

Leasehold Reform

Introduction

1. Leasehold legislation is extremely complex. The first reaction of someone with experience of leasehold litigation, would be to warn anyone against acquiring a leasehold interest because of the problems involved. The reality is that flats are an essential source of housing which can only be held under leasehold or commonhold. It would be unwise to make any manifesto commitments without being clear about the consequences of what is proposed and how to achieve it. Leasehold reform is an area where angels fear to tread....
2. The big issue for the future is Commonhold. This was introduced by the Commonhold and Leasehold Reform Act 2002 as an alternative to leasehold, and was the first new type of legal estate to be introduced in English law since 1925. However, despite the apparent advantages, it has not taken off. The Law Commission report that fewer than 20 commonholds have been created. The issue is whether commonhold should be compulsory, incentivised, or an option for new homes. Despite my misgivings, I suspect that commonhold is the best option for the future and should be compulsory. This was not my view until I started to prepare this note.
3. The best starting point on leasehold reform is three excellent reports from the Law Commission published in July 2020:
 - **“Reinvigorating commonhold: the alternative to leasehold ownership”** Law Com No.394 (see [link](#));
 - **“Leasehold home ownership: buying your freehold or extending your lease”** Law Com No. 392 (see [link](#)), In January 2020, the Commission had published “Report on options to reduce the price payable” Law Com No.387 (see [link](#));
 - **“Leasehold home ownership: exercising the right to manage”**, Law Com 393 (see [link](#)).
4. There is a highly regarded APPG on Leasehold and Commonhold Reform. This has worked closely with the Law Commission. Michael Gove has been working closely with both groups and anxious to push forward the Law Commission recommendations.
5. The government has recently introduced two bills which it hopes it can enact before the General Election:
 - The **Renters (Reform) Bill** (see [link](#)) which is outside the scope of this Note. The challenge will be whether the government can abolish Section 21 before the Election. It is understood that it is unlikely that it will do so for two practical reasons: (a) County Courts do not have the capacity to determine whether any grounds of possession are established where the landlord seeks possession (the jurisdiction could be transferred to First-tier Tribunals (“FTTs”)); (b) If ASTs can no

longer be renewed to increase rents, landlords will need to rely on section 13 of the Housing Act 1988 to increase rents in respect of assured tenancies. This would lead to a large increase in the caseload for FTTs.

Comment: The abolition of section 21 should be a short-term priority. A more radical approach in the longer term would be a manifesto commitment to introduce the Rented Homes Bill which was recommended by the Law Commission in 2006. It has been introduced in Wales.

- The **Leasehold and Freehold Reform Bill** (see [link](#)). This gives effect to a number of the recommendations made by the Law Commission. The proposals are discussed in the Appendix.

6. The two people who know most about Leasehold Reform are:

- **Martin Boyd** who has recently left the Leasehold Knowledge Partnership to head the Leasehold Advisory Service.
- **Professor Nick Hopkins** who led the Law Commission's work on Leasehold Reform. In May 2021, the Government established a [Commonhold Council](#) as a partnership of industry, leaseholders and Government that will prepare homeowners and the market for the widespread take-up of commonhold. Nick Hopkins is appointed to the Council's Technical Support Group.

It is assumed that both will advise as the Leasehold and Freehold Reform Bill passes through parliament. The focus of Labour's campaigning should therefore be on the Bill, rather than the manifesto.

7. The big issue that the government has ducked is whether commonhold should be compulsory, incentivised, or an option for new homes. It is reported that Labour is pushing for it to be made the "default tenure for all new properties". Michael Gove has recently stated that a ban on new leaseholds would be added to the Bill as it passes through Parliament.
8. The concept of leasehold seems to be restricted to England and Wales. There is a learning curve as to how flat ownership works elsewhere in Europe, and in the USA, Canada, Australia and Singapore, where condominiums and strata titles are commonplace. There is considerable trepidation as to how it might work in England. High quality managing agents will be critical. The challenge at present is to identify the managing agent who is "least bad". RICS has an important role in promoting good practice.
9. The Leasehold Reform (Ground Rent) Act 2022 put an end to ground rents for most new long leasehold leases in England and Wales. Only a peppercorn will be payable. On 9 November 2023, the DLUHC issued a 6 week consultation on restricting existing ground rents (see [link](#)). The options are:
- capping ground rents at a peppercorn

- setting maximum financial value for ground rent
- capping ground rents at a percentage of the property value,
- limiting ground rent to the original value when the lease was agreed
- freezing ground rent at current levels.

