Law Commission
Reforming the law

Leasehold home ownership: buying your freehold or extending your lease

HC584

Law Com No 392

(Law Com No 392)

Leasehold home ownership: buying your freehold or extending your lease

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons to be printed on 20 July 2020

HC 584

This publication is available at www.gov.uk/official-documents.

Any enquiries regarding this publication should be sent to us at propertyandtrust@lawcommission.gov.uk.

ISBN 978-1-5286-2061-1

CCS 0620752350

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the APS Group on behalf of the Controller of Her Majesty's Stationery Office

The Law Commission

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Right Honourable Lord Justice Green, Chairman

Professor Sarah Green

Professor Nick Hopkins

Professor Penney Lewis

Nicholas Paines QC

The Chief Executive of the Law Commission is Phil Golding.

The Law Commission is located at 1st Floor, Tower, 52 Queen Anne's Gate, London SW1H 9AG.

The terms of this Report were agreed on 26 June 2020.

The text of this Report is available on the Law Commission's website at http://www.lawcom.gov.uk.

All websites footnoted in this Report were last visited on 10 July 2020.

Table of contents

Glossary

Terms and definitions in Italics are new terms of art introduced by our reformed regime.

"the 1967 Act": Leasehold Reform Act 1967.

"the 1993 Act": Leasehold Reform, Housing and Urban Development Act 1993.

"the 2002 Act": Commonhold and Leasehold Reform Act 2002.

"Articles of association": a company's articles of association are the rules governing how that company operates.

"Building": the basic meaning of a building is a built or erected structure with a significant degree of permanence, which can be said to change the physical character of the land. In some places, we also use this term in a more restrictive sense. See paragraphs 6.187 to 6.215.

"Business lease": a lease containing premises which are occupied by the leaseholder for the purposes of a business carried on by the leaseholder (under the current law), or a lease that is excluded because its terms do not permit residential use of the premises, or because the premises are being used solely for business purposes (under our recommended regime, on which see paragraphs 6.48 to 6.68).

"Capitalisation rate": the rate of return that buyers, at the valuation date, are seeking in relation to the particular interest in that type of property, of that investment quality, in that location. It is derived from market evidence.

"Claim Notice": *a Claim Notice is a document that may be served on the "competent landlord" by the leaseholder(s) in order to begin an enfranchisement claim (under our recommended regime). See paragraphs 8.109 to 8.117.*

"Collective enfranchisement": a claim (under the current law) by multiple leaseholders of flats in a building (or part of a building) to acquire the freehold of the building (or part of the building) through a "nominee purchaser".

"Collective freehold acquisition": *a claim (under our recommended regime) by multiple leaseholders of residential units in a building or part of a building, or in multiple buildings and/or parts of buildings, to buy the freehold of the building, part of the building, or buildings and/or parts of buildings, through a "nominee purchaser".*

"*Commonhold Consultation Paper ("Commonhold CP")*": the Commonhold project is one of the Law Commission's three residential leasehold projects. It is a review of the existing law of commonhold. In September 2018 we published a consultation paper: Reinvigorating commonhold: the alternative to leasehold ownership (2018) Law Com No 241. In this paper we made provisional proposals for reform and invited consultees to share their views on these proposals. These responses form the basis of the Commonhold Report.

"*Commonhold Report*": alongside this Report we are publishing a report making recommendations for reform to the law of commonhold: Reinvigorating Commonhold: an alternative to leasehold home ownership (2020) Law Com No 394.

"Company limited by guarantee": a company limited by guarantee is a type of private company. Its members do not hold shares in the company, but rather undertake liability for the company's debts to the extent of a guarantee (which is usually for a nominal amount of money). They are liable for this sum only in the event that the company becomes insolvent.

"Company limited by shares": a company limited by shares is a type of private company. Its members hold shares, and a member's liability for the company's debts is limited to any unpaid part of the nominal value of his or her shares.

"Competent landlord": under the current law, the competent landlord is the landlord who holds a sufficiently long interest in a flat (whether the freehold or a long intermediate lease) that he or she can grant the leaseholder of that flat a lease extension under the 1993 Act. If there are multiple landlords who meet that definition, the competent landlord will be the one whose interest is closest in the chain of interests to that of the leaseholder. Under our recommended regime, the competent landlord is the first superior landlord whose interest in the building is sufficient to be able to grant or transfer the interest claimed by the leaseholder.

"Counter-notice": a document that may be served by a landlord who has received a notice of claim (under the current law).

"Conveyance": see "transfer".

"Curtilage": the curtilage of a property is land that has a reasonably close association with that property, such that the two can be considered together to be part of an integral whole. Precisely what land will be within the curtilage of a particular property is a factual question that will differ from case to case, depending on the physical characteristics and of the premises, as well as the ownership, functions and uses of the land.

"Decapitalisation": the process of deriving an annual income which is equivalent to a given capital sum.

"Deferment rate": the annual discount applied, on a compound basis, to an anticipated future receipt (assessed at current prices) to arrive at its market value at an earlier date. It is used to ascertain the present value of an asset that consists, and consists only, of the right to vacant possession of a particular residential property at the end of the lease to which the freehold is subject.

"Diminution in value": the difference in value between the landlord's interest in a flat before and after the grant of a lease extension under the 1993 Act.

"ECHR": the ECHR is the European Convention on Human Rights.

“Enfranchisement claim”: we use “enfranchisement claim” as a generic term to refer to:

(under the current law):

1. claims to acquire the freehold of a house under the 1967 Act;
2. claims to extend the lease of a house under the 1967 Act;
3. collective enfranchisement claims in respect of flats (see above) under the 1993 Act; and
4. lease extension claims in respect of flats under the 1993 Act.

(under our recommended enfranchisement regime):

1. lease extension claims in relation to a residential unit or a building or part of a building; and
2. individual and collective freehold acquisition claims.

It should be noted that “enfranchisement” also has a more limited technical meaning, where it is used to refer only to freehold acquisitions. However, we use “enfranchisement” as a generic term to refer to both freehold acquisition claims and lease extension claims.

“Enfranchisement Consultation Paper (“CP”)”: in September 2018 we published a consultation paper: Leasehold home ownership: buying your freehold or extending your lease (2018) Law Com No 238. In the CP we made provisional proposals for reform and asked questions of consultees. This Report follows from those responses.

“Flat”: a flat (under the current law) is a separate set of premises (whether or not on the same floor) which forms part of a building, which is constructed or adapted for use for the purposes of a dwelling, and either the whole or a material part of which lies above or below another part of the building.

“Freehold ownership”: freehold ownership is property ownership that lasts forever, and which generally gives fairly extensive control of the property.

“Freehold vacant possession value (FHVP)”: the amount that a property is worth held freehold and not subject to any leasehold interests.

“Freeholder”: the freeholder is the owner of the freehold interest in any property. The freeholder is at the top of any chain of leases of a given property.

“Ground rent”: a regular payment which must be made by a leaseholder to his or her landlord.

“Head lease”: see “intermediate lease”.

“Home purchase plan”: a financial arrangement offered by a bank or other financial institution whereby an individual is permitted to purchase their home in a manner which conforms with religious norms governing the prohibition of interest payments.

“Hope value”: an amount of money payable as part of the premium in a collective enfranchisement claim in respect of non-participating flats, to reflect the fact that the leases of those flats may be extended (at a premium) in the future.

“House”: a house (under the current law) is a building designed or adapted for living in (whether the building is structurally detached or not), so long as it can reasonably be called a house.

“Individual freehold acquisition”: *a claim (under our recommended regime) by a single leaseholder to acquire the freehold of the building in which their residential unit is (or units are) located. See Chapter 4.*

“Information Notice”: *a notice served by a leaseholder on his or her immediate landlord and/or any other landlord seeking information about the ownership of his or her building (under our recommended regime). See paragraphs 8.75 to 8.89.*

“Intermediate landlord/leaseholder”: a person who holds an “intermediate lease”. He or she holds a leasehold interest, and in turn is a landlord under another lease of all or part of the same property. We use “intermediate leaseholder” where we discuss the rights and obligations that arise by virtue of the person being a leaseholder, and “intermediate landlord” where we discuss the rights and obligations that arise by virtue of the person being a landlord. See Chapter 13 for discussion of intermediate leases.

“Intermediate lease”: a lease that is superior to another lease (in other words, a lease under which the leaseholder is also the landlord under another lease). Put another way, it is a lease that has an interest above and below it. For example, where a freehold house is subject to a 999-year lease to X, which in turn is subject to a 125-year lease to Y, which itself is subject to a 99-year lease to Z, then the 999-year lease and the 125-year lease are both “intermediate leases”. The 125-year lease is also a “sub-lease” (as is the 99-year lease). An intermediate lease is also known as a “head lease” or a “superior lease”. See Chapter 13 for discussion of intermediate leases.

“Interest”: a leasehold or freehold estate is an interest in land; for brevity, we refer to a leaseholder’s or a landlord’s “interest”.

“Joint landlord”: where the landlord’s interest is held by more than one person, they are referred to as “joint landlords”.

“Landlord”: we use “landlord” as a general term for a person who holds an interest in property out of which a lease has been granted. A landlord may be either the freeholder of the property, or hold a leasehold interest in the property himself or herself.

“Lease”: a lease is the legal device (usually a written document) that grants a person a leasehold interest in a property and sets out the rights and responsibilities of the leaseholder and landlord. A leasehold interest is a form of property ownership (see “leasehold ownership”). We generally use the term “lease” instead of “tenancy”

because it is typically used to refer to long leases (which therefore qualify for enfranchisement rights), whereas "tenancy" is generally used to refer to short leases (such as where a home is rented on, say, a one-year "assured shorthold tenancy"). However, the current enfranchisement legislation uses the word "tenancy" and we adopt that language in places when referring directly to that legislation.

"Lease extension": a lease extension is the grant of a new, longer lease of a flat or a house (under the current law) or of a residential unit (under our recommended regime).

"Leasehold ownership": leasehold ownership of property is time-limited ownership (for example, ownership of a 99-year lease), and control of the property is shared with, and limited by, the landlord.

"Leaseholder": a "leaseholder" is a person who holds a leasehold interest in property, granted by a person (the landlord) with the freehold interest or a more extensive leasehold interest in that property. We generally use the term "leaseholder" instead of "tenant" for the same reason that we use "lease" instead of "tenancy" – that is, because it is typically used to denote those who own a property on a long lease (and therefore qualify for enfranchisement rights), whereas "tenant" is generally used to refer to those who rent a property on a short lease (such as a one-year "assured shorthold tenancy"). However, the current enfranchisement legislation uses the word "tenant" and, in some instances, we adopt that language when referring to the legislation – for example, when referring to a "qualifying tenant" under the 1993 Act.

"Long lease": subject to a number of qualifications, a long lease (under both the current law and our recommended regime) is a lease that is granted for a term exceeding 21 years.

"Making Land Work": in 2011 we published a report: Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com No 327. Making Land Work makes a number of recommendations to reform the law relating to specific rights and obligations relevant to land.

"Marriage value": marriage value is the additional value an interest in land gains when the landlord's and the leaseholder's separate interests are "married" into single ownership.

"Modern ground rent": the rent determined under section 15 of the 1967 Act, payable during the additional term of a lease extension of a house (under the current law). It is calculated by valuing the "site", and then decapitalising that value.

"Mortgagor/Mortgagee": the mortgagor is the borrower – the owner of the property who mortgages it in return for a loan. In the context of this Report, the mortgagor is usually the landlord or the leaseholder. The mortgagee is the lender – usually a bank or a building society that lends money secured by the mortgage.

"Nominee purchaser": a nominee purchaser is a person, either natural or corporate, who (under the current law) conducts a collective enfranchisement claim on behalf of the participating leaseholders and acquires the relevant premises on their behalf. We

retain this term to describe the person performing the same function in respect of a collective freehold acquisition claim under our recommended regime.

"Non-participating leaseholder": a non-participating leaseholder is a leaseholder who qualifies for participation in a collective enfranchisement claim (under the current law) or a collective freehold acquisition claim (under our recommended regime) but does not participate.

"Notice of claim": a document that may be served by a leaseholder in order to begin an enfranchisement claim (under the current law). In the 1967 Act these documents are referred to as a "notice of tenant's claim". In the 1993 Act these documents are referred to as a "tenant's notice" in relation to claims for a new lease, and an "initial notice" in respect of collective enfranchisement claims.

"Participating leaseholder": a participating leaseholder is a leaseholder who qualifies for participation in a collective enfranchisement claim (under the current law) or a collective freehold acquisition claim (under our recommended regime), and chooses to participate.

"Peppercorn rent": many long leases specify an annual ground rent of a peppercorn. Strictly, the landlord in these cases could require the leaseholder to provide him or her with a peppercorn annually, but invariably this is not demanded. A peppercorn rent is used in circumstances where it is deemed appropriate for there to be no substantive rent payable. The inclusion of a nominal rent is intended to satisfy the English contract law requirement of "consideration" – meaning that an exchange must occur in order for a binding contract to be formed. Under the current law, any lease extension of a lease of a flat under the 1993 Act must be granted at a peppercorn rent.

"Premium": the premium is the sum a leaseholder or nominee purchaser must pay to the landlord(s) in order to obtain a lease extension or to acquire the freehold of property. The premium is also referred to as the "price".

"Prime Central London": Savills Residential Research produce a Prime London Index which is designed to reflect the price movements of prime property in London. The Index is divided into five areas: Central, North West, North & East, South West and West. The Prime "Central" London Index includes Notting Hill, Kensington, Chelsea, Knightsbridge, Marylebone, Mayfair, Westminster and Pimlico. While the term Prime Central London ("PCL") is not necessarily used with precision, it generally refers to these areas.

"Relativity": the value of the current lease of a dwelling divided by the freehold value of the same dwelling with vacant possession (FHVP), expressed as a percentage.

"Residential unit": *a residential unit is (under our recommendations) a unit which has been constructed or adapted for use for the purposes of a dwelling (even where there might also be some non-residential use). See Chapter 6.*

"Response Notice": *a document served by a competent landlord in response to a Claim Notice (under our recommended regime).*

“Reversioner”: the reversioner is the landlord, whether in a 1967 Act enfranchisement claim relating to a house, or in a 1993 Act collective enfranchisement claim, who is responsible for the conduct of the claim on behalf of any other landlords.

“Right to participate”: the right to participate was a right that we proposed for leaseholders who did not participate at the time of a collective freehold acquisition to purchase, subsequently, a share of the freehold interest held by those who did participate.

“RTM Consultation Paper (“RTM CP”)”: the Right to Manage project is one of the Law Commission’s three residential leasehold projects. It concerns the right of leaseholders to take over control of the management functions of their buildings. We published a consultation paper on our provisional proposals for this area of law in January 2019: Leasehold home ownership: exercising the right to manage (2018) Law Com No 243. The responses to that CP formed the basis of the Right to Manage Report.

“RTM Report”: alongside this Report we have also published a report making recommendations for reform to the right to manage regime: Leasehold home ownership: exercising the right to manage (2020) Law Com No 393.

“Shared ownership lease”: a shared ownership lease is a lease under which the leaseholder purchases a “share” of a house or flat (usually between 25% and 75%) and pays a normal rent on the remainder of the property. The lease generally permits the leaseholder to acquire additional shares in the property over time, usually up to 100%. See paragraphs 7.6 to 7.93.

“Split freehold” and “split reversion”: a leaseholder’s lease may be granted by more than one landlord (because the lease is granted from multiple leasehold or freehold titles owned by different people) or a landlord’s title may be subsequently divided between more than one person. Under these circumstances, the landlord’s interest is referred to as a “split freehold” (where the landlord is also a freeholder) or a “split reversion” (where the landlord holds his or her interest under a lease). The term “split freehold” may also be used where the freehold claimed by the nominee purchaser is split between the reversion to the building or buildings and other property which the leaseholders (exclusively or non-exclusively) are entitled to use.

“Sub-lease”: a lease that is inferior to another lease (in other words, a lease under which the landlord is also the leaseholder under another lease). Put another way, it is a lease that has a leasehold interest above it. For example, where a freehold house is subject to a 999-year lease to X, which in turn is subject to a 125-year lease to Y, which itself is subject to a 99-year lease to Z, then the 125-year lease and the 99-year lease are both “sub-leases”. The 125-year lease is also an “intermediate lease” (as is the 999-year lease). A sub-lease is also known as an “under lease” or an “inferior lease”. See Chapter 13 for discussion of sub-leases.

“Sub-lessee”: a person who holds a “sub-lease”. He or she holds a leasehold interest, and his or her immediate landlord is also a leaseholder.

“Tenancy”: see “lease”.

“Tenant”: see “leaseholder”.

“Transfer”: we use the term “transfer” to describe the process, or document, by which the freehold title to land is transferred from one owner to another. We also use the term “conveyance”.

“the Tribunal”: the First-tier Tribunal (Property Chamber) in England, and the Leasehold Valuation Tribunal in Wales.

“Unit”: a unit is (under our recommendations) a separate, independent set of premises (whether or not on the same floor), which must form all or part of a building. A unit can either be a residential unit or a non-residential unit. See Chapter 6.

“Valuation Report”: we published the Valuation Report – Leasehold home ownership: buying your freehold or extending your lease, Report on options to reduce the price payable (2020) Law Com No 387 – in January 2020. The report dealt with the question of how the premiums leaseholders must pay to exercise enfranchisement rights should be calculated. We set out options for reducing premiums and simplifying the way in which premiums are calculated. However, we did not make recommendations as to how premiums should be calculated.

“Vesting order”: an order under which the court completes an enfranchisement claim in place of the landlord.

“White knight”: a third party who contributes to the premium payable on a collective enfranchisement (under the current Law) or collective freehold acquisition (under our recommended regime) in respect of the non-participating leaseholders’ share of that premium.

Leasehold home ownership: buying your freehold or extending your lease

To the Right Honourable Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice

Chapter 1: The future of home ownership

INTRODUCTION

1.1 Our homes are hugely important. It is no surprise, therefore, that housing policy is high up the political agenda. Problems that we experience with our homes can become particularly pronounced. Many leaseholders of flats would point to issues with cladding that were brought into focus following the Grenfell Tower fire tragedy as an illustration of this impact. A recent report from the UK Cladding Action Group found that 9 out of 10 leaseholders surveyed said their mental health had deteriorated as a direct result of the situation in their building.[1] For all of us, the COVID-19 pandemic, and consequential requirement to "stay at home", has emphasised how much we depend on our homes.

1.2 Broadly speaking, we occupy our homes either as owners or as renters.

(1) Owners: Many people own, or aspire to own, a home.[2] The focus of our projects, and of Government's work on leasehold and commonhold reform, is on owners.

(2) Renters: There have been significant reforms to the way in which homes are rented in Wales,[3] and Government intends to provide tenants with greater security in their homes in England.[4] Renters are not the focus of this Report.

---

1 UK Cladding Action Group, *Cladding and internal fire safety: mental health report 2020* (May 2020), p 6, at https://drive.google.com/file/d/1ezKSaJqO3bVyG9-eH58SoiT2bH4D8PjW/view.

2 In the 2010 British Social Attitudes survey, 86% of respondents expressed a preference for buying a home and 14% preferred to rent: Department for Communities and Local Government, *Public attitudes to housing in England: Report based on the results from the British Social Attitudes survey* (July 2011), at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/6362/1936769.pdf.

3 Renting Homes (Wales) Act 2016. The 2016 Act was enacted following recommendations made by the Law Commission in its reports, Renting Homes (2003) Law Com No 284 and Renting Homes in Wales (2013) Law Com No 337.

4 See proposal for a Renters Reform Bill, which would remove the current right of landlords in the private rented sector to evict their tenants by giving two months' notice to leave: *The Queen's Speech, December*

1.3 Reforms concerning home ownership have been discussed for some time, and the future of home ownership is set to change.

1.4 In this Report, we recommend reform of the law of leasehold enfranchisement. It follows our earlier report setting out the options for reducing the price that leaseholders must pay to make an enfranchisement claim.[5] Alongside this Report, we are publishing reports with our recommended reforms to the right to manage ("RTM"), and to the law of commonhold.

> Enfranchisement is the right for people who own property on a long lease ("leaseholders") buy the freehold or extend their lease.
>
> The right to manage ("RTM") is a right for leaseholders to take over the management of their building without buying the freehold.
>
> Commonhold allows for the freehold ownership of flats, offering an alternative way of owning property which avoids the shortcomings of leasehold ownership.

1.5 Before we explain our recommendations for reform, it is important to consider the overall purpose of reform, to explain how our three reports fit together, and to explain their relationship with Government's work on leasehold and commonhold reform.

1.6 In this chapter, we start by looking to the future and explaining what the future of home ownership could look like after reform. We then discuss the route to get there.

(1) In Part A, we summarise how home ownership currently works and its problems.

(2) In Part B, we discuss our recommended reforms and Government's reforms.

(3) In Part C, we explain how all the proposed reforms fit together.

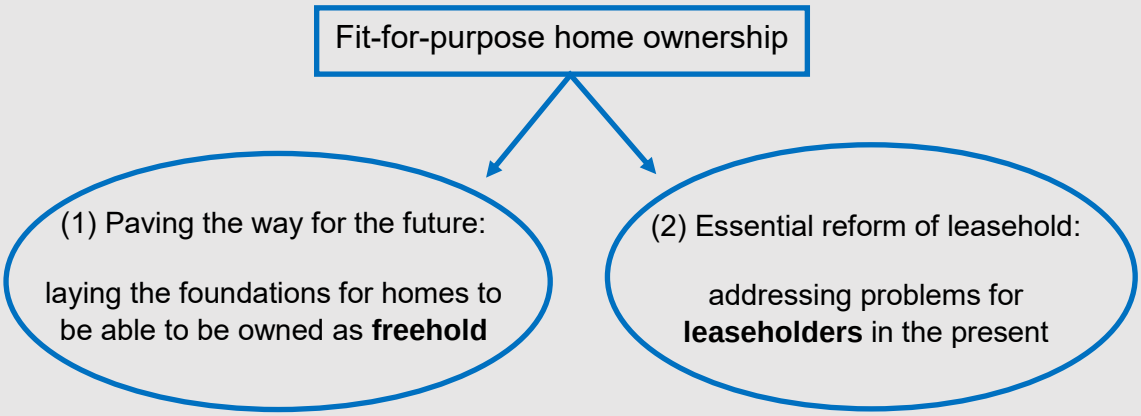
2019, pp 46-47, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_-_background_briefing_notes.pdf. See also temporary measures whereby landlords will have to give all renters 3 months' notice if they intend to seek possession of a property in the Coronavirus Act 2020, s 81 and sch 29.

5 Leasehold home ownership: buying your freehold or extending your lease – Report on options to reduce the price payable (2020) Law Com No 387 ("the Valuation Report").

HOME OWNERSHIP AFTER REFORM: A SUMMARY

1.7 The reforms proposed by the Law Commission and by Government are intended to create fit-for-purpose home ownership. They are about making our homes ours, rather than someone else's asset.

1.8 The reforms fall into two categories.



(1) Owners of future homes

1.9 For owners of future homes:

(1) houses will always be sold on a freehold basis – because Government intends to ban the sale of houses on a leasehold basis.[6]

(2) flats will:

(a) be sold *solely* on a freehold (that is, "commonhold") basis – if Government requires commonhold to be used and bans leasehold; or

(b) sometimes be sold on a commonhold basis and sometimes on a leasehold basis – if Government actively incentivises commonhold, but does not go as far as to ban leasehold; or

(c) continue (as is presently the case) to be sold on a leasehold basis – if Government takes no action to require or incentivise the use of commonhold and/or does not ban leasehold.

(3) commonhold will be a viable alternative to leasehold – because our recommendations will make commonhold workable.

(4) insofar as any homes are sold on a leasehold basis, they will not contain any ground rent obligations – because Government intends to restrict ground rents to zero.[7]

---

6 Subject to exceptions.

7 Subject to exceptions.

1.10 As a consequence, for owners of future homes:

(1) the right for leaseholders to buy the freehold of their house will be largely redundant – because houses in the future will already have been sold freehold;

(2) if flats are *only* sold on a commonhold basis, the right for leaseholders (i) to extend their lease, (ii) to buy their freehold, or (iii) to take over the management of their block of flats (the RTM), will be redundant – because the flats will already have been sold freehold;

(3) if flats continue to be sold on a leasehold basis:

(a) it will be significantly cheaper for leaseholders to extend the lease of their flat – because (i) restricting ground rents to zero, and (ii) our options for reducing enfranchisement prices, will limit the amount that leaseholders have to pay;

(b) it will be significantly cheaper for leaseholders (with their neighbours) to buy the freehold of their block – because (i) restricting ground rents to zero, and (ii) our options for reducing enfranchisement prices, will limit the amount that leaseholders have to pay.

(i) Those leaseholders would then be able to convert to commonhold, if they wanted to do so.

(ii) Those leaseholders are less likely to want or need to exercise the RTM (which involves taking over the management of a block but not buying the freehold) – because the cost of purchasing the freehold will be significantly cheaper than it is now.

(2) Leasehold owners of existing homes[8]

1.11 While there can be an ambition for freehold to be the basis of home ownership in the future, it is crucial to recognise that leasehold will continue to exist for some time. Many people already own a leasehold home. And some homes may be granted on a leasehold basis in the future – namely (i) any flats granted on a leasehold basis (if commonhold is not required, or sufficiently promoted), and (ii) any houses which are exempt from the leasehold house ban. For those leaseholders:

(1) it is necessary for various problems with leasehold ownership to be resolved; and

(2) they will need to have the improved rights that we recommend:

(a) to extend their lease or to purchase their freehold, and – in the case of flats – to convert to commonhold; and

(b) to take over the management of their block.

---

[8] Including leasehold owners of future homes, to the extent that leases are still granted of future homes.

1.12 The recommendations that we make in our reports on enfranchisement and the right to manage will considerably improve the position of existing leaseholders, and any future leaseholders, in a number of respects. In particular:

(1) a lease extension will result in a lease being extended by 990 years at a peppercorn rent, so that the need to extend a lease only arises once and no ground rent is payable;

(2) more leaseholders will be able collectively to purchase the freehold of their block or take over the management of the block: leaseholders cannot currently do so if more than 25% of the block is commercial property, and we recommend raising the threshold to 50%;

(3) it will be possible to purchase the freehold or take over the management of multiple buildings (for example, in an estate);

(4) the process for making an enfranchisement or RTM claim will be easier, quicker, and cheaper, with procedural traps removed;

(5) leaseholders making an enfranchisement or RTM claim will no longer have to pay their landlord's costs (in the case of enfranchisement, if Government sets premiums at market value); and

(6) leaseholders making an enfranchisement claim will be better able to convert from leasehold to commonhold, if they wish to do so.

1.13 In addition, the options for reducing enfranchisement prices in our earlier report would reduce the amount that leaseholders have to pay to extend their lease or purchase their freehold.

Home ownership after reform	Existing homes	Future homes
Houses	Improved rights for leaseholders Existing leaseholders can buy the freehold – and it will be cheaper to do so	New houses are freehold
Flats	Improved rights for leaseholders Existing leaseholders can buy the freehold and convert to commonhold – and it will be cheaper to do so	Government to decide whether commonhold is compulsory, incentivised, or optional Even if leasehold continues, the right to buy the freehold (including converting to commonhold) will be significantly cheaper

PART A: HOW HOME OWNERSHIP CURRENTLY WORKS AND ITS PROBLEMS

Freehold and leasehold ownership

1.14 What does "ownership" mean? When an estate agent markets a house or flat as being "for sale", what is the asset on offer? In England and Wales, property is almost always owned on either a freehold or a leasehold basis.

(1) Freehold is ownership that lasts forever, and generally gives fairly extensive control of the property.

(2) Leasehold provides time-limited ownership (for example, a 99-year lease), and control of the property is shared with, and limited by, the freehold owner (that is, the landlord).

1.15 So we refer to "buying" or "owning" a house or a flat. But when we buy on a leasehold basis, we are in fact buying a lease of a house or flat for a certain number of years (after which the assumption is that the property reverts to the landlord). A leasehold interest is therefore often referred to as a wasting asset: while it may increase in value in line with property prices, its value also tends to fall over time as its length (the "unexpired term") reduces. There comes a point when the remaining length of the lease makes it difficult to sell, because purchasers cannot obtain a mortgage since lenders will not provide a mortgage for the purchase of a short lease.[9]

1.16 In addition, leasehold owners often do not have the same control over their home as a freehold owner. For example, they may not be able to make alterations to their home, or choose which type of flooring to have, without obtaining the permission of their landlord. The balance of power between leasehold owners and their landlord is governed by the terms of the lease and by legislation. Recently, concerns have been raised that the lack of control historically associated with leasehold ownership has – in some cases – become a feature of freehold ownership. We return to that issue below.

1.17 As well as a division of control, landlords may have different interests from leaseholders. For instance, the landlord may see a leasehold property solely as an investment opportunity or a way of generating income, while for leaseholders the property may be their home as well as a capital investment.

Different types of ownership	Freehold	Leasehold
Duration of ownership	Lasts forever	Time-limited
Control	Generally extensive	Shared with landlord

[9] If a lease is unmortgageable, and if the leaseholder cannot afford to extend the lease, the leaseholder might be able to sell the lease to a cash-buyer who can afford to pay the landlord to extend the lease. The purchase price would be reduced by (at least) the cost of a lease extension.

1.18 In summary, therefore, leasehold does not provide outright ownership. The experience of leasehold owners has been described as being that of "owners yet tenants".[10] On the one hand, they are homeowners, with some of the benefits that ownership brings, such as a financial stake in the home. On the other hand, they have a landlord who maintains some control over their use of their home, who has a financial interest in their home, and who will ultimately take back the home on the expiry of the lease.

> The inherent features of leasehold "provided the impetus for the development of commonhold, and remain at the heart of many criticisms of leasehold. They do not simply suggest the need for tighter regulation of developers and landlords in the interests of their leaseholders. Instead, they call into question the ability of the landlord-tenant relationship to deliver home-ownership, and provide an imperative for a radical increase in the control held by individuals over their homes. This change, which is reflected in the Law Commission's three residential leasehold and commonhold projects, arguably marks a renewed focus on the home as a vital element in people's financial and personal autonomy".[11]

Leasehold as a valuable asset for landlords

1.19 As we go on to explain below, these inherent features of leasehold ownership are the root cause of many criticisms that have been levelled at it as a mechanism to deliver home ownership. Conversely, these features of leasehold ownership are the very reason that it is an attractive investment opportunity, and a valuable asset, for landlords.

(1) Since a lease is a *time-limited interest*, there will come a point when the leaseholder needs to extend the lease or buy the freehold in order to retain the property. The leaseholder has to pay the landlord in order to do so. In addition, throughout the term of the lease, the leaseholder will usually have to pay ground rent to the landlord, which provides a source of income for landlords.

(2) The landlord's *control* over the property provides a further source of income. For example:

(a) landlords can charge leaseholders a fee for certain actions, such as giving consent to alterations to a flat, or for registering a change of ownership when a leaseholder sells his or her flat; and

(b) landlords can receive income indirectly through the service charge that leaseholders are required to pay for the costs of maintaining their block or estate. For example, the premium for insuring a block will be paid by the leaseholders, but when arranging the insurance policy the landlord might receive a commission from the insurance company. Similarly, the landlord might arrange for the services at a block (such as for

---

[10] I Cole and D Robinson, "Owners yet tenants: the position of leaseholders in flats in England and Wales" (2000) 15 *Housing Studies* 595.

[11] N Hopkins and J Mellor, ""A Change is Gonna Come": Reforming Residential Leasehold and Commonhold" (2019) 83(4) Conveyancer and Property Lawyer 321, 331-322 ("*A Change is Gonna Come (2019)*").

management, for cleaning, or for repair work) to be undertaken by an associated company.

Why are homes owned on a leasehold basis?

Flats

1.20 Flats are almost universally owned on a leasehold, as opposed to freehold, basis. There is a good legal reason for that: certain obligations to pay money or perform an action in relation to a property (such as to repair a wall or a roof) cannot legally be passed to future owners of freehold property. These obligations are especially important for the effective management of blocks of flats. For instance, it is necessary that all flat owners can be required to pay towards the costs of maintaining the block, which is important since flats are structurally interdependent. There are therefore good reasons, under the current law, why flats are sold on a leasehold basis.

Houses

1.21 But leasehold ownership is not limited to flats. Sometimes houses are sold on a leasehold basis. That has been the case for some years.[12] More recently there has been an increase in new-build houses being sold on a leasehold basis. That allows developers to sell the property subject to an ongoing obligation to pay a ground rent.

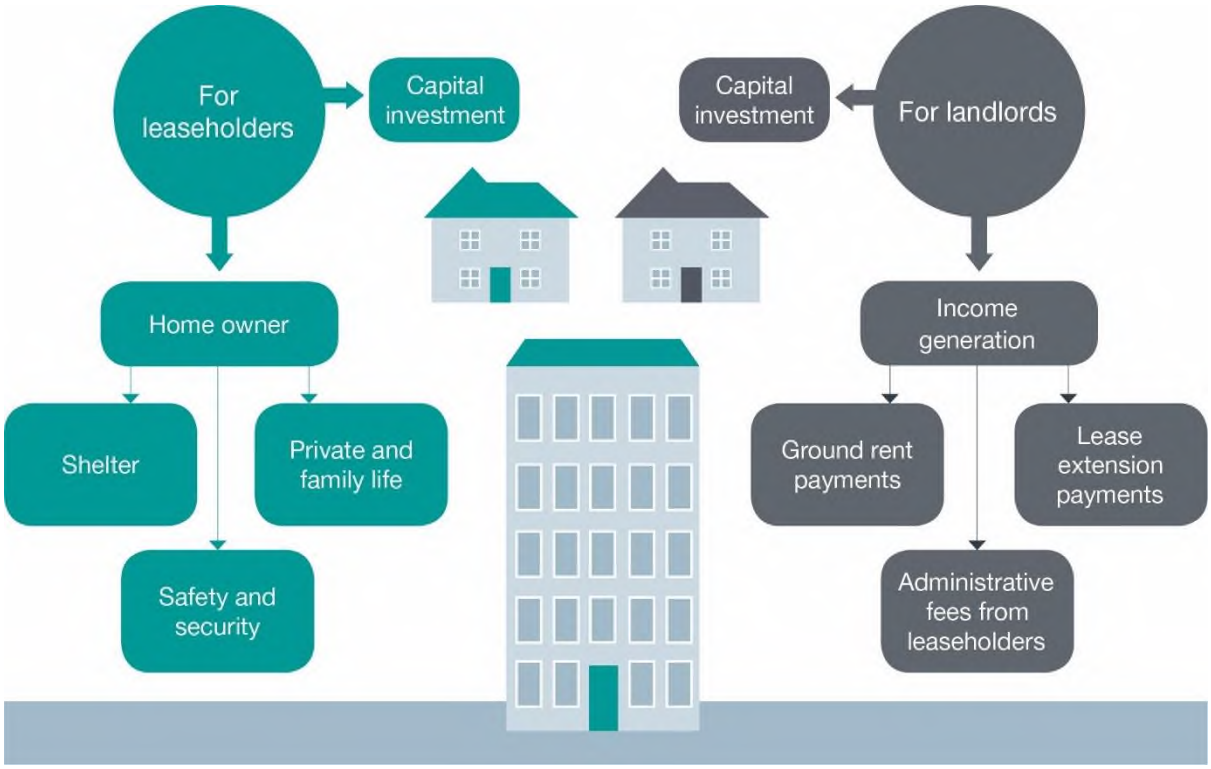
1.22 The legal reasons for selling houses on a leasehold basis are less apparent than those for leasehold flats. One reason might be the need to impose positive obligations on house owners in relation to the upkeep (management) of an estate, but that does not apply in all cases.

A source of income

1.23 We have explained that there can be good legal reasons why homes are sold on a leasehold basis. The reasons why, for legal purposes, houses and flats may be sold on a long lease do not, however, require the lease to provide income streams to the landlord (see paragraph 1.19 above), beyond those needed to maintain the property, the block, or the estate.

[12] Historically, the sale of houses on a leasehold basis became widespread practice in particular areas of the country.

Figure 1: The purpose of a leasehold home



Leasehold and feudalism

1.24 Leasehold is often referred to as "feudal". In fact, leasehold developed outside of the main feudal tenures and later in time. Leases began as contracts, not interests in land. But while "feudal" is a misdescription of the landlord-tenant relationship, it is not necessarily a mischaracterisation. The language of "feudalism" reflects the power imbalance experienced by leaseholders, and concerns that the tenure has too readily facilitated the extraction of excessive monetary payments from those leaseholders.[13]

What is wrong with leasehold home ownership?

1.25 Residential leasehold has, for some time, been hitting the headlines and is the subject of an increasingly prominent policy debate. There is a growing political consensus that leasehold tenure is not a satisfactory way of owning residential property.

> "too often leaseholders, particularly in new-build properties, have been treated by developers, freeholders and managing agents, not as homeowners or customers, but as a source of steady profit. The balance of power in existing leases, legislation and public policy is too heavily weighted against leaseholders, and this must change".[14] Housing, Communities and Local Government Select Committee

---

13 *A Change is Gonna Come (2019).*

14 Housing, Communities and Local Government Committee, Leasehold Reform (2017-19) HC 1468, para 25, at https://publications.parliament.uk/pa/cm201719/cmselect/cmcomloc/1468/1468.pdf.

Criticisms based on leasehold ownership being inherently unfair

1.26 Many people have a fundamental objection to leasehold being used as a mechanism for delivering home ownership. They argue that the fact that external investors have a financial stake in a person's home – which arises from the time-limited nature of the leaseholder's interest and the control enjoyed by the landlord – creates an inappropriate, unbalanced and inherently unfair starting point for home ownership. Leasehold, it is argued, is fundamentally flawed as a mechanism to deliver the type of home ownership that people want and expect. The solution is said to be for home ownership – of both houses and flats – to be delivered through freehold (including commonhold) ownership.

1.27 Arguments about inherent unfairness are compounded by the inequality of arms that exists, broadly speaking, between leaseholders and landlords in the current leasehold regime. It is a systemic inequality between leaseholders (as a whole) and landlords (as a whole), as opposed to an individual inequality as between particular people within those groups. We discussed the inequality of arms, the opposing views on whether leasehold ownership is inherently unfair, and competing arguments about reform in our earlier report on valuation in enfranchisement.[15]

Criticisms of ways in which the leasehold market operates

1.28 While there is a strong voice that leasehold is inherently unfair and should be replaced with freehold (including commonhold), there are also criticisms of specific aspects of how the leasehold market operates.[16] To those who have a fundamental objection to leasehold, they are all symptoms of what they consider to be an inherently unfair system. But these criticisms are not made solely by those who have a fundamental objection to leasehold; many who do not object to the use of leasehold nevertheless have concerns about aspects of the way that it operates. For example, concerns have been raised about:

(1) legal, practical and financial obstacles for leaseholders seeking to exercise their statutory rights, including:

(a) their right to extend their lease or buy their freehold (that is, their enfranchisement rights);

(b) their right to take over management of their block (that is, the RTM);

(c) their right to challenge the reasonableness of service charges that have been levied by landlords;

---

15 Valuation Report, para 1.71 and 3.45 onwards (on the inequality of arms), para 3.4 onwards (on inherent unfairness), and Ch 3 generally on competing views about reform.

16 We summarise the wider policy debate in Ch 1 of our Enfranchisement, Commonhold and Right to Manage CPs, where we refer to media coverage, the activities of campaign groups, Government announcements, the work of the All-Party Parliamentary Group on Leasehold and Commonhold, and various Parliamentary debates about leasehold.

(d) the "right of first refusal", which is intended to allow leaseholders whose landlord proposes to sell the freehold of their block of flats to step in to the purchaser's shoes and themselves purchase the freehold instead;

(e) the right to apply to the Tribunal for a manager to be appointed to manage the block instead of the landlord;[17]

(f) the right to form a recognised tenants' association, and acquire the contact details of the leaseholders in a block in order to do so;

(2) high and escalating onerous ground rents, with a particular concern about the imposition of ground rents which double at periodic intervals (generally ten years) during the term of a lease; such obligations can make properties unmortgageable and unsaleable, trapping the owners in their homes;

(3) houses being sold on a leasehold, as opposed to freehold, basis, for no apparent reason other than for developers to extract a profit from owning the freehold;

(4) the absence of any compulsory regulation of managing agents, either in terms of their qualifications or the quality of their work;

(5) excessive service charges levied by landlords;

(6) the ability of landlords to require leaseholders to pay all or some of the landlord's legal costs when there has been a dispute between the parties, including in cases where the leaseholder has "won" a legal challenge against their landlord;

(7) the legal entitlement of landlords to "forfeit" (that is, terminate) a lease if the leaseholder breaches a term of the lease;

(8) the charging by landlords of unreasonable permission fees for leaseholders to carry out alterations to their property; and

(9) close relationships between property developers and particular conveyancers which may threaten the latter's independence in advising clients seeking to buy leasehold properties from the referring developers.

1.29 The concerns set out above lie against a background, generally speaking, of leasehold purchasers not understanding what leasehold ownership involves.

> "For most consumers, buying a house or flat will be their largest purchase and investment. Because it is a relatively infrequent purchase consumers are unlikely to accumulate significant knowledge of the process or of the salient characteristics of different forms of property ownership. Further, while the value of the purchase may make the consumer cautious, the sheer magnitude of the purchase price will typically

[17] The First-tier Tribunal (Property Chamber) in England and the Leasehold Valuation Tribunal in Wales.

make other amounts of money involved seem insignificant by comparison". Competition and Markets Authority[18]

1.30 Further, even when purchasers do understand what leasehold ownership involves, there is often no choice over the form of ownership. As we explained above, flats are almost invariably owned on a leasehold basis.

1.31 Some criticisms outlined above can fairly be described as abusive practices by landlords or developers. The Competition and Markets Authority ("CMA") launched an investigation into leasehold home ownership in 2019 and published an interim report in 2020.[19] The CMA expressed concerns about ground rents in leases, about mis-selling of leasehold houses, about service charges and permission fees, and about a failure of "checks and balances" in the leasehold system. The CMA stated that it intended to take enforcement action in relation to the mis-selling of leasehold property, and in relation to leases containing high and escalating ground rents.

1.32 While there have been abusive practices in leasehold, we would emphasise that there are other landlords who operate fairly and transparently. But however fairly the system is operated, inherent limitations of leasehold remain.

1.33 All of the criticisms summarised above derive, at least to some extent, from those inherent limitations – namely that the asset is time-limited, and that control is shared with the landlord. Those limitations are compounded by the fact that the landlord and leaseholder have opposing financial interests – generally speaking, any financial gain for the landlord will be at the expense of the leaseholder, and vice versa. Accordingly, the leasehold system has been reformed over the years in an attempt to create an appropriate balance between those competing interests. Given their opposing interests, it is very unlikely that leaseholders and landlords will agree that the balance that has been struck between their respective interests is fair. Their interests are diametrically opposed, and consensus will be impossible to achieve.

"For landlords, property is fundamentally about money: both the capital value in the freehold and the income that is generated from ground rent payments, commissions, enfranchisement premiums and other fees. That is not to say that the profit generated cannot be used for good ends, and landlords come in many guises. … But the fact remains that the primary value of property to many landlords is financial. And whether a particular landlord has observed better or worse practices does not alter the fact that, systematically, leaseholders still lack autonomy and control over their homes.

For homeowners, the home is also about money, but in a very different sense. It is about having a financial stake in the property in which we live; a stake we are increasingly being asked to draw upon to support us financially into retirement, as well as to support the next generation. But the more a person's home is used as a financial asset to benefit their landlord, the less it is an investment for the individual. The more a leaseholder's money is providing an investment for their landlord, the less their

[18] Competition and Markets Authority, *Leasehold housing: update report* (February 2020) para 33, at https://www.gov.uk/cma-cases/leasehold.

[19] Competition and Markets Authority, *Leasehold housing: update report* (February 2020).

money is providing an investment for their own future, their family and their next generation.

For homeowners, however, the home is about more than money. Britain has famously been described as a nation of homeowners. Fulfilling the dream of home-ownership has long been many people's ambition. Much of this ambition can be attributed to the non-financial, "x-factor" values that home-ownership encompasses, and which have become embedded in an ideology of home ownership. Our home is the focal point of our private and family lives; it is integral to our identity, reflecting who we are and the community we belong to. Bad law and bad practice that affect people's experience in their home therefore have a particular impact on them. The current programme of law reform marks an opportunity to reform the law so that it can better deliver both the financial and non-financial benefits of home ownership".[20]

Freehold ownership of flats: commonhold

1.34 In many countries, leasehold ownership does not exist. Instead, forms of "strata" or "condominium" title are used so that flats can be owned on a freehold basis.

1.35 In England and Wales, commonhold was introduced as an alternative to leasehold in 2002, to enable the freehold ownership of flats.[21] Commonhold allows the residents of a building to own the freehold of their individual flat (called a "unit") and to manage (or appoint someone to manage) the shared areas through a company. For many blocks, the homeowners would not themselves carry out the day-to-day management but would instead appoint agents to manage the block. Crucially, however, the homeowners (rather than an external landlord) would control the appointment of those agents.

1.36 For homeowners, commonhold offers a number of advantages over leasehold ownership. In particular:

(1) it allows a person to own a flat forever, with a freehold title – unlike a leasehold interest, which will expire at some point in the future;

(2) no ground rent is payable;

(3) it gives the homeowner greater control of their property than leasehold; and

(4) it is designed to regulate the relationship between a group of people whose interests are broadly aligned. That is in stark contrast to the leasehold regime, which has to attempt to balance and regulate the competing interests of landlord and leaseholder.

---

20 *A Change is Gonna Come (2019),* 330-331.

21 Commonhold was created by the Commonhold and Leasehold Reform Act 2002. While primarily designed to enable the freehold ownership of flats, commonhold is equally capable of applying in a commercial context. It can, for example, regulate the relationship between individually owned offices within an office block.

1.37 Despite these apparent advantages, however, commonhold has not taken off – fewer than 20 commonholds have been created since the commonhold legislation came into force.[22]

Why has commonhold failed?

1.38 Various suggestions have been made as to why commonhold has not taken off.

(1) Some have suggested that shortcomings in the law governing commonhold can make it unworkable in practice and have led to a lack of confidence in commonhold as a form of ownership.

(2) Some ascribe commonhold's low uptake to an unwillingness of mortgage lenders to lend on commonhold units.

(3) Some think that there may be a lack of consumer and sector-wide awareness of what is a relatively unfamiliar form of ownership.

(4) Others point out that commonhold remains less attractive to developers than leasehold because of the opportunities that leasehold offers to secure ongoing income-streams on top of the initial purchase price paid by the leaseholders.

(5) Others point out that Government provided no incentives for developers to use commonhold – and no disincentives to them continuing to use leasehold (for example, by removing the financial advantages for developers of selling leasehold flats).

(6) Others suggest that the low uptake is more the result of inertia among professionals and developers. Moreover, we have been told that there is insufficient incentive (financial or otherwise) for developers of homes and commercial property to change their practices and adopt a whole new system while the existing one (from their perspective at least) does the job.

Stewardship and culture change[23]

1.39 A common thread that runs through all three of our projects is moving management and control from a third-party landlord to homeowners. But it is in relation to commonhold that the management of land has come under the greatest scrutiny, because of the removal of the relationship of landlord and tenant. This shift from leasehold to freehold tenure has raised questions as to the stewardship of land and the utility of the landlord-tenant relationship in the residential context. Stewardship is not always defined, but in this context, we use the term to mean the management of land over time and for the next generation of owners. It has been suggested that landlords are necessary to provide stewardship over residential property. Institutional landlords are said to act as custodians who take a long-term view of the investments needed in a building or estate.[24] Such landlords are also said to have superior

---

22 L Xu, "Commonhold Developments in Practice" in W Barr (ed), *Modern Studies in Property Law: Volume 8* (2015) p 332.

23 Taken from *A Change is Gonna Come (2019)*, 328-329.

24 Housing, Communities and Local Government Committee, Leasehold Reform (2017-19) HC 1468, para 81.

expertise in overseeing insurance, maintenance, health and safety, fire risks, planning obligations, building regulations and anti-social behaviour.[25]

1.40 But this argument must address the following challenge: if owners of houses are trusted to be the stewards of their house, why can owners of flats not be similarly trusted? While leaseholders have a shorter-term interest than their landlords, it is the term of the lease granted by the landlord that so constrains them. There is no reason to assume that leaseholders would not have the same incentives as landlords presently do if they had the same enduring financial stake.[26] The management of a block is undoubtedly more complex than that of an individual house. It is not suggested that commonhold unit owners themselves will personally take charge. In all but small blocks, where self-management is a realistic choice, the expectation is that professional managers will be appointed.

1.41 This insistence on the necessity of landlord freeholders to provide inter-generational stewardship of a building or estate is symptomatic of a broader issue. The reform of leasehold, and particularly the reinvigoration of commonhold, bring about a need for cultural change, and for all participants in the housing market to re-think fundamental assumptions on which the market currently operates.

1.42 It has been suggested, for example, that developers will not build unless there is a professional landlord in place to manage the development. This ignores the fact that commonhold structures are used around the world and that large, mixed-use developments are built in those jurisdictions. It is also argued that commonhold owners will not take an active interest in the management of their block. Such arguments operate on the assumption that flat owners are ultimately apathetic about how their buildings or estates are run.[27] While commonhold is about empowering and giving responsibility to owners of flats, it is also about owners of flats being ready to accept responsibility and therefore being ready to take on that cultural change. Law reform must be matched by changes in people's expectations of what home-ownership will involve. It should not be assumed that apathy generated in a leasehold system – where the long-term financial investment and control of a building lie with an external third party – will carry over into a system in which, from the outset, investment and control lie with the unit owners.

1.43 In summary, therefore, commonhold should not be looked at through the lens of leasehold. Commonhold involves a culture change. It moves away from an "us and them" mindset, towards "us and ourselves".

---

25 See, for example, https://wslaw.co.uk/wp-content/uploads/2019/07/LR-December-Bulletin-2018.pdf, p 3.

26 S Bright, "Do freeholders provide a unique and valuable service?" (2019) at https://www.law.ox.ac.uk/housing-after-grenfell/blog/2019/04/do-freeholders-provide-unique-and-valuable-service.

27 Housing, Communities and Local Government Committee, Leasehold Reform (2017-19) HC 1468, para 17.

PART B: LAW COMMISSION AND GOVERNMENT RECOMMENDATIONS FOR REFORM

The impact of COVID-19

1.44 The final stage of the preparation of our reports has been undertaken against the backdrop of the COVID-19 pandemic. In common with many people in England and Wales, Law Commission staff and Commissioners found themselves working from, as well as living in, their homes, as everybody limited contact with others to benefit the health of their communities. It is a reminder of the huge importance that a home plays in a person's life, and that individuals must work together to build and get the most out of a community. A significant part of our current work reforming leasehold and commonhold has been aimed at making sure that there exist the right tools to ensure homeowners have the comfort and certainty that they need to enjoy their homes into the future, and, where homes form part of bigger developments, the right people are involved in the decisions that enable their communities to flourish.

Law Commission recommendations for leasehold and commonhold reform

1.45 We have published a suite of final reports on our three projects:

(1) leasehold enfranchisement;

(2) the right to manage; and

(3) commonhold.

1.46 Our three projects fall into two categories.

(1) Improving leasehold: our recommendations about leasehold enfranchisement and the right to manage are aimed at improving the existing system of leasehold ownership, to make it easier, quicker and cheaper to exercise leasehold rights.

Our starting point in these projects is the fact that leasehold ownership exists. Our recommendations are aimed at improving the law governing leasehold ownership.

(2) Reinvigorating commonhold, so that leasehold is no longer needed: our recommendations about commonhold are aimed at creating a workable alternative to leasehold ownership, with a view to its widespread use in the future.

> Once we have commonhold in a way that works … we do not need long residential leases. Commonhold solves the two underlying concerns that we hear about leases. … Once commonhold is there and it is working, if you want a system of ownership that removes those underlying concerns with leasehold,

you can use commonhold". Professor Nick Hopkins, evidence to the Housing Select Committee[28]

Our starting point in this project is that it is not necessary for leasehold to be used as the mechanism for delivering home ownership. Rather, commonhold can be used instead, and we would go as far as to say that it should be used in preference to leasehold, because it overcomes the inherent limitations of leasehold ownership set out above. But commonhold can only replace leasehold if it is workable in practice.

"The right to manage and enfranchisement … mitigate the systemic difficulties with leasehold. But commonhold alone removes those difficulties, delivering freehold ownership of individual flats or units, and collective freehold ownership and management of the common parts".[29]

1.47 We summarise our three projects below.

Our Terms of Reference

1.48 The Terms of Reference for all three of our projects include two general policy objectives identified by Government, which are:

(1) to promote transparency and fairness in the residential leasehold sector; and

(2) to provide a better deal for leaseholders as consumers.

1.49 Our Terms of Reference include specific provisions for each of our projects, which we set out in the following chapter and in Appendix 1 to this Report.

1.50 Our Terms of Reference are not neutral. They require us to make recommendations that would alter the law in favour of leaseholders. They indicate a policy conclusion reached by Government that the leasehold system in its current form is not a satisfactory way of owning homes.

1.51 We set out many criticisms of leasehold above. Some amount to abusive practices, which have often been a focus of concern (particularly in media reports). But the reform of leasehold is not intended simply to remove abuse. Those practices have served to highlight long-standing concerns with leasehold. Government's work and our recommendations for reform are therefore not confined simply to removing abuses. Our Terms of Reference refer generally to providing "a better deal for leaseholders as consumers". Our recommendations for reform are therefore intended to make the law work better for all leaseholders.

---

[28] Housing, Communities and Local Government Committee, Oral evidence: Leasehold reform (2017-19) HC 1468), response to Question 456, at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/housing-communities-and-local-government-committee/leasehold-reform/oral/95161.pdf.

[29] *A Change is Gonna Come (2019)*, 328.

Improving leasehold: reform of leasehold enfranchisement

1.52 Leasehold enfranchisement is the process by which leaseholders may extend the lease, or buy the freehold. In order to exercise enfranchisement rights, leaseholders must pay a sum of money ("a premium") to their landlord.[30]

1.53 We make recommendations for a brand-new, reformed enfranchisement regime. We recommend that the enfranchisement rights, and the leaseholders who qualify for them, should be expanded, improved, simplified and rationalised. And we recommend that the process that leaseholders must follow to exercise enfranchisement rights should be improved and simplified, and that the costs that leaseholders incur doing so should be reduced.

1.54 We previously published our final report concerning one aspect of leasehold enfranchisement, namely the amount that leaseholders must pay to their landlords in order to make an enfranchisement claim.[31] As required by our Terms of Reference, we set out the options for Government to reduce the premiums paid by leaseholders.

Improving leasehold: reform of the right to manage

1.55 The right to manage is a right for leaseholders to take over the management of their building without buying the freehold. They can take control of services, repairs, maintenance, improvements, and insurance.

1.56 We make recommendations which will make the RTM more accessible, less confusing, and more certain. Our recommendations would simplify and liberalise the criteria that govern which properties may be subject to an RTM claim. We have designed a new process by which information and claims are exchanged between leaseholders, landlords, and RTM companies to clear the procedural thicket which currently plagues the regime but also will facilitate better communication between all parties. We also recommend that RTM companies should not be required to cover any non-litigation costs incurred by the landlord as a result of an RTM claim.

The alternative to leasehold: reinvigorating commonhold

1.57 We explain above that commonhold allows for the freehold ownership of flats (and other interdependent properties), offering an alternative way of owning property which avoids the shortcomings of leasehold ownership.

1.58 We also summarised some of the reasons why commonhold is said to have failed in paragraph 1.38 above.

1.59 Our project seeks to address the first suggested barrier to the uptake of commonhold in paragraph 1.38 above: perceived shortcomings in the legal design of the commonhold scheme. Our project analyses which aspects of the law of commonhold have so far impeded commonhold's success, for example by affecting market confidence, or making it unworkable. In accordance with our Terms of Reference, we

---

30 There is an exception: leaseholders of houses can extend their lease without paying a premium but instead paying a higher annual rent. See para 2.8(2) below.

31 Valuation Report.

recommend reforms to reinvigorate commonhold as a workable alternative to leasehold, for both existing and new homes.

1.60 Other barriers to the uptake of commonhold, including those identified in paragraph 1.38 above, are not problems with the law and do not fall within our Terms of Reference.[32] They are issues which Government is considering – and Government therefore has a crucial role in seeking to reinvigorate commonhold as a mechanism for delivering home ownership.

Government proposals for leasehold and commonhold reform

1.61 Improving and facilitating home ownership is a priority for Government, and – as part of that – reform of residential leasehold and commonhold law has become an increasing priority. The UK Government and Welsh Government have announced various proposals for reform. Our recommendations for reform will be considered by both Governments as part of their overall programmes of reform.

1.62 We summarise Government's current proposals for reform below. We do not comment on those proposals. They are all matters which fall outside the scope of our projects. Nevertheless, it is important to explain those proposals in order to explain how all proposed reforms (including those that we recommend) fit together.

Ministry of Housing, Communities and Local Government

1.63 The Ministry of Housing, Communities and Local Government ("MHCLG") has announced its intention to bring forward the following measures.[33]

(1) For the future, banning the sale of houses on a leasehold basis, other than in exceptional circumstances.[34] As we explain further below, the only good legal reason for selling houses on a leasehold basis – namely ensuring that owners on an estate will contribute to (reasonable) shared costs – would be provided by the creation of "land obligations": see paragraph 1.63(11) below.

---

32 Our project did, however, provide an opportunity to gather evidence on these wider measures to reinvigorate commonhold, and we report on them in our Commonhold Report.

33 See: (1) Department for Communities and Local Government ("DCLG"), *Tackling unfair practices in the leasehold market: A consultation paper* (July 2017) ("*Tackling unfair practices consultation, July 2017*"); (2) DCLG, *Tackling unfair practices in the leasehold market: Summary of consultation responses and Government response* (December 2017) ("*Tackling unfair practices response, December 2017*"); (3) MHCLG, *Implementing reforms to the leasehold system in England: A consultation* (October 2018) ("*Implementing reforms consultation, October 2018*"); (4) MHCLG, *Implementing reforms to the leasehold system in England: Summary of consultation responses and Government response* (June 2019) ("*Implementing reforms response, June 2019*"); and (5) MHCLG, *Government response to the Housing, Communities and Local Government Select Committee report on leasehold reform* (July 2019) ("*Response to Select Committee, July 2019*"). (1) and (2) are at https://www.gov.uk/government/consultations/tackling-unfair-practices-in-the-leasehold-market; (3) and (4) are at https://www.gov.uk/government/consultations/implementing-reforms-to-the-leasehold-system; (5) is at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814334/CCS0519270992-001_Gov_Response_on_Leasehold_Reform_Web_Accessible.pdf.

34 *Implementing reforms response, June 2019*, Ch 2. The ban would apply, predominantly, to houses that are built in the future. The ban on the grant of leases of houses would, however, also prevent the grant of a *new*

(2) For the future, when homes are sold on a leasehold basis (which, following the leasehold house ban, will predominantly be flats), restricting ground rents to zero in those leases.[35]

(3) Regulation of the property agent sector, including letting, managing and estate agents through mandatory licensing, mandatory codes of practice, new qualifications provisions and a new regulator with a range of enforcement options.[36]

(4) Consideration of reform of the regulation of the service charges that leaseholders must pay, including the requirements to consult with leaseholders before incurring expenditure on major works or on long-term contracts.[37]

(5) Reviewing the ability of landlords to charge leaseholders permission fees under long leases, such as fees for permission to make alterations to the property.[38]

(6) Reviewing the circumstances in which leaseholders are required to contribute to their landlord's legal costs.[39]

(7) Requesting that the Law Commission update its previous recommendations to abolish forfeiture.[40]

(8) Protecting leaseholders from losing their homes for small sums of rent arrears.[41]

(9) Reviewing loopholes in the "right of first refusal".[42]

---

lease over an *existing* house. The ban would not apply to existing leases of houses.

35 *Implementing reforms response, June 2019*, Ch 3.

36 The proposals included plans for a mandatory code of practice covering letting and managing agents and nationally recognised qualification requirements for letting and managing agents to practise. In addition, an independent regulator was proposed which would oversee both the code of practice and the delivery of the qualifications: DCLG, *Protecting consumers in the letting and managing agent market: call for evidence* (October 2017), and MHCLG, *Protecting consumers in the letting and managing agent market: Government response* (April 2018). A working group chaired by Lord Best was subsequently tasked with "considering the entire property agent sector to ensure any new framework, including any professional qualifications requirements, a Code of Practice, and a proposed independent regulator, is consistent across letting, managing and estate agents": see: *Regulation of property agents working group – final report* (July 2019), at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818244/Regulation_of_Property_Agents_final_report.pdf.

37 *Response to Select Committee, July 2019*, pp 25-29.

38 *Response to Select Committee, July 2019*, pp 23-24.

39 *Response to Select Committee, July 2019*, p 29.

40 *Response to Select Committee, July 2019*, pp 29-30. We have previously recommended that forfeiture be abolished and replaced with a regime to enforce the terms of leases in a proportionate way: Termination of Tenancies for Tenant Default (2006) Law Com No 303.

41 *Tackling unfair practices response, December 2017*, Ch 4.

42 *Response to Select Committee, July 2019*, p 13. We explain the right of first refusal in para 1.28(1)(d) above.

(10) Implementation of most of the Law Commission's recommendations on fees charged in leasehold retirement properties ("event fees"), including limiting the circumstances in which event fees can be charged and requiring the disclosure of information to prospective purchasers.[43]

(11) To support the leasehold house ban, relying on the implementation of the Law Commission's recommendations to reform property law, including introducing "land obligations" and reforming the way in which rights over land are created, varied, terminated and regulated.[44]

(12) Extending mandatory membership of a redress scheme to landlords who do not use managing agents.[45]

(13) Setting a cap on what leaseholders can be charged for the provision of information about the lease to potential purchasers, and a minimum time within which the information must be provided.[46]

(14) Extending rights currently enjoyed by leaseholders to freeholders of houses – in particular:

(a) extending the right to challenge charges for the maintenance of an estate where they are unreasonable, as well as allowing freeholders of houses to apply to change their managing agent;[47]

(b) protecting freeholders from losing their homes for unpaid service charges which are owed as "rentcharges";[48]

(c) reforming the "right of first refusal" by extending the right to leaseholders of houses;[49] and

---

43 Letter from Heather Wheeler MP, then Minister for Housing and Homelessness, to the Rt Hon Lord Justice Green, Chair of the Law Commission, 27 March 2019, at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/03/Letter-from-Mrs-Heather-Wheeler-MP.pdf.

44 *The Queen's Speech 2016*, p 61, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524040/Queen_s_Speech_2016_background_notes_.pdf; *Tackling unfair practices response, December 2017*, para 36; and Implementing reforms consultation, October 2018, para 2.21. See also Making Land Work: Easements, Covenants and Profits À Prendre (2011) Law Com No 327.

45 MHCLG, *Strengthening consumer redress in the housing market* (January 2019), para 123, at https://www.gov.uk/government/consultations/strengthening-consumer-redress-in-housing.

46 *Implementing reforms response, June 2019*, Ch 5, which sets out proposals for a cap of £200 plus VAT and a timeframe of 15 working days.

47 *Tackling unfair practices response, December 2017*, Ch 5; *Implementing reforms response, June 2019*, Ch 4.

48 *Tackling unfair practices response, December 2017*, para 81.

49 *Implementing reforms response, June 2019*, paras 2.34-2.35; *Response to Select Committee, July 2019*, p 13.

(d) considering regulating the ability of developers and others to charge homeowners permission fees, such as to make alterations to their property.[50]

(15) Ensuring the New Homes Ombudsman is created and requiring developers of new-build homes to belong to it, which would provide new-build homebuyers with an effective route to resolve disputes, avoiding the need to go to court.[51]

(16) Considering the case for creating a Single Housing Court, to see whether it could make it easier for all users of court and tribunal services to resolve disputes, reduce delays and to secure justice in housing cases.[52]

1.64 Some measures have already been implemented.

(1) Changes have been made to the recognition of residents' associations, to require landlords to provide residents' associations with information about leaseholders.[53]

(2) A Government-backed pledge, designed to help leaseholders with onerous ground rent terms, has been agreed by many landlords, developers, conveyancers and managing agents.[54]

(3) Restrictions are to be placed on the properties that qualify for support from the Help to Buy scheme in England, reflecting the leasehold house ban and the restriction of ground rents to zero.[55]

---

50 *Response to Select Committee, July 2019*, pp 23 to 24.

51 MHCLG, *Redress for purchasers of new build homes and the New Homes Ombudsman: technical consultation* (June 2019) and *Government response* (February 2020), at https://www.gov.uk/government/consultations/redress-for-purchasers-of-new-build-homes-and-the-new-homes-ombudsman.

52 MHCLG, *Considering the case for a Housing Court – A Call for Evidence* (November 2018), at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755326/Considering_the_case_for_a_housing_court.pdf.

53 The Tenants' Associations (Provisions Relating to Recognition and Provision of Information) (England) Regulations SI 2018 No 1043. The regulations are intended to make it easier for residents' associations to contact leaseholders, increasing the likelihood of those leaseholders becoming members of the association. This affects the chances of the association being formally recognised under s 29(1) of the Landlord and Tenant Act 1985, which improve if a higher percentage of the leaseholders are members. For background, see s 130 of the Housing and Planning Act 2016; DCLG, *Recognising residents' associations, and their power to request information about tenants* (July 2017), at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/632116/s130_HPAct_consultation.pdf.

54 MHCLG, *Public pledge for leaseholders* (27 June 2019), at https://www.gov.uk/government/publications/leaseholder-pledge/public-pledge-for-leaseholders.

55 *Tackling unfair practices response, December 2017*, para 47; MHCLG, *Leasehold axed for all new houses in move to place fairness at heart of housing market* (27 June 2019), at https://www.gov.uk/government/news/leasehold-axed-for-all-new-houses-in-move-to-place-fairness-at-heart-of-housing-market; MHCLG, *Housing Secretary clamps down on shoddy housebuilders* (24 February 2020), at https://www.gov.uk/government/news/housing-secretary-clamps-down-on-shoddy-housebuilders

(4) Government has committed that no new scheme will fund the building of leasehold houses.[56]

1.65 In addition, commonhold has been brought back on to the political agenda. MHCLG has stated that, in addition to pursuing leasehold reform:

> we also want to look at ways to reinvigorate commonhold. … This will help ensure that the market puts consumers' needs ahead of those of developers or investors. We will also look at what more we can and should do to support commonhold to get off the ground working across the sector, including with mortgage lenders.[57]

Welsh Government

1.66 The Welsh Government has imposed restrictions on properties that qualify for support from the Help to Buy Wales scheme, namely that houses should generally be sold on a freehold basis and that ground rents should be restricted.[58] At the same time, a Help to Buy Wales conveyancer accreditation was introduced, and the use of an accredited conveyancer was made mandatory for sales through the scheme, to ensure a minimum level of information is given to purchasers on a range of issues, including information about leasehold. In addition, the major developers operating in Wales pledged not to use leasehold for new-build houses, whether sold through the Help to Buy scheme or otherwise.[59]

1.67 In addition, the Welsh Government established a working group on leasehold reform. The group's report, published in 2019, made a wide range of recommendations, including recommendations to:[60]

(1) legislate to ban the unjustified use of leasehold in new-build houses, with some exceptions;

(2) legislate to ban onerous ground rents and implement the reduction of future ground rents to a nominal financial value;

(3) improve education and awareness for all participants in the property market;

(4) improve transparency for consumers with respect to the obligations that burden a leasehold or freehold property at the point of sale; and

---

56 MHCLG, *Funding for new leasehold houses to end* (2 July 2018), at https://www.gov.uk/government/news/funding-for-new-leasehold-houses-to-end.

57 *Tackling unfair practices response, December 2017*, p 25.

58 Developers have to present genuine reasons for a house to be marketed as leasehold. In addition, starting ground rents need to be limited to a maximum of 0.1% of the property's sale value and leasehold agreements have to have a minimum term of 125 years for flats and 250 years for houses.

59 *Written Statement: Leasehold Reform in Wales* (6 March 2018), at https://gov.wales/written-statement-leasehold-reform-wales.

60 *Residential Leasehold Reform – A Task and Finish Group Report*, pp 21-22, at https://gov.wales/independent-review-residential-leasehold-report. See also *Written Statement: Response to Report of the Task and Finish Group on Leasehold Reform* (6 February 2020), at https://gov.wales/written-statement-response-report-task-and-finish-group-leasehold-reform.

(5) introduce an updated Code of Practice in Wales for the licensing and accreditation of managing agents.

1.68 The Welsh Government has also published a Call for Evidence to better understand how private housing estates are maintained through the payment of estate service charges by homeowners and residents. The evidence base collected by this process will then be used by the Minister for Housing and Local Government to consider the case for reform.[61]

PART C: THE BIG PICTURE – HOW THE VARIOUS REFORM PROPOSALS FIT TOGETHER

Introduction

1.69 In Part B, we have summarised the areas in which we are recommending reform, and we have summarised (without commenting on) Government's proposals for reform. We now explain how all those proposed reforms fit together.

1.70 It is important to look at existing and future home owners. Reform must cater for the needs of:

(1) Leaseholders of existing homes: reform must cater for the needs of the leaseholders of existing houses and flats, as well as the future owners of those homes.[62] It is estimated that there are at least 4.3 million leasehold homes in England alone.[63]

(2) Owners of future homes: reform must cater for the needs of the owners of houses and flats that are built in the future: 178,000 new-build properties were completed in England in 2019, of which 78% were houses and 22% were flats.[64]

> "The work of the Law Commission and of the Government brings onto the horizon an unprecedented level of reform of residential leasehold and commonhold. Lying at the heart of the work is an acknowledgement that leasehold home ownership has failed to deliver the benefits associated with being an owner, and that the systemic problems with leasehold mean that the tenure is ill-equipped to do so".[65]

---

61 Welsh Government, *Estate charges on housing developments: call for evidence* (February 2020), at https://gov.wales/sites/default/files/consultations/2020-02/estate-charges-on-housing-developments.pdf.

62 In addition, it is necessary to consider leasehold owners of future homes, to the extent that leases are still granted in the future.

63 MHCLG, *Estimating the number of leasehold dwellings in England 2017-2018* (26 September 2019), at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/834057/Estimating_the_number_of_leasehold_dwellings_in_England__2017-18.pdf.

64 MHCLG, *House building; new build dwellings, England: December Quarter 2019* (26 March 2020), at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875361/House_Building_Release_December_2019.pdf.

65 *A Change is Gonna Come (2019)*, 330.

Overall aim: fit-for-purpose home ownership

1.71 The aim of all the proposed reforms can be summarised as seeking to create fit-for-purpose home ownership.

1.72 There are two strands to that work:

(1) paving the way for the future: laying the foundations for homes to be able to be owned as freehold; and

(2) essential reform of leasehold: addressing problems for leaseholders in the present.

(1) Paving the way for the future: laying the foundations for homes to be able to be owned as freehold

Owners of future homes

1.73 MHCLG's proposed ban on *houses* being sold on a leasehold basis (see paragraph 1.63(1) above) will ensure that, in the future, houses will be sold on a freehold basis (subject to exceptions). Accordingly, houses that are built in the future will predominantly be owned on a freehold basis.

1.74 By implementing our recommendations for the creation of land obligations, there would no longer be any reason – from a legal point of view – for selling houses on a leasehold basis. That is because land obligations would allow for freehold owners to be subject to positive obligations. Land obligations would be a rational and controlled mechanism for requiring payments to be made.

1.75 Turning to future *flats*, as recorded in our Terms of Reference, Government wishes to reinvigorate commonhold as a workable alternative to leasehold. Our recommendations to reform the law of commonhold will overcome the defects in the current legal regime so that commonhold can be used with confidence.

1.76 In the future, the sale of all flats could be on a commonhold basis, rather than as leasehold (as is invariably the case currently).[66] The Law Commission's reforms will ensure that commonhold is workable and flexible enough to cater for the wide range of modern-day developments.

> We urge the Government to ensure that commonhold becomes the primary model of ownership of flats in England and Wales, as it is in many other countries. … there is no reason why the majority of residential buildings could not be held in commonhold; free from ground rents, lease extensions, and with greater control for residents over service charges and major works. We are unconvinced that professional freeholders provide a significantly higher level of service than that which could be provided by leaseholders themselves". Housing, Communities and Local Government Committee[67]

---

66 We refer to the sale of flats to cover (a) the sale, for the first time, of new-build flats, and (b) the sale of *existing* flats which are not already subject to a long lease, such as where a freehold owner splits a house into multiple flats and sells the individual flats.

67 Housing, Communities and Local Government Committee, Leasehold Reform (2017-19) HC 1468, p 3.

1.77 If commonhold is not used (or if it is used only in some cases), the 40,000 or so flats built each year (or some of them) will continue to be sold on a leasehold basis, with the inherent limitations of leasehold.

1.78 Developers and other property-owners are currently incentivised to sell flats on a leasehold basis. As we explained in paragraph 1.19 above, the freehold is a valuable asset for the developer because it provides a steady income from ground rents, income from lease extension premiums, and other income from the leaseholders. Developers can therefore sell the flats that they build twice: they sell a long lease to the homeowner, and they can sell the freehold to an investor. By contrast, commonhold flats can only be sold once – to the homeowner. Developers therefore have no incentive to adopt commonhold. The restriction of ground rents to zero will remove one significant incentive to sell flats on a leasehold basis, since a developer will not receive (or be able to sell) a steady ground rent income. However, the freehold will continue to be valuable, because enfranchisement premiums might be paid and there may be additional income to be gained from owning the freehold. Accordingly, the incentive will remain to sell flats on a leasehold basis. Moreover, given the limited consumer awareness about commonhold, there may not be sufficient consumer demand to act as a catalyst for change. Even if such demand were to exist, the fact that demand for housing outstrips supply means that prospective homeowners do not have the bargaining power to demand commonhold flats.[68]

1.79 We summarise in Appendix 3 to our Commonhold Report what consultees said about the steps that would be necessary to reinvigorate commonhold.

1.80 Based on the evidence that we have gathered during our projects, we have concluded that commonhold will not be used unless (a) it is made compulsory, or (b) adequate incentives are put in place to make it more attractive to developers than leasehold (or conversely that leasehold is disincentivised sufficiently to makes it less attractive than commonhold). Commonhold will not take root on its own. There is no reason why developers will start selling commonhold flats for so long as there is more money to be made by selling leasehold flats.

1.81 Developers have had the option of using commonhold or leasehold for over 15 years, but have almost invariably used leasehold. Commonhold was not pushed by Government. Unless it is encouraged, or mandated, there is no reason to believe that the outcome will be any different from when it was first introduced. But the consequences may be even graver. For those who object to commonhold, and prefer leasehold, a second apparent "failure" of the commonhold model is likely to be claimed to be a reason that commonhold cannot and will not work. That, in our view, would be a very unfortunate outcome, and would do a great disservice to current and future homeowners. Commonhold is used around the world; it can and does work. But for so long as there is more money to be made from leasehold, and unless initial impetus can be given to overcome inherent inertia and a lack of awareness, it is not

---

68 House of Commons Library Briefing Paper, *Tackling the under-supply of housing in England* (2020), http://researchbriefings.files.parliament.uk/documents/CBP-7671/CBP-7671.pdf; Welsh Government, *Delivering More Homes for Wales: Report of the Housing Supply Task Force* (2014), at https://gov.wales/sites/default/files/publications/2019-04/delivering-more-homes-for-wales-recommendations.pdf.

going to take root on its own. Without Government intervention, commonhold simply cannot compete with leasehold.

1.82 Accordingly, while implementation of our recommendations on commonhold reform is necessary for the reinvigoration of commonhold, it will not be sufficient on its own to do so.

1.83 For houses, Government has decided to ban the use of leasehold, so that freehold ownership is used.[69] That policy can be pursued because the legal mechanisms for owning houses on a freehold basis already exist (subject, to some extent, to the creation of land obligations: see paragraph 1.63(11) above). It would be a logical extension of that policy to ban the use of leasehold for flats, so that commonhold (freehold) ownership is used instead – once a workable legal mechanism exists. Our recommendations to reform commonhold would create that workable legal mechanism, and so banning the use of leasehold for flats becomes a realistic possibility.

1.84 As well as the direct loss of income that developers would suffer by selling flats on a commonhold basis, they would also have to adapt to an unfamiliar ownership model. This was one of the other barriers to the success of commonhold noted in paragraph 1.38 above, alongside inertia amongst professionals, a lack of sector-wide and consumer awareness, and caution on the part of mortgage lenders. These barriers to the uptake of commonhold all require Government intervention if they are to be overcome.

1.85 Government must therefore decide:

(1) whether there should be an equivalent of the leasehold house ban for flats, so that flats cannot be sold on a leasehold basis in the future but must instead be sold on a commonhold basis. Put another way, commonhold could be made compulsory; or

(2) whether developers and other property-owners should (as is currently the case) be left to choose between using leasehold or commonhold for the sale of flats, and if so:

(a) whether – and how – the sale of flats on a commonhold basis should be incentivised; and/or

(b) whether – and how – the sale of flats on a leasehold basis should be disincentivised; and

(3) what measures it will adopt in order to overcome the other practical barriers to commonhold, in particular a lack of awareness, and caution and inertia amongst developers, lenders and professionals.

---

69 Subject to exceptions.

Leaseholders of existing homes

1.86 For leaseholders of existing houses,[70] our recommendations to reform the enfranchisement regime will provide improved rights to acquire the freehold (an "individual freehold acquisition"), and therefore move away from leasehold ownership to freehold ownership.

1.87 For leaseholders of existing flats,[71] our recommendations to reform the enfranchisement regime will provide improved rights both to extend the lease and to acquire the freehold of the block – a "collective freehold acquisition". In addition, our recommendations to reform the law of commonhold will allow leaseholders to then convert the block to commonhold, if they wish to do so. We recommend that leaseholders should have a choice whether (1) to undertake only a collective freehold acquisition, retaining the leasehold structure, or (2) replace the leasehold structure by converting to commonhold.

1.88 As commonhold becomes more prevalent, it is likely to be more desirable for leaseholders to convert to commonhold, rather than merely purchase the freehold by making a collective freehold acquisition claim. In time, Government might decide that leaseholders should only be able to convert to commonhold, rather than carry out a collective freehold acquisition claim and retain the leasehold structure.

Ensuring freehold ownership itself is fit-for-purpose

1.89 We have summarised above the measures that would pave the way to home ownership – of both houses and flats, and of both existing and future homes – to be freehold rather than leasehold.

1.90 That ambition does, however, rest on an assumption that freehold ownership is preferable to leasehold ownership. Generally speaking, for the reasons we set out in paragraphs 1.14 to 1.18 above, freehold ownership is preferable to leasehold ownership. Freehold ownership, however, is not without its own problems.

(1) Concerns have been expressed about some features of freehold ownership. For example, freehold house owners can be required to pay estate management charges,[72] and there have been concerns about such charges being high or about difficulties challenging the charges. When sums are due under a "rentcharge", any failure by the freeholder to pay the sums due can result in them losing the property.[73]

---

70 Including leaseholders of any future houses that are sold on a leasehold basis.

71 Including leaseholders of any future flats that are sold on a leasehold basis.

72 The legal position is that positive obligations cannot bind future owners of the land (see para 1.20 above). However, freehold land can be subject to a requirement to pay an "estate rentcharge", and there are various "workarounds" which can be effective to bind future freehold owners such as a "chain of covenants" protected by a restriction at HM Land Registry.

73 See *Roberts v Lawton* [2016] UKUT 395 (TCC), [2017] 1 P & CR 3, which featured the method of enforcing rentcharges implied by s 121(4) of the Law of Property Act 1925 whereby the holder of a rentcharge that is in arrears may grant a lease of the charged land to a trustee to raise money to discharge the outstanding

(2) There has been growing concern that certain undesirable features of leasehold ownership have been replicated in freehold ownership. The term "fleecehold" has been used to describe this phenomenon. Examples include obligations imposed on freehold homeowners to pay permission fees to make alterations to their home and inappropriate charges for the upkeep of neighbouring land and facilities.[74]

(3) As home ownership moves away from leasehold, the opportunity for developers and investors to make money from leasehold will evaporate. It is quite possible that they will look for ways to make money instead through freehold ownership. There is, therefore, a risk that the problems currently seen in leasehold may appear in freehold.

1.91 Put another way, moving from leasehold to freehold ownership is not a complete solution to the problems currently faced by homeowners, and nor does it guarantee that practices decried in the context of leasehold ownership will not also emerge as part of freehold ownership.

1.92 Certain reforms to freehold ownership are therefore necessary:

(1) Government's plans to extend certain rights currently enjoyed by leaseholders to freeholders will provide protections that do not currently exist (see paragraph 1.63(14) above); and

(2) the implementation of our recommendations on property law reform – including the creation of land obligations – will improve the operation of freehold ownership, and introduce a more streamlined, proportionate and controlled mechanism for homeowners to contribute towards maintenance costs: see paragraph 1.63(11) and 1.74 above.

1.93 As well as resolving existing problems with freehold ownership, it will be necessary to continue to monitor the way in which freehold ownership is working in practice in order to address any future problems as they arise. In particular, freehold is not free from the risk of abuse, and it is necessary to ensure that bad practices in leasehold do not creep back in under the disguise of freehold ownership.

1.94 In the case of commonhold, our recommendations for reform are designed to ensure that this form of freehold ownership is fit-for-purpose. There are various problems with the current commonhold model, and they would be resolved by our recommendations for reform. We have said that it is important that the practical operation of freehold ownership is monitored, and commonhold is no different. In our Commonhold Report, we conclude that the law of commonhold should be kept under review – just as it is in other countries which adopt a similar ownership model – in order to identify and resolve any problems as they emerge in the future.

---

debt. See MHCLG's work on fees and charges (paras 1.63(14)(a) and (b) above) and the Welsh Government Call for Evidence (para 1.68 above).

[74] See, for example, BBC News, *'Fleecehold': New homes hit by 'hidden costs'* (20 March 2019), at https://www.bbc.co.uk/news/uk-england-46279048. See also MHCLG's work on permission fees (para 1.63(14)(d) above).

Summary: reforms that lay the foundations for home ownership to be freehold

Laying the foundations for home ownership to be freehold	Existing homes	Future homes
Houses	Improved enfranchisement rights: existing leaseholders can buy the freehold	Leasehold house ban: new houses to be sold on a freehold basis
Flats	Improved enfranchisement rights: existing leaseholders can buy the freehold and convert to commonhold	Commonhold is available. Government to decide whether commonhold should be compulsory, incentivised, or optional.

(2) Essential reform of leasehold: addressing problems for leaseholders in the present

1.95 While there can be an ambition for freehold to be the basis of home ownership in the future, it is crucial to recognise that leasehold currently exists, and will continue to exist – certainly in the short term, and probably for many years to come.

(1) There are millions of existing leaseholders of houses and flats. Even if those leaseholders transition to freehold (or commonhold) ownership, that process will be gradual.[75] Unless and until existing leaseholders become freeholders, they need suitable protection as leaseholders.

(2) Similarly, if and in so far as leasehold continues to be used in the future, there needs to be suitable protection for leaseholders.

(a) For owners of future houses, leasehold generally ought not be relevant, since Government proposes to ban leasehold houses (subject to exceptions).

(b) For owners of future flats, leasehold would not be relevant if commonhold becomes the norm, either because it is made compulsory or because it is sufficiently incentivised over leasehold (see paragraphs 1.75 to 1.85 above).

[75] Although we are recommending the expansion of enfranchisement rights, some leaseholders would remain unable to buy the freehold. For example, while we recommend increasing the threshold for commercial use from 25% to 50% (see para 1.12(2) above), leaseholders will not be able to buy the freehold to their block if more than 50% of the block is in commercial use.

1.96 It is therefore necessary for various problems with leasehold ownership to be resolved. Of the various reforms discussed in Part B above,[76] those intended to improve the position of existing leaseholders and any future leaseholders include:

(1) improving the enfranchisement regime, so that it is easier, quicker and cheaper for leaseholders to extend their lease or buy their freehold: see paragraphs 1.52 to 1.54. We recommend the creation of an improved right to a lease extension, and improved rights for leaseholders to acquire their freehold (either individually or with their neighbours). Exercising enfranchisement rights removes the ground rent in existing leases, whether the claim is for a lease extension or for the purchase of the freehold. We have already published our report on the options that are available to Government to reduce the premiums that leaseholders must pay in order to exercise enfranchisement rights;

(2) improving the right to manage, so that it is easier, quicker and cheaper for leaseholders to take over control of the management of their block. We recommend improvements to the right to manage: see paragraphs 1.55 to 1.56;

(3) (for leaseholders of future homes only) restricting ground rents to zero in future leases: see paragraph 1.63(2).[77] Having said that, houses built in the future will not generally be leasehold (as a result of the leasehold house ban) and flats built in the future would not be leasehold if commonhold is used in preference to leasehold.[78] Put another way, once the restriction on ground rents is effective, there might be very few leases to which it would apply – houses will generally be sold freehold, and flats could always be sold commonhold;

(4) regulating property agents and requiring landlords who do not use managing agents to be members of a redress scheme: see paragraphs 1.63(3) and 1.63(12);

(5) consideration of the reform of the regulation of service charges, permission fees, and legal costs: see paragraphs 1.63(4), 1.63(5) and 1.63(6);

(6) reviewing our previous recommendations to abolish forfeiture in leasehold: see paragraphs 1.63(7) and 1.63(8);

(7) reviewing loopholes in the "right of first refusal": see paragraph 1.63(9);

(8) reforming the regulation of event fees: see paragraph 1.63(10) above;

(9) regulating the provision of information by landlords to prospective purchasers of leases: see paragraph 1.63(13); and

---

[76] See paras 1.45 to 1.68 above.

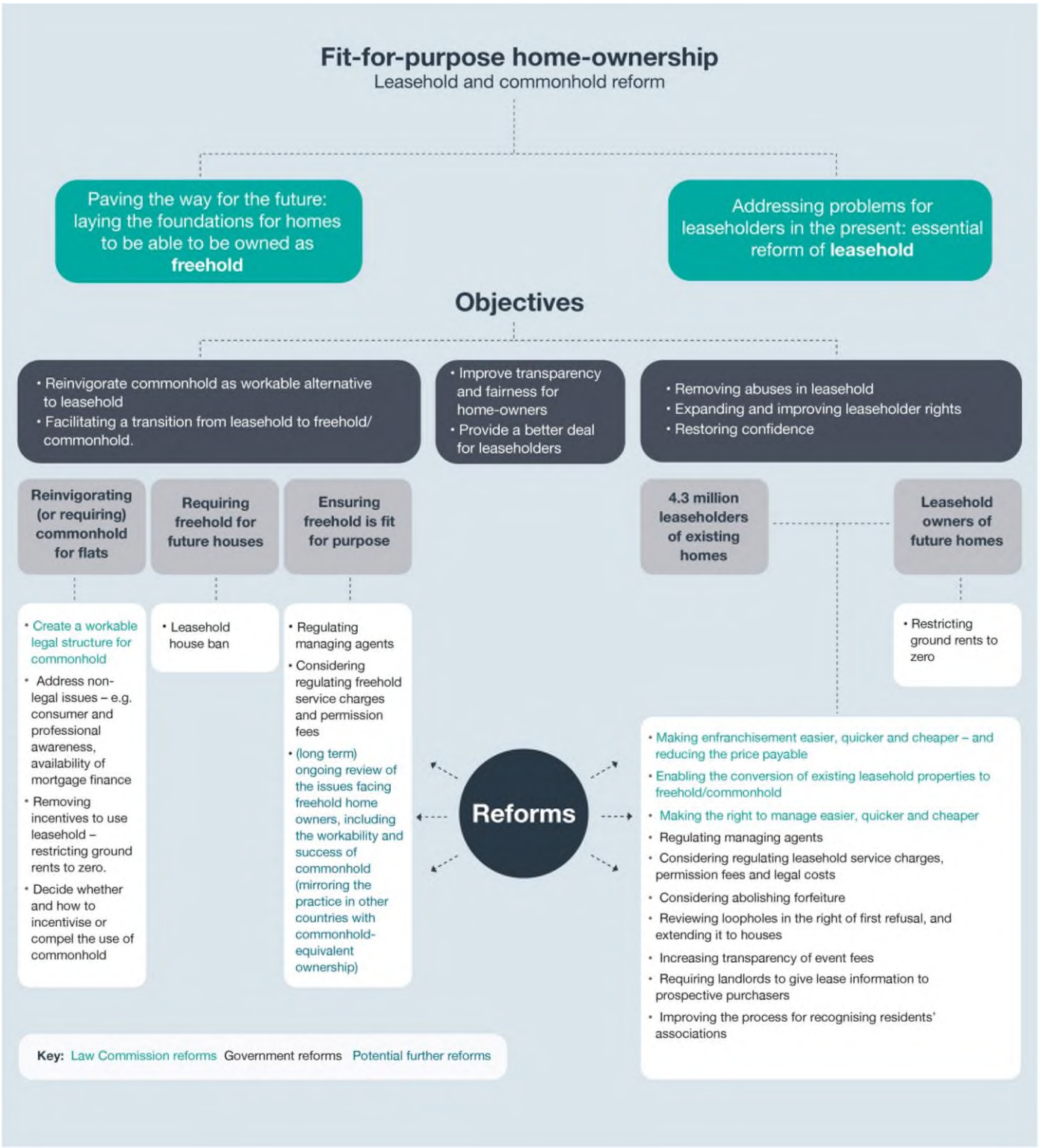
[77] The restriction on ground rents will not change the ground rents in existing leases, so this measure will only affect leaseholders of future homes. Removing ground rent in existing leases can be done through an enfranchisement claim: see para 1.96(1) above.

[78] Indeed the restriction of ground rents to zero is one of the measures that would remove the current incentive to use leasehold, and might therefore go some way to encourage the use of commonhold.

(10) improving the process for recognising residents' associations: see paragraph 1.64(1) above.

1.97 In the following diagram, we summarise how the various reforms fit together.

Figure 2: The big picture: how the various reform proposals fit together



Part I: Introduction

Chapter 2: Introduction

2.1 In the previous chapter, we outlined the inherent problems with leasehold ownership, and the criticisms made of its features and the way the leasehold market operates. It is these problems that underlie our work on leasehold enfranchisement.

2.2 In this chapter, we continue the introduction to our leasehold enfranchisement project by setting out a summary of the current law and its key deficiencies. We then give an overview of our work to date, including the consultation on our provisional proposals for reform and how we analysed the responses to the Consultation Paper. We also provide a summary of the key changes we are recommending in respect of the leasehold enfranchisement system and the benefits these changes will bring to leaseholders,[1] as well as other participants in the leasehold market.

WHAT ARE ENFRANCHISEMENT RIGHTS?

2.3 We explained in the Consultation Paper,[2] and in Chapter 1, that leasehold does not give outright ownership of a home. The experience of leasehold owners has been summed up as being that of "owners yet tenants".[3] On the one hand, leaseholders are homeowners, with some of the benefits that ownership brings (such as a financial stake in the property). On the other hand, they have a landlord who maintains some control over their use of their home, and who will ultimately take it back on the expiry of the lease.

2.4 We also explained in the Consultation Paper that many purchasers do not understand what leasehold ownership involves. Further, even when they do, there is often no choice over the form of ownership; flats are almost invariably owned on a leasehold basis.

2.5 As a consequence, legislation has been enacted that gives leaseholders "enfranchisement rights".

(1) Leaseholders have a right to extend their lease, which provides them with longer-term security in their home and goes some way to overcoming the problem of owning a wasting asset. Leaseholders' security in their homes, and the value of their assets, is better protected if they can extend, say, a 60-year lease to 150 years.

---

1 We generally use the term "leaseholder" instead of "tenant" when describing those who enjoy enfranchisement rights. We do so because "leaseholder" is typically used to denote those who own their home by holding a long lease (who therefore qualify for such rights), whereas "tenant" is generally used to refer to those who rent their home with short leases (such as a one-year "assured shorthold tenancy"). However, the enfranchisement legislation uses the word "tenant", and, in some instances, we adopt that language when referring to the legislation – for example, when referring to a "qualifying tenant".

2 CP, para 1.1 and following.

3 I Cole and D Robinson, "Owners yet tenants: the position of leaseholders in flats in England and Wales" (2000) 15 *Housing Studies* 595.

(2) Leaseholders of houses have a right to purchase their freehold, and leaseholders of flats have a right, acting with the other leaseholders in their building, to purchase the freehold of their block. Freehold acquisition provides leaseholders with the same advantages as a lease extension (namely, security in their home and protecting the value of their asset), but also allows them to gain control of their property from an external landlord.

2.6 Our enfranchisement project is a wide-ranging examination of leaseholders' enfranchisement rights.

THE CURRENT LAW

2.7 In this section we provide a brief overview of the current law of enfranchisement. A fuller summary of the current law of enfranchisement, and its history, can be found in Chapter 2 of the Consultation Paper.

Houses: the Leasehold Reform Act 1967

2.8 The Leasehold Reform Act 1967 (the "1967 Act") gives leaseholders of houses two rights:

(1) the right to acquire the freehold of their houses; and/or

(2) the right to a single 50-year lease extension of their houses, at a "modern ground rent".[4]

2.9 To qualify for either of these rights, a leaseholder's property must be a "house": a building "designed or adapted for living in", and "reasonably…called" a house.

2.10 To qualify for the right to acquire the freehold of a house, the following further requirements must be met:

(1) the leaseholder must have a "long tenancy", which – with a few exceptions and qualifications – means a lease granted for a term of longer than 21 years;

(2) the leaseholder must have held that long lease for two years before making the claim;

(3) there cannot be a sub-lessee who qualifies for rights under the 1967 Act;

(4) if the leaseholder's lease is an "excluded tenancy", it must meet the "low rent test";[5] and

(5) if the house contains a flat let to a "qualifying tenant"[6] for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 (the "1993 Act"),

---

4 For details of what is a "modern ground rent" and its calculation, see CP, para 14.88 and following.

5 For details of when a lease is an "excluded tenancy" and the "low rent test" see paras 7.267 below and CP, paras 7.25 to 7.31.

6 The Leasehold Reform, Housing and Urban Development Act 1993 uses the language of "qualifying tenants", but establishing its meaning is convoluted (see the 1993 Act, s 39(3)). In this instance, "qualifying tenant" is used to mean a long leaseholder of a flat who has enfranchisement rights under the 1993 Act.

or if the leaseholder has a business lease of the house, a residence test must be satisfied. The residence test requires the leaseholder to have occupied all or part of the house as his or her only or main residence for the previous two years, or for at least two years in the previous ten years.

2.11 In addition to the above criteria, a property must meet the following three additional criteria to qualify for a 50-year lease extension:

(1) the house must fall within certain rateable values;

(2) the lease must not be terminable on death or marriage; and

(3) the lease must always meet the "low rent test" (not just where the lease is an "excluded tenancy").

2.12 If these qualifying criteria are satisfied, and the lease does not fall into an exception to enfranchisement rights,[7] then the leaseholder has enfranchisement rights under the 1967 Act. The leaseholder may serve his or her landlord with a notice of claim, following which the landlord may serve a notice in reply. The parties will then negotiate over the premium and the terms of the transfer or new lease before the freehold is transferred or a new lease is granted. The law of valuation is set out comprehensively in the Consultation Paper and the Valuation Report.[8] Any disputes arising between the leaseholder and landlord are resolved either (i) by the county court or (ii) by the First-tier Tribunal (Property Chamber) in England, or the Leasehold Valuation Tribunal in Wales (the "Tribunal").[9]

Flats: the Leasehold Reform, Housing and Urban Development Act 1993

2.13 The 1993 Act provides two rights for leaseholders of flats.

(1) Individual leaseholders of flats have a right to obtain a 90-year lease extension at a notional rent of a peppercorn ("a lease extension").[10] This right arises provided the leaseholder has been a qualifying tenant for two years preceding the claim. The leaseholder commences the claim by serving a notice of claim on the landlord.

(2) Long leaseholders of flats acting together via a nominee purchaser have a right to purchase the freehold of their block of flats. This is known as the right to

---

7 CP, Ch 9.

8 CP, Ch 14 and the Valuation Report, Ch 2.

9 Leasehold Valuation Tribunals are one of the types of Tribunal that make up the Residential Property Tribunal Wales, see https://residentialpropertytribunal.gov.wales/about.

10 Strictly speaking, leaseholders obtain a new lease for a term expiring 90 years after the term date of their original lease. It is, however, generally referred to as a "lease extension". The notional rent applies during both the remaining term of the existing lease, and the additional 90 years.

Many long leases specify an annual ground rent of a peppercorn. Strictly, the landlord could, under the lease, require the leaseholder to provide him or her with a peppercorn annually, but invariably this is not demanded. A peppercorn rent is used in circumstances where it is deemed appropriate for there to be no substantive rent payable. The inclusion of a nominal rent is intended to satisfy the English contract law requirement of "consideration" – meaning that an exchange must occur in order to form a binding contract.

"collective enfranchisement". In general, the building must meet several conditions to qualify for the right, notably that:

(a) the building must be a "self-contained building" or a "self-contained… part of a building";

(b) two or more flats in the building must be held by "qualifying tenants" (namely, leaseholders with a lease of over 21 years, save for certain exceptions);

(c) two-thirds of the flats in the building must be held by "qualifying tenants";[11] and

(d) no more than 25% of the floor space in the building, excluding common parts, can be used for non-residential purposes.

2.14 The collective enfranchisement process can only be commenced if the qualifying tenants of at least half of the flats in the building agree to participate in the claim. The leaseholders begin the process, again, by serving a notice of claim on the landlord.

2.15 In respect of both lease extension claims and collective enfranchisement claims under the 1993 Act, landlords are required to serve counter-notices. A failure to do so within a set period entitles leaseholders making a valid claim to acquire the interest claimed on the terms set out in their initial notice. Where a claim is successful, a price will be payable to the landlord. The law relating to the valuation of interests under the 1993 Act can be found in the Consultation Paper and the Valuation Report.[12] As is the case under the 1967 Act, 1993 Act claims are usually completed following a period of negotiation between the parties. Any disputes are resolved by the county court or the Tribunal.

PROBLEMS WITH THE CURRENT LAW

2.16 Broadly speaking, the problems with the current enfranchisement regime fall into five categories.

Inherent unfairness of leasehold tenure

2.17 Many criticisms of the enfranchisement regime are informed by the view that leasehold is inherently unfair for leaseholders. We discuss that argument at paragraph 1.25 and following above. This perceived underlying unfairness then exhibits itself during the process of exercising enfranchisement rights.

2.18 Leaseholders buy a time-limited interest, frequently at a value close to – or even equivalent to – the freehold value. As the term of a long lease diminishes, its saleability and its usefulness as mortgage security also diminishes, particularly once there are fewer than 80 years remaining on the lease. Leaseholders – or their

---

11 See the 1993 Act, s 3.

12 CP, Ch 14 and the Valuation Report, Ch 2.

successors in title – often find themselves compelled to make an enfranchisement claim either:

(1) because they wish to sell their home and a purchaser can only be found (or will only be able to obtain a mortgage) if the length of the lease is extended; or

(2) because they know that the cost of doing so in the future will likely be higher.

2.19 While landlords might contend that leaseholders chose to buy a leasehold property, this is not always the case. Almost all flats and maisonettes are only available on a leasehold basis, and the early 21st century has seen an historically high proportion of new-build houses being offered for sale on long leases rather than freehold.[13] Furthermore, we have been told that many prospective purchasers of houses and flats – particularly first-time buyers – do not have a full understanding of the terms of the lease, or of the implications of owning a leasehold property. The increasingly dominant role that leasehold plays in the housing market has made the use of enfranchisement rights a necessity for a far greater proportion of homeowners.

An inconsistent regime

2.20 The current enfranchisement regime is the product of over 50 Acts of Parliament, totalling over 450 pages. There are numerous anomalies and unintended consequences resulting from this regime having been reformed in a piecemeal fashion. The rules for houses and flats often differ without any logical reason. The most significant divergence concerns the right to a lease extension, the substance of which differs significantly between houses and flats.[14]

Complexity and uncertainty

2.21 Many aspects of the enfranchisement regime are complex. It can be difficult to work out whether a leaseholder qualifies for enfranchisement rights. In the case of houses, for example, eligibility for enfranchisement rights may depend on historic rateable values. These values may be difficult, or, in some cases, impossible to find. Furthermore, the procedure for exercising enfranchisement rights is complicated, and varies depending on the right being exercised. In some circumstances, strict deadlines apply, which can be a trap for the unwary.

Costly procedure

2.22 The complexity of the process by which enfranchisement rights are exercised gives rise to legal costs, and the complexity of valuation gives rise to valuation costs. Both sets of costs can be significant, and can be disproportionate to the property value. In some cases, the costs involved exceed the premium payable. While these costs are borne by both leaseholders and landlords, leaseholders are required to pay towards their landlords' costs. They therefore feel the burden of these costs more acutely.

---

13 Competition and Markets Authority, *Leasehold housing – Update report* (February 2020), paras 20 to 32, at https://www.gov.uk/cma-cases/leasehold.

14 CP, Ch 1, fig 1.

Undesirable incentive structures

2.23 Various aspects of the enfranchisement regime create undesirable incentive structures. For example, the regime can encourage a tactical "gaming" approach to negotiations, which tends to favour more experienced landlords over leaseholders. The complexity of the regime affords plenty of scope for parties to disagree. The threat of litigation on those points, and the time it can take to resolve disputes, can be used tactically against a party who is seeking to complete the process quickly and at minimal cost. The consequence can be an incentive for leaseholders to take voluntary lease extensions or freehold transfers outside of the statutory regime.[15] In doing so, leaseholders can be exposed to risks, such as the inclusion of onerous terms in lease extensions or conveyances.

2.24 We discuss the general, systemic inequality between leaseholders and landlords in paragraphs 1.26 and 1.27 above.

OUR PROJECT

2.25 A project on leasehold enfranchisement was included in our Thirteenth Programme of Law Reform,[16] published in December 2017 (the "Thirteenth Programme"), following discussions with Government. Government supported the inclusion of the project in our Thirteenth Programme, as required by our Protocol with Government.[17]

Terms of Reference

2.26 While we work independently from Government, our project is designed to pursue certain objectives, which have been identified by Government and which are set out in Terms of Reference that span all three residential leasehold and commonhold projects (see paragraph 1.46 and following above and Appendix 1).

2.27 The objectives that we have been asked to achieve that relate to enfranchisement rights are set out in figure 3 below. These Terms of Reference are not neutral. Our project aims to respond to the long-standing problems with leasehold that have been brought to the fore in recent years by abusive practices. This project has comprised a comprehensive, root-and-branch review of the law of leasehold enfranchisement with a view to promoting transparency and fairness in the residential leasehold sector and improving the position of leaseholders as consumers.

---

15 See para 14.3 and following below.

16 See the Thirteenth Programme of Law Reform (2017) Law Com No 377, para 2.32 and following. Details of the Law Commission's Thirteenth Programme of Law Reform are at https://www.lawcom.gov.uk/project/13th-programme-of-law-reform/. For information about how this project was included in the Thirteenth Programme of Law Reform, see CP, paras 1.15 and 1.16.

17 Protocol of 29 March 2010 between the Lord Chancellor (on behalf of the Government) and the Law Commission (2010) Law Com No 321, at https://www.lawcom.gov.uk/document/protocol-between-the-lord-chancellor-on-behalf-of-the-government-and-the-law-commission/; and Protocol of 10 July 2015 between the Welsh Ministers and the Law Commission, at https://www.lawcom.gov.uk/document/protocol-rhwng-gweinidogion-cymru-a-comisiwn-y-gyfraith-protocol-between-the-welsh-ministers-and-the-law-commission/. Also see para 2.63 below.

Figure 3: Policy objectives relating to enfranchisement rights reform identified by Government

- To promote transparency and fairness in the residential leasehold sector.
- To provide a better deal for leaseholders as consumers.
- To simplify enfranchisement legislation.
- To consider the case to improve access to enfranchisement and, where this is not possible, reforms that may be needed to better protect leaseholders, including the ability for leaseholders of houses to enfranchise on similar terms to leaseholders of flats.
- To examine the options to reduce the premium (price) payable by existing and future leaseholders to enfranchise, whilst ensuring sufficient compensation is paid to landlords to reflect their legitimate property interests.
- To make enfranchisement easier, quicker and more cost effective (by reducing the legal and other associated costs), particularly for leaseholders, including by introducing a clear prescribed methodology for calculating the premium (price), and by reducing or removing the requirements for leaseholders (i) to have owned their lease for two years before enfranchising, and (ii) to pay their landlord's costs of enfranchisement.
- To ensure that shared ownership leaseholders have the right to extend the lease of their house or flat, but not the right to acquire the freehold of their house or participate in a collective enfranchisement of their block of flats prior to having "staircased" their lease to 100%.
- To bring forward proposals for leasehold flat owners, and house owners, but prioritising solutions for existing leaseholders of houses.

THE CONSULTATION PAPER AND CONSULTATION PROCESS

The Consultation Paper

2.28 In September 2018, we published the Consultation Paper. In that paper, we made provisional proposals on wide-ranging reforms to the enfranchisement regime. We invited consultees to share their views on the proposals and raised a number of consultation questions.

2.29 We wrote the Consultation Paper with the assistance of responses made to our public consultation on what areas of work should feature in our Thirteenth Programme of Law Reform, the views of various individuals and organisations with whom we met and the views of a broad range of individuals at meetings of our expert advisory

groups. As well as inviting consultation responses, we invited leaseholders to respond to a survey (the "Leaseholder Survey") to share with us their experiences of the process of exercising enfranchisement rights.

2.30 The issues on which we made proposals and the questions we asked in the Consultation Paper were organised under four main headings.

- What should the enfranchisement rights be?
- Who should be entitled to exercise enfranchisement rights?
- How should enfranchisement rights be exercised?
- What should it cost to enfranchise?

Consultation events

2.31 During the consultation period, we organised and attended a large number of events in England and Wales in order to explain our provisional proposals for reform, encourage discussion and debate about our proposals, gather attendees' views and encourage people to provide written responses to the Consultation Paper.

2.32 We held consultation events in Birmingham, Cardiff, London, Manchester, Newcastle and Southampton, including a symposium at the law faculty at University College London. We also attended several events and meetings hosted by other organisations. We heard from a wide range of stakeholders with diverse perspectives.

The consultation responses

2.33 We received more than 1,000 responses to the Consultation Paper.[18] These responses were sent to us by a wide range of consultees, including leaseholders, commercial freeholders, charity freeholders, social housing providers, developers, law firms, surveyor firms, legal and valuation professionals and trade associations, and various representative bodies. We also received over 1,500 responses to the Leaseholder Survey, which sat alongside the main response form for the Consultation Paper.

2.34 As we noted in the Valuation Report, the strength of feeling of many consultees – particularly of leaseholders – was evident in the responses to the Consultation Paper. In some instances, we received polarised answers to the questions we asked. For instance, landlords and their professional representatives expressed strong opposition to removing the current requirement that leaseholders exercising enfranchisement rights must contribute to the transaction costs of the landlord. Leaseholders, on the other hand, objected strongly to this aspect of the current law and expressed a great deal of support for its removal. This polarisation reflects the fundamentally antagonistic nature of the landlord-leaseholder relationship, and the fact that, in many instances, a benefit to one represents a disadvantage or cost to the other. Consequently, there were many issues raised in the Consultation Paper on which no consensus emerged.

---

[18] Consultees are listed in Appendix 2. Responses were received via our online form, by email and by post.

2.35 Alongside the Valuation Report, we published the consultation responses to the valuation-specific consultation questions, and a summary of the responses that we received to the Leaseholder Survey. We have published the remaining responses to the Consultation Paper – with personal information redacted – alongside this Report.

The analysis of responses

2.36 Since our consultation closed in January 2019, we have been analysing the responses as part of the process of developing our recommendations that we set out in this Report.

2.37 In framing our recommendations, we have carefully considered all consultees' comments and the reasons why they favoured or opposed a provisional proposal, and weighed the arguments made. So, while the number of responses for or against a proposal was helpful in deciding whether to pursue the proposal, the level of support received was not the only factor in our decision making. Our recommendations have also benefited from holding further meetings with a range of stakeholders.

2.38 To assist us in making our recommendations, we prepared a statistical analysis of the responses received to the Consultation Paper. A copy of this analysis has been published on our website alongside this Report.

2.39 We categorised consultees into a number of categories. For example, some individuals identified as leaseholders and others said that they were responding on behalf of an organisation such as a law firm, a housing association, or a particular trade association.

2.40 Categorising consultees assisted our understanding of how different groups of consultees responded to the issues raised in the Consultation Paper, including which topics were supported or opposed by which groups, and helped us to ensure that we had properly accounted for the breadth of different views. Our categorisation sets out those consultees who broadly have the same or similar interests. However, we do not wish to suggest that everyone within a given category would have a single opinion, or one that is necessarily different from those in other categories.

2.41 When analysing the responses received, we acknowledged that certain groups of consultees have particular expertise or experience in relation to certain topics. For example, the views of legal professionals who regularly advise clients on litigating points under the current law were particularly useful in preparing our recommendations on procedure and dispute resolution. Equally, the views of leaseholders assisted us greatly in understanding the challenges the current qualifying criteria pose for leaseholders attempting to exercise enfranchisement rights.

Inequality of arms

2.42 As we explained in the introduction to the Valuation Report,[19] there is a systemic inequality between leaseholders (as a whole) and landlords (as a whole). This inequality of arms exhibited itself in the responses that we received to the Consultation Paper. Some of the responses that we received from landlords were very detailed and technical, and some were prepared with professional assistance. For

[19] See the Valuation Report, paras 1.71 to 1.73.

these landlords, it made commercial sense to incur costs in order to put forward the best arguments that they could and to try to protect their financial interests. Even where landlords did not incur additional costs, they were often providing their responses in reliance on their own expertise acquired from detailed knowledge of their business operations. The notable exception was landlords which are leaseholder-owned.

2.43 We are very conscious, though, that leaseholders who are not lawyers were not necessarily able to provide responses setting out their strongest arguments. Individual leaseholders do not, in general, have the same "in-house" expertise as many landlords and they do not have the funds to pay professionals for assistance in preparing a consultation response. Their knowledge of the law is often drawn only from their personal experience. Nor did leaseholders, as a group, pool their resources to pay for such assistance. Various organisations exist to try to coordinate and campaign for the interests of leaseholders, but they are unable to match the resources that some landlords are able and willing to spend.

2.44 Many of those best placed to respond to technical consultation questions are professionals and many of the professionals who responded to the Consultation Paper were either explicitly instructed by landlords to respond to the Consultation Paper, or are generally instructed to act on behalf of landlords more than they are by leaseholders. In carefully weighing all the information that has been provided to us, we have been mindful of this inequality of arms.

The Valuation Report

2.45 As outlined above,[20] our work is part of a broader set of leasehold-focussed reforms. After discussions with Government, we prioritised our work on the question of how the premiums leaseholders must pay to exercise enfranchisement rights should be calculated ahead of the main body of our work in order to assist Government's decision-making.

2.46 The Valuation Report was published in January 2020. In that report, we set out options for reducing premiums and simplifying the way in which premiums are calculated. However, we did not make recommendations as to how premiums should be calculated. Setting out options, rather than recommendations, was anticipated in, and in accordance with, our Terms of Reference.[21] This is because issues around valuation are not simply legal questions: while they involve considerations of law, they also involve questions around valuation, social policy and political judgement. It is therefore not an area in which it would be appropriate for the Law Commission to give final recommendations for reform. Rather it is for Government and, ultimately, Parliament, to decide.

---

[20] See para 1.69 and following above.

[21] Our Terms of Reference require us to consider "*the options* to reduce the premium (price) payable by existing and future leaseholders to enfranchise, whilst ensuring sufficient compensation is paid to landlords to reflect their legitimate property interests" (emphasis added).

THIS REPORT AND OUR RECOMMENDATIONS FOR REFORM

2.47 Having published our conclusions on the valuation aspects of enfranchisement, we consider in this Report all other aspects of the enfranchisement regime.

2.48 This project is a root-and-branch review of enfranchisement rights. In both the Consultation Paper and in this Report, our approach to reform has been to assess all aspects of the enfranchisement regime from first principles, and to consider the case for reform. Consistent with our Terms of Reference, we have produced recommendations designed to reform enfranchisement rights to the lasting benefit of leaseholders.

2.49 Some of the changes we are recommending can be thought of as technical adjustments to make the scheme of enfranchisement rights work more smoothly and efficiently. Other recommendations would introduce more radical reforms that shift the balance of power in favour of leaseholders. We have sought to ensure that none of the enfranchisement rights currently enjoyed by leaseholders are diminished by our proposals and that, so far as possible, those rights are extended in scope and improved in quality.

Key recommendations and benefits

2.50 We are confident that our recommendations will bring about significant benefits and we summarise them below.

(1) We are recommending the retention of the existing enfranchisement rights, but in an improved, streamlined form. We have sought to eliminate all unjustified distinctions between the way in which the rights apply to houses and the way in which they apply to flats. For example, we recommend that there should be an improved, uniform right, available to all qualifying leaseholders, to a lease extension that will be for a term of 990 years at a peppercorn ground rent. This will replace the current right of leaseholders of flats to a 90-year extension (or repeated extensions, if need be) at a peppercorn ground rent, and the right of leaseholders of houses to a single 50-year extension at a modern ground rent.

Our recommendation will ensure that leaseholders of both flats and houses have access to the same fair and efficient lease extension right. It will provide them with a cost-effective means of extending the terms of their leases to ensure that they have the security that is necessary for them to enjoy, mortgage and sell their homes.

(2) For leaseholders who already have a very long lease, we are recommending the introduction of a new right to buy out the ground rent under their lease without extending its term. Furthermore, in the event that Government does not cap the treatment of ground rent in calculating enfranchisement premiums,[22] we recommend a right for leaseholders with “onerous” ground rents to extend the

[22] See the Valuation Report, para 6.144 and following.

term of their lease without being required at the same time to buy out their ground rent.[23]

(3) We recommend that lease extensions and freehold acquisitions should be carried out on the fairest terms possible for the leaseholder.

(a) In respect of lease extensions, we recommend that, as a starting point, the new lease will be on the same terms as the existing lease. A party may only require the existing terms to be varied where it is necessary to address specific issues, which we have identified.[24]

(b) For freehold acquisitions, landlords will not generally be able to impose new obligations on leaseholders which do not correspond to existing obligations to which leaseholders are already subject in their leases. Even where leaseholders are under existing obligations in their leases, only those terms of the lease which are necessary and appropriate in order to regulate the ongoing relationship between the leaseholder's property and neighbouring property will be permitted to remain (for example, to protect the ongoing management of the common areas of an estate in which the leaseholder's property is located). By contrast, terms that are inconsistent with freehold ownership, or which oblige leaseholders to make unnecessary or unreasonable payments, will not be permitted. Landlords will not be able to impose new obligations on leaseholders acquiring their freeholds which are solely designed to provide landlords with an ongoing income stream.

(c) In relation to both lease extensions and freehold acquisitions, leaseholders will be able to claim extensions or freehold versions of property rights which benefited their leasehold titles. Leaseholders will be able to claim extensions or freehold versions of these rights even where they were granted by a third-party separately from the leaseholder's lease. By way of an example, a leaseholder who enjoys a right of way granted by a neighbour for the benefit of his or her lease and who brings a claim to acquire the freehold will be able to claim a permanent right of way from the neighbour for the benefit of the freehold.

Our recommendations will ensure that, in the vast majority of cases, leaseholders who buy their freeholds or extend their leases will be in a better position than they were under their original leases. No leaseholders will be in a worse position. Our recommendations will also facilitate the inclusion of terms to help to protect the proper and legitimate management of estates.

(4) We make recommendations to prevent mortgages and other rights secured against the landlord's title from presenting an obstacle to the exercise of

---

23 For further information on what is meant by "onerous" ground rents, see para 3.93 below.

24 At para 2.51 below, we summarise our recommendation to Government that it should consider taking steps to regulate the ability of leaseholders and landlords to enter into voluntary agreements to extend leases or transfer freeholds on terms that are inconsistent with our statutory scheme.

enfranchisement rights and make it easier for a leaseholder to merge his or her leasehold title with the freehold after an individual freehold acquisition.

(5) We are recommending a reformed right of collective freehold acquisition that will facilitate claims in respect of multiple buildings as well as single buildings. We make a series of recommendations relating to the additional land which leaseholders carrying out a collective freehold acquisition claim are entitled to acquire, in addition to the freehold interest in their building(s). We also recommend that leaseholders should be able to require landlords to take leasebacks of units within the premises being acquired which are not let to leaseholders who are participating in the claim. Leaseholders must carry out a collective freehold acquisition claim through a nominee purchaser, which is a corporate body with limited liability (such as a limited company), and there should be a defence to a claim where the premises have been the subject of a successful claim within the preceding two years.

Our recommended reforms to the collective freehold acquisition regime will make it easier and more cost-effective for leaseholders to buy the freehold of their building – as well as the freeholds of multiple buildings which they might wish to own and manage together, such as blocks of flats on the same estate. Our recommendations will also ensure that suitable ownership structures are put in place for the management of buildings following the completion of collective freehold acquisition claims.

(6) We recommend the simplification of the criteria which must be met in order for leaseholders to benefit from enfranchisement rights. Principally, we are recommending that there should be a new scheme of qualifying criteria – based around a new concept that we are calling a "residential unit"[25] – rather than distinguishing between, and therefore creating scope for argument about, houses and flats. We also recommend the relaxation of several of these qualifying criteria. For example, we are recommending that the percentage limit on the level of non-residential use permitted in a building eligible for a collective freehold acquisition be increased from 25% to 50%, and that this limit also apply to multi-unit individual freehold acquisitions. We recommend the general abolition of the financial criteria that some properties must satisfy if leaseholders of those properties are to benefit from enfranchisement rights. We also recommend the removal of requirements that a leasehold property must have been owned by a person for at least two years before certain enfranchisement rights can be exercised.

The rationalisation and liberalisation of the criteria to qualify for enfranchisement rights will make them available to a greater number of leaseholders, will make the law simpler to understand and apply, and will reduce the incidence of disputes. It will also lower the costs of seeking professional advice for leaseholders and landlords alike.

(7) We recommend the reform or abolition of some of the existing exceptions to the availability of enfranchisement rights in order to increase access to them. We

---

[25] See para 6.38 below for further details about is meant by "residential unit".

are, however, recommending that there should be a new exemption from freehold acquisition claims for community-led housing developments. We also make recommendations designed to facilitate Government's policy decision that owners of shared ownership leases should be able to extend their leases, but should not be able to carry out an individual freehold acquisition claim or participate in a collective freehold acquisition claim until they have staircased to 100% ownership.

(8) We recommend the replacement of the various procedures by which enfranchisement rights are exercised by a single, streamlined procedure. Our proposed procedure will remove existing traps which can lead to leaseholders' claims failing. Our recommendations will also reduce opportunities for either party to challenge the way in which a claim has been made or opposed, or to try to take any other inappropriate procedural or tactical advantage.

(9) We recommend that, so far as it is possible, all enfranchisement disputes and issues should be determined by the Tribunal, replacing the complex division of proceedings between the Tribunal and the county court under the current law.

Our recommendations will save both leaseholders and landlords time and money by making the regime easier to navigate, significantly reducing the need to make separate applications to the court and Tribunal and providing an alternative route for straightforward valuation disputes that do not require a full Tribunal hearing.

(10) We recommend that the answer to the question of whether leaseholders should continue to be required to contribute to their landlords' non-litigation costs should depend on which option is adopted for the valuation of the premium payable.[26] If Government adopts a broadly market-value based approach, then we recommend that leaseholders should (in most cases) no longer be required to contribute to their landlord's non-litigation costs. However, if Government adopts a valuation methodology that is not broadly market-value based, we recommend that leaseholders should continue to be required to contribute to their landlord's non-litigation costs, but that the amount paid should be set by a fixed costs regime. These recommendations will make the exercise of enfranchisement rights more cost-effective for leaseholders.

(11) We recommend that the limited powers of the Tribunal to order one party to pay all or part of another party's litigation costs should be applied to all the disputes that it hears. This will reduce the circumstances in which one party can be ordered to pay the litigation costs of another party. We are, however, recommending specific exceptions to this rule where a leaseholder has incurred costs as a result of the absence or conduct of his or her landlord.

(12) We make a series of recommendations in relation to the treatment of intermediate or other leasehold interests in an enfranchisement claim. Our broad aim has been to simplify the statutory provisions where possible, and to ensure that the presence of intermediate leases, or other leasehold interests,

---

[26] See our explanation of the Valuation Report at para 2.45 above.

does not present an unreasonable statutory, financial or practical impediment to leaseholders who wish to bring an enfranchisement claim.

2.51 In the course of this project, we have considered the ability of parties to enter into voluntary agreements (for example, freehold transfers) that are not consistent with our recommended statutory scheme. Those agreements fall outside of the Terms of Reference for our work and we have therefore made no formal recommendations about their regulation. We do, however, make a recommendation that Government should consider taking steps to regulate the ability of leaseholders and landlords to enter into lease extensions or transfers of an individual freehold on terms that are not consistent with our proposed statutory regime (as set out in Chapters 3 and 4, respectively).[27] Taking these steps will help prevent leaseholders from being persuaded to agree lease extensions or transfers that have been drafted on unreasonable terms.

2.52 However, owing to the complexity of collective freehold acquisitions and the many different contingencies that can arise, we do not conclude that Government should take similar steps to regulate the ability of leaseholders and landlords to enter into agreements for collective freehold acquisitions that are not on terms consistent with what is permitted by the statutory scheme which we recommend in Chapter 5.

Notable changes from the proposals in the Consultation Paper

2.53 In some instances, after careful consideration of the responses we received to the questions asked in the Consultation Paper and our own further research, we have concluded that our recommendations should take a different approach to that which we had provisionally proposed. We changed our approach in some areas, including in relation to the following three, key points.

(1) The right to participate: in the Consultation Paper, we proposed that a leaseholder who did not participate in a collective freehold acquisition should, at a later date, be able to purchase a share of the freehold interest held by those who did participate. We maintain our view that the policy has merit. Indeed, a clear majority of consultees were supportive of our provisional proposal. However, consultees raised several significant complexities that we were unable to resolve which has prevented us from making a final recommendation that the right to participate should be introduced at this stage. We have concluded that further work and consultation with stakeholders is needed, and we would welcome discussions with Government around when and how that might be done. We do not consider that the further work required should delay implementation of our recommendations made in this Report, which will provide the starting point for that work. We explain our conclusion briefly in Chapter 5,[28] and will publish a further note on the Law Commission's website following publication of this Report.

(2) Estate enfranchisement claims: in the Consultation Paper, we proposed that leaseholders on an "estate" should be able to make a single, collective freehold acquisition claim to acquire the whole of that estate. We suggested that an

---

27 See para 14.110 and following below.

28 See para 5.242 and following below.

"estate" might be defined as any buildings the leaseholders of which contribute to a common service charge. The principle of "estate enfranchisement" was widely supported by consultees. However, on reflection, we agree with views expressed by consultees that there are insurmountable challenges that arise from attempting to define an "estate". Instead, we recommend that the leaseholders of any two or more buildings which each meet the qualifying and participation criteria for a collective freehold acquisition claim should be able to carry out a "multi-building" collective freehold acquisition claim, even if there is no "link" between those buildings. This more flexible approach will enable all or part of an "estate" to undertake a collective freehold acquisition. We explain in full this departure from the provisional proposal made in the Consultation Paper in Chapter 5.[29]

(3) The 25% limit on non-residential use in individual and collective freehold acquisition claims: we provisionally proposed the retention of the rule that, in order to qualify for a collective freehold acquisition, no more than 25% of the internal floor area of a building (other than common parts) may be occupied or intended to be occupied for non-residential use. We also provisionally proposed applying this 25% limit to multi-unit individual freehold acquisitions. In this Report, however, we recommend that this limit be increased to 50%. We believe that a building in which at least 50% of the floor space is residential can fairly be described as a "residential" building, and that the leaseholder or leaseholders of such buildings should be able to exercise the right to an individual or collective freehold acquisition (as appropriate). The rationale behind this change is explained in full in Chapter 6.[30]

ISSUES BEYOND THE SCOPE OF OUR PROJECT

2.54 Consultees raised a great many issues in their responses to the Consultation Paper. Some issues, while related closely to the subject matter of our work, are not within the scope of our Terms of Reference and do not form part of the reformed enfranchisement regime that we set out in this Report.

(1) Abolishing leasehold: a significant minority of leaseholders called for us to abolish the leasehold system. We recognise that there are drawbacks to leasehold and that there is significant dissatisfaction among leaseholders with the practices of some landlords. Our three home ownership projects share a common imperative: to alleviate the disadvantages of the leasehold tenure – including by creating a workable alternative to leasehold. It is not, however, within the scope of our work to abolish the leasehold tenure.

(2) Doubling (or otherwise onerous) ground rents: as explained above, MHCLG is carrying out work to ban ground rents in long residential leases. That policy does not form part of our Terms of Reference and we make no comment on it. However, we discussed the treatment of ground rents in enfranchisement

---

29 See para 5.73 below.

30 See our discussion at paras 6.166 to 6.171 in the context of individual freehold acquisition claims, and paras 6.326 to 6.338 in the context of collective freehold acquisition claims.

premiums in the Valuation Report. The valuation options we put forward included the possibility of capping the level of ground rent that is taken into account when calculating the premium.[31]

(3) Permission fees: many consultees raised the issue of freehold sales including terms that require a third-party landlord's consent and seemingly unnecessary payments before alterations may be made to the appearance or structure of a property. Our project is aimed at improving the experience for leaseholders seeking to extend their lease or buy their freehold. Addressing onerous terms in existing leases or freeholds is therefore beyond the scope of our work. Our project does, however, consider the terms on which a leaseholder should be able to acquire the freehold to their property through an enfranchisement claim.

It is important to remember that being a freehold owner does not necessarily mean being free of any obligations to other property owners. Many freehold properties are subject to restrictions on how the property may be used or developed, with good reason. But our recommendations would ensure that, where a leaseholder uses enfranchisement rights to purchase his or her freehold, the landlord cannot at that point make the property subject to any new onerous terms which go beyond obligations to which leaseholders were subject prior to acquiring the freehold. Moreover, our recommendations would ensure that, during the freehold acquisition process, landlords cannot impose obligations on leaseholders which are designed solely to retain an ongoing income stream, even if leaseholders were under such obligations in their leases.

(4) Forfeiture: our project relates to enfranchisement rights, namely the ability of leaseholders to obtain lease extensions or to buy their freeholds. In a sense, forfeiture is the opposite of enfranchisement, as it concerns bringing a lease to an early end. Forfeiture is a separate branch of leasehold law, which is relevant where a leaseholder is in breach of the terms of his or her lease. It therefore falls outside the scope of our project. In relation to forfeiture, the Law Commission has already recommended its abolition. We published our recommendations in 2006.[32] In response to calls for forfeiture to be reformed, Government has requested that we update our 2006 recommendations and we are discussing with Government how that might be done.[33]

(5) Regulating the sale of leasehold properties: a significant minority of consultees reported widespread problems within the leasehold property market. Many leaseholders stated that they were misled by those selling or granting long leases and that their conveyancing solicitors failed to explain adequately the terms of the leases. The regulation of the sale of leasehold properties is not

---

31 See the Valuation Report, paras 6.119 to 6.154.

32 Termination of Tenancies for Tenant Default (2006) Law Com No 303.

33 Government response to the Housing, Communities and Local Government Select Committee report on Leasehold Reform (2019) CP 99, para 85, at https://www.parliament.uk/business/committees/committees-a-z/commons-select/housing-communities-and-local-government-committee/news/leasehold-reform-govt-response-published-17-19/.

within the scope of our project. However, the Competition and Markets Authority ("CMA") published in February 2020 an interim report on the leasehold sector.[34] While this was not a full investigation, the CMA nonetheless found evidence of potential mis-selling and the inclusion of unfair contract terms in residential long leases.[35] The CMA is preparing to take enforcement action on the basis of this evidence.

(6) The sale by developers of freehold reversions to third parties without the knowledge of leaseholders: consultees and stakeholders more generally frequently reported that developers assured leaseholders at the point of sale that they would be able to purchase the freeholds to their houses, following which the freeholds were sold to different landlords. Government has announced its intention to introduce a "right of first refusal" for leaseholders of houses, similar to that currently in existence for blocks of flats.[36]

2.55 We were aware of several of the above concerns at the time the Consultation Paper was published.[37] However, the issues were and are beyond the scope of our Terms of Reference. That means the work we have undertaken on residential leasehold in our three residential leasehold and commonhold Reports, while critical, is only part of the solution to problems and challenges that affect homeowners, and leaseholders in particular. In the Consultation Paper, we made clear:

> [Our] hope that our enfranchisement, commonhold and right to manage projects will be the first step in realising a longer-term ambition for a comprehensive programme of leasehold reform, addressing other concerns raised with us by consultees in response to our Thirteenth Programme consultation, and culminating in a streamlining and consolidation project.[38]

2.56 One part of the wider solution for homeowners and leaseholders is expected to come from work that Government is undertaking, which we mention in Chapter 1.[39] We will continue to engage with, and support Government as it progresses its work.

2.57 However, the calls for change remain and so does the hope we set out in the Consultation Paper. As we research, develop, and liaise with Government about our future priorities for law reform we will keep in the forefront of our mind the importance of the legal regimes which support and give confidence to homeowners, occupiers and the residential property market.

---

34 Competition and Markets Authority, *Leasehold housing – Update report* (February 2020).

35 The law relating to unfair terms can apply, in some cases, to the terms of residential leases. However, we regard the application of unfair terms law to leases as being in need of review. Our Thirteenth Programme of Law Reform, para 2.45 and following, indicated that a project on the topic of unfair terms in residential leases would be undertaken when resources allow.

36 See the Landlord and Tenant Act 1987, s 1. Also see paras 1.28(1)(d), 1.63(9) and 1.63(14) above.

37 CP, para 1.71.

38 CP, para 1.72.

39 See para 1.61 and following above.

THE IMPACT OF REFORM

2.58 Our recommendations constitute wholesale reform of the leasehold enfranchisement regime. The recommendations, when implemented, will have financial and non-financial implications for a wide range of actors in the property market, including existing leaseholders, future homeowners, developers and mortgage lenders.

2.59 We have had in mind the potential impact of our recommendations throughout their development.

2.60 We are confident that the recommendations made are fair and that, by addressing problems and inefficiencies in the existing enfranchisement regime, they will be beneficial.

2.61 We have agreed with Government that, if it accepts our recommendations, Government will take the lead on the formal impact assessments to ascertain the effects of implementing our reforms and which accompany legislation as it passes through Parliament.

2.62 In order to assist Government in preparing the impact assessments, we used the Consultation Paper to gather evidence from consultees on the likely impact of our provisional proposals. We asked a series of questions about the economic impact of the current law and the potential impact of our proposed reforms. We also created the Leaseholder Survey, through which we invited individual leaseholders to share their experiences of the enfranchisement process. We have shared the responses received with Government.

THE LAW IN WALES

2.63 The extent of Welsh devolution in relation to leasehold enfranchisement is unclear. Aspects of enfranchisement law have, in the past, been treated as devolved matters.[40] "Housing" was expressly devolved to Wales in the Government of Wales Act 2006.[41] Following the Wales Act 2017, rather than expressly devolving competence in certain areas, competence is devolved unless expressly reserved. The Senedd Cymru (Welsh Parliament) cannot modify "the private law", which includes the law of property. But that does not apply if the modification "has a purpose (other than modification of the private law) which does not relate to a reserved matter".[42] In other words, the Senedd Cymru has power to amend the law of property in Wales, provided

---

40 The Housing and Planning Act 2016, s 136 and sch 10, confers a power to make regulations governing minor intermediate leasehold interests for the purposes of enfranchisement legislation (namely the Leasehold Reform Act 1967 and the Leasehold Reform, Housing and Urban Development Act 1993). The power is exercisable by the Secretary of State in relation to land in England and by the Welsh Ministers in relation to land in Wales. Regulations for England were made by the Department for Communities and Local Government in 2017 (Valuation of Minor Intermediate Leasehold Interests (England) Regulations 2017 (SI 2017 No 871)).

41 Government of Wales Act 2006, sch 7, Pt I, para 11.

42 Wales Act 2017, s 3 and schs 1 and 2 (and the new schs 7A and 7B).

the purpose of the amendment is related to a matter which is devolved (for example, housing).

2.64 Under our Protocol with the Welsh Ministers, the Law Commission will only undertake a project concerning a matter that is devolved to Wales if it has the support of the Welsh Ministers.[43] To the extent that any of the matters in our Terms of Reference are devolved to Wales, the Welsh Ministers have indicated their support for the Commission undertaking this project.

2.65 Our project, therefore, is intended to cover both England and Wales, and to result, where reasonably possible, in a uniform set of recommendations that are suitable for both England and Wales. Nevertheless, in Chapter 3 of the Consultation Paper, we asked consultees whether a reformed enfranchisement regime should treat particular issues differently.[44]

2.66 The overwhelming majority of consultees who answered that question thought that there should not be any difference between how England and Wales are treated by a reformed enfranchisement regime.

2.67 Of the few consultees who indicated that there were issues that should be treated differently in England and Wales, none named any substantive issues on which there should be divergent treatment. We have concluded that there are no aspects of a reformed enfranchisement regime that should diverge between England and Wales.[45]

2.68 We note here that Government should consider whether, and the extent to which, prescribed documents (and any relevant guidance) that will be used within the enfranchisement regime should be produced in both English and Welsh.

STRUCTURE OF THIS REPORT

2.69 This Report consists of 15 chapters, separated into seven parts, and two appendices.

Chapter 1 comprises an overview of our three residential leasehold and commonhold projects, how they interrelate and how these projects fit into Government's own leasehold reform work. This chapter also sets out our post-reform vision for home ownership.

(1) *Part I: Introduction*

This Chapter 2 introduces our project, our consultation process and this Report.

---

43 Protocol of 10 July 2015 between the Welsh Ministers and the Law Commission, at https://www.lawcom.gov.uk/document/protocol-rhwng-gweinidogion-cymru-a-comisiwn-y-gyfraith-protocol-between-the-welsh-ministers-and-the-law-commission/.

44 CP, Consultation Question 1, para 3.42.

45 This conclusion was also reached in the Valuation Report, para 1.82.

(2) *Part II: What should the enfranchisement rights be?*

Chapter 3 sets out our recommendations for the creation of a uniform right for leaseholders of both houses and flats to be granted a new, longer lease of their house or flat – what we call a "lease extension".

Chapter 4 sets out our recommendations for an updated, streamlined right for a leaseholder of a house to purchase the freehold of their property (the right of "individual freehold acquisition").

Chapter 5 sets out our recommendations for a reformed right for leaseholders of flats to join together to purchase the freehold of their building (the right of "collective freehold acquisition"), or multiple buildings (a "multi-building" collective freehold acquisition").

(3) *Part III: Who should be entitled to exercise enfranchisement rights?*

Chapter 6 sets out our recommendations to reform the law governing a leaseholder's eligibility to exercise enfranchisement rights: a "unified" scheme of qualifying criteria, based around the new concept of a "residential unit".

Chapter 7 concerns the exceptions and qualifications to the above scheme of qualifying criteria for enfranchisement rights. We make recommendations for the reform of several of these exceptions, and recommend abolishing several others that we consider are either no longer useful or desirable.

(4) *Part IV: How should enfranchisement rights be exercised?*

Chapter 8 sets out our recommendations for the creation of a single procedure that can be used to exercise any enfranchisement right and contains detailed recommendations for how leaseholders should make enfranchisement claims.

Chapter 9 sets our recommendations about how landlords should respond to enfranchisement claims, the validity of notices under our new regime, and how a claim should be progressed.

Chapter 10 concerns various issues that arise after a claim has been commenced and when it comes to be completed, including the effect of serving a claim notice, protecting the claim on assignment of the relevant lease(s) or sale of the landlord's interest, the position of mortgagees, and registration issues.

Chapter 11 sets out our recommendations in respect of enfranchisement disputes, including the consolidation of almost all enfranchisement disputes and issues in the Tribunal, and the establishment of an alternative route for the determination of straightforward valuation disputes that do not merit a full Tribunal hearing.

Chapter 12 sets out a range of recommendations in respect of non-litigation costs and litigation costs.

(5) *Part V: Intermediate leases and other leasehold interests*

Chapter 13 makes a number of recommendations in respect of the treatment of intermediate leases in enfranchisement claims, including the basis on which those interests should be valued. We also make recommendations as to the treatment of other leasehold interests in premises that are subject to a collective freehold acquisition claim.

(6) *Part VI: Voluntary transactions and contracting out*

Chapter 14 concerns agreements for lease extensions and freehold acquisitions made on terms that are inconsistent with what is permitted by our recommended statutory scheme. While the regulation of such agreements falls outside our Terms of Reference, we set out our conclusions on the steps Government should consider taking to regulate the ability of leaseholders and landlords to enter into agreements that are "not on statutory terms". We also make recommendations as to the ability of the parties to exclude a leaseholder's enfranchisement rights under our new regime.

(7) *Part VII: Summary of our recommendations*

Chapter 15 gathers together all of the recommendations we make in this Report.

(8) Appendix 1 sets out our Terms of Reference.

(9) Appendix 2 contains a list of consultees.

NEXT STEPS

2.70 The recommendations we make in this Report will not directly change the law; rather, they will be considered by Government and a decision made as to whether to implement them.

2.71 Assuming that our recommendations are accepted, then there are a number of steps to take before our recommendations become law. One of the most important steps would be Parliament's consideration of a Bill.

2.72 Unlike some of our work, there is no draft Bill attached to this Report. The process of drafting a Bill is valuable. It can assist in clarifying certain aspects of policy. That process may be particularly valuable in the case of our Reports on residential leasehold and commonhold, because, not only do our Reports interact, to a greater or lesser degree, with one another, they may also interact with work that Government is undertaking.

2.73 During the implementation process, including the drafting of the Bill, we will assist Government with any need for clarification of policy, or other matters relating to implementation, that may arise.

PUBLICATIONS ACCOMPANYING THIS REPORT

2.74 Alongside this Report, we have published on our website:[46]

(1) a summary of our three residential leasehold and commonhold law reform projects;

(2) the responses to the Consultation Paper, which have been redacted to remove consultees' personal information, and to protect those who have provided their responses confidentially or anonymously;

(3) a statistical summary of how consultees responded to the consultation questions;

(4) Counsel's Opinion concerning removing the requirement for leaseholders to contribute towards their landlords' non-litigation costs, together with our instructions to Counsel; and

(5) a note regarding the right to participate that we proposed in the Consultation Paper.[47]

ACKNOWLEDGEMENTS

2.75 We are very grateful to everyone who responded to the Consultation Paper, listed in Appendix 2.

2.76 During the course of preparing this Report, we have held a number of meetings with individuals and organisations. We are grateful to them all for giving generously of their time and expertise.

2.77 We are also grateful to all those who attended and contributed at the events that we hosted and attended, and also to those who allowed us the use of their facilities.[48]

2.78 In particular, we extend our thanks to the members of our advisory groups, whose details were listed in Appendix 4 to the Consultation Paper. We also extend our particular thanks to: Sir Peter Bottomley MP, Justin Madders MP and Sir Edward Davey MP (co-chairs of the All-Party Parliamentary Group on Leasehold and Commonhold Reform) and Jim Fitzpatrick, who was co-chair before standing down from Parliament; the Leasehold Knowledge Partnership; and officials from the Ministry of Housing, Communities and Local Government and the Welsh Government.

2.79 We are also grateful to Julian Clark, Jennifer Ellis, Damian Greenish, Philip Rainey QC and John Stephenson for their further assistance concerning the determination of enfranchisement premiums where there is an intermediate lease.

---

46 At https://www.lawcom.gov.uk/project/leasehold-enfranchisement/.

47 See para 2.53(1) above.

48 See paras 2.31 to 2.32 above.

2.80 Finally, we would like to acknowledge here the assistance of Louie Burns and Professor James Driscoll, both of whom were members of advisory groups associated with our projects on residential leasehold and commonhold, and who sadly died prior to the publication of this Report.

THE TEAM WORKING ON THE REPORT

2.81 The following members of the Law Commission's Property, Family and Trust Law team have contributed to this Report:[49] Charlotte Black; Liam Davis; Emily Fitzpatrick; Ellodie Gibbons; Matthew Jolley; Frances Joyce; Caoimhe McKearney; Jonathan Mellor; Thomas Nicholls; Colin Oakley; Kevin Pain; Christopher Pulman; Daniel Robinson; and Rebecca Sage.

[49] The list of contributors includes those who have worked on this Report full- or part-time.

Part II: What should the enfranchisement rights be?

Chapter 3: The right to a lease extension

INTRODUCTION

3.1 In this chapter we set out our recommendations for the creation of a uniform right for leaseholders of both houses and flats to be granted a new, longer lease of their house or flat – what we call a "lease extension". Although a lease extension continues the relationship of landlord and leaseholder, it is a very important right. It is useful where a leaseholder does not qualify for a right of freehold acquisition, or for some other reason is unable to or does not wish to purchase the freehold to their home. It is particularly important for those leaseholders who live in blocks of flats or other buildings where the freehold can only be obtained collectively by a number of leaseholders working together. In these cases, the right to a lease extension is the only enfranchisement right which an individual leaseholder can exercise acting alone.

3.2 It was notable that a very large number of consultees responded to the consultation questions about lease extensions in Chapter 4 of the Consultation Paper. We assume that, to some extent, the volume of responses received to the questions in Chapter 4 simply reflects the fact that these were some of the first questions we asked in our consultation. However, it may also reflect the importance of the lease extension right to individual leaseholders. Each year, a great number of leaseholders across the country will seek to extend their leases – many more than will look to purchase their freehold, either individually or collectively. Often, they will be doing so in order to enable them to sell their property. To some extent, the need to consider a lease extension periodically is accepted as being part and parcel of owning a leasehold property, and of owning a flat in particular.

3.3 Under the current law, leaseholders of houses and flats enjoy separate, quite different lease extension rights – and it is widely agreed that the right of leaseholders of flats is more favourable. We see no reason for leaseholders' rights to diverge in this manner, and so we recommend that, going forward, a uniform right to a lease extension should be available to all long leaseholders (who satisfy the qualifying criteria which we recommend in Chapter 6 below). This is also consistent with our recommendation in Chapter 6 to move away from the language of houses and flats and to adopt the new concept of a "residential unit".[1]

3.4 We also make various other recommendations to improve the operation of the lease extension right. These recommendations include:

(1) a considerably longer lease extension of 990 years to be added to the remaining term of the existing lease;

(2) identifying more clearly the kinds of variations which either party can require to be made to the terms of a lease when it is extended;

[1] See paras 6.27 to 6.45 below.

(3) clarifying elements of the current law which should ensure that lease extensions are not delayed by having to seek the landlord's mortgagee's consent; and

(4) providing leaseholders with additional rights to acquire the extension of property rights (such as rights of way) which benefit the lease, while ensuring that other valuable rights do not fall away on a lease extension.

We think these recommendations will make the right to a lease extension a truly valuable right for leaseholders and help both leaseholders and landlords to be clear as to their entitlements when bringing or responding to a lease extension claim.

3.5 Additionally, we recommend the introduction of a new right for certain leaseholders to buy out the ground rent under their lease without extending the term of their lease and, in the event that Government does not cap the treatment of ground rent in calculating enfranchisement premiums, a right for leaseholders with "onerous" ground rents to extend the term of their lease without buying out their ground rent.[2] We think that, together with the standard lease extension right, these rights will provide a suite of enfranchisement rights to assist leaseholders facing a range of difficulties with their leasehold homes.

3.6 It should be noted from the outset that the recommendations made in this chapter are concerned with how any new *statutory* right to a lease extension should operate. In other words, our recommendations as to the terms of a lease extension – its length, the ground rent payable, and its other terms – are intended to determine what, exactly, a leaseholder seeking a lease extension (or, indeed, a landlord from whom a lease extension has been requested) may insist upon, even if the other party does not agree. We are aware, however, that landlords or leaseholders may sometimes seek to agree other terms for their lease extensions which would not reflect our recommendations. For example, a leaseholder might be willing to take a lease extension for a shorter term than that for which the statute provides, or to agree to pay ground rent, in exchange for a reduction in the premium payable for the lease extension. Alternatively, the parties might wish to agree variations to the terms of the existing lease which are not within the permitted categories of variations which we recommend at paragraph 3.209 below.

3.7 Overall, our recommendations in this chapter are designed with the aim of ensuring that the statutory lease extension right is valuable to leaseholders, and that they are not at risk of entering into a lease extension on terms which are not in their best interests.[3] We acknowledge that this aim may not always be achieved if landlords and leaseholders remain entirely free to enter into lease extensions on other terms – what are commonly referred to as "voluntary" lease extensions. On the other hand, though, we also recognise that there may be cases where it is desirable for the parties to agree terms other than those provided for by our recommended statutory scheme. In

---

2 We explain what is meant by an "onerous" ground rent at para 3.93 below.

3 We discuss this risk in more detail in our discussion of the terms of a lease extension, beginning at para 3.148 below.

any event, we acknowledge that it is not actually possible to prevent leaseholders from entering into a lease extension on such terms.[4]

3.8 We discuss the issue of voluntary lease extensions in Chapter 14 below, where we recommend that Government considers regulating such transactions so that the statutory regime which we recommend in this chapter is not undermined. In that chapter, we suggest that where a lease extension is "not on statutory terms" – that is, not in accordance with the statutory scheme which we recommend in this chapter – it should be necessary for the parties to seek the Tribunal's approval of the terms of the lease extension, so as to ensure that they are objectively reasonable. Without such approval, any terms which differ from that which would have been obtained under the recommended statutory scheme would not have their usual effect.[5]

PROBLEMS WITH THE CURRENT LAW

3.9 We set out the current law on the operation of lease extension rights, and the criticisms thereof, in full in the Consultation Paper.[6] In this section, we summarise the key problems with the law which we identified, before turning to the recommendations which we make to address those problems.

Key features of the 1967 Act and 1993 Act lease extension rights

3.10 We explained in the Consultation Paper that the lease extension rights available under the 1967 Act and the 1993 Act are quite different. To summarise:

(1) The 1967 Act provides that leaseholders of houses (who meet the relevant qualifying criteria) have a right to be granted, in substitution for their existing lease, a new, extended lease for a term ending 50 years after the end date of the existing lease. No premium is payable for the grant of the lease extension, but the leaseholder will be required to pay what is known as a "modern ground rent" after the end date of the existing lease has passed.[7] This right may be exercised once only.

(2) The 1993 Act provides that leaseholders of flats (who meet the relevant qualifying criteria) have a right to be granted, in substitution for their existing lease, a new, extended lease for a term ending 90 years after the end date of the existing lease. A premium is payable for the grant of the lease extension,

---

4 See para 14.54 below.

5 The issue of voluntary lease extensions is outside the scope of our Terms of Reference for this project, which is focussed on the exercise of statutory enfranchisement rights. Accordingly, the views which we express and the suggestions which we make in Ch 14 as to how voluntary lease extensions might be regulated do not amount to formal recommendations to Government.

6 See CP, paras 4.3 to 4.37.

7 A "modern ground rent" is the rent determined under s 15 of the 1967 Act, payable during the additional term of a lease extension of a house. It is calculated by valuing the "site", and then decapitalising that value.

but the new lease will be at a "peppercorn" ground rent from the date it is granted.[8] This right may be exercised as often as the leaseholder wishes.

3.11 Both Acts also provide a right for the landlord to regain possession of the house or flat during the term of the lease extension, for the purposes of redevelopment. In the case of houses, this right is exercisable during the last 12 months of the term of the original lease or at any point thereafter. In the case of flats, it is exercisable during the last 12 months of the term of the original lease or during the last five years of the lease extension. In both cases, the landlord must obtain a court order in order to regain possession, and the leaseholder must be paid compensation for the loss of the property. However, the court has no discretion to refuse to order possession if it is satisfied that the landlord intends to demolish or reconstruct all or a substantial part of the house and premises, or of the premises containing the flat (and, in the case of a flat, that he or she could not reasonably do so without obtaining possession of the flat).

3.12 A number of criticisms have been made of the lease extension rights under the 1967 and 1993 Acts.

(1) First, it is unsatisfactory that leaseholders of houses and leaseholders of flats enjoy very different lease extension rights. There is no good reason why this should be the case. In particular, the lease extension right under the 1967 Act is generally considered to be significantly less favourable to leaseholders than that under the 1993 Act. A 50-year lease extension is no longer considered to offer long-term security of tenure to leaseholders, especially given that the right can be exercised only once. Further, the modern ground rent payable during the extended term can amount to a very substantial annual sum.

(2) Indeed, even the 90-year lease extension available under the 1993 Act is now thought by some to be inadequate, given the prevalence of much longer leases – often up to 999 years – today. It has also been said that the 1993 Act right is too prescriptive, in that it requires leaseholders simultaneously to extend their lease (and therefore pay the landlord for the deferral of his or her right to possession of the property) and to extinguish their ground rent (and therefore pay the landlord for the loss of that income stream over the remainder of the original term). As a result, the premium payable for the lease extension can be significant.

Premises to be included in a lease extension

3.13 In the Consultation Paper, we explained that a lease extension of a house under the 1967 Act will be a lease of the "house and premises", meaning that it will include "any garage, outhouse, garden, yard and appurtenances" that are let to the leaseholder with the house. However, this rule is subject to two provisos.

---

8 Many long leases specify an annual ground rent of a peppercorn. Strictly, the landlord in these cases could require the leaseholder to provide him or her with a peppercorn annually, but invariably this is not demanded. A peppercorn rent is used in circumstances where it is deemed appropriate for there to be no substantive rent payable. However, a nominal rent must be specified because of the English contract law requirement of "consideration" – meaning that an exchange must occur in order for a binding contract to be formed.

(1) First, a landlord is able to ask for other premises which were let to the leaseholder with the house but which are no longer held by the leaseholder (perhaps because they have been transferred to a third party) to be included in the lease extension. Those premises will be included if the leaseholder agrees, or if the court is satisfied that it would be unreasonable for the landlord to have to retain those other premises while letting the house. The landlord must give notice that he or she wishes to include those further premises within two months of the date of service of the leaseholder's notice of claim.

(2) Second, where a part of the house and premises lies above or below other premises in which the landlord has an interest, he or she is able to object to that part of the house and premises being included within the lease extension. The part will be excluded if the leaseholder agrees, or if the court is satisfied that any hardship or inconvenience likely to result to the leaseholder from the exclusion of that part is outweighed by the difficulties involved in the further severance of it from the other premises and resulting hardship or inconvenience. Again, the landlord has two months from the date of service of the leaseholder's notice of claim to raise such an objection.

3.14 A lease extension under the 1993 Act operates in a similar way. A lease extension of a flat will include "any garage, outhouse, garden, yard and appurtenances belonging to, or usually enjoyed with, the flat and let to the tenant with the flat".

3.15 We explained in the Consultation Paper that these provisions setting out the premises which will be included in a lease extension have been criticised for several reasons.

(1) The provisions can be difficult for leaseholders to understand and apply without the benefit of legal advice. This difficulty has been accentuated by the way in which courts have interpreted the provisions: for example, holding that for land to be included in a lease extension, it must be within the "curtilage" of the property in question.

(2) A leaseholder can be left with a lease of premises which are less extensive than the original premises let to him or her under the original lease.

(3) The two-month time limit within which landlords must give notice of their desire to include other premises within a lease extension under the 1967 Act, or exclude part of the house and premises under the existing lease, may be too strict.

Terms of a lease extension

3.16 Under the current law, the parties to a lease extension are free to agree on its terms. If they cannot agree, the lease extension will be granted on the same terms as the existing lease, save that (to summarise very briefly):

(1) there are certain terms which the lease extension must include (most notably, suitable provision for the landlord to be paid in respect of any services which he or she is obliged to provide during the extended term);

(2) there are certain modifications which must be made to the terms of the existing lease, if applicable (such as modifications to take account of the omission from

the new, extended lease of property which was included in the existing lease, or of alterations made to the property since the grant of the existing lease); and

(3) either party may require any term of the existing lease to be excluded or modified if it would be unreasonable not to so in view of changes occurring since the commencement of the existing lease which affect the suitability of the terms of that lease, or (under the 1993 Act only) if it is necessary to do so in order to remedy a defect in the existing lease.

3.17 Again, several criticisms have been made of the above position.

(1) The freedom which the current law provides for the parties to a lease extension to agree whatever terms they like for that lease extension has been widely criticised. We have been told that some landlords see the lease extension process as an opportunity to introduce new terms which are unfair to leaseholders (for example, new permission fees). There is a risk that leaseholders will agree to such terms owing to a lack of understanding of what is being proposed, or because of an inequality of bargaining power between the landlord and the leaseholder.[9]

(2) On the other hand, it has been said that the changes which one party can require be made to the terms of the existing lease, in the absence of agreement from the other party, are too limited. Leaseholders have argued that the lease extension process should provide for the removal of unfair or onerous terms from leases, rather than for them to continue in a new, longer lease.

(3) Either way, finalising the terms of a lease extension can be one of the most difficult parts of negotiating a lease extension (aside from agreeing the premium), and frequently leads to delay and/or increased costs. Some stakeholders have also argued that the power referred to at paragraph 3.16(3) above is unclear and imprecise, and sometimes applied inconsistently by the Tribunal, leading to uncertainty for the parties.

Mortgages

3.18 We believe that the current law regarding the effect of a lease extension on mortgages is largely satisfactory. Both the 1967 and 1993 Acts provide that statutory lease extensions are deemed to be “authorised” by the landlord’s mortgage lender, which means that the consent of the mortgage lender is not required for the lease extension. However, the new extended lease will not be “binding" on the mortgage lender if the existing lease is not binding.

3.19 However, there is a defect in the law relating to mortgages secured against the lease. A lease extension operates by surrender and regrant: the existing lease is surrendered and a new extended lease is granted. Under the 1993 Act, where a lease extension is granted in relation to a flat, any mortgage over the existing lease is automatically transferred onto the new lease. But the 1967 Act does not contain any equivalent provision. Thus, for lease extensions of houses, leaseholders need to execute a deed of substituted security to transfer their mortgages to the new lease,

[9] See further discussion of the issue of inequality between landlords and leaseholders at para 3.150 below.

complicating the process of obtaining the extension. There is no reason for this disparity between the two statutory schemes to exist.

Property rights benefiting/burdening the lease

3.20 Finally, at the end of this chapter, we consider a problem with the current law that we did not discuss in the Consultation Paper. The problem concerns appurtenant property rights that benefit or burden a lease. An appurtenant property right is a right enjoyed as part of the ownership of a leasehold or freehold estate in land. An example is a right of way, which is a kind of easement. The owner of a piece of land (plot A) may have a right of way over a neighbouring piece of land (plot B) for the purposes of accessing plot A.

3.21 As we did not analyse the problems presented by appurtenant rights in the Consultation Paper, we discuss them in detail in this chapter. In summary, we identify two problems with the current law which we endeavour to solve.

(1) First, it is unclear in what circumstances a leaseholder can, alongside the extension of his or her lease, claim an extension of an appurtenant right over a third party's land which benefits the lease. A leaseholder may be able to extend the relevant rights if the third party counts as a "landlord" for the purposes of the 1967 or 1993 Acts. But there are other cases in which an extension cannot currently be claimed, despite the fact that the relevant rights may have become vital to the leaseholder's enjoyment of his or her land.

(2) Second, a lease extension operates by surrender and regrant. The current law does not make clear how property rights burdening or benefiting the existing lease may transfer to the new lease. It is possible that some rights will be lost if appropriate arrangements cannot be concluded with affected third parties.

A UNIFORM LEASE EXTENSION RIGHT FOR ALL

3.22 As noted above, the lease extension rights currently conferred on leaseholders of houses and flats are different, and it is generally considered that the right to a lease extension of a house under the current law is considerably less favourable to leaseholders than the equivalent right available to leaseholders of flats. We therefore made a provisional proposal that there should be one uniform right to a lease extension, available to both leaseholders of houses and leaseholders of flats, to obtain a new, extended lease at a nominal ground rent as often as they so wish, on payment of a premium. We asked whether consultees agreed with this proposal.[10]

Consultees' views

Consultees who agreed with our proposal

3.23 The vast majority of consultees agreed with our provisional proposal to introduce a uniform lease extension right. These included bodies representing professionals and leaseholders, most freeholders, firms of professionals, individual professionals and a very large number of leaseholders.

---

[10] See CP, Consultation Question 2, Pt 1, para 4.40.

3.24 Many of those who supported our proposal gave generic reasons in support of having lease extension rights *at all* – such as the need for leaseholders to have security in their homes. Only a relatively small number actually addressed the divergent position of leaseholders of houses and flats under the current law. Of those, several referred to specific issues faced by leaseholders of houses, particularly the fact that, in contrast to leases of flats, the lease of a house can only be extended once. One anonymous leaseholder wrote that:

> leases should be extended as many times as required. Having the right to extend it only once is absolutely ridiculous.

3.25 Another leaseholder, Emma Latham, commented on the fact that the lease extension available to leaseholders of houses is much shorter in duration than that available to leaseholders of flats, and with a "modern ground rent" payable during the extended term does not really improve the marketability of the house.

3.26 Others simply observed that there is obvious good sense in treating houses and flats the same. As Franciszka Mackiewicz-Lawrence, a leaseholder, put it, "whether we live in leasehold flats or houses they still remain homes for which we have often paid large sums of money". Several consultees also considered that a unified approach would make the enfranchisement regime easier to understand. Beth Rudolf, a conveyancer, commented that "there appears to be no sensible reason for flats and houses to be treated differently".

3.27 Some of those who supported our proposal stated that they did so only on certain conditions. For example, a considerable number of leaseholders stated that the premium payable must be "realistic" or "reasonable", or that the procedure for obtaining a lease extension must be quicker and simpler. Several freeholders, on the other hand, wrote that premiums must be "sufficient" or at full market value, and that the landlord's reasonable costs must be paid by the leaseholder. We address each of these other aspects of a reformed enfranchisement regime elsewhere in this Report or in the Valuation Report.

Consultees who disagreed with our proposal

3.28 Only a small number of consultees disagreed with our proposal or answered "other". Surprisingly, the majority of these were leaseholders and other individuals. However, it was clear from reading the substantive comments that most of these individuals did not actually disagree with the suggestion that the rights of leaseholders of houses and of flats be aligned. Rather, they disagreed with our proposal because they considered that leasehold should be abolished altogether, that houses should not be sold on a lease in the first place, or that it should not be necessary to pay for a lease extension.

3.29 A handful of firms and freeholders also expressed disagreement with our proposal. But again, the reasons given for disagreement tended to relate not to equivalence between leaseholders of houses and of flats but to other aspects of our proposal. Several professional consultees were concerned that the ability for leaseholders to seek repeated lease extensions could place an unfair burden on landlords, while freeholders argued that ground rents should be permitted as these can provide a valuable income to enable responsible landlords to meet costs which are unrecoverable from leaseholders.

3.30 A small number of firms and individual professionals were of the view that lease extensions are unnecessary in the case of houses, and should no longer be available to leaseholders of houses, since freehold acquisition is more desirable. But only one consultee made a substantive argument for providing different lease extension rights for flats and houses. BRW Sparrow, a landlord, wrote:

> flats yes, because they have paid the "full" market price. Houses no as they have paid a much-reduced price compared to flats.

Discussion and recommendations for reform

3.31 We have a great deal of sympathy with leaseholders who consider that they should not be faced with the need to purchase a lease extension, and wish for leasehold ownership to be abolished.[11] In our project on commonhold, we have made recommendations to reinvigorate commonhold as the alternative to leasehold, to enable the freehold ownership of flats. However, our project on enfranchisement is designed to ensure that leasehold works better for those who remain leaseholders, including leases that are already in existence and that are unable (for example because they do not meet the qualifying criteria) to convert to commonhold. Accordingly, the right to a lease extension must continue to exist. We have also explained in the Valuation Report at paragraphs 1.16 to 1.19 why a premium must be paid on any kind of enfranchisement claim.

3.32 We consider that as a matter of policy, in so far as possible, the lease extension rights of leaseholders of houses and of flats should align. This view was supported by a substantial majority of consultees. Further, no consultee offered any convincing reason why leaseholders of houses and flats should be treated differently. We do not agree with BRW Sparrow that leaseholders of houses have paid a significantly reduced price for their homes because they are leasehold rather than freehold. We have been told that, in recent years, leasehold houses have generally been sold at prices which are the same as or very close to the price at which they would have been sold on a freehold basis.[12]

3.33 Nor are we inclined simply to dispense with the ability for leaseholders of houses to extend their leases, as some consultees suggested.[13] It is no doubt true that most leaseholders of houses would choose to buy their freehold rather than purchase a lease extension if they can, as the cost is likely to be similar. But that is not necessarily a reason to take away consumer choice from those who might for whatever reason prefer to remain a leaseholder. For example, an elderly individual in a retirement property might be happy to remain a leaseholder because the lease places all responsibility for organising repairs and maintenance on the landlord. In any

---

11 See Ch 3 of the Valuation Report – in particular paras 3.4 to 3.11.

12 See also Competition and Markets Authority, *Leasehold housing – Update report* (February 2020), para 77(c).

13 Damian Greenish, a solicitor, suggested that it is inconsistent with Government's proposed ban on leasehold houses to permit leases of houses to be extended. However, the ban is intended to apply to new leases only. While a lease extension technically takes the form of a surrender of the existing lease and the grant of a new lease, Government has confirmed that lease extensions of existing leases on houses will not be contrary to the ban.

event, some leaseholders of houses will not have the option to acquire their freehold – for example, leaseholders of houses built with overhang or underhang, shared ownership leaseholders who have not yet staircased to 100% ownership, National Trust leaseholders, and leaseholders of the Crown in the "excepted areas".[14] In these cases, the lease extension right is crucial to provide these leaseholders with security of tenure.

3.34 Finally, we remain of the view that leaseholders should be able to seek lease extensions as often as they wish, and that those extended leases should be at a nominal ground rent – by which we mean a peppercorn. We do not consider that either of these aspects of our proposal are likely to be a problem in practice – indeed, this is the approach taken to lease extensions of flats under the current law.

3.35 We therefore recommend that our provisional proposal should be taken forward. The same lease extension right should be available to leaseholders of both houses and flats, and this should be a right, as often as they wish (and on payment of a premium), to have a new, extended lease at a peppercorn ground rent.

Recommendation 1.

3.36 We recommend that leaseholders of both houses and flats should be entitled, as often as they so wish (and on payment of a premium), to obtain a new, extended lease at a peppercorn ground rent.

THE LENGTH OF A LEASE EXTENSION AND REDEVELOPMENT BREAK RIGHTS

3.37 In the Consultation Paper, we noted a general consensus that the 50-year lease extension available to leaseholders of houses under the 1967 Act is much too short to provide sufficient security of tenure in the modern day. We also observed that it may now be the case that even the 90-year extension available to leaseholders of flats under the 1993 Act is insufficient.[15] We therefore asked consultees for their views as to the appropriate length of a lease extension, noting that we had heard suggestions of 125 years, 250 years and even 999 years.[16]

3.38 We also sought consultees' views as to the points at which the landlord should be entitled to terminate a lease which has been extended for the purposes of redevelopment. We explain at paragraph 3.11 above that under both the 1967 Act and the 1993 Act, the landlord under a lease which has been extended has the right, at particular points in time, to terminate the lease and regain possession of the property in order to carry out redevelopment work (while paying appropriate compensation to the leaseholder). These kinds of rights are known as "redevelopment break rights".

---

14 See Chs 6 and 7 below for discussion of these issues.

15 See CP, paras 4.22 and 4.25.

16 See CP, para 4.39, and Consultation Question 2, Pt 2, para 4.41.

3.39 Redevelopment break rights do not exist purely to enable landlords to redevelop their properties for commercial gain. Rather, the existence of such rights is an acknowledgment of the fact that there are many buildings subject to long leases which will not necessarily survive for the duration of those leasehold interests. Redevelopment break rights help to ensure that where this is the case, the landlord can bring the long lease (or leases) to an end so that the building can be demolished or reconstructed, while also ensuring that the leaseholder receives appropriate compensation for the loss of his or her home.

3.40 Clearly, if lease extensions are to become longer, it will be even more important that sensible provision is made for redevelopment break rights. It would not be appropriate to replicate the approach of the 1993 Act (under which the lease can be terminated only in the last 12 months of the term of the original lease or in the last five years of the extended term) in the case of a lease which has been extended by (say) 250 or 999 years. On the other hand, as we observed in the Consultation Paper, a "rolling break right" like that under the 1967 Act (under which the lease can be terminated in the last 12 months of the term of the original lease or at any point during the extended term) creates considerable uncertainty for leaseholders.

Consultees' views on lease extension length

3.41 In the Consultation Paper we did not put forward a provisional proposal for how long a lease extension should be, but instead invited consultees' views. The answers given by consultees varied widely. Numerical responses ranged from 10 years to 1,000 years, with popular suggestions being 90 years, 99 years, 125 years, 250 years and 999 years. Other consultees expressed their view in non-numerical terms – for example, that the lease extension should be "the length of a lifetime", "the same length as the original lease term", or "long enough to sell the lease to someone who needs a mortgage to purchase it". A small number of consultees said that lease extensions should be unlimited.

3.42 A considerable number of consultees (freeholders and professionals in particular) thought that the new enfranchisement regime should offer 90-year lease extensions, as is the case for flats under the 1993 Act at present. They argued that a 90-year extension offers sufficient security and is widely understood, being the current "industry standard". Geraint Evans, a surveyor, wrote that the 90-year extension under the 1993 Act "works well in practice, providing good and marketable title". Others suggested that a 90-year extension reflects the realistic lifespan of most buildings, whereas longer leases would tend to endure beyond a building's normal life expectancy. A few consultees suggested that to increase the length of a lease extension would be unfair to those leaseholders who have already availed of either a 50-year or 90-year extension under the current law.

3.43 There was also widespread support across most categories of consultees for a slightly longer lease extension than that available under the 1993 Act, of up to 125 years.[17] This group of consultees included a significant number of professional representative bodies and professional firms. These consultees tended to agree with our observation that a 90-year lease extension does not always provide sufficient security these days, and sometimes results in a further claim having to be made. The government-funded,

[17] In addition to 125 years, popular suggestions included 95, 99 or 100 years.

independent Leasehold Advisory Service ("LEASE"), explained that "there are some instances where a lease has become very short and even with the 90-year extension may mean that a further extension will be required in a relatively short space of time for the premises to remain mortgageable". Again, though, concerns were expressed that a lease extension much in excess of 125 years would lead to difficulties. The Property Bar Association ("the PBA") described such leases as "more notional than realistic", given the useful life of modern buildings, while a couple of consultees expressed concern that very long lease extensions could result in premiums becoming unaffordable.

3.44 The most frequently suggested lease extension length, however, was 999 years. This was supported by a very large number of individuals and self-identified leaseholders, as well as by a number of professionals and members of our advisory groups. These consultees argued that a 999-year lease extension would avoid the need for further lease extension claims in the future and bring the leaseholder "very close" to freehold ownership. As Jennifer Ellis, a surveyor, stated:

> If the new lease is any shorter than 999 years, it simply invites the making of further claims. If the object of this exercise is to assist lessees, then surely they must be granted 999-year leases. My first inclination was to suggest that the lessee should be able to choose the length of the new term, but on reflection, I think the "don't create the opportunity for further claims" argument prevails.

Several consultees also referred to the fact that 999-year leases are now commonly granted on new developments.

3.45 A number of consultees indicated that they thought the length of a lease extension should be a matter of choice for the leaseholder. Reasons given for permitting leaseholders to choose the length of their lease extension centred around maximising consumer choice, keeping lease extensions affordable and avoiding the need to pay for a longer term than is required. Consultees pointed out that some leaseholders (with short unexpired terms) would welcome the opportunity to purchase a very long lease extension, while others (perhaps those who already have 999-year leases) might wish to purchase a short lease extension in order to eliminate their ground rent.

3.46 Finally, several professionals employed more technical reasoning. Three members of our advisory group commented that whatever lease extension length is chosen should be a multiple of 90 years, with redevelopment break rights on the original term date and every 90 years thereafter.[18] It was said that this approach is necessary to ensure "that in blocks of flats new leases under the revised legislation dovetail with new leases obtained under the 1993 Act" – in other words, to ensure that a landlord is able to terminate all of the leases in a building at the same time.

3.47 In a detailed and useful consultation response, and in subsequent discussions, Philip Rainey QC expanded on the above point. He was of the view that the chosen multiple of 90 years should be as close to 999 years as possible, so as to give leaseholders a truly valuable interest, which accords with increasingly-common market practice, and to ensure that they need only extend their leases once. A very long lease extension

[18] Philip Rainey QC, Damian Greenish and Mark Chick (a solicitor).

would also ensure that the reversionary value of the freehold afterwards would be nil, thus simplifying the valuation of the lease extension premium. However, he concluded that the most appropriate lease extension length would be 810 or perhaps 720 years – a length specifically chosen to avoid the potential for difficulties to arise where a block of flats is subject to a 999-year head lease, and to protect the interests of that head lessee.[19]

Consultees' views on redevelopment break rights

3.48 Consultation responses to this question were very polarised. The vast majority of individuals and leaseholders simply stated that landlords should never be permitted to terminate a lease without the leaseholder's agreement, perhaps without appreciating the role that redevelopment rights play in relation to the lifespan of buildings, that such rights exist under the current law, and that they are only exercisable at particular points in time, pursuant to a court order, and on payment of compensation to the affected leaseholder. Others considered that a landlord should be able to do so only in "exceptional" circumstances, where the leaseholder is in breach of covenant, or where the property has been classed as beyond economic repair by an independent assessor. Further, many of those individual consultees who did appear to accept the need in principle for a general redevelopment right took the opportunity to comment on the mechanisms of how the right should operate, and restrictions that should be in place to protect leaseholders, rather than answering the question about the points in time at which the right should be exercisable.

3.49 Freeholders' and professionals' responses, on the other hand, were broadly split between those who thought that redevelopment rights should be structured along the lines of the current 1993 Act break right (that is, a right to break the lease on or shortly before the expiry of the original term, and the same in respect of the extended term), and those who argued for a new approach.

3.50 In the former category were at least ten major law firms, a number of individual professionals, several significant freeholders and the British Property Federation. A small number of leaseholders and the National Leasehold Campaign also supported this approach. Many of these consultees simply stated that the approach of the 1993 Act – described by Trowers & Hamlins LLP, solicitors, as "the industry standard" – should remain, perhaps suggesting a number of years before the end of the term within which termination ought to be possible. However, other responses acknowledged that waiting until, say, the last five years of the extended term would not be very satisfactory for landlords if lease extensions are increased substantially in length. These consultees made various suggestions as to how the right currently contained in the 1993 Act could be adapted to suit a longer lease extension – for example, by allowing termination of the extended lease somewhat earlier (such as during the last 10 years of the extended term, rather than only the last 5), or providing an additional right to terminate midway through the extended term. Building on the suggestion that lease extension length should be a multiple of 90 years so as to coincide with existing lease extensions and existing break rights, a number of consultees suggested that it should be possible to terminate the lease at 90-year

[19] For further explanation of this point, see Philip Rainey QC's full consultation response, available in the published consultation responses on the Law Commission website.

intervals from the original term date, or perhaps in the last 5 years of each of the 90-year "multiples" making up the lease extension. As Hamlins LLP (solicitors) put it:

> The landlord should be entitled to terminate the lease for the purposes of redevelopment at the original contractual termination date of the lease and at 90-year intervals. This is to ensure that consistency is maintained. There is a concern in the property industry that there are a great number of blocks of flats particularly within the London area that will need extensive structural works within the next 25 to 50 years and in some cases complete demolition and rebuilding. It is vital that if work like this is to be carried out that freeholders can obtain vacant possession of blocks of flats at the same time which means that there is a real need for there to be consistency in terms of break dates in leases.

3.51 In the latter category, consultees made various suggestions for an alternative approach.

(1) A number of consultees considered that the landlord should have the ability to terminate the lease at regular periodic intervals from the original term date. For example, the Law Society considered that a break right every 60 years "would produce less interference with the right of leaseholders to retain value in their respective flats without the threat of termination too frequently", while John Stephenson, a solicitor, considered that 20-year intervals would be appropriate as any longer period would make the right "almost worthless".

(2) Bi-Borough Legal Services for Westminster and Kensington & Chelsea argued that the need to redevelop can arise at any time, and so landlords should have a right to terminate the lease at any time provided planning permission for the proposed development has been obtained.

(3) Mark Chick suggested that if leases are to be extended to 999 years, a break right should be available wherever the landlord has a "settled intention to redevelop" – similar to the "redevelopment ground" on which a landlord may oppose the renewal of a business lease.[20] He considered that this approach "would also answer the hidden problem of many leases extended to 999 years on a voluntary basis with no right to break and also would bring harmony to estates where the landlord's approach to voluntary extension has been arbitrary".

(4) Damian Greenish gave a comprehensive answer, arguing that as well as provision for redevelopment along the lines of the 1993 Act approach (so as to be consistent with lease extensions already granted), there should be provision for termination at any time, with court or Tribunal approval, if the landlord can show that the building is obsolete or not reasonably capable of repair and maintenance.

Discussion and recommendations for reform

3.52 We are of the view that a lease extension under a reformed enfranchisement regime should be considerably longer than the 90-year extension available to leaseholders of

[20] Landlord and Tenant Act 1954, s 30(1)(f).

flats under the current law. While in the majority of cases a 90-year extension will provide adequate security for leaseholders, it is fair to say that this is not the case where the remaining term of a lease is relatively short at the point at which the extension is sought. We note the views of a number of consultees that a 90-year lease extension means that a second extension can be necessary. We are concerned that a modest increase in the length of a lease extension – say, to 125 years – would provide only a temporary solution and that, over time, leases that fell below a particular duration would come to be seen as less marketable and as offering less good security. A much longer lease extension will help to avoid the need for a second claim to be made in relatively quick succession and provide leaseholders with a substantially-enhanced interest in their homes, in accordance with our objective of providing a better deal for leaseholders as consumers.

3.53 Further, we do not agree that granting a very long lease extension will lead to difficulties relating to the lifespan of buildings, if appropriate provision is made for redevelopment break rights. We note that freehold ownership inherently endures beyond the lifespan of a building, and the fact that 999-year leases are currently granted suggested that a lease length beyond the expected lifespan of the building is not in fact problematic. In any event, our main aim in recommending a very long extension is not necessarily to guarantee that the lease will continue for the entirety of the period of the extension but rather to shift the value in the property from landlord to leaseholder.

3.54 Nor are we especially concerned, as some consultees have suggested, that very long lease extensions may be out of reach, financially-speaking, for leaseholders. In the majority of cases, adding 90 years to the remaining term of a lease will strip the landlord's reversionary interest of most of its value, so that a (say) 250 or 999-year lease extension will not cost very much more than a 90-year lease extension.[21] In any event, the *relative* extra cost of extending a lease beyond 90 years will *always* be low compared to the cost of an extension of just 90 years. That is because, when the term of a lease is extended, of the part of the premium which is attributable to extending the term, the bulk can be attributed to the first 90 years of the extension.

3.55 It is for similar reasons that we do not consider it necessary or desirable to offer leaseholders a choice of different lease extension lengths. One of the aims of our reforms is to produce a simplified enfranchisement regime. As there will be little difference in the cost of the extension, we do not consider that to offer a choice of (say) a 90-year lease extension in addition to a longer lease extension would provide sufficient benefit to leaseholders to justify the additional complexity which would result. It is arguable that offering leaseholders the choice of a *much* shorter lease extension (of, say, 20 or 50 years) could benefit leaseholders, because the premium would be significantly cheaper than for a 90-year lease extension. But aside from introducing complexity into our scheme, such a short lease extension would not really help leaseholders for the long term. It would not be long before a leaseholder who has paid a premium (albeit a lower one) for a very short lease extension would need to seek a further extension, and pay a premium (and the costs of the transaction) once again.

---

[21] The exception to this would be where the remaining term of the lease to be extended is very short (relatively speaking), so that even after a 90-year extension, the landlord's reversionary interest retains some value.

3.56 As we consider that the length of a lease extension should be considerably longer than the current length of 90 years, the question arises as to what the appropriate length should be. Most of the arguments presented to us focussed on whether the lease length should remain at 90 years, or be extended modestly to 125 years on the one hand, or should be 999 years on the other. While a variety of views were expressed for lease extensions of 250 years, there seemed to be no particular arguments advanced – if a long extension was preferred – for favouring 250 years over 999 years. Once it is accepted that a very long lease extension should be available, there is therefore no reason not to make the extension as close to 999 years as possible. We note that while 999 years was – perhaps unsurprisingly – the most frequently suggested by individual leaseholders, it was also supported by some professionals (including some members of our advisory group), freeholders and representative bodies. A number of advantages of 999-year lease extensions were highlighted to us by Philip Rainey QC. First, it ensures that a lease will only need to be extended once. Second, it provides leaseholders with the best interest – short of freehold – that the law can offer. Third, as 999-year leases are commonly granted, it avoids the risk of a two-tier market developing.

3.57 We therefore consider that the length of a lease extension should be as close to 999 years as possible. But we do not think – despite its popularity with consultees – that 999 years is the most appropriate lease extension length. Instead, we are persuaded by the argument that the chosen length should be a multiple of 90 years, with redevelopment break rights at 90-year intervals (reflecting those provided by the1993 Act currently). We wish to ensure consistency between leases extended under the current law and under our new regime, and retain the ability for landlords to take possession of all units within a building at the same time We also consider that clearly demarcated break rights – rather than a rolling break right, such as that under the 1967 Act, or a right to break a lease at any point where a property is obsolete, as some consultees suggested – will provide greater certainty for leaseholders.

3.58 Finally, while we acknowledge the concern raised by Philip Rainey QC in respect of head lessees who hold the bulk of the value in a block of flats,[22] we do not think that it is necessary to specify a lease extension length of 810 or 720 years to deal with this concern. Instead, we are content that this issue can be adequately addressed by recommendations we make elsewhere in this Report which would protect the position of head lessees holding valuable long leasehold interests and the position of leaseholders where such head lessees are involved.[23]

3.59 We therefore recommend that:

(1) on a lease extension claim, an additional period of 990 years should be added to the remaining term of the existing lease; and

(2) where a lease has been extended under the new regime, the landlord should be entitled, during the last 12 months of the term of the original lease or in the last

---

22 See para 3.47 above.

23 See Recommendations 59, 64 and 86, and at paras 8.201, 9.107 to 9.109 and 13.45 below.

five years of each period of 90 years after the commencement of the extended term, to obtain possession of the property for redevelopment purposes.[24]

3.60 We think that this recommendation will provide leaseholders with a truly valuable lease extension right, while ensuring fairness to landlords who, in due course, need to redevelop their properties. We have not consulted on the procedure which should be followed by a landlord who wishes to terminate an extended lease for redevelopment, nor on the compensation which should be paid to a leaseholder in this scenario, so we make no recommendations in that regard. These matters are dealt with in the current law, although we note that this is an area which Government may wish to review in the process of delivering new legislation.

3.61 Finally, we note that leaseholders who have recently obtained a lease extension (or do so before changes to the law are implemented) may feel it is unfair that they were only able to obtain a 90-year lease extension, while other leaseholders will now be able to obtain much longer lease extensions. We also acknowledge that leaseholders may not have had the choice of waiting for the law to change before obtaining an extension. They may, for example, have had to extend their lease to obtain a marketable title in order to move house, or to remortgage. The position of those leaseholders (or their successors) does not, however, detract from the benefits of providing for much longer lease extensions in future. Those leaseholders (or their successors) will be able to benefit from the new lease length by making a further claim. Moreover, the fact that they have recently extended their lease means that their ground rent will, most likely, already be a peppercorn and the reversion will have little or a nil value. As a result, the premium payable for a further lease extension should be very low.

Recommendation 2.

3.62 We recommend that:

(1) on a lease extension claim, an additional period of 990 years should be added to the remaining term of the existing lease; and

(2) where a lease has been extended, the landlord should be entitled, during the last 12 months of the term of the original lease or the last five years of each period of 90 years after the commencement of the extended term, to obtain possession of the property for redevelopment purposes.

[24] The references to the last 12 months of the term of the original lease and the last five years of each period of 90 years after the commencement of the extended term are intended to ensure that redevelopment break rights under our recommendation align with any such rights which might already exist in relation to other leases in the same building, which have already been extended under the current regime. See our explanation of the current law on redevelopment break rights at para 3.11 above.

A RANGE OF LEASE EXTENSION RIGHTS?

3.63 In the Consultation Paper, we explained that the 1993 Act right to a lease extension has been criticised for requiring leaseholders simultaneously to extend the term of their lease (and therefore pay the landlord for the deferral of the reversion) and to extinguish the ground rent (and therefore pay the landlord the value of the remainder of the original term).[25] We noted suggestions that leaseholders should be able to choose between extending their lease, extinguishing their ground rent, or both, in order to reduce the premium payable on the lease extension.

3.64 Bearing in mind that permitting this kind of choice would make the statutory right to a lease extension more complicated, we formed the provisional view that in all cases leaseholders should simply have a uniform right to a fixed additional term at a nominal ground rent. However, we invited consultees' views as to whether a more nuanced approach would be welcome. Consultees were asked to indicate whether they thought that leaseholders should also have the choice only to extend the term of the lease (without changing the ground rent), or only to extinguish the ground rent (without extending the lease).[26]

Consultees' views

3.65 Consultees' responses to this question were divided, with no option receiving majority support. The most popular option was to give leaseholders maximum choice, enabling them to choose between extending their lease only, extinguishing their ground rent only, or both. However, the next most popular option was at the opposite end of the scale: a significant number of consultees felt that leaseholders should have no choice but to simultaneously extend their lease and extinguish their ground rent, as under the current law. Remaining responses were fairly evenly split between giving leaseholders either the choice to extend their lease without changing their ground rent, or the choice to extinguish their ground rent without extending their lease but not both.

3.66 In terms of how the various categories of consultees responded:

(1) The views of representative bodies were fairly evenly spread between "no choice" and "maximum choice" (whether they represent landlords, leaseholders or professionals).

(2) Freeholders (especially commercial freeholders) generally favoured giving leaseholders maximum choice, with a significant number also indicating support for a right to extend the lease while maintaining the current ground rent.

(3) Amongst professionals and firms, there were similar levels of support for "no choice" and "maximum choice", and lesser degrees of support for one or other of the intermediate options. However, our advisory group members tended to favour "maximum choice", with two supporting a right to extinguish the ground rent without extending the lease.[27]

---

25 See para 4.26 of the CP.

26 Consultation Question 3, para 4.46.

27 Philip Rainey QC and Mark Chick.

(4) The views of leaseholders and other individuals broadly aligned with the general trends set out above.

Arguments in favour of a single right with no element of choice

3.67 Consultees who supported a single lease extension right requiring leaseholders to both extend their lease and extinguish their ground rent included some professional representative bodies, some leaseholder representative bodies, various commercial freeholders, law firms and surveyors' firms, and a considerable number of self-identified leaseholders and other individuals.

3.68 Many of these consultees presented arguments as to why each of the additional possible choices on which we consulted are not desirable. These points are discussed further below. However, others made more general arguments in favour of restricting leaseholders to a uniform statutory lease extension right.

3.69 In the first place, several consultees suggested that there is likely to be limited demand for a right purely to extend a lease, or only to extinguish ground rent. William Stansfield wrote, "I should think that most leaseholders would want to do both in nearly all cases".

3.70 More significantly, though, a large number of leaseholder representative bodies and self-identified leaseholders expressed serious concerns that the availability of different lease extension options was a level of complexity too far, which had the potential to result in poorly-informed leaseholders being "exploited" or "scammed" by unscrupulous landlords. Concerns were raised that leaseholders may not appreciate the full implications of their choice and may opt for what appears to be a good option in the short-term, but with detrimental consequences in the long term. As Alison Rowlands, a leaseholder, put it:

> Please keep things easy. Leaseholders do not wish for a complicated system whereby decisions they make may penalise them at a later time.

3.71 It was also suggested – by Jo Darbyshire (a leaseholder) and the National Leasehold Campaign, amongst others – that having a range of options is likely to lead to increased cost to leaseholders in obtaining professional advice to ensure they make an informed decision.

3.72 Finally, several consultees pointed out other potential negative consequences of providing a range of options, beyond those for the leaseholder seeking the lease extension. Leasehold Solutions and the Leasehold Knowledge Partnership ("LKP") expressed concern for potential buyers of leasehold interests, who may be affected by decisions made by a previous leaseholder who sought the lease extension solely to facilitate a sale of the property. A small number of consultees also argued that giving leaseholders the choices on which we consulted could, as Christopher Jessel (a solicitor) put it, result in a "messy mix of leases with different lengths at different rents" in a block, and make management more complicated.

Arguments for and against an additional right to extend the lease without changing the ground rent

3.73 A significant majority of freeholders and a slight majority of firms and professionals were in favour of giving leaseholders the right to extend their lease while maintaining the ground rent payable under the lease (whether alone, or together with a further right to extinguish the ground rent without extending the lease). Leaseholders and other individuals who supported this option in one form or another also outnumbered those who opposed it.

3.74 Some of these consultees simply seemed to consider that removing the ground rent under a lease is not an important consideration on a lease extension claim, and that the main motivation for leaseholders to seek a lease extension is to address the diminishing term of the lease.

3.75 However, the key argument advanced by those who supported such a right was that the continuation of ground rent can significantly reduce the premium payable for a lease extension. In some cases, this can make lease extensions affordable where otherwise they would not be, thus enabling more leaseholders to extend their leases. A number of commercial freeholders expressed this view in very strong terms, stating that many of their leaseholders opt to retain a ground rent. For example, Consensus Business Group (a landlord) told us that over the last 3 years, 70% of lease extensions in their portfolio (1,241 lease extensions) were completed “outside the Act” – that is, they were what are often called “voluntary” lease extensions – with a reduced premium being paid and ground rent retained or even increased. They claimed that the leaseholders in these cases were aware of the statutory route but preferred this option, and that there was no issue with selling and re-mortgaging provided the ground rent and any reviews are reasonable, “such as RPI linked”.

3.76 Other consultees (predominantly landlords) argued in favour of this option on the basis that ground rents are vitally important to landlords’ interests and the interests of those behind them (such as pension funds and insurers). It was also said that ground rent can be vital to ensure a landlord retains a real interest in a property so as to keep them actively involved in the building, or to provide necessary funds to cover any landlord’s costs which cannot be recovered from leaseholders.

3.77 By contrast, those who did not believe that leaseholders should have the right to extend their lease while retaining the ground rent argued that, generally speaking, ground rents in long leases should not exist as a matter of principle. For example, Philip Rainey QC stated:

> I believe that ground rents in long leases are wrong in principle. That is also Government policy, to ban new ground rents. Therefore, there should be no right for lessees to keep paying ground rent under new leases.

3.78 Some consultees also pointed to more practical difficulties with having such a right. Jo Darbyshire and the National Leasehold Campaign said:

> Another point to consider is the ongoing tightening of mortgage lending against leasehold properties. A leaseholder could extend at the existing ground rent only to find that their property cannot be remortgaged or sold where ground rent is high as a

percentage of property value. Reducing the ground rent to a nominal value ensures this cannot happen.

3.79 The Chartered Institute of Legal Executives ("CILEx"), meanwhile, queried the consistency of this option with Government's intention to bring forward legislation banning ground rents in the majority of new leases.[28]

Arguments for and against an additional right to extinguish the ground rent without extending the lease

3.80 Support for the introduction of a right to extinguish the ground rent under a lease without extending the lease (whether alone, or together with the right discussed immediately above) was widespread. Consultees who supported this option included various professional bodies, the majority of commercial freeholders, a majority of firms and individual professionals, and a significant majority of leaseholders and other individuals. Two members of our advisory group, Philip Rainey QC and Mark Chick, together with John Stephenson and Parthenia (surveyors), were in favour of a right only to extinguish ground rent, but not of a right only to extend the lease. It should be noted, however, that some consultees who supported the introduction of a right to extinguish ground rent without extending the term of the lease suggested that this right should be available only to leaseholders who have a sufficiently long remaining term on their lease that an extended term will be of no concern to them in the near future, or only to those with "onerous" ground rents.[29] Suggested minimum unexpired terms ranged from 125 years to 750 years.

3.81 Generally, consultees' reasoning for supporting a right to extinguish the ground rent without extending the lease focussed on the predicament of leaseholders who are subject to onerous or doubling ground rents in long or very long leases. Both professionals and leaseholders explained that these leaseholders have no need to extend their lease term (which may be as long as 999 years), but wish to buy out their ground rent before it becomes onerous, and/or to make their property saleable. It was said to be "pointless" to require them to claim an extended lease term purely to solve this problem.

3.82 Several consultees considered that, given the forthcoming ban on ground rents in the majority of new leases, the right to extinguish ground rent in an existing lease (which is very long and does not require extending) would help to avoid the creation of a "two-tier" market, consisting of leases with ground rent and those without. This argument was most persuasively made by a number of leaseholders from 1 West India Quay Residents' Association. Pointing out that media coverage of the ground rent scandal has led prospective buyers to scrutinise ground rent obligations much more closely, Antonio De Gouveia wrote:

> If Government is to cap or eliminate ground rents on new leases (which we think they will do), then there is even more reason for new legislation from the Law

---

28 Ministry of Housing, Communities and Local Government, *Implementing reforms to the leasehold system in England – Summary of consultation responses and Government response* (June 2019), paras 3.41 to 3.48: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/812827/190626_Consultation_Government_Response.pdf.

29 See para 3.91 below for discussion of what is meant by an "onerous" ground rent.

> Commission to enable all leaseholders in our building to buy out their ground rent (onerous or not). They can then avoid property devaluation. Property devaluation of existing leasehold stock carries the risk of major impacts to the economy more generally.
>
> Having the choice of buying a new-build flat with a peppercorn ground rent (zero financial value), or even having a £10 per annum clause, will mean older leases like ours – with meaningful ground rent terms – would become deeply unattractive and may even lead to banks refusing to remortgage against them.

3.83 Other consultees offered practical arguments in favour of this potential right. Professionals, including Philip Rainey QC and Jennifer Ellis, explained that a right simply to buy out the ground rent under a lease would leave little to argue about in respect of valuation, would avoid the need to involve the freeholder where a leaseholder's immediate landlord has a limited reversion, and could be carried out by means of a simple deed of variation rather than a deed of surrender and regrant or the grant of a new lease. Accordingly, the transactional costs incurred by a leaseholder who already has a very long lease which does not require to be extended would likely be low.

3.84 On the other hand, consultees who were opposed to a right to buy out ground rent without extending the lease queried whether there would be much financial advantage to leaseholders in pursuing this option. Nesbitt and Co (surveyors) observed that "the high escalating ground rents that lessees would most benefit from having extinguished occur in fairly long leases. As a consequence, the additional amount payable to extend the lease is not significant". It was also suggested that permitting this kind of claim could lead to leaseholders having to make lease extension claims twice, if they choose only to extinguish their ground rent and then come to require an extension to the term at a later date. Additionally, several consultees mentioned the potential negative impact that the elimination of ground rent may have on freeholders' willingness to take an active interest in the upkeep of their buildings.

3.85 Finally, CILEx pointed out that it is something of a misnomer to refer to a right purely to buy out one's ground rent as a lease extension. They feared that this may cause confusion amongst consumers and the general public.

Arguments in favour of maximum choice

3.86 As stated above, the most popular response to this question was that leaseholders should be able to choose between extending their lease only, extinguishing their ground rent only, or both. This was the case across all categories of consultees – freeholders, leaseholders, professional firms or individuals, and other individuals. Particularly strong support for maximising choice came from commercial freeholders and members of our advisory group.

3.87 Most of the substantive arguments made by consultees who supported giving leaseholders both choices have already been recited above. Otherwise, many consultees in this category simply acknowledged that different leaseholders will have different preferences, depending on their personal situation and the terms of their lease. As Damian Greenish put it:

There are reasonably compelling arguments in favour of offering this choice to consumers, particularly the option to extinguish the ground rent without extending the lease. This could be an attractive option for those leaseholders who have a lease for a term of sufficient length not to be concerned to extend it but are subject to a ground rent which they would wish to buy out. Similarly, there may be those leaseholders with a shorter term who are content to pay for the extension but are equally happy to continue to pay the rent under the existing lease for the residue of the existing term.

Richard Stacey, a surveyor, pointed out that "there is no standard lease in England and Wales", so flexibility would be beneficial.

3.88 Otherwise, a significant number of consultees (largely leaseholders and individuals) who made substantive comments simply expressed a more general view that choice or flexibility for leaseholders is in itself a good thing – for example, it was stated that leaseholders "should have options", or "should have more freedom". However, it should be noted that several consultees, while supporting maximum choice for leaseholders, did consider that care would need to be taken to ensure that leaseholders were not taken advantage of. Michael Kelly, himself a leaseholder, stated that offering choice "brings with it a higher burden of clear and simple communication from an impartial government backed party, that is demonstrably independent of the freehold circle".

Other points made by consultees

3.89 It is worth noting that a considerable number of consultees who responded to this question appeared to believe that the question was asking whether or not parties should be able to enter into "informal" or "voluntary" lease extensions under a revised enfranchisement regime, rather than whether leaseholders should have a range of statutory entitlements to choose from. Indeed, it seems that some of those who supported the existence of a right to extend a lease while retaining ground rent – several freeholders, in particular – did so on the assumption that otherwise there would be no ability for parties to agree a lease extension which retains a ground rent, whether within the new statutory scheme or outside it.

3.90 We asked a separate question about voluntary lease extensions in the Consultation Paper.[30] We discuss the responses to that question and make recommendations in relation to voluntary lease extensions in Chapter 14. Our discussion and recommendation below focus on whether leaseholders should have statutory rights to extend their lease only and extinguish their ground rent only, as well as the right recommended at paragraph 3.36 above to have a new, extended lease at a peppercorn ground rent.

Discussion and recommendations for reform

3.91 As will be clear from the analysis above, consultation responses to this question revealed no clear consensus. The most popular answer given by both leaseholders and freeholders was that leaseholders should be able to choose between extending their lease only, extinguishing their ground rent only, or both. But, on the other hand, a

[30] Consultation Question 7, paras 4.98 to 4.99.

significant proportion of consultees also felt that the statutory lease extension right should contain no element of choice. In reaching our view on whether each of the suggested possible rights should exist, we have carefully considered the arguments presented by all consultees.

Should there be a right to extend the lease without changing the ground rent?

3.92 On the current valuation methodology, the cost of compensating the landlord for the loss of ground rent over the remaining term of the existing lease (known as "the term") will often make up a significant proportion of the premium payable for a lease extension. The main argument made by consultees who supported the introduction of a right to extend a lease while retaining the current ground rent was therefore the potential to make lease extension claims considerably cheaper – and thus accessible to more leaseholders – by eliminating this element of the premium.

3.93 This argument carries particular weight in relation to those leaseholders who are subject to what have become known as "onerous" ground rents – that is, an annual ground rent which exceeds 0.1% of the freehold value of the property.[31] We have explained in some detail in the Valuation Report how, on current valuation methodology, a high or escalating ground rent results in the "term" element of the enfranchisement premium being very significantly higher than for leaseholders with lower, fixed or more moderate ground rents.[32] These leaseholders are therefore more likely to find themselves in difficulty if they need to extend the term of their lease – whether simply to obtain long-term security in their home, or to enable them to sell or re-mortgage the lease. They may be unable to afford to do so because the current requirement to buy out the ground rent liability as part of the lease extension claim simply puts the premium out of reach.

3.94 We agree that it is desirable to ensure that as many leaseholders as possible can afford to extend their leases and thereby acquire long-term security in their homes. However, we do not think that it is appropriate, generally speaking, for ground rents to remain when a lease is extended. Since 1993, it has been the case that when a lease of a flat is extended, the rent under the extended lease will be reduced to a peppercorn. Further, Government has announced that it will ban ground rents of any

---

31 There is no set definition of an onerous ground rent, though it seems to have become generally accepted in the market (reflecting a view that has conventionally been held by valuers for many years) that a ground rent above 0.1% of the property's freehold value is onerous. This view partially stems from the Tribunal's decision in *Millard Investments Ltd v Cadogan* (LON/LVT/1756/04), but has been widely accepted. The Nationwide Building Society's lending policy is not to lend on properties with a ground rent above 0.1% of the value of the property (see CP, para 15.65). For a summary of some of the arguments about what amounts to an onerous ground rent, see *Leasehold Reform, Report of the Housing, Communities and Local Government Committee* (March 2019) HC 1468, paras 88 to 91, at https://publications.parliament.uk/pa/cm201719/cmselect/cmcomloc/1468/1468.pdf. The Tribunal's decision in *Roberts v Fernandez* (LRA/14/2014) suggested that a ground rent above 0.21% of the property value was onerous. Ground rents which double frequently (e.g. every 10 years) are generally regarded as being onerous, and have been subject to Government intervention: see https://www.gov.uk/government/publications/leaseholder-pledge/public-pledge-for-leaseholders.

32 See the Valuation Report at paras 2.12 to 2.27.

financial value in the majority of future leases.[33] While Government has indicated that ground rents will be permitted to remain within "voluntary" lease extensions agreed outside of the statutory scheme (for the duration of the unexpired term of the existing lease),[34] the general policy of opposition to ground rents in long leases is clear. Creating a statutory right to extend a lease but keep the ground rent would be inconsistent with this policy. We do not, therefore, recommend the introduction of a general right for all leaseholders to extend their leases but retain a ground rent within the extended lease.

3.95 As for those leaseholders with onerous ground rents, our recommendation depends on what Government decides to do in response to our Valuation Report. In that Report, one of the options for reducing premiums which we put forward was the introduction of a cap on the amount of annual ground rent that may be taken into account when calculating the "term" element of enfranchisement premiums. We suggested that only ground rent up to 0.1% of the freehold value of the property – the threshold beyond which rent is considered onerous – should be taken into account. Leaseholders with ground rents above this level would thereby see a reduction in the premium which they would otherwise have to pay for a lease extension, while still being able to remove the obligation to pay ground rent going forward.[35]

3.96 If this option were to be taken forward by Government, leaseholders with onerous ground rents would be able to buy out their ground rent as part of a lease extension claim, like any other leaseholder, but the cost of doing so would be significantly reduced. If, however, this option is not implemented, we are of the view that the ability to retain the current ground rent following a lease extension should be available to these leaseholders, so that they do not have to pay the "term" element of the usual enfranchisement premium. Leaseholders with onerous ground rents may want and need to extend a lease which is running down, but be unable to do so because buying out the ground rent is unaffordable. A right to simply extend the lease while retaining the current ground rent would provide a pragmatic solution to this particular problem, enabling these leaseholders to obtain long-term security in their homes in the immediate term, perhaps with a view to buying out the ground rent at a later date.

3.97 We therefore recommend that, in the event the treatment of ground rent in calculating enfranchisement premiums is not subject to the cap we have suggested in the Valuation Report, leaseholders with an onerous ground rent should be entitled to extend the term of their lease, but maintain the current ground rent within the new, extended lease.

3.98 It is important to clarify exactly how we envisage this recommendation should operate.

---

33 Ministry of Housing, Communities and Local Government, *Tackling unfair practices in the leasehold market – Summary of consultation responses and Government response* (December 2017), paras 67 to 72: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/670204/Tackling_Unfair_Practices_-_gov_response.pdf.

34 Ministry of Housing, Communities and Local Government, *Implementing reforms to the leasehold system in England – Summary of consultation responses and Government response* (June 2019), paras 3.41 to 3.48: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/812827/190626_Consultation_Government_Response.pdf

35 See the Valuation Report, paras 6.144 to 6.154.

(1) First, by "current ground rent", what we mean is that the ground rent provisions of the existing lease should be replicated exactly in the lease extension – whether these provide for a fixed ground rent, or one which varies in some way over time. More specifically:

(a) It should not be possible within a statutory lease extension for the parties instead to include provision for a higher ground rent to be paid. It is true that such provision would enable a leaseholder to reduce the premium payable for a lease extension even further – because the landlord would be gaining the right to receive an increased income in the future as part of the transaction. But we consider that to permit ground rents not only to be retained but in fact to be *increased* would be a step too far. There is a significant difference between permitting the continuation of an onerous ground rent that now exists, in order to reduce the leaseholder's lease extension premium, and permitting an even higher ground rent to be negotiated in its place. This option might also offer scope for leaseholders who find the leasehold system difficult to navigate (and who do not always receive good quality legal advice when agreeing lease extensions) to be manipulated by better-informed freeholders who wish to enhance their already lucrative income stream further.

(b) Nor should it be possible for the parties to replace the current ground rent provisions with provision for a lower ground rent instead (which would still result in some saving on the premium payable if the ground rent were to be bought out entirely). Bearing in mind comments from leaseholders and their representative bodies that a choice of different lease extension rights may pose difficulties for less well-informed leaseholders, we think that this option is likely to introduce an undesirable level of complexity. Indeed, in some cases (such as where a ground rent provision is couched in terms of RPI or based on some other formula), it may not even be straightforward to work out whether an alternative ground rent provision would result in a higher or lower ground rent being payable.

(2) Second, we consider that the current ground rent provisions should apply only for the duration of the unexpired term of the original lease. Once this has expired, and the new lease has entered the extended term, a peppercorn ground rent should apply. We have adopted this approach for three reasons.

(a) First, we are suggesting that an onerous ground rent can be carried forward to the extended lease only to assist leaseholders who could not otherwise afford to extend their lease *as a result of the onerous ground rent*. To achieve that policy aim, it is only necessary to carry forward the existing ground rent obligation for the duration of the original term. We are not seeking to facilitate the continuation of ground rents generally. So, beyond the limited aim of this measure, the same policy considerations apply as for all lease extension claims: the ground rent should be reduced to a peppercorn for the duration of the extended term.

(b) Second, in so far as an enfranchisement premium compensates the landlord for the loss of the reversion (that is, for the delaying by 90 years

of the landlord's right to recover possession), the calculation is done on the assumption that the landlord loses *all* of their reversionary value for the duration of the extension. If a ground rent were to be included for the duration of the extended term, the landlord would *retain* some reversionary value during the extended term (namely the right to receive the ground rent). In theory, including that ground rent obligation could slightly reduce the premium. But lease extensions under the 1993 Act do not currently allow landlords to retain any value during the extended term by including ground rent obligations, and to allow such ground rent obligations to be created would be contrary to the general policy aim of removing ground rents from leases on lease extensions.

(c) Third, and in any event, there would be practical difficulties in determining what level the ground rent should be during the extended term – the landlord might suggest one figure, and the leaseholder might suggest another. It is difficult to identify any basis on which the level of the ground rent could be set, or (if necessary) determined by the Tribunal.

Should there be a right to extinguish ground rent only?

3.99 As we explain above, those leaseholders who are subject to an onerous ground rent can be faced with an unaffordable premium if they need to extend the term of their lease. But even where a lease is already very long, so that an extension of the term is not required, the ground rent itself can cause other problems for leaseholders. A ground rent which is onerous, or set to become onerous in the future, may well make a lease unsaleable or unmortgageable. And even a ground rent which is not considered onerous according to the accepted definition[36] – perhaps because the property is of high value – may still amount to a significant present or future financial burden. Leaseholders facing these difficulties will, if their lease is sufficiently long, be much more interested in "buying out" their ground rent than in extending the term of their lease.

3.100 Consultees are right to observe that, where a lease is already very long, the portion of the normal lease extension premium which relates to extending the term of the lease is likely to be relatively minimal. Being able simply to buy out the ground rent is therefore unlikely to be considerably cheaper than proceeding with a standard lease extension combining both elements. However, we do not consider that this is a reason to insist that all leaseholders who wish to escape from the ground rent provisions of their lease should be forced to obtain an extension to the term of their lease which they do not require – even if this adds little or nothing to the premium payable. Leaseholders have made it clear to us that they are not interested in having an extension to the term where this is not needed, and consultees of all types have expressed strong support for a separate right purely to buy out ground rent.

3.101 Indeed, there are likely to be certain practical benefits to be gained from dispensing with an extension of the lease term in appropriate cases. As consultees have pointed out, valuation ought to be a simple process where all that needs to be done is the capitalisation of the ground rent (especially if Government were to adopt a valuation methodology which uses prescribed rates). There will be no need to involve the

[36] See para 3.93 above for discussion of what is meant by an onerous ground rent.

freeholder in cases where the leaseholder's immediate landlord is themselves a lessee with an insufficient interest to grant a 990-year extension to the term – thus entirely avoiding the concerns raised by Philip Rainey QC in relation to the introduction of very long lease extensions.[37] And it may also be simpler and quicker to enter into a straightforward deed of variation to vary the ground rent than the deed of surrender and regrant which is required to extend the term of a lease. All of these factors mean that the costs to a leaseholder of buying out their ground rent alone are likely to be lower than a claim to also extend the term of their lease.

3.102 Further, we are mindful that if our recommendation at paragraph 3.97 above is adopted (in the event that Government chooses not to cap the ground rent taken into account on enfranchisement), so that leaseholders with onerous ground rents are able to extend their leases without buying out the ground rent, it would be desirable for those who take up this option to be able to buy out their ground rent subsequently, when they are in a financial position to do so.

3.103 For these reasons, we think that a right simply to extinguish ground rent would be very useful for certain leaseholders. We are not concerned about the possibility that the loss of ground rent income will cause freeholders to become uninterested in the maintenance of their buildings, as some consultees have suggested. The risk of this is, of course, the same as with the standard, dual-function lease extension right which exists under the current law and which we recommend should continue at paragraph 3.36 above. However, we are concerned to ensure that the introduction of a right to extinguish ground rent does not lead to leaseholders routinely having to make two claims against their landlord in relatively quick succession – once to extinguish their ground rent, and later to extend the term. As well as the inconvenience which would result for both parties, and the possibility of leaseholders' choices being influenced by landlords, this is likely to result in higher transactional costs than if both elements of the normal lease extension right were pursued in one claim.

3.104 Accordingly, we recommend that a right to extinguish the ground rent payable under the lease without extending the term of the lease should only be available to leaseholders whose lease already has a sufficiently long remaining term, such that an extension of the term is unnecessary. An extension of the term would be unnecessary if the leaseholder would have no need for an extended term for a long time, and if the price of extending the term will not start to increase significantly for a long time. Using examples from our Valuation Report, for a property worth £250,000, the premium in respect of the extension of the lease (the "reversion") would be:

(1) £3, if the lease had 241 years unexpired;

(2) £23, if the lease had 200 years unexpired;

(3) £237, if the lease had 150 years unexpired;

(4) £2,303, if the lease had 101 years unexpired; and

---

[37] See para 3.47 above.

(5) £7,349, if the lease had 76 years unexpired.[38]

3.105 The shorter the unexpired term, the more expensive the premium for the reversion becomes – but at the same time, the more important it is for the leaseholder to extend the lease. Indeed, if the extension is delayed any further, the premium will increase even more rapidly. The shorter the unexpired term, therefore, the greater the likelihood of leaseholders disadvantaging themselves if they only extinguish the ground rent and do not extend the term of the lease. In order to prevent leaseholders from suffering that disadvantage, we think that the right to extinguish the ground rent, without also extending the lease at the same time, should only be available to leaseholders with a very long lease – and we would suggest setting the threshold at 250 years, because the reversion is of negligible value at that lease length. If, however, Government wished to make this option available to more leaseholders, then the threshold could be set at a lower level.

3.106 We also recommend that, should the cap on ground rents which we have put forward as an option in our Valuation Report be taken forward by Government in enfranchisement claims generally, that cap (and any exceptions thereto) must equally apply to the calculation of any premium payable pursuant to the exercise of this right. Otherwise, it would most likely be cheaper for a leaseholder with an onerous ground rent to exercise the full, standard lease extension right than to simply buy out their ground rent.

3.107 We acknowledge that the right to buy out ground rent, if introduced, would essentially amount to an entirely new statutory right for leaseholders. As CILEx pointed out, it cannot really be described as a kind of lease extension right, since it does not involve any extension of the lease term. However, while true, this does not in our view amount to a reason not to provide leaseholders with this option, even if it might be better framed as an additional right which is distinct from but complementary to the normal lease extension right. For many years now, the reduction of ground rent to a peppercorn has been an important outcome for owners of flats claiming a lease extension – often, just as important to the leaseholder as the extension of the term. Extinguishing ground rent is therefore, to many, a key function of the law of enfranchisement, even though it does not relate to the leaseholder's tenure in the property. As such, we consider that a right to buy out ground rent – a right which leaseholders have made clear they want – can usefully form part of a package of enfranchisement rights available to those who meet the relevant qualification criteria, designed to enhance their overall security in their homes.

Conclusion

3.108 We recommend that leaseholders who already have very long leases should be entitled to extinguish the ground rent payable under their lease without also extending the term of the lease. We also recommend that, if the amount of ground rent to be taken into account in calculating enfranchisement premiums is not to be capped,

---

[38] See the Valuation Report, para 2.54 (see the value of "the reversion" for Houses 1, 2, 3 and 4, which have unexpired terms of 101, 76, 241 and 241 years respectively), and para 7.17 (for the valuation of the reversion for an equivalent house with 150 or 200 years unexpired).

leaseholders with onerous ground rents should be entitled to extend the term of their lease while maintaining that ground rent.

3.109 That said, we do not anticipate that either of these rights will necessarily be very widely used. They are pragmatic solutions which we put forward in order to help certain leaseholders with specific, problematic circumstances. In the majority of cases, however, we would expect that leaseholders will wish to both extend the term of their lease and eliminate their ground rent. Indeed, we remain of the view that doing exactly that is the "gold standard", which is to be encouraged where possible.

3.110 Relatedly, we acknowledge the concern raised by many consultees that introducing any element of choice where enfranchisement rights are concerned might in fact work to the detriment of leaseholders. We know that leaseholders will not always be well-advised or have a full understanding of the law, their options and the respective consequences of those options. If our recommendations are accepted, we suggest that it will be important for Government to ensure that information about the choices available to leaseholders is made readily available, free of charge, and in a manner which is accessible to the ordinary homeowner.

3.111 We also acknowledge that these recommendations are in large part designed to reduce lease extension premiums payable by leaseholders by ensuring that the leaseholder pays only the "term" (that is, buying out the ground rent) or the "reversion" (that is, extending the lease term) portion of a normal lease extension premium, not both. But of course, this ignores the fact that, at present, there can be other elements to a lease extension premium – such as "marriage value", or "development value".[39] In the Valuation Report, we have put forward options for reform of the current valuation methodology which could see neither of these types of value continue to be included in lease extension premiums. But if, on the other hand, Government's decisions in respect of valuation mean that these aspects of current valuation methodology will continue to play a part in valuations in the future, thought will need to be given to how they could be accounted for where, under our recommendations in this section, only one of the two key elements of the standard lease extension right is pursued.

[39] For an explanation of "marriage value", see the Valuation Report, para 2.40. For an explanation of "development value", see the Valuation Report, para 2.58(1).

Recommendation 3.

3.112 We recommend that, in addition to the right to obtain a new, extended lease at a peppercorn ground rent:

(1) (if the treatment of ground rent in calculating enfranchisement premiums is not subject to a cap) leaseholders who have a lease with an "onerous" ground rent (that is, an annual ground rent which exceeds 0.1% of the freehold value of the property) should be entitled to extend the term of their lease (on payment of a premium), but maintain the current ground rent provisions within the extended lease for the duration of the unexpired term of the original lease; and

(2) leaseholders who have a lease with a very long remaining term (we suggest 250 years, but the threshold could be set lower if Government wished to do so) should be entitled to extinguish the ground rent payable under the lease (on payment of a premium) without extending the term of the lease.

PREMISES TO BE INCLUDED IN A LEASE EXTENSION

3.113 As set out at paragraph 3.15 above, a number of criticisms have been made of the current provisions governing the premises which will be included in a lease extension. In the Consultation Paper, we therefore provisionally proposed a different way forward. We suggested that a leaseholder making a lease extension claim should have a right to a lease extension of the whole of the premises included under his or her existing lease. The character of the land, as well as whether it is within the curtilage of the property, should not matter. Additionally, we suggested that all of the rights granted by an existing lease over land that is not included within the premises let under the lease should continue under the terms of the lease extension where it is possible to do so.[40] We consider this proposal in more detail later in this chapter.[41] We suggested that these proposals would make it easier for leaseholders to understand what they are entitled to claim as part of a lease extension, reducing the likelihood of disputes and related costs on this issue.

3.114 In respect of the two provisos referred to at paragraph 3.13 above, we provisionally proposed that the second – in relation to excluding premises on the basis that they lie above or below other premises in which the landlord has an interest – should not apply in lease extension cases.[42] However, we suggested that the first proviso – in relation to including premises which were originally granted to the leaseholder but subsequently assigned to another – should continue to apply. We argued that the

---

40 See CP, para 4.48.

41 See paras 3.241 to 3.300 below.

42 Under the current law, the proviso is expressed to apply in the context of both lease extension claims and claims to acquire the freehold of a house under the 1967 Act. We discuss its application in the context of individual freehold acquisition claims in Ch 4 below, at paras 4.10 to 4.11, and 4.31 to 4.37.

landlord should make the request to include such premises in the Response Notice,[43] but that there should not continue to be a strict two-month time limit for raising the issue.

3.115 We asked consultees whether they agreed with our general provisional proposal in relation to the premises to be included in a lease extension, as well as whether they supported our suggested approaches to the two provisos.[44]

Consultees' views

3.116 A sizeable majority of consultees agreed with our provisional proposal that the premises included within a lease extension claim should, as a starting point, match those let under the current lease. Many argued that this approach would "reduce the opportunity for argument as to the extent of the 'curtilage'",[45] and would make the process "fairer" for leaseholders by preventing "game playing from freeholders".[46]

3.117 Only a tiny minority of consultees disagreed with this element of our provisional proposal. Some did so on the basis that the current law in fact works well in the vast majority of cases, contrary to the view we expressed in the Consultation Paper. However, the primary concern of these consultees was that the suggested approach might allow a leaseholder to include premises in a claim which have nothing to do with the residential premises by virtue of which he or she has enfranchisement rights. The British Property Federation summarised this criticism as follows.

> The consequence of this proposal is that once a leaseholder has established a right to a new lease of a residential unit, that right is effectively extended to all the land included in the lease, regardless of its nature and extent and whether it has any connection with the residential units. If, for example a leaseholder has a lease of a building comprising offices with a top floor flat, then this proposal suggests that, having established a right to a new lease of the flat, the leaseholder can include within that lease all the offices. That cannot be right.

3.118 Another consultee, Philip Rainey QC, gave an example of the potential impact of this proposal.

> Grosvenor Estate Belgravia has a lease of Belgravia (the so-called "escalator lease", see the *Klaasmeyer* case). If the proposal were adopted, then if a flat or house fell into the possession of Grosvenor Estate Belgravia, it could claim a new lease of that flat or house – and all of Belgravia too! The same issue would arise in the case of any head-lease.

3.119 Many consultees supported our suggestion to preserve the ability of a landlord to request that premises which were originally granted to the leaseholder but subsequently assigned to another should be included in the lease extension: the first of the two provisos which we discussed in the Consultation Paper. Some, however,

---

43 Response Notices are discussed in Ch 9 below, at paras 9.5 to 9.38.

44 See CP, Consultation Question 4, para 4.52.

45 Birmingham Law Society.

46 LKP.

caveated their support in relation to one primary feature of our provisional proposal: the suggested removal of a strict time limit for the landlord to make the request.

3.120 In the Consultation Paper, we suggested that the Response Notice should not be a final deadline for landlords to raise this issue; instead, a landlord should be able to make the request at any time, subject to the requirement to obtain Tribunal consent in certain circumstances (as well as the Tribunal's power to make a wasted costs order where a party behaves unreasonably).[47] Numerous consultees were concerned that this change might open up an avenue for those landlords to create a "delaying/complicating/costly diversion" in the lease extension process.[48] There was, therefore, considerable support for continuing to impose a time limit on these landlords, with, for example, the PBA writing as follows.

> The idea that there would be no long stop date or deadline for a proposal to be made within a lease extension process, nor any consequences of a late proposal would lead to a lot of uncertainty between the parties. It may also lead to tactical late proposals.

3.121 A few consultees supported actively restricting the ability of a landlord to make a request after the Response Notice has been served. For instance, the PBA wrote:

> it is suggested that provision should be for any proposal to be included in a Landlord's Response notice unless otherwise agreed by the parties. It should also be made clear that any such proposal cannot be introduced once all the terms including price are agreed or determined. It would be unnecessarily complex and confusing to have a small addition treated as part of the statutory lease extension process after that was concluded. The parties can of course just complete a deed of variation as a standalone subsequent addition.

3.122 Other consultees raised narrower concerns with this proviso: for example, about the scope of the land which a landlord could request be included in a lease extension claim. Several consultees wrote that the landlord's ability to request that additional premises be included in the lease extension should not extend to land that was not originally included in the lease if the leaseholder does not want it. Moreover, some consultees expressed concern that a leaseholder should not be compelled to agree to this request by a landlord. These concerns were both reflected in our provisional proposal, which restricted the landlord's ability to request other premises be included to premises which were originally granted to but no longer held by the leaseholder (perhaps because the premises were subsequently assigned to another person). Furthermore, these other premises would only be included in the lease extension if the leaseholder agrees, or if the Tribunal is satisfied that it would be unreasonable to require the landlord to retain them without the house and associated premises.

3.123 A substantial majority of consultees agreed with the third and final part of our provisional proposal, relating to the second proviso: that, for lease extensions, landlords should not be able to request to exclude premises on the basis that it lies below or above other premises in which the landlord has an interest. Most gave no

---

47 See CP, para 4.50 and n 186.

48 Robert Nix, a leaseholder.

reasons for their agreement, although some made specific additional comments on this point. Ian Young contended that there may need to be exceptions to this in relation to housing associations and Notting Hill Genesis, a housing association, gave an example of this.

> … it might be desirable to negotiate with the leaseholder to retake some part of the premises for the better management of the property as a whole such as a balcony or equipment maintenance. Provided this can be fairly negotiated between the parties it should be of benefit to both the leaseholder and the landlord.

3.124 A small minority of consultees, however, disagreed with this part of our provisional proposal. The Apex Housing Group, managing agents, for example, contended that:

> a landlord should have the ability to choose from a prescribed list of reasons for why parts of the premises let under a leaseholder's existing lease should be excluded or amended from a lease extension, such as for parts of the premises that fall outside the flat. This is to ensure that future development is not hindered by demising common areas or rooftop spaces to tenants when such areas could benefit the estate for development purposes.

Discussion and recommendations for reform

The premises included in the lease

3.125 To begin with, we consider the first part of the provisional proposal we made in the Consultation Paper, relating to the premises that should be included in a lease extension. The starting point we suggested was that the premises included in the lease extension should mirror the premises let under the existing lease. This approach was designed to be both certain and simple. We also wished to move away, if possible, from the current law's use of legal terminology such as "curtilage".

3.126 However, the criticisms of our suggested approach made by a small number of consultees and referred to above are compelling. Although our provisional proposal would, we think, have worked properly in the majority of simple cases (involving, say, a house and a garden, or a flat and a parking space), it would equally have caused significant problems in other situations.

3.127 Take, for instance, a long leaseholder of a large office block which contains a single residential flat, in which he or she lives. Under our scheme, we intend that the leaseholder should be able to obtain a lease extension over the flat, as it is his or her home. However, as a result of our provisional proposal, as was rightly pointed out by some consultees, the leaseholder's lease extension would cover the entire building. The mere fact that the leaseholder qualifies in respect of a single flat would enable him or her to obtain a lease extension over all the land demised under the current lease (including the offices), even where it is not properly related to the flat.

3.128 Another example of this would involve a leaseholder of a house and garden situated in and let with extensive grounds and woodland. In our view, the lease extension should include the house and the garden, but should not extend to the rest of the land.

Under our provisional proposal as set out in the Consultation Paper, however, the lease extension would likely cover all the surrounding land.[49]

3.129 We think, therefore, that our provisional proposal in the Consultation Paper, while attractive in some ways, has the potential to produce some undesirable results. Some form of limitation on the premises to be included in a lease extension should be preserved in our new scheme.

3.130 As we set out in Chapter 6, the scope of the unified lease extension right will vary depending on which qualifying criteria are met.

(1) The first question in our new scheme of qualifying criteria is whether a person has a long lease of a residential unit (or of more than one residential unit). If so, he or she has the right to a lease extension of that residential unit (or those residential units).[50]

(2) In addition, if he or she meets the additional qualifying criteria so as to qualify for an individual freehold acquisition of the building or part of the building in which the residential unit is situated, the leaseholder can obtain a lease extension of the whole building or part of the building.[51]

3.131 We consider that, in both cases, whether the lease extension right relates to one or more residential units or to an entire building, the lease extension should also include certain premises associated with the unit, units or building (as appropriate). For instance, in the case of a leasehold house let with a garden and a garage the leaseholder should be able to extend the lease of the house, garden and garage. Equally, in the case of a flat, let with a car parking space in the next-door car park, the leaseholder should be able to extend the lease of the flat and the car parking space.

3.132 In order to achieve these outcomes, our scheme needs to make provision for certain associated premises to be included in a lease extension claim along with the residential unit or units, or, as the case may be, the building or part of the building. What, then, should be included within the scope of "associated premises"?

3.133 As we explain above, the current law provides that premises include "any garage, outhouse, garden, yard and appurtenances" that are let to the leaseholder with the house or flat. In the case of flats, there is the additional condition that the premises be "belonging to, or usually enjoyed with, the flat". By virtue of case law, there is an additional requirement for lease extensions of houses that the additional premises be within the "curtilage" of the house.[52]

---

49 In both of these examples, it is possible that the "ancillary use" provision would apply, as the residential unit might be considered to be "ancillary" to other premises, and therefore no enfranchisement rights would attach: see Ch 6 at paras 6.83 to 6.86 onwards. However, that provision is narrow and rarely applicable.

50 See Ch 6, at paras 6.22 to 6.104.

51 See Ch 6, at paras 6.132 to 6.138.

52 The concept of the "curtilage" of a building was recently considered in detail in *Hampshire CC v Secretary of State for the Environment, Food and Rural Affairs* [2020] EWHC 959 (Admin), [2020] 4 WLUK 229, at [71] onwards.

3.134 We continue to think that terms such as “appurtenance” and “curtilage” are unclear and may cause confusion in *some* cases. As we explain below, we will continue to look for ways in which this language could be clarified or simplified. However, many of the consultation responses we received expressed the view – contrary to our view as set out in the Consultation Paper – that, in the vast majority of situations, these provisions do not cause any issues; we were told that difficulty only arises in a small number of borderline cases. Moreover, we think that the current law, while using difficult language, does succeed in most cases in identifying the premises which should be included in a lease extension claim: land and features which are genuinely associated with the house or flat over which the lease extension is being sought.

3.135 Consequently, we now consider that the best starting point for determining which associated premises should be included in a lease extension claim should be the current law, as adapted to our new scheme of qualifying criteria, as follows.

(1) Where the lease extension is of a residential unit or residential units in a building, the extended lease should include any garage, outhouse, garden, yard and appurtenance let to the leaseholder with the residential unit or residential units. These additional premises should be within the curtilage of the building or self-contained part of the building in which the residential unit or residential units are located. This condition makes allowance for the fact that a single residential unit in a building with multiple units (for instance, a traditional flat) does not truly have a “curtilage” in the way that a house does. However, there should, we think, be some requirement that the additional premises be associated with the building in which the residential unit is located. A car parking space in the car park adjoining a block of residential units (and therefore within its curtilage) should be included in the lease extension claim of the residential unit with which it is let. However, the fields further down the road, let with the residential unit (but clearly outside the curtilage of the block), should not be included; this is more akin to the example of a house with a garden (which should be included) and extensive fields and woodland (which should not), which we set out above.

(2) Where the lease extension is of a building or a self-contained part of a building, the extended lease should include any garage, outhouse, garden, yard and appurtenance let to the leaseholder with the building or self-contained part of the building. These additional premises should again be within the curtilage of the building or self-contained part of the building.

3.136 We intend to explore with Parliamentary Counsel whether it would be possible to alter or improve the language of the current law. In particular, we will look at whether certain terms, such as “appurtenances”, can be updated so as to be more easily understood and applied without the need for legal advice. Furthermore, we will examine whether it would be desirable for the legislation to set out how the “curtilage” of a building is to be determined. In doing so, we will explore whether this requirement should be somewhat relaxed, in line with consultees’ support for the less restrictive approach to the question of which premises can be included in a lease extension that

we provisionally proposed in the Consultation Paper.[53] We will also consider whether the related recommendation we made in our Planning Law in Wales report can be adopted (with suitable adaptations) for the purposes of enfranchisement legislation. In that report, we recommended that the relevant Bill should include a provision to the effect that:

> the curtilage of a building is the land closely associated with it, and that in determining whether a structure is within the "curtilage" of a building, the factors to be considered include:
>
> (a) the physical 'layout' of the building, the structure, and the surrounding buildings and land;
>
> (b) the ownership, past and present, of the building and the structure; and
>
> (c) their use and function, past and present.[54]

3.137 In the vast majority of cases, this change from the approach provisionally proposed in the Consultation Paper will make no difference to the outcome of lease extension claims. In the simple (and common) cases including those referred to at paragraph 3.131 above, the outcome of the claim will be the same. The lease extension of a house will generally include its garden, and the lease extension of a flat will generally include its car parking space. The move away from our provisional proposal will affect leaseholders of larger buildings which contain a flat, as well as leaseholders of houses which have extensive grounds beyond those closely associated with the houses. In those cases, we think it right that the lease extension includes the flat or the house, and the premises that are truly associated with them; but, in the case of the flat, it should not include the entire head lease, nor, in the case of the house, should it include the fields and woodlands extending far beyond the garden.[55]

Requesting the inclusion of additional premises

3.138 We now turn to the second part of our provisional proposal in the Consultation Paper: the proviso that enables a landlord to request that "other premises" that were initially let to the leaseholder but subsequently assigned to another should be included in the lease extension. This suggestion was widely supported by consultees. There were a couple of minor concerns raised by consultees (that the landlord's ability to request that other premises be included be limited to specific types of premises, and that the leaseholder should not be forced to agree to the inclusion of these other premises), which were addressed by our provisional proposal itself.[56] As we mentioned above, however, numerous consultees raised one major concern with this proviso: the

---

53 It may be desirable, for instance, for a small meadow over the road from (but let with) a house and garden to be included in the lease extension of the house and garden, even though, at present, this might be prevented by the "curtilage" requirement. However, any relaxation of this requirement would not be intended to catch some of the more extreme examples such as those involving extensive grounds and woodland: see para 3.128 above.

54 Planning Law in Wales (2018) Law Com No 383. Recommendation 18-16, at para 18.99.

55 See paras 3.127 and 3.128 above.

56 See para 3.122 above.

absence of a time limit on landlords who wish to make a request to include other premises.

3.139 The basis of this concern seemed to be that the absence of a strict time limit would enable landlords to delay the lease extension process in a tactical and undesirable manner. For that reason, several consultees supported requiring the landlord to make the request in his or her Response Notice, or otherwise preserving some applicable strict time limit to these cases.

3.140 However, our recommended reforms to the procedure which must be followed in carrying out an enfranchisement claim pull in the opposite direction to retaining a strict time limit in this context. In Chapter 9 we recommended that a Response Notice should state whether the landlord wishes for 'other land' to be included in the lease extension.[57] This requirement is the starting point: we expect that the landlord would make the request at this early stage. However, we are not proposing that a failure to include the request should render the Response Notice invalid – nor that the notice should be incapable of amendment once it has been served.[58]

3.141 As we explain in Chapter 9, we do not think that failing to serve a Response Notice should preclude a landlord from applying to take part in a claim before a determination has been made, or to set aside a determination which has been reached in his or her absence.[59] Against the background of these recommended reforms to the procedural regime, it would be surprising – and arguably inconsistent – to require a landlord to give notice whether he or she wishes to include other premises in the lease extension within a certain time period following service of the Claim Notice. Instead, we remain of the view that the landlord:

(1) should, in usual circumstances, make the request in his or her Response Notice; but

(2) should not be precluded from raising the point at a later stage in accordance with our recommendations for amendment of notices in Chapter 9.[60]

3.142 We note that this approach aligns with our recommended approach to other matters which need to be included in the Response Notice, such as a landlord requesting leasebacks of certain parts of premises on a collective freehold acquisition claim.[61] Moreover, we reiterate that the Tribunal has the power where a party has behaved

---

57 See paras 9.21 to 9.38 below.

58 We recommend that Response Notices should only be rendered invalid in very limited circumstances: where the prescribed form has not been used, it fails to make clear (to a reasonable recipient) whether the claim is admitted or denied (and the basis for any denial of the claim, if relevant) or the landlord's address for service, or it has not been signed: see Recommendation 68, at paras 9.63 to 9.69 below.

59 See paras 9.110 to 9.151.

60 See paras 9.52 to 9.69, where we recommend that the parties should be able to agree to amend (or apply to the Tribunal for amendment of) a notice which contains a defect that does not affect the validity of the notice.

61 See paras 5.152 to 5.172 and para 9.35 below.

unreasonably (which may be relevant in cases of late requests without good reason) to make an order that the party should pay the other party's costs.[62]

Requesting the exclusion of additional premises

3.143 The final part of our provisional proposal in the Consultation Paper, regarding the removal of the ability of a landlord to ask to exclude certain premises from the lease extension, was almost universally supported by those consultees who expressed a view on the point. We note that the premises to which this proviso would apply are very narrow: it would only apply to premises (included within the leaseholder's lease) which lie below or above other premises in which the landlord has an interest. The main reason for this proviso's existence in the current law, it seems, is to prevent flying freeholds arising where there are small amounts of overhang or underhang between the leaseholder's acquired premises and the landlord's retained, neighbouring premises.[63] But flying freeholds cannot arise as a result of the grant of a lease extension, and so we do not think that this proviso serves a useful or desirable purpose in this context. We discuss its application in the context of individual freehold acquisition claims, in the context of which flying freeholds can arise, in Chapter 4 below.[64]

3.144 Moreover, some of the concerns raised by consultees on removing this proviso, [65] such as a desire not to include common areas or rooftop spaces in the lease extension, do not arise as a result of this part of our provisional proposal. We therefore remain of the view that this proviso should not apply in respect of lease extensions.

Recommendation 4.

3.145 We recommend that:

(1) a lease extension of a residential unit or residential units should include other associated premises (any garage, outhouse, garden, yard and appurtenance let to the leaseholder with the residential unit or residential units, and within the curtilage of the building containing the residential unit or residential units); and

(2) a lease extension of a building or self-contained part of a building should include other associated premises (any garage, outhouse, garden, yard and appurtenance let to the leaseholder with the building or self-contained part of the building, and within its curtilage).

---

62 See paras 12.189 to 12.196.

63 We explain the concept of flying freeholds, and the associated problems, in Ch 4 at para 4.11.

64 See paras 4.10 to 4.11 and 4.31 to 4.37 below.

65 See paras 3.123 to 3.124 above.

3.146 We recommend that:

(1) a landlord should be able to propose that other land originally let to but no longer held by a leaseholder be included in a lease extension;

(2) there should be no strict time limit within which that proposal can be made; and

(3) that other land should be included if:

(a) the leaseholder agrees; or

(b) the Tribunal is satisfied that it would be unreasonable to require the landlord to retain it separately from the premises included in the lease extension.

3.147 We recommend that there should be no power for a landlord to argue that parts of the premises let under a leaseholder's existing lease and which lie above or below other premises in which the landlord has an interest should be excluded from a lease extension.

TERMS OF A LEASE EXTENSION

3.148 In the Consultation Paper, we explained the need for future legislation governing the terms which may be included in a lease extension to strike a careful balance. On the one hand, we wish to minimise the risk that leaseholders may agree to terms which are not in their best interests (whether because they do not appreciate the consequences of doing so, or because they lack the ability or resources to contest the terms proposed by their landlord). But on the other hand, there is an argument that we should not seek unduly to restrict parties' freedom to contract on whatever terms they wish. Indeed, we have heard from many leaseholders who would like to be able, as part of the lease extension process, to remove what they consider to be onerous or unfair terms within their existing lease. We are also mindful that agreeing the terms of a lease extension can, at present, be a significant source of dispute – and therefore delay and cost. Reducing the potential for dispute may be another good reason to limit the extent to which parties are free to negotiate the terms of their lease extension.

3.149 We considered a range of options for the extent to which parties ought to be entitled to depart from the terms of the existing lease. These included:

(1) giving the parties no power whatsoever to depart from the terms of the existing lease;

(2) requiring the parties to use a standard model lease;

(3) giving the parties narrow powers to depart from the terms of the existing lease (specifically, restricting the parties, in the absence of agreement, to terms

selected by one party or the other from a prescribed list of modern, uncontentious terms);

(4) giving the parties wide (but still defined) powers to depart from the terms of the existing lease; and

(5) retaining the current law, which allows the parties to agree to change the terms of the existing lease in any way they wish.

3.150 In the Consultation Paper, we highlighted the potential for an imbalance in the respective negotiating powers of landlords and leaseholders engaged in a lease extension claim.[66] This imbalance is to some extent inherent in the lease extension process, given the imperative for a leaseholder to obtain a lease extension so as to acquire security in their home, or a saleable asset. However, it can also be exacerbated by the inequality of arms which tends to exist between landlords and leaseholders more generally, with landlords tending to have both greater expertise and greater resources to call upon than leaseholders.[67]

3.151 We therefore formed the provisional view that, in order to protect leaseholders from unfair outcomes, there should be a limit on the parties' ability to modify the terms of a lease when it is extended (whether by agreement or by right). We proposed that the terms of a lease extension (other than the length of the term and the ground rent) should be identical to the terms of the existing lease, save where either party has elected to include terms drawn from a prescribed list of modern, uncontentious terms. We gave several examples of terms which might appear on such a list, including landlord's covenants to enforce the covenants within leases of neighbouring properties, to enforce repairing obligations imposed on a third-party management company and to carry out a management company's repairing obligations if that company fails to do so.

3.152 We asked consultees whether they agreed with this provisional proposal. We also asked consultees to share their views as to the terms which should appear on such a prescribed list.[68] We discuss consultees' views on both these topics below, before setting out our policy view in respect of the terms of a lease extension, generally speaking. We subsequently examine whether a lease extension should take the form of a standard or model lease, and then the specific situations of *Aggio* lease extensions, and issues relating to common parts leases. Finally, we set out our recommendation for reform, which covers all these issues together.[69]

---

66 See CP, para 4.81 and following.

67 See discussion of this issue at paras 1.71 to 1.73 and 3.45 to 3.49 of the Valuation Report. The points made in those paras regarding landlords' and leaseholders' respective abilities to contest a dispute over an enfranchisement premium would apply equally to a dispute over the terms of a lease extension.

68 See CP, Consultation Question 6, Pts 1 and 2, paras 4.91 and 4.92.

69 See Recommendation 5 at paras 3.209 to 3.210 below.

The general approach to the terms of a lease extension

Consultees' views

3.153 Well over half of consultees indicated support for our provisional proposal. However, it is fair to say that this apparent level of support belies significant disagreement amongst those who gave reasons for their answer. Indeed, it was clear to us that some consultees may have misunderstood what was intended by our proposal; amongst those who agreed were a number who appeared to believe that it would provide an avenue for correcting every problem that may be presented by the terms of an existing lease. Further, at least 20 consultees who indicated agreement with our proposal made comments which in fact showed partial or complete disagreement.

Consultees who agreed with our proposal

3.154 Consultees who indicated support for our provisional proposal included a number of groups representing professionals and leaseholders, various landlords of different kinds, numerous law firms, surveyors' firms and individual professionals, and a very large number of self-identified leaseholders and other individuals.

3.155 As mentioned above, quite a few of these consultees were under the impression that our proposed list of prescribed terms would enable onerous or unfair terms in existing leases – such as permission fees – to be removed. Numerous consultees – including the National Leasehold Campaign, Jo Darbyshire and Katie Kendrick (a leaseholder) – agreed with our proposal either on that basis, or on the basis that we would recommend an alternative statutory power for tackling onerous clauses. Additionally, a very large number of consultees answered "yes" to our consultation question without giving any further substantive comment. It is therefore unclear whether these consultees also took our provisional proposal to be a means for removing unfair terms from leases.

3.156 Amongst those who did give clear reasons for supporting our proposal, however, four broad themes emerged. Consultees argued that:

(1) The lease extension process would be simpler and easier for leaseholders to understand if the terms of the new lease were, in general, the same as those of the existing lease. As Jad Adams put it: "it is a lease extension; a variation of a lease is a different matter".

(2) On the other hand, a lease extension may be a useful opportunity to review the terms of a lease to see if they meet modern standards. Heather Keates (a conveyancer) stated that, in her experience, landlords tend to refuse requests for modernisations when leases are extended and so a compulsory modernisation mechanism would be welcome.

(3) Our provisional proposal was likely to make lease extensions cheaper, by avoiding the costs relating to negotiating lease terms and the litigation costs should such negotiations break down.

(4) Additionally, our proposal would help to avoid abuse by preventing landlords from trying to insert onerous or unfair clauses during the lease extension

process. As Verity McMahon, a solicitor, explained, commenting on the current law:

> Prescribed and permitted clauses and covenants are not clearly stated in either Act and often in practice these provisions are stretched and manipulated, especially by landlords, to include provisions that were not intended by the mechanics of the Act; leaving the leaseholder with the option to either accept the unfavourable provisions or covenants or to incur further expense to argue the same at a costly First Tier Tribunal.

Consultees who disagreed with our proposal

3.157 Consultees who expressly disagreed with our provisional proposal included commercial freeholders, several law firms, surveyors' firms and individual professionals, and a number of self-identified leaseholders and other individuals. A clear majority of those who responded "other" to this consultation question and gave reasons for their answer – as well as of those who made comments without responding "yes", "no", or "other" – also appeared to disagree with our proposal. These consultees included a number of enfranchisement professionals and members of our advisory group, such as Damian Greenish, Philip Rainey QC and Mark Chick.

3.158 Consultees who disagreed with our proposal gave a variety of reasons for their view. Some simply pointed out a number of potential difficulties with our provisional proposal. Concerns raised included the following.

(1) It will prove impossible to develop a sufficiently comprehensive, useful and uncontroversial list of standard terms for inclusion on a prescribed list, since the range of defects which can exist within leases, or improvements which may be desirable, is too great.

(2) Any such list would have to be updated frequently, since it is not possible to know what terms are going to be deemed necessary or appropriate in years to come.

(3) The process of incorporating even standard terms into a lease could require fairly extensive (and therefore expensive) redrafting by solicitors.

(4) Including new terms drawn from a prescribed list in an extended lease could lead to a mismatch between that lease and other leases in the same building, if leaseholders choose to include different standard terms, which might make management difficult.

(5) All of the terms suggested in the Consultation Paper as possible contenders for such a list would place additional burdens on landlords. The Hampstead Garden Suburb Trust considered that this would "greatly reduce the value of freehold reversions and income to landlords", making it harder for them to discharge their functions under the leases.

3.159 Other consultees expressed a preference for a different approach. On the one hand, some of these consultees favoured even tighter restrictions on the terms which may be adopted for a lease extension. Two consultees supported the use of a model residential lease, to be produced by Government or by an organisation such as the

Royal Institution of Chartered Surveyors ("the RICS") or the Law Society, while several commercial freeholders suggested that the new lease following a lease extension should simply match the terms of the existing lease (aside from the prescribed changes regarding term and rent). Consensus Business Group said that this approach would "ensure simplicity, reduce cost, expedite the process and ensure uniformity of lease terms across blocks of flats or developments". Several consultees noted that changes to the leases could be negotiated independently aside from a lease extension or that terms could be updated by making use of other statutory mechanisms to alter leases.

3.160 On the other hand, a number of consultees supported maximum flexibility to alter the terms of a lease as part of the lease extension process. Individual leaseholders argued that this would enable them to address onerous or unreasonable terms, such as permission fees. Robert Nix took the view that the starting point should not be that the new lease replicates the terms of the existing lease, but that it should have "modern, up-to-date and reasonable terms". He wrote:

> My own lease is complex, antiquated and unreasonable. I would not wish to extend the lease on the same terms. I would want to extend on modernised (but fair) terms.

3.161 The majority of those who disagreed with our proposal, however, sat somewhere between these two extremes, favouring a scheme somewhat akin to that which exists under the 1993 Act, or at least containing some of the elements of that scheme.

3.162 These consultees pointed, first, to the utility of the various provisions of the 1993 Act (most of which also have equivalents in the 1967 Act) that enable the parties to a lease extension to vary the terms of the lease in certain circumstances.

(1) Several consultees, including the National Trust, commented that where certain specified changes have occurred during the term of the existing lease, such as alterations to the property or a change to the premises demised, it is necessary to be able to make appropriate modifications to the new lease to reflect the reality of the situation.[70]

(2) The Wellcome Trust (a charity landlord), amongst others, noted the importance to landlords of the requirement that provision be made for the recovery of the costs of providing services (at least during the extended term of the new lease), where the existing lease does not already contain such provision.[71]

(3) And many consultees referred to the desirability of being able to make changes to remedy a defect in the existing lease, or where it would be unreasonable to retain an existing term unchanged in view of unspecified "changes" occurring since the commencement of the existing lease which affect the suitability of the term.[72] As Thackray Williams LLP, solicitors, pointed out, correcting defects in the existing lease during the lease extension process "will save the leaseholder from having to obtain a further variation at additional cost". Boodle Hatfield LLP,

---

70 The provisions being referred to are 1993 Act, s 57(1) and 1967 Act, s 15(1).

71 The provisions being referred to are 1993 Act, s 57(2) and 1967 Act, s 15(3).

72 The provisions being referred to are 1993 Act, s 57(6) and 1967 Act, s 15(7).

solicitors, also expressed the view that some defects could even render a lease unmortgageable if not corrected.

Overall, it was apparent that, in many consultees' opinions, an approach which restricts the parties to selecting standard terms from a prescribed list – described by the PBA as "unnecessarily rigid and unrealistic" – would not be an adequate replacement for the above provisions of the current law. As noted above, consultees thought that standard terms would not be sufficient to cater for the myriad different changes which different circumstances might demand, and which it would be possible for parties to insist on under the current law.

3.163 Several consultees who supported an approach similar to the current law also emphasised the importance of the parties being able simply to agree on other more wide-ranging changes, as at present, and argued that it would be wrong for this aspect of consumer choice to be reduced. They pointed out that there may be good reasons to add or remove certain new terms on a lease extension, in the interests of modernisation and the removal of obsolete or inappropriate terms. As Damian Greenish explained, our provisional proposal may have the effect of "obliging the parties to accept a lease on terms that might be "… otiose or obsolete … or which leaseholders consider to be unduly onerous…" or otherwise objectionable. The parties must forgo the opportunity to improve the lease terms (even when they both wish to do so) and are forced to accept terms that neither of them wants. Further, while acknowledging that some parties can act obstructively in the lease extension process, Long Harbour and HomeGround, a landlord and an asset manager, stated that:

> In our experience, the vast majority of cases proceed without issue and being able to agree sensible changes, where there are issues with a lease, can often result in a cost saving for parties.

3.164 Accordingly, several consultees concluded that the retention of the current regime would be preferable to that which we proposed in the Consultation Paper. The Property Litigation Association ("the PLA") summed up this view succinctly:

> The current regime allows a degree of flexibility to modernise leases in view of changes in law and in the building and allows for defects and omissions in leases to be remedied. Any new regime should retain this flexibility, which is beneficial to landlords, leaseholders, purchasers and mortgagees.

3.165 Mark Chick gave a similar response, adding that in his view changes negotiated by agreement between the parties should be permitted regardless of their nature.

Consultees' views as to the contents of a list of prescribed terms

3.166 As we explain below at paragraph 3.170, we are not recommending the introduction of a list of prescribed terms. For that reason, we are not including in this Report a full summary of the responses we received to our question on which terms should be included within such a prescribed list.

3.167 We note that many of the responses to this question revealed the difficulties that would be associated with drawing up a list of prescribed terms. One example of this is that opposite views were expressed on identical topics, such as whether there should

be a prescribed term prohibiting assignment or subletting of a lease without the consent of the landlord (not to be unreasonably refused), or, in contrast, whether leases should always permit subletting. Differing views were also set out on whether any (and, if so, how much) deviation should be permitted from a list of prescribed terms.

3.168 These difficulties have fed into our decision not to recommend the use of a list of prescribed terms. That said, we are recommending that secondary legislation could be used to set out a list of specific defects which a lease might contain, or the types of changes that may have occurred since the grant of the lease, which should enable a party to require changes to be made to the existing terms.[73] Some of the views expressed by consultees in response to this question may be directly relevant in compiling that list, and recourse should be made to these responses at that stage. In particular, we think that account should be taken of suggestions made by consultees – or which we made in the Consultation Paper,[74] and which found support among consultees – relating to:

(1) the insurance provisions in leases (and their compliance – or otherwise – with the requirements of the UK Finance Mortgage Lenders' Handbook);

(2) the mutual enforceability of obligations;

(3) the issue of access to carry out repairs;

(4) the provision of appropriate rights of support, shelter and protection; and

(5) the updating of leases to take account of changes in legislation since the original grant.

Discussion

3.169 The primary purpose of the right to a lease extension is to address the fact that a lease is a wasting asset, by extending the length of the lease. A lease extension is not intended to be a means by which leaseholders (or indeed landlords) may resolve problems relating to the terms of their leases. In particular, it is not supposed to be an opportunity for leases to be completely rewritten. We therefore remain of the view set out in the Consultation Paper at paragraph 4.57: the starting point, whenever a leaseholder seeks to exercise the right to a lease extension, is that the terms of the new lease should be identical to those of their existing lease.[75]

3.170 However, in terms of how far the parties should be permitted to depart from that starting point (whether by mutual agreement or pursuant to a power for one party to require changes to be made to the terms of the existing lease), it is clear that our provisional proposal that parties should only be permitted to adopt standard, uncontentious terms from a prescribed list is not the way forward. While a majority of consultees in fact supported that proposal, we are persuaded by comments received

---

73 See para 3.175 below.

74 See para 3.151 above, and fig 3 at para 4.85 of the CP.

75 This starting point is not intended to apply to *Aggio* lease extensions, which we discuss below at para 3.189 to 3.204.

from a wide range of consultees that there are difficulties with this approach. On reflection, we think that our proposal failed to take sufficient account of the utility of the specific provisions under the current law (as found in section 57 of the 1993 Act) which enable parties to ensure that, amongst other things, provision is made for payment of service charges during the extended term of a lease and defects in the lease can be corrected.[76] We acknowledge that these provisions perform an important function, and we do not consider that a list of prescribed terms would be able to do the same job. For example, we are unlikely to be able to draw up a list of prescribed terms which would cater for every possible defect in a lease, or which would provide appropriately for the payment of service charges in every case where this is required.

3.171 That said, we do not think there should be a wide-ranging power by which a party can require a departure from the terms of the existing lease simply because those terms are in some way "unfair". As we have said, rewriting the lease is not the primary purpose of the lease extension process. While we acknowledge that there are a significant number of leaseholders with concerns about unreasonable or onerous terms in their leases, these concerns do not result from any defect in the law governing lease extensions but from problems with the law of leasehold as a whole. We therefore consider that these issues should be addressed not through the lease extension process but by means of a bespoke statutory process which would enable unfair terms to be challenged in any lease, whether before or after it is extended. Any solution connected to enfranchisement could, necessarily, assist only those leaseholders who are able to enfranchise, and wish to do so because of the duration of their lease or the ground rent payable. The Law Commission's Thirteenth Programme of Law Reform indicated that a project on unfair terms in residential leasehold would be undertaken by the Commission when resources allow, and that work has not yet begun.[77]

3.172 We are also cautious about permitting the parties to a lease extension mutually to agree upon any changes they wish to the terms of their existing lease, without *any* oversight of those terms, as the current law does. We acknowledge the argument made by a number of consultees – predominantly freeholders and their representatives – that parties' freedom of contract should not be restricted, and that it is unattractive to require parties to retain the terms of their existing lease where both would like to make changes. We also accept that there will be cases where both parties are well-informed and well-advised, and have been able readily to reach agreement on certain changes for which there are good reasons. For example, it may be desirable simply to update an old-fashioned lease with modern provisions in plain English, even if this does not amount to correcting defects or removing terms which it would be unreasonable to retain. However, we are mindful of the inequality of bargaining power which can exist between the landlord and leaseholder during the lease extension process (as explained at paragraph 3.150 above). We think that there is a real danger of improper pressure being placed on leaseholders by unscrupulous landlords if the parties to a lease extension may freely agree any departure from the

---

76 See paras 3.16 and 3.161 to 3.162 above.

77 See the Thirteenth Programme of Law Reform (2017) Law Com No 377, para 2.45 and following. Details of the Law Commission's Thirteenth Programme of Law Reform are at https://www.lawcom.gov.uk/project/13th-programme-of-law-reform/.

terms of the current lease. On balance, we consider that leaseholders require some degree of protection from this risk.

3.173 Indeed, we are concerned that even to replicate exactly the provisions of the current law referred to at 3.170 above may provide too much room for exploitation of leaseholders. In some respects, the wording of the relevant parts of section 15 of the 1967 Act and section 57 of the 1993 Act is rather widely-drawn. It is not clear exactly what should qualify as a "defect" in the lease which may be remedied under section 57(6)(a), what kinds of "changes" might justify the exclusion or modification of existing terms under section 15(7) or section 57(6)(b), or when it might be "unreasonable" not to exclude or modify a term in light of such changes. For instance, while there is an overwhelming case for resolving a defect which means that the lease does not give an accurate picture of (say) the extent of the premises demised, there is not the same case for adding a useful but non-essential provision that had originally been left out the lease due to an oversight. The wording of sections 15 and 57, however, does not particularly assist with this distinction. We think that ambiguities of this kind could be used by landlords to take advantage of leaseholders or, at the very least, could increase the scope for argument over whether a change proposed by one party is permissible.

3.174 Bearing in mind all of those considerations, our approach to the terms of a lease extension has two limbs.

(1) First, in the paragraphs below, we make a recommendation as to the changes which a party can require to be made to the terms of a lease when it is extended.

(2) Second, we acknowledge that is it not feasible (or necessarily desirable, in all cases) to prevent leaseholders from entering into a lease extension on terms other than those which could be required pursuant to that recommendation, where they mutually agree to do so. As explained at 3.8 above, we discuss the question of lease extensions which are "not on statutory terms" separately in Chapter 14 below. We suggest in that chapter that any such transaction should be the subject of an application for Tribunal approval, so that there is some oversight of the terms which a leaseholder has agreed to. Without such approval, any terms which differ from that which would have been obtained under the recommended statutory scheme would not have their usual effect.

3.175 Our recommendation as to the changes which a party can require to be made to the terms of their lease when it is extended seeks to balance the concerns identified in paragraphs 3.170 to 3.173 above. We wish to ensure that a party can require changes to the terms of their existing lease when it is extended in order to correct defects or to take account of changed circumstances, but we also want to identify more precisely than the current law does the situations in which this action is appropriate. We think that this can be achieved by drawing up a list not of prescribed terms, as we had proposed, but rather of the specific defects which a lease may contain, or the types of changes which have occurred, which should entitle a party to require changes to be made to the existing terms. In other words, the law should attempt to spell out – as it does at present for certain matters – all of the different issues which might suitably be addressed by a departure of some kind from the terms of the existing lease. We

envisage that these issues would include some of the suggestions which consultees made for inclusion on a list of prescribed terms, to which we refer above, such as making sure that insurance provisions in the lease are brought up to date, providing for appropriate rights of support, shelter and protection, and ensuring that the parties' obligations under the lease reflect current legislation.

3.176 We think that this approach makes sensible provision for parties to make useful and necessary changes to the terms of a lease while they are carrying out a lease extension, but without so much flexibility that leaseholders are at risk of agreeing to the inclusion of terms which may be to their detriment. We are mindful, of course, that it may be challenging to come up with a comprehensive list of appropriate types of changes. We are also aware that what is considered appropriate for inclusion on this list may change over time. But we consider that it would be sufficient for the relevant primary legislation to set out the most obvious cases in which it may be appropriate to depart from the terms of the existing lease, with further detail provided by means of secondary legislation.

3.177 We therefore recommend that, on a lease extension, the starting point should be that, with the exception of the ground rent and the length of the lease, the new lease will be on the same terms as the existing lease. However, either party will be permitted to require suitable variations to those terms (whether by excluding or modifying existing terms, or adding new ones) wherever this is necessary:

(1) to take account of the omission from the new lease of property included in the existing lease;

(2) to take account of alterations made to the property demised since the grant of the existing lease;

(3) in a case where the existing lease derives from two or more separate leases, to take account of their combined effect and of the differences (if any) in their terms;

(4) to insert "such provision as may be just" to require service charge payments by the leaseholder from the end of the term of the existing lease in respect of any obligation on the landlord to provide services, repairs, maintenance or insurance during the extended term (where the existing lease does not include such provision or includes provision only for the payment of a fixed amount); or

(5) to remedy a "defect" in the existing lease, or to take account of a "change" occurring since the date of commencement of the existing lease, provided such defect or change falls within one of the categories prescribed by regulations.

3.178 As with section 15 of the 1967 Act and section 57 of the 1993 Act, either party to the lease will have the right, unilaterally, to insist on these kinds of variations. It will be possible to refer the question of the terms of the new lease to the Tribunal for determination, if the other party does not agree.[78] As to point (5) above, we envisage that regulations referred to would provide for a wide range of common leaseholder issues to be addressed, including the specific matters identified at 3.168 above, as

[78] See para 11.21 below.

well as providing a power for the Secretary of State to amend or add to this list at any time. It should be noted that there may be some overlap between this recommendation and the ongoing work of both Government and the Competition and Markets Authority in relation to potentially onerous or unfair lease terms, such as permission fees and other charges.[79] However, the outcome of that work and its likely effect may not be known for some time. We therefore consider that there remains a useful role for this recommendation to play in ensuring that leaseholders are protected from exploitation when negotiating the terms of a lease extension.

3.179 Finally, there are two additional instances in which it may be necessary for the terms of a lease to be varied when it is extended, in addition to the five cases identified above. First, a variation may be necessary to cater for the situation where a "common parts lease" is to expire before the end of the extended lease – as discussed further at paragraphs 3.205 to 3.207 below. Second, our detailed recommendations later in this chapter as to the effect of a lease extension on property rights which benefit or burden the lease include a recommendation concerning what we call "special-purpose rights".[80] These are property rights granted for a limited period for the purposes of a particular project – such as a two-year easement permitting a crane on one party's land to overhang neighbouring land for the duration of a development project (known as an easement of "oversail"). Any terms of the existing lease which create or refer to such rights may be carried over into the lease extension, but may need to be amended to reflect the fact that the duration of the relevant special-purpose right should remain unchanged. The two-year easement of oversail should not begin again with the lease extension.

A standard or model form lease extension

3.180 Alongside our discussion of the terms of a lease extension in the Consultation Paper, we suggested that a lease extension should take the form of a standard template lease.[81] By this we meant a short-form lease which lets the property for the extended term at a peppercorn rent, incorporates the terms of the existing lease by reference, and sets out any variations to those existing terms within a schedule. While we did not ask a consultation question on this suggestion, a handful of consultees addressed the issue in their replies. As a result, we have considered whether we should recommend the adoption of a standard or model form lease for general lease extensions, before then turning to the specific context of *Aggio* lease extensions below.

Consultees' views

3.181 Some of the responses we received were in support of our suggestion. Irwin Mitchell LLP, solicitors, told us that

> Where possible (which is most situations unless the lease is particularly old or there have been a number of variations to the original lease), we usually proceed using a short form lease by reference to the current lease but annexing the current lease so that it is clear to all what the terms of the new lease are. This makes the process of

---

79 See para 1.63 above and Competition and Markets Authority, *Leasehold housing – Update report* (February 2020), paras 81 to 92, at https://www.gov.uk/cma-cases/leasehold.

80 See paras 3.284 to 3.286 and Recommendation 7 at paras 3.298 to 3.300 below.

81 See CP, para 4.87.

reaching agreement far quicker, simpler and more transparent than where entirely new leases are drafted for a lease extension. Requiring leases (save for in certain situations) to be drafted in this short form would also prevent much of the gaming or tactics some landlords or their solicitors currently employ and would also result in lower legal costs for all parties.

3.182 Other consultees raised similar points in support of this approach. Berkeley Group Holdings PLC, a developer, also thought that our suggestion would assist in reducing costs, while Long Harbour and Home Ground supported the idea that the new lease should list the relevant changes and then incorporate the terms of the existing lease by cross-reference, save where this would cause confusion.

3.183 However, some consultees thought that our suggestion would result in a lack of clarity for leaseholders. The National Trust thought it would be better if a new replacement lease were issued on a lease extension, as it had found that leases which set out their terms by reference to another, earlier lease ("leases by reference") can be confusing for leaseholders who have to look at two documents to check their obligations. Overall, the National Trust thought that it is more "consumer friendly" to have all the terms of the lease in one document. Boodle Hatfield LLP also thought that "it is far better to put a new full lease in place, so that one does not have to rely on the parties having the original lease to hand to refer to years later".

Discussion

3.184 We want to make the process of agreeing a lease extension as simple and cost-effective as possible. Based on consultees' responses, it is clear that there are advantages to the form of lease which we suggested. While we acknowledge concerns that a lease by reference requires the reader to examine two documents, we think that the associated cost savings would outweigh any inconvenience in cross-checking two documents. Consultees' suggestions that the existing lease should be annexed to the new lease by reference would also reduce this inconvenience, and avoid the risk that parties are unable to locate the existing lease when required.

3.185 However, a key aspect of our suggestion was for all lease extensions to be on a standard template form.[82] In their response to our consultation question regarding the form of *Aggio* lease extensions (considered below), some consultees raised concerns that legislating for a model form would not be feasible.[83] These concerns apply equally to our general suggestion for a standard template lease extension. And as consultees have pointed out, mandating the use of a standard form could lead to additional difficulties where, for example, the existing lease was granted some time ago or has been varied several times. Any exception for such leases would be necessarily broad, and therefore risk undermining the requirement to use a standard form.

3.186 In addition, we do not think there is a satisfactory method for enforcing the use of a standard form lease. While we could provide for the Tribunal to determine whether the lease accords with the standard form as part of the claim, or if the deviation from the standard form is reasonable, this approach could lead to arguments being raised as to the use of clause numbers, headings and other points which do not affect the parties'

---

82 Save in relation to *Aggio* lease extensions, as discussed at paras 3.189 to 3.204 below.

83 See para 3.194 below.

rights under the lease. Such arguments could lead to delays and costs on both sides. While we considered that a standard form lease would aid any checks that are made by HM Land Registry and interested third parties prior to or following registration, on reflection we think that the existing HM Land Registry prescribed clauses already assist with this process.[84] Any requirement for HM Land Registry to identify and prevent registration of leases which are not in the standard form could lead to difficulties in identifying deviations from the standard form and, in the worst case, to a leaseholder paying for a lease extension that proves to be invalid.[85]

3.187 We also think that the recommendations and conclusions which we make elsewhere in this Report are likely to discourage landlords from using a claim for a lease extension as an opportunity to present leaseholders with a wholly new form of lease that introduces changes which are outside our statutory regime. Our recommendation that the terms of the new lease will be on the same terms as the existing lease (with the exception of ground rent and the length of the lease), with limited variations, means that granting the lease extension by way of a lease by reference which annexes the existing lease will be the easiest way to document the lease extension in most cases. In Chapter 14, we have suggested that where a lease extension is not on terms that are consistent with our statutory regime, and has not been approved by the Tribunal as being objectively reasonable, a leaseholder should be able to choose not to be bound by those terms that are not consistent with our statutory regime.[86] Where the form of lease is granted by reference to the existing lease, with a schedule setting out any changes, those changes will be easily identifiable by both parties. This means that the parties are less likely inadvertently to introduce terms which are inconsistent with our statutory regime and, where such terms are introduced, they will be clearly set out as differences from the existing lease.

3.188 As a result, we are not taking forward our suggestion to require a lease extension to take a particular form. However, we invite Government to consider publishing guidance as to the form of lease extension which parties would be expected to use. The guidance would set out that a lease extension should:

(1) be granted for an extended term of 990 years (in addition to the remaining term of the existing lease)[87] at a peppercorn rent;

(2) incorporate the terms of the existing lease by reference, setting out any variations to those existing terms within a schedule; and

---

84 Where the lease is a disposition of a registered estate in land and is required to be completed by registration under s 27(2)(b) of the Land Registration Act 2002, r 58A of the Land Registration Rules 2003 requires the lease to include a standard set of clauses at the beginning of the lease. These clauses include (*inter alia*) the date of the lease, the landlord's title number(s), the term of the lease and the premium payable on grant of the lease. The particulars also require a statement to be included where the lease is granted pursuant to the provisions of the 1993 Act.

85 We discuss similar arguments in relation to regulation of lease extensions on non-statutory terms at para 14.56 to 14.58 below.

86 See para 14.74 below.

87 See paras 3.62 above.

(3) provide for the leaseholder's current lease to be annexed.

The terms of "*Aggio*" lease extensions

3.189 As we explained in the Consultation Paper, a different approach is required regarding the terms – and possibly the form – of *Aggio* lease extensions: a specific type of lease extension stemming from the decision in *Howard de Walden Estates Ltd v Aggio*.[88] *Aggio* lease extensions involve a leaseholder obtaining a lease extension of only part of the premises currently held under his or her lease. For example, a leaseholder may own a long lease of two residential units, one of which he has sublet to another on a long lease. He or she will be entitled, under our recommended scheme of qualifying criteria, to a lease extension of the residential unit which he or she has retained.[89] In a more extreme case, a leaseholder may have a long lease of an entire block of flats, every one of which he or she has sublet with the exception of one flat, in which he or she lives. The leaseholder may obtain a lease extension of that one flat.

3.190 In such cases, the terms of the existing lease may only provide a partial guide to the terms that will need to be included in the new extended lease, as well as the premises that will need to be included and omitted. The terms of a lease of an entire block of flats, and the rights and obligations taken on by the landlord and the leaseholder, may be entirely inappropriate in relation to a lease of a single flat. We therefore suggested that the general rule regarding the terms of new extended leases (namely that they should match the terms of the existing lease) would not be appropriate for *Aggio* lease extensions.

3.191 We also asked consultees for their views on whether it would be desirable to adopt a standard or model lease for *Aggio* lease extensions, either as the form of lease that must be used, or as the starting point from which other changes might be ordered.[90]

Consultees' views

3.192 A number of consultees supported the use of a model lease for *Aggio* lease extensions. The National Leasehold Campaign, for instance, argued that this would bring the benefits of "simplicity and consistency" to these cases. Prosper Marr-Johnson, a surveyor, argued that adopting a standard or model lease in these cases would be "very helpful", on the basis that some landlords are "so prescriptive in adopting precisely the same terms as per the head lease that the 'underleases' fail to include any landlord covenants or easements relevant for the duration of the existing (head)lease". Damian Greenish supported the adoption of a model lease for *Aggio* lease extensions in principle, but noted that the differences between houses and flats would need addressing.

> The former generally includes the whole of the building on FRI terms whilst the latter generally comprises only part of a building, excludes structural elements and places management obligations on the landlord who then recovers the costs incurred

---

88 *Howard de Walden Estates Ltd v Aggio* [2008] UKHL 44, [2009] 1 AC 39. See Ch 4 of the CP, at para 4.88 onwards.

89 See paras 6.23 to 6.24 below.

90 See CP, Consultation Question 6, Part 3, at para 4.93.

through a service charge. There would therefore need to be different model forms for houses and flats although there would no longer be a definition of either.

3.193 Others contended that a model lease would be good "as a starting point",[91] but that there would be a need for flexibility too. One consultee – the Birmingham Law Society – suggested that it would be sensible to adopt a "standard lease… with wording to adjust the effect of the reduced demise". Similarly, Charlie Coombs, a surveyor, argued that "a standard lease might be appropriate, but it would need to remain flexible in order to match the other existing leases in the building in terms of service charge, repairing obligations, alienation, use, redevelopment rights, etc". Stephen Desmond suggested using "model heads of terms" for these leases, rather than a model lease.

3.194 In contrast, a slight majority of consultees were of the view that it would not be appropriate to use a standard model lease for *Aggio* lease extensions. The predominant reason given for this view was that each case is different (varying, for instance, with the terms of the relevant head-lease): "properties are too different from each other for one size even to fit many, never mind all".[92] It was argued that these variations would make a standardised – and therefore relatively inflexible – approach "highly impractical".[93] For example, the Wellcome Trust wrote that it would not be:

> appropriate for a standard or model lease to be adopted for *Aggio* style leases. Any new lease will need to be consistent with the terms of other leases in the building, particularly with respect to recovery of service charge and provision of services to enable ease of management and proper recovery of the landlord's costs of carrying out its obligations.

3.195 Exempting *Aggio* lease extensions from the standardised approach set out above, therefore, was described as "realistic and necessary" by CILEx, on account of the "unique characteristics of these leases". Other issues with using a standardised approach were set out by the Law Society, who wrote that:

> the leaseholder might just have two flats in the current lease, the whole building or just the residential section of a mixed-use building; the lease may or may not include common parts that the leaseholder controls during the residue of the current lease, but which revert to his landlord after the current lease expires. The difficulty of prescribing a form of lease that is likely to be suitable for individual lease extensions in these varying situations is evident.

3.196 Some consultees were of the view that, while a recommended form of lease might be desirable in practice, this is not something that should be legislated for. Hamlins LLP suggested that "there is no reason why interested bodies such as ALEP or respected legal publishers like Practical Law Company could not provide a model lease which could be used as a precedent". Similarly, the PBA argued that useful precedents could be set, but that "rigid legislated standard terms would inhibit contractual freedom and

---

91 Wallace LLP, solicitors.

92 Philip Rainey QC.

93 Mark Chick.

the growth and development of terms as the property market changes, causing stagnation at best and inadequate or inaccurate terms at worst".

3.197 Instead of a standard or model lease in these situations, several consultees contended that a different starting point should be adopted. Philip Rainey QC suggested that there is often "another long lease in the block… which is a very good guide as to the appropriate terms; it would be helpful if the Tribunal had a power to adopt such a lease as the starting point". Bryan Cave Leighton Paisner LLP (solicitors) agreed that, if *Aggio* leases are to be possible under the new scheme, the most appropriate starting point is "to draft a lease based on other occupational leases in the building so that the service charge provisions, insuring obligations and repairing obligations are consistent throughout the building". Where there are no other occupational long leases in the building, there was some agreement that there is a better case for a type of model lease, possibly taking into account "the terms of the current head lease, where this may be appropriate".[94]

3.198 Other consultees went further, and argued that there should be greater scope to negotiate the terms of an *Aggio* lease extension individually. This was supported by the fact that *Aggio* lease extensions were said to be fairly unusual. John Stephenson, for example, wrote that:

> in Aggio cases the parties should be left to agree the form of lease with the FTT determining any unresolved issues. This is likely to happen only with the first such lease in the building. It is not worth having legislation to cover this relatively rare event.

3.199 Furthermore, the point was made by a number of consultees that, in these situations, there is, in the words of Bryan Cave Leighton Paisner LLP, "less of an imbalance between the bargaining power of the landlord and the tenant claiming the lease extensions" than in an ordinary lease extension claim.

Discussion

3.200 We recommended at paragraph 3.177 above that, subject to limited exceptions where the terms of the existing lease are defective or inadequate, an ordinary lease extension should be granted on the same terms as the existing lease. In order to protect leaseholders, who typically possess unequal bargaining power to landlords, we suggest (in Chapter 14) that the Tribunal should be required to approve other changes to the terms of the lease.

3.201 *Aggio* lease extensions are different. The starting point cannot be the same as for general lease extensions. It is in the nature of an *Aggio* lease extension that the premises included in the new lease are less extensive than those in the existing lease. Not only is that the case, but many of the rights and obligations that will need to attach to the new lease will need to be different from those in the existing lease. For example, the insurance and maintenance obligations typically contained in a lease of an entire block of flats are likely to be very different than those needed in relation to an individual flat (and, indeed, may not make any sense in an extended lease of that flat).

---

[94] Long Harbour and HomeGround.

3.202 Consultees' views have emphasised to us the numerous variables and difficulties that arise where an *Aggio* lease extension is being claimed. Moreover, consultees pointed out that, in many of the cases involving *Aggio* lease extensions, the leaseholder is a commercial investor (who has rented multiple residential units or an entire block of flats). Such a leaseholder is less likely to be in a significantly weaker bargaining position than the landlord. The need to protect the leaseholder is therefore lessened. However, even if the leaseholder's interest in the property is not primarily commercial (if, for example, they have a lease of two residential units, one of which is sublet), it remains the case that the terms of the existing lease may provide a poor model for the new extended lease. If so, then the landlord and leaseholder need to be able to agree new terms between themselves.

3.203 Consequently, we are of the view that there should be more flexibility in respect of negotiating an *Aggio* lease extension. That said, we do think that certain aspects of the *Aggio* lease extension should reflect those of an ordinary lease extension: namely, the term of the new lease should be 990 years, and the ground rent should be a peppercorn. If the *Aggio* lease extension does not include those provisions, it will not be a lease extension "on statutory terms", and will therefore require Tribunal approval.[95] Assuming the *Aggio* lease extension is granted for a term of 990 years, at a peppercorn ground rent, it will be "on statutory terms" and the other terms should, we think, be left to the parties to agree. If there is a dispute regarding any of these other terms, then the parties will need to apply to the Tribunal for a resolution.[96] The Tribunal may order the lease to be extended on such terms as are reasonable, taking account of the terms of the existing lease, the terms of any other comparable leases in the building, and any other factor that is relevant (including those set out in paragraph 3.177).

3.204 Furthermore, given the need for flexibility in respect of the terms of an *Aggio* lease extension, and given our conclusion on the form of ordinary lease extensions set out above,[97] we do not think that it would be appropriate or helpful to recommend the adoption of a standard or model lease in these situations. Of course, as some consultees suggested, the parties may wish to base the new lease on other long leases in the building, or on any precedents that are produced by professional representative organisations. And if Government issues guidance as to the form of lease extensions in accordance with our suggestion at paragraph 3.188 above, then the parties may use this guidance as a starting point when deciding the form of the lease extension.

Common parts leases

3.205 In the Consultation Paper, we also commented briefly on cases where the common parts of a building are let to and managed by a third party.[98] We suggested that additional terms would have to be included within a lease extension so that the

---

95 On the approach that we suggest at paras 14.10 to 14.76 below.

96 See para 11.21 below.

97 See para 3.177 above.

98 See Ch 4 of the CP, at para 4.90.

leaseholder's rights in respect of the common parts are extended beyond the expiry of the third party's existing lease of the common parts.

3.206 We remain of the view that a variation of a term to extend the leaseholder's rights over common parts where that is required – or the inclusion of an additional term to that end – should be permissible on a lease extension claim. It may be sensible, for example, for a variation or additional term to set out that, when the third party's lease expires, "the rights and responsibilities of the management company pass to the landlord, and the tenant is required to make any payments previously payable to the management company to the landlord instead".[99]

3.207 This issue should be included as one of the categories of term in respect of which either party is permitted to require suitable variations on a lease extension (whether by excluding or modifying existing terms of the existing lease, or adding new ones). If there is a dispute on this point, as with the other categories listed above at paragraph 3.177, the parties will need to seek a resolution by the Tribunal.

Recommendations for reform

3.208 Our recommendation brings together the above discussion concerning the terms of lease extensions. It sets out the starting point for ordinary lease extensions – that the terms of the new lease should be the same as those of the existing lease – and details the variations that one party or the other ought to be able to require to be made. It also identifies the need for different treatment in the case of *Aggio* lease extensions.

Recommendation 5.

3.209 We recommend that, on a lease extension (other than an *Aggio* lease extension), the starting point should be that the new lease will be on the same terms as the existing lease (with the exception of the ground rent and the length of the lease). However, either party should be permitted to require suitable variations to the terms of the existing lease (whether by excluding or modifying existing terms, or adding new ones) wherever this is necessary:

(1) to take account of the omission from the new lease of property included in the existing lease;

(2) to take account of alterations made to the property demised since the grant of the existing lease;

(3) in a case where the existing lease derives from two or more separate leases, to take account of their combined effect and of the differences (if any) in their terms;

(4) to insert "such provision as may be just" to require service charge payments by the leaseholder from the end of the term of the existing lease, where the existing lease does not include such provision;

[99] Boodle Hatfield LLP, writing in response to Consultation Question 6.

(5) to remedy a "defect" in the existing lease, or take account of a "change" occurring since the date of commencement of the existing lease, provided such defect or change falls within one of the categories prescribed by regulations;

(6) to reflect the fact that a special-purpose property right granted or reserved in the lease is not being regranted or extended in duration; or

(7) to take account of the fact that the leaseholder's rights in respect of common parts may need to be extended beyond the expiry of a third party's existing lease of those common parts.

3.210 We recommend that the terms of *Aggio* lease extensions should be left to the parties to agree, with the exception of the ground rent and the length of the lease.

MORTGAGES

3.211 A lease extension, whether it takes place under the 1967 Act or the 1993 Act, operates by way of surrender and regrant.[100] The existing lease is surrendered and a new longer lease is granted in its place. The substitution of the existing lease with a new lease raises a question about how the substitution affects interests which benefited the existing lease and burdened land belonging to the landlord or a third party. It raises questions about what happens to interests belonging to the landlord or third parties that burdened the existing lease. And it raises questions about how the new lease may be affected by third-party interests binding the landlord's estate.

3.212 In the Consultation Paper, we examined some of these issues in detail. We considered the case of mortgages burdening the leaseholder's or the landlord's title. But we only considered other interests that burden or benefit the lease or the freehold very briefly. However, our new enfranchisement scheme does need to make provision for what happens to these interests, and we will return to consider the issue later in this chapter. First, we will examine our proposal about mortgages.

3.213 We provisionally proposed that, when a leaseholder is granted an extended lease under our new scheme, any mortgage over the existing lease should automatically be transferred to the new lease.[101] We also provisionally proposed that a lease extension should automatically be binding on the landlord's mortgagee.[102]

Consultees' views

3.214 A sizeable majority of consultees agreed with both elements of our provisional proposal, although the second element about the landlord's mortgagee automatically being bound was more controversial than the first. Most consultees who answered "no" or "other" to our consultation question provided no reasons for doing so.

---

100 See, for example, *Mosley v Hickman* (1986) 12 HLR 292, 296.

101 See CP, Consultation Question 5, para 4.54.

102 See CP, para 4.53.

Moreover, several consultees who did provide reasons for opposing our proposal misunderstood its nature or its scope.

3.215 Some consultees were under the misapprehension that our provisional proposal would cause extra cost or inconvenience for leaseholders. But our proposal would not give landlords and mortgagees greater opportunity to delay, object to, or place conditions on a lease extension. If mortgages are automatically transferred from the existing lease to the new lease, then there is no need to execute a deed of substituted security with the mortgagee. And if lease extensions are automatically binding on the landlord's mortgagee, there is no need to seek the mortgagee's consent to the new lease.

3.216 A further point that caused some confusion among consultees was the degree to which our provisional proposal reflects the current law.

3.217 The 1993 Act provides that, where a lease extension is granted in relation to a flat, any mortgage over the existing lease is automatically transferred onto the new lease.[103] Our provisional proposal would therefore simply replicate this provision in our new scheme. By contrast, where a lease extension is granted in relation to a house under the 1967 Act, the Act indicates that a mortgage should transfer from the existing lease to the new,[104] but the Act does not make provision for the automatic transfer of the mortgage.[105] The leaseholder and the mortgagee will therefore need to execute a deed of substituted security. The first part of our provisional proposal would, therefore, make a difference to the law under the 1967 Act. It would make the enfranchisement regime for houses and the regime for flats consistent.

3.218 Regarding mortgages over the landlord's estate, both the 1967 Act and 1993 Act make the same provision.[106] This provision is more nuanced than might be suggested by the text of our provisional proposal. Both Acts draw a distinction between whether a lease extension is "authorised" and whether the new lease will "be binding" on the landlord's mortgagee. A lease extension is "deemed to be authorised as against" the landlord's mortgagee. The lease extension is deemed to be authorised even if the existing lease was granted after the mortgage and the landlord had not been authorised by the mortgagee to let the property. The landlord's mortgagee should not, therefore, be able to prevent the landlord from granting a lease extension. We discuss what relevance this may have for restrictions registered against the landlord's title in Chapter 10.[107]

3.219 However, even if a lease extension is deemed to be authorised by the landlord's mortgagee, this does not mean that the lease is automatically binding on the

---

103 1993 Act, s 58(4).

104 1967 Act, s 14(6), which refers to cases "where under a lease executed to give effect to this section the new tenancy takes effect subject to a subsisting charge on the existing tenancy".

105 HM Land Registry require a mortgage over the existing lease either to be discharged or transferred to the new lease by a deed of substituted security (*Practice guide 27: the leasehold reform legislation* (March 2018), para 9.7.2).

106 1967 Act, s 14(4); 1993 Act, s 58(1) and (2).

107 Paras 10.150 to 10.212 below.

mortgagee. Both Acts provide that, if the current lease was granted after the mortgage and was not authorised by the mortgagee, the fact that the mortgage is deemed to authorise the grant of the lease extension does not mean that the new lease is binding on the mortgagee.[108] In these circumstances, a leaseholder would be advised to seek express authorisation for the ease extension from the mortgagee (and not merely rely on deemed authorisation) to ensure that he or she is not in danger of eviction if the landlord defaults on the mortgage.

3.220 One consultee, CILEx, wanted to know whether we are proposing to change the current law. We are not (although the statutory language might be simplified). We are proposing that a mortgagee cannot prevent the grant of a lease extension. In that sense, the grant of a lease extension should always be deemed to be "authorised". But the new lease will only automatically be binding on the mortgagee if the existing lease is binding on the mortgagee. A mortgagee that is not bound by an authorised lease extension should not become bound simply because the leaseholder has decided to extend the lease.

3.221 Some consultees, such as the Wellcome Trust, raised concerns about whether providing for mortgagees automatically to be bound by lease extensions might affect their willingness to lend. However, given that our proposal would largely replicate the current law, we do not think it is likely to have a significant impact on the ability of leaseholders and landlords to obtain finance.

3.222 Having clarified these points, we will look at each element of our provisional proposal, and the responses we received from consultees, separately.

Mortgages burdening the lease

3.223 Several consultees, including Wallace LLP, Philip Rainey QC, Orme Associates Property Advisors, and Gerald Grigsby, supported the idea that mortgages should transfer automatically from the existing lease to the new lease on the basis that it reflects the current law under the 1993 Act. CILEx pointed out that, in addition, our proposal would bring the law regarding lease extensions for houses under the 1967 Act into line with the 1993 Act regime for flats.

3.224 Nevertheless, there is a further question whether we *should* be replicating the current law or introducing a new system. Some consultees pointed out the advantages to leaseholders if a mortgage over a lease is automatically transferred on a lease extension. For example, Midland Valuations Ltd, surveyors, made the following point.

> There is frequently considerable delay in obtaining a Deed of Substituted Security from a mortgage lender which puts a leaseholder at risk of missing deadlines and time frames dictated by the legislation. It can also add significantly to the cost. If an existing mortgage lender is prepared to grant a mortgage over, say, a 65-year term, why would they object to the term being increased by a further 90 years?

---

[108] There is an additional complication. Even if the existing lease was unauthorised by the mortgagee, if the existing lease was granted before the 1967 Act came into force (for leases of houses) or before the 1993 Act came into force (for leases of flats), the new lease *will* be binding on the mortgagee.

We agree. We think that the automatic transfer of mortgages makes the enfranchisement process significantly quicker and cheaper for leaseholders.

3.225 However, a number of consultees, including Midland Valuations Ltd, Guy Charrison (a landlord) and the Conveyancing Association, were concerned that, if the terms of the new lease are onerous or unfavourable to the leaseholder, then the security provided by the new lease to the mortgagee may not be as good as the security provided by the existing lease. This problem should not arise in relation to our new enfranchisement scheme. First, if granted in accordance with our scheme, the new lease will contain (apart from necessary corrections and updates) the same terms as the existing lease, except that the term will be longer and the ground rent will be reduced to a peppercorn.[109] Second, we are recommending Government consider limiting the ability of the parties to agree a lease extension that is not on statutory terms without the approval of the Tribunal. Terms which do not comply with the statutory scheme would not then have their usual effect.[110] Thus, in all circumstances, the new lease should provide better security than the existing lease.

3.226 We continue to think, therefore, there is a strong case for maintaining the first part of our provisional proposal.

Mortgages burdening the landlord's estate

3.227 Consultees were a little more cautious about our proposal that a lease extension should be binding on the landlord's mortgagee. The PLA (supported by CMS Cameron McKenna Nabarro Olswang LLP, solicitors) pointed out that, while transferring a mortgage from the existing lease to the new lease benefits the mortgagee by increasing its security, making a mortgage over the landlord's estate subject to a new extended lease reduces the mortgagee's security. Consequently, several consultees argued that the second part of our provisional proposal should be modified.

(1) The PLA suggested that the consent of the landlord's mortgagee should be obtained prior to the grant of the lease extension so that the mortgagee can impose conditions (such as recovering part of the premium paid). Similarly, Church & Co Chartered Accountants also suggested that the mortgagee should have a right to a proportionate repayment of its loan from the premium paid for the lease extension.

(2) Some law firms (Thackray Williams LLP and Fieldfisher LLP) and mortgage lenders, together with UK Finance, were concerned that mortgagees should be notified of lease extensions, particularly so that they could take account of any substantial changes in the terms of the lease.

(3) Trowers & Hamlins LLP commented on the need for the premium paid to reflect a "fair market value for which the mortgage valuation would have been based upon".

---

109 See paras 3.169 to 3.179 above.

110 See Ch 14.

3.228 We do not agree with the first suggestion, that leaseholders should be required to seek the landlord's mortgagee's consent to a lease extension. Some consultees (including Nick Trainer, and an anonymous leaseholder) made the fundamental point that, if a lease extension is not binding on the landlord's mortgagee, the lease risks being lost if the landlord defaults on the mortgage. This would defeat the purpose of allowing lease extensions to take place. Consultees also pointed out that a requirement to seek consent can be used to frustrate the lease extension, or be used to extort further payments from leaseholders or to pressurise leaseholders to agree to vary the terms of the lease. Both Hamlins LLP and the PBA said that, at present, many cases are delayed while consent is obtained from the mortgagee. The PBA said:

> Mortgagees can take so long and require so many hurdles to be met before consent is given that the required four months for completion of the new lease following the agreement of terms acquisition cannot be met. The leaseholder then has to incur unnecessary costs making a court application.

3.229 Moreover, under the current law, a lease extension is always automatically authorised by the landlord's mortgagee and is usually binding on the mortgagee. We would need to be presented with very strong reasons if were to change the current law to the detriment of leaseholders. We do not think strong enough reasons have been put forward. A landlord's financial arrangements concerning the reversion should not prevent a leaseholder exercising statutory rights. And if the landlord's mortgage lender is to be bound by the lease extension, they must have lent money secured against the landlord's property in the knowledge that it was let on a lease which qualifies for enfranchisement rights (or, alternatively, must have authorised the grant of lease). The mortgagee is taking a known risk that the lease may be extended.

3.230 A common point raised by consultees, including the PBA, was that the effect of a lease extension on a landlord's mortgagee should be clarified with HM Land Registry. A particular issue raised was that sometimes mortgagees place restrictions on the register preventing the registration of a new lease if the mortgagee has not given consent. We make a recommendation in Chapter 10 intended to resolve this issue.[111] We recommend that the new legislation should make it clear that a mortgagee is deemed to consent to a lease extension and that this consent meets the requirements of a consent restriction in the register.

3.231 Regarding the second point raised by consultees set out at paragraph 3.227 above, we agree that we should make provision for the landlord's mortgagee to be notified of a lease extension. We are consequently making a recommendation regarding notification in Chapter 10.[112] But we do not think that a notification requirement should be expanded into a requirement to seek the mortgagee's consent, particularly where that amounts to a power of the mortgagee to veto the transaction.

3.232 The third point, raised by Trowers & Hamlins LLP, concerned the adequacy of the premium paid by the leaseholder for the new lease. It was worried that a lease extension may be granted at less than market value, so the landlord's mortgagee's

---

111 Recommendation 80, particularly para 10.210(1) below.

112 Recommendation 77, para 10.106 below.

security may be reduced and any amount the mortgagee is entitled to recover from the premium would not be sufficient to offset its loss of security. But for the reasons set out below, we do not think we need to make any change to our proposal in response to this concern.

3.233 The grant of a lease extension does not discharge a mortgage over the landlord's estate. The mortgage remains secured against that estate. Depending on the type of mortgage and its terms, the mortgagee may have no right to recover any portion of the premium paid for the extension. We cannot, for example, make general provision for leaseholders to pay the premium directly to the mortgagee or into court, because this would not be appropriate in many cases. (The situation is very different with individual and collective freehold acquisitions claims, as we discuss in Chapters 4 and 5.[113]) Thus, the mortgagee will need to recover any sums it is due directly from the landlord.

3.234 In our Valuation Report, we set out options for Government to consider in determining the premium that should be payable for a lease extension. Whatever option is taken, we anticipate that that a new legislative scheme (together with any necessary guidance or online resources) will make clear in each case what premium is to be paid for an extension. Landlords are unlikely to agree to the grant of a lease extension at a premium that is significantly less than the one they are entitled to under the new scheme (particularly if they are liable to make mortgage payments). But we do not intend to prevent a landlord and a leaseholder from agreeing that a lower premium should be paid. The parties may, for example, want to offset a debt owed by the landlord to the leaseholder or take account of improvements has made to the property for which he or she is entitled to be reimbursed by the landlord. The parties may simply want to avoid any dispute and agree a price that is favourable to the leaseholder.

3.235 We do not think that we should provide that a lease extension is only authorised if the leaseholder pays the statutory premium for the grant. Suppose a leaseholder's lease had priority over a mortgage on the landlord's title. The leaseholder was granted the lease and at a later date the landlord mortgaged his or her reversion. The leaseholder extends his or her lease and pays a little less than the statutory premium. The existing lease is surrendered; the leaseholder now has a new longer lease instead. We do not think it would be fair to provide that the new lease is now bound by the mortgage and unauthorised. That would be a severe penalty for the leaseholder, putting them at risk of eviction by the landlord's mortgagee.

3.236 The only other option, we think, would be to provide that a leaseholder should obtain a landlord's mortgagee's consent to a lease extension. But we have already explained why consent should not be required. Additionally, a leaseholder does not usually have to obtain consent under either the 1967 or the 1993 Acts. We would be making the lease extension process more difficult for leaseholders by requiring them to seek consent.

3.237 We think, therefore, that mortgagees should, where necessary, have to fall back on their other remedies. They have the option of suing on a landlord's personal covenant to repay the loan. In extreme cases, their options may include bankrupting a landlord.

---

[113] See paras 4.372 to 4.404 and 5.183 to 5.195 below.

Leaseholders should be aware that, although the point does not appear to have been tested in court, it might be possible for a mortgagee then to challenge the grant of the lease extension to the leaseholder as a transaction at an undervalue.

3.238 Finally, Long Harbour and HomeGround suggested that the lease extension should also be binding on any third-party charge, such as a charging order under the Charging Orders Act 1979. We agree.

Recommendations for reform

3.239 We are therefore making the following recommendation in line with our provisional proposal.

Recommendation 6.

3.240 We recommend that, where a lease extension is granted:

(1) any mortgage or other charge secured against the existing lease should automatically be transferred to the new lease; and

(2) if the landlord's estate is subject to a mortgage or other charge:

(a) the mortgagee or chargee should automatically be deemed to consent to the lease extension; and

(b) the lease extension should automatically be binding on the mortgagee or chargee, but only if the existing lease had priority over the mortgage or charge or was authorised by the mortgagee or chargee.

PROPERTY RIGHTS BENEFITING THE LEASE

3.241 At the beginning of our discussion of mortgages above, we noted that there may be a similar but broader issue that we need to resolve regarding other property rights that benefit or burden the leaseholder's or the landlord's title. These are not issues that we discussed at length in the Consultation Paper, and we did not ask a specific consultation question about them. But we did suggest a possible general approach that could be taken. We said the following.

> We also believe that all of the rights granted by an existing lease over land that is not included within the premises granted to the leaseholder by that lease should be continued by the terms of the lease extension where it is possible to do so.[114]

3.242 Our focus in this and the following section will be specifically on property rights: interests in land rather than personal obligations of landowners. We will consider, in particular, restrictive covenants and easements. But our recommendations would also apply to profits à prendre (rights to take things from a person's land) and, in the event

[114] See CP, para 4.48.

that our recommendations in our 2011 report Making Land Work are implemented, to land obligations as defined in that report.[115] These rights are known as "appurtenant rights", because they are linked to (or "appurtenant to") the ownership of a piece of land; they are enjoyed by the owner of the relevant land, whoever that may be.

3.243 Property rights over neighbouring land that are granted with a lease may be extremely valuable. For example, a leaseholder may be able to obtain a lease extension relating to extensive premises at a low price and with a minimum of effort. But if the premises can only be accessed via a right of way over a neighbour's land, it will be vitally important to the leaseholder that he or she continues to enjoy that right of way after the lease is extended. The loss of a right of way can render land effectively worthless. Our new scheme for enfranchisement must make some provision for the effect of a lease extension on appurtenant rights. As a lease extension takes place at law by way of a surrender and regrant, appurtenant rights attached to the existing lease may be lost if we do not make provision for these rights to be regranted or transferred to the new lease.

3.244 We think that our suggestion in the Consultation Paper provides a good starting point. Although we did not ask a direct consultation question about it, several consultees commented on the suggestion. Their responses are summarised below. These responses have prompted us to consider some complications which we think our new scheme for lease extensions needs to address.

(1) First, we suggested extending appurtenant rights "granted in an existing lease". We need to consider whether this suggestion should apply only to rights granted in the lease itself, or whether it should also extend to rights granted in a separate agreement concluded alongside the lease, or by a separate agreement concluded on a later occasion.

(2) Second, we must consider whether our policy would apply only to rights granted for the (remaining) duration of the existing lease, or whether our suggested policy would also apply to time-limited rights (for example, a five-year easement granted to a leaseholder with a 100-year lease).

(3) Finally, we must decide whether leaseholders should only be able to extend appurtenant rights granted over the landlord's retained land or whether they should also be able to extend rights granted over land belonging to a third party.

Summary of consultees' views

3.245 A number of consultees supported the idea that property rights over other land which benefit a leaseholder's lease should be extended on a lease extension. For example, Andrew Yelland, a leaseholder, agreed that "there should be no more or less rights guaranteed by the process of lease extension". A couple of consultees argued that a lease extension should, in particular, extend rights to use a parking space which accompany the existing lease. One anonymous leaseholder also said that, where a lease of a flat is extended and the flat is in a development which includes common areas, "the extension must automatically include (at no cost) rights over those areas as well". Derek Sparrow, a leaseholder, said that all easements should be included in

[115] Law Com No 327.

a lease extension. He also wanted to know whether a landlord would be able to offer more rights with the extension, and whether a leaseholder would have the choice whether to accept a grant of further rights. We also think that we should consider whether a leaseholder should be able to choose to take fewer rights with a lease extension.

3.246 Two consultees provided detailed responses commenting on complications that can arise where a lease grants rights over land which is now owned by a third party. Mark Chick offered the following response.

> I agree with the basic premise of the suggestion, but I have a concern that there may be an issue with property rights / easements that are shared with other properties. A particular issue that I have seen in practice (aside from split reversions) is where the rights available over adjoining land that is not in the same freehold ownership are in themselves time limited, perhaps because the title is leasehold. Clearly, with an extension the adjacent owner (who is not the reversioner) cannot be compelled to grant rights in excess of the extent of their own title. Is the suggestion that limited rights (such as an access to a garden etc.) would be binding upon superior landlords who are not a party to the original lease and who do not have any other direct relationship with the competent landlord or the flat owner? On balance therefore my answer is “no”.

3.247 Second, Boodle Hatfield LLP supported our suggestion but noted that there may be complications with rights over third-party land.

> We agree … with the suggestion at paragraph 4.48 that all rights under the existing lease should be continued in the new extended lease, save that this needs to be subject to a caveat that the grant of such rights should only continue where it is possible to do so (and, as above, excluding Aggio-type claims). If circumstances have changed since the date of the grant of the existing lease, such that the rights cannot now be granted by the landlord, the legislation should accommodate that.

Examples of property rights benefiting freeholds and leases

3.248 We think that Mark Chick and Boodle Hatfield LLP have raised an important point about cases in which landlords grant rights over their retained land and then transfer that land to a third party. There is a related issue about cases in which leases benefit from interests granted (at the outset) by third parties. Additionally, underlying both of these issues is a question about what happens (and what should happen) when a lease that benefits from rights over other land is extended.

3.249 In order properly to examine these issues, we think it will be helpful to consider some specific cases. We start by considering a straightforward case in which a freehold title has the benefit of property rights over other land and the freeholder then grants a long lease. We then give an example of a more complicated case in which property rights have been granted for the benefit of the leasehold title itself.

Property rights benefiting a freehold

3.250 Suppose that the freehold owner of a piece of land (plot X) negotiates with the freehold owner of a neighbouring piece of land (plot Y) for the grant of a permanent right of way over plot Y (which enables easier access to plot X from a main road). The

right of way is a property right (an easement) that benefits the freehold title to plot X and burdens the freehold title to plot Y. The owner of plot X then lets the land on a lease which qualifies for enfranchisement rights. Unless the owner of plot X expressly withholds the benefit of the right of way when he or she lets the land, the leaseholder will be entitled to use the right of way over plot Y for the duration of the lease.[116]

3.251 If the leaseholder claims a lease extension, no difficulties arise. The landlord's freehold title still has the benefit of a right of way over plot Y and the landlord can grant a new extended lease with the benefit of this same right. The owner of plot Y suffers no prejudice. His or her land is still burdened by the same easement used by a neighbour; it is merely that the neighbour is a leaseholder rather than a freeholder.

3.252 The only case in which we think difficulties may arise is a scenario in which the owner of plot Y granted the owner of plot X a time-limited right (for a specific purpose): the standard example we will use is an easement of crane oversail granted for two years for the purpose of completing some development work on plot X. The duration of an easement does not need to match the duration of the estate that it benefits.

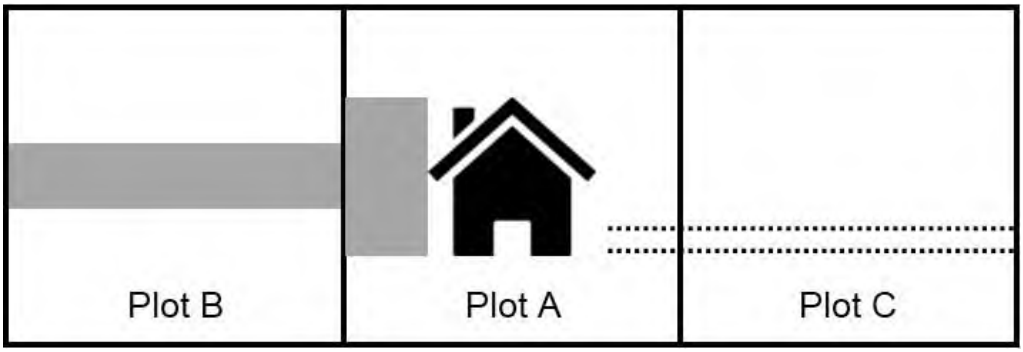
3.253 It is unlikely that the owner of plot X would then let the land on a long residential lease with the benefit of two-year easement of crane oversail. But if this were to happen, and the leaseholder were to claim a lease extension, the owner of plot X would not be able to extend that right in conjunction with the lease extension. (Indeed, we do not think that a right of this kind should be extended on a lease extension.) But matters are more complicated if, for some reason, the freehold has the benefit of, for example, a 50-year right of way over plot Y. We will return to consider cases of this kind at paragraphs 3.284 to 3.286 below.

Property rights benefiting a lease

3.254 There are a wider variety of cases in which an appurtenant right can be granted for the benefit of a leasehold title (rather than for the benefit of the landlord's freehold title). An example setting out the relevant variations is provided below.

[116] Law of Property Act 1925, s 62(1) and (4).

Figure 4: Property rights benefiting a leasehold title



The freehold owner of plot A lets the plot (the house and the land) to a leaseholder on a 50-year residential lease. The freeholder also owns the freehold of plot B. The freeholder grants the leaseholder an easement over plot B (specifically, a right of way to use the driveway which leads to the leaseholder's front door, shown in grey).

We will consider some variations of the grant of the right of way over plot B. It might be granted within the lease, or by a separate deed executed at the same time or on a later occasion. We will also consider cases in which the right of way is granted for a fixed period that is shorter than the lease term.

The leaseholder also has an easement over plot C (specifically, a right of way over a path to the leaseholder's back door, marked by the dotted lines). We will consider two scenarios.

In the first scenario, plot C used to be owned by the landlord (the freeholder who owns plots A and B) and the landlord granted the right to use the path. But plot C has now been sold to a third party. Importantly, when the landlord sold plot C, he or she failed to reserve a right of way over the land for the benefit of the freehold title to plot A. So, plot C is burdened by a right of way for the benefit of the lease of plot A, but not for the benefit of the freehold to plot A.

In the second scenario, plot C was always owned by a third party. The leaseholder negotiated independently with that third party for a grant of a right of way to benefit the lease of plot A.

3.255 We will refer back to this illustration repeatedly in explaining how we think we should resolve the issues raised by consultees. But while the illustration only refers to rights of way, we intend our discussion also to apply to all other property rights, such as restrictive covenants.

3.256 Our discussion will be structured as follows.

(1) First, we will consider in what circumstances leaseholders should be entitled to claim an extension of appurtenant rights alongside a lease extension. In addressing this issue, we will examine

(a) whether it should matter if the relevant rights were granted in the existing lease or separately from the existing lease;

(b) whether the relevant rights may be extended regardless of whether they burden the landlord's retained land or land belonging to a third party; and

(c) what difference it should make if the relevant rights were granted for the duration of the existing lease or for a shorter period.

(2) Second, we will consider whether and in what circumstances leaseholders should be able to choose not to extend an appurtenant right that they are entitled to extend.

A leaseholder's entitlement to extend appurtenant rights benefiting the existing lease

Property rights granted outside the lease

3.257 The starting position for a lease extension either under the 1967 Act or under the 1993 Act is that (aside from issues of rent and duration) the new lease is granted "on the same terms" as the existing lease.[117] Furthermore, both Acts state that "provision shall be made by the terms of the new lease or by an instrument collateral thereto for the continuance of any agreement, with any suitable adaptations, collateral to the existing lease".[118]

3.258 Neither Act defines the meaning of phrase "collateral agreement/document". The authors of *Hague* note that it is unclear what kinds of agreements the Acts were intending to capture. They suggest it might apply to a licence granted by a landlord to a leaseholder giving permission to use the property in a particular way.[119] But we do not see why the wording of the Acts could not also apply to an agreement between the landlord and the leaseholder of plot A, executed at the same time as the lease, granting the leaseholder a right of way over plot B.

3.259 Ensuring that leaseholders can extend appurtenant rights granted in their leases or in collateral agreements accords with elements of the current law. It was also universally supported by all consultees who commented on the issue.

3.260 Additionally, we do not think that it should make a difference whether the relevant rights are granted within the lease or alongside the lease, or whether they are granted on a later occasion. We think this for two reasons.

(1) First, the terms of the lease extension may not reflect the terms of the lease and collateral agreements as they were originally agreed. If the lease or collateral agreements have been varied in the interim, the new lease will reflect those terms *as varied*. For example, the right of way over plot B may not have been granted in the original lease of plot A. The leaseholder may originally have accessed his or her house only by the path over plot C. The road over plot B may have been built later on and the lease varied to grant a right to use it. In

---

117 1967 Act, s 15(1); 1993 Act, s 57(1).

118 1967 Act, s 15(4); 1993 Act, s 57(3).

119 *Hague*, para 32-08.

these circumstances, the new extended lease should also grant an extended right to use the road over plot B. But we don't think there is any difference of principle between a case where the landlord grants the new right to use the road by varying the lease and a case where the landlord grants the right by executing a separate deed.

(2) More fundamentally, the crucial issue, it seems to us, is what appurtenant rights a leaseholder enjoys at the point that he or she claims a lease extension. For example, the lease of plot A may originally have been granted decades ago, when there was an entirely different route for accessing the house. That historical means of access may no longer exist. The leaseholder may now only be able to access the property using a recently-granted right of way over plot B. In this context, it is vitally important for the leaseholder to be able to obtain an extension of that right of way. Without it, a lease extension of plot A may be almost worthless.

Property rights affecting a third party's land

3.261 The next issue for us to consider is whether it should matter if the land over which a leaseholder exercises the relevant property rights belongs to the landlord or to a third party. Our focus will be on plot C. We will start by considering the scenario in which plot C was originally owned by the landlord and then sold to a third party after the lease of plot A was granted. We will then consider a scenario in which plot C was owned by a third party from the outset.

3.262 One difficulty in addressing this issue is that it is unclear, on the current law, who qualifies as a "landlord" under the 1967 and 1993 Acts. The law in relation to business leases under the Landlord and Tenant Act 1954 ("the 1954 Act") is somewhat clearer, due to the decision of the Court of Appeal in *Nevill Long & Co (Boards) Ltd v Firmenich & Co*.[120] Imagine that the lease of plot A is a business lease caught by the 1954 Act. The lease also granted the leaseholder a right of way over plot C (which was at the time owned by the landlord). In line with the decision in *Nevill Long*, the sale of plot C to a third party would count as a severance of the reversion to the lease. After the sale, there would still be one business lease, but two landlords: the freehold owner of plot A and the new freehold owner of plot C. The leaseholder could bring a claim under the 1954 Act for a new lease against both landlords and the new lease would include and extension of the right of way over plot C.

3.263 The principles in *Nevill Long* may apply more widely than the 1954 Act. For example, in *Cardwell v Walker*, Lord Neuberger, when he was High Court Judge, held that the reasoning in *Nevill Long* about what counts as a severance of the reversion to a lease was not dependent upon the specific provisions of the 1954 Act.[121] The decision in *Cardwell v Walker* implies that a purchaser of plot C would count as one of the leaseholder's landlord for the purposes of landlord and tenant law in general. That decision has now been applied in a first-instance decision of the County Court in *Lupin*

---

120 (1984) 47 P&CR 59

121 However, Lord Neuberger also noted that the decision in *Nevill Long* is not beyond criticism. The Court of Appeal took it for granted that selling land burdened by an easement granted in a lease counted as a severance of the reversion; the point was not specifically argued

Ltd v 7-11 Princes Gate Limited and Princes Gate Partnership LLP in relation to the right to a lease extension under the 1993 Act.[122]

3.264 We think, therefore, that the third-party owner of plot C (who bought the land from the landlord) would count, under the current law, as one of the leaseholder's landlords. The current law would then allow the leaseholder to extend the right of way over plot C when he or she extends the lease of plot A, provided that the right over plot C was granted in the lease or a collateral agreement. But the point is uncertain.

3.265 If the owner of plot C does not qualify as a landlord under the 1967 or 1993 Acts, then, on the facts of our scenario, the leaseholder has no means of obtaining an extended right of way over plot C (other than by negotiating independently with the third-party owner). It would be different if the landlord owner of plot B had reserved a right of way over plot C for the benefit of the freehold when the land was sold. That benefit could then be extended to the lease on a lease extension. But our scenario concerns property rights granted for the benefit of the lease, not the freehold; no right of way benefiting the freehold was reserved.

3.266 Furthermore, suppose that plot C had always belonged to a third party, so that the right of way over plot C was granted independently of the lease of plot B. In this scenario. we do not think there would any way of construing the third-party owner as a "landlord" for the purposes of the 1967 or 1993 Acts.

3.267 We think there are strong reasons to allow a leaseholder who is claiming a lease extension also to claim an extension of any appurtenant rights that benefit the lease, regardless of whether those rights burden land belonging to the landlord, land that used to belong to the landlord, or land that has always belonged to a third party.

(1) First, appurtenant rights may be vitally important. We could have formulated our example so that the only means of accessing plot A was via the right of way over plot C. The right to extend the lease may be almost worthless without a right to extend the duration of the easement over plot C.

(2) Second, if the leaseholder originally obtained the right of way over plot C by negotiating with the third-party owner, he or she may only have negotiated for a 50-year easement because he or she only had a 50-year lease. Enfranchisement legislation aims to mitigate the disadvantages of only having a 50-year lease by granting a right to a lease extension. But the disadvantages are not fully mitigated if there is no entitlement to extend appurtenant rights against third parties.

(3) Third, we have been imagining that plot C is owned by a third party who is unrelated to the landlord. But it might be owned from the outset by a company owned and controlled by the landlord. If we do not allow the leaseholder to claim an extension of appurtenant rights against the company, we potentially give landlords a means of holding leaseholders to ransom. They must grant a lease extension, and under the options for reform in our Valuation Report the

[122] Decision of the County Court at Central London (31 March 2020), at https://www.falcon-chambers.com/images/uploads/news/Judgment-Lupin_Ltd_-v-_7_-_11_Princes_Gate_Ltd_and_another-final_31_March_2020.pdf.

price paid for the lease extension may in future be prescribed, but they can increase the price by negotiating independently for the extension of essential appurtenant rights.

3.268 If we allow leaseholders to claim extensions of appurtenant rights against third parties, however, those third parties will need to be respondents to the lease extension claim (and possibly receive part of the premium paid). The freehold owner of plot A cannot grant extended rights over plot C. And the Tribunal cannot order the rights over plot C to be extended if the owner of plot C is not a party to proceedings. Consequently, we make recommendations regarding the service of enfranchisement claims on third parties in Chapter 8.[123] We recommend that leaseholders should be obliged to serve their landlord(s) and all parties from whom they are claiming extended property rights, but a failure to serve some of the relevant parties will not invalidate the claim. The Tribunal can make orders to regularise the claim and join the missing parties to the claim. We think this recommendation answers the concern raised by Mark Chick in his consultation response.

Should the extension of property rights be automatic?

3.269 We have so far argued that leaseholders should be entitled to claim an extension of appurtenant rights benefiting their leases regardless of how or when those rights were granted, and regardless of whether they affect land belonging to the landlord or a third party. We have not yet considered whether the landlord or a third party should be able to object to the grant of an extended appurtenant right.

Property rights granted in the lease

3.270 We start with property rights that are granted in the lease itself for the benefit of the leaseholder's title. These rights may be granted by the landlord over his or her retained land or, in the case of a tripartite lease, may be granted by a third party (who may also qualify as a "landlord" under the current law).

3.271 We explain above that the default position for a lease extension is that the new lease is granted on the same terms as the existing lease.[124] We recommended that the parties should be able to agree variations of the terms only in very limited circumstances.[125] If they wish to agree more extensive changes to the lease, then, under the policy put forward in Chapter 14, the parties must apply for Tribunal approval. The terms of the existing lease may confer rights on the leaseholder that do not amount to independent property rights. (In *Caldwell v Walker*, for example, the landlord was obliged to be available to sell cards for an electricity meter to the leaseholders at reasonable times of the day.) When such terms are carried across to new lease, the effect is to extend the relevant rights for the duration of the new lease. We think that the same principles should apply to the extension of *property* rights granted in the lease. The landlord (or other party to the lease) should be obliged to grant an extension of the relevant rights.

---

123 Recommendation 58, para 8.171 below.

124 Paras 3.169 to 3.179 above.

125 Recommendation 5, para 3.209 above.

3.272 However, we have come to the conclusion that we need to include a limited exception to this rule. Property rights (particularly easements) may be granted for a specific, time-limited purpose. For example, a neighbour may grant a leaseholder a two-year easement of crane oversail for the purpose of a specific development. Alternatively, the leaseholder may be given a five-year right of way, in the expectation that, after five years, the leaseholder will have an alternative and better means of accessing the property. A temporary right to park may be granted while an alternative parking structure (which the leaseholder will be able to use) is completed. The possible variations are endless.

3.273 We will refer to these property rights as "special-purpose rights". They are generally granted for a limited period of time, although this criterion will not always distinguish them from other kinds of rights. For example, if a lease only has ten years left to run, any right granted for the benefit of lease must be of (relatively) short duration. What we have in mind are rights that were not granted to the leaseholder to improve his or her general enjoyment of the land under the lease; rather, they were granted to support a special use of the land that was expected to last for a specific period of time (and so would come to an end regardless of whether the lease were to be extended). Moreover, the grant of the rights must have been limited in some way that they would not endure (for a significant period) after the expected end of the relevant special use of the land. An obvious example would a two-year right granted for the purposes of a development that was expected to last two years.

3.274 We recommend that a leaseholder should not have the right to claim an extension of special-purpose rights on a lease extension, regardless of whether they are granted in the lease or by a separate agreement, and regardless of whether they were granted by the landlord or a third party. If there is a dispute about whether an appurtenant right is a special-purpose right, the Tribunal will have jurisdiction to determine the issue.

3.275 If Government chooses to implement our recommendations, careful consideration will need to be given to the statutory definition of this exception. It concerns rights granted for the purpose of special, time-limited use of the leasehold land granted so as not to endure (significantly) longer than the relevant use of the land. But it should not be open to landlords, for example, to grant 50-year leases with the benefit of 49-year appurtenant rights and then claim that the rights must therefore be special-purpose rights (and potentially hold the leaseholder to ransom). Rights which contribute to the leaseholder's ordinary enjoyment of the property must continue and be extended to match the new lease.

Property rights granted outside the lease

3.276 We have also argued that leaseholders should have a right to extend property rights that were granted separately from the lease for the benefit of the leasehold title. We consider that the exception for special-purpose rights should also apply in this context. A leaseholder should not, for example, be entitled to claim an extension of a two-year right of crane oversail granted by a neighbour for the purpose of carrying out development work.

3.277 But setting aside special-purpose rights, where a leasehold title has the benefit of a property right that was granted separately from the lease, should the owner of the land affected by the right (the "servient" land) have a right to object to its extension? The

difficulty that we face in answering this question is that there is a wide spectrum of possible cases that our new scheme will have to address.

3.278 At one end of the spectrum, a third party may grant a leaseholder a property right in the expectation that the right will come to an end at a definite point in the future. For example, a neighbour may agree to a restrictive covenant preventing him or her from developing his or her land for 10 years. The covenant may be expected to last for 10 years because it was made for the benefit of the leaseholder who has 10 years left on the lease.[126] The neighbour may have tentative plans to develop his or her land in 10 years' time (perhaps thinking that he or she will be selling the property by this point). Alternatively, the neighbour may have agreed to a 10-year restrictive covenant for the benefit of a much longer lease. If the covenant provides a general benefit to the leaseholder, it may not count as a special-purpose right – it may simply be a time-limited right. In these cases, it is arguable that the neighbour should be able to object to the extension of the right. The case for saying this is even stronger if the right was granted at a time when the leaseholder's lease did not give rise to enfranchisement rights. It may originally have been a business lease (or non-qualifying residential lease) that was varied so as to qualify for enfranchisement rights.

3.279 Moreover, even if the relevant property right can and should be extended, there may be a strong case for it to be varied. Suppose the leaseholder has a right of way over the neighbour's land. The neighbour may be happy for the leaseholder to continue to enjoy a right of way for accessing his or her property, but may wish the right of way to follow a different route. The current route may cause significant inconvenience to the neighbour, whereas the new route might be equally convenient to the leaseholder.

3.280 At the other end of the spectrum, a property right granted outside the lease may have been granted by the landlord or an associated person or company. It may have been granted in full knowledge that the lease attracted enfranchisement rights. The lease may be for a term of one hundred years and the right may have been granted for that full term. There would then be no expectation that it will come to an end in the foreseeable future. Even if the right was granted long after the beginning of the lease it may have become essential to the leaseholder's enjoyment of the property. In a case of this kind, the relevant right should be extended when the lease is extended and the landlord (or third party) does not seem to have valid grounds to object to its extension.

3.281 These cases may be varied in countless ways and the relevant third party (or the landlord) may have better or worse grounds to object to the extension of an appurtenant right depending on the facts of the case. If we tried to cater for every possible situation with a comprehensive set of rules, there is a danger that our scheme for enfranchisement would become unduly complex. Our solution is to enable leaseholders to apply for the extension of all appurtenant rights granted outside of their leases but allow landlords and third parties to object to the extension of a right if

[126] We recognise that it is rare for owners to let qualifying leases run down to this point and also rare for lease extension claims then to be brought; it may be easier and not much more expensive to negotiate for the grant of a completely new lease. But cases of this kind may become more common under our new scheme if the valuation options chosen by Government make lease extensions significantly cheaper.

it would unreasonable in the circumstances to extend it. In the event that a landlord or third party objects, the matter would need to be resolved by the Tribunal.

3.282 We emphasise, however, that the starting point should be that all appurtenant rights (other than special-purpose rights) benefiting a lease are extended to match the term of the new extended lease. There should be a high threshold for showing that an appurtenant right benefiting a lease should not be extended. We recommend that the Secretary of State should have a power to specify factors in secondary legislation that the Tribunal must consider in exercising its discretion. There are some factors that we think would be relevant to the Tribunal's exercise of its discretion including –

(1) the extent to which the appurtenant right will contribute to the leaseholder's reasonable enjoyment of the property;

(2) conversely, the extent to which the appurtenant right will interfere with the reasonable enjoyment of the servient land; and

(3) whether the appurtenant right (despite not being a special-purpose right) was nevertheless granted for a limited period of time.

But this list is not meant to be exhaustive. And we do not mean to suggest that appurtenant rights should not be extended merely because one of these factors is in play. In particular, the mere fact that the right was granted for a limited period of time should not be determinative, as it will be essential to ensure that the grant of appurtenant rights for a limited period of time is not used to frustrate the exercise of enfranchisement rights.

3.283 We also make a similar recommendation in Chapter 5 concerning the inclusion on a collective freehold acquisition of property which the leaseholders have a right to use but not to use exclusively.[127]

Special-purpose rights and time-limited rights benefiting the freehold

3.284 We mentioned earlier (paragraphs 3.252 to 3.253 above) the possibility that a third party may grant a time-limited property right for the benefit of a freehold. If the freehold is then let on a qualifying lease with the benefit of the right and the leaseholder claims a lease extension, the landlord cannot extend the right because he or she does not own the land over which it is exercised. Only the third party can grant an extension of the relevant right.

3.285 Although the right was granted for the benefit of the freehold rather than the leasehold title, we consider that our policy set out above (on the extension of rights granted for the benefit of the lease but outside the lease itself) should apply in this situation as well. There is again a huge range of possible cases. The time-limited right granted for the benefit of the freehold may have been granted by a person or company associated with the landlord. The right may be essential to the enjoyment of the lease. It may have been granted for a limited period as a means of extracting further

[127] Recommendation 20, paras 5.149(4) and 5.150 below.

payments from the leaseholder on a lease extension. Alternatively, it may be a relatively inessential right granted by an independent neighbour.

3.286 We think that it is important that a leaseholder should be able to claim an extension of rights enjoyed under the lease even if they were granted for the benefit of the freehold. But as we discuss above, we do not think that the leaseholder should be able to extend special-purpose rights. Moreover, we think that the owner of the burdened land should have a right to object to the extension, with disputes being determined by the Tribunal.

Choosing not to extend an appurtenant right

3.287 On a lease extension, we have recommended that landlords and third-party owners of burdened land can (exceptionally) object to an extension of an appurtenant right that was granted independently from the lease. Should leaseholders have a similar option (an issue raised by Derek Sparrow in his consultation response). Should leaseholders be able to select which rights benefiting their leases they wish to extend?

3.288 We do not think that leaseholders should be able to choose whether or not to extend an appurtenant right granted in the lease. The leaseholder and the landlord (or other party to the lease) may agree not to extend a particular right but they will require the Tribunal to approve a lease extension on these terms. Our policy regarding appurtenant rights granted in the lease then matches our policy regarding the terms of lease extensions in general. Our scheme seeks to protect leaseholders (who are generally in a weaker bargaining position) from being manipulated into agreeing lease extensions that are not on statutory terms.

3.289 But our policy is different in relation to property rights granted outside the lease. A leaseholder should not be obliged to claim their extension. A leaseholder would otherwise be obliged to claim an extension of rights despite knowing that the owner of the servient land has valid grounds to object. A leaseholder would be forced to bring a claim that he or she may know is going to be lost. Rather, we recommend that leaseholders should have a choice whether or not to claim an extension of independent appurtenant rights.

3.290 Steps should be taken to ensure that leaseholders do not inadvertently overlook the need to extend property rights granted by the landlord independently from the lease. We recommend that standard form Claim Notices should include a claim to extend all appurtenant rights benefiting the lease, unless the leaseholder expressly states (in an appropriate section of the notice) that an extension of identified rights is not required. (However, if the rights were granted by a third party, the onus will be on leaseholders to claim an extension of rights from those third parties.)

Transfer of the benefit of interests from the existing lease to the new extended lease

3.291 There is a final difficulty regarding rights over land outside the lease that may arise on a lease extension and which our new enfranchisement scheme should address. In our 2011 report Making Land Work, we discussed the uncertainty in the law about whether an appurtenant interest (such as an easement) that benefits a lease can survive the surrender of the lease and then benefit the freehold. We suggested that the preferable view is that easements that benefit a lease come to an end when the

lease is surrendered.[128] A similar rule applies where a leaseholder has the benefit of a restrictive covenant granted in the lease over land formerly owned by the landlord and now owned by a third party. The restrictive covenant will be extinguished on the determination of the lease.[129] (The reasoning of the Court of Appeal in *Wall v Collins*[130] may suggest that the benefit of an easement attaches to the land itself and survives for the benefit of the freehold. But this case specifically concerned merger, rather than surrender, and we previously argued that it was wrongly decided.[131] The reasoning of the court in *Wall v Collins* has not yet been applied to restrictive covenants in leases.)[132]

3.292 Given that lease extensions take place at law by way of a surrender and regrant, leaseholders risk losing valuable property rights during the lease extension process, unless they negotiate for the benefit of the relevant interests to be transferred to the new lease.

3.293 We think that there is a simple statutory solution to this potential problem. Our new scheme could provide that, on a lease extension, all property rights benefiting a lease automatically transfer to the new lease. The priority of the interests in relation to one another should remain unchanged. In general, although the extension of the lease takes effect at law as a surrender and regrant, we are suggesting that the new extended lease should be treated as if it were a continuation of the same estate as the existing lease.

3.294 The automatic transfer of interests benefiting the existing lease to the new lease may add nothing where the landlord or a third party must grant identical interests (but extended in duration) for the benefit of the lease in any case. However, where a property right that benefits the lease is not extended on a lease extension (for example, if the leaseholder chooses not to claim it), it is useful for the existing rights to transfer to the new lease so that they are not lost. Our recommendation would also ensure that special-purpose property rights (which, as discussed at paragraphs 3.272 to 3.273 above, are not extended) also automatically transfer to the new lease.

3.295 It is important to note that the suggested statutory transfer of interests from the existing lease to the new lease would not affect their nature or duration. In our example, if the leaseholder had a 10-year right of way over plot C and fails to claim an extension (with or without the Tribunal's permission), the 10-year easement would carry over to the new lease for whatever period was left.

---

128 Making Land Work: Easements, Covenants and Profits à *Prendre* (2011) Law Com No 327, paras 3.249 and 3.252; *MRA Engineering Ltd v Trimster Co Ltd* (1988) 56 P&CR 1.

129 *Golden Lion Hotel (Hunstanton) Ltd v Carter* [1965] 1 WLR 1189.

130 [2007] EWCA Civ 444, [2007] Ch 390.

131 Easements, Covenants and Profits à Prendre (2008) Law Commission Consultation Paper No 186, paras 5.72 to 5.85.

132 This possibility is discussed in by Andrew Francis in *Restrictive Covenants and Freehold Land: A Practitioners Guide* (5th ed, 2019), para 7.42.

3.296 We consider that the same recommendation should also apply in relation to intermediate leases that are surrendered and regranted on a lease extension. We discuss the surrender and regrant of intermediate leases in Chapter 13.[133]

Recommendations for reform

3.297 Bringing together the points raised in our discussion in this section, we make the following recommendation. This recommendation implements the suggestion made in the Consultation Paper regarding the extension of appurtenant rights, which was supported by consultees, and also addresses the range of further difficulties we have identified regarding the effect of a lease extension on these rights.

Recommendation 7.

3.298 We make the following recommendations regarding property rights granted in the lease for the benefit of the lease.

(1) A lease extension should include an extension of all property rights granted in the lease itself for the benefit of the leasehold title so that their duration matches the term of the new lease (regardless of whether the rights affect the land belonging to the landlord or the demised premises or land belonging to a third party).

(2) Accordingly—

(a) the leaseholder must claim and the landlord (or, where relevant, the third party to the lease) must grant an extension of the rights described in paragraph (1); and

(b) if the parties agree that a relevant property right will not be extended, the lease extension is not on statutory terms.

However, our recommendation does not apply to "special-purpose rights". The Tribunal may determine disputes about whether a right is a special-purpose right.

3.299 We make the following recommendations regarding property rights granted separately from the lease.

(1) A leaseholder should be entitled to claim, at his or her election, an extension of any property rights (so that their duration shall match the term of the new lease) that were granted separately from the lease and that were granted:

(a) for the benefit of the leasehold title; or

(b) for the benefit of the freehold or an intermediate leasehold title and which the leaseholder is entitled to use under the terms of the existing lease.

[133] Paras 13.46 to 13.51 below.

(2) The leaseholder's entitlement to claim an extension of property rights should apply regardless of their nature or duration, regardless of whether they were granted at the same time as the lease or on a later occasion, and regardless of whether the land which they affect belongs to the landlord or a third party.

(3) A standard form Claim Notice should automatically include a claim for an extension of all such property rights that the recipient is able to grant unless the leaseholder expressly indicates otherwise.

(4) Landlords and third parties should be entitled to object to the extension of property rights that were granted separately from the lease, with disputes to be determined by the Tribunal. The Tribunal should have a discretion to allow the right not to be extended or for it to be varied on the extension.

(5) The Secretary of State should have the power to specify factors in regulations that the Tribunal must take into account in exercising its discretion, but the starting point should be that all property rights benefiting the lease are extended.

Our recommendation does not apply to "special-purpose rights".

3.300 We further recommend that, on the completion of a lease extension by the surrender of the existing lease and the grant of a new lease, there should be an automatic statutory transfer of all property rights benefiting the existing lease to the new lease. The same automatic transfer should apply to rights benefiting intermediate leases that are surrendered and regranted on a lease extension.

PROPERTY RIGHTS BURDENING THE LEASE

3.301 Although we suggested in the Consultation Paper that property rights that benefit a lease should also be extended on a lease extension, we did not make any suggestions regarding property rights that burden the lease (or burden a superior lease or the freehold). But many of the same or similar problems that arose in relation to interests that benefit a lease also arise in relation to interests that burden them. Although we did not discuss these problems in the Consultation Paper, we think that our new scheme for enfranchisement needs to address them. Moreover, to a large extent, the policy we have developed regarding the burden of interests simply follows from the points we made in discussing the benefit of interests.

3.302 We will start by considering problems that arise due to the grant of a new lease taking effect by way of surrender and regrant. We then consider whether a landlord or a third party should be entitled to extend property rights affecting a lease when the lease is extended.

Transferring the burden of interests from the existing lease to the new extended lease

3.303 As we explain in paragraphs 3.291 to 3.296 above, while a lease extension takes effect at law by way of surrender and regrant, we do not think that a lease extension should provide an occasion for stripping property rights away from a lease or making it

newly subject to other property rights. So far as is possible, we think the new lease should take effect as if it were a continuation of the existing lease.

3.304 We do not think that any difficulties arise in standard cases where a third-party has an interest that burdens the landlord's freehold and is also binding on the leaseholder's lease. Consider the following example.

Freehold and lease both subject to a third-party property right

A landlord's freehold is subject to a restrictive covenant benefiting a neighbour, which is protected by a notice registered against the landlord's title. The landlord then lets his or her property on a long lease. Once granted, the lease is also subject to the restrictive covenant.

If the lease is extended, the existing lease is surrendered and a new lease is granted. If the notice is still registered when the new lease is granted, the new lease will be subject to the restrictive covenant. This outcome is unproblematic.

3.305 Problems can arise, however, if a third party owns an interest that only affects the landlord's title without also being binding on the lease. We give an example of such a scenario below.

Freehold but not lease subject to a third-party property right

A landlord's freehold is subject to a long lease. It is possible that after the grant of the lease, the landlord may agree with a neighbour to impose a restrictive covenant over the freehold. The covenant would be binding on the freehold reversion but not on the lease; for this reason, such interests are unlikely to be granted, unless the lease is expected to end imminently.

Alternatively, suppose the landlord agreed the restrictive covenant before the grant of the lease, but the neighbour failed to protect it by registering a notice. The leaseholder was not bound by the unregistered restrictive covenant. But the neighbour could register a notice against the freehold after the grant of the lease to ensure that the freehold and any subsequent leases will continue to be bound by it.

The leaseholder claims a lease extension. As a statutory lease extension operates by way of surrender and regrant, the leaseholder's new extended lease is granted *after* the creation of the restrictive covenant. If the restrictive covenant is now protected by registration, it will be binding on the new lease, even though it was not binding on the original lease.

3.306 The current law does not ensure that a leaseholder, when they obtain a new extended lease, is not made subject to the interests that previously only affected the freehold.

Moreover, the leaseholder would be bound by the interest immediately, not merely at the point that the existing lease would have ended.

3.307 But the surrender of the existing lease and grant of a new, extended lease is merely the mechanism by which a lease is extended. The leaseholder's right to a lease extension arises by virtue of his or her ownership of the existing lease. The right to a lease extension aims to resolve the problem that leases are a wasting asset; it is not intended to put leaseholders in a worse position than they are in under their existing leases. The leaseholder's existing lease is not bound by the restrictive covenant. We do not think the new lease should be bound either. The new lease should retain the priority of the existing lease in relation to interests affecting the landlord's title.

3.308 We discuss a potential complication in Chapter 4, however, where we outline a case in which a freehold and a lease end up being burdened by separate interests but with identical natures. We explain how, as a result of the way in which a landlord may reserve rights for the benefit of retained land when he she grants a lease, a future purchaser of that land may end up with a right of way binding the lease and a separate but identical right of way binding the freehold.[134] Although in this scenario, the current lease is technically not bound by the right of way burdening the freehold, we think that the new extended lease should be bound by that right of way and we do not intend our recommendation to imply otherwise. We are concerned with cases in which a property right affects the freehold, but not the lease *and where the lease is not bound by any corresponding and equivalent right*.

3.309 A similar approach can be taken in cases in which a third party owns an interest that burdens the lease but does not affect the freehold. Consider the following example.

Lease but not freehold subject to a third-party property right

A leaseholder enters into a restrictive covenant for the benefit of a neighbour's property. The agreement does not involve the landlord. The restrictive covenant does not affect the freehold. When the term of the lease expires and the landlord recovers possession of the property, the landlord will not be bound by the restrictive covenant.

The leaseholder claims a lease extension, which involves a surrender and regrant. The surrender of the lease is a consensual agreement between the landlord and the leaseholder to bring the lease to an end early. But the surrender cannot prejudice the proprietary interests of a third party in the lease (under the legal principle that a person cannot be adversely affected by an agreement or arrangement to which he or she is not a party[135]). After the surrender, the landlord's title will then be bound by the restrictive covenant for the remaining period of the original lease. The new extended lease will also be bound by the restrictive covenant, provided it is protected by a notice in the register.

134 Paras 4.146 to 4.147 above.

135 *Barrett v Morgan* [2000] 2 AC 264, 271.

3.310 However, although legal principles have developed that limit the extent to which third parties can be prejudiced by the surrender and regrant of a lease, the situation in the above scenario is not entirely satisfactory.

(1) First, if the restrictive covenant is not protected by a notice in the register, the extension of the lease may have a surprising outcome. Even though the restrictive covenant is not registered, we think it will still burden the freehold after the surrender of the lease.[136] But it will not bind the new extended lease when it is granted.[137] If this is right, the landlord will end up bound by the restrictive covenant and the leaseholder will take free of it.

(2) Second, the landlord is required by the 1967 or 1993 Acts to accept the leaseholder's surrender of the existing lease. By doing so, the landlord's title becomes subject to the restrictive covenant. It will remain subject to that covenant until the time that the existing lease would have come to an end, regardless of whether the new extended lease continues to exist. For example, the leaseholder might breach the terms of the new lease and it might then be forfeited. If the existing lease had been forfeited, the restrictive covenant would have ceased to exist. But forfeiture of the new lease does not have this effect because the restrictive covenant now attaches to the freehold. We do not think that this outcome is fair on the landlord, who had no role in creation of the restrictive covenant.

3.311 We recommend as a solution to the problems we have outlined in this section a statutory provision that sets out what happens to interests burdening the landlord's title or the lease on a statutory lease extension. We think that interests that burden a lease should simply be carried across to the new lease on a lease extension. The default position (subject to what we say in the next section) should be that the nature and duration of the relevant interests are unchanged. Their relative priority to one another, or to interests affecting the freehold or a superior lease, should also be unchanged. Moreover, interests affecting the freehold or a superior lease should have the same priority in relation to the new lease as they did in relation to the existing lease. In other words, a lease extension should leave the status quo unchanged.

3.312 We also think that the same principles should apply in relation to the surrender and regrant of intermediate leases, an issue we discuss in Chapter 13.[138]

Extending property rights burdening a lease

3.313 We have explained how property rights burdening a lease may be transferred from the existing lease to the new lease on a statutory lease extension. Earlier in this chapter, we discuss how property rights benefiting a lease may be extended when the lease is

---

136 The law is not entirely clear on this point. The issue turns on whether the surrender of a lease is a "registrable disposition" within the meaning of s 27 of the Land Registration Act 2002. And the answer to that question depends on whether the surrender of a lease is a "transfer" of the lease to the landlord. Our tentative view is that it is not.

137 The grant of the new lease is a registrable disposition under s 27 of the Land Registration Act 2002.

138 See paras 13.46 to 13.51 below.

extended. We need to consider whether a lease extension should also be an occasion for extending the duration of property rights that burden a lease.

3.314 Just as property rights granted in the lease for the benefit of the leaseholder title should be extended on a lease extension, so we think that property rights burdening the lease that were granted or reserved in the lease itself should also be extended. This approach fits with our policy that the new extended lease should, with limited exceptions, contain the same terms as the existing lease.

3.315 Property rights that bind leasehold land and that were granted or reserved in the lease itself will generally benefit the landlord's retained land, at least at the outset. However, the rights may benefit third-party land. The landlord may have subsequently sold the benefited land to the third party. Alternatively, the rights may have benefited third-party land from the outset. For example, a tripartite lease between a landlord, a leaseholder and a management company that owns the common parts of a housing estate may impose restrictive covenants or easements on the leasehold title for the benefit of the management company's land.

3.316 We think rights granted or reserved in the lease help define the entitlement to land given to the leaseholder by the landlord. The landlord agreed to let the land on the basis that it would be subject to property rights reserved in the lease. And the leaseholder agreed to take the lease of the land on the basis that his or her title would be bound by these rights. We do not think that either the landlord or the leaseholder can, in general, have a legitimate objection to their extension.

3.317 But we do not believe that landlords or third parties should have any right, on a lease extension, to insist on the extension of property rights binding the lease that were granted outside of the lease itself. We think that this approach is justified by both practical and policy considerations.

3.318 Starting with practical considerations, suppose that a neighbour has the benefit of a 50-year right of way affecting a leaseholder's 50-year lease, which the neighbour and the leaseholder separately agreed. The neighbour did not seek to obtain a right of way affecting the freehold. The leaseholder now claims a new 990-year lease. Suppose our new scheme were to provide that the neighbour's right of way now becomes a 990-year easement. There would be adverse consequences for the leaseholder and his or her landlord. There is no provision in our scheme (or in current enfranchisement law) for the leaseholder to obtain a payment from the neighbour for the grant of the extended right. Furthermore, the extension of the right of way would reduce the value of the new lease and so reduce the premium payable to the landlord. But the landlord has no means of obtaining compensation for this reduction in value. Allowing the extension of such rights would significantly complicate enfranchisement procedure and the valuation of new leases.

3.319 Regarding policy considerations, the neighbour has negotiated and paid for a 50-year right of way. We do not think this right of way should be lost on a lease extension. The neighbour should still have what he or she bargained for. But enfranchisement rights are not intended to confer a windfall (or any particular benefit) on the *neighbours* of leaseholders. They are intended to confer a benefit on leaseholders.

3.320 The points we have made in this section are brought together in the following recommendation.

Recommendation 8.

3.321 We recommend that the following provisions should apply on the completion of a lease extension by the surrender of the existing lease and the grant of a new lease.

(1) There should be an automatic statutory transfer of all property rights burdening the existing lease to the new lease. The same automatic transfer would apply to property rights burdening intermediate leases that are surrendered and regranted on a lease extension.

(2) The new extended lease should have the same priority in relation to property rights affecting the freehold or a superior lease as the existing lease. This rule does not apply, however, in relation to mortgages, estate contracts and options (on which, see below). It also does not apply to property rights affecting the freehold where the lease is also affected by a materially identical corresponding property right.

3.322 We recommend that property rights which burden the lease and which were granted or reserved in the lease should automatically be extended on a lease extension.

Estate contracts and options

3.323 Both the 1967 Act and the 1993 Act address cases in which the landlord has agreed to sell or grant an option to purchase or a right of pre-emption in respect of his or her property to a third party. Section 5(7) of the 1967 Act makes the following provision regarding the effect of a leaseholder's notice of claim to acquire the freehold or a lease extension of his or her house:

> the landlord and all other persons shall be discharged from the further performance, so far as relates to the disposal in any manner of the landlord's interest in the house and premises or any part thereof, of any contract previously entered into and not providing for the eventuality of such a notice.

Section 5(7) goes on to provide that, where a leaseholder has claimed a lease extension, a contract with a third party for the acquisition of the landlord's property will only be discharged if the property is to be acquired with vacant possession.

3.324 Section 5(7) draws no distinction between options to purchase the landlord's title that were granted before the existing lease and those that were granted afterwards. Suppose, for example, that a freeholder enters into a contract with a third party for the sale of his or her property, or grants an option to purchase it, with vacant possession. A contract to purchase the property or an option constitutes an "estate contract"; it grants the third party an equitable property right in the property which may be protected by the registration of a land charge (if the property is unregistered) or a notice (if the property is registered). The freeholder then grants a long lease, and the lease is not authorised by or subject to a special agreement with the third party. The

leaseholder would be well advised not to take such a lease; the leaseholder is at risk of being evicted the moment the third party exercises the option or proceeds with the purchase. Nevertheless, even though the option or estate contract is binding on the lease, the effect of section 5(7) appears to be to discharge the agreement between the freeholder and the third party as soon as the leaseholder makes a claim for a lease extension or to acquire the freehold.[139]

3.325 Section 19(4) and (5) of the 1993 Act make equivalent provision for collective freehold acquisitions. But (oddly) the 1993 Act does not state that estate contracts and options granted to third parties to purchase the freehold with vacant possession are discharged when a leaseholder claims a lease extension of a flat. The second part of section 5(7) concerning lease extensions and vacant possession is not replicated in the 1993 Act.

3.326 Suppose that a freeholder grants an option to a third party to purchase the freehold with vacant possession after the expiry of an existing lease of a flat in the relevant building. The option is protected by a notice. If the leaseholder claims a lease extension, the existing lease is surrendered. The new lease would be granted subsequently to the option and would, at first sight, be subject to the third party's right to acquire the property with vacant possession.

3.327 The 1993 Act makes some relevant provision for this scenario in section 93(1) (which replicates section 23(1) of the 1967 Act). Under section 93(1):

> any agreement relating to a lease (whether contained in the instrument creating the lease or not and whether made before the creation of the lease or not) shall be void in so far as it … purports to exclude or modify any right to acquire a new lease under Chapter II … .

An agreement giving a third party an option to purchase the freehold with vacant possession would effectively exclude the leaseholder's right to acquire a new lease. However, it is doubtful whether section 93(1) would apply to an option agreement concluded before the grant of the existing lease was contemplated.[140] We discuss the interpretation of sections 23 and 93 in more detail in Chapter 4.[141]

3.328 There seems, therefore, to be an asymmetry between the 1967 and 1993 Acts. Under the 1967 Act but not the 1993 Act, prior agreements for the purchase of a landlord's property with vacant possession are discharged by a lease extension. We cannot see any reason why this asymmetry should exist. We do not think that our new scheme should automatically discharge estate contracts on lease extensions of houses, and individual and collective freehold acquisitions, but not on lease extension of a flat.

---

139 We are not aware of any case in which the court has considered this point of interpretation concerning s 5(7) of the 1967 Act (or the equivalent provision in s 19(4) and (5) of the 1993 Act).

140 The Court of Appeal in *Rennie and Rennie v Proma Ltd and Byng* (1990) 22 HLR 129 held (at 139) that, if a provision of an agreement is void under s 23(1) of the 1967 Act, it "must be void *ab initio*; one must look at the position as at the time when the agreement was made". Following *Proma Ltd*, an agreement for the sale of the landlord's freehold cannot purport to exclude or modify a right to acquire the freehold or an extended lease if it is uncertain whether a lease with enfranchisement is going to be granted.

141 Paras 4.186 to 4.190.

Given we are recommending the creation of a new, unified scheme for lease extensions and freehold acquisitions that will apply both to houses and to flats,[142] we intend to introduce a single rule to deal with estate contracts.

3.329 A key purpose of our reforms is to make the enfranchisement process work better for leaseholders. It would not be consistent with this goal to deprive leaseholders of a protection afforded by the 1967 Act. Consequently, we have decided to follow the approach taken by the 1967 Act rather than the 1993 Act. A lease extension claim should automatically discharge a prior contract for the sale of, or option to purchase, the landlord's property with vacant possession.

3.330 Including these provisions in our new scheme would have no effect, however, upon an estate contract or option to purchase the lease granted by the leaseholder prior to making a lease extension claim. They will also have no effect on a contract or option for the acquisition of a property right affecting the lease (for example, an option to take a grant of an easement). A leaseholder should not be able to escape from contracts into which he or she has entered by claiming a lease extension.

3.331 But the burden of an estate contract or option affecting the existing lease should not automatically transfer to the new extended lease. A leaseholder who has agreed to sell a lease with 20 years left to run for £100,000 and who claims a lease extension should not automatically be taken to have agreed to sell his or her new 990-year lease for £100,000. Moreover, our scheme cannot provide for estate contracts and options to be transferred to the new lease with specified modifications. Such contracts may include an unlimited variety of provisions that would be unsuitable in relation to the new extended lease.

3.332 In practice, therefore, an estate contract or option binding the lease will be an obstacle to a lease extension. If the relevant agreements are protected by restrictions registered against the leaseholder's title, the leaseholder may be unable to surrender the existing lease in order to obtain the grant of a new extended lease. Alternatively, where a new lease is successfully granted, the existing lease may be deemed to be continuing in existence for the purposes of the enforcement of the estate contract or option. A leaseholder will need to negotiate with the beneficiary of the option or estate contract for its release (potentially in return for the grant of a modified new option or estate contract that will affect the new lease after its grant).

[142] Recommendation 1, para 3.36 above.

Recommendation 9.

3.333 We recommend that an estate contract or option to purchase the landlord's title with vacant possession should be suspended by the service of a Claim Notice seeking a lease extension and discharged on completion of the claim.

3.334 We recommend that an estate contract or option to purchase the leaseholder's title or to acquire a property right burdening that title should not automatically transfer to the new lease following a lease extension claim. The leaseholder would have to comply with any restriction protecting such a contract or option, and it would prevent the successful surrender of the existing lease unless the leaseholder agrees with the beneficiary of the estate contract or option—

(1) for the purchase of the existing lease or the grant of the property right to take place before the completion of the claim;

(2) for the estate contract or option to be discharged; or

(3) for a new estate contract or option to be agreed in relation to the new lease.

3.335 A contract between the landlord and a third party may also present an obstacle to obtaining a lease extension if the contract prohibits the landlord from granting a new lease or sets conditions on how a new lease may be granted. The landlord may be required to follow a particular process that significantly delays the lease extension or may be required to ensure the leaseholder undertakes new obligations that were not imposed under the existing lease. We discuss such contracts in detail in Chapter 4 and make a recommendation for them (subject to certain exceptions) to be suspended and then discharged on an individual freehold acquisition claim.[143] We believe that this recommendation should also to apply to claims for a lease extension, although we will not duplicate our detailed discussion in Chapter 4 here. We discuss the recommendation in relation to all enfranchisement claims (including claims for a lease extension) in Chapter 10.[144]

CONCLUSION

3.336 In this chapter, we have set out a number of recommendations intended to make the right to a lease extension a truly valuable right for leaseholders and to help both leaseholders and landlords to be clear as to their entitlements when bringing or defending a lease extension claim. We now turn to our equivalent recommendations in respect of the right of individual freehold acquisition.

---

143 Recommendation 12, at paras 4.217 to 4.218 below.

144 Paras 10.150 to 10.213, especially Recommendation 80, para 10.210(3).

Chapter 4: The right of individual freehold acquisition

INTRODUCTION

4.1 The ability of leaseholders to acquire their freeholds is central to the enfranchisement regime. In Chapter 1 we identified two inherent disadvantages of leasehold ownership: that a lease is a time-limited asset; and that leasehold ownership does not provide the level of autonomy or control expected to be enjoyed by owning a home. Other disadvantages are associated with leasehold ownership. In particular:

(1) leasehold ownership is precarious – the landlord may ultimately take possession of the property if the leaseholder does not comply with the terms of the lease; and

(2) owning a lease may be expensive – a lease may require the leaseholder to pay a high ground rent, inflated service charges, or a variety of fees (for example, for obtaining the landlord's permission to make alterations to the property).

4.2 The entitlement to a lease extension discussed in Chapter 3 is an important right that helps tackle the fact that a lease is a wasting asset. But the result of a lease extension is a new lease; the relevant homeowner still owns the property on a leasehold basis. By contrast, the ability of a leaseholder to acquire the freehold to his or her property should resolve many of the disadvantages of leasehold ownership.

4.3 In this chapter we set out our recommendations relating to the right for leaseholders to acquire their freeholds via a process we call "individual freehold acquisition". As we explain further in Chapter 6, we recommend moving away from the language of "houses" and "flats" and adopting the use of the single concept of a "residential unit". In keeping with this recommendation, rather than following the approach of the current law which has separate regimes for the freehold acquisition of "houses" and "flats", we are recommending the use of the concepts of an "individual freehold acquisition" and a "collective freehold acquisition".

4.4 In very broad terms, the right of individual freehold acquisition will be available where a single long leaseholder owns all of the units (or, perhaps, the only unit) in a building.[1] This means that the right of individual freehold acquisition will, in practice, mainly apply to leaseholders of houses. Leaseholders of flats will generally need to acquire the freehold of their building collectively with leaseholders of other flats in their building via a collective freehold acquisition. We discuss collective freehold acquisitions further in Chapter 5.

[1] We discuss which leaseholders qualify for an individual freehold acquisition in more detail at para 6.139 onwards.

4.5 Our discussion of individual freehold acquisition claims will follow the structure set out below.

(1) First, we consider the extent of the premises that leaseholders will acquire on an individual freehold acquisition.

(2) Second, we consider what we referred to in the Consultation Paper as the "terms" of the freehold acquisition. We explain that the discussion in the Consultation Paper covered a range of different issues which we now think need to be addressed separately. We therefore follow a different structure from the Consultation Paper and address the following questions.

(a) Should a leaseholder acquire the freehold subject to all existing property rights that burden the freehold title at the time the individual freehold acquisition claim is brought, or should some property rights fall away? Relatedly, should the leaseholder acquire the freehold with the benefit of all existing property rights that benefit the freehold title?

(b) What should be the effect of an individual freehold acquisition claim on existing personal obligations owed by the landlord to third parties that—

(i) prevent the landlord transferring the freehold to the leaseholder;

(ii) delay the transfer of the freehold from the landlord to the leaseholder; or

(iii) permit the transfer to take place only if the leaseholder enters into corresponding personal obligations?

(c) Should any new property rights be created during the individual freehold acquisition process which either benefit or burden the freehold title being acquired by the leaseholder?

(d) Should a leaseholder be required on an individual freehold acquisition to undertake any new personal obligations owed to the landlord or a third party?

(3) Finally, we make recommendations to address cases in which the freehold or an intermediate lease[2] is subject to a mortgage or a rentcharge.

PREMISES TO BE ACQUIRED

4.6 In Chapter 3, we discuss the issue of what premises should be included in the extended lease where a leaseholder obtains a statutory lease extension.[3] We now need to consider what premises a leaseholder should obtain when he or she makes

---

2 We discuss intermediate leases in Ch 13.

3 See paras 3.13 to 3.15, and 3.113 to 3.147.

an individual freehold acquisition claim. The two issues of what premises are acquired on a leasehold extension and on an individual freehold acquisition are closely related.

4.7 The provisions of the 1967 Act that determine the extent of the premises included in a lease extension of a house also apply to the freehold acquisition of a house. The leaseholder is entitled to include the freehold of the "house and premises" in the claim.[4] The provisos enabling the landlord to ask to include other land originally included in the lease but no longer held by the leaseholder, or to exclude premises that lie above or below other premises owned by the landlord, apply as they do under the current law relating to lease extensions.[5]

4.8 Furthermore, except in one case, we made the same criticisms in the Consultation Paper of these provisions in the context of freehold acquisitions as we did in the context of lease extensions.[6] We provisionally proposed as a starting point that the premises included in an individual freehold acquisition claim should match those included under a lease extension claim: all the land included in the lease. We argued that this would make it easier for all parties to understand which premises can be the subject of a claim.

4.9 We made one further provisional proposal: that where the leaseholder is entitled to an individual freehold acquisition, but his or her lease does not include every part of the building in which his or her residential unit is situated, the freehold transfer should include the whole building (and any leases granted in respect of the other parts of the building).[7] The latter provisional proposal was primarily designed to counteract the granting of internal leases of houses (while retaining or subletting, for example, the walls and roof space) in order to prevent a leaseholder having the right to an individual freehold acquisition.

4.10 The only significant difference between our proposals for lease extensions and individual freehold acquisitions relates to what we referred to as "the second proviso" in Chapter 10.[8] The current law permits a landlord to request that part of the premises included under a lease, which lies above or below other premises, be excluded from a lease extension or a freehold acquisition of a house. We provisionally proposed that landlords should no longer have this ability in relation to lease extension claims, and we have made a recommendation to that effect.[9] But the ability for landlords to request to exclude premises may be more important in relation to freehold acquisition claims, as it relates to preventing the creation of flying freeholds.

4.11 So-called "flying freeholds" arise where one party's freehold interest overhangs or projects under another (rather than there being a strict vertical dividing line between

---

4 "Premises" includes "any garage, outhouse, garden, yard and appurtenances" which are let to the leaseholder with the house: see para 3.13.

5 See para 3.13. As with lease extension claims, the provisos are subject to a strict two-month time limit.

6 See CP, para 5.16.

7 See CP, first part of Consultation Question 13, para 5.30(1).

8 See para 3.114 above.

9 See paras 3.143 to 3.144, and Recommendation 4 (specifically para 3.147).

them). Flying freeholds are problematic because, when different parties' properties overlap in this way, it is very important for certain obligations to be in place – such as, for example, reciprocal obligations for each party to keep their property in repair, in order that the other receives suitable structural support. But as we explain in Chapter 1, these kinds of obligations cannot legally be passed to future owners of freehold property.[10] Moreover, mortgage lenders are often reluctant to lend against flying freehold titles. We therefore provisionally proposed that the landlord should continue to be able to request that land which lies above or below other premises in which he or she has an interest be excluded from the transfer on an individual freehold acquisition claim, so that flying freeholds do not arise. We also provisionally proposed that there should be no strict statutory time limit on the landlord asking for land to be either included in or excluded from the transfer.[11]

Consultees' views

4.12 Consultees, particularly leaseholders, were generally supportive of our provisional proposal that the premises included in a freehold acquisition claim should comprise the premises let under the existing lease. Many consultees concurred that this was an attractive and simple approach, reducing the opportunity for landlords to employ complicating and delaying tactics. The Residential Landlords Association said the provisional proposal aligns with the views of many leaseholders about what they should be entitled to include on an individual freehold acquisition claim.

> When a leaseholder purchases their freehold they should quite rightly have the expectation that they have purchased the whole of their property leasehold with no additional areas exempt. Under current legislation, freeholders can obtain parts of the property which can result in parts of the property being issued with additional leases. There have been examples where gardens and even certain rooms or attic space have remained on a lease with no real option of the leaseholder ever fully owning their property or having full rights to these parts of their property.

4.13 Some consultees caveated their support with a desire for more detail about how this proposal would operate. One consultee, the Royal Institution of Chartered Surveyors ("the RICS"), wrote that they are "in principle, in support of the foregoing but this is an area where more clarity is essential".

4.14 Consultees who disagreed with this provisional proposal did so on similar grounds to those who disagreed with the equivalent proposal in relation to lease extensions.[12] The most common argument was summed up by one consultee.

---

10 See para 1.20. It is for this same reason that flats are almost universally owned on a leasehold, rather than freehold, basis. We note that commonhold enables the freehold ownership of flats, by providing a structure to manage the relationship between individually-owned freehold flats, therefore avoiding the problems usually associated with flying freeholds: see the Commonhold Report at paras 2.4 to 2.6.

11 See CP, second part of Consultation Question 13, para 5.30(2).

12 See paras 3.117 to 3.118.

> As in the case of lease extension claims, premises let under the leaseholder's lease should only be included if they have some connection to the building of which the freehold is being acquired.[13]

4.15 Consultees expressed more mixed views regarding our provisional proposal that the leaseholder should be entitled to the whole of the building in which his or her residential unit is situated (even if parts of that building are not included within the existing lease). Some consultees, such as the Wellcome Trust (a charity landlord), supported this approach on the basis that the "landlord is adequately compensated for the loss of any other parts of the building not currently let to a leaseholder". Another consultee agreed subject to further clarification, expressing concern that this provisional proposal does not "allow one leaseholder compulsorily to acquire another's lease of parts capable of occupation, which surely could not have been intended".[14]

4.16 On the other hand, some consultees objected to the leaseholder being able to acquire more than the premises let under his or her lease. One consultee – Church & Co Chartered Accountants – wrote that this approach would be unfair on the landlord.

> If you have a row of maisonettes with a shared roof that is not demised to the leaseholder, the right to that airspace belongs to the freeholder. The freeholder may well wish to add an additional floor of new accommodation above the whole row of maisonettes. To take away the roof area from the freeholder and his rights above it would be both unfair confiscation of his property and also against the government's and the Mayor of London's stated goals of adding density within urban areas.

4.17 A similar argument was made by the Country Land and Business Association (a landlord representative body), who argued that the unfairness to the landlord lies in the fact that there may be a potential uplift in value in respect of the premises which are not demised to the leaseholder. It was contended that this potential uplift:

> should rest with the freeholder rather than the leaseholder. At the time of enfranchisement any such gain may not yet have crystallised as there is unlikely to be any planning permission in place and so not properly reflected in the premium paid.

4.18 Other consultees disagreed with this part of the provisional proposal on different grounds. For instance, the Landmark Trust, a charity landlord, contended that it would be inequitable for a leaseholder to acquire more of a building than he or she "actually leases as the remainder may comprise commercial and heritage assets". Another consultee, Berkeley Group Holdings PLC (a developer), wrote that our suggested approach was "too blunt and wide"; instead, there should be "some measurement of the exclusivity or consideration of the character of the other parts, such as you have identified (e.g. the roof or air space which only serves the residential unit)".

4.19 A majority of consultees was supportive of the provisional proposals to allow landlords to request to include or exclude parts of premises, and that these provisos should not be subject to a strict time limit as they are now. The ability of a landlord to request that

---

13 The Portman Estate, a landlord.

14 The Law Society.

parts of the premises be excluded from the freehold acquisition claim was said to be appropriate in certain situations, for instance where part of a leaseholder's premises is situated above a communal structure such as a communal basement car park.

> The landlord should have the right to exclude such parts as the alternative of taking a leaseback of those parts is not appropriate given the management and maintenance responsibilities of the larger parts and the landlord's obligations to the other tenants within the estate and/or building regarding those communal parts and the limitations of the enforcement of positive covenants in a freehold transfer.[15]

4.20 Numerous consultees, however, expressed concern about the lack of a strict time limit in the context of these provisos. The Law Society, for example, wrote that it was concerned with the provisional proposal that there "should be no statutory deadline or time limit for the landlord to offload the remainder of the parcel upon the enfranchised leaseholder".

Discussion and recommendations for reform

The premises included in the lease

4.21 We begin with the question of which premises should be included in an individual freehold acquisition. In the Consultation Paper, we suggested that the starting point should be that the premises included in an individual freehold acquisition should match all the land let under the existing lease. We discuss the corresponding part of the equivalent provisional proposal relating to lease extensions in detail in Chapter 3.[16] In that Chapter, we conclude that this provisional proposal did not provide a desirable way forward: although it might have worked properly in the majority of cases, it would have caused significant problems in some other cases.

4.22 We think that the same issues equally arise as a result of this provisional proposal in the context of individual freehold acquisitions. Take, for instance, a leaseholder who has a single lease of ten houses, one of which he or she lives in, and the rest of which are sublet to other long leaseholders.[17] This leaseholder would, as a matter of qualification, only be entitled to an individual freehold acquisition in respect of the house which is not sublet.[18] The individual freehold acquisition of that single house should include, for instance, the garden let with (and genuinely associated with) that house. However, the individual freehold acquisition should not include the other nine houses which have been sublet, merely because they are held under the same long lease.

4.23 Another example of this issue is one which we set out in Chapter 3.[19] Consider the leaseholder of a house and garden, let with extensive grounds and woodland. We think that this leaseholder should only be able to acquire the freehold of the house

---

15 Berkeley Group Holdings PLC.

16 See paras 3.113 to 3.147 above.

17 This example mirrors, in many ways, the example given at para 3.127 of a leaseholder of a large office block which contains a single residential flat, in which he or she lives.

18 See para 6.139 onwards, where we discuss the scheme of qualifying criteria applicable to individual freehold acquisitions.

19 See para 3.128 above.

along with the premises which can genuinely to said to be associated with the house: in other words, the garden. The extensive surrounding grounds and woodland should not be included in the individual freehold acquisition, just as they should not be included in the lease extension.

4.24 Some form of limit on the premises which can be included in an individual freehold acquisition claim, therefore, must be preserved in our new scheme. In Chapter 3, we set out our preferred approach for achieving this limit: in essence, maintaining and adapting the current law to our new scheme. We think that this would also apply sensibly to individual freehold acquisitions, as follows.

4.25 Individual freehold acquisitions essentially replicate the current right of a leaseholder of a house to acquire the house and premises under the 1967 Act. The right will arise, in simple terms, where a leaseholder has a long lease of all the units in a building (a "house" under the current law), or of all the units in a self-contained part of a building (a "terraced house" or similar under the current law).[20] A leaseholder carrying out an individual freehold acquisition should be able to include in his or her claim the building or self-contained part of the building in respect of which he or she qualifies (along with the airspace and subsoil),[21] and any "associated premises". Associated premises should include any garage, outhouse, garden, yard and appurtenance let to the leaseholder with the residential unit or residential units in the building or self-contained part of the building. These additional premises should be within the "curtilage" of the building or self-contained part of the building (as appropriate).[22]

4.26 As we explain in respect of lease extensions, we intend to explore with Parliamentary Counsel whether the language of the current law can be updated or improved.[23] Moreover, we emphasise that this change from the provisional proposal in the Consultation Paper will not make a difference to the vast majority of individual freehold acquisition cases. The leaseholder of a house will be able to include the garden and garden shed in his or her individual freehold acquisition claim. It is only the cases where the lease of a house also includes (usually extensive) premises outside the curtilage of the house: in other words, the lease includes premises which are not genuinely associated with the house (such as a series of fields, let with, but situated some distance away from, the house).

Acquiring the whole building

4.27 We turn now to the part of the provisional proposal in which we suggested that, even if parts of a building are not included within a leaseholder's existing lease, he or she should be entitled to acquire the freehold of the whole of the building in which his or her residential unit or units are situated (as well as to acquire the reversion to any

---

20 See paras 6.142 to 6.145.

21 *LM Homes Ltd v Queen Court Freehold Co Ltd* [2020] EWCA Civ 371, [2020] 2 WLR 1135, at [28] to [38], in which it was held that the airspace and subsoil form parts of the "building" to which the qualifying tenants were entitled to claim the freehold. This case specifically concerned collective enfranchisement under the 1993 Act, but the relevant principles will be of general application to individual and collective freehold acquisitions under our recommended reforms.

22 The concept of a "curtilage" is discussed at paras 3.133 to 3.134 above.

23 See para 3.136 above. We will also consider whether the "curtilage" requirement should be somewhat relaxed, as we discuss in that para.

leases granted in respect of the other parts of the building). Consultees expressed mixed views on this approach. However, several consultees thought this proposal would have wider application than we intended.

(1) We reiterate that the starting point in these cases is that the leaseholder must qualify for an individual freehold acquisition. We set out our scheme of qualifying criteria in detail in Chapter 6. However, we note here that the leaseholder of a building (or self-contained part of a building), in which there are other units not demised under his or her lease, will *not* be eligible for an individual freehold acquisition. The right to an individual freehold acquisition will only apply in cases where there are no units in a building or self-contained part of a building other than those demised under the leaseholder's lease. The concern of some consultees that our provisional proposal would enable a leaseholder to acquire parts of a building beyond his or her lease, but capable of being used residentially, should be allayed by this point.

(2) In the provisional proposal, we referred to the leaseholder being able to obtain "the whole of the building in which his or her residential unit is situated". We should be clear that in this context, we mean "building or self-contained part of a building". The leaseholder of a terraced house will, in ordinary circumstances, qualify for an individual freehold acquisition of his or her "self-contained part of the building" (the single terraced house). His or her individual freehold acquisition will include that single terraced house (and any relevant associated premises, such as the garden).

4.28 The purpose of this part of the provisional proposal was to cater for situations where a leaseholder has an internal lease of a property. Take a detached, traditional house, where the leaseholder has a long lease of the internal parts of the house, but the freeholder retains the walls and the roof. This proposal was designed to give such a leaseholder the right to acquire the freehold of the house, not merely of the internal parts.

4.29 We do not think that any concerns raised by consultees regarding this proposal outweigh the desirability of enabling this leaseholder to acquire the freehold of his or her home. A freehold acquisition merely of the internal parts of the building should not be possible because of the risk of creating flying freeholds. And we do not think that landlords should be able to prevent enfranchisement claims merely by retaining elements of the leased property such as the roof. This provides too easy a method to frustrate a leaseholder's enfranchisement rights. Moreover, while landlords should be compensated for transferring their interests in the walls or roof of a building to the leaseholder, we do not think the landlord's retained interest in the building should be afforded greater weight than the leaseholder's interests in his or her residential units. We think the opposite. We consider, therefore, that this part of the provisional proposal is desirable, and should be carried into our new scheme of the right to an individual freehold acquisition.

4.30 Some consultees were concerned that this approach would see landlords losing out on development opportunities without being adequately compensated. In the Valuation Report, we set out an option for Government as to how to address the aspect of valuation relating to "development value". We wrote that it would be possible

to enable leaseholders to take a form of restriction on development instead of paying development value on the freehold acquisition claim, and to compensate the landlord at a later stage, if development becomes desirable.[24] For the reasons given in the Valuation Report, we think that this option, if implemented, would adequately address the concerns of consultees that landlords would be undercompensated in these circumstances.

Requesting the inclusion or exclusion of additional premises

4.31 The final part of this provisional proposal concerned the ability of landlords to ask to include certain other land in or exclude certain parts of the demised premises from the individual freehold acquisition claim. In general, preserving the ability of a landlord to request both was supported by consultees. We remain of the view that both abilities should feature in our scheme going forwards as they do under the current law (though we reiterate that the scope of these provisos is narrow, and aimed at addressing specific scenarios causing difficulty to the landlord or to both parties).[25]

4.32 Numerous consultees were concerned about our suggestion that there should not be a strict time limit applicable in respect of these two provisos. The same arguments were made by many consultees regarding our corresponding suggestion in the context of lease extensions. In Chapter 3, we acknowledged those concerns, but explain that preserving a strict time limit does not accord with the overall reforms of the procedure for enfranchisement claims that we are recommending in Chapter 9.[26] This explanation applies equally to these two provisos in the context of individual freehold acquisitions, and, as a result, we remain of the view that there should be no strict time limit in respect of making these requests.

4.33 The removal of a strict time limit should not enable landlords to delay the individual freehold acquisition process unreasonably or tactically. The landlord should make the request to include or exclude premises as appropriate in his or her Response Notice. Failure to do so should not preclude the landlord from raising one or both of the provisos at a later stage, provided that, where an application to the Tribunal has been made, the permission of the Tribunal to raise this issue is obtained by the landlord. We reiterate that the Tribunal has the power where a party has behaved unreasonably (which may be relevant in cases of late requests relating to these provisos without good reason) to make an order that the party should pay the other party's costs.[27]

---

[24] See Sub-option (3) in the Valuation Report, at paras 6.176 to 6.179.

[25] The scope of the provisos is set out in more detail at para 3.13 above.

[26] See paras 3.140 to 3.142 above.

[27] See paras 12.189 to 12.196 below.

Recommendation 10.

4.34 We recommend that an individual freehold acquisition of a building or self-contained part of a building should include other associated premises (any garage, outhouse, garden, yard and appurtenance let to the leaseholder with the building or self-contained part of the building, and within its curtilage).

4.35 We recommend that where:

(1) a leaseholder qualifies for an individual freehold acquisition in respect of a building or self-contained part of a building; but

(2) parts of the building or self-contained part of the building are not included within his or her existing lease,

he or she should nevertheless be entitled to acquire the freehold of the whole of that building or self-contained part of the building (as well as to acquire the reversion to any leases granted in respect of those other parts).

4.36 We recommend that:

(1) a landlord should be able to propose that other land originally let to but no longer held by a leaseholder be included in an individual freehold acquisition;

(2) there should be no strict time limit within which that proposal can be made; and

(3) that other land should be included if:

(a) the leaseholder agrees; or

(b) the Tribunal is satisfied that it would be unreasonable to require the landlord to retain it separately from the premises included in the individual freehold acquisition.

4.37 We recommend that:

(1) a landlord should be able to propose that parts of the premises let under a leaseholder's existing lease and which lie above or below other premises in which the landlord has an interest should be excluded from an individual freehold acquisition; and

(2) the land should be excluded if:

(a) the leaseholder agrees; or

(b) the Tribunal is satisfied that any hardship or inconvenience likely to result to the leaseholder from the exclusion of that part is outweighed by the difficulties that will be caused for the landlord by the further

severance of it from the other premises and any resulting hardship or inconvenience.

TERMS OF ACQUISITION

4.38 Apart from the premises to be acquired on an individual freehold acquisition, the other principal issue that we discussed in Chapter 5 of the Consultation Paper was entitled "Other terms of acquisition".[28] We put forward specific provisional proposals about cases in which the landlord's title is subject to a mortgage or a rentcharge. We discuss these proposals at the end of this chapter. The rest of the chapter examined "the terms" on which the leaseholder acquires the freehold.

4.39 While our focus in the Consultation Paper was on "the terms" of the transfer of the freehold from the landlord to the leaseholder, the issue we were considering could be framed more broadly in the following way: when leaseholders acquire their freeholds through the process of individual freehold acquisition, what rights should those freeholds benefit from and what obligations should they be subject to? It is not enough to say that leaseholders should simply acquire "their freehold" via enfranchisement. Freeholds are not "one size fits all". They necessarily differ because each property is different, and freeholds are therefore subject to different obligations, and benefit from different rights.

4.40 This is an issue of real concern to both leaseholders and landlords alike. Leaseholders are concerned about the types of obligations they and their freehold will be subject to once they have acquired their freeholds. They do not want to acquire a "second class" type of freehold, which is worse than the freehold title enjoyed by their landlord, or which is effectively "leasehold in disguise". Nor do leaseholders want their landlord to use the freehold acquisition process as an opportunity to impose onerous restrictions or other obligations on the freehold (particularly those which require ongoing payments of money, and those which unduly restrict what leaseholders can do with their homes).

4.41 On the other hand, landlords are concerned to ensure that, following freehold acquisitions, they can adequately protect the amenity and value of any nearby land they are retaining, and that they can continue to manage estates adequately. Landlords are also concerned that they are not left owing obligations to third parties which relate to the freehold which has been acquired by the leaseholder (and which the landlord no longer owns).

Our approach in the Consultation Paper

4.42 Having considered the responses provided by consultees, we think that it would be helpful to clarify several aspects of our discussion of "terms" in the Consultation Paper. In particular, we think it is important to draw the following distinctions much more clearly than we did in the Consultation Paper:

[28] See CP, paras 5.7, 5.18 and 5.31.

(1) We should distinguish between existing rights and obligations which already affect the freehold or the landlord when the leaseholder brings his or her claim to acquire the freehold and those rights and obligations that are newly created by the transfer of the freehold to the leaseholder. The distinction is important because the leaseholder is acquiring an existing freehold title; the leaseholder is not acquiring a new freehold title created for the purpose of the freehold acquisition claim. As such, the freehold title being acquired by the leaseholder may already benefit from or be burdened by rights and obligations owed by or to third parties. While the landlord and the leaseholder may be free to create new rights and obligations in the transfer, they may not be free to release or vary pre-existing rights and obligations, particularly if they affect third parties.

(2) There is also an important distinction between two different types of right: personal rights and property rights.

(a) A property right that binds the freehold attaches automatically to *the freehold* itself (it "runs with the land'). That means that the right is capable of binding anyone (including the leaseholder) who acquires the property from the landlord. An example is a right of way over a neighbour's land (a type of easement).

(b) A personal right concerning the freehold binds *an individual* (rather than land). The right would not automatically affect a person who buys the freehold because it does not attach to the freehold itself. An example is a personal permission (known as a "licence") given by the landlord to a third party to visit the property. If the landlord sells the property, the third party will need to get fresh permission from the new owner to visit.

(3) Lastly, our discussion in the Consultation Paper focussed primarily upon rights and obligations as between the landlord and the leaseholder. However, either the freehold or the lease may be affected by rights or obligations benefiting or burdening third parties. We need to consider the effect of an individual freehold acquisition on third-party rights.

4.43 In order to bring these distinctions to light, we have reframed the discussion in this chapter. We will focus on the different kinds of rights and obligations that benefit or bind the freehold, the landlord or the leaseholder and that may survive, be varied or be created during an individual freehold acquisition.

4.44 We start by considering the nature of freehold ownership in general and looking at the kinds of rights and obligations that may affect a freehold. We then consider what should happen to existing property rights that benefit or burden the freehold on an individual freehold acquisition. After this, we consider what should happen regarding the landlord's existing personal rights and obligations. Finally, we move on to consider whether and when new rights and obligations should be created on an individual freehold acquisition.

4.45 As a result of our change of approach, we do not address our consultation questions one by one. Rather, we will refer to issues raised in those questions, and to consultees' views, as and where they become relevant.

FREEHOLD OWNERSHIP

4.46 We think it is fundamental for our enfranchisement scheme to recognise that freehold ownership is qualitatively different from leasehold ownership. Freehold owners own their land outright; their ownership is not time-limited like leasehold ownership. With freehold ownership, there is no landlord who also owns an interest in their property, and to whom the property will revert after a period of time. As a general rule, therefore, we think that freehold owners should have more freedom than leasehold owners to deal with their property as they see fit. Correspondingly, many obligations that are familiar in the context of leasehold ownership would not be appropriate in the context of freehold ownership. The obligation to pay rent is a prime example; unlike leaseholders, freehold owners do not make periodical rental payments in return for occupying their land.

4.47 On the other hand, many leaseholder consultees expressed the view that they should acquire a freehold which is free from any obligations or restrictions at all, other than those imposed by planning law. Many leaseholders thought that this amounted to true freehold or “free from hold” as some put it.

4.48 However, being a freehold owner does not necessarily mean being entirely free to do whatever you choose with your land. As a matter of general property law, obligations are routinely created by freehold owners in order to regulate the relationship between neighbouring properties. For example, in order to access his or her home, a homeowner may require access over the freehold property next door (an easement known as a right of way). Equally, a freehold owner may be obliged not to develop their land without the consent of a neighbouring freehold owner, in order to protect the value or amenity of the neighbouring property (another type of property right, known as a restrictive covenant).

4.49 Such matters restrict what freehold owners can do with their properties. However, these restrictions are considered a necessary and legitimate part of freehold ownership. It is also important to remember that these kinds of property rights may not only burden the freehold acquired by the leaseholder, but may also benefit it. The only access to the freehold land acquired by the leaseholder may be by using a right of way over a neighbour’s land. The right of way adds significantly to the value of the freehold; the property would be unusable without it.

4.50 It would be unrealistic, therefore, for our enfranchisement regime to provide for all leaseholders to acquire a freehold which is entirely free from obligations owed to their outgoing landlord or third parties. However, we aim to ensure, in so far as possible, that leaseholders acquire a freehold which is subject only to obligations which are appropriate and necessary to regulate the relationship between their property and neighbouring properties owned by the landlord or third parties (as opposed to obligations which are designed to secure a purely personal benefit for landlords or third parties, such as an ongoing income stream).

4.51 Before considering our recommendations, we need to examine in more detail some different concepts to which we are going to refer repeatedly in our discussion. First, we want to look more closely at what is meant by the term “fleecehold obligations”, a term used frequently by leaseholders in their consultation responses. Second, we consider some of the problems that can arise when leaseholders acquire the freeholds

of houses on estates. Third, we consider some points about personal obligations, focussing in particular upon contractual obligations. Fourth, we examine an important feature of many kinds of property rights, namely that they are appurtenant rights enjoyed in connection with the ownership of another piece of land. Finally, we look briefly at the status of positive covenants affecting land under English and Welsh law.

"Fleecehold" obligations

4.52 The primary concern that leaseholder consultees raised in response to all the questions we asked in this chapter of the Consultation Paper was the risk that landlords may use the freehold acquisition process as an opportunity to impose onerous obligations on leaseholders acquiring their freeholds, which are inconsistent with leaseholders' newly acquired status as freehold owners. Such obligations are often referred to by leaseholders as "fleecehold" obligations.

4.53 Leaseholders did not put forward a unified view about what obligations might amount to "fleecehold". However, the central concern voiced by leaseholders was that they may remain or be made subject to obligations that require the payment of money after they have acquired their freeholds. Many leaseholders were also concerned that their use of their properties (or their freedom to alter or develop them) should not be unduly restricted after they had acquired their freeholds.

4.54 We are concerned in general that onerous or unreasonable obligations should not be imposed during a freehold acquisition claim, and (in line with the views of leaseholders) we think that obligations requiring the payment of money deserve special scrutiny. An individual freehold acquisition claim often deprives landlords of an investment, but they are compensated for this loss by the payment of the statutory premium. It is important that landlords should not be able to retain their income streams by securing new payment obligations on the freehold. Leaseholders would otherwise be deprived of one of the key benefits which freehold acquisitions are supposed to afford them.

4.55 Leaseholders have, in particular, highlighted two ways in which landlords may try to secure their income streams despite the completion of an individual freehold acquisition.

(1) First, leaseholders did not want to remain or to be made subject to obligations to pay fees and charges to their former landlords or to third parties in return for permission to make alterations to their homes. Examples that are sometimes given include permission to own a pet, to install a satellite dish, to make minor home alterations such as changing a front door colour, or, sometimes, more major alterations such as building a porch or a conservatory. Often such fees can be significant.[29]

(2) Second, leaseholders expressed concerns about having to pay for the upkeep and maintenance of common areas and facilities on housing estates via service

[29] The Housing, Communities and Local Government Committee, Leasehold Reform (2017-19) HC 1468, para 131, at https://publications.parliament.uk/pa/cm201719/cmselect/cmcomloc/1468/1468.pdf.

charges or estate management fees.[30] As we discuss further below, the cost of the ongoing upkeep and maintenance of such common spaces and facilities often has to be paid for by the residents of the estate (rather than by the local authority). While there may be no objection in principle to leaseholders having to pay the reasonable costs of maintaining common areas and facilities which they use or which benefit their properties, we do agree that leaseholders should not be charged excessive or opaque amounts for the use of communal areas, should not be charged fees which are not actually incurred, and should not be charged in relation to the upkeep of areas from which they (or the community as a whole) derive no benefit.

4.56 We aim, where possible, to prevent "fleecehold" abuses in our new enfranchisement scheme by restricting the kinds of payment obligation that may fall on a leaseholder following an individual freehold acquisition.

4.57 Concerns about "fleecehold" are not confined to enfranchisement. We have been told of instances where a house has been bought as freehold from the outset, but on terms described as amounting to "fleecehold". In this project we can only consider the terms on which a freehold is acquired through enfranchisement. We are, however, conscious that our recommended reforms sit alongside a number of other reforms Government has indicated it will or might undertake to prevent homeowners becoming subject to "fleecehold" obligations. Such reforms will assist all homeowners, whether they are buying their home on a freehold basis from the outset, or whether they acquire their freehold via enfranchisement. We set out Government's proposals for reform in Chapter 1.[31]

Estates

4.58 Many leasehold houses are situated on estates, which have estate management frameworks in place to enable the upkeep and maintenance of the estate, and to protect the value and amenity of all properties.

4.59 In particular, estates often have common spaces and facilities for use by residents, which remain in private ownership (as opposed to being adopted by local authorities). Such common spaces and facilities might include things like roadways and pavements, street lighting, car parks, play parks and open spaces. The cost of the upkeep and maintenance of such common spaces and facilities is usually paid for by the residents of the estate, via payments often referred to as "estate management charges" or "service charges".

4.60 Government has noted that there are several different ways in which such arrangements may be structured.[32] For example, the developer of the estate can retain ownership of the communal areas and facilities, and remain responsible for their maintenance (managing these areas either themselves or via a managing agent).

---

30 We explain these terms in more detail at para 4.59 below.

31 See para 1.63 above. For example, reforms are being considered to regulate the imposition of permission fees on both leasehold and freehold homeowners.

32 See *Tackling unfair practices consultation, July 2017,* para 6.2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/632108/Tackling_unfair_practices_in_the_leasehold_market.pdf.

Alternatively, the communal areas and facilities may be owned by the residents of the estate or a third party via an estate management company (which, again, manages the areas itself or via a managing agent). Or some other arrangement may be used. Whichever arrangement is used, however, it is usually the residents of the estate who ultimately pay for the upkeep of the common areas and facilities.

4.61 In addition, houses on estates can be subject to mutual obligations designed to ensure that the appearance of the estate is kept relatively uniform, and that homeowners do not make undesirable alterations to their homes which affect the value or desirability of the remainder of the estate.

4.62 It has become clear to us that the legal structure of estate management frameworks within estates containing houses sold on a leasehold basis can be complex and varied. For example, when the leaseholder acquires his or her freehold, the landlord may not necessarily own the freehold of the whole of the remainder of the estate. Parts of the freehold of the estate may be owned by another third-party landlord, a residents' management company, or other leaseholders who have already acquired their freeholds. In addition, the web of obligations required to support estate management structures can be extensive. Obligations can be owed by leaseholders to their landlord or to a residents' management company (and vice versa). Obligations may also, sometimes, be owed to other freehold or leasehold owners on the estate (and vice versa). Even where the leaseholder does not directly covenant with the other owners on the estate, obligations owed by the leaseholder to their landlord or a residents' management company under the lease may ultimately benefit the other residents. As a further complication, obligations may not always be contained in the lease. They are sometimes contained in separate deeds of covenant, which may be protected by restrictions on the title.

4.63 As we note below, while the 1967 Act originally provided for "estate management schemes" to be created in order to prevent enfranchisement interfering with estate management frameworks, it has not been possible to apply to create new estate management schemes since 1976. Accordingly, many leaseholders are now acquiring their freeholds on estates which do not (and cannot) benefit from an estate management scheme.

4.64 Many consultees, particularly landlords and professionals, raised concerns about the potential for the freehold acquisition process to cause disruption to existing estate management frameworks. We agree that freehold acquisitions can pose special problems for estates, because the right to freehold acquisition can lead to estates which were originally made up entirely of leasehold homes (where the legal structures used for estate management frameworks were created accordingly), becoming part leasehold and part freehold. That can create difficulties because the same obligations that can be imposed in a lease may not be able to be easily imposed when the freehold is acquired.

4.65 The difficulty of individual freehold acquisition claims interfering with estate management schemes is one that currently exists. We have given considerable thought to how we could ensure that existing (and legitimate) estate management structures are preserved in all cases during the freehold acquisition process. However, we have concluded that the issue is not one that can be resolved solely

through this project. This is because, as we note above, estate management structures are complex, and our project was not designed to explore the intricacies of how estates are structured. In addition, we are concerned there might be a tension between trying to find a solution which protects all estate management frameworks, however complex, and our Terms of Reference, which require us to make enfranchisement easier, quicker and more cost effective for leaseholders. For example, we are very concerned to avoid a situation in which leaseholders on an estate who bring a freehold acquisition claim routinely have to serve their claim, not just on their landlord and a residents' management company, but also on all other leaseholders on the estate. This would significantly complicate the freehold acquisition process, and would increase costs for all leaseholders.

4.66 While we may not, therefore, be in a position to solve *all* the problems that freehold acquisitions pose for estates, we make a number of recommendations below which will considerably improve some of the main problems estates currently face.

4.67 First, estate management systems usually require residents to be subject to positive covenants (for example, an obligation to pay towards the upkeep of an estate road, or to maintain their boundary wall). However, even if leaseholders are subject to such positive covenants in their leases, the current law provides no clear way for a landlord to oblige the leaseholder to enter into new positive covenants which will continue to bind them once they have acquired their freehold.[33]

4.68 Second, positive covenants, even if they are imposed on the enfranchising leaseholder, do not currently run automatically with freehold land in the same way as they do with leasehold land. In other words, if the leaseholder acquires the freehold and then sells it on, the buyer will not automatically be bound to comply with any positive covenants.[34]

4.69 Third, the current law does not clearly set out the extent to which obligations owed by or to third parties other than the landlord, such as a residents' management company, can be either preserved (in the case of pre-existing rights which already affect the freehold or the landlord at the time the leaseholder's claim is brought) or created anew when leaseholders acquire their freeholds.

4.70 While the issues set out above are ones about which landlord consultees primarily expressed concern, they also prejudice leaseholders. If a leaseholder acquires their freehold and thereafter that leaseholder (or later down the line, their successor in title) is no longer obliged to pay for the upkeep of the communal areas and facilities on their estate, or to comply with obligations to maintain the appearance of their property, that can have many undesirable consequences. It can lead to the remaining leaseholders on an estate having to pay more to maintain communal areas (while leaseholders who have acquired their freeholds may in some cases benefit from a windfall in continuing to enjoy communal areas without contributing to their maintenance). If landlords (or

---

33 Save perhaps where the leaseholder will derive a corresponding benefit under the principle in *Halsall v Brizell* [1957] Ch 169. This problem is noted and discussed by the authors of *Hague* at paras 6-24 and 6-30.

34 As we note in para 4.81 to 4.82 below there are a number of mechanisms commonly used by conveyancers to ensure that positive covenants do bind successors in title (but this does not happen automatically). Again, the authors of *Hague* discuss this problem at para 6-24.

residents' management companies) are unable to recover the full amount of sums they are obliged to spend maintaining estates, this can act as a disincentive to them carrying out their obligations properly. Ultimately it can lead to the breakdown of the estate management system, which can affect the value of all properties on the estate.

4.71 In addition, even if, on acquiring their freehold, a leaseholder happens to agree to enter into positive obligations relating to estate management (not because they are required to, but simply taking a pragmatic approach), the 1967 Act contains no provisions which might help the leaseholder understand what types of positive obligations it is reasonable for their landlord to require them to agree to. This makes leaseholders more vulnerable to the imposition of onerous or inappropriate positive obligations during the enfranchisement process.[35] It is therefore in everyone's interests, including leaseholders, that the law is made clearer and more comprehensive.

4.72 We think the recommendations that we make below will achieve this aim. We will also continue to explore, in the implementation stage of the project, the extent to which our recommendation can be developed in order further to protect estate management frameworks, while remaining within the scope of our Terms of Reference.

4.73 As with the issue of "fleecehold" above, our recommendations sit alongside reforms which Government has proposed to assist with problems that arise in the context of estates. These reforms will improve the position for leaseholders of properties on estates who acquire their freeholds. We set out Government's proposals for reform in Chapter 1.[36] We also acknowledge those consultees who commented that local authorities appear not to be adopting common facilities such as estate roads and sewers as frequently as was previously the case. It is not within the remit of this project to address this issue directly. Nonetheless, if Government were to consider this issue in the future, it could potentially reduce the number of estates with privately owned common areas, maintainable at the costs of the residents (as opposed to being maintained at local authority expense). This may also improve the position of many leaseholders.

Personal obligations

4.74 The subject matter of personal obligations can be very wide-ranging.[37] Personal obligations may be negative in nature (preventing a party from doing something) or positive (requiring a party to do something). They often involve one party being obliged to pay a sum of money to another party. Unlike property rights, which we discuss in the following section, personal obligations may have nothing at all to do

---

35 See *Hague*, para 6-24: "since the Act is so unsatisfactory in its provisions relating to "common facilities" the only sensible solution is for the landlord and the tenant to agree voluntarily a practical scheme that ensures that such common facilities continue to be properly maintained and that the cost thereof can be recovered. In most cases it is to the practical advantage of both parties that this should occur".

36 See para 1.63 above. For example, giving freeholders the right to challenge service charges where they are unreasonable, and protecting freeholders from losing their homes where unpaid service charges are owed as "rentcharges".

37 Subject to a few restrictions under the law of contract – for example, a valid contract cannot require a party to do something illegal.

with protecting or preserving the value or amenity of land. Personal obligations simply secure a personal benefit for the person who is owed the obligation.

4.75 A purchaser of land may undertake personal contractual obligations as part of the purchase transaction. There is nothing in the general law of property which limits the type of personal obligations that might be imposed on a purchaser by agreement with the seller.[38]

Appurtenant rights

4.76 We are concerned in many parts of this chapter specifically with a category of property rights that are known as appurtenant rights. Some property rights in land can be owned independently of the ownership of any other related piece of land. For example, a mortgage is a form of property right, but a mortgagee does not have to own any other land near to or related to the land affected by the mortgage. By contrast, some property rights must be enjoyed in conjunction with an estate in land which they benefit. These property rights are known collectively as appurtenant rights. Two important examples of appurtenant rights are easements and restrictive covenants.

(1) A person cannot own an easement (for example, a right of way) that exists by itself (known as an easement "in gross"). There is no such thing as a private property right simply to travel across someone's land; rather, a person may have a right to cross someone's land *in order to access his or her own l*and. An easement affecting an estate in land (for example, the freehold to plot A) must belong to the owner of another estate in land (for example, the freehold owner of plot B) and must "accommodate and serve" the land in plot B.

(2) Similarly, a restrictive covenant can only constitute a property right in land if it is appurtenant to another estate in land. The restrictive covenant must be given to the owner of an estate whose land is touched and concerned by the performance of the covenant.

4.77 The status of easements and restrictive covenants as appurtenant rights is important for our discussion in this chapter because, as we set out above, these rights are commonly used to regulate the relationship between neighbouring parcels of land. In particular, easements and restrictive covenants granted in leases can play an important role in the management of leasehold housing estates. One issue that we are going to consider is whether new property rights should be created on an individual freehold acquisition to replicate obligations that exist in the lease. For example, a leaseholder may be prohibited under the terms of the lease from painting the outside of his or her house a new colour (to keep the look of the building in keeping with that of neighbouring houses). One option for us to consider is whether our enfranchisement scheme should convert that restriction into a restrictive covenant in favour of the landlord following an individual freehold acquisition.

---

[38] As we note in paras 4.81 to 4.82 below, there are mechanisms by which such personal obligations can be made to bind successive owners of land (even if they do not relate in any way to the land itself). In particular, such personal obligations can legitimately be protected by a restriction on the register, or one of the conveyancing mechanisms referred to in para 4.82 below might be used. In this way personal obligations can be made to behave like property rights, even though they do not benefit land.

Positive covenants

4.78 The final issue that is going to arise at several points in our ensuing discussion concerns positive covenants. Many positive obligations simply secure personal benefits, and do not benefit land in any way. However, some positive obligations do benefit land (just as restrictive covenants benefit land). These types of positive obligations are often referred to as "positive covenants". In general terms, a covenant is positive if it requires the person under the obligation to spend money in order to comply.

4.79 Unlike a restrictive covenant, a positive covenant does not currently create a form of property right.[39] A landowner may agree with a neighbour that he or she will carry out works on the land (for example, that he or she will cut back foliage that would otherwise obscure the neighbour's view), which may benefit the neighbour's property. The agreement may be personally enforceable against the landowner if it constitutes a valid contract. But the agreement would not be enforceable against a third party who bought the landowner's land.

4.80 Given that positive covenants are not property rights, two techniques are often used to try to make positive obligations attach to land so that they will bind future owners.

4.81 First, positive obligations can be embedded in another property right that does attach to land.

(1) Most familiarly to leaseholders, positive covenants in a lease are enforceable by and against landlords and leaseholders and their successors in title.

(2) A second option, where a freeholder is subjected to positive covenants, is to rely on rentcharges. A rentcharge is an annual or other periodic sum of money charged on or issuing out of land, otherwise than under a lease or mortgage. It is possible for landowners (often developers), when they sell their land, to impose a rentcharge annexed to a right of re-entry which enables the landowner to retake possession of the land if the rentcharge is unpaid or if other conditions are not met. These conditions may include compliance with positive covenants by the new owner of the land. The right of entry (with its attached conditions) constitutes a property right enforceable against future owners of the land.[40] It has been impossible to create new rentcharges since 1977 and existing rentcharges will cease to exist in 2037.[41] However, there is an exception for "estate rentcharges", which include rentcharges for a nominal sum of money imposed to make covenants (including positive covenants) enforceable against successive owners of the burdened land.[42]

---

39 *Rhone v Stephens* [1994] 2 AC 310.

40 Law of Property Act 1925, s 1(2)(e).

41 Rentcharges Act 1977, s 2(1) and (2), and 3(1).

42 Rentcharges Act 1977, s 2(3)(c) and (4)(a).

4.82 Second, some legal mechanisms may be used to make personal positive obligations on a landowner (obligations that are not property rights) nevertheless run with the land.

(1) Chains of indemnity covenants: a landowner enters into a positive covenant (for example, to pay for the upkeep of estate roads). When the landowner sells the land, the seller requires the buyer to agree to pay for the upkeep of the roads and to indemnify the seller in the event that the buyer fails to pay. When the new owner sells, he or she will obtain a similar covenant from next buyer, and so on, giving rise to a chain of indemnity covenants. If the positive covenant is breached, the owner of the estate roads would still need sue the original owner of the burdened land, who would then pursue the indemnity against the original buyer (who would then, in turn, pursue the indemnity against the next buyer, and so on up the chain).

(2) Compulsorily renewed covenant, coupled with a restriction on register: the original owner of the burdened land (the original covenantor) agrees to ensure that any buyer of the land will enter into a direct covenant (with the owner of the estate roads):

(a) to comply with the initial positive covenant to pay for their upkeep; and

(b) to ensure that any subsequent buyer of the land enters into a direct covenant in similar terms.

This arrangement ensures that the owner of the benefited land (the estate roads) always has a direct contractual obligation which it can enforce against each successive owner of the burdened land. The obligation to ensure that any buyer of the burdened land enters into the necessary direct covenants is usually protected by a restriction on the register of title. The restriction will prevent a disposition of the burdened land without the consent of the owner of the benefited land or, alternatively, without a certificate being provided to HM Land Registry confirming that the requirement to provide the direct covenants from any buyer of the burdened land has been met.

4.83 The limited options, and the complexity of existing mechanisms, for making positive obligations run with the land present problems for us at several stages. We must consider what should happen if the landlord is subject to a positive obligation and must require the leaseholder to enter into an equivalent obligation as a condition of the transfer of the freehold. We must also consider whether positive obligations in a lease should "carry over" and continue to bind the freehold after an individual freehold acquisition has taken place, and if so, how such obligations could bind the new freeholder and successive owners.

4.84 Some of the problems we consider in this chapter will be easier to solve if Government implements our 2011 report Making Land Work: Easements, Covenants and Profits à Prendre.[43] In that report we recommended the introduction of a new kind of legal interest in land called a "land obligation". Land obligations may involve both

[43] Law Com No 327.

negative and positive obligations, including (in tightly defined circumstances) requirements to pay the costs of another landowner performing a reciprocal obligation that benefits the burdened owner's land. We will draw on elements of our discussion in Making Land Work at various points in this chapter.

GENERAL PRINCIPLES

4.85 Having introduced some concepts and issues which we will be exploring further in this chapter, we now set out some general principles that guide our ensuing recommendations. These principles are not taken from any single source, but we have drawn them together by considering the current law and the problems with it, together with consultees' responses. We recognise that there are some tensions between these principles (particularly between principles (1) to (3), which protect leaseholders, and principles (4) and (5), which protect landlords and third parties). Throughout this chapter, we will be considering how to strike the right balance between these different principles.

(1) As a general rule, when leaseholders acquire their freeholds, those freehold should be subject only to obligations which are necessary to regulate the relationship between their property and neighbouring properties (belonging to the landlord or third parties). In other words, obligations imposed on freeholds acquired by leaseholders must usually be property rights which protect and benefit land. Leaseholders should not generally have imposed on them personal obligations which simply confer a personal benefit on their landlord or a third party (although there will be some categories of exceptions which we explore below).

(2) Many obligations that fall on leaseholders under their leases should not in any circumstances continue to bind them after they acquire the freeholds to their properties. Some obligations appear to us to be inconsistent with freehold ownership of a house.[44] Most obviously, the obligation to pay rent should fall away; it should not somehow be reconstructed as a freehold obligation. Similarly, we would not expect a leaseholder who has acquired the freehold of a house still to be under an obligation to obtain permission and pay a permission fee, for example, if he or she wishes to keep a pet at the property. To give another example, leasehold owners sometimes require their landlord's approval to sublet their properties, or to remortgage; freehold owners are not usually subject to any requirement to obtain permission from a third party to let their property or to remortgage.[45]

(3) Similarly, a freehold acquisition claim should not generally provide an opportunity for imposing new obligations on the leaseholder (as freeholder) that did not bind them as a leaseholder. In other words, we think that freehold

---

[44] A similar point was made in the White Paper on Leasehold Reform in England and Wales, (1966) Cmnd 2916, para 21, which said: "Most of the covenants under the existing lease concern the relations between the landlord and leaseholder and will automatically and rightly disappear when the lease is enfranchised".

[45] An exception may be where there is a mortgage over the freehold. The mortgage lender may, as part of the mortgage contract and to protect their security, require their consent to be obtained before the freehold owner lets the property.

ownership should confer an advantage on leaseholders; it should certainly not place them in a worse position that they were in as leaseholders. Relatedly, after a freehold acquisition, it should not usually be an advantage for the leaseholder to retain the lease and decide not to merge the leasehold and freehold titles. We discuss merger in Chapter 10.[46]

(4) Landlords should not in most cases be obliged to clear up or improve their freehold titles before transferring them to the leaseholder. Leaseholders need not generally be put in a better position than their landlords: in acquiring their freehold they are, in general, simply stepping into the shoes of their landlords. But it may be that some burdens on the freehold title should be stripped away to prevent them providing disincentives or obstacles to a freehold acquisition.

(5) The acquisition of freeholds by leaseholders should not cause significant prejudice to third parties.

(6) Where possible within the scope of our Terms of Reference, our recommendations should ensure that the process of freehold acquisition does not unduly disrupt the proper and legitimate management of existing estates.

PRE-EXISTING PROPERTY RIGHTS BURDENING OR BENEFITING THE FREEHOLD

4.86 We have set out the principles which will guide our recommended reforms for individual freehold acquisitions and discussed freehold ownership and some general introductory issues. We intend now to start considering the substantive issue of what rights and obligations should bind or benefit the freehold following an individual freehold acquisition.

4.87 We think that the easiest starting point is to consider what should happen to property rights that already affect the freehold at the time that the leaseholder brings his or her acquisition claim. We will consider pre-existing personal obligations on the landlord and the creation of new property rights and new personal obligations below.

4.88 We asked a question in the Consultation Paper that was partially relevant to the issue of pre-existing property rights. We asked consultees whether leaseholders should acquire their freeholds "subject to the rights and obligations on which the freehold is currently held, or on terms reflecting the rights and obligations contained in the existing lease".[47] The first part of this question potentially covered both pre-existing property rights and pre-existing personal obligations.

4.89 Before looking at how consultees responded to our question, however, we note that a number of consultees were uncertain as to what extent we were proposing in the Consultation Paper to change the current law. Indeed, the provisions of the 1967 Act are not easy to interpret. Moreover, in preparing this Report, we have tried to keep in mind the question of whether our recommendations would make leaseholders better

---

46 See paras 10.123 to 10.149.

47 See CP, para 5.48.

or worse off than under the current law. We start, therefore, by giving an overview of what provision the 1967 Act makes regarding pre-existing property rights.

The current law

4.90 The 1967 Act contains two sets of provisions about what property rights may be binding on a freehold following transfer to a leaseholder on an individual freehold acquisition claim. The first set of provisions are contained in section 8 and seem (at first sight) primarily to concern whether or not the freehold can be transferred subject to pre-existing property rights. The second set of provisions are contained in section 10 and seem (at first sight) primarily to concern what property rights may be newly created when the freehold is transferred.

4.91 But matters are not as simple as they appear. On closer examination, section 8 is very difficult to interpret – so much so that, we cannot be certain what it means. Moreover, some of the provisions of section 10 seem to concern not merely the creation of new property rights but also whether the freehold can be transferred subject to pre-existing property rights.

4.92 Section 8(1) of the 1967 Act states that the landlord is required to transfer the freehold of the house to the leaseholder subject to the leaseholder's existing lease and "tenant's incumbrances", but otherwise "free of incumbrances". In order to interpret this provision, it is necessary to understand what is meant by "incumbrances" and "tenant's incumbrances" in the 1967 Act. This is difficult.

(1) *Incumbrances*: the only definition that the 1967 Act gives of the term "incumbrances" is that it "includes rentcharges and … personal liabilities attaching in respect of the ownership of land or an interest in land though not charged on that land or interest".[48] This partial definition is supplemented by section 8(3) which says that "incumbrances" do *not* include—

> burdens originating in tenure, and burdens in respect of the upkeep or regulation for the benefit of any locality of any land, building, structure, works, ways or watercourse.

(2) *Tenant's incumbrances*: these are defined in the 1967 Act as including "any interest directly or indirectly derived out of the tenancy, and any incumbrance on the tenancy or any such interest (whether or not the same matter is an incumbrance also on any interest reversionary on the tenancy)".[49] A "tenant's incumbrance" may therefore be an incumbrance that affects the lease (at the time that the leaseholder makes an individual freehold acquisition claim) or an incumbrance that affects both the lease and the landlord's title. An incumbrance that only affects the landlord's title without also affecting the lease is not a tenant's incumbrance.

4.93 We cannot know what a "tenant's incumbrance" is, however, if we do not know what an "incumbrance" is. The term can be used in a general property law context to refer

---

48 1967 Act, s 8(2).

49 1967 Act, s 8(2).

to all property rights which burden a freehold or leasehold title, such as leases, mortgages, easements and restrictive covenants.[50] However, the term is also sometimes used to refer to burdens such as mortgages or charges (that is, to rights affecting the land which require the owner to pay money).[51] And other nuanced interpretations of the term have been put forward in other contexts.[52] The difficulty is that leading practitioners' texts take differing views of how the term "incumbrances" is being used in the 1967 Act.

(1) The authors of *Hague* take the view that the term "incumbrances" is being used in the Act in the same broad way as in the general law (so as to include all third-party rights which burden the landlord's or leaseholder's title at the time of enfranchisement, such as leases, mortgages, easements and restrictive covenants).[53] They consider that the purpose of the definition of "incumbrances" in section 8(2) of the 1967 Act is simply to extend the term "incumbrances" to cover rentcharges and certain personal liabilities, and that "personal liabilities" include indemnity covenants for the performance of both positive and restrictive covenants, and also equitable interests that arise under constructive trusts.[54]

(2) However, in contrast to the view taken in Hague, the authors of *Emmet and Farrand on Title* suggest that the term "incumbrances" is being used in the 1967 Act to refer only to obligations requiring the payment of money (and not to property rights such as easements and restrictive covenants).[55]

4.94 The problem for us is that either view can be supported by considering different aspects of the legislation. The broad interpretation taken in *Hague* is supported by recent case law. In *Kent v Kavanagh*, the Court of Appeal held that "a right in the nature of an easement" reserved on the grant of a lease may be a "tenant's incumbrance".[56] (It does not seem to have been argued, however, that the interpretation of "incumbrance" might be unclear. The Court of Appeal was also not considering whether the transfer must be subject to pre-existing property rights). Section 8(1) does appear to be describing the landlord's basic duty to convey the freehold to the leaseholder. There is nothing in the wording of that crucial subsection to suggest that it is only concerned with incumbrances in the sense of obligations to pay money. Subsection (2) says incumbrances *include* such things as rentcharges and personal liabilities; it does not say that they are limited to such financial obligations. Furthermore, subsection (4) and (5) concern overreaching, a concept that

---

50 See *Megarry & Wade: The Law of Real Property* (9th ed 2019), para 14-081: "The term "incumbrances" covers all subsisting third party rights such as leases, rentcharges, mortgages, easements and restrictive covenants. It also includes statutory liabilities, if they are not merely potential or imposed on property (or a particular class of property) generally".

51 *District Bank Ltd v Webb* [1958] 1 WLR 148, pp 149 to 150.

52 See, for example, *Belvedere Court Management Ltd v Frogmore Developments Ltd* [1997] QB 858.

53 See *Hague*, para 6-12: "the expression 'incumbrances' usually has a wide meaning, covering subsisting third party rights such as leases, mortgages, easements and restrictive covenants, and these are clearly included".

54 See *Hague*, para 6-12.

55 *Emmet and Farrand on Title* (looseleaf ed 2020), para 28-070

56 [2006] EWCA Civ 162, [2007] Ch 1, para [50].

we explain below. What is important at this point is that these provisions enable the overreaching of interests under trusts or settlements of land and these interests are not limited to obligations to pay money.

4.95 But there are difficulties in interpreting the 1967 Act in this way. We focus on two difficulties in particular.

(1) First, if "incumbrances" includes all property rights affecting land, then section 8(1) obliges the landlord to transfer the freehold to the leaseholder free of any property right that affects the freehold but does not also affect the lease. For example, suppose that a landlord leases his or her land and does not reserve a power to grant easements over the land that will also bind the lease. Nevertheless, the landlord grants an easement to a neighbour that burdens the freehold title but does not burden the leasehold title. The authors of *Hague* seem to take the view that such an easement would be an incumbrance but not a tenant's incumbrance.[57] Thus, under section 8(1), the landlord has to convey the freehold to the leaseholder free of the easement. However, the landlord does not have any power to strip away a third party's easement from the freehold title. There is no mechanism in the 1967 Act that gives the landlord a statutory power to remove easements or any property rights. The court would be likely to resist any suggestion that the Act confers any such power impliedly, given that it is a power to interfere with third-party property rights. Therefore, if section 8(1) is interpreted in line with *Hague*, it directs a landlord to do something he or she appears unable to do.[58]

(2) Second, this interpretation of section 8(1) is in tension with the provisions of section 10. Section 10(3)(b) provides that the transfer of the freehold to the leaseholder shall include "such provisions (if any) as the landlord may require for the purpose of making the property conveyed subject to…rights of way granted or agreed to be granted before the relevant time[59] by the landlord or by the person then entitled to the reversion on the tenancy". Section 10(4)(a) makes similar provision for restrictive covenants affecting the freehold. These provisions appear to provide that the transfer of the freehold to the leaseholder can be made subject to all relevant rights of way or restrictive covenants, even if these rights of way do not also bind the lease.[60] Section 10 then presents an extremely wide exception to the general duty in section 8(1), construed as a duty to convey the freehold free of property rights that do not bind the lease. Indeed, it is not clear what remaining property rights could then be caught by the duty in section 8(1).

---

57 *Hague*, para 6-12.

58 Note that s 10(1) of the 1967 Act, which deals with the rights that the landlord is deemed to grant under s 62 of the Law of Property Act 1925, also contains the following provision: "the landlord shall not be bound to convey to the tenant any better title than that which he has or could require to be vested in him".

59 The "relevant time" is the date on which the leaseholder serves the Claim Notice on the landlord (1967 Act, s 37(1)(d)).

60 See *Hague*, para 6-17.

4.96 In favour of the interpretation of "incumbrances" in *Emmet and Farrand*, it can be pointed out that many of the provisions of section 8 do seem to be focussed upon payment obligations. For example, section 8(3) refers to "burdens in respect of the upkeep or regulation … any land, building, structure, works, ways or watercourses", which presumably catches obligations to pay for the upkeep of neighbourhood structures or facilities. The reference to "burdens originating in tenure" catches surviving manorial incidents affecting former copyhold land, which may include liabilities for the upkeep of dykes, ditches, sea walls, bridges and the like.[61] But the points mentioned above which support *Hague's* interpretation also serve to undermine *Emmet and Farrand*'s interpretation.

4.97 The upshot is that we cannot be certain how section 8 of the 1967 is supposed to be interpreted. It is clear that the 1967 Act aims to restrict the extent to which leaseholders, once they have acquired the freeholds to their properties, will be subject to obligations to pay money (whether to the landlord or a third party) that they were not subject to under their leases. We note that the Act also makes detailed provision for the discharge of mortgages and the redemption of rentcharges (which we discuss at the end of this chapter).[62] The Act may also aim to limit the circumstances in which leaseholders could come to be bound by property rights that do not bind the lease. But if that is its aim, it is not one that the Act fully achieves.

4.98 We look next at some specific provisions made by the 1967 Act for particular kinds of property right. We will consider equitable interests under trusts of land, estate contracts (agreements or options with third parties for the purchase of the landlord's title), and positive covenants.

Equitable interests

4.99 It is possible that a landlord whose freehold is let on a qualifying lease, holds the property on a trust of land for other beneficiaries. Alternatively, in rare cases, the freehold may be settled land, an antiquated form of trust under which successive individuals will acquire a beneficial interest in the property. It has not been possible to create a new settlement since the Trusts of Land and Appointment of Trustees Act 1996 came into force. Nevertheless, there are still some surviving settlements. They are governed by the Settled Land Act 1925.

4.100 The 1967 Act makes provision for the "overreaching" of equitable interests affecting the landlord's freehold title when the freehold is transferred to the leaseholder. Overreaching is a process by which, when land is sold, a person's equitable interest in that land is converted into an interest in the proceeds of sale. Thus, for example, if the freehold is held on trust and overreaching occurs, the beneficiaries under the trust will no longer have an equitable interest affecting the property; they will instead have an equitable interest in the proceeds of sale (the premium paid by the leaseholder).

4.101 The 1967 Act provides that the transfer of the freehold to the leaseholder is capable of overreaching any incumbrance affecting the freehold that is capable of being overreached. It modifies the effect of the Law of Property Act 1925 so that it permits

---

61 Law of Property Act 1922, sch 12, para 6.

62 Paras 4.372 to 4.410 below.

overreaching to occur where the purchase price is paid to redeem a mortgage over the freehold or is paid into court. It modifies the effect of the Settled Land Act 1925 so that it permits landlords to transfer their freeholds in line with the statutory scheme.[63]

4.102 Further, the Act provides that the leaseholder shall be deemed to acquire the freehold for money or money's worth, even if the leaseholder in fact makes no payment or only a nominal payment. This ensures that a leaseholder acquires a freehold which is free from any equitable interests that are not registered in accordance with the requirements of the Land Registration Act 2002 (in the case of registered land),[64] or of which he has no actual or constructive notice (in the case of unregistered land).

Estate contracts

4.103 As we discuss in Chapter 3,[65] section 5(7) of the 1967 Act makes provision for estate contracts that require the landlord to transfer the property to the third party with vacant possession (presumably after the end of any lease) to be discharged when a leaseholder makes a lease extension claim. It likewise makes provision for estate contracts to be discharged where the leaseholder pursues an individual freehold acquisition claim.

Positive covenants

4.104 Finally, the 1967 Act appears to make some provision for the transfer of positive obligations. As we mentioned above, section 8(3) of the Act contemplates that, on the transfer of the freehold, the leaseholder may be made subject to (presumably pre-existing) obligations in relation to the upkeep of buildings, ways, watercourses and so on. But the Act says nothing about how the leaseholder may be made subject to these obligations or how they might bind the leaseholder's successors in title if they do not constitute property rights. We examine the creation of new rights and obligations later in this chapter.

4.105 The Act did, however, make provision in section 19 for the landlords to apply (within two years of the Act's commencement; that is, by 1 January 1970) for certification of management schemes governing housing estates. The time limit was extended to 31 July 1976 in relation to some properties (where the right to enfranchise arose due to later amendments of the 1967 Act).[66] Enfranchising leaseholders within relevant estates would remain subject to certified management schemes. But as it has been many decades since landlords were able to apply to certify a management scheme, section 19 is only now relevant to some older housing estates.

Consultees' views

4.106 Returning to our consultation question, consultees were presented with a choice. Should leaseholders acquire a freehold (a) subject to the rights and obligations that

---

63 1967 Act, s 8(4).

64 Land Registration Act 2002, s 29.

65 Paras 3.323 to 3.334 above.

66 Housing Act 1974, s 118.

affected the freehold when it was owned by the landlord, or (b) on terms reflecting the rights and obligations in the lease?

4.107 Several consultees expressed confusion at the choice we had presented. In retrospect, we think that their confusion was justified. We did not suggest how a leaseholder could avoid acquiring the freehold subject to (and with the benefit of) existing property rights. The other option presented – namely preserving rights and obligations contained in the lease – would involve the creation of new rights and obligations affecting the freehold. We did not examine the possible mechanics of their creation, a point raised by Fieldfisher LLP, solicitors, and John Stephenson, a solicitor. Moreover, Tapestart Limited, a landlord, pointed out that the "binary choice" presented in our consultation question is "overly simplistic". It continued as follows.

> Any leaseholder buying the freehold must comply with the matters affecting the freehold that are registered in the property and charges registers of the freehold title (and should provide an indemnity to that effect). Conversely, the leaseholder will not want to lose any rights (e.g. over shared or common parts) contained in the lease. Accordingly, the terms of the freehold acquisition must contain a mix of the rights and obligations in both the current freehold title and the existing lease.

4.108 Nevertheless, despite the problems with our consultation question, it provided an opportunity for consultees to comment on a range of matters including whether a leaseholder should acquire the freehold subject to existing property rights. We can extract from these responses the views of consultees on the more specific question of whether leaseholders should acquire the freehold subject to any property rights that affect the freehold at the time of the acquisition claim.

4.109 We received a large number of responses to our consultation question. Many responses did not directly answer the question, although they may nevertheless have raised important points. Some consultees – primarily leaseholders and leaseholder groups – said that the freehold should be acquired entirely free from any kind of obligation or restriction. We have explained why this is not a feasible option.[67] Other consultees argued that the freehold should at least not be acquired subject to onerous or fee-generating covenants (with most focussing on whether onerous terms should be transferred from the lease). Thus, for example, one confidential consultee argued that the rights obtained on a freehold acquisition should mirror the rights of the existing freeholder, in order to avoid adding an extra layer of rights and creating a second-class freeholder. Similarly, the National Leasehold Campaign said the following.

> The default position should be for the leaseholder to have what the freeholder has, so the freehold subject to the rights and obligations on which the freehold is currently held. If for some reason this is not possible then the leaseholder could acquire the freehold acquisition claim subject to the rights and obligations of the current lease subject to the removal of clauses that are onerous and unfair to leaseholders (e.g. permission fees).

---

[67] See paras 4.46 to 4.51 above.

4.110 Out of the consultation responses that directly answered our consultation question, the most common answer (given in around two-thirds of the relevant responses) was that a leaseholder should acquire the freehold subject to existing rights and obligations affecting the property. Those who favoured transferring rights and obligations from the lease (either instead of or in addition to those attached to the freehold) generally did so because they did not want leaseholders to lose valuable rights enjoyed under their leases. For example, the Leasehold Advisory Service ("LEASE") wanted leaseholders to be able "to benefit from rights that go with the freehold title while not losing those which they currently have under the existing lease".

4.111 A significant number of consultees thus expressly endorsed the idea that a leaseholder should acquire the freehold subject to existing rights and obligations. Very few gave any reason why a leaseholder should not acquire the freehold subject to such rights and obligations. In particular, consultees raised the following points.

(1) Hamlins LLP, solicitors, the Property Bar Association ("the PBA"), and John Byers all emphasised that the leaseholder is "stepping into the shoes" of the landlord (and so should be subject to the same rights and obligations). The Chartered Institute of Legal Executives ("CILEx") said that taking the freehold subject to existing rights and obligations would "accurately reflect the asset being purchased" and would ensure that the leaseholder acquires what the landlord has, and would be clearer and better understood at a consumer level.

(2) Boodle Hatfield LLP, solicitors, The Law Society, and Sarah Foster all commented that there may be difficulties if the leaseholder, in acquiring the freehold, could escape from existing obligations owed to third parties. The third parties would be deprived of their rights and the landlord may be left in breach of covenant (where the obligation in question is, for example, a restrictive covenant that continues to bind the former landlord personally).

4.112 However, a few consultees suggested that there may be situations in which a leaseholder should acquire the freehold free from existing obligations. Maddox Capital Partners Limited, a landlord, and Christopher Jessel, a solicitor, said that we should consider cases in which the freehold is burdened by an interest that does not also burden the lease (a "reversionary" interest). Christopher Jessel said that the freehold acquired by the leaseholder should not be subject to reversionary obligations granted by the landlord after the date of the lease, which do not also bind the lease. Relatedly, Nigel Carnie, a leaseholder, agreed that leaseholders should acquire the freehold subject to some existing rights and obligations but "they need to be legitimate and historic, not made on the hoof by the landlord to self-serve". We think that this comment is particularly relevant to cases in which a landlord, knowing that a freehold acquisition claim is imminent (or even in progress) burdens the title with new property rights. These property rights would only affect the reversion and not the lease, unless the landlord has reserved a power under the lease to create them.

Discussion and recommendations for reform

4.113 As a general rule, we do not think that an individual freehold acquisition claim should alter what pre-existing property rights burden or benefit the freehold. Subject to issues of registration or notice, the freehold should be transferred subject to and with the

benefit of all property rights. The leaseholder should step into the shoes of the freeholder.

4.114 The general rule we have set out was broadly supported by consultees. It has the advantage of simplicity. The acquisition of the freehold by the leaseholder will, in respect of pre-existing property rights affecting the freehold, simply match the position under an open market sale. Moreover, the existence of property rights burdening the freehold should be taken into account in determining the premium payable by the leaseholder on the freehold acquisition.

4.115 We consider that the function of a freehold acquisition is, primarily, to enable leaseholders to acquire the freehold title from their landlord. It is not to enable leaseholders to "clean up" the title by removing pre-existing rights binding the freehold (and therefore binding their landlord). Requiring the landlord to "clear off" property rights from the freehold title before it is acquired by the leaseholder, would have a significant detrimental impact on the landlord (who, presumably, would be required to pay for the release of the relevant property rights). It would have a detrimental impact on the leaseholder if the costs could be passed on by the landlord. And it would have a detrimental impact on third parties who stand to lose what may be entirely legitimate interests in the freehold. As we noted previously,[68] it is well-established as a matter of general property law that freehold owners can protect the value and amenity of their land by imposing certain types of obligations on neighbouring freehold land (particularly, easements and restrictive covenants).

4.116 We also note that there are some avenues open to a leaseholder who wants to challenge onerous property rights burdening the freehold independently of the enfranchisement process. Restrictive covenants may be challenged by an application under section 84 of the Law of Property Act for their modification or discharge. We recommended in Making Land Work that this regime should be extended to apply to easements.[69]

4.117 Some consultees, however, raised specific concerns about estate rentcharges. We have considered carefully whether estate rentcharges should be excepted from the general rule, set out in paragraph 4.113 above, but have concluded they should not be. We explain the nature of rentcharges in paragraph 4.81(2) above. Although regular (income-generating) rentcharges can no longer be created, it remains possible to create estate rentcharges. They may take one of two forms.[70]

(1) The first kind of estate rentcharge is a rentcharge for a nominal sum used to ensure that positive and negative obligations, that would ordinarily only bind a landowner personally, will run with the land and bind successors in title. Performing the positive obligation may be expensive; an obligation to maintain a boundary, for example, may be onerous if it involves maintaining a stone wall around the property.

---

68 See paras 4.46 to 4.51 above.

69 Making Land Work: Easements, Covenants and Profits A Prendre (2011) Law Com No 327.

70 Rentcharges Act 1977, s 2(4).

(2) The second kind of estate rentcharge is a rentcharge imposed to secure payments for services that benefit the land of the burdened owner. Such estate rentcharges may, for example bind the freehold properties within a housing estate and hold in place a complex system of obligations for regulating the estate (with the rentowner being a management company that, for example, maintains the estate roads, gates and common areas).

4.118 There is a concern amongst leaseholders that estate rentcharges are being used by landlords as a mechanism to ensure that "fleecehold" type obligations bind successors in title to a freehold house. Aside from the onerous nature of "fleecehold" type obligations themselves, the use of estate rentcharges causes concern because, if the sums of money owed under an estate rentcharge are not paid, the rentowner often has a right to take possession of the property even though it is owned on a freehold basis (akin to forfeiture under a lease).

4.119 We sympathise with leaseholders' concerns about the use of estate rentcharges. However, we do not think that a new scheme for enfranchisement is the right place to introduce new provisions designed to regulate their use. The problems presented by estate rentcharges arise in a wider context than enfranchisement. We also note that Government intends to legislate to give freeholders in housing estates greater rights to challenge service charges and to restrict the powers of the rentowners to enforce rentcharges where they have only remained unpaid for a short period of time.[71]

4.120 We have come to the conclusion, however, that there do need to be some exceptions to our general rule that a leaseholder should acquire the freehold subject to existing property rights. We start by considering whether an exception needs to be made in relation to any property rights that benefit the freehold and then proceed to consider property rights that burden the freehold. Finally, we supplement our discussion by recommending special rules that should apply in relation to three kinds of property right: mortgages, beneficial interests and estate contracts.

4.121 In relation to each of the exceptions we set out below, we think that our recommendations are justified in order to protect leaseholders. The exceptions should ensure that leaseholders acquire a freehold which is not burdened by property rights which would, by their very nature, significantly undermine the statutory right of freehold acquisition (in particular, leaseholders should not obtain a freehold subject to the landlord's mortgage, or subject to a trust, or to an estate contract obliging the leaseholder to sell the freehold on to someone else). Leaseholders should also avoid obtaining freeholds which are burdened by reversionary property rights burdening the freehold which the leaseholder could not have anticipated when the lease was granted and which the leaseholder did not at any point consent to.

---

71 Department for Communities and Local Government, *Tackling unfair practices in the leasehold market: Summary of consultation responses and Government response* (December 2017), paras 80 to 81: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/670204/Tackling_Unfair_Practices_-_gov_response.pdf.

Property rights benefiting the freehold

4.122 Consider the following scenario in which a leaseholder acquires the freehold to his or her property with the benefit of a property right over a third party's land.

> A owns the freehold to Plot Y and the next-door property, Plot Z.
>
> A grants a lease for 125 years of Plot Y to B. In the lease, A grants B a right of way over Plot Z.
>
> Subsequently, A sells the freehold to Plot Z to C. A reserves a right of way over Plot Z for the benefit of his or her retained land (the freehold to Plot Y).
>
> B later brings an individual freehold acquisition claim. B acquires the freehold title to Plot Y with the benefit of the right of way over Plot Z (preserving the position B enjoyed under its lease).[72]

4.123 In this scenario, the acquisition of Plot Y by B does not cause any prejudice to C, the third-party owner of Plot Z. C's land is burdened by exactly the same property right (for the same duration) as it was prior to the individual freehold acquisition claim.

4.124 Importantly, the position for C would be no different if the relevant property right had benefited only the freehold to Plot Y and not B's lease. (Although the default position is that a lease of a property entitles the leaseholder to enjoy the benefit of any rights appurtenant to that property, the landlord can expressly without the benefit of a particular right.[73] Alternatively, after a property is let, a landlord can negotiate with a neighbour for the grant of a new property right that will only benefit the freehold.) In such a case, before the individual freehold acquisition, C's land would be subject to a property right benefiting the freehold to plot A and exercisable by A (the freeholder). After individual freehold acquisition, C's land would still be subject to a property right benefiting the freehold to plot A and exercisable by B (the new freeholder). C's situation is the same.

4.125 We recommend, therefore, that in all cases the leaseholder should acquire the freehold together with any existing property rights that benefit the title. The leaseholder should have the same advantages as those enjoyed by a third-party purchaser on an open-market sale.

---

72 We recognise that problems can arise for leaseholders on enfranchisement if a landlord in the position of A in the above example *fails* to reserve a right of way (or other relevant right) over Plot Y when Plot Z is sold to C. In that situation, A cannot subsequently transfer the freehold to B with the benefit of a freehold right of way over Plot Z (because A no longer owns Plot Z), We discuss how this problem may be resolved at paras 4.333 to 4.335 below.

73 Law of Property Act 1925, s 62(1), (2) and (4) (a lease of a property is a "conveyance" within the meaning of the Act).

Property rights burdening the freehold

4.126 We have reached a different conclusion, however, in respect of existing property rights which *burden* the freehold title at the point of enfranchisement. We recommend that a leaseholder should acquire the freehold subject to property rights that bind both the freehold and the lease. But we do not think that the same general rule should apply where the freehold is burdened by property rights which do not bind the lease (to use the words of Christopher Jessel, where the freehold is affected by "reversionary interests").

4.127 We recommend that the freehold acquired by leaseholders should not be bound by property rights which, at the point of enfranchisement, bind the freehold title but which do not bind the leaseholder's lease. (Our recommendation is, however, subject to the more specific recommendations we make below regarding mortgages, beneficial interests under trusts of land, and estate contracts.[74])

4.128 We acknowledge that this recommendation involves treating leaseholders differently from (and more favourably than) third-party purchasers. We think our recommendation is justified in order to protect leaseholders, and, for the reasons we explain below, we do not think that third parties will be unduly prejudiced.

4.129 In the vast majority of cases, where there is a right binding the freehold (such as a restrictive covenant or easement) this right will also bind the lease. Nevertheless, we set out below two examples in which a lease may not be bound by a property right affecting the freehold.

Third-party property right not registered

A is the registered proprietor of a freehold. A enters into a restrictive covenant for the benefit of a neighbouring property owned by B. B fails to protect the covenant by registering a notice against A's title.

A grants a lease for 125 years to C. C is registered as the proprietor of the new leasehold estate. Due to section 29(1) Land Registration Act 2002, B's covenant is postponed to C's estate, so C takes free of it (it does not bind C's lease).

B cannot enforce the covenant against C and so cannot control the use of the property for as long as C's lease continues. But A's freehold estate is still bound by B's restrictive covenant. If C's lease were to end, B would be able to enforce their covenant against A.

Under our recommendation, if C acquires the freehold from A via an individual freehold acquisition, the freehold acquired by C will take priority over B's covenant (just as C's lease took priority over B's covenant). B will not be able to enforce the covenant against C.

[74] See paras 4.148 to 4.165 below.

Third-party property right post-dating the grant of the lease

A is the registered proprietor of a freehold. A grants a lease for 125 years to C. C is duly registered as proprietor of the leasehold estate.

Subsequently, A grants an easement (a right of way) over the freehold to B, which is registered on B's title and registered against A's title.

Because C's lease predates B's right of way, and was properly registered, it takes priority over B's right of way. B cannot enforce the easement against C for so long as the lease continues. But A's freehold estate is still bound by B's easement. If C's lease were to end, B would be able to enforce the easement against A.

Under our recommendation, if C acquires the freehold via an individual freehold acquisition, the freehold acquired by C will take priority over B's easement (just as C's lease took priority over B's easement). B will not be able to enforce the right of way against C.

4.130 We recognise that some arguments could be made for taking an alternative approach. It could be argued that an individual freehold acquisition should *in every case* simply provide the leaseholder with the opportunity to step into the shoes of the landlord and acquire the freehold as it stands at the point at which the claim is brought. It might be argued that it is not correct to draw a distinction between those freehold interests which only bind the freehold at the point of enfranchisement, and those which also bind the lease. The leaseholder is acquiring a different title (the freehold) from his or her existing leasehold title, and so must acquire it as it stands at the point of acquisition (as would any other purchaser in a sale on the open market).

4.131 However, we think that there are compelling arguments in favour of our recommended approach.

4.132 First, our recommended approach is consistent with our policy in relation to lease extensions. In Chapter 3, we recommend that, on a lease extension claim, property rights that bind the freehold but do not bind the current lease, will not bind the extended lease.[75] Although lease extensions must take place at law by way of surrender and regrant, we pointed out that this is merely an issue of legal mechanics rather than an issue of principle. The new lease should be treated as if it were genuinely an extension of the old lease. Consequently, the new lease should have the same priority as the old lease in relation to property rights affecting the freehold.

4.133 Therefore, consider the second example that we gave above. B owns a right of way which was granted by A after the grant of C's lease. The right of way binds the freehold but not the lease. Suppose that we had decided that, if C brings an individual freehold acquisition claim, C should acquire the freehold still subject to B's right of way. The situation created would be anomalous. C would still own the lease and

[75] Recommendation 8, para 3.321(2) above.

would not be bound by the easement in his or her role as leaseholder. C would have an incentive not to merge the leasehold or freehold titles; otherwise, B could start exercising the right of way. C might consider creating a company, transferring the freehold to the company and then claiming a lease extension for 990 years further to postpone the date on which B's easement would become enforceable.

4.134 We consider this incentive for C not to merge the leasehold and freehold titles to be perverse. The aim of an individual freehold acquisition should be that C becomes a freeholder instead of a leaseholder; the right of freehold acquisition is predicated on the assumption that freehold ownership is preferable to leasehold ownership. Our scheme should not provide incentives to perpetuate leasehold. It would be especially unattractive if a result of our new scheme were to be that houses, which might otherwise have become owned on a freehold basis, remain as leasehold (particularly at a time when Government is seeking to ban new leasehold houses).[76]

4.135 Moreover, although we recognise that B may suffer some prejudice if C can acquire the freehold free of B's easement, the prejudice suffered is effectively the same as it would be if C had opted to claim a lease extension. There is little difference in practice between B's easement's being postponed to a 990-year lease and its being postponed to a freehold (and effectively extinguished). In particular, we do not think the loss of value to B will be any different whether the leaseholder extends his or her lease (in which case B's easement is postponed to a 990-year lease (which can be perpetually renewed)) or acquires the freehold (in which case B's easement is permanently postponed to the freehold interest).

4.136 Second, the leaseholder is not in the position of a third-party purchaser deciding whether or not to purchase a property (with the benefit and burden of any rights that affect it). We do not accept that the leaseholder's enfranchisement right should be construed simply as a right to acquire a new asset. The leaseholder has already bought in to the property in acquiring his or her lease. Enfranchisement law aims to give the leaseholder the means of improving his or her title to the property (of improving his or her quality of ownership). The freehold title acquired by the leaseholder may thus be seen as a development or as something arising out of his or her leasehold title. In the scenarios we are considering, the lease has priority over the third party's interest. There is therefore a case for saying that the freehold acquired by the leaseholder should also have priority over the third party's interest.

4.137 Third, our recommended approach blocks one avenue by which landlords may seek to abuse the enfranchisement process. We are concerned that unscrupulous landlords might, prior to and in anticipation of leaseholders serving a claim to acquire the freehold, seek to clog the freehold title with obligations of an onerous nature. Their goal might be to discourage an individual freehold acquisition claim from being brought. Alternatively, it might be to extract further money from the leaseholder in return for arranging the release of the relevant property rights.

4.138 We think that there is considerable potential to abuse a policy which requires a leaseholder to acquire the freehold exactly as it stands at the point of enfranchisement in all cases. Landlords will be less able to employ such tactics if the freehold acquired

---

[76] See para 1.63 above.

by leaseholders is subject only to property rights which bind the lease as well as the freehold. Our policy may therefore have the added benefit of reducing the number of cases in which leaseholders acquire a freehold burdened by onerous and inappropriate obligations.

4.139 These are our reasons for making our recommendation. We also consider that any prejudice caused to third parties will be limited. Looking at the two examples set out under paragraph 4.129 above, we think that in both cases, the rights of third parties are sufficiently protected.

4.140 In the first case, B should have registered its restrictive covenant. If B had done so, B would have ensured that its restrictive covenant had priority over C's lease. If B was legally advised in the transaction, B may have a negligence claim against his or her conveyancer for failing to register the restrictive covenant. If not, B should bear the consequences of his or her own mistake.[77]

4.141 The second case is unlikely to arise frequently in practice. It is unusual for a party such as B to acquire a reversionary property right that does not bind C's lease, because such rights cannot be enjoyed until the lease expires. (Moreover, as enfranchisement law concerns long residential leases, B is only likely to seek such a right when the lease is about to end). If B does want to acquire such a right, it is open to B to seek to obtain C's consent to the grant of the easement (paying C accordingly) so that it will also bind C's lease. This would ensure that if C subsequently acquired the freehold title, B's easement would continue to bind the freehold. In the event that B cannot obtain C's consent, B will have to take a view as to the likelihood of C exercising enfranchisement rights and B subsequently losing the easement, and decide whether or not to enter into the transaction (and at what price).

4.142 We acknowledge, however, that it is possible to vary our scenario so that C's lease did not qualify for enfranchisement rights at the time that B was granted the easement. For example, the lease may originally have been a business lease that was subsequently varied to become a residential lease. Alternatively, the lease may always have attracted enfranchisement rights, but the law at the time the lease was granted (the law before the implementation of our recommendation) may not have permitted C to acquire the freehold unencumbered by B's easement.

4.143 Nevertheless, in these cases, we think that B's rights should fall away when C acquires the freehold. These are unusual cases. We do not think that the possibility of them arising justifies creating a complicated scheme whereby, for example, B's easement will only fall away in the event that C's lease qualified for enfranchisement rights at the point that the easement was granted. Such a scheme may require a leaseholder in the position of C to carry out a potentially complex and difficult historical exercise to try to work out if the lease qualified for enfranchisement rights at the appropriate time. This approach would be detrimental to leaseholders, landlords and

---

77 We recognise that a situation could arise in which B's restrictive covenant was not properly registered because of a mistake by HM Land Registry, rather than a mistake by B (for example, HM Land Registry may have wrongly registered the restrictive covenant against the incorrect title number). In such a case both B and C are protected by the scheme under Land Registration Act 2002 relating to rectification of the register and indemnities.

also third parties, by complicating the enfranchisement process, increasing cost, and increasing the risk of disputes.

4.144 Moreover, in these scenarios, B is not losing a right that he or she is currently able to exercise. B has only an expectation that he or she may be able to exercise the right in the future. Even without the enfranchisement legislation, that expectation may be frustrated. Most long residential leases confer security of tenure. Even after the end of the fixed term, these leases may continue under schedule 10 to the Local Government and Housing Act 1989.

4.145 Given these considerations, we recommend that a leaseholder who acquires the freehold should not be bound in any circumstances by property rights that affected the freehold but did not affect the lease.

4.146 There is one point we need to clarify, however, which is illustrated by the following scenario.

> A owns the freehold of Plot Y and of the neighbouring plot, Plot Z.
>
> A grants a lease for 125 years of Plot Y to B. In the lease A reserves a right of way over Plot Y, for the benefit of Plot Z.
>
> Subsequently, A sells the freehold of Plot Z to C. As part of the sale, A grants C a right of way over Plot Y, for the benefit of the freehold title to Plot Z.
>
> B later acquires Plot Y via an individual freehold acquisition claim.

4.147 This case is similar to the second case under paragraph 4.129 above in that C's right of way is granted after the date of B's lease. However, we do not consider that this is a case in which B's lease is not "bound" by C's right of way, or where C's right of way should fall away when B acquires the freehold. We do not intend for our special recommendation to apply in this case. Although the right of way reserved in the lease and the right of way over the freehold granted when Plot Z is transferred are technically distinct rights, their content is identical. The lease is subject to a right of way over the leaseholder land for the benefit of Plot Z. This is not, therefore, an example of a situation in which the leaseholder needs protecting from a burden which did not bind the leaseholder under the lease. We raised an identical point, and made an equivalent recommendation, regarding lease extensions in Chapter 3.[78]

Special rules for mortgages, trusts and estate contracts

4.148 Our general recommendation, then, is that a leaseholder should acquire the freehold with the benefit of and subject to all existing property rights affecting the title. This general rule should be subject to an exception: the leaseholder should acquire the freehold free from any property rights that did not also bind the lease. But we mentioned that there are some kinds of property right that should not be subject to these rules. We recommend that special provisions should apply in relation to

[78] Paras 3.308 and 3.321(2) above.

mortgages, interests under trusts of land, and estate contracts. These are property rights about which the 1967 Act also makes special provision.

Mortgages

4.149 When a third party purchases a landlord's reversionary freehold title, the third party will ordinarily pay the purchase price to the landlord's solicitors in return for an undertaking that they will arrange for the discharge of any mortgage secured against the title. The same is true when a leaseholder acquires the freehold following an individual freehold acquisition claim. A mortgage will simply be discharged out of the purchase price as part of the usual conveyancing process.

4.150 However, the current law also makes provision for the automatic discharge of mortgages in certain circumstances. These provisions may be of use where the landlord's equity of redemption is very small or the property is in negative equity[79] (so the statutory price paid by the leaseholder would not ordinarily be enough to pay off the mortgage) or where the landlord or mortgagee is missing or not cooperating, so the amount outstanding under the mortgage cannot be ascertained.

4.151 We discuss mortgages in detail later in this chapter.[80] For the reasons we set out, we recommend that our new scheme for individual freehold acquisition should also make provision for automatic discharge. A mortgage will automatically be discharged if the leaseholder pays the statutory price for the freehold (or a sufficient proportion of that price to redeem the mortgage) directly to the mortgagee or into court. If a leaseholder instead pays the purchase price directly to the landlord and the landlord does not use the money to redeem the mortgage, the mortgage will remain on the freehold title. But it will only secure the mortgage debt up to the value of (any part of) the statutory price (or any part of it that was not paid to the mortgagee or into court).

4.152 In our previous discussion of other kinds of property right, we said that rights that only affect the freehold and do not also affect the lease should fall away when the leaseholder acquires the freehold. If we applied the same approach to mortgages, then a mortgage which only bound the freehold and did not also bind the lease would automatically fall away on an individual freehold acquisition. On this approach, a reversionary mortgage would fall away even if a leaseholder failed to pay (a sufficient proportion of) the purchase price to the mortgagee or into court.

4.153 However, we do not think we should take this approach in respect of mortgages. Mortgages should not simply be extinguished on a freehold acquisition even if they only bind the landlord's reversionary title. We think there are reasons to distinguish mortgages from, for example, easements and restrictive covenants that only bind the reversion.

---

79 In this context, a landowner's equity of redemption is the landowner's remaining interest in the property after taking account of the mortgage (which includes the landowner's right to recover the property on payment of the mortgage debt). If the debt is very large, the value of the landowner's remaining interest will correspondingly be very small. A property is in negative equity when the amount secured by the mortgage exceeds the value of the property.

80 See paras 4.372 to 4.404 below.

(1) First, reversionary easements and restrictive covenants are rare, whereas many mortgages are secured against freeholds that have already been let, or that are subsequently let on a lease that is authorised by the mortgagee.

(2) Second, an easement, for example, that binds the reversion but not a subsisting lease provides at best the hope of a future benefit. The easement cannot be used until the lease comes to an end. By contrast, a mortgage over the reversion provides an immediate benefit. The landlord must make the mortgage payments. If the landlord defaults on the mortgage, the mortgagee may not be able to take possession of the freehold and evict the leaseholder, but it can sell the landlord's reversionary interest to recover the debt.

(3) Third, requiring a leaseholder to pay the purchase price directly to the mortgagee or into court in order to ensure the discharge of the mortgage does not cause the leaseholder any real hardship. The leaseholder has a clear route to acquiring an unencumbered freehold. It is very different to require the leaseholder to take the freehold subject, for example, to onerous restrictive covenants that did not bind the lease.

Beneficial interests under trusts

4.154 The second special rule we need to consider concerns beneficial interests under trusts of land. If a landlord holds his or her property on trust, we do not want a leaseholder who acquires the property after an individual freehold acquisition claim to be bound by the interests of the beneficiaries under the trust. And more generally, we do not want the fact that the landlord holds the property on trust to present an obstacle to freehold acquisition.

4.155 Where the landlord's title is registered, there is little danger that a leaseholder who acquires the freehold could be bound by beneficial interests in the freehold. An interest under a trust of land cannot be protected by a notice on the register.[81] A leaseholder is a purchaser for value of the freehold (a point we consider in more detail at paragraph 4.166 below). Thus, under the land registration regime, the leaseholder who acquires the freehold will not be bound by the beneficiary's interest unless that beneficial interest is "overriding".[82] This kind of interest could only be overriding if the beneficiary is in actual occupation of the leaseholder's property.[83] This situation is extremely unlikely to arise, as it would mean that the freeholder is in occupation of the property over which the leaseholder has been granted a long lease.

4.156 But trusts of land may still be of concern to an enfranchising leaseholder. First, a leaseholder may still have some residual concerns that a landlord would be acting in breach of trust in transferring the freehold and that the leaseholder's acquisition of the freehold may still be called into question on this basis. Second, the landlord's property may be unregistered land and, after the acquisition, the leaseholder may be bound by beneficial interests of which he or she had notice. Third, the existence of the trust may

---

81 Land Registration Act 2002, s 33.

82 As overriding interest is one that can bind the purchaser of registered land even though the interest was not recorded in the register. An important category of overriding interest is an interest belonging to a person in discoverable actual occupation of the land being purchased.

83 Land Registration Act 2002, s 29 and sch 3, para 2.

place restrictions on the landlord's ability to transfer the property to the leaseholder at all. This third concern requires more detailed consideration.

4.157 If HM Land Registry is aware that a landowner holds a registered title on trust, the registrar will enter a restriction in the register in Form A. A Form A restriction reads as follows:

> No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court.

If the beneficiaries can show that, under the terms of the trust, the landlord may not dispose of the freehold without the beneficiaries' consent, the registrar may also enter a Form N restriction, preventing a disposition of the property being registered unless the landlord or the leaseholder provides the registrar with the beneficiaries' written consent to the disposition.

4.158 We consider the issues that may arise in relation to restrictions in more detail in Chapter 10.[84] We recommend there that the beneficiaries under a trust of land should be deemed to consent to a disposition of the freehold by the landlord that takes place pursuant to an enfranchisement claim. The landlord will not then be in breach of trust in disposing of the property to the leaseholder. We also recommend that the consent should qualify for the purposes of a consent-restriction in the register.

4.159 These recommendations do not, however, completely resolve the problems that may arise in relation to trusts of land. We also need to address overreaching (a concept we explain at paragraph 4.100 above). Even if the beneficiaries under the trust consent to the disposition, this does not ensure that their interests will be overreached (and so will become interests in the purchase money paid rather than in the property). Their consent does not satisfy the terms of a Form A restriction. The purchase price still needs to be paid to two trustees or a trust corporation. And the terms of the trust may make it difficult for the landlord or the leaseholder to arrange for the appointment of a second trustee.[85]

4.160 We do not think that interests under a trust of land should be overreached merely by the payment of the purchase price to a sole landlord on an individual freehold acquisition claim. That would deprive the beneficiaries of the long-standing protection under the Law of Property Act 1925 (that overreaching requires payment to two or more trustees or to a trust corporation). But we think we should give leaseholders an option for ensuring their freehold acquisition claim can progress where there is a difficulty securing the appointment of a second trustee.

4.161 We recommend that the interests of beneficiaries under a trust of the landlord's property should be deemed to be overreached by the payment of the purchase price into court. Where the leaseholder is required to pay (a portion of) the money directly to the mortgagee, we recommend that this payment should also be deemed to overreach

---

84 Paras 10.150 to 10.212 below.

85 For example, in *Rennie and Rennie v Proma Ltd and Byng* (1990) 22 HLR 129, a trust was deliberately structured to prevent the appointment of a second trustee and thereby prevent enfranchisement.

the interests of any beneficiaries, providing any remainder is paid into court. (There will be no need, however, for a leaseholder to pay the money into court to ensure overreaching where the landlord is a trust corporation or the purchase price can be paid to two or more joint owners).

4.162 Finally, we think we need to make some provision for settled land (a rare and antiquated form of trust discussed at paragraph 4.99 above). Section 8(4)(a) of the 1967 Act provides that (where the purchase price is paid into court) a conveyance of the freehold to the leaseholder should overreach beneficial interests in settled land as if "the conveyance were made under the powers of the Settled Land Act 1925" and as if the conveyance complied with the requirements for overreaching under the Law of Property Act 1925. We recommend that our new scheme should contain an equivalent provision, which should match our recommendation for other trusts of land.

Estate contracts

4.163 In Chapter 3, we discuss the effect of a lease extension on agreements between the landlord and a third party for the sale of the landlord's property.[86] A landlord is at liberty to sell his or her reversionary title. He or she may enter into an agreement to sell the property to a third party, or grant the third party an option to purchase it, or grant them a right of first refusal in the event that the landlord chooses to sell. These agreements may give rise to a kind of proprietary interest in the property, which the third party can protect by registration as a land charge (in relation to unregistered land) or by registering a notice (in relation to registered land). These agreements are often referred to as "estate contracts".

4.164 We explain in Chapter 3 that section 5(7) of the 1967 Act makes provision for estate contracts that require the landlord to transfer the property to the third party with vacant possession (presumably after the end of any lease) to be discharged when a leaseholder makes a lease extension claim.[87] We explain that the formulation of the equivalent provision in the 1993 Act is better: estate contracts are suspended on the service of a claim and discharged when the claim is completed. Estate contracts are discharged regardless of whether they had priority over the existing lease and were protected at the time the lease was granted. We recommended replicating this provision in our new scheme for lease extensions.

4.165 The same reasoning applies in relation to individual freehold acquisitions. If a leaseholder had to acquire the freehold subject, for example, to an option to purchase in favour of a third party, the third party could immediately deprive the leaseholder of the fruits of his or her enfranchisement claim. The third party could even be a company set up by the landlord for the purpose of frustrating any enfranchisement claim. And most importantly, estate contracts are discharged under the current law on an individual freehold acquisition claim (again, under section 5(7) of the 1967 Act) regardless of whether they had priority over the lease. We are not minded to weaken existing protections for leaseholders.

---

86 Paras 3.323 to 3.334 above.

87 Paras 3.323 to 3.324 above.

Valuable consideration

4.166 Finally, we recommend that a further provision of the 1967 Act should be replicated in our new individual freehold acquisition scheme. The current law deems leaseholders who have completed an individual freehold acquisition and paid the statutory price to have acquired the freehold "for a valuable consideration in money or money's worth". This provision applies even if the freehold is of negative value so that the statutory price is zero, or if the leaseholder only has to make a nominal payment.

4.167 The provision is important because it brings into operation key principles of registered and unregistered conveyancing. A transferee of land who gives value for the transfer (some Acts refer in different contexts to "valuable consideration" and others to transfers for "money or money's worth")[88] may acquire the property free of the burden of various property rights. In particular, the transferee may take free—

(1) of equitable property rights affecting unregistered land of which he or she has no notice;

(2) of property rights affecting unregistered land that could have been protected by being registered as land charges but are not so protected; and

(3) of property rights affecting registered land that are not protected by the registration of a notice and are not overriding interests.

4.168 Leaseholders under our new individual freehold acquisition scheme should also be able to take advantage of these rules. We recommend that a leaseholder who has paid the statutory price under our individual freehold acquisition scheme (even if that price is zero) should be deemed to have acquired the freehold for "valuable consideration" and "money or money's worth".

Recommendations for reform

4.169 The threads of our discussion of existing property rights and individual freehold acquisitions are brought together in our recommendation. A leaseholder should acquire the freehold with the benefit of and subject to all existing property rights affecting the title (assuming that relevant notice or registration requirements are met). But special rules should apply in relation to property rights that bind the freehold but not the lease, mortgages, beneficial interests under trusts of land, and estate contracts.

4.170 Although we have been discussing property rights affecting the freehold, we intend our recommendations also to apply to property rights affecting intermediate leases. We discuss intermediate leases in Chapter 13. In acquiring the freehold, the leaseholder will also acquire any intermediate leases and our recommendations should determine what property rights will affect those leases after the acquisition.

---

88 The statutes that govern registered and unregistered conveyancing use different phrases. The Land Registration Act 2002 refers to "valuable consideration" (s 29(1)). The Land Charges Act 1972 uses both phrases (see ss 4(6) and 17(1)) as does the Law of Property Act 1925 (see s 205(1)(xxi)).

Recommendation 11.

4.171 We recommend that, subject to the exceptions set out below, a leaseholder who brings an individual freehold acquisition claim should be treated in the same way as a third-party purchaser. Consequently, if the relevant requirements of registered or unregistered conveyancing are met, the leaseholder should acquire the freehold subject to and with benefit of all existing property rights.

4.172 We recommend that special rules should apply in the following situations.

(1) The freehold acquired by the leaseholder should not be bound by any property rights that, at the time that the individual freehold acquisition claim is completed, bind the freehold but do not bind the lease. However, this rule should not apply if the lease is bound by a separate but equivalent right.

(2) The rule in paragraph (1) above should not apply to mortgages (which we recommend should be subject to separate rules).

(3) If the freehold is held on trust or is settled land, the interests of the beneficiaries under the trust or settlement should be deemed to be overreached:

(a) by the payment of the purchase price into court; or

(b) if the leaseholder is required to pay (a portion of) the purchase price directly to the landlord's mortgagee, by the payment of the price to the mortgagee, provided that any remainder is paid into court; and

as if (in relation to settled land) the freehold were transferred pursuant to the powers conferred by the Settled Land Act 1925.

(4) An estate contract or option to purchase the freehold should be suspended by the service of a Claim Notice seeking an individual freehold acquisition and discharged on completion of the claim.

4.173 A leaseholder who has paid the statutory price for an individual freehold acquisition, as determined by whichever new valuation scheme is selected by Government, should be deemed to have acquired the freehold for "valuable consideration" and "money or money's worth".

PRE-EXISTING PERSONAL OBLIGATIONS BINDING THE LANDLORD

4.174 Having set out our policy regarding pre-existing property rights affecting the freehold, we turn to consider personal obligations binding on a landlord and the relevance they may have for an individual freehold acquisition claim. Our focus is on obligations arising under contracts or other binding agreements.[89]

4.175 We explain in the last section that the starting point should be that a leaseholder acquires the freehold subject to all existing *property* rights. The starting point in relation to *personal* obligations binding the landlord should be the opposite. When leaseholders acquire the freeholds to their properties, they need not ordinarily be concerned about personal obligations that were binding on their former landlords. Even if these obligations concern the landlords' use of their land, if they are only personal, they do not bind the freeholds as such and so should not affect leaseholders when they acquire them.

4.176 But problems can arise in relation to agreements that limit or set conditions on a landlord's ability to dispose of his or her property. These agreements can cause difficulties for both the landlord and the leaseholder.

(1) First, suppose that a landlord contracts with a third party not to sell his or her property within the next year. The leaseholder brings a claim to acquire the freehold. The landlord is compelled by statute to transfer the freehold to the leaseholder. The landlord has then been forced to breach his or her contract with the third party and may be liable in damages.

(2) Second, as we discuss in Chapter 10, the landlord's agreement may be protected by a restriction entered in the register.[90] The Land Registration Act 2002 permits restrictions to be registered that prevent "unlawful" dispositions of the property.[91] Unlawfulness includes dispositions in breach of contract. The registrar cannot register a disposition in breach of a restriction.[92] Thus, agreements entered into by the landlord may present an obstacle to enfranchisement.

4.177 There are a wide variety of circumstances in which a contract may place limitations on the transfer of a property. Consequently, there are a wide variety of circumstances in which a restriction may be registered. We think that our new enfranchisement scheme needs to cater for three ways in which a contract may place limitations on a landlord's powers of disposal.

(1) First, the landlord may be bound by an agreement that he or she is not to dispose of the property unless a particular condition is satisfied or particular

---

89 Some agreements are binding under particular statutes despite the fact that there would not otherwise amount to valid contracts.

90 Paras 10.150 to 10.212 below.

91 Land Registration Act 2002, s 42(1)(a).

92 Land Registration Act 2002, s 41(1).

steps are taken, where those conditions or steps effectively prevent enfranchisement taking place at all.

(2) Second, an agreement may require the landlord to follow a particular process in disposing of his or her property that is more expensive (for the leaseholder) or slower than the process prescribed by our new scheme.

(3) Third, an agreement binding the landlord may not delay enfranchisement or prevent it taking place, but may require the landlord to ensure that, when the leaseholder acquires the freehold, the leaseholder undertakes certain obligations (and ensures that any successor in title undertakes identical obligations).

4.178 Although we did not directly discuss these three kinds of agreements in the Consultation Paper, we did ask some related questions and we summarise the relevant points raised by consultees below. We then look at the first two kinds of agreements, which prevent or disrupt enfranchisement and we make recommendations to ensure that these agreements will not be able to have this effect.

4.179 Finally, we consider the third class of agreements: those requiring the landlord to ensure the leasehold takes on personal obligations on acquiring the freehold. These agreements present a problem. If the relevant obligations are onerous, or if there is simply no reason why the leaseholder should undertake them, they may dissuade the leaseholder from exercising his or her statutory rights and seeking to acquire the freehold. They may also provide a means of preserving unattractive aspects of leasehold ownership (as would happen, for example, if a leaseholder still had to pay permission fees to his or her former landlord after becoming a freeholder). Conversely, however, the relevant obligations may play an important role in governing the relationship between neighbouring landowners or in supporting the proper management of housing estates. Consequently, it may not be acceptable simply to provide that all obligation-imposing agreements are to be of no effect; we need to look for a more nuanced solution.

Consultees' views

4.180 In Chapter 5 of the Consultation Paper, we did not discuss the difficulties that may arise where a landlord is under personal obligations constraining or setting conditions on his or her ability to dispose of the freehold. We did refer to some related issues in Chapter 11 of the Consultation Paper, where we made a provisional proposal about cases in which a landlord is required to seek the consent of a third party to a transfer of the freehold.[93] We discuss this provisional proposal in Chapter 10.[94]

4.181 In response to our proposal about consent-requirements, consultees raised two points that we think are relevant to the issues we are considering here.

(1) First, the Birmingham Law Society pointed out that our new scheme for enfranchisement should not force landlords to breach their contracts with or

---

93 See CP, para 11.179.

94 Paras 10.150 to 10.212 below.

obligations to third parties, or at least it should afford them a statutory defence if subsequently sued by the third parties.

(2) Second, Clifford Chance LLP, solicitors, drew attention to the fact that (as we discussed earlier)[95] chains of personal agreements protected by restrictions in the register provide a means for ensuring that positive obligations bind successive owners of land. The firm drew attention in particular to positive obligations governing housing estates, for example to obligations on landowners to pay for the maintenance of estate roads.

4.182 Additionally, although we did not discuss the effect of pre-existing personal obligations on landlords in Chapter 5 of the Consultation Paper, a pattern emerged in the responses from consultees to the questions we did ask. Many consultees – predominantly legal and other professionals, landlords and commercial investors – repeatedly raised concerns about the effect of enfranchisement on schemes of obligations governing housing estates.

(1) For example, in response to our provisional proposal that a leaseholder could acquire the freehold subject to additional terms drawn from a list of prescribed terms,[96] the Property Litigation Association ("the PLA") expressed concern that, "where a property forms part of a larger estate, the prescribed list is unlikely to cover the precise estate management rights and obligations specific to each property and contained in each lease". Similar concerns were raised by Fieldfisher LLP, Mark Chick (a solicitor), Maddox Capital Partners Ltd, the Wellcome Trust, and many others.

(2) In response to our provisional proposal that a leaseholder could acquire the freehold subject to any rights and obligations in the lease relating to land that will be retained by the landlord, many consultees again raised issues about housing estates. Berkeley Group Holdings PLC, for example, said that—

> the rights and obligations should follow those set out in the leaseholder's existing lease where it forms part of a wider estate and be carried across as [an] estate rentcharge or chain of positive covenants to ensure the continued observance and enforceability of mutual estate regulations/covenants and service charge payments.

Similar concerns were raised by Howard de Walden Estates Ltd and Cadogan (both landlords), Boodle Hatfield LLP, Bruce Maunder-Taylor (a surveyor), and several others.

4.183 Although leaseholders and leaseholder groups tended not to discuss difficulties concerning the management of housing estates, where concerns were raised, they tended to focus on the undesirability of allowing leaseholders to be bound by objectionable obligations after the acquisition of the freehold. And another consultee,

---

95 See paras 4.78 to 4.84 above.

96 See CP, para 5.49.

Kevin Tranter, said that we should prevent the imposition of obligations that would enable profiteering by landlord and management companies.

4.184 We can extract the following key points from these responses. It was already clear that the fact that a landlord is bound by personal obligations under a contract relating to his or her land should not be allowed to prevent enfranchisement taking place or significantly to delay its completion. But as the Birmingham Law Society argued, we should take steps to ensure that landlords are not then liable for breach of contract. The more difficult question is what should be done about contracts which oblige the landlord only to transfer the freehold to the leaseholder if the leaseholder agrees to take on particular personal obligations. The views of consultees varied depending on what the relevant obligations are. The landlord should not be able to insist on leaseholders undertaking "fleecehold" or profit-generating obligations. But many consultees were concerned that our new scheme should (if possible) not interfere with the smooth running of housing estates.

Agreements that prevent the transfer of the freehold

4.185 Given our aims and the views of consultees, we need to consider how our new scheme for individual freehold acquisition might circumvent the effect of contracts binding the landlord that limit his or her ability to transfer the freehold. We think that there are some existing provisions of the 1967 and 1993 Acts that we might adapt for use in our new freehold acquisition scheme. We consider these provisions, and how they might be adapted, below.

The 1967 and 1993 Acts and contractual limitations on a landlord's powers of disposition

4.186 Both the 1967 and the 1993 Acts make provision to stop agreements relating to a lease preventing the leaseholder from exercising enfranchisement rights. Section 23(1) of the 1967 Act reads as follows:

> Except as provided by this section, any agreement relating to a tenancy (whether contained in the instrument creating the tenancy or not and whether made before the creation of the tenancy or not) shall be void in so far as it purports to exclude or modify any right to acquire the freehold or an extended lease or right to compensation under this Part of this Act, or provides for the termination or surrender of the tenancy in the event of a tenant acquiring or claiming any such right or for the imposition of any penalty or disability on the tenant in that event.

Section 93(1) of the 1993 Act contains an almost identical provision regarding the right of collective enfranchisement and lease extensions of flats under that Act.

4.187 Sections 23(1) and 93(1) operate as anti-avoidance provisions. A term in a lease, or in an agreement entered into alongside a lease, that prohibits the leaseholder from exercising enfranchisement rights is void. But these provisions have a broader application than this.

4.188 The meaning and scope of section 23(1) was considered by the Court of Appeal in *Rennie and Rennie v Proma Ltd and Byng*.[97] The case concerned a freehold (already

[97] (1990) 22 HLR 129.

let on a qualifying lease) that was transferred to Proma Ltd subject to a trust. The trust prevented a transfer of the property by the company without the consent of the beneficiary, Mr Byng.[98] The Court of Appeal held that the terms of the transfer to Proma Ltd, which created the trust, clearly constituted an "agreement relating to [the] tenancy".[99] It held that it did not matter whether the agreement was expressed to restrict the leaseholders' enfranchisement rights; the issue was whether that was the agreement's effect.[100]

4.189 But the court also gave the following additional guidance about the provision.

> This does not mean that the court will be required to have regard to events subsequent to the relevant agreement in order to determine whether "it purports to exclude or modify any right to acquire the freehold". Mr. Price, by examples, well illustrated the difficulties of any such approach or of reading the word "void" as merely meaning "voidable". The legislature cannot, we think, have contemplated that the relevant part of the agreement should be valid in some circumstances and void in others. The relevant part of it, if it is void at all, must be void ab initio; one must look at the position as at the time when the agreement was made. In our judgment, the phrase "purports to exclude or modify any right to acquire the freehold" means "would, but for its avoidance by the subsection, exclude or modify any right to acquire the freehold".[101]

4.190 It appears, therefore, that some agreements that could prevent enfranchisement taking place would not be caught by section 23(1) of the 1967 Act (or section 93(1) of the 1993 Act). Suppose that an agreement prevents a freeholder from disposing of his or her property without a third party's consent. The agreement is concluded at a time when none of the parties expect the freehold to be let on a qualifying lease. The provision regarding consent is not void; sections 23(1) or 93(1) do not apply as there is no qualifying lease and no intention to grant one. Nevertheless, the property is later let on a qualifying lease. A provision that is not void cannot become void under these sections. The agreement may thus present an obstacle to enfranchisement and sections 23(1) or 93(1) do nothing to overcome it.

Introducing a new general rule

4.191 We think that there is a strong case for including a provision along the lines of sections 23(1) and 93(1) in our new scheme for enfranchisement. These provisions reflect a fundamental principle: the rights given by legislation to leaseholders to acquire an extended lease or the freehold title to their properties should not be capable of being circumvented by arrangements concluded between landlords and third parties.

---

98 The facts of the case also contained an added complication as the terms of the trust also provided that the power to appoint new or additional trustees was exercisable only by Mr Byng. As Proma Ltd was a sole trustee and was not a trust corporation, a transfer of the property to the leaseholders would not have overreached Mr Byng's beneficial interest.

99 (1990) 22 HLR 129, 138.

100 (1990) 22 HLR 129, 139.

101 (1990) 22 HLR 129, 139.

4.192 But as discussed above, the specific approach taken by these provisions – the focus on whether a provision of an agreement was void from the outset, and on what the agreement "purports" to do – is not ideal. We think that a better model is provided by section 5(7) of the 1967 Act and (in particular) section 19(4) and (5) of the 1993 Act, which concern estate contracts (discussed above).[102] Section 19(4) and (5) suspends the provisions of an estate contract when an enfranchisement Claim Notice is served, and discharges the (relevant part of the) contract when the claim is completed.

4.193 If a provision of an agreement to which the landlord is a party prevents the landlord from transferring the freehold (or the relevant parts of the freehold) to the leaseholder or granting an extended lease, we think the provision should be suspended by the service of a Claim Notice and discharged by the completion of the claim. (However, other parts of the contract, if they are capable of standing alone, may survive.) We intend this rule to apply to all agreements that have the effect of preventing enfranchisement, whether or not they had that effect when originally concluded and whether or not they specifically concern the relevant lease.

4.194 We do not think that there needs to be an additional rule concerning agreements that make enfranchisement slower or more cumbersome by requiring the landlord to follow a particular process in disposing of his or her property. Our new scheme for enfranchisement enables a leaseholder to apply to the Tribunal where the leaseholder and the landlord cannot agree a date for completion.[103] The Tribunal may specify a date for completion. We envisage that our new provision would make it clear that, if an agreement prevents the landlord completing by the date set by the Tribunal, the agreement would count as "preventing" enfranchisement and so would be suspended and then discharged.

4.195 By way of illustration, suppose that a landlord is bound by an agreement that prevents him or her from transferring the freehold to the leaseholder without first giving notice to a third party.[104] This requirement is protected by a restriction registered against the landlord's title. The restriction prevents a disposition of the property being registered unless the landlord's solicitors certify that they have notified the third party in the required form. The landlord cannot locate the third party and, consequently, cannot give the required notice. Suppose that completion now cannot take place in line with the date set by the Tribunal.[105] In these circumstances, our new provision would suspend the notification requirement in the landlord's agreement and then discharge it on completion. If the notification provision is protected by a restriction in the register, the leaseholder could apply to have it removed on the basis that the underlying agreement has ceased to have effect.

---

[102] See paras 4.163 to 4.165 above.

[103] Paras 8.31, 11.21(8) and 11.29 to 11.32 below.

[104] A possible example would be where the landlord holds the property on behalf of a club (or unincorporated association) and cannot dispose of it without complying with the club rules. This requirement may be protected by a restriction in Form R.

[105] The Tribunal may, however, take into account the notification requirement on the landlord and what efforts have been made to comply with it in setting a date for completion.

Agreements requiring that new personal obligations be imposed on the leaseholder

4.196 An agreement concluded between a landlord and a third party may, however, act as a significant disincentive to enfranchisement without actually delaying it or preventing it from taking place. A landlord may agree only to transfer his or her freehold if he or she requires the transferee to undertake particular obligations towards a third party. We will consider some examples of such an arrangement shortly. If a leaseholder pursuing an individual freehold acquisition has to agree to undertake these obligations, then (depending on their nature) they may cause the leaseholder to reconsider whether to acquire the freehold at all.

4.197 In discussing what we should do about agreements that prevent a landlord from transferring the freehold to the leaseholder, we were able to use the provisions of the 1967 Act as a starting point. We do not have that advantage in relation to agreements requiring personal obligations be imposed on the leaseholder as a condition of the transfer. As we explain above,[106] the drafting of the crucial section of the 1967 Act (section 8) is obscure and its interpretation is disputed. We discussed the problems of interpreting this provision in general, but we now examine the *particular* difficulties in applying it to contractual obligations on the landlord. We focus on obligations on the landlord to pay for services provided on a housing estate.

Problems applying the 1967 Act to chains of contacts

4.198 As mentioned earlier, under section 8 of the 1967 Act, incumbrances include "personal liabilities attaching in respect of the ownership of land or an interest in land though not charged on that land or interest". The authors of *Hague* suggest it applies to "indemnity covenants for the performance of both positive and restrictive covenants"[107] – in other words, that it applies to the kinds of chains of contracts that we are examining in this section. But the court has not, to our knowledge, endorsed any particular interpretation of this phrase.

4.199 Suppose that a landlord is under a personal obligation to pay a management company for services provided on a housing estate. The obligation might be to pay for the upkeep of estate roads which are owned by the management company. Are these obligations "incumbrances"? They are personal liabilities, but they also need to "attach in respect of the ownership of land". The landlord may only have agreed to them because he or she owns the relevant property, but it is unclear whether that is enough. Perhaps the obligations also need to attach to the land by being embedded in a chain of personal contracts or indemnity covenants of the kind discussed at paragraph 4.82 above. But if that is right, the 1967 Act certainly does not make this point apparent.

4.200 If the obligations on the landlord are incumbrances, could they also be "tenant's incumbrances"? Again, it is unclear. The landlord and the leaseholder could be jointly bound by a personal obligation under a contract to which they are both parties, but this scenario is unlikely. If a landlord is subject to personal obligations relating to estate management, a more likely scenario is that he or she will let the property subject to a requirement on the leaseholder to reimburse the landlord for his or her

---

106 See paras 4.90 to 4.98.

107 See *Hague*, para 6-12.

expenditure. The obligations on the leaseholder and the landlord have different contents – one is to pay a third-party management company and one is to reimburse the landlord. They are distinct; one is a leasehold covenant and the other a personal obligation (although the burdens on the landlord and on the leaseholder are clearly related). We are consequently unsure whether the incumbrance binding the landlord – if it *is* an incumbrance – could be a tenant's incumbrance.

4.201 A further provision in section 8 may also be relevant. Subsection (3) provides that the transfer of the freehold "shall be made subject" to "burdens in respect of the upkeep or regulation for the benefit of any locality of any land, building, structure, works, ways or watercourse" (which shall not count as incumbrances). This provision might apply to the obligation to pay for the upkeep of the estate roads. Nevertheless, the application of the subsection depends on the answer to the following questions. Is a personal obligation a "burden" for the purposes of subsection (3)? Does it matter whether the landlord is under an obligation to ensure that anyone who acquires the freehold undertakes a similar payment obligation, or can the landlord freely choose to make the transfer subject to the obligation? In what way could or should the transfer of the freehold be "made subject" to the obligation? We cannot answer these questions with any certainty.

4.202 Subsection (3) is also of no assistance if the obligation on the landlord is to pay for estate services that do not involve the upkeep or regulation of land. It is unclear whether, for example, an obligation to pay staff in a security office, who manage the entrance to a private estate and CCTV cameras, would count as "a burden in respect of the regulation of land". Moreover, it seems even less likely that an obligation would be caught if it is to pay for a service that does not involve the use of land at all.

The goals of our reforms

4.203 A primary aim of our reforms is to clarify the current law regarding the imposition of personal obligations on the leaseholder during an individual freehold acquisition. Under the current law, it is hard to see how leaseholders could know whether they will have to take over particular personal obligations on the landlord, or even how their solicitors could give them clear advice on this issue.

4.204 We also aim to address two key concerns raised by consultees.

(1) First, where possible, we should prevent freehold acquisitions destroying legitimate schemes of obligations that regulate housing estates. Where the landlord is bound by a web of personal obligations relating to a housing estate (and is obliged to ensure that any transferee of the freehold will undertake equivalent obligations), the leaseholder should generally be required to undertake the relevant obligations as a condition of obtaining the freehold.

(2) Second, a landlord may be contractually obliged to ensure that any transferee of the freehold undertakes an almost unlimited array of different obligations. It is theoretically possible for a landlord to agree that the freehold may only be transferred subject to an obligation to pay permission fees to an estate manager in order to make minor alterations to the property. Such agreements, protected by restrictions on the register, may provide an avenue for preserving some of the worst features of leasehold ownership of land despite a successful freehold

acquisition. The landlord should not be able to insist that the leaseholder undertakes such inappropriate “fleecehold” obligations.

Our recommendation

4.205 We recommend that, subject to an exception which we discuss below, any contractual provision that prevents a landlord transferring a freehold to a leaseholder unless the leaseholder agrees to undertake specific personal obligations is suspended and then discharged on the service and completion of an individual freehold acquisition. Our recommendation should automatically address any case in which a landlord is contractually required to ensure the leaseholder undertakes inappropriate “fleecehold” obligations. Any such contractual provision will be of no effect under our general rule.

4.206 We also recommend that our general rule should be subject to an exception. We explain in paragraphs 4.175 to 4.84 above how chains of personal agreements can provide a means for ensuring that positive covenants (which cannot currently constitute property rights) will nevertheless transfer when the relevant property changes hands. Positive covenants may perform an important function regulating the relationship between neighbouring landowners. For example, one landowner may agree to maintain a shared fence and other agree to pay half the cost of the maintenance. Alternatively, as consultees pointed out, the relevant positive covenants may play an important role in the context of a housing estate where homeowners need to share responsibility for paying for shared facilities and spaces. To allow leaseholders who are enfranchising to acquire freeholds free from all positive covenants could leave landlords or third parties disadvantaged, and could also contribute to the breakdown of estate management.

4.207 The difficulty is to distinguish between obligations that are legitimate features of estate management or legitimate arrangements between neighbours and those that are unreasonable, unduly onerous, or simply designed to generate profit or hinder enfranchisement claims. We believe, however, that much of the relevant work has already been done in our report Making Land Work.[108] Our report recommended the introduction of a new kind of property right: a land obligation. A land obligation may involve both positive and negative requirements on a landowner, including requirements to pay money for reciprocal benefits. But land obligations have several features that prevent them from being used to replicate for freeholds the kinds of abusive or onerous obligation that can exist in leases.

(1) A positive or negative land obligation requires a landowner to do or not to do something on land comprised within his or her estate. Land obligations are not like rentcharges. Aside from reciprocal payment obligations (which are discussed below), they cannot require landowners to make payments to the beneficiary of the land obligation.

(2) A land obligation must be owed to the owner of an estate in land, whose land is “touched and concerned” by the performance of the obligation.[109] A land obligation cannot provide merely a personal benefit to that landowner.

---

108 (2011) Law Com No 327.

109 For an explanation of this requirement, see (2011) Law Com No 327, paras 5.49 to 5.70.

(3) The landowner to whom a land obligation is owed may be under a reciprocal payment obligation to pay a proportion of the costs of performing the land obligation. Obligations to pay money can thus only exist where a landowner's land is benefited by activities carried out on another landowner's land.

(4) Only costs that were reasonably incurred in carrying out works completed to a reasonable standard are recoverable under a reciprocal payment obligation.[110]

4.208 We intend to use the definition of a land obligation to frame an exception to our general rule about the discharge of contracts. If the landlord is under a contractual obligation not the transfer the property unless the transferee undertakes particular personal obligations, the relevant provision of the contract will be suspended and then discharged unless it meets the following conditions.

4.209 The first condition, is that the obligation that must be undertaken by the leaseholder is of a type that could be created through the use of a land obligation. The obligation must be for the leaseholder to carry out or not to carry out a specified activity on his or her land for the benefit of land belonging to the person to whom the obligation is owed. Alternatively, if the obligation is to pay money, it must be to pay (a portion of) the reasonable costs of works carried out by another landowner on other land which benefit the leaseholder's land and are performed pursuant to an obligation owed to the leaseholder.

4.210 The second condition is that the relevant contract must not merely require the landlord to create new personal obligations on the transfer of the freehold; the landlord must be under equivalent personal obligations him- or herself prior to the transfer. Our current policy is about preserving existing chains of personal obligations. We address the creation of new property rights and personal obligations in the next sections of this chapter.

4.211 The third and final condition is required to ensure that our policy concerning personal obligations on the landlord is consistent with our policy regarding existing property rights affecting the freehold. We have recommended that leaseholders, when they acquire their freeholds, should not be bound by property rights that burdened the freehold but did not also bind the lease. There would be an inconsistency if a leaseholder could be forced to take over personal obligations from landlords where the leaseholder was not previously bound by any equivalent or related obligation under the lease.

4.212 Pursuant to our first and second conditions, the landlord must be bound by an agreement that requires him or her to perform the equivalent of a land obligation. The landlord must be under a positive or negative obligation (not) to carry out an activity on the land for the benefit of another landowner or owe that other landowner a reciprocal payment obligation for works carried out on the landowner's land. The contract must require the landlord to ensure that any transferee of the property will undertake an identical obligation to the other landowner. The third condition is that, at

[110] (2011) Law Com No 327, Chs 5 and 6, and Appendix A (draft Law of Property Bill), Part 1, particularly clause 1(2), (3) and (5), and clause 9.

the time of the individual freehold acquisition, the leaseholder must have been subject to a related obligation under the terms of the lease. By a related obligation, we mean:

(1) for negative obligations on the landlord, that the leaseholder was also under an obligation not to perform the relevant activity;

(2) for positive obligations on the landlord, that the leaseholder was under an obligation to perform the relevant activity instead of or in conjunction with the landlord or to pay (a portion of) the landlord's costs of performing the activity; and

(3) for payment obligations on the landlord, that the leaseholder is under an obligation to pay (a portion of) the landlord's costs of making the relevant payment.

4.213 A contract binding the landlord which meets the conditions set out above will not be suspended or discharged under our general rule. Moreover, our new enfranchisement scheme will make it clear that the landlord is allowed to insist upon the leaseholder entering into the relevant personal obligations as a condition of the transfer of the freehold.

4.214 By way of illustration, suppose that the roads in a housing estate are owned by a management company. The management company is under an obligation to keep the roads in good repair, which benefits the homeowners in the estate. The homeowners are under an obligation to pay the reasonable costs of maintaining the roads. The obligation on the homeowners is of a type that could be created via a land obligation (a reciprocal payment obligation) under Making Land Work. The homeowners are also required to ensure that any transferee of the relevant properties will enter into an identical obligation to pay for the upkeep of the roads. One owner lets his or her property on a long residential lease. The leaseholder is required by the terms of the lease to pay a service charge which covers the landlord's ongoing liability to pay for the estate roads. Our recommendation entails that, if the leaseholder brings an individual freehold acquisition claim, the landlord can comply with the terms of the agreement with the management company and insist that the leaseholder enters into a personal obligation towards the company to pay for the upkeep of the roads.

4.215 By contrast, an obligation on a former leaseholder not to keep a pet without permission of a former landlord, with a permission fee to be paid, could not be created as a land obligation. First, the former landlord may not own any other land in the neighbourhood. Second, even if the former landlord does own other land, an obligation on the former leaseholder not to keep pets is unlikely to benefit (to touch and concern) that land. Third, the obligation to pay money does not relate to the costs of the former landlord performing any works that benefit the former leaseholder's land. A contract requiring the landlord to ensure that a transferee of the freehold agrees to pay permission fees would thus be suspended and then discharged under our general rule.

4.216 In summary, then, we have made the following recommendations in this section.

Recommendation 12.

4.217 We recommend that the service of a Claim Notice seeking an individual freehold acquisition should suspend the operation of any provision of an agreement to which the landlord is a party that:

(1) prevents the landlord from transferring the freehold to the leaseholder;

(2) prevents the transfer from happening by the date for completion specified by the Tribunal; or

(3) subject to the exception set out below, prevents the transfer happening unless the leaseholder agrees to enter into specified personal obligations benefiting a third party (or the landlord).

The provisions of agreements suspended on the service of a Claim Notice should be discharged on the completion of the claim.

4.218 The exception mentioned in paragraph (3) above is that some agreements binding the landlord will not be suspended or discharged under our scheme. The landlord should be entitled to insist on the leaseholder undertaking personal obligations towards the relevant third party as a condition of the transfer of the freehold to the extent that those obligations meet the following conditions.

(1) The agreement imposes an obligation on the landlord which is of type that would be capable of being imposed by means of a "land obligation" within the meaning of our report Making Land Work. The obligation must be owed to a third-party landowner and must be:

(a) a negative obligation to refrain from performing a particular activity on the landlord's land which touches and concerns the third party's land;

(b) a positive obligation to carry out a particular activity on the landlord's land which touches and concerns the third party's land; or

(c) a reciprocal payment obligation to pay the third party (a portion of) their costs of carrying out an activity on their land which (i) touches and concerns the landlord's land, and (ii) is carried out pursuant to an obligation owed to the landlord.

(2) The landlord is obliged by the agreement to ensure that transferees of the freehold will undertake an identical personal obligation owed to the third party (in return, where applicable, for the third party entering into the relevant obligation in favour of the transferee).

(3) At the time of the individual freehold acquisition claim, the leaseholder is under an obligation under the terms of the lease:

(a) (in cases where the landlord is under a negative obligation) not to perform the relevant activity;

(b) (in cases where the landlord is under a positive obligation) to perform the relevant activity instead of or in conjunction with the landlord or to pay (a portion of) the landlord's costs of performing the activity; or

(c) (in cases where the landlord is under a reciprocal payment obligation) to pay (a portion of) the landlord's costs of making the relevant payment.

Some contracts falling outside our recommended exception

4.219 We think that our recommendation will make it far clearer when a leaseholder will be required to step into the shoes of the landlord with regard to the performance of personal obligations. It should also ensure that many obligations that regulate the relationship between neighbouring landowners or govern housing estates will continue to bind post enfranchisement, while ensuring that "fleecehold" obligations drop away.

4.220 However, it is important to note two limitations of our current policy. There are two kinds of agreement that are not saved by our exception and that would be suspended and discharged under our general rule.

4.221 First, we have not recommended any provision to preserve overage agreements. Overage agreements are typically used in relation to the sale of a property that has development potential. The purchaser pays a set price up front and agrees to pay a further sum if a specified event occurs within a prescribed period of the purchase. For example, a landowner sells a property to a developer and the developer agrees to pay an additional sum in the event that he or she obtains planning permission for the development within the next five years. Overage obligations are contractual obligations binding the purchaser personally. But an overage agreement may specify that, in the event that the purchaser transfers the property within the relevant period, the transferee must agree to be bound by the overage agreement.

4.222 A residential property that is subject to an enfranchisement claim is unlikely to be affected by an overage agreement. If the property is residential (and has been let on a long lease), it is unlikely to have been acquired for the purposes of development. Moreover, where overage agreements place limitations on the onward transfer of the property, they can prohibit letting without the former owner's agreement or require any leaseholder to agree to comply with the overage agreement as a condition of taking the lease.

4.223 For overage to raise any difficulties on an individual freehold acquisition, the landlord would need to be bound by an overage agreement restricting transfers of the freehold, and yet the landlord must have been able to let the property without the leaseholder agreeing to comply with any overage obligations. If this unusual scenario were to arise and the leaseholder were to bring a claim under the 1967 Act, he or she could acquire the freehold free from any overage obligations. The outcome would be the same under our recommended scheme. The overage agreement, which sets conditions on the transfer of the freehold, would be suspended and then discharged on an individual freehold acquisition claim. We are not intending to change the law regarding overage

agreements. It would interfere with the statutory valuation of the freehold if the leaseholder had to undertake additional payment obligations under an overage agreement, and it would enable landlords to engineer overage agreements with related persons in order to discourage freehold acquisition claims.

4.224 Second, our exception preserves chains of contracts involving payments for things such as maintenance of estate roads, or communal gardens, or even a security gate and CCTV cameras. These are all payments for activities carried out on the payee's land. These payments can be required by reciprocal payment obligations as defined in Making Land Work. Imagine, however, that the owners of houses on an estate have agreed to pay for a service that does not involve the use of land. Consultees did not mention any specific examples where such obligations have been agreed. But the freehold owners of houses on an estate could conceivably have agreed to pay for a security guard, or (perhaps in the context of a retirement village or specialist housing) for the provision of medical care, cooking and cleaning, home-maintenance or gardening services. These agreements could not be implemented through the use of land obligations. Consequently, if one of these properties were to be let on a long lease and the leaseholder were to bring an individual freehold acquisition claim, then, in line with our recommendations, the leaseholder could not be compelled to sign up to these arrangements.

4.225 (A similar issue arises in relation estates of leasehold houses where the leases contain obligations to pay for the provision of services that do not involve the use of neighbouring land. We discuss the creation of new property rights on an individual freehold acquisition later in this chapter, and recommend that, in some circumstances, land obligations may be created to replicate rights in the lease. But we note again at paragraph 4.327 below that this recommendation will not catch pure service obligations (which cannot be land obligations).)

4.226 We would not wish to introduce a rule that enables *any* chain of contracts requiring successive owners of land to pay for services to survive an individual freehold acquisition, regardless of the nature of the services or of the payment obligation. Obligations to provide services may take an endless variety of forms. The services may not be necessary, they may not be wanted, they may concern matters which leaseholders (once they are freeholders) can easily provide for themselves, or they may be disproportionately expensive compared to any benefit they confer. Indeed, the services may be provided by the former landlord or an associated person or company as a means of generating profit.

4.227 However, we are also not in a position to claim that payments for pure services (that do not involve the use of neighbouring land) do not sometimes play an important role in the management of housing estates. We would need to consider, in particular, the role that such obligations may play in retirement villages or housing provided for care purposes. But we did not ask consultees to provide evidence about such estates or propose specific solutions to ensure that the right kinds of obligations will run with the land. Furthermore, the problems of estate management that we are considering here are not specific to enfranchisement law; there are general difficulties with the management of estates of freehold houses. We would need to ensure that any solution we proposed for the purposes of enfranchisement also makes sense in relation to the management of estates in general.

4.228 We think that further consideration should be given to the effect of enfranchisement on service-obligations. There may need to be a further exception to our general rule that discharges contracts binding the landlord. If there does need to be a further exception, it would need to apply, in particular, to cases in which the landlord is under an obligation to pay for services collectively with other landowners in the neighbourhood (especially where neighbours or the service provider would need to meet the costs of any shortfall in the payments received).

4.229 Our current recommendation should nevertheless bring considerable clarity to the law and save the majority of obligations that play an important role in the management of housing estates. We have decided to rely on the definition of land obligations in Making Land Work because it provides a means of controlling the kinds of obligations that leaseholders may be required to undertake when they acquire their freeholds. Indeed, it may turn out that our recommendation would already catch every obligation that we would want to save in relation to actual (rather than theoretical) housing estates.

4.230 Finally, it should be noted that our recommendation would not prevent leaseholders, post enfranchisement, from choosing to pay for the continued provision of useful services. It would also not affect the operation of the rule in *Halsall v Brizell*,[111] according to which a person may not take the benefit of a deed without complying with the reciprocal obligations it imposes. A leaseholder could not, for example, continue to enjoy the benefit of services that had been provided to the landlord without accepting the reciprocal obligation under the relevant contract to pay for their provision.

NEW PROPERTY RIGHTS CREATED DURING THE INDIVIDUAL FREEHOLD ACQUISITION PROCESS

4.231 The other category of rights and obligations which we need to consider are those which are newly created during and as part of the individual freehold acquisition process. We start by discussing the creation of new property rights, and next move on to discuss the creation of new personal obligations.

4.232 We recognise that the ability to create new rights and obligations during the individual freehold acquisition process needs to be controlled, particularly where such rights and obligations burden leaseholders or the freehold title they are acquiring. In particular, as we note above, we are concerned to take steps to prevent landlords being able to impose “fleecehold” type obligations on leaseholders during the freehold acquisition process, even if leaseholders are subject to obligations under their leases to pay onerous permission fees.

4.233 However, if the balance is not struck correctly when considering what new rights and obligations can be created during the freehold acquisition process, then this can disadvantage landlords, leaseholders and third parties alike. As we have noted above, the creation of some new property rights is necessary in order to protect the value and amenity of the leaseholder’s land, the landlord’s retained land and third-party land. The creation of new rights is also necessary in order to preserve, where possible,

[111] [1957] Ch 169.

existing estate management frameworks, something which benefits leaseholders as well as landlords and third parties.

4.234 The ability to create new property rights during the freehold acquisition process is likely to be most important in terms of regulating the relationship going forward between the leaseholder's (now freehold) land and the landlord's retained land. At the point at which the leaseholder brings their freehold acquisition claim, there are unlikely to be any pre-existing property rights benefiting or burdening the freehold title which already regulate this relationship, because at that point in time the landlord owns the freehold of both the leaseholder's land and the landlord's retained land (and the landlord cannot create property rights against him- or herself).

4.235 The position is different in relation to land which neighbours the leaseholder's land, but which is owned by third parties. In many cases, the property rights needed to regulate the relationship between the leaseholder's (now freehold) land and neighbouring land belonging to third parties will already benefit or burden the freehold title when the leaseholder brings their freehold acquisition claim (as, for example, where the landlord has previously sold part of its freehold land to a third party, as in the case set out in paragraph 4.122 above). The need to create new property rights regulating the relationship between the leaseholder's (now freehold) land and the third party's land is likely to be more limited, therefore, than the need to create new property rights to regulate the relationship between the leaseholder's land and the landlord's retained land. However, there is undoubtedly still a need for our scheme to provide for the creation of new property rights during the freehold acquisition process, which benefit or burden neighbouring third-party land. We consider this further below.

4.236 We start our discussion by examining the approach taken by the current law. After this, we consider what new property rights could be imposed on the freehold title being acquired by the leaseholder as part of the freehold acquisition process.

The current law

4.237 The 1967 Act provides a detailed code for the creation of new property rights on an individual freehold acquisition. Most of the relevant provisions are contained in section 10 of the Act. In specified circumstances, it allows the creation both of rights that will benefit the freehold being acquired by the leaseholder and of rights that will burden that freehold and benefit land retained by the landlord or belonging to a third party. We examine the creation of property rights that benefit the freehold first, before looking at the creation of rights that burden the property. We will not discuss those provisions that concern the carry-over of *pre-existing* property rights.

The creation of new property rights benefiting the freehold

4.238 The 1967 Act makes provision for the landlord to transfer his or her entire interest in the freehold to the leaseholder together with all rights and interests benefiting the property. Section 10(1) of the 1967 Act states that, on the transfer of the freehold, a landlord may not "exclude or restrict the general words implied in conveyances under

section 62 of the Law of Property Act 1925, or the all-estate clause implied under section 63", unless the leaseholder consents.[112]

(1) Section 63 requires the landlord to transfer the entirety of his or her interest in the relevant property.

(2) Section 62 operates as a statutory shorthand; where it applies, the seller of land is deemed to have transferred or granted (among other things) all "liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof".

4.239 The application of section 62 of the Law of Property Act 1925 is very broad. A landlord is not merely obliged to transfer the freehold to the leaseholder with the benefit, for example, of existing property rights (such as a right of way over the landlord's retained land). Section 62 also incorporates into the transfer a grant of property rights in place of rights previously "enjoyed with" the land. For example, if the landlord has merely given the leaseholder a personal permission (a licence) to pass over his or her retained land, section 62 would turn that permission into a fully-fledged easement when the leaseholder acquires the freehold. We discussed the operation of section 62 (and how it can set a trap for the unwary) in more detail in Making Land Work.[113] It should be noted, however, that section 62 operates by deeming the landlord to have granted rights; it does not itself (statutorily) create any rights and it cannot force a landlord to grant rights that he she has no power to grant (such as property rights burdening a third party's land).

4.240 Aside from applying section 62 to the transfer of the freehold, section 10 of the 1967 Act also allows for the creation of specific property rights that will benefit the freehold title when it is acquired by the leaseholder. It makes separate provision for the creation of a few classes of essential easements, for the creation of rights of way, and for the creation of restrictive covenants.

4.241 Section 10(2) makes mandatory provision for the grant, in specific circumstances, of the following kinds of rights.

(1) rights of support for any building or part of a building;

(2) rights to the access of light and air to any building or part of a building;

(3) rights to the passage of water or of gas or other piped fuel, or to the drainage or disposal of water, sewage, smoke or fumes, or to the use or maintenance of pipes or other installations for such passage, drainage or disposal; and

---

[112] A landlord is also permitted to exclude the words implied under ss 62 or 63 "for the purpose of preserving or recognising any existing interest of the landlord in tenant's incumbrances or any existing right or interest of any other person" (1967 Act, s 10(1)). We are unsure, however, to what cases this exception would apply. Part of the difficulty is the unclarity over the meaning of "tenant's incumbrances" discussed at paras 4.92 to 4.97 above.

[113] Law Com No 327, paras 3.52 to 3.70.

(4) rights to the use or maintenance of cables or other installations for the supply of electricity, for the telephone or for the receipt directly or by landline of visual or other wireless transmissions.

4.242 The circumstances in which the landlord must grant rights (more specifically, they are all forms of easement) falling under these descriptions for the benefit of the freehold are as follows. First, the landlord must be capable of granting the relevant rights. In practice, the landlord would have to own the land that would be affected by these rights or would have to have some means of compelling another landowner to grant them. Second, the grant of the relevant rights must be "necessary to secure to the tenant as nearly as may be the same rights as at the relevant time were available to [the leaseholder]":[114]

(1) "under or by virtue of the tenancy or any agreement collateral thereto"; or

(2) "under or by virtue of any grant, reservation or agreement made on the severance of the house and premises or any part thereof from other property then comprised in the same tenancy".[115]

4.243 To illustrate, if a landlord leases plot A to the leaseholder and grants in the lease a right for the leaseholder to receive electricity through cables passing over plot B (which the landlord also owns), the landlord must grant an easement of cables for the benefit of plot A when the leasehold acquires the plot following an individual freehold acquisition claim. Alternatively, if the landlord sold plot B and reserved a right to receive electricity through cables over that land for the benefit of the leaseholder, the landlord must grant a corresponding easement (if he or she can) when the leaseholder acquires the freehold to plot A.

4.244 Section 10(3)(a) requires the landlord to grant such rights of way (so far as landlord capable of granting them) that the leaseholder "may require", provided they meet the following test. (Note that these rights are not granted automatically; they are granted if the leaseholder requests them.) The test is that the rights of way are "necessary for the reasonable enjoyment of the house and premises as they have been enjoyed during the tenancy and in accordance with its provisions". In other words, the status quo under the lease in relation to rights of way will be maintained.

4.245 Finally, section 10(3)(b)(ii) allows the leaseholder to require the imposition of restrictions on other property (so far as the landlord can agree them) that—

(1) "are such as materially to enhance the value of [the freehold transferred]"; and

(2) "secure the continuance (with suitable adaptations) of restrictions arising by virtue of the tenancy or any agreement collateral thereto".

The creation of new property rights burdening the freehold

4.246 Section 62 of the Law of Property Act 1925 only applies to the grant of rights by the landlord alongside the transfer of the freehold. It cannot be used to make the freehold

---

114 The time when the Claim Notice was served.

115 1967 Act, s 10(2)(i).

subject to any new property rights. However, section 10 of the 1967 Act allows the landlord, in specified circumstances, to transfer the freehold to the leaseholder subject to new easements, rights of way, or restrictive covenants.

4.247 First, section 10(2)(ii) requires the landlord to transfer the freehold subject to any of the four classes of essential easement set out at paragraph 4.241 above—

> for the benefit of other property as are capable of existing in law and are necessary to secure to the person interested in the other property as nearly as may be the same rights as at the relevant time were available against the tenant under or by virtue of the tenancy or any agreement collateral thereto, or under or by virtue of any grant, reservation or agreement made [the severance of the house and premises or any part thereof from other property then comprised in the same tenancy].

Technically, the landlord does not need to own the "other property" in order for him or her to be obliged to create applicable easements that benefit it. But the 1967 Act does not contain any mechanism that would force a landlord to grant rights for the benefit of third-party land if he or she chooses not to comply with the duty under section 10(2)(ii).

4.248 Second, under section 10(3)(b), the landlord may transfer the property subject to rights of way that are "necessary for the reasonable enjoyment of other property" in which the landlord has an interest.

4.249 Third, section 10(4)(b) and (c) allows the landlord to require the leaseholder to enter into restrictive covenants binding the freehold—

(1) "which are capable of benefiting other property" and "secure the continuance (with suitable adaptations) of restrictions arising by virtue of the tenancy or any agreement collateral thereto"; or

(2) "which will not interfere with the reasonable enjoyment of the house and premises as they have been enjoyed during the tenancy but will materially enhance the value of other property in which the landlord has an interest".

Note again that the land that may be benefited by restrictive covenants falling under paragraph (1) does not need to be owned by the landlord. Broadly speaking, section 10(4) provides that the leaseholder will acquire the freehold subject to restrictive covenants that correspond to restrictions imposed by the lease. However, the section provides that the landlord may require the leaseholder to enter into restrictive covenants that only the landlord will be able to enforce only if they "materially enhance the value" of the property they benefit.

General provisions

4.250 Finally, section 10(5) provides that neither landlord nor leaseholder is entitled when seeking to impose new rights of way or restrictive covenants to require the inclusion in the conveyance of any provision which is unreasonable in all the circumstances, in view:

(1) of the date at which the tenancy commenced, and changes since that date which affect the suitability at the relevant time of the provisions of the tenancy; and

(2) where the tenancy is or was one of a number of tenancies of neighbouring houses, of the interests of those affected in respect of other houses.

4.251 It should be noted that there is nothing in the 1967 Act which enables the landlord to insist on the leaseholder entering into new positive covenants relating to the freehold title, even if the leaseholder was under positive obligations in their lease.

Our approach in the Consultation Paper

4.252 In the Consultation Paper we said that in appropriate circumstances it would be legitimate for new property rights to be imposed on freehold titles being acquired by leaseholders, and on freehold titles of landlords' retained land. We asked a number of questions which are relevant to the issue as to what new property rights it should be possible to create during the freehold acquisition process.

4.253 We first discussed cases where the leaseholder acquires the whole of the landlord's freehold land, so that the landlord is not retaining any neighbouring freehold land. In this situation we said we did not think it would generally be necessary to create *any* new terms during the freehold acquisition process (whether personal obligations or property rights).[116]

4.254 We discussed two exceptions where we thought it might be necessary to create new rights and obligations even though the landlord is not retaining any land. First, where the landlord has granted the leaseholder rights in his or her lease over land which the landlord has subsequently sold to a third party (without reserving the necessary rights in favour of the landlord's retained freehold title).[117] We discuss this exception further below, when we discuss third-party rights.[118] Second, we acknowledged that, in some cases, a leaseholder might wish to allow a restriction to be imposed preventing him or her from developing their property, with a view to limiting the premium payable for the freehold.[119] We discuss the second exception later, when we consider what new personal obligations it might be necessary to create during the freehold acquisition process.[120]

4.255 We asked consultees two questions. First, we asked whether consultees agreed with our proposal that, in those cases where the landlord does not retain land, it should only be possible to add new terms to the freehold transfer where the leaseholder elects to include a term drawn from a prescribed list. Second, we asked consultees what terms they would suggest including on any such prescribed list.[121]

---

116 See CP, para 5.41.

117 See CP, para 5.43.

118 See para 4.334 below.

119 See CP, para 5.45.

120 See paras 4.362 and 4.368.

121 See CP, second and third parts of Consultation Question 15, paras 5.49 and 5.50.

4.256 We next considered cases where the landlord does retain neighbouring land after the leaseholder acquires his or her freehold, where there is no existing estate management scheme in place, and where the leaseholder's lease contains rights and obligations in respect of the land to be retained by the landlord (or in other words, where the lease already contains provisions which regulate the relationship between the leaseholder's land and the landlord's retained land). We acknowledged that in this situation it might be necessary to impose new rights and obligations during the freehold acquisition process. In particular, we thought that it might be necessary to ensure that some of the covenants in the lease were continued (on a freehold basis) when the leaseholder acquires his or her freehold. Consultees were asked whether the leaseholder should acquire the freehold subject to terms that either reflect the rights and obligations set out in the leaseholder's existing lease, or which appear within a prescribed list of covenants (and we asked consultees what terms they would include in such a prescribed list).[122]

4.257 We then went on to discuss positive covenants. We highlighted that we thought it was important to ensure that existing estate management frameworks (which reflect obligations set out in leaseholders' leases) do not collapse when leaseholders acquire freeholds of houses which form part of an estate.[123] We gave two examples of such obligations: an obligation on a landlord to maintain common parts and an obligation on a leaseholder to pay a service charge in respect of the landlord's maintenance costs.[124]

4.258 We recognised that achieving this aim would require the imposition of new positive covenants during the freehold acquisition process, and that such positive covenants would need to be capable of binding successors in title. We said that existing legal mechanisms could be used to achieve this – such as estate rentcharges or chains of covenants. Alternatively, we suggested that if the recommendations in our Making Land Work report were introduced, the concept of a land obligation could be used. As a further alternative, we said we could introduce a new, bespoke, statutory positive obligation specifically for enfranchisement cases.[125] We did not ask consultees a question directly about these suggestions. Instead we asked consultees whether they thought that landlords should be able to enforce covenants against leaseholders, even if landlords no longer retain land. We also asked a question about whether unpaid sums due from a leaseholder to a landlord of an estate should be capable of being charged against the freehold and enforced by the landlord as if he or she were a mortgagee of the property. We thought that these suggestions might help with preventing existing estate management frameworks from collapsing as a result of enfranchisement. However, we did not explain clearly in the Consultation Paper how such a scheme would work.

4.259 Finally, we asked a question about cases in which the landlord retains land, there is no estate management scheme in place, but the lease does not contain any terms that set out the relationship between the leaseholder's land and the landlord's retained

---

122 See CP, paras 5.56, 5.57, 5.66 and 5.67.

123 See CP, paras 5.52 and 5.58.

124 See CP, para 5.52.

125 See CP, para 5.58.

land. We asked whether consultees agreed with our proposal that, in this scenario, new rights and obligations should only be created during the freehold acquisition process where they appear within a prescribed list (and, if so, what terms should be included on that list).

Consultees' views

Cases where the landlord does not retain any land

4.260 We think that many consultees agreed with our view that it would not generally be necessary in this scenario to create any new terms (whether property rights or personal obligations) during the freehold acquisition process. A few consultees expressly said this. For example, Damian Greenish (a solicitor) said that he could not think what new terms would need to be added into the freehold transfer if the landlord was not retaining any neighbouring land: "if the landlord has no retained land, the leaseholder should be required to acquire the freeholder's interest as it is".

4.261 Many other consultees, while not explicity agreeing with our view, appeared confused by the questions we asked. They seemed mistakenly to assume that the questions were intended to refer to situations in which the landlord *was* retaining land, and answered the questions accordingly. We suspect that underlying this confusion was an assumption by many consultees that it would not be necessary to impose any new rights and obligations (whether property rights or personal obligations) where the landlord was retaining no land.

4.262 Likewise, there were not really any suggestions offered as to what property rights might be included in a prescribed list in cases where the landlord was not retaining any land. This is not surprising, since creating new property rights such as easements and restrictive covenants would require the landlord to retain land, to which the benefit of the property right would attach. The suggestions that were made by consultees, therefore, seemed primarily to be relevant to situations where the landlord is retaining land. For example, Tapestart Limited suggested that the freehold should be transferred to the leaseholder "subject to such rights (if any) of access and egress, passage and running of gas, electricity, water, sewage, telecommunications media, support, light and air as are reserved by the lease for the benefit of the [landlord's] retained property".

4.263 Many consultees responded to the suggestion that a prescribed list could be used, but they addressed the idea of having a prescribed list in general terms (rather than specifically in relation to cases where landlords do not retain land). We consider consultees' views in relation to the idea of having prescribed lists below.

Cases where the landlord does retain land and the lease contains relevant terms

4.264 We next look at the questions we asked in relation to cases where the landlord does retain land, and the lease already sets out the relationship between the leaseholder's land and the landlord's retained land. We suggested two different ways of determining what types of rights and obligations could be newly created during the freehold acquisition process: either having a prescribed list of covenants or taking terms from the existing lease.

4.265 There was considerable support amongst consultees for having a prescribed list of covenants, including support from many leaseholders and from bodies associated with leaseholders. Fewer professionals or landlords supported the use of a prescribed list, but the idea still gained support from some.

4.266 Many consultees who supported prescribed lists did not explain their reasons. Those that did give reasons for their view generally thought that prescribed lists would quicken and simplify the process of enfranchisement, would limit expense and would lead to fewer disagreements between the parties. A few consultees also said that they thought prescribed lists might enable outdated or defective provisions in leases to be updated. Another view expressed was that the acquisition of the freehold by a leaseholder is an entirely new transaction (separate to and different from the grant of the lease), and it was felt that the terms of the lease should not therefore be relevant when the leaseholder acquires the freehold.

4.267 In addition, many consultees supporting prescribed lists, particularly leaseholders, thought that they would prevent onerous obligations transferring from leaseholders' leases to the freehold title, and would ensure leaseholders acquired the freehold on fair, reasonable terms. Leaseholders were particularly concerned about unfair covenants requiring them to pay fees to the landlord even after they had purchased their freeholds. Stephen Heslop (a leaseholder) observed that "people's homes should not be allowed to become an unregulated revenue stream for investors". Some leaseholders also thought that prescribed lists might help to limit the amount of control their landlord would retain over the freehold being acquired by the leaseholder, and would redress the balance of power between landlords and leaseholders. Michael Kelly (a leaseholder) said that the terms of existing leases are already "stacked against" leaseholders and the "imbalance needs to be redressed".

4.268 On the other hand, many consultees, primarily landlords and professionals, thought that the idea of using prescribed lists was unworkable in practice. Some consultees expressed the view that prescribed lists would not simplify the freehold acquisition process for leaseholders or landlords (or that they could lead to problems and disputes at a later date). For example, the PBA and Hamlins LLP said: "we also do not agree that [prescribed lists] will make freehold acquisitions more common, cheaper or quicker, we just think it will unnecessarily restrict parties from entering into agreements on terms that suit them". Long Harbour and HomeGround (a landlord and an asset manager) said that "by limiting what can be agreed to, terms in a list may well not give the parties enough scope for reaching a sensible agreement to deal with an issue that has not been anticipated by statute and may result in additional difficulties at a later stage for the parties".

4.269 Consultees were also concerned that no prescribed list could be sufficiently detailed or comprehensive to be usable, because plots of land are so diverse in this country. Consultees, therefore, felt that no prescribed list could contain all possible terms that might legitimately need to be imposed when freeholds are acquired by leaseholders. Fieldfisher LLP, for example, said that "we do not consider that the terms should be taken from a prescribed list. Each property/estate will differ and the additional terms should reflect the make up of that particular property or estate".

4.270 Moreover, landlords and professionals were concerned that requiring terms to be picked from prescribed lists would ignore or undermine existing arrangements between landlords and leaseholders that had already been agreed in the leaseholder's lease, and which were necessary to regulate the relationship between the leaseholder's land and land being retained by the landlord.

4.271 This concern of landlords and professionals was particularly prevalent in the context of estates. Consultees pointed out that leases of homes on estates often contained a framework of bespoke obligations requiring leaseholders to pay service charges and ensuring that estates are maintained and kept of relatively uniform appearance. Such estate management frameworks are there to protect the value of all homeowners' homes on the estate. There was concern amongst consultees that the use of a prescribed list would mean that these obligations would be lost or watered down, or at least that the bespoke nature of such rights and obligations could not be fully captured by a prescribed list. For example, Clifford Chance LLP said "where the house is situated on an estate and all the long leases on the estate have been granted on the substantially the same terms, the legislation should aim to maintain this status quo. If, instead model terms are use[d], discrepancies will arise between the transfer terms and the lease terms. This may cause management issues and disputes".

4.272 Those consultees who supported taking terms from existing leases were a mixed group. They included a minority of leaseholders, but included most landlords as well as a significant number of professionals (both solicitors and surveyors).

4.273 The main concern of consultees supporting the idea of taking terms from existing leases was to safeguard the ongoing management of estates, as explained in paragraph 4.271 above. A number of consultees noted that this would protect not just landlords, but also other leaseholders on the estate.

4.274 Other reasons for supporting the idea of taking terms from existing leases were also given. For example, Long Harbour and HomeGround commented that the right for leaseholders to acquire their freeholds via enfranchisement is a 'no fault' right (in other words, the claim does not arise as a result of the landlord's fault, and the landlord's property rights should not be prejudicially affected by the leaseholder's claim). They also expressed the view the leaseholder should have been advised about their rights and obligations under the lease when they originally purchased the house, so taking terms from the existing lease should not cause leaseholders any prejudice. John Stephenson expressed the view that terms should be taken from the existing lease since the terms of the lease are "the bargain which the parties originally made, and which should be reflected in the new freehold interest".

4.275 The Law Society agreed that terms should be taken from the existing lease not a prescribed list, but suggested that those terms should "be subject to variation where they are, or would in the changing circumstances be, demonstrably unfair or unreasonable".

4.276 Consultees made a number of suggestions as to what types of rights and obligations might appear on a prescribed list. These included restrictions on the use of the leaseholder's property (for example, restricting its use to that of a single residential dwelling), restrictions on external alterations and the placing of equipment (such as satellite dishes) externally, obligations to keep the property in repair, obligations to pay

service charges, easements for the benefit of the leaseholder's property and the landlord's retained land (such as rights of way, rights of drainage and to run service media), and rights of access for the benefit of both the leaseholder's property and the landlord's retained property (for example, for repairing and maintaining service media).

Positive covenants

4.277 We did not ask a question directly about our suggestions in the Consultation Paper as to how positive covenants could be made to run with the land. Nonetheless, a number of consultees commented about the importance of allowing appropriate positive obligations to run with the land, particularly in the context of estates. For example, the National Housing Federation said that:

> we agree that in some cases, the existing freeholder will have legitimate reasons for attaching conditions to the enfranchisement. This will apply where, for instance, the lease relates to a property within a larger development to which the freeholder provides services. In this situation it should be possible for the enfranchisement to be made subject to a rentcharge or similar mechanism so that the new owner can continue to contribute to the cost of services from which his or her property benefits.

4.278 Our suggestion that landlords should be able to enforce obligations even when they did not retain land confused a number of consultees. Some appeared unsure what type of obligations we were referring to, how such obligations might be enforced if the landlord did not retain any land, and why this might be desirable. Such confusion is understandable because we did not explain this suggestion clearly in the Consultation Paper.

4.279 Other consultees simply did not think it was desirable for the landlord to continue to have a right to enforce obligations when the landlord no longer had any proprietary interest in the relevant estate. For example, Fieldfisher LLP disagreed with our proposal, stating that "from a landlord perspective, if the landlord has no retained land, then we cannot see that it has any interest in continuing to enforce the benefit of covenants that it has received". Some consultees thought that leaseholders should be able to take control of the management of the estate themselves. There was also concern that our proposal might allow landlords to continue to profit from or to exploit leaseholders, even after they had acquired their freeholds.

4.280 Despite this, many consultees did support the suggestion, although without always giving reasons for their answer. Of those who did give reasons for their answer, they often thought the proposal would assist with preserving estate management frameworks. For example, Bruce Maunder-Taylor commented that "if the landlord (or other person controlling the management of the estate) cannot rely on the enforceability of obligations, then the management function of the estate is likely to fail to some degree". Pearn Ltd thought that our proposal would "benefit other homeowners on the estate and maintain standards".

4.281 Our proposal that a landlord of an estate might be able to charge unpaid sums against the leaseholder's newly acquired freehold also caused confusion. Quite a few consultees thought we were referring to unpaid sums due from the leaseholder to the landlord under their lease, which had accrued prior to the freehold acquisition taking

place. A number of consultees commented that such sums should simply be dealt with on completion of the freehold acquisition. For example, Heather Keates (a conveyancer) said:

> this will unnecessarily complicate subsequent conveyancing. All unpaid sums should be cleared at the point of completion of the acquisition and if items are uncertain at that point they should be dealt with by way of retention. Fettering the tenant's new freehold title is completely unworkable - it will cause priority problems for lenders as well.

4.282 In fact, we were referring to unpaid sums (such as estate management fees) that might accrue after the leaseholder acquired his or her freehold. We were asking whether, in such cases, the landlord of an estate should be able to obtain a charge against the freehold in respect of such unpaid sums.

4.283 There was some support for this proposal, particularly amongst landlords. However, the proposal also generated considerable concern amongst consultees. Damian Greenish was concerned that our proposal might leave leaseholders vulnerable to abuse. He commented:

> this is of course possible under an Estate Management Scheme. It is a difficult one to answer because the landlord needs to have a remedy to seek payment from recalcitrant freeholders but equally it is obvious that such a system could be open to abuse from certain landlords adopting an oppressive approach.

4.284 Other professionals were concerned that our proposal gave landlords greater powers than they would have outside the context of enfranchisement. They also pointed out that landlords could simply use existing enforcement powers if a leaseholder (turned freeholder) defaults on paying estate management fees. For example, the landlord could sue the leaseholder for the unpaid sums, and then might be able to obtain a charging order if the leaseholder failed to meet the judgment debt. Thus, Shoosmiths LLP and Bryan Cave Leighton Paisner LLP, both solicitors, said:

> this goes beyond the rights that a landowner who is managing an estate with houses would have if they had originally sold houses on a freehold basis with covenants to pay estate service charges. If there are unpaid charges, the estate owner already has the right to bring a legal action and, if a judgment debt is unpaid, to obtain a charging order. The proposal to allow a charge is also contrary to the Government's proposals to extend the rights of freeholders who pay service charges to bring them into line with the rights afforded to tenants of houses and flats. The landlord of a block of flats does not have the right to obtain a charge over a flat. We do not see why the right should be granted on the enfranchisement of a house.

4.285 Leaseholders and other consultees also expressed concerns about the ability of estate landlords to take possession of their properties, even after a freehold acquisition had taken place, because the charge would give them powers equivalent to a mortgagee.

Cases where the landlord does retain land and relevant terms are not contained in existing lease

4.286 While leaseholders were generally supportive of the idea of using a prescribed list in this context, some leaseholders also expressed concern about the fairness of the idea underlying our proposal: that landlords would be able to create new obligations binding leaseholders, even where such obligations did not reflect existing arrangements in their leases. Leaseholders were understandably nervous that this might allow landlords to impose onerous obligations on them during the freehold acquisition process, particularly obligations requiring additional expenditure by leaseholders. For example, Lynne Martin, a leaseholder, disliked our proposal because "landlords could then charge fees for management of any ground and roads which they own still, even charging a toll for using the road or fee to park". Likewise Ian Leigh, a leaseholder, disagreed with our proposal because he was concerned that "otherwise the freeholder could attempt to offload costs on to the leaseholder".

4.287 A number of other consultees also thought that it would generally not be appropriate to create any new rights and obligations where these did not correspond to existing arrangements under the lease. For example, Tapestart Limited commented that "there should be no new terms (beyond what is already in the lease) introduced in respect of the landlord's retained land". David Pugh thought that leaseholders should not be burdened with any additional obligations over and above those contained in their leases: "it is reasonable that the leaseholder's previous position should continue when he/she buys the freehold to his accommodation".

4.288 Other consultees disagreed and thought that there should be some provision in our new scheme to allow landlords to impose new terms on leaseholders to protect their retained land, even when such terms did not appear in existing leases. Many consultees who supported our proposal did not give reasons for their answer. One exception was Apex Housing Group, managing agents, who supported our proposal because they thought it would allow terms to be added where there are no (or insufficient) terms in the lease governing the relationship between the lease and retained land. They thought it would also assist in promoting future development of existing estates.

4.289 A number of consultees, mainly professionals, thought that cases in which relevant rights and obligations were not contained in existing leases would be rare or exceptional. Such consultees included Julian Briant (a surveyor), the PLA and CMS Cameron McKenna Nabarro Olswang LLP (solicitors).

4.290 All these consultees and a number of others thought that prescribed lists should not be used in this scenario. For example, the PLA said: "in practice, we believe that a leaseholder's existing lease is likely to deal with rights and obligations, and it will only be in exceptional cases that that is not the case. Therefore, and having regard to our concerns that it would not be possible to create a sufficiently comprehensive prescribed list, we consider that reference to a prescribed list should not be made". Likewise, Boodle Hatfield LLP said "we do not agree, the list of prescribed clauses will either be very long or run the risk of being too prescriptive and failing to deal with necessary circumstances. As above, any such list would not allow for the fact that each property is different from the next".

4.291 Damian Greenish pointed out that although our proposal only referred to needing a prescribed list of *covenants*, it might also be necessary for there to be provision to allow other rights to be granted and reserved in some cases even where the lease does not contain corresponding rights.

4.292 Only a few consultees made suggestions as to the type of situations in which it might be necessary to create new property rights not included in the lease. John Stephenson thought that only mutual rights in respect of conduits and mutual inclusion or exclusion of rights of light, would be necessary. Clifford Chance LLP thought that provision might need to be made for cases where the freehold being acquired by the leaseholder is more extensive than the demised premises under the lease. They also thought there might be situations where the landlord is retaining land and where additional detailed provisions may be required to deal with shared rights and structures (and corresponding costs), since the lease provisions might not be sufficiently detailed enough to deal with these types of arrangements.

Discussion and recommendations for reform

Property rights not personal obligations

4.293 When we talk about creating new rights and obligations during and as part of the freehold acquisition process, it is primarily the creation of new property rights (as opposed to new personal obligations) that we have in mind. The imposition of appropriate property rights allows for the regulation of the ongoing relationship between the leaseholder's land and the landlord's or a third-party's neighbouring land. By contrast, freehold acquisitions should not, generally, allow for the creation of new personal obligations which confer purely personal benefits on individuals, particularly where such personal obligations bind leaseholders.[126]

4.294 The property rights that we are concerned with are specifically those which, by their very nature, attach to and protect land, and which are used to regulate the relationship between neighbouring parcels of land. As we explain above, these rights are referred to as "appurtenant rights".[127] The main two categories we will consider below are covenants and easements.

4.295 We have consciously referred to "covenants" here (to include positive and restrictive covenants) rather than simply to "restrictive covenants". We recognise that, currently, only restrictive covenants (and not positive covenants) can be created as property rights. However, for the reasons we explain below, we are recommending to Government both that it should be possible to create some new positive covenants during the freehold acquisition process, *and* that such positive covenants be created as property rights (through the implementation of the recommendations in our report Making Land Work).[128]

4.296 We think that many consultees agreed with our view that it is predominantly new property rights (as opposed to personal obligations) that should be created during the freehold acquisition process. For example, as we note above, when we asked

---

126 Although there are some exceptions to this general rule, which we discuss below at paras 4.364 to 4.371.

127 See para 4.76.

128 Law Com No 327.

consultees what new rights and obligations might need to be created in situations where the landlord does not retain any land to which a property right could attach, consultees made very few suggestions. We acknowledge that the position might be slightly more complicated in relation to estates, and this is an issue to which we return below.

4.297 In addition, a scheme which clearly recognises that it is predominantly property rights which can be newly created during the freehold acquisition process (as opposed to personal obligations), will assist leaseholders in avoiding becoming subject to "fleecehold" type obligations when they acquire their freeholds. We think that the true purpose of "fleecehold" obligations is generally not to protect the landlord's neighbouring land, but simply to extract money from freeholders, leaving outgoing landlords with a continuing income stream. As such, the type of obligations leaseholders are most concerned about when they refer to "fleecehold" obligations are likely to amount to personal obligations rather than property rights.

Defining which appurtenant rights can be created

4.298 It is not sufficient simply to say that new appurtenant rights can be created during the freehold acquisition process. Appurtenant rights, such as covenants and easements, can take many different forms, they can be onerous and they can significantly affect the value and amenity of land. It is important, therefore, to have a clear test which defines which appurtenant rights it is legitimate to impose where leaseholders acquire their freeholds.

4.299 In the discussion that follows we will develop a general rule which we think should apply when we are considering the question as to what new property rights can be created during the freehold acquisition process. In developing this general rule, for clarity's sake, we will focus on the most straightforward of examples, where obligations are owed in the lease by the leaseholder to the landlord (or vice versa) and where rights in the lease are granted by the landlord to the leaseholder or reserved by the landlord. In Chapter 3, we discuss a number of more complicated scenarios, in particular where obligations are owed between leaseholder and third party (rather than between leaseholder and landlord) and where rights are granted in documents other than the lease. We acknowledge that similar scenarios will also arise in the context of freehold acquisitions, just as they occur in the context of lease extensions, and we discuss these scenarios further in paragraphs 4.333 to 4.351 below.

4.300 In considering how to frame the general rule, a useful starting point is to look at the suggestion we made in a number of the questions in the Consultation Paper that we could rely on prescribed lists to determine which rights and obligations could legitimately be newly imposed during the freehold acquisition process. In proposing the idea of prescribed lists, we thought they might simplify the freehold acquisition process, reduce the risk of disputes, and protect leaseholders by ensuring that landlords could not seek to impose unfair or unduly onerous terms.

4.301 While we acknowledge the strength of support shown for prescribed lists, particularly by leaseholders, having considered all the consultee responses, we do not think that we can proceed with a policy that relies solely on new rights and obligations being taken from prescribed lists. We agree with those consultees who said that prescribed lists could never cater adequately for all situations which could arise in practice, given

the diversity of land in this country. If prescribed lists are not sufficiently comprehensive, their use is likely to increase the complexity of the enfranchisement process (not reduce it) and increase the risk of disputes (quite contrary to our original aim).

4.302 We also agree with those consultees who said that using prescribed lists is likely to lead to undesirable disruption of existing estate management structures. This is because the use of prescribed lists is likely to interfere significantly with existing webs of obligations which are contained in leaseholders' leases and which support legitimate estate management. We explain in paragraphs 4.70 to 4.71 above why this is undesirable and why it would disadvantage both leaseholders and landlords.

4.303 We also think that it would be the wrong approach, as a matter of general principle, if no reference were made to the terms of the lease when determining what new property rights should be imposed when the leaseholder acquires his or her freehold. In the majority of cases, even where houses are not situated on estates, the lease will contain bespoke terms which have already been negotiated between the leaseholder and the landlord, and which regulate the relationship between the leaseholder's land and the landlord's retained land. While we do not want to allow unreasonable terms to carry over from the lease to the leaseholder's freehold title, it would seem short-sighted to ignore the terms of the lease completely, even in cases where such terms are reasonable and necessary to protect the leaseholder's land, the landlord's retained land, or neighbouring land belonging to third parties.

4.304 Moreover, having regard to the terms of the existing lease when deciding which property rights should be created during the freehold acquisition process, in fact, offers protection to leaseholders. We agree with those consultees who said that the freehold acquisition process should not, as a general rule, present an opportunity for landlords (or third parties) to impose new obligations on leaseholders which they were not subject to as leaseholder, even where these might preserve the amenity and value of the landlord's retained land or the third party's land. If the property rights imposed on the freehold during the freehold acquisition process simply ensure a continuation of arrangements already contained in the lease, leaseholders are protected from becoming subject to more onerous property rights (in favour of the landlord or third parties) as freeholders than they were as leaseholders. This approach is in keeping with our general policy in paragraph 4.85 above, that leaseholders should not be worse off as freeholders than they were as leaseholders. For example, if a leaseholder is not subject to any restriction under his or her lease on making external alterations to their property, it would not, usually, be appropriate for the landlord to use the freehold acquisition process to seek to impose such a restrictive covenant on the freehold title being acquired by the leaseholder (even if it might benefit the landlord's retained land).

4.305 On the other hand, we think that it is too simplistic an approach to say (without more) that newly created rights and obligations should simply be taken from and reflect the terms of the leaseholder's existing lease. This would not answer the concerns of leaseholders, because it gives no way of distinguishing between terms of the lease which should legitimately be carried over to the freehold, and those which are not appropriate in the context of freehold ownership.

4.306 While we recognise that there was a clear divide in the consultation responses between the majority of leaseholders (who favoured using a prescribed lists of terms to avoid onerous obligations transferring from their lease to the freehold), and the majority of landlords and professionals (who favoured basing terms on the existing lease to avoid disruption to estate management), we think it is possible to make recommendations which address, to an extent, the differing concerns of all the main groups of consultees. We explain our approach in more detail below.

The general rule

4.307 Drawing together the discussion above, we can set out the following overarching, general rule: that a new property right should be created during the freehold acquisition process where it amounts to an appurtenant right (including a positive obligation that could be created as a property right under our recommendations in Making Land Work) and where it corresponds to an existing obligation owed under the lease or an existing right granted or reserved under the lease. This rule applies equally to property rights created during the freehold acquisition process which burden the leaseholder's newly acquired freehold title (and which benefit the landlord's retained land), as it does to property rights created during the freehold acquisition process which benefit the leaseholder's newly acquired freehold title (and which burden the landlord's retained land).

4.308 So far as possible, we intend our recommended scheme for individual freehold acquisitions to be prescriptive. Landlords and leaseholders will not be entitled to insist on the creation of other rights and obligations not covered by our general rule (unless covered by the exceptions set out below), or the rules for replication of property rights granted separately from the lease which we discuss later in this chapter. Our recommended rules should not only clarify when new property rights can be created but also protect leaseholders from the imposition of rights and obligations falling outside our scheme.

4.309 Moreover, where the lease contains an obligation or a right which benefits a leaseholder and which is capable of being created as an appurtenant right when the leaseholder acquires his or her freehold, we recommend that the leaseholder should automatically be taken to claim such a right when the leaseholder brings his or her claim. It will not be open to leaseholders, unilaterally, to opt out of acquiring an appurtenant right to which they are entitled (although they could agree with the landlord that they will not acquire the relevant appurtenant right, and the agreement would then require Tribunal approval, because it would be a freehold acquisition not on statutory terms).[129] Likewise, where the lease contains an obligation or a right which benefits a landlord and which is capable of being created as an appurtenant right when the leaseholder acquires his or her freehold, then the landlord will automatically be taken to claim such a right against the leaseholder. This recommendation corresponds to the equivalent policy in Chapter 3, in relation to lease extensions.[130] It ensures that, when they bring their freehold acquisition claim, leaseholders always claim those rights from which they benefit under the lease,

---

[129] We discuss freehold acquisitions which are not on statutory terms further in Ch 14. We have recommended that Government considers regulating individual freehold acquisitions that are not on statutory terms.

[130] See paras 3.298 and 3.322.

protecting leaseholders from acquiring a freehold which does not benefit from rights which they need to enjoy their land.

4.310 We recognise that there will need to be some exceptions to the general rule; both so that new property rights can be created when they would not be under the general rule, and so that existing property rights are not continued when they would be under the general rule. However, it is important that these exceptions are clearly identified and tightly defined in any legislation in order to avoid undermining the protection that our general rule provides to leaseholders. We will undertake further work during the implementation stage of this project to ensure that this is achieved. The exceptions fall into three main categories.

4.311 First, those cases in which it is necessary to create a new property right when a leaseholder acquires his or her freehold, even though the property right does not correspond to an existing right or obligation in the lease (and so could not be created under the general rule). We agree with those consultees who thought that such cases would be "exceptional". Nonetheless, we think that some such cases will need to be provided for, particularly where the general rule cannot apply straightforwardly as a result of other recommendations we have made to improve the position of leaseholders. For example, in paragraph 4.29 above we recommend that in cases where a leaseholder has an internal lease of a house (so that they are demised only the internal parts of the house, while the landlord retains the shell: the main structure, including the walls and roof), the leaseholder should, nonetheless, have the right to acquire the whole house through a freehold acquisition claim. In such a case, the lease is unlikely to contain all rights and obligations that are necessary to protect and regulate the relationship between the leaseholder's freehold title and the landlord's retained land (because the leaseholder's freehold land is more extensive than the land demised under the lease). By way of example, where the leaseholder's land is semi-detached or one of a row of terraced houses, the lease is not likely to reserve the necessary right of support for the benefit of the neighbouring house(s), since the lease did not demise the structure of the house to the leaseholder. Provision will therefore need to be made in our scheme to enable the necessary property rights to be created during the freehold acquisition process.

4.312 Second, cases in which a property right could be created under the general rule (because it amounts to an appurtenant right and it corresponds to a right or obligation in the lease) but it would be unreasonable to expect a property right to be created when the leaseholder acquires his or her freehold. Again, we think that the categories of cases to which this exception applies should be extremely narrowly drawn. However, there is an exception of this type in the current law (which we refer to above at paragraph 4.250), which (in broad terms) takes into account changes in circumstances since the grant of the lease.[131] We envisage that a similar kind of exception will need to form part of the new scheme. This will assist leaseholders, since it could protect them from having to claim (and pay for) a property right under the general rule which, for example, has become obsolete since the grant of the lease.

[131] 1967 Act, s 10(5).

4.313 The third exceptional category covers special-purpose rights. We explain the concept of a special-purpose right in Chapter 3.[132] A special-purpose right is a property right granted for a special, time-limited use of the benefiting land (that is not part of the standard enjoyment of the land in question) and where the right is not expected to endure significantly longer than the special use in question. We gave the example of a two-year easement of crane oversail granted for the purpose of facilitating development works, but it could also, for example, be the use of a temporary right of way for accessing the property while a permanent driveway is construction. As with lease extensions discussed in Chapter 3, we do not intend for landlords, leaseholders or third parties to be able to turn special-purpose rights into permanent rights affecting the freehold on an individual freehold acquisition. (They may, however, continue to affect the leasehold title and be transferred onto the freehold title for their original duration under our policy for automatic merger explained in Chapter 10.)[133]

4.314 As we note above, we also need to explain how the general rule applies to rights and obligations contained in the lease, but which are owed by a leaseholder to a third party who is also a party to the lease (or vice versa). We do this in paragraphs 4.333 to 4.338 below. We also need to explain how the general rule applies to rights granted separately to the lease (whether granted between leaseholders and landlords, or between leaseholder and third parties). We do this in paragraphs 4.339 to 4.351 below.

4.315 Having set out the general rule above, we now turn to explore in more detail how it applies to the two main types of appurtenant rights that could be created during the freehold acquisition process: covenants and easements.

Covenants

4.316 A leaseholder's lease will contain covenants owed by the leaseholder to the landlord. The lease will also contain covenants owed by the landlord to the leaseholder, but these are usually much more limited (for example, a landlord may simply covenant to allow the leaseholder to have quiet enjoyment of the demised premises).

4.317 Because of this, it is usually the landlord who wants to ensure the continuation of leasehold covenants when the leaseholder acquires his or her freehold. As we have noted above, many covenants owed by leaseholders under their leases should not survive the leaseholders' acquisition of their freehold, because they are no longer appropriate once the leaseholder owns the property outright. Our recommendation ensures that such covenants cannot continue. However, although the landlord no longer retains an interest in the leaseholder's property following a freehold acquisition, the landlord may still retain other neighbouring land which the tenant's covenants owed by the leaseholder protect and benefit. Likewise, it is possible that the lease will contain covenants owed to the leaseholder by the landlord, which relate in some way to retained land of the landlord, and which protect the value and amenity of the leaseholder's land.

4.318 In such cases, it can be in the interests of landlords and leaseholders for such covenants to continue to perform the job of protecting the relevant land, even after a

---

132 At paras 3.272 to 3.273.

133 See paras 10.123 to 10.149.

leaseholder acquires their freehold. In order to achieve this, a new appurtenant right has to be created during the freehold acquisition process, which burdens or benefits (as the case may be) the leaseholder's (now freehold) title. The following example provides an illustration of the point:

> A owns the freehold of a terrace of houses, all of which are let on long leases. All the leases contain covenants owed by the leaseholders, preventing external alterations being made to the front of the houses. These leasehold covenants have been routinely enforced by the landlord since the houses were built, in order to ensure that the houses continue to have a uniform appearance. This has protected the value of the whole estate – not just the value of the landlord's freehold title, but also the value of the leaseholders' long leases.
>
> B, the leaseholder of the one of the houses, brings a freehold acquisition claim. It should be possible for the landlord to insist on the restriction on making external alterations being created as a freehold property right, binding on B's newly acquired freehold title, and benefiting the landlord's retained land. Otherwise, if B acquires its freehold free of such a restriction, B will be able to make any alterations B wishes to the external appearance of his or her house (subject to planning laws), potentially devaluing not just the landlord's retained freehold title, but also the remaining leaseholders' long leases.

4.319 While the current law allows for the creation of new restrictive covenants binding or benefiting the leaseholder's newly acquired freehold title, it does not clearly provide for the creation of any new positive covenants. This is the case even where the lease contains positive obligations which protect the value and amenity of land belonging to the landlord, leaseholder or third party. This is not satisfactory. As we note above positive covenants can play an extremely important role in regulating the relationship between properties, particularly in the context of estates.

4.320 We therefore recommend that positive and restrictive covenants should be treated similarly in our new enfranchisement regime. In other words, we think that it should be possible for both restrictive and positive covenants to be created during the freehold acquisition process, but only where they provide for the continuation of existing obligations owed under the lease, and where they protect (or "touch or concern") land belonging to the landlord or the leaseholder (as the case may be).

4.321 While we appreciate that leaseholders will be cautious of a policy that allows positive covenants under their leases to be continued when they acquire their freeholds, our policy will ensure that leaseholders will not be required to enter into obligations which are inconsistent with freehold ownership or which are simply designed to generate income for landlords, rather than protecting the amenity and value of landlord's retained land.

4.322 We recognise that we need to address the mechanism by which positive covenants can be created so as to bind freehold titles, given that, as we note above, they can currently only be created as personal obligations. As we set out in the Consultation Paper, we could allow parties to use one of the existing workarounds used by conveyancers to try to ensure that positive covenants bind successive owners of

land.[134] Alternatively, we could create a new bespoke positive property right to suit our enfranchisement regime.

4.323 However, we think that pursuing either of these options would be both unnecessary and undesirable. The problem which we are trying to solve (that of positive covenants not binding successive owners of land) is not a problem which is specific to enfranchisement; it is generally a problem in property law. Moreover, it is a problem to which we have already provided a solution in our Making Land Work report. If Government were to implement the recommendations in our Making Land Work report, we think it would provide two benefits in this context.

4.324 First, it would provide a single test for determining which leasehold covenants (whether positive or restrictive) should "carry over" from the leasehold to the freehold: only those covenants which are capable of being created as a land obligation could be created as a new property right during the freehold acquisition process. In other words, subject to a possible exception which we refer to in paragraph 4.327 below, neither landlord nor leaseholder would be able to insist on any covenant in the lease which was not capable of being created as a land obligation being created anew during the freehold acquisition process. We explain at paragraph 4.207 above how land obligations would work and the features that prevent them from being used to replicate for freeholds the kinds of abusive or onerous obligation that can exist in leases.

4.325 Second, implementing the recommendations in our Making Land Work report would provide the mechanism by which positive covenants (as well as restrictive covenants) could run with the leaseholder's freehold title – both positive and restrictive covenants could be created as land obligations, as a form of property right which attaches automatically to land.

4.326 We think that our recommendation would ensure that where it is desirable for an obligation contained in a leasehold covenant to "carry over" to the freehold, this would occur because the obligation would be capable of being created as a land obligation. Likewise, our recommendation would ensure that where it is not desirable for an obligation contained in a leasehold covenant to "carry over" to the freehold, this would not occur because the obligation would only be capable of being created as a personal obligation (not a land obligation) during the freehold acquisition process. This would bring much-needed clarity to the law.

4.327 We mention, however, a possible exception in paragraph 4.324 to our rule that only those leasehold covenants capable of being created as land obligations should survive a freehold acquisition. The potential exception to which we refer corresponds to that which we explored above in paragraphs 4.224 to 4.228. In those paragraphs we discuss our recommendation in relation to pre-existing personal obligations binding the landlord. We explain our general rule, that a landlord could only compel a leaseholder to enter into such obligations, where they were capable of being created as land obligations under the test in Making Land Work. We then note that there might be another narrow category of cases which would not pass the test set out in our general rule, but which we might want to preserve during freehold acquisitions. We

[134] We explain some of these workarounds in more detail in paras 4.81 to 4.82 above.

refer to the relevant obligations as “service-obligations” (such as an obligation to pay for a security guard, or an obligation to pay for some services in retirement villages). We explain that further consideration needs to be given to understand the extent to which such “service-obligations” exist and the extent to which they require preserving during the freehold acquisition process (particularly in order to protect other leaseholders from being required to pay more for the same service, if the enfranchising leaseholder is able to escape the obligation).

Easements

4.328 A leaseholder’s lease may also contain rights granted by the landlord for the benefit of the leaseholder over other land owned by the landlord, or rights reserved in the lease by the landlord over the leaseholder’s land, for the benefit of the landlord’s other land. In such a case, it can be important for both leaseholder and landlord for such rights to be preserved when the leaseholder acquires his or her freehold, through the creation of freehold easements. The importance of this can be demonstrated through the following example:

> A owns the freehold of Plot X and next-door plot, Plot Y.
>
> Plots X and Y share a driveway. Half of the driveway is in Plot X, and half is in Plot Y.
>
> A grants B a long lease of Plot Y. In the lease, A reserves a right of way over the shared driveway in Plot Y. A also grants B a right of way over the shared driveway in Plot X.
>
> A also grants C a long lease of Plot X. In the lease A reserves a right of way over the shared driveway in Plot X. A also grants C a right of way over the shared driveway in Plot Y.
>
> B brings an individual freehold acquisition claim of Plot Y. B must be entitled to require A to grant a permanent right of way over the shared driveway in Plot X for the benefit of the freehold title to Plot Y.
>
> Likewise, A must be entitled to reserve a permanent right of way over the shared driveway in Plot Y, for the benefit of the freehold title to Plot X. This preserves the value of Plot Y for A, but also ensures that when C later brings a freehold acquisition claim of Plot X, C will acquire the freehold of Plot X with the benefit of a pre-existing freehold right of way over the shared driveway in Plot Y.

4.329 We set out the current law regarding the creation of easements during the freehold acquisition process in paragraphs 4.238 to 4.244 and 4.246 to 4.248 above. We recommend two main changes to the current law.

4.330 First, we recommend that in all cases the general rule set out in paragraphs 4.307 above should apply (subject to exceptions we set out in paragraphs 4.310 to 4.313). In other words (and subject to the exceptions), it should only be possible to create a freehold easement which either benefits or burdens the leaseholder’s freehold title where the easement corresponds to a right granted or reserved in the lease. We note that in the current law, for reasons which are not clear to us, the landlord appears to be able to reserve a freehold right of way over the leaseholder’s newly acquired

freehold title even where this does not reflect a right reserved in the lease. We do not see why this should be the case, where in all other cases the current law provides that new freehold easements can only be created where they correspond to existing arrangements under the lease. Our recommendations will ensure that our general rule applies in all cases where new easements are created.

4.331 Second, we are conscious that the law of easements has moved on considerably since the introduction of the 1967 Act, and continues to evolve. Case law continues to define the types of right that are capable of amounting to freehold easements. For example, the Supreme Court has recently clarified that a right to use sporting and recreational facilities can amount to an easement.[135] The current law contains a list of rights that may be created as easements during the freehold acquisition process. Given the evolution in the law of easements since 1967, we do not think this list is sufficiently comprehensive to ensure that leaseholders (and landlords) will acquire all necessary easements on freehold acquisitions. We therefore recommend that wherever a right reserved or granted in a lease is capable of being created as an easement (according to general law of easements) then our general rule (set out in paragraph 4.307 above) should apply.

4.332 Aside from these changes, we note that the current law provides that section 62 cannot be excluded without the consent of the leaseholder. We recommend this provision be preserved, in so far as it accords with our other recommendations.

Obligations under the lease owed to or owed by third parties

4.333 Our discussion above focussed upon the creation of new property rights to replicate rights and obligations in the lease between the leaseholder and the landlord. But rights may also be created in the lease that benefit or burden land belonging to a third party.

4.334 We considered a possible example in the Consultation Paper.[136] A lease of plot A grants a leaseholder rights over the landlord's retained land, plot B (for example, a right of way to access the back of the property). The landlord then sells plot B to a third party. The third party acquires the land subject to the rights in the lease,[137] but the landlord does not reserve a right of way on the transfer for the benefit of the freehold to the leaseholder's property. Under the current law, it is unclear whether the leaseholder can claim a permanent right of way over plot B when he or she acquires the freehold. The answer depends, we think, on whether the new owner of plot B also counts as a "landlord" for the purposes of the 1967 Act; we discuss the uncertainty of the current law in Chapter 3.[138]

4.335 We consider that the general rule we have recommended in relation to the rights and obligations between the leaseholder and the landlord should also apply to rights and obligations contained in the lease between the leaseholder and third parties. On an

---

135 *Regency Villas Title Ltd and others v Diamond Resorts (Europe) Ltd* [2018] UKSC 57.

136 See CP, para 5.43.

137 We are assuming that the relevant registration requirements have been met for the purchaser of plot B to be bound by the rights in the lease.

138 See paras 3.262 to 3.266.

individual freehold acquisition, permanent property rights will be created benefiting or burdening the freehold if they correspond to rights and obligations in the lease between the leaseholder and third parties which are capable of being created as appurtenant rights. Our recommendation resolves the concern raised in the Consultation Paper about cases in which the landlord has sold his or her retained land. We also intend the general rule as applied to rights in the lease affecting third parties also to be subject to our exception for special-purpose rights and the other (provisional) exceptions we discuss above.

4.336 We bring the policy decisions we have reached throughout this section together in the following recommendation.

Recommendation 13.

4.337 We recommend that, on an individual freehold acquisition claim:

(1) the leaseholder should acquire the freehold subject to appurtenant property rights that will replicate existing rights and obligations under the terms of the lease owed to the landlord or to a third party (and benefiting their land); and

(2) the leaseholder should acquire the freehold with the benefit of appurtenant property rights that will replicate existing rights and obligations under the terms of the lease owed to the leaseholder and benefiting the leaseholder's land.

The appurtenant property rights that may be created on an individual freehold acquisition should include land obligations, introduced through implementation of our recommendations in Making Land Work. Our recommendations do not apply to "special-purpose rights".

4.338 We reiterate, however, that we intend to give further consideration to potential limited exceptions to our recommended rule, allowing additional property rights to be created or preventing otherwise permissible property rights from being created. We intend to consider, among other things, cases in which property rights benefiting or burdening a lease have become obsolete or redundant due to changes in the neighbourhood, and cases in which the leaseholder is acquiring more land than was let under the lease.

Property rights benefiting the lease and granted separately from the lease

4.339 We have set out our policy regarding the creation of property rights on an individual freehold acquisition to replicate rights granted in the lease itself. But as we explain in Chapter 3, a leasehold title may be benefited by property rights that were granted separately from the lease. For example, some years after the grant of the lease, the leaseholder may decide that it would be useful to have an alternative means of access to his or her land passing over some of the landlord's retained land. The leaseholder may negotiate with the landlord for a grant of a separate right of way over that land. Alternatively, the relevant land may belong to a third party. The third party may grant a right of way specifically for the benefit of the leasehold title (which does not attach to or benefit the freehold title). Equally, a leasehold title may be *burdened* by property

rights agreed separately from the lease and benefiting other land belonging to the landlord or a third party.

4.340 We recommended in Chapter 3 that leaseholders should be entitled, on a lease extension, to claim an extension of property rights benefiting the leasehold title but granted separately from the lease.[139] It does not matter whether those rights were granted by the landlord or a third party. The primary justification for our policy is that appurtenant rights may be vital to the leaseholder's enjoyment of the leasehold property regardless of when or by whom they were granted. For example, an easement of cables, enabling electricity supply to the leasehold property, may not originally have been granted in the lease (particularly if it is very old). It may have been granted on a later occasion through negotiation with a neighbour. But by the time the leaseholder brings a lease extension claim, the right may have been in place for decades and its importance in relation to a modern property is clear. In extreme cases, a lease extension may be useless to a leaseholder if it does not carry with it a right to extend appurtenant rights benefiting the lease.[140]

4.341 However, we explain in Chapter 3 that there are a very wide variety of cases that our new enfranchisement scheme needs to address. Property rights granted outside the lease may have been granted by the landlord or a third party, and may have been granted in the expectation that they would last for the foreseeable future or that they would come to an end at a definite point leaving the servient land unencumbered. Alternatively, the rights may have become obsolete or it may be desirable for them to be varied. To cater for all possible cases, we recommended that leaseholders should have a choice whether to claim an extension of appurtenant rights granted separately from the lease and that the owner of the burdened land should have a right to object, with disputes to be resolved by the Tribunal.[141]

4.342 We have set out the reasons for our recommendations in Chapter 3 in some detail, and we think that the same reasoning applies to individual freehold acquisitions. With lease extensions, leaseholders are replacing their current leases with new extended leases. On an individual freehold acquisition leaseholders replace their leasehold titles with freehold titles. (Technically, after an individual freehold acquisition, leaseholders may retain their leasehold titles and choose not to merge them with their new freehold titles. But we think our scheme should ensure that, in general, there will no benefit to leaseholders in deciding not to merge the titles.) We consider that the freehold title, which from the perspective of the leaseholder is supposed to replace the lease, should be able to benefit from the same property rights as benefited the lease. It would be incongruous if a leaseholder could obtain a 990-year extension of an appurtenant right on a lease extension, but no extension of the right on an individual freehold acquisition. The leaseholder might then have an incentive to claim a lease extension rather than try to acquire the freehold, even though the entitlement to acquire the freehold is supposed to be the superior right. Alternatively, the leaseholder might be incentivised not to merge the leasehold and freehold titles, but transfer the freehold to a related person or company and claim a lease extension.

---

139 See para 3.299.

140 See paras 3.257 to 3.268.

141 See para 3.299.

4.343 Thus, we recommend that, on an individual freehold acquisition, where the leasehold title has the benefit of a property right granted separately from the lease, the leaseholder should be entitled to claim the grant of an equivalent right that will attach to the freehold title and last indefinitely.

4.344 However, as with the extension of appurtenant rights on a lease extension, our new scheme for individual freehold acquisitions needs to cater for a great variety of cases. In some cases, there may be a good reason why a property right burdening the landlord's or a third-party's land and benefiting the lease should not be turned into a perpetual right benefiting the freehold.[142]

4.345 We recommended that leaseholders should have a choice whether to seek to acquire the freehold-equivalent of an existing property right that benefits the lease and was granted separately from the lease. The owner of the land burdened by the relevant right (whether it is the landlord or a third party) should have a right to object to the creation of a new, equivalent freehold right. Disputes may be determined by the Tribunal, but our view is that the starting point should be that leaseholders may obtain the same property rights for the benefit of the freehold as exist for the benefit of the lease.

4.346 We recommend that that the Secretary of State should have a power to specify factors in secondary legislation that the Tribunal must consider in exercising its discretion. As with lease extensions discussed in Chapter 3,[143] there are some factors that we think would be relevant to the Tribunal's exercise of its discretion including:

(1) the extent to which the appurtenant right will contribute to the leaseholder's reasonable enjoyment of the lease;

(2) conversely, the extent to which the appurtenant right will interfere with the reasonable enjoyment of the servient land; and

(3) whether the appurtenant right (despite not being a special-purpose right) was nevertheless granted for a limited period of time.

4.347 Finally, we do not intend any of recommendations in this section to apply in relation to special-purpose rights as described in Chapter 3 and discussed above.

Property rights burdening the lease and granted separately from the lease

4.348 We recommended above that property rights (or rights that are capable of being created as property rights) that are granted in the lease for the benefit of the landlord's (or another party to the lease's) retained land should be turned into property rights burdening the freehold on completion of an individual freehold acquisition claim.[144] We also need to consider what should happen to property rights that burden the leasehold title and that were granted independently of the lease.

---

142 See paras 3.276 to 3.281.

143 See para 3.282.

144 See para 4.437.

4.349 In general, we do not think that such property rights should be converted into (perpetual) burdens on the freehold. Again, we think that our reasoning in Chapter 3 about lease extensions applies equally to individual freehold acquisitions.[145] Suppose that a leaseholder owns a 50-year lease and the leaseholder independently grants a neighbour a right of way over the leasehold land for the remaining period of the lease. Suppose that this 50-year easement were to become a permanent easement burdening the freehold on an individual freehold acquisition. The imposition of the easement would reduce the value of the freehold and so reduce the premium payable to the landlord. But enfranchisement law (and our new scheme) does not provide the landlord or the leaseholder with an avenue by which to obtain a payment from the neighbour for the extension of the right. Moreover, the aim of enfranchisement law is not to provide a benefit to the neighbours of leaseholders; it is to provide a benefit to leaseholders.

4.350 The neighbour's easement will not be lost on enfranchisement, however. It will continue to bind the leasehold title after the leaseholder acquires the freehold for the duration of its grant. In the event that the leaseholder elects to merge the leasehold and freehold titles in line with our scheme for automatic merger set out in Chapter 10,[146] we have recommended that the burden of the neighbour's easement should transfer to the freehold for the rest of its original duration (for 50 years).

Recommendation 14.

4.351 We make the following recommendations about what new property rights may be claimed on an individual freehold acquisition for the benefit of the freehold, where those rights will replicate existing property rights that were granted *separately* from the lease.

(1) A leaseholder should be entitled to claim (at his or her election) the grant of a permanent property right for the benefit of the freehold title where that right will replicate an existing property right that was granted:

(a) for the benefit of the leasehold title; or

(b) for the benefit of the freehold or an intermediate leasehold title and which the leaseholder is entitled to use under the terms of the existing lease.

(2) The leaseholder's entitlement to claim the grant of a property right for the benefit of the freehold title to replicate an existing property right enjoyed in relation to the lease should apply regardless of when the existing right was granted, its duration and whether it affects land belonging to the landlord or a third party.

---

145 See paras 3.317 to 3.319.

146 See 10.123 to 10.149.

(3) A standard form Claim Notice should automatically include a claim for the grant of all applicable property rights for the benefit of the freehold that the recipient is able to grant, unless the leaseholder expressly indicates otherwise.

(4) Landlords and third parties should be entitled to object to the grant of the relevant property rights, with disputes to be determined by the Tribunal. The Tribunal should have a discretion to allow the new right not to be granted or for it to be granted in a different form.

(5) The Secretary of State should have the power to specify factors in regulations that the Tribunal must take into account in exercising its discretion, but the starting point should be that all relevant property rights claimed by the leaseholder for the benefit of the freehold are granted.

Our recommendations do not apply to "special-purpose rights".

Additional proposals in the Consultation Paper

4.352 In paragraph 4.258 above we refer to two additional proposals we made in the Consultation Paper. First, we asked consultees whether they thought that obligations owed to a landlord of an estate by a leaseholder who has acquired the freehold of their premises should be enforceable whether or not the landlord has retained land that benefits from that obligation. Second, we asked a question about whether unpaid sums due from a leaseholder to a landlord of an estate should be capable of being charged against the freehold and enforced by the landlord as if he or she were a mortgagee of the property. We do not recommend that Government proceeds with either of these proposals, both of which caused considerable confusion amongst consultees.

4.353 In relation to the first proposal, consultees' confusion was understandable since we did not clearly explain how our proposal might work. For example, it was not clear what types of obligations we had in mind, how a landlord might enforce obligations when the landlord no longer had an interest in the estate, or why it might be desirable for the landlord to do so. On reflection, we agree with those consultees who suggested it would be undesirable (as well as impractical) to require a landlord to enforce obligations against leaseholders in cases where the landlord retains no relevant land that benefits from such obligations. While some consultees thought that our proposal would help preserve estate management frameworks, we think that the recommendations we have made above are better suited to achieving this aim.

4.354 As to the second proposal, we agree with those consultees who thought this proposal was unfair to leaseholders. As consultees pointed out, the proposal could give landlords of estates additional powers against leaseholders who have acquired their freeholds via enfranchisement, compared to homeowners who had acquired their homes on a freehold basis from the outset. This would be unsatisfactory, and contrary to our Terms of Reference. We also agree with consultees who suggested that the proposal was unnecessary, because landlords already have a remedy in order to

pursue leaseholders (turned freeholders) for unpaid estate management fees; such unpaid fees can be pursued as a contractual debt.

NEW PERSONAL OBLIGATIONS CREATED DURING THE INDIVIDUAL FREEHOLD ACQUISITION PROCESS

4.355 Finally, we look at the question as to whether it should be possible to impose new personal obligations on leaseholders, landlords or third parties during and as part of the freehold acquisition process.[147]

4.356 It follows from what we have said above that, as a general rule, it should not be possible to create new personal obligations during the freehold acquisition process. We explore below a number of limited exceptions to this general rule.

4.357 We did not ask a question in the Consultation Paper which dealt directly with this issue because, as we note above, we did not clearly distinguish between property rights and personal obligations in the Consultation Paper.[148] However, a number of questions that we asked (and which we set out in paragraphs 4.253 to 4.259 above) were relevant to this issue, and gave consultees the opportunity to tell us where they thought it would be necessary to create new personal obligations during the freehold acquisition process (and what types of obligations these might be).

4.358 We gave one specific example in the Consultation Paper of a case in which leaseholders might wish a new personal obligation to be imposed during the freehold acquisition process: where a leaseholder wished to allow a restriction to be imposed preventing him or her from developing their property, with a view to limiting the premium payable for the freehold.[149] We discuss this exception further below.

Consultees' views

4.359 It is particularly useful to look at how consultees responded to the question we asked about what obligations might need to be imposed during the freehold acquisition process where landlords are not retaining any land. In these cases, it would not be possible to create new appurtenant rights (since the landlord is not retaining any land for the right to attach to), so any suggestions made by consultees in response to this question are likely to relate to personal obligations.

4.360 In fact, however, few consultees made any suggestions as to what new obligations might need to be created during the freehold acquisition process where the landlord is not retaining land. As we note above, many consultees appeared confused by the question, and answered it on the assumption that the landlord must be retaining land.

4.361 Suggestions that we did receive from consultees as to the types of personal obligations which might need to be created included the following.

(1) A covenant given by the leaseholder to observe and perform the covenants, stipulations and other matters in the charges register of the registered title for

---

147 We explain what we mean by "personal obligations" in paras 4.74 to 4.75 above.

148 See para 4.42 above.

149 See CP, para 5.45.

the freehold, so far as the same are still subsisting, and to indemnify the landlord against any breach or non-observance thereof. (Tapestart Limited).

(2) Where the leaseholder elects not to merge the lease with the freehold, an indemnity from the leaseholder to observe and perform the obligations contained in the lease on the part of the landlord and to indemnify the landlord against any future breach (The Wellcome Trust, CMS Cameron McKenna Nabarro Olswang LLP, and the PLA).

4.362 A number of consultees responded to our suggestion that leaseholders might want to elect to include in the transfer a restriction on developing the premises, so as to reduce the premium payment to the landlord for the freehold.[150] Some consultees questioned whether allowing such a covenant to be imposed was desirable (for example, Damian Greenish said it could lead to land stagnating) or practical (for example, consultees thought it was not clear how such a covenant would be enforceable against future owners of the leaseholder's land, or how a payment to release the covenant at a future date might be calculated). However, we have already considered the various arguments for and against allowing leaseholders to elect to include a covenant of this type in the Valuation Report and we have put it forward as an option for Government.[151]

4.363 A few consultees commented on our proposal that only leaseholders (and not landlords) should be able to elect to choose terms from any prescribed list. Consultees, including Boodle Hatfield LLP, Charlie Coombs (a surveyor), and Daniel Watney LLP (surveyors),[152] thought this was unfair. For example, Boodle Hatfield LLP said:

> the question also suggests that it would only be a lessee who would have an opportunity to elect for additional terms to be included in the freehold transfer. It would be inequitable to introduce such a right, and to not afford the same right to a landlord.

Discussion and recommendations for reform

4.364 We recommend that there should be very few categories of personal obligations that are capable of being created during the freehold acquisition process. As we note above, personal obligations do not generally perform a role in protecting land; their purpose is usually simply to confer a personal benefit on the party benefiting from the obligation.

4.365 Strictly limiting the types of personal obligations which can be imposed on leaseholders during the freehold acquisition process will protect leaseholders from becoming subject to onerous "fleecehold type obligations". As we have said above, we think that the true purpose of these type of obligations is not to protect the value of a landlord's neighbouring land, but to extract money from freeholders, leaving outgoing

---

150 See CP, para 5.45.

151 See the Valuation Report, paras 6.155 to 6.179.

152 On behalf of Dame Alice Owen's Foundation, the Charity of Richard Cloudesley, and the Dulwich Estate (charity landlords).

landlords with a continuing income stream. Such obligations are therefore likely to amount to personal obligations.

4.366 In order to ensure that the types of personal obligations which can be created during the freehold acquisition process are tightly defined, we recommend that the Secretary of State be given power to prescribe a list of personal obligations that can be created. We think that a prescribed list is likely to be possible in this context, because of the limited categories of cases which would need to be included on it. We agree with those consultees who commented that it is likely to be unfair only to allow leaseholders to select terms from the list. In some cases, landlords will also need to be able to select terms from the list, where such terms are intended to be for their benefit (for example, in the case of the indemnities referred to in paragraph 4.361 above).

4.367 We anticipate the following types of obligations being included on such a list. First, we agree with those consultees who suggested that it might be necessary to impose some indemnities of the type set out in paragraph 4.361 above during the freehold acquisition process. It is not our intention to interfere with the imposition of these type of indemnities, nor with the imposition of other routine conveyancing provisions (although it will be important to ensure that such provisions are tightly defined within any legislation to protect leaseholders).

4.368 In addition, in the event that Government chooses to allow leaseholders to elect to take a restriction on development, as suggested at paragraph 6.179 of the Valuation Report, then such a restriction is likely to take the form of a registrable personal obligation.

4.369 Further, in the event that, following further consideration, our scheme needs to make provision for "service-obligations" (which benefit estates) to be preserved during the freehold acquisition process, it is possible these would take the form of a personal obligation.[153]

Recommendation 15.

4.370 We recommend that as a general rule it should not be possible to create new personal obligations during the freehold acquisition process, whether such obligations bind the leaseholder, the landlord or a third party.

4.371 It should only be possible to create new personal obligations during the freehold acquisition process where they are necessary and are taken from a list prescribed by the Secretary of State.

[153] We discuss "service-obligations" in paras 4.224 to 4.228 and 4.327 above.

THIRD-PARTY INTERESTS: LANDLORDS' MORTGAGES AND RENTCHARGES

4.372 We made some provisional proposals in the Consultation Paper about how an individual freehold acquisition should affect mortgages and rentcharges burdening the freehold.[154]

(1) First, we proposed that any mortgage secured on the freehold title should automatically be discharged by the transfer of the freehold. But the leaseholder should be subject to a duty to pay the whole purchase price, or if less the sum outstanding under the mortgage, to the mortgagee or alternatively into court. We proposed that any sums due from the leaseholder to the landlord should be reduced by the sum paid to the mortgagor or into court.

(2) Second, we provisionally proposed that a landlord should be under a duty to use his or her best endeavours to redeem any rentcharge on the freehold (except for estate rentcharges).

4.373 We made the same proposals regarding collective freehold acquisitions, which we discuss in Chapter 5.[155] Both of these provisional proposals were designed to ensure that leaseholders are not prejudiced by additional costs or delay as a result of dealing with third-party interests affecting the freehold title. We further hoped that our proposal would prevent landlords seeking to charge leaseholders for obtaining their mortgagees' consent to transfers.

4.374 The proposals regarding mortgagees in this chapter and Chapter 5 are complemented by our proposal discussed in Chapter 10 to require landlords to notify their mortgagees where a freehold acquisition claim is made. This proposal may help resolve the concerns raised by one mortgage lender in response to Consultation Question 14 that it be informed when a freehold acquisition takes place.

4.375 Our provisional proposals reflect the existing law under the 1967 Act to a large extent (and the analogous proposals for collective freehold acquisitions discussed in Chapter 5 largely reflect the provisions of the 1993 Act).

4.376 Regarding mortgages, the 1967 Act imposes different rules depending on when the relevant lease was granted and whether or not it was authorised by the landlord's mortgagee.

(1) If a lease of a house either:

(a) was granted before the 1967 Act came into force, or

(b) was binding on the landlord's mortgagee (because it was granted prior to the mortgage or because it was authorised by the mortgagee),

then, provided the leaseholder complies with requirements concerning the payment of the purchase price, the mortgage over the freehold will

---

154 See CP, Consultation Question 14, paras 5.34 to 5.35.

155 See CP, Consultation Question 27, paras 6.107 to 6.108.

automatically be discharged on an individual freehold acquisition.[156] The payment requirements are that the leaseholder must pay the purchase price (or a sufficient portion of it) towards the redemption of the mortgage or, alternatively, into court.[157] It does not matter if the purchase price as determined under the Act would otherwise be insufficient to discharge the mortgage. The mortgagee does not need to be a party to the conveyance of the freehold and has no power to object. If the purchase price is not paid in line with the requirements of the 1967 Act, the mortgage will not be discharged. It will continue to secure the mortgage debt, but only up to the value of any portion of the statutory purchase price that was not paid in line with the requirements.

(2) If a lease of a house was granted after the 1967 Act came into force and is not binding on the landlord's mortgagee at the time the leaseholder makes an individual freehold acquisition claim, then the mortgage will only be discharged if it is satisfied by the payment of the price to the mortgagee or into court.[158] In other words, payment of the statutory price for the freehold will not discharge the mortgage unless the price is sufficient to pay off the amount outstanding under the mortgage or the mortgagee agrees to release the charge.

4.377 Our provisional proposal about mortgages effectively involves following the approach set out in paragraph (1) in all cases, regardless of when the relevant lease was granted or whether it was authorised by the mortgagee, with an additional provision about leaseholders dealing directly with the landlord's mortgagee. (It is worth noting that the 1993 Act contains a general rule for the discharge of mortgages on a collective freehold acquisition but does not contain an exception for cases in which the leases were not binding on the mortgagee. We are therefore proposing to bring the 1967 Act in line with the 1993 Act).

4.378 There is, however, one important point about the provisions of the 1967 Act which we need to clarify. The Act says that a mortgage will automatically be discharged on "a conveyance executed to give effect to section 8".[159] Section 8(1) sets out when the landlord will be obliged to convey the freehold to the leaseholder, which the leaseholder is "bound" to accept "at the price and on the conditions so provided" under the Act. The question then arises whether, if the landlord and the leaseholder agree to transfer the freehold for less than the statutory price determined under the Act, a mortgage over the freehold would still automatically be discharged under section 12.

4.379 We are not aware of any case in which this issue has been directly considered by the courts. The lack of case law is perhaps unsurprising. A landlord is unlikely to agree to transfer the freehold for less than the statutory price if the money paid will be insufficient to discharge the mortgage and leave the landlord personally liable for the outstanding sum. Moreover, a leaseholder's conveyancers are likely to ensure they obtain an undertaking from the landlord's conveyancers to discharge the mortgage in any case. It is only in exceptional cases that a party has expressly to rely on the

---

156 1967 Act, s 12(1).

157 1967 Act, s 12(2).

158 1967 Act, s 12(8)

159 1967 Act, s 12(1).

automatic discharge provisions. And a mortgagee is unlikely to dispute automatic discharge unless it is confident that the price paid is clearly less than the statutory price.

4.380 Nevertheless, we think the preferable interpretation of the 1967 Act is that the automatic discharge provisions are only triggered on the payment of the statutory price. We think that where section 12(2) refers to the leaseholder's duty "to apply the price payable for the house and premises, in the first instance, in or towards the redemption of any such charge", it is referring to the price as determined under the Act. Moreover, we think this is why the Act does not (and does not need to) make any provision for transfers at an undervalue.

4.381 Suppose, then, that the open market value of the freehold is £100,000. The mortgage on the freehold secures a debt of £80,000. The price that the leaseholder must pay for the freehold as determined by the 1967 Act is £50,000. The landlord agrees to convey the freehold to the leaseholder for £30,000. The leaseholder pays the purchase price into court. The mortgage is not automatically discharged, despite the payment into court, because the statutory price has not been paid. It remains on the title, but only secures the mortgage debt up to a value of £20,000 (the difference between the sum paid into court and the statutory price).

4.382 We intend our proposal regarding the discharge of mortgages to replicate this element of the current law. Automatic discharge should occur where the leaseholder pays the statutory price to the mortgagee or into court, and should do so regardless of which valuation option outlined in the Valuation Report is adopted by Government.

4.383 Regarding rentcharges, on an individual freehold acquisition, the landlord may convey the freehold to the leaseholder subject to an existing rentcharge.[160] However, if the amount due under the rentcharge exceeds the annual ground rent payable under the lease, the landlord is obliged to redeem the rentcharge (or apportion it, where it also affects other property) so that the amount due is less than the annual ground rent.[161] Where there is difficulty redeeming the rentcharge, the 1967 Act also makes provision for the leaseholder to pay (a sufficient proportion of) the purchase price into court, with the landlord to pay any additional amount required to redeem the rentcharge into court, following which the rentcharge will automatically be discharged from the freehold and become a right to the money held by the court.[162]

4.384 We will consider our proposal about mortgages and our proposal about rentcharges separately.

Mortgages: consultees' views and recommendations for reform

4.385 Just over half of consultees agreed with our provisional proposal but a significant minority disagreed. Unfortunately, many of those consultees who disagreed with our provisional proposal did so because either they thought that landlords should not be

---

160 1967 Act, s 8(4)(b).

161 1967 Act, s 11(2).

162 1967 Act s 11(4) and (5).

able to mortgage the freehold interest at all[163] or because they misunderstood our proposal and thought we were suggesting that leaseholders should be obliged to pay the whole of the amount outstanding on the landlord's mortgage.

4.386 Most consultees who expressed agreement with our proposal did not offer any substantive comments about it. Those who offered comments, such as Leasehold Solutions (surveyors) and Stephen Heslop, highlighted some clear benefits of our provisional proposal. They said it could make the enfranchisement process simpler and prevent delays caused by obtaining the mortgagee's consent and a discharge certification. Linda Skelton (a leaseholder) wrote that it helps protect leaseholders. Other consultees said that it ties up loose ends that might otherwise cause difficulties with the homeowner further down the line. Orme Associates Property Advisers noted that there is an advantage in efficiency in enabling leaseholders to deal directly with the mortgagee or the mortgagee's solicitor. CILEx reported that its members were in favour of a system that enables leaseholders to deal directly with the mortgagee, without having to go through and rely on the freeholder.

4.387 The PBA and Hamlins LLP asked whether mortgages would automatically be discharged when the sale of the freehold is completed or when the transfer is registered. Like the transfer of legal title to the freehold, we think that the discharge of a mortgage must take effect at law when the mortgage is removed from the register.

4.388 Those consultees who raised concerns tended to refer to one of five general issues. However, as we explain below, we do not think that any of these issues reveals a fundamental problem with our proposal.

Payments to the freeholder

4.389 First, several consultees (including CMS Cameron McKenna Nabarro Olswang LLP, Boodle Hatfield LLP, and the PLA) suggested that leaseholders should only pay sums into court in exceptional circumstances. Similarly, Cadogan wanted leaseholders to be obliged to pay the purchase price to the mortgagee directly or into court only where the landlord or the mortgagee has refused to cooperate. The Conveyancing Association and Damian Greenish both suggested that (at least where the freeholder and mortgagee are cooperative) the purchase price should be paid to the freeholder or his or her solicitors for them to discharge the mortgage. In this respect, a leaseholder should be treated in the same way as a third-party purchaser of the freehold. The Conveyancing Association noted that buyers typically require an undertaking from the seller's conveyancer to discharge the mortgage and apply to remove the charge from the register.

4.390 The difficulty with putting leaseholders in the same position as third-party purchasers is that it fails to address the problem at which our provisional proposal was directed. Mortgages are not automatically discharged on a third-party purchase of the freehold; they are discharged if the mortgagee consents, which the mortgagee will do if it is paid a sufficient amount to satisfy the outstanding mortgage debt.[164] We have been told by consultees that landlords can rely on the need to obtain a mortgagee's consent to

---

163 We explain why we cannot adopt this suggestion in para 10.88.

164 Or, if the property is in negative equity, at least the open market value of the property.

delay the enfranchisement process or to extract additional payments from leaseholders.

4.391 If mortgages over the freehold are to be automatically discharged, we think we need to introduce a system for ensuring that the purchase price paid by the leaseholder reaches the mortgagee. Under our provisional proposal, in standard cases, the money should be paid directly to the mortgagee. It is consistent with our proposal that the money may be paid to the landlord's solicitors *if this is what the mortgagee requests*. Moreover, payments should only be made into court where (whether because of a lack of cooperation or otherwise) the leaseholder cannot pay the requisite portion of the purchase price directly to the mortgagee.

4.392 It should be noted that, as under the current law, a mortgage will only be automatically discharged where a leaseholder complies with the proposed duty. If the purchase price is paid to the freeholder rather than the mortgagee or into court, and the freeholder does not use the money to discharge the mortgage, there will be no automatic discharge.

Obtaining information from the mortgagee

4.393 Second, a few consultees (including the Law Society and Pennington Manches LLP – solicitors) were worried that leaseholders may not have sufficient information about the mortgage and that the mortgagee may not be permitted to correspond with the leaseholder about the outstanding sum due. However, freeholders may authorise their mortgagees to correspond with their leaseholders, or may pass on the relevant information to the leaseholders. If freeholders fail to provide the necessary assistance, leaseholders may pay the entirety of the purchase price into court.

Breach of the terms of the mortgage

4.394 Third, two consultees – the British Property Federation and Bert Lourenco – wanted to know what would happen if a landlord faced early termination fees or would be placed in breach of the terms of the mortgage by its early termination. Section 12(4) of the 1967 Act makes provision for this scenario. It provides that mortgagees must accept at least three months' notice of the landlord's intention to redeem the mortgage and terms of the mortgage that are inconsistent with this period of notice are overridden. We intend to include an analogous provision in our new scheme for enfranchisement.

Mortgages burdening multiple properties

4.395 The fourth issue raised by several consultees (including the PLA) concerned cases in which a mortgage burdens multiple properties, only one of which is let on a qualifying lease. But we do not believe that multiple-property cases present any problems for our provisional proposal.

4.396 On an individual freehold acquisition, a landlord's mortgage will be discharged *from the property acquired by the leaseholder*. The mortgage may continue to burden other property; our proposal is not intended to imply otherwise. It may be difficult for a mortgagee to provide a redemption figure where only part of its security is being released (although this process should be familiar to mortgagees with loans secured against multiple properties). But ultimately, a mortgagee can either provide the leaseholder with a redemption figure within the relevant timeframe or it cannot. If it

cannot, the leaseholder can pay the entirety of the purchase price into court and leave the landlord and the mortgagee to determine their respective shares.

4.397 Some consultees were concerned that mortgagees may try to "load" the mortgage against or away from the property acquired by the leaseholder. Whether a mortgagee is entitled to do this under the terms of the mortgage is a matter to be resolved between the landlord and the mortgagee. It should have no effect on the leaseholder.

Negative equity

4.398 Finally, several consultees commented on cases where the freehold being acquired is in negative equity. Fieldfisher LLP, for example, said that mortgagees may be concerned about the automatic discharge of their security in these circumstances.

4.399 We do not think that the possibility of negative equity itself presents a problem for our provisional proposal. A charge provides a mortgagee with security up to the value of the encumbered property. It does not necessarily provide security for the entirety of the mortgage debt. It is perfectly possible for a mortgage to be created to provide partial security for a loan. For example, a £10 million loan may be partially secured by mortgages against two £1 million commercial properties.

4.400 A mortgage agreement may (but does need to) make provision for what happens if the encumbered property goes into negative equity. The mortgagee may be entitled to control or set conditions on whether the encumbered property is sold. These provisions may be in place so that the mortgagee can ensure that, if the borrower sells, he or she will provide some alternative security for the loan, to prevent sales at an undervalue, or alternatively to allow a mortgage to delay a sale until the property appreciates in value. However, these provisions should not interfere with the leaseholder's exercise of enfranchisement rights. A transfer of the property to the leaseholder at the statutory price should not be a sale at an undervalue and should realise, rather than remove, the mortgagee's security. (This issue will need to be considered if the statutory valuation of freeholds for the purpose of enfranchisement is changed so that it falls far below their market value.)[165] The automatic discharge of mortgages may prevent a mortgagee from exercising its contractual rights to delay or control the sale. But the landlord's mortgagee cannot be allowed to prevent or significantly delay enfranchisement, and a leaseholder who has paid the statutory price should not have to take the freehold subject to the landlord's mortgage.

Conclusion

4.401 We do not think that any of the points raised by consultees show that we should abandon our provisional proposal. We think, in line with the majority of consultees, that our proposal will make the enfranchisement process simpler and easier for leaseholders.

4.402 There was, however, a further point raised by the Law Society which we need to consider. It pointed out that, as our proposals may reduce the price payable for acquiring a freehold, it may become more likely that the premium will not cover the entire sum due under the landlord's mortgage. Depending on which of our options for

[165] Government will need to weigh the potential impact on mortgagees in deciding which of the options set out in the Valuation Report to pursue.

valuation are pursued by Government, leaseholders may pay less on a freehold acquisition claim than would be paid by a third-party purchaser of the freehold. The effect of such a decision by Government would be to reduce the value of the freehold, and indirectly reduce the security it provides to mortgagees, at least in relation to acquisitions by leaseholders. Mortgages would continue to secure a debt up to the value of the freehold, but the value of the freehold would be reduced. We do not think this possibility undermines the rationale for our provisional proposal.

4.403 We have therefore decided to make a recommendation in line with our provisional proposal. Although we did not discuss the issue in the Consultation Paper, we intended and continue to intend our proposal to apply to mortgages burdening intermediate leases which are acquired as part of an individual freehold acquisition.

Recommendation 16.

4.404 We recommend that, where an individual freehold acquisition is made and the landlord's estate, or a superior leasehold estate that will also be acquired through the claim, is subject to a mortgage:

(1) the leaseholder should be under a duty to pay:

(a) the whole of the statutory price; or

(b) (if less) the sum outstanding under the mortgage;

to the mortgagee or, alternatively, into court;

(2) if the leaseholder complies with the duty in (1) above, any mortgage secured against the freehold title, or against a superior leasehold title also acquired though the claim, should automatically be discharged;

(3) if the leaseholder does not comply with the duty in (1) and the mortgage is not otherwise discharged, it will remain on the freehold title after acquisition by the leaseholder but will only secure the mortgage debt up to the value of such part of the statutory purchase price as was not paid in accordance with the duty in (1); and

(4) any sums due from the leaseholder to the landlord should be reduced by any sums paid under (1) above.

Rentcharges: consultees' views and recommendations for reform

4.405 Our second proposal in Consultation Question 14 concerning rentcharges was supported by a clear majority of consultees. There was, however, widespread confusion about the nature of rentcharges; many consultees thought we were talking about ground rents. We are unsure, therefore, what weight to ascribe to consultation responses which did not provide substantive comments on our policy.

4.406 A rentcharge is a form of proprietary interest that may burden a freehold and require the freeholder periodically to pay a sum of money to the rent owner. The Rentcharges Act 1977 made it impossible for landowners to create new rentcharges.[166] It provides a statutory route for owners of properties burdened by a rentcharge to redeem it by paying to the rentowner the sum determined under regulations issued under the Act. Furthermore, under that Act, almost all existing rentcharges will cease to exist in 2037.[167] The Act does not, however, apply to "estate rentcharges", which are defined rentcharges for a nominal amount imposed to ensure positive covenants bind transferees of the land or for securing reasonable payments for services provided by the rent owner which benefit the land.[168]

4.407 A further difficulty arose because we did not say in the Consultation Paper who would pay the costs of redeeming a rentcharge burdening the landlord's title. (As mentioned above, under the current law, the landlord may convey the freehold to a leaseholder subject to a rentcharge, but is obliged to redeem so much of any rentcharge as exceeds the annual ground rent under the lease.) Thus, some consultees, such as Consensus Business Group, a landlord, agreed on the basis that the freeholder would be able to recover his or her reasonable costs of redeeming the rentcharge from the leaseholder. Others, such as the PBA, disagreed on the basis that landlords should not have "to incur costs in tidying or improving that interest for the leaseholder".

4.408 Responses from consultees did not, therefore, indicate clear support for a particular policy. In particular, there was no consensus about who should pay the costs of redeeming a rentcharge. Furthermore, several consultees were concerned that an obligation on the landlord to use "best endeavours" to redeem a rentcharge is imprecise. Some thought it too onerous and some thought it too weak, particularly where it can be unclear who owns a particular rentcharge and whether it is still enforceable. For example, BRW Sparrow (a landlord), Shoosmiths LLP and Bryan Cave Leighton Paisner LLP pointed out that many rentcharges have not been enforced for more than 12 years and so are statute barred. BRW Sparrow commented that it can be difficult to trace an unregistered rentowner.

4.409 We have come to conclusion that we should not proceed with our provisional proposal. Indeed, even though the current law makes provision for the redemption of rentcharges in some circumstances by the landlord, we think that, for the following reasons, our new scheme should not make any provision for rentcharges whatsoever.

(1) When the 1967 Act was passed, it was possible for a landlord to create a rentcharge burdening his or her own property in favour of an associated company and thereby ensure that his or her income stream would remain even if the leaseholder acquired the freehold. But it has not been possible to create income-generating rentcharges for over 40 years. Landlords can no longer secure their income streams by the creation of rentcharges.

---

166 Rentcharges Act 1977, s 2(1).

167 Rentcharges Act 1977, s 3. A few rentcharges that were created before the 1977 Act but became payable after it came into force may be extinguished a bit later (60 years after they first became payable).

168 Rentcharges Act 1977, s 2(4) and (5).

(2) Several consultees (including the Law Society) pointed out that ordinary third-party purchasers of the freehold would acquire it subject to existing rentcharges. They were unsure that there is a justification for treating enfranchising leaseholders differently. We agree. We included a proposal regarding rentcharges only because they were addressed by the 1967 Act.

(3) It is relatively rare to encounter a non-estate rentcharge in practice and in around 15 years' time all existing non-estate rentcharges will cease to exist in any case. Additionally, as Shoosmiths LLP, Bryan Cave Leighton Paisner LLP and Clifford Chance LLP pointed out, non-estate rentcharges rarely exceed a nominal sum per year. We are not sure that they call for special treatment in our new enfranchisement scheme. The provisions of the 1967 Act concerning rentcharges are particularly complicated, making the process of enfranchisement more difficult for leaseholders to understand where rentcharges are involved. We are not convinced there is still a case for including this additional complexity in our new scheme for enfranchisement.

(4) We do not believe that landlords should be required to bear the cost of redeeming a rentcharge. A landlord is now unlikely to have been responsible for the creation of a rentcharge (which must necessarily have happened more than 40 years ago). We do not see a justification for requiring landlords to spend money, without being able to recover their costs from the leaseholder, in order to give the leaseholder a better title than the landlords themselves enjoyed. Alternatively, if we allowed landlords to pass the costs on to leaseholders, we would no longer be conferring any advantage on leaseholders; in fact, this approach would make enfranchisement more expensive for leaseholders in any case involving a rentcharge.

(5) An obligation to redeem rentcharges may delay the enfranchisement process, which in itself may increase costs for leaseholders.

(6) If there is a subsisting rentcharge affecting the freehold, that fact should be taken into account in valuing the freehold when the leaseholder comes to acquire it. Furthermore, as Boodle Hatfield LLP pointed out, it is open to the leaseholder, once the freehold acquisition is completed, to seek to redeem the rentcharge under the Rentcharges Act 1977.

(7) Government is intending to legislate to constrain the enforcement mechanisms that are available to rent owner when a rentcharge goes unpaid.

4.410 For these reasons, we no longer think that there is a case for making provision for rentcharges in our new enfranchisement scheme and we are not proceeding with our provisional proposal.

Chapter 5: The right of collective freehold acquisition

INTRODUCTION

5.1 In this chapter we set out our recommendations for a reformed right for leaseholders of flats to join together to purchase the freehold of their building. We call this the right of "collective freehold acquisition". This right will enable leaseholders to own the freehold of the building in which their home is situated (albeit jointly with others), and therefore give them control of the management of the buildings. Unlike the current law, we recommend that this right should extend to enabling leaseholders to acquire multiple buildings together, rather than just a single, self-contained building or part of a building. This will enable leaseholders to own and manage several buildings together where they think that it would be desirable to do so – for example, blocks of flats on the same estate. Accordingly, throughout this chapter (and generally in this Report), all references to a "building" should, unless the context suggests otherwise, be taken to refer equally to a part of a building or to multiple buildings (or indeed to any combination of buildings and parts of buildings).

5.2 Our recommendations as to the operation of the right of collective freehold acquisition are designed to make the collective freehold acquisition process easier and cheaper for leaseholders, and to ensure that suitable ownership structures are put in place for the management of buildings following the completion of collective freehold acquisition claims. We recommend that leaseholders must carry out a collective freehold acquisition claim through a nominee purchaser which is a corporate body with limited liability (such as a limited company). We also recommend that leaseholders should be able to require landlords to take leasebacks of units within the premises being acquired which are not let to leaseholders who are participating in the claim. We make a series of recommendations relating to the additional land which leaseholders are entitled to acquire, in addition to the freehold interest in their building, and make recommendations regarding the terms on which the freehold may be acquired which closely follow those made in respect of individual freehold acquisition claims in Chapter 4 above. Lastly, we recommend that there should be a defence to a claim where the premises have been the subject of a successful claim within the preceding two years.

5.3 In the Consultation Paper, we proposed the introduction of a new "right to participate" – that is, a right for leaseholders who did not participate in a collective freehold acquisition claim to purchase a share of the freehold interest held by those who did participate at a later date. We discuss this proposal at the end of this chapter. We maintain that it would be desirable for a leaseholder who did not participate in a collective freehold acquisition claim to be able to join in the ownership and management of the premises acquired later on. However, as we explain below, we have encountered a significant number of complexities in attempting to develop this proposal, and have therefore concluded that further work is needed before we could recommend the introduction of such a right.

PROBLEMS WITH THE CURRENT LAW

5.4 We set out the current law of collective enfranchisement, and the criticisms thereof, in full in the Consultation Paper.[1] Five key criticisms can be made.

(1) Leaseholders are able to nominate any natural person(s) or corporate body as the nominee purchaser who will acquire the premises on their behalf. A decision to acquire the premises in the names of individuals rather than through a corporate structure can lead to a lack of clarity over the beneficial ownership of the premises, difficulties with day-to-day decision-making and dispute resolution, and conveyancing difficulties.

(2) A collective enfranchisement claim can only be made in relation to a single, self-contained building or part of a building. Multiple buildings which would be most sensibly owned and managed together (such as on an estate) cannot be acquired in the same claim.

(3) The provisions of the 1993 Act relating to the extent of the premises which leaseholders making a claim are entitled to acquire can be difficult to understand, and outcomes are uncertain.

(4) It is possible for one faction of leaseholders (representing 50% of the flats in a building) to make a successful collective enfranchisement claim, only for another faction (representing the other 50%) to do so immediately thereafter. The result is that the ownership and management of the building can moves back and forth between the two groups – potentially repeatedly. This problem, which is most likely to arise in small buildings, is known as the "ping-pong problem".

(5) Leaseholders proposing to make a collective enfranchisement claim are not obliged to invite all other leaseholders in the building to participate in the proposed claim, nor even to inform them of their intentions. This means that leaseholders can be excluded from the opportunity to exercise their enfranchisement rights, either inadvertently or deliberately.

5.5 Our recommendations in this chapter for a reformed right known as the right of collective freehold acquisition seek to address the first four of these issues. As mentioned above, and as we explain further at the end of this chapter, we have concluded that further work is needed before we could recommend the introduction of the right to participate which we provisionally proposed in the Consultation Paper, which would go some way to alleviating the problem of leaseholders being excluded from a collective freehold acquisition claim.

THE NOMINEE PURCHASER

5.6 In the Consultation Paper, we made a number of provisional proposals relating to the nominee purchaser which leaseholders must appoint to conduct a collective freehold acquisition claim and acquire the freehold of a building on their behalf.

---

[1] See CP, paras 6.6 to 6.59.

5.7 First, we proposed a general requirement that a collective freehold acquisition claim must be carried out by a nominee purchaser which is a company, save where:

(1) the premises to be acquired contain four residential units or fewer;[2]

(2) all residential units are held on long leases;

(3) the leaseholders of all residential units are participating in the claim; and

(4) all those leaseholders agree to using a different nominee purchaser.[3]

We also proposed that the company used should take the form of a company limited by guarantee.[4]

5.8 We explained that using a company as the nominee purchaser addresses the problems we have identified which arise from holding the freehold title in the names of individual leaseholders. It provides clarity surrounding beneficial ownership, aids efficient day-to-day management of the property by enabling decision-making by appointed directors, and avoids the need to execute a conveyance of the legal title to the property each time a flat is sold. We thought that a limited liability company should be used because the threat of unlimited liability might discourage many leaseholders from participating in a collective freehold acquisition. We also explained that a company limited by guarantee is preferable to a company limited by shares because it is likely to be administratively more convenient for its directors – who will probably be ordinary leaseholders – to operate.

5.9 We asked consultees whether they agreed with these proposals. We also asked whether consultees consider that any of the requirements of company law are inappropriate or onerous for a nominee purchaser company and should be relaxed.[5]

5.10 Next, we proposed that the articles of association of any nominee purchaser company making a collective freehold acquisition claim must contain certain prescribed articles.[6] We considered that a template set of articles would make collective freehold acquisition easier, quicker and cheaper, and speed up the conveyancing of flats thereafter. We also felt that some prescription of articles was necessary in order to ensure equal treatment for leaseholders seeking to join in a collective freehold acquisition at a later date, pursuant to the new right to participate which we had proposed separately.[7] In order to ensure that articles of association cannot be changed after the collective freehold acquisition is complete, so as to frustrate the exercise of the right to participate, we proposed that the prescribed articles may only be departed from where there are no existing or potential leaseholders who may seek to exercise the right to participate in the future. We then set out a list of key matters in

---

2 In Ch 6 below, we recommend a scheme of qualifying criteria based around the single concept of a "residential unit", rather than categorising leasehold homes into houses and flats.

3 See CP, paras 6.61 to 6.66.

4 See CP, paras 6.69 to 6.78.

5 See CP, Consultation Question 21, paras 6.67 to 6.68, and Consultation Question 22, para 6.79.

6 See CP, paras 6.80 to 6.85.

7 As to that proposal, see CP, paras 6.144 to 6.156.

respect of which we thought it would be desirable to have prescribed articles, as well as a list of matters for which we thought leaseholders setting up a nominee purchaser company should be required to provide in the articles, but with flexibility as to how exactly they do so.

5.11 We asked consultees whether they agreed with this proposal. We also sought consultees' views as to the matters in respect of which it would be desirable for company articles to be prescribed, as well as matters in respect of which it would be desirable to require provision in the company articles, albeit with some freedom as to the content of any such provision.[8]

5.12 Finally, we also made a provisional proposal that a nominee purchaser company be restricted from disposing of the premises acquired on a collective freehold acquisition, save where:

(1) all the residential units within the premises are held on long leases, all the leaseholders are members of the nominee purchaser company, and all members of the company agree with the proposed disposition; or

(2) the Tribunal makes an order permitting the proposed disposition.[9]

5.13 We considered that there is little point requiring leaseholders to use a company as the nominee purchaser for a collective freehold acquisition if they can immediately transfer the freehold title into the names of one or more individuals – whether to prevent the exercise of the right to participate in the future, or simply to avoid the obligations associated with running a company. However, there may be cases where there is good reason for such a transfer. We considered that the Tribunal would be well-placed to identify these cases.

5.14 We asked consultees whether they agreed with this proposal. We also sought consultees' views as to the grounds on which the Tribunal should be empowered to permit a disposition.[10]

5.15 Together, these provisional proposals were designed to provide a clear structure for leaseholders to use in a collective freehold acquisition, while at the same time facilitating our separate proposal for a new right to participate. In the following sections, we set out consultees' views on each of these proposals, before formulating our final recommendations with regards to the nominee purchaser.

Consultees' views

Requirement to use a company nominee purchaser

5.16 Overall, a substantial majority of consultees agreed that there ought to be a general requirement for leaseholders making a collective freehold acquisition claim to use a

---

8 See CP, Consultation Question 23, paras 6.86 to 6.87.

9 See CP, paras 6.88 to 6.90. The Tribunal referred to is the First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

10 See CP, Consultation Question 24, paras 6.91 to 6.92.

company nominee purchaser.[11] The reasons which these consultees gave for their view tended to align with the arguments we made in the Consultation Paper for introducing such a requirement.

(1) A number of consultees felt that our proposal would bring clarity to the collective ownership and management of buildings. The Property Litigation Association ("the PLA") wrote: "We agree that a general requirement that the nominee purchaser should be a company would provide clarity and streamline decision-making processes (amongst other things)". Franciszka Mackiewicz-Lawrence (a leaseholder) stated that the use of a company nominee purchaser "provides a clear structure to manage the building".

(2) Others referred to the relative ease with which shares in a company can be transferred when a residential unit is sold, compared to a transfer of a share of freehold title. Church & Co Chartered Accountants commented:

> The nominee purchaser should always be a limited company. This allows for easy transfer of ownership of a share of the company when a leaseholder sells their interest. I have seen structures or un-incorporated partnerships owning the freehold, which makes transfers of a share of the freehold excruciating and expensive on the sale of a flat. If you add in the executors of one of the previous flat owners, it can hold up the process forever.

5.17 Several consultees also made additional points. Hamlins LLP (solicitors) and the Property Bar Association ("the PBA") pointed out that "right of first refusal" notices under section 5 of the Landlord and Tenant Act 1987 are not required to be served where what is being transferred is membership of a company rather than a share of freehold title.[12] The Leasehold Advisory Service ("LEASE") commented that the use of a company nominee purchaser "would be consistent with Right to Manage and Commonhold and is a vehicle with which practitioners in the enfranchisement field are familiar".

5.18 Very few arguments were made against our proposal. Philip Rainey QC observed that there may be good reasons in certain cases why a company is not used as the nominee purchaser, giving the example of "sophisticated claims in London, often with overseas participants". Clifford Chance LLP (solicitors) referred to the possible tax implications of mandating the use of a company nominee purchaser. A small number of consultees commented that a company managed by leaseholders is more likely to be struck off for failure to comply with company law requirements, such as the need to file an annual return. In this situation, the freehold title held by the company will first pass to the Treasury Solicitor as "bona vacantia", and then to the Crown (if disclaimed

---

[11] Only a small majority stated expressly that they agreed with our provisional proposal in Consultation Question 21. However, a number of those who disagreed with that proposal explained that they only did so because they did not agree with the exception which we proposed to the general requirement to use a company nominee purchaser. There was widespread support for the general requirement itself.

[12] Pt I of the Landlord and Tenant Act 1987 requires that the landlord of a building containing flats which meets certain qualifying criteria must not dispose of his or her interest in the building without first offering it to the leaseholders of the flats.

by the Treasury Solicitor) under the doctrine of "escheat".[13] Leaseholders who find themselves in this position may face a long and expensive process to have the company restored to the register and to recover the freehold title.

5.19 Consultees were divided, however, as to whether there should be any exception to a general requirement to use a company nominee purchaser and, if so, how that exception should be framed.

5.20 On the one hand, a number of consultees commented that there should be no exception, arguing that the good reasons for using a company nominee purchaser in large buildings apply equally in the case of smaller buildings. For example, Andrew Perrin (a surveyor) wrote that "a company is the ideal potential owner of a collective enfranchisement. I consider that it should be for all cases, even down to two parties within a converted house". Christopher Balogh considered that the costs associated with setting up a company are moderate when shared between participants, and can be less than the costs associated with co-ownership and trusteeship.

5.21 On the other hand, some consultees felt that the use of a company should not be mandated for leaseholders in smaller buildings. Pennington Manches LLP (solicitors) and The Law Society feared that a requirement to set up and run a company might deter such leaseholders from making a claim. However, consultees' suggestions as to the maximum size of building which should fall within an exception for smaller buildings ranged from two residential units to 20. A number of consultees agreed with the specific exception we had proposed, recognising that it would facilitate the new right to participate which we proposed in the Consultation Paper. As LEASE put it:

> We accept that there is a strong case to permit an exception to the above requirement in the case of claims concerning a small building but only where the risk of making the right to participate more difficult can be eliminated. We consider the four conditions set out in the question eliminate this risk as they will ensure there are no remaining leaseholders (or potential leaseholders) who may later try to exercise the right to participate".

The type of company to be used

5.22 Very few consultees who responded to our proposal that the nominee purchaser company should be a company limited by guarantee commented specifically on the question of limited or unlimited liability. No consultee told us that unlimited liability would be preferable.

5.23 There was more divergence amongst consultees as to whether the nominee purchaser company should be limited by shares or limited by guarantee. Only a slight majority of consultees agreed with our proposal that the nominee purchaser company should be a company limited by guarantee. A significant minority favoured use of a company limited by shares. Some consultees disagreed that the type of company to be used should be prescribed at all, while others suggested a number of alternative structures which might be used to hold the freehold instead.

---

[13] For a simple explanation of the concept of bona vacantia and the doctrine of escheat, see https://www.burges-salmon.com/-/media/files/non-pub-pdfs/escheat-guidance-flyer.pdf?la=en.

5.24 Consultees who supported the use of a company limited by guarantee tended to focus on the ease of administration associated with such companies. LEASE took the view that a company limited by guarantee is more convenient to operate than one limited by shares, "certainly when a member's flat is being sold and particularly on those occasions when the stock transfer form is overlooked during the sale transaction". Gerald Grigsby (a solicitor) commented that our proposal "reduces the management expense of record-keeping for share ownership transfers". David Heard (a leaseholder) pointed out that companies limited by guarantee are used successfully in the right to manage regime – a position which we recommend maintaining in the RTM Report.[14] A commonhold association must also take the form of a company limited by guarantee.[15]

5.25 On the other hand, Irwin Mitchell LLP (solicitors) observed that the transfer of shares on the sale of a flat is normal practice for the conveyancing profession, and should not be considered a burdensome task. A number of consultees also identified other potential benefits of a company limited by shares over one limited by guarantee.

(1) Several consultees, including freeholders and firms of professionals, disagreed with our suggestion in the Consultation Paper that differential voting rights and the distribution of income can be adequately accommodated within a company limited by guarantee, by express provision in the company articles. These consultees considered that companies limited by guarantee will be satisfactory in the straightforward situation where all the leaseholders participate, have flats of roughly equal value, and make similar contributions. But in many cases, there will be a need to cater for unequal contributions, or to distribute surplus funds arising from lease extensions or disposals. Mark Chick, a solicitor and member of our advisory group, commented in detail:

> I disagree strongly… One only has to look at the ill-fated 'RTE Company' from the 2002 Act to see an example of why a more 'bespoke' model will not be suited to the complexity or flexibility of many enfranchisements. In addition, if an objective is to reduce costs for leaseholders, then in my view this will not achieve it as more bespoke drafting will be required. A shares model has a much better chance of being used without much adaption and with better flexibility for matters such as non-voting shares, redeemable preference shares and other means of dealing with the equity of investment…

(2) Mark Chick was also concerned that the operation of a company limited by guarantee would not readily be understood by leaseholders. He considered that the average leaseholder is more likely to be familiar with the concept of a company limited by shares, because "if they own or have an involvement in a company it will be more than likely to be a shares model as a general trading company".

---

14 See the RTM Report, paras 6.3 to 6.10.

15 See the Commonhold Report, para 7.67.

(3) Perhaps most fundamentally, Graham Webb (a leaseholder) warned that a company limited by guarantee would not deliver what leaseholders want from a collective freehold acquisition. He wrote:

> Leaseholders want ownership. Conceptually, owning shares in the freehold-owning company bestows real ownership. Being a member of a company limited by guarantee doesn't cut it in the same way".

5.26 A considerable number of consultees took the view that leaseholders should simply be able to choose the type of nominee purchaser which suits their particular circumstances best. The British Property Federation thought that our proposal "might restrict leaseholders' willingness to make collective claims if they are deprived of the flexibility to organise their affairs in a financial and tax-efficient way". Philip Rainey QC argued that while the company limited by guarantee has its benefits, "the ability to adopt a company limited by shares in appropriate cases is very useful, as is the ability to adopt a different structure such as an LLP".

5.27 Finally, a small number of consultees suggested that we consider alternative structures for the nominee purchaser. Hayes Point Collective Freehold Ltd and the Wales Co-operative Centre referred us to a model co-operative legal structure which has been drawn up by the Wales Co-operative Centre and the Confederation of Co-operative Housing and which it is said could be used for a collective freehold acquisition. One consultee mentioned the "Tyneside lease" arrangement, common to the North-East of England, under which the leaseholder of each flat in a two-unit building is also the freeholder of the other flat.

Relaxation of company law requirements

5.28 Fewer than half of consultees indicated that they thought there should be a relaxation of company law requirements for nominee purchaser companies. Most of these consultees gave no reason for their view, nor any suggestions as to which company law requirements they thought should be relaxed. Those consultees who did offer a substantive comment tended to frame this in generic terms, referring to the potential burden on ordinary people. As one leaseholder told us:

> Homeowners are not necessarily business people and many have neither interest nor sufficient knowledge of company law to know what is involved let alone carry out its requirements. It also implies a commercial interest which is confusing and intimidating to lay people.

5.29 Beth Rudolf, a conveyancer and member of our advisory group, commented that "company law is too complex for the simplistic requirements of a 'Management Company' and runs the risk of failure due to inflexible requirements and obligations inappropriate to a not-for-profit arrangement".

5.30 A small number of consultees identified specific requirements which they thought ought to be relaxed for nominee purchaser companies. These included in particular the requirement to file an annual confirmation statement and the requirement to file annual accounts. The Law Society wrote:

> The Society considers it prudent to relax some requirements of company law in relation to nominee companies. They would probably be unduly onerous and be more likely to be overlooked. In particular, a nominee company should not be struck off the register for failure to file returns with the Registrar of Companies, and the Registrar should be requested to produce practice guides specifically directed to members of enfranchisement companies. It is more important that service charge accounts are produced in accordance with the RICS Service Charge Residential Management Code, and perhaps that the Company law provisions for resolving deadlock between members might be retained.

5.31 On the other hand, many consultees felt strongly that company law requirements should not be relaxed for nominee purchaser companies. The Hampstead Garden Suburb Trust thought that "if lay people are to take control of property, they are taking on a serious liability and should be subject to the same regimes, and held as accountable, as the party from whom they have purchased". Consensus Business Group (a landlord) pointed to the obligations owed by a nominee purchaser company to other stakeholders, including to leaseholders who did not participate in the collective freehold acquisition, as a reason to ensure that the company is held responsible. For Graham Webb, the rigour of company law serves a two-fold purpose: it "protects the wider leaseholder base from any misdeeds of the company directors, and the directors from any accusations of misdeeds from the wider pool of leaseholders".

5.32 Other consultees argued that the specific requirements which a nominee purchaser company must comply with are not onerous or burdensome in any event. In many cases, all that will be required is the production and filing of accounts, and the filing of a simple confirmation statement, both to be done annually.[16] In some cases, a tax return may have to be completed. Small companies are exempt from the requirement to have a company's accounts audited.[17] Jad Adams put it bluntly:

> If they can't handle a minimal amount of company administration, they can't manage a building.

5.33 Finally, a small number of consultees thought that company law requirements should be stricter for nominee companies. It was suggested that "directors who break the law should be personally liable", while Paul Church argued that all nominee purchaser companies should be subject to an annual audit, given that the company may hold a significant amount of cash belonging to leaseholders.

Prescription of articles

Should articles be prescribed?

5.34 A little over half of consultees agreed with our provisional proposal that the nominee purchaser company's articles of association must contain certain prescribed articles, and that it should only be possible to depart from those articles where all of the residential units within the premises are held on long leases, and all leaseholders are

---

16 Companies Act 2006, Pt 15 and s 853A.

17 Companies Act 2006, ss 477 to 479. It will be very rare for a nominee purchaser company not to be a "small company". See Companies Act 2006, ss 382 to 384.

members of the company. Professor James Driscoll thought that "the model for commonhold associations in the 2002 Act is a very useful way of proceeding and that the articles should be prescribed". These consultees also recognised that prescribed articles and the proposed limitation on departing from those articles would be necessary in order to facilitate our proposed new right to participate (although views differed as to whether the introduction of the right to participate would be positive or negative).

5.35 Some consultees wished to go further than our proposal, suggesting that there should be no ability to depart from the prescribed articles under any circumstances, or only in very narrow circumstances. Berkeley Group Holdings PLC (a developer) stated:

> So far as possible, the articles should be prescribed. The ability to amend the articles should be limited… which will provide a level of consistency across all residential schemes… It should not be possible except by 100% agreement to change the articles as we are dealing with people's homes which is also a major investment.

5.36 Others thought that prescription of articles was desirable, but that some exceptions would be required. Long Harbour and HomeGround (a landlord and an asset manager) agreed that a prescribed set of articles governing the fundamental matters associated with the running of a nominee purchaser company would be helpful, provided leaseholders can amend these to address their individual needs, especially in more complicated buildings or estates. A number of consultees suggested that it should be possible to depart from prescribed articles with Tribunal permission, or with a majority of (for example) 75% of leaseholders in favour of the change.

5.37 However, a significant minority of consultees did not support any prescription of articles, commenting that it would restrict consumer choice and would not be able to accommodate the variety of buildings which might be the subject of a collective freehold acquisition. Charlie Coombs (a surveyor) thought that our proposal was likely to "hinder enfranchisement" as a result. Boodle Hatfield LLP (solicitors) wrote:

> We think this is very dangerous… It is always going to be difficult to prescribe a set of articles which can be applicable in a wide range of different buildings, in particular in relation to different classes of share if different obligations and/or service charge requirements arise".

5.38 Several consultees therefore favoured the production of optional, model articles which can be used as a starting point, as opposed to prescribed articles. Irwin Mitchell LLP said:

> It will help people seeking to enfranchise if examples of articles of association are readily available. If these are broad enough it is unlikely that groups seeking to enfranchise will need to depart from them.

In relation to what matters should articles be prescribed?

5.39 Responses to this question contained wide-ranging suggestions, covering issues such as the appointment of directors, decision-making processes, the transfer of membership, voting provisions, insurance, AGMs and other meetings, and the

production and member approval of annual accounts. Most consultation responses did not distinguish between matters in respect of which it would be desirable for articles to be prescribed, and those matters in respect of which provision in the articles should be required, but with some freedom as to that provision.[18]

5.40 A few consultees – such as Long Harbour and HomeGround – agreed that prescribed articles should cover all those matters set out in paragraphs 6.83 and 6.85 of the Consultation Paper. Another group, including The Society of Licensed Conveyancers, LEASE, The Law Society, and solicitors' firms Bryan Cave Leighton Paisner LLP and Shoosmiths LLP, thought that the provisions of the model articles which are currently prescribed for right to manage companies ("RTM companies") could be adopted, with appropriate modifications.

5.41 However, most responses flagged specific matters which consultees felt should be included in the articles. Various consultees focussed on provisions which would facilitate the transfer of shares in, or membership of, the nominee purchaser company on the sale of a flat. Christopher Balogh emphasised that the transfer should be "easy and economic". Mark Chick thought that the articles should contain "a requirement deeming share transfer when a unit is sold regardless of formality". Orme Associates Property Advisers told us that the articles should include "the obligation to effect the transfer of your share or membership to the new buyer of the flat, or in default the right for the company to cancel that membership upon transfer of the leasehold estate in the flat".

5.42 Some consultees felt that the nominee purchaser company should be under the control of leaseholders only. Mark Attenborough (a leaseholder) was clear that only a leaseholder should be capable of being a director, while Church & Co Chartered Accountants suggested that "ownership of the shares must be associated with ownership of a flat". Hayes Point Collective Freehold Ltd wrote:

> All leaseholders have a right to be a member except in specific circumstances. [The articles] should specify how membership could be refused or rescinded [and] all members to have one vote irrespective of individual investment.

5.43 Others, flagging the involvement of "white knights" and other investors, felt that the articles should contain a mechanism allowing a non-owning investor to have a voting interest.[19] A few consultees suggested that the owners of commercial units in the building should also be entitled to representation on the board.

5.44 Some consultees' suggestions focussed on the election of directors and their decision-making procedures. Hayes Point Collective Freehold Ltd thought that directors should be elected annually with a maximum rolling 3-year term. Others had views on which issues should be left to the directors to determine. One leaseholder suggested that the prescribed articles should contain restrictions on decisions which can be made by directors, so that they are forced to consult the leaseholders on any

---

[18] Consultation Question 23 sought consultees' views as to the matters which should fall in each of these categories: see CP, para 6.87.

[19] A "white knight" is a third party who contributes to the premium payable on a collective freehold acquisition claim in respect of the non-participating leaseholders' share of that premium.

major decision. The Federation of Private Residents Associations ("the FPRA"), while agreeing with our provisional proposal, told us that the terms on which a member's lease may be extended or varied was an issue "best left to the directors, who will be subject to general statutory law, their duty to act fairly and in the interests of the members of the company".

5.45 Consultees also raised the issue of profits which accrue to the nominee purchaser company. Hayes Point Collective Freehold Ltd wrote:

> Profits should be reinvested not distributed to members. The nominee purchaser should be unable to sell premises and distribute profits to members, except in very specific circumstances.

5.46 Finally, some responses focussed on how the prescribed articles might facilitate our proposed right to participate. For example, The Chartered Institute of Legal Executives ("CILEx") commented that the articles should provide a way for non-participating leaseholders to join at a later date, while Church & Co Chartered Accountants suggested that this would require "a process and valuation".

Restriction on future dealings with the freehold title

5.47 Well over half of consultation responses supported our provisional proposal that a nominee purchaser company should be restricted from disposing of the premises acquired on a collective freehold acquisition, save where:

(1) all the residential units within the premises are held on long leases, all the leaseholders are members of the nominee purchaser company, and all members of the company agree with the proposed disposition; or

(2) the Tribunal makes an order permitting the proposed disposition.

5.48 CILEx recognised the link between this proposal and our separate proposal for the introduction of a new right to participate. They agreed that it should not be possible "for a nominee purchaser company to dispose of the freehold at the expense of these rights".

5.49 However, there was also some strong opposition to our proposed restriction, particularly from professional consultees. The following arguments were advanced.

(1) Church & Co Chartered Accountants argued that placing restrictions on the nominee purchaser company's ability to deal with the freehold title will devalue the freehold, with the effect that it cannot be used as security for a loan. This may mean that a collective freehold acquisition cannot be financed in the first place.

(2) Similarly, the PBA and Hamlins LLP expressed concern that leaseholders might be deterred from making collective freehold acquisition claims by the possibility of being "stuck" with a property, if other leaseholders will not co-operate with a future sale. Hamlins asked why, instead of our proposal, the nominee purchaser company could not simply be required to serve notices notifying non-participating leaseholders of their intention to sell the freehold, and giving them a fixed period to exercise the proposed right to participate.

(3) Mark Chick pointed out that there might be many different situations in which it is desirable to dispose of the freehold following a collective freehold acquisition, for valid commercial reasons.

(4) Philip Rainey QC described our proposal as a "wholly unnecessary" restriction, which is driven solely by the need to preserve the proposed right to participate for the future. He also considered that it will be difficult to come up with an appropriate list of grounds on which the Tribunal should be entitled to grant permission for a disposition of the freehold.

5.50 In terms of those grounds, consultees provided a wide range of suggestions, including:

(1) where there is agreement by all members of the nominee purchaser company (or a high proportion thereof, or excluding only those who are uncontactable);

(2) after ten years have elapsed from the completion of the collective freehold acquisition claim, or after a period of inactivity;

(3) for the purposes of redevelopment or where the property is subject to a demolition order;

(4) where a collective freehold acquisition is "not working", or where there has been mismanagement, a lack of maintenance or a failure to comply with legislative requirements;

(5) where the company has defaulted on its liabilities, or is facing insolvency; or

(6) where the proposed transfer is in the best interests of the members of the company or the leaseholders.

5.51 On the other hand, some consultees took the view that the nominee purchaser company should never be entitled to dispose of the freehold. The Leasehold Knowledge Partnership ("LKP") and Leasehold Solutions (surveyors) explained that the purpose of a collective freehold acquisition "should be to allow leaseholders to take control of their own building or estate, not to gain an asset". As such, they did not consider that there are any circumstances in which it would be appropriate for the Tribunal to permit a disposition.

Discussion and recommendations for reform

The form of the nominee purchaser

5.52 We think that, under our new enfranchisement regime, leaseholders carrying out a collective freehold acquisition claim should be required to use a nominee purchaser which is a corporate body.

5.53 It was clear from consultee responses to our question about whether to require a company nominee purchaser that we are right to be concerned about the management and conveyancing issues which can arise where a collective freehold acquisition is carried out in the names of individual leaseholders. And while some consultees pointed to the risk that a nominee purchaser company may be struck off,

creating complications for the leaseholders, similarly difficult issues can arise where a property is held in individual names, such as on death or bankruptcy. We therefore do not consider that it is appropriate for leaseholders to carry out collective freehold acquisition claims in the names of individual leaseholders any longer, even if there may be some cases where that approach would be preferred by certain leaseholders.

5.54 Further, we do not think that there should be any exception to this requirement for smaller buildings, or otherwise. The exception to the requirement to use a company limited by guarantee which we proposed in the Consultation Paper was formulated so as to ensure that it would only apply where there were no remaining leaseholders (or potential leaseholders) who might later seek to exercise the right to participate, and we have concluded that we cannot recommend the introduction of the provisionally-proposed right to participate at this time.[20] But more generally, we are no longer convinced that it is appropriate for even a small building acquired by collective freehold acquisition to be held in the names of individual leaseholders.

(1) First, difficult issues of management are just as likely to arise in a small building as in a large one – and we think that a stalemate situation is perhaps even more likely where only a small number of leaseholders are involved. Leaseholders in small buildings would therefore benefit just as much as those in bigger buildings from the decision-making structure which a corporate structure provides.

(2) Second, we received numerous comments from consultees referring to the significant difficulties they have experienced, where a trust structure has been used, with transferring a share of the freehold title when an individual flat is sold. This concern applies equally to all buildings, regardless of their size.

(3) Finally, the idea behind permitting the use of named individuals as the nominee purchaser only in respect of buildings containing up to four residential units stemmed primarily from the fact that the legal title to land can be held by a maximum of four people.[21] Therefore, in buildings containing up to four residential units, at least one owner of each residential unit could be named on the legal title to the freehold. On reflection, however, we do not think the fact that at least one owner of each unit can be registered merits an exception. With so many leasehold properties owned by two or more people jointly, even in small buildings it would result in a trust structure for the freehold title under which not all of the leaseholders are named. We are concerned that leaseholders who are not named on the freehold title could be disadvantaged. Further, owing to the doctrine of survivorship, it is inevitable that the legal and beneficial title to the building will cease to coincide on the death of any participating leaseholder.

5.55 For these reasons, we think that the benefits of using a corporate body as the nominee purchaser on a collective freehold acquisition claim easily outweigh the short-term inconvenience and cost which leaseholders may incur in setting up the required structure, even in the case of smaller buildings. We do not, therefore,

---

20 See para 5.3 above and paras 5.222 to 5.246 below.

21 Law of Property Act 1925, s 34(2).

recommend the creation of any exception to the requirement to use a nominee purchaser which is a corporate body, whatever the size of the building being acquired.

5.56 As to the type of corporate body which may be used, a number of consultees made a convincing case for permitting other corporate structures to be used in addition to companies limited by guarantee, including companies limited by shares, limited liability partnerships ("LLPs") and certain co-operative structures.[22] Each of these different forms of corporate body will have their own specific advantages and disadvantages, and each group of leaseholders may have different reasons for wanting to acquire their freeholds and different views as to how to manage the same after the acquisition takes place. In particular, a number of consultees felt that a company limited by shares would offer a considerable advantage over a company limited by guarantee in a case where leaseholders do not contribute equally to the price payable for the collective freehold acquisition. Any corporate body, though, is likely to provide the same improvements in relation to clarity of ownership, smooth management and ease of conveyancing which we, and many consultees, have identified in relation to companies limited by guarantee.[23]

5.57 We do not think, until such time as the right to participate can be introduced,[24] that the enfranchisement regime needs to be or should be as prescriptive as the right to manage or commonhold regimes, under which a company limited by guarantee is used as the RTM company and the commonhold association respectively.[25] It is clear that consultees wish to retain the current ability to choose a corporate structure which suits their own particular needs. Accordingly, we do not recommend that a particular type of corporate body must be used as the nominee purchaser on a collective freehold acquisition claim. Rather, leaseholders should be free to choose the corporate form which is most suitable for their particular circumstances. We suggest only that a corporate structure which carries limited liability should be required, since the prospect of unlimited liability is likely to dissuade leaseholders from joining in a collective freehold acquisition.

5.58 We therefore recommend that leaseholders making a collective freehold acquisition claim should be required to use a corporate body with limited liability as the nominee purchaser.

---

22 Note that organisations which describe themselves as "co-operatives" may use a variety of legal forms, both incorporated (meaning that the organisation has legal personality and can hold property and enter into contracts) and unincorporated (meaning that the organisation does not have legal personality and must act via its individual members). Clearly, for a nominee purchaser, an incorporated form would be required, such as a co-operative society, company limited by guarantee or company limited by shares. An unincorporated association, which is a common form of co-operative, would not be suitable.

23 A "Tyneside lease", suggested by one consultee, is not a form of corporate structure and as such would not be suitable for use on a collective freehold acquisition claim. In any event, the Tyneside lease is a specific arrangement which is only suitable for use in buildings consisting of one ground floor flat and one first floor flat.

24 See para 5.3 above and paras 5.222 to 5.246 below.

25 The reasons why it is preferable for a company limited by guarantee to be used as the RTM company are set out in the RTM Report at paras 6.3 to 6.10.

Recommendation 17.

5.59 We recommend that leaseholders making a collective freehold acquisition claim should be required to use a corporate body with limited liability as the nominee purchaser, without exception.

Relaxation of company law requirements

5.60 Consultees have pointed out that the company law requirements which apply to a nominee purchaser in the form of a limited company are minimal. In many cases, all that is required is for the company to file annual accounts and an annual confirmation statement. Where the only money received by the company is service charge funds, which are held on trust for the leaseholders,[26] we understand that it will be sufficient to file "dormant accounts".[27] A tax return will also only be required where the company has other income.

5.61 We think that the filing of an annual confirmation statement and the filing of accounts are both important requirements for any company, including a nominee purchaser company. A nominee purchaser company will be the landlord not only of those leaseholders who participated in the collective freehold acquisition and are now members of the company, but also of those leaseholders who did not participate in the claim. The company exerts direct control over these individuals' homes and the services they receive, via its directors. We think it is important for leaseholders to be able to ascertain from Companies House the ownership of the company and its financial status. Further, we do not think that these basic filing requirements are overly burdensome or costly to comply with.

5.62 We do not, therefore, consider that any of the requirements of general company law ought to be relaxed in the case of nominee purchaser companies. In the light of our recommendation above that leaseholders may use any form of limited liability corporate body as a nominee purchaser, we also suggest that the same approach is adopted in respect of corresponding legislative requirements relating to any other corporate structure.

Prescription of articles

5.63 We acknowledge the concerns raised by numerous consultees that requiring leaseholders to use prescribed articles of association for a nominee purchaser company would restrict consumer choice and may not cater adequately for the varying circumstