usually be sent to your home address and has to include: the name of the lessee, the length of time the demand covers, how much money is due, the name and address of the freeholder and the date by which payment must be made.

If you fail to pay ground rent, then a landlord may exercise the option of recovering the money through the courts. If a dispute is not resolved, then the freeholder can also choose to begin forfeiture proceedings, which means the landlord will try and recover possession of the property. By law the landlord can only pursue this course of action if the money owed exceeds £350 and you have been in arrears for over three years.



Rising ground rents

Ground rents have traditionally been very low. However in recent years there has been a developing trend towards higher ground rents which in many cases then rise sharply. Some freehold investors take every opportunity to add unconscionable ground rent clauses to leases in order to exploit unsuspecting leaseholders. In some cases these clauses are very well camouflaged but by linking ground rent to rentable value and/or including steep doubling provisions freeholders have succeeded in catching out a number of unwary leaseholders. Some leaseholders have seen that their ground rent rises from a couple of hundred pounds per year to many thousands of pounds per year. Such rises will have a devastating effect on the value of a leasehold property and at the same time will substantially increase the value of the freeholder's interest.

A small number of freeholders have been adding very unfair ground rent terms to existing leases when their lessees have sought extensions, or perhaps to correct an error in the existing lease. Once a lease has less than 81 years left to run the cost of extending the lease, or buying the freehold, will start to rise significantly. Once a lease has less than 60 years left it may be difficult to get a mortgage and by the time it has less than 45 years left it may be impossible to get a mortgage. As the lease gets shorter the cost of extending it rapidly escalates.

For this reason most leaseholders will start to try and negotiate lease extensions once the lease has less than about 85 years left. An intention to sell is often the trigger because at that point the leaseholder may learn that the shorter the lease the less the property will be worth and so they want to extend the lease just to improve the value and attractiveness of the property on sale. At this point some freeholders may agree a short extension for a quite small premium provided that they can also increase the ground rent. Agreeing to this can result in a tortuously worded ground rent clause stating that the ground rent will double every 10 years. However, what is often overlooked is that the actual effect of these clauses is that the 10 year periods start from the beginning of the lease, not from the date on which the extension is agreed.

This can mean that when the property is sold the ground rent can rise from say £250 to, in some cases, as much as £8,000 per year. Freehold investors Martin Paine and his wife Margaret Anne Kirmond have been identified in Parliament because they have often used this backdating clause. In one reported case involving a flat at Blythe Court in Coleshill near Birmingham, the ground rent payable by the leaseholder to Mr Paine's company will eventually rise to a staggering £8,000,000 per year for a one bedroom flat that cost less than £60,000. This happened because the purchaser's solicitor failed to realise that the 10 year doublings started not when the lease extension was granted in 2014 but from 1961 when the original lease term commenced.

There are currently also serious concerns about escalating ground rent clauses attached to certain new-build leasehold homes. Some of the major householders, including Taylor Wimpey, have been including clauses which mean that the ground rent will double every decade. This will mean that an unsuspecting leaseholder who buys a new property with an initial ground rent of £300 per year will see that ground rent increase to £9,600 fifty years later. Many of these leases were granted from about 2007 so already a lot of lessees have seen their ground rent double for the first time.

Although it is usual for flats to be sold leasehold, there has also been a trend amongst developers to sell houses, especially in areas where prices are relatively low, as leasehold rather than on the traditional freehold basis. High ground rents are a means of transferring, or retaining, value from the leasehold property back to the developer's freehold reversion. For example, in a development of 40 flats in Prescot, Merseyside, Taylor Wimpey sold the flats for an average price of about £80,000 each. About two years later Taylor Wimpey sold the freehold on for a further £396,079.62, that is the equivalent of about an extra five flats.

The freehold was worth that much because the total ground rent income was £10,000 per year with the first doubling due on 1 January 2018 and then the ground rent will double again every ten years for the next forty years so that the freeholder's annual ground rent income will eventually rise to £320,000 per year. A very attractive investment for the owner of the freehold, but entirely at the expense of the leaseholders who may find their flats end up becoming worthless, or worth very little, by the time their ground rent rises to £8,000 per year for each flat.

While some housing developers have now switched to a formula which means that future rises are tied to the Retail Prices Index (RPI), those still facing exorbitant increases are finding that their properties are impossible to sell on, except at a substantial loss. This is a problem that has been reported across all regions of the UK. It is however particularly prevalent in North West England and in other areas where property prices are generally lower than average. It is therefore a problem that very often afflicts property owners who can least afford the financial loss caused by such high ground rents.

What you should have been told

Before agreeing to buy a leasehold property your conveyancing solicitor (or licensed conveyancer) should tell you about the key terms within the lease and other factors which may affect the title to the property, or your use and enjoyment of the property. This advice is often called a "Report on Title" or a "Report on Contract" and it should be sent to you before you commit to the purchase on exchange of contracts. For example, if you are planning to buy a property as a 'buy to let' investment you would expect the conveyancer to tell you if the lease contained a clause preventing the property being let.

The Report on Title should also tell you how much the ground rent is and how and when it will increase. If the ground rent is particularly high, or set to escalate sharply with frequent doubling, or because it will be re-set as a percentage of the purchase price, you should also be warned that it may affect the value of your property.

If you buy with a mortgage it is a requirement that the lender is informed by the conveyancer of any increases in the ground rent that cannot be readily established, or that are unreasonable. If the lease contains terms that are unsatisfactory then the solicitor is expected to obtain a deed of variation in order to ensure that the terms of the lease are amended to an acceptable form.

If there are doubts about whether the ground rent clause might be onerous, the valuer should be asked to confirm whether the valuation will be affected by the ground rent. In most cases it should be fairly obvious that if two properties are broadly similar in every way except that one has a much higher, or more sharply escalating, ground rent than the other, most buyers would choose the property with the lower ground rent.

High ground rents will cause market resistance on a sale and may make a leasehold property with an onerous ground rent clause difficult, or even impossible, to sell except at a much reduced price.

The solicitor who is advising you on the conveyancing process should warn both you as buyer and any lender who is providing a mortgage secured on the property, if the terms of the lease are unusual, or may adversely affect the value of the leasehold property.

A recent case study

Carter Lemon Camerons' Graham Balchin was instructed by a client who had bought a flat in south-east London in December 2013 for £265,000. Unknown to the client the seller had arranged with the freeholder (one of Martin Paine's companies) to have a variation of the lease in order to rectify an error in the lease plan.

A deed of variation was agreed between the seller and the freeholder to correct the lease plan. However, the freeholder used it as an opportunity to also alter the ground rent review provisions. Instead of being fixed at £250 per year doubling every 15 years, the ground rent was increased to £300 per year doubling every 10 years. The effect of that variation was that the doubling provision would result in the ground rent increasing to £153,600 per year for the last 10 years of the 99 year lease.

However the deed of variation went even further as the ground rent review clause continued:

“ ..that if the annual rent does not exceed two thirds of the Rentable Value of the Premises the Tenant shall be required to pay such annual rent [during each rent review period] as shall be £1 less than two thirds of the Rentable Value of the Premises. For the purpose of this lease “Rentable Value” shall mean the rent at which the Premises might reasonably be expected to let from year to year if the Tenant undertook to pay all usual tenant’s rates and taxes and the landlord undertook to bear the costs of repairs and insurance and other expenses (if any) necessary to maintain the Premises in a state to command that rent and assuming that the Reserved Property [i.e. the remainder of the building of which the Property formed part] were in good tenantable repair and complied with then statutory requirements to be let...

”

In December 2014 the client received a letter from the freeholder asserting that the Rentable Value was £10,140 per year (£195 per week) and therefore that the annual ground rent would be increasing to £6,759. As that rent would also be subject to doubling every 10 years the ground rent would eventually increase to (at least) a staggering £1,730,304 for the last 10 years of the 99 year lease. The ground rent provisions rendered the flat virtually worthless.

Unfortunately the client's conveyancing solicitors failed to check the terms of the deed of variation and warn the client, or the lender, that the ground rent terms were both unusual and onerous to the point of being unconscionable. The client was instead incorrectly told in the report on title that the ground rent was £250 per year and would be doubling every 15 years.

In order to restore the original ground rent terms to the lease the freeholder demanded a premium of £65,000. That sum was claimed from and ultimately paid by the negligent conveyancing solicitors together with the costs incurred in amending the lease to remove the onerous ground rent clause as well as the client's costs incurred in pursuing the professional negligence claim.



Professional negligence claims

It is well established law that conveyancing solicitors owe a duty to provide their purchaser clients a clear explanation of the key terms in the lease and set out any other important matters that may affect the client's use and enjoyment of the property.

If a solicitor, or licensed conveyancer, fails to provide their client sufficient warning about unusual and onerous ground rent clauses, whether contained in the original lease or added by a deed of variation, the client may end of buying a property that is worth much less than the price paid.

In those circumstances the client may have a potential professional negligence claim against their solicitor for the loss caused by the solicitor's failure to adequately warn about the onerous ground rent, or any other unacceptable terms in the lease.

As a first step it is usually necessary to instruct a surveyor to retrospectively value the property as at the date of purchase and taking into account the onerous ground rent or other unacceptable terms contained in the lease. The valuer should also value the same property but on the assumption that it had 'standard' ground rent provisions, so that it is possible to ascertain how much less the property is worth as a result of the ground rent clause; the diminution in value.

The surveyor should also be asked to calculate the likely cost of obtaining a statutory 90 year lease extension under the Leasehold Reform, Housing and Urban Development Act 1993, in order to and at the same time reduce, or eliminate, the onerous ground rent. If the property is a house, the surveyor will instead need to calculate the cost of acquiring the freehold. We can then advise as to the options and the best way to proceed in order to resolve the problem and recover any loss.

There are time limits for bringing professional negligence claims and it is therefore vital that legal advice is sought immediately a problem with a lease is identified.

Contact Carter Lemon Camerons for advice

The specialist dispute resolution team at Carter Lemon Camerons can assist you with ground rent claims. If you would like further advice on any of the issues raised in this guide, please do not hesitate to contact **Graham Balchin** at grahambalchin@cartercamerons.com or telephone Graham on **020 7406 1000**.



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This guide was correct at time of publication and is not a substitute for legal advice.