10. In this note, I consider the three Law Commission reports and highlight the extent to which the Leasehold and Freehold Reform Bill follows these recommendations. I then highlight a few issues for the future.

Commonhold

11. Commonhold is a system of property ownership in England and Wales. It involves the indefinite freehold tenure of part of a multi-occupancy building (typically a flat) with shared ownership of and responsibility for common areas and services. The Leasehold Advisory Service provide a good description of how Commonhold works (see [link](#)).

12. Consideration needs to be given as to why Commonhold has not proved popular. Developers have tended to opt for tripartite leases with (a) the freeholder; (b) a management company (which may be controlled by the lessees) and (c) the lessee. This creates a valuable freehold interest which may attract significant ground rents and premiums when the tenant seeks to extend their lease or enfranchise the freehold. Developers have had no incentive to grant 900-year leases, if they can attract the same premium from granting a 99 or 125-year lease. These advantages will disappear now that ground rents have been abolished for new developments and the premiums payable on lease extension/enfranchisement are to be reduced.

13. However, there are reasons why lessees have been wary of enfranchisement and/or commonhold:

- Unit-holders are reluctant to assume the responsibility as directors.
- The complexities and expense of complying with duties imposed on the directors.
- Unit-holders may fall out with each other if there is a dispute as to how high the service charges should be. The FTT sees many applicants who become obsessive about their service charges.
- The problem of dealing with unit-holder from hell. Forfeiture is not available. This is a draconian remedy that requires reform. However, it is an effective remedy compared with any civil action to control anti-social behaviour or persistent failure to pay the sums due.
- The consequences should the commonhold association go into liquidation.

14. The Law Commission make a number of recommendations that seek to make commonhold not only a workable, but a preferred form of homeownership to residential leasehold. The recommendations include measures designed to:

- make it easier for leaseholders to convert to commonhold and gain greater control over their properties;

- enable commonhold to be used for larger, mixed-use developments which accommodate not only residential properties but also shops, restaurants and leisure facilities;
- allow shared ownership leases to be included within commonhold;
- give owners a greater say in how the costs of running their commonhold are met and ensure they have sufficient funds for future repairs and emergency works;
- make it easier to take action against those who fail to pay their share of the commonhold's costs;
- ensure commonholds are well maintained and insured, with new powers to replace directors who are not complying with the commonhold's rules;
- provide owners with flexibility to change the commonhold's rules while improving the protections available to those affected by the change; and
- improve mortgage lenders' confidence in commonhold to increase the choice of financing available for home buyers.

15. *I make the following observations:*

- *Any proposals to ease the process whereby leaseholders convert to commonhold should be welcomed.*
- *Further work is required on recommended best practice to ensure that commonhold works in practice.*
- *Should disputes be resolved through a "commonhold bespoke dispute resolution process" or by access to the FTT?*

Leasehold home ownership: acquiring the freehold; extending the lease

16. The Law Commission recommendations include:

- providing a new right to leaseholders of both houses and flats to a lease extension for a term of 990 years, with no ongoing ground rent under the extended lease - the current extension is for only 90 years.
- providing a new right for leaseholders to "buy out" the ground rent under their lease without also having to extend the length of their lease;
- removing the requirement for leaseholders to have owned their leases for two years before exercising enfranchisement rights and allowing flat owners to buy the freehold of a block where up to 50% of the building is commercial space;
- making it easier and cheaper for leaseholders of flats to enfranchise by providing for groups of flat owners to acquire multiple buildings in one claim and allowing leaseholders to require landlords to take "leasebacks" of units within the building which are not let to leaseholders participating in the claim;
- ensuring that a leaseholder is protected against the imposition of onerous or unreasonable obligations on acquisition of the freehold title to his or her home;
- replacing the various procedures for making enfranchisement claims with one, streamlined procedure;

- providing that all enfranchisement disputes and issues should be decided by the Tribunal – currently the jurisdiction is split between County Courts and the FTT; and
 - eliminating or controlling leaseholders' liability to pay their landlord's costs, in place of the current requirement for leaseholders to pay their landlord's uncapped costs, which can equal or exceed the enfranchisement price.
17. The Report on valuation in enfranchisement, puts forward three alternative schemes for determining the premium, which will make enfranchisement cheaper, saving leaseholders of houses and flats money, whilst ensuring sufficient compensation is paid to landlords to reflect their legitimate property interests. Each scheme uses a different basis to determine the price of enfranchisement, and facilitates further reforms to make the process simpler and to reduce uncertainty.
- Scheme 1: it is assumed that the leaseholder is never in the market. The result is that no marriage value or hope value is payable. The enfranchisement premium would be: Term + Reversion.
 - Scheme 2: it is assumed that the leaseholder is not now in the market but may be in the future. The result is that hope value (but not marriage value) is payable. The enfranchisement premium would be: Term + Reversion + Hope value
 - Scheme 3: it is assumed that the leaseholder is in the market. The result is that marriage value is payable. The enfranchisement premium would be: Term + Reversion + Marriage value (which is payable where the unexpired term is 80 years or less).
18. A leaseholder must currently pay their landlord's non-litigation costs. To prevent any ECHR challenge, the Commission are proposing that under Scheme 1 and 2, this position would remain, but costs would be capped. This would not apply under Scheme 3 (which reflects the market rate).
19. *Comment: Scheme 1 is clearly the best for the leaseholder. It seems that the government is going for Scheme 2.*
20. Alongside the three schemes, the Commission have put forward a range of other options for reform. These include:
- Prescribing the rates used in calculating the price, to remove a key source of disputes, and make the process simpler, more certain and predictable.
 - Helping leaseholders with onerous ground rents, by capping the level of ground rent used to calculate the premium.
 - The creation of an online calculator for determining the premium to make it easier to find out the cost of enfranchisement, and reduce uncertainty around the process.
 - Enabling leaseholders who are collectively enfranchising a block of flats to avoid paying "development value.

Exercising the Right to Manage

21. The right to manage (“RTM”) was introduced in the Commonhold and Leasehold Reform Act 2002 to give leaseholders the ability to take over the landlord’s management functions in respect of their building, without having to buy the freehold. It is a “no-fault” right, which leaseholders can exercise without the need to prove a complaint against their landlord or managing agent.
22. The process of acquiring the RTM has become extremely technical, The Law Commission have identified the following problems:
 - unpredictable and sometimes excessive costs of claiming the RTM, particularly as the RTM company is liable for the landlord’s costs as well as its own;
 - restrictive qualifying criteria meaning it is not possible to claim the RTM in respect of multiple blocks on an estate, buildings with more than 25% non-residential space, or leasehold houses;
 - information about the building and management functions being provided to the RTM company too late in the process, so that the leaseholders cannot always make informed decisions about claiming the RTM or prepare for an efficient handover of management functions; and
 - uncertainty as to how the RTM applies to areas which are shared with other buildings, such as gardens and car parks.
23. The Law Commission have made recommendations to:
 - reduce the costs of making an RTM claim, and give leaseholders more control over those costs;
 - make the RTM available to more leaseholders in a wider variety of buildings; and
 - make the process of claiming the RTM less complicated and less likely to be frustrated because of small procedural errors.

Further Options

24. Forfeiture remains a remedy for freeholders. In 2006, the Law Commission published a report on forfeiture (see [link](#)). This has never been implemented.
25. Particular problems arise on developments where there are a number of shared ownership leases where the social landlord is the intermediate landlord. In practice, the social landlord tends to do no more than pass down the service charge from the head lessor to the tenant. The social landlord rarely intervenes to protect the interests of its tenants. This is an area which merits a review. Indeed, is a share ownership lease where the tenant has only a 20% interest in the lease, but pays 100% of the service charge and a rent a fair model?
26. The Law Commission recommendations seek to make provision for the future (i.e. Commonhold) and make it easier for existing tenants to enfranchise, exercise their RTM or extend their leases. However, problems will exist where not all tenants wish

to, or are unable, to participate. The complex situations which exist are illustrated by Silsoe House, a 1970s block in Camden where I live. It was owned by the Crown Estate Commissioners (“CEC”). There are **48** flats. In 1972, **33** of the lessees decided to acquire the freehold, the enfranchisement being completed in 1974. Each of these lessees now have a share in the freehold and have been granted 999-year leases at a peppercorn rent. **7** lessees decided not to participate and occupy under their original leases of 99 years and continue to pay a ground rent. There were **8** non-qualifying tenants, namely flats where the CEC retained possession. Between 1972 and 1974, the CEC granted leases of between 125 and 150 years at ground rents. The CEC retain intermediary interests having been granted 999 years leases of these flats by the new freehold company. The situation is a mess which will be replicated in many of the 3.5m flats in England and Wales. Commonhold will solve the problem for the future. Once this becomes the accepted form of tenure, there will need to be a review to address the ongoing problems that have arisen over the past 100 years.

27. The timebomb that is ticking is the simple fact that all leasehold buildings have a limited life. None will still be standing in 990 years’ time. At present, a CPO by a public authority would seem to be the only option if the freeholder and all the lessees are unable to agree of the future development options of a building that has reached the end of its life. Some post-War blocks which were built to a low standard are already reaching this position.

28. An alternative to a CPO might be to introduce a Singapore-style process known as the collective sale or “en bloc sale” of tower blocks for redevelopment. These cases require 80% of apartment owners to agree to sell to a developer, if the building is more than 10 years old, or 90%, if it is less than 10 years old. Disputes arise where minority owners resist the collective sale of the block, often where there is a dispute about the valuation/ acquisition value for their properties. In these cases, application can be made to the ‘Strata Titles Board’ a kind of tribunal. If the matter cannot be resolved within 60 days, the matter is escalated to the Singapore High Court for determination

Robert Latham
5 December 2023

Appendix - Leasehold and Freehold Reform Bill

This summary is taken from the government’s Guide to the Bill (see [link](#)).

Increase the standard lease extension term for houses and flats to 990-years (up from 90 years in flats, and 50 years in houses), with **ground rent reduced to a peppercorn** (zero financial value) upon payment of a premium. This will make sure that leaseholders can enjoy secure, ground rent-free ownership of their properties for years to come, without the hassle and expense of repeated lease extensions.

Comment: It is surprising that this is the highlight of the Bill, if leasehold interests are to be abolished for the future!

Remove the so-called ‘marriage value’, which makes it more expensive to extend leases when they’re close to expiry.

Comment: The government seem to be going for Scheme 2 recommended by the Law Commission.

Remove the requirement for a new leaseholder to have owned their house or flat for 2 years before they can benefit from these changes – so that more leaseholders can exercise their right to the security of freehold ownership or a 990-year lease extension as soon as possible.

Increase the 25% ‘non-residential’ limit preventing leaseholders in buildings with a mixture of homes and other uses such as shops and offices, from buying their freehold or taking over management of their buildings – to allow leaseholders in buildings with up to 50% non-residential floorspace to buy their freehold or take over its management.

Make buying or selling a leasehold property quicker and easier by setting a maximum time and fee for the provision of information required to make a sale (such as building insurance or financial records) to a leaseholder by their freeholder (known as ‘landlords’).

Require transparency over leaseholders’ service charges – so all leaseholders receive better transparency over the costs they are being charged by their freeholder or managing agent in a standardised comparable format and can scrutinise and better challenge them if they are unreasonable.

Replace buildings insurance commissions for managing agents, landlords and freeholders with transparent administration fees – to stop leaseholders being charged exorbitant, opaque commissions on top of their premiums.

Extend access to “redress” schemes for leaseholders to challenge poor practice. We will require freeholders who manage their property to belong to a redress scheme so leaseholders can challenge them if needed.

Comment: I do not believe that any redress schemes exist at present.

Scrap the presumption for leaseholders to pay their freeholders’ legal costs when challenging poor practice.

Comment: Sections 34 and 35 make important changes to the ability of a landlord to pass on litigation costs through the service charge, and for the tenant to be able to recover their costs where it is just and equitable to do so.

Grant freehold homeowners on private and mixed tenure estates the same rights of redress as leaseholders – by extending equivalent rights to transparency over their estate charges and to challenge the charges they pay by taking a case to a FTT, just like existing leaseholders.

Comment: This is an essential change. Currently leaseholders of house would need to challenge the reasonableness of any estate charge in the County Court. In practice, this does not happen.

Build on the legislation brought forward by the Building Safety Act 2022, ensuring freeholders and developers are unable to escape their liabilities to fund building remediation work – protecting leaseholders by extending the measures in the Building Safety Act 2022 to ensure it operates as intended.

Comment: The Building Safety Act is unduly complex. Few solicitors feel competent to advise on its provisions. Lessees need to understand their rights if they are to enforce them!

Ban the sale of new leasehold houses so that - other than in exceptional circumstances - every new house in England and Wales will be freehold from the outset.

Comment: There is no justification for granting leases of houses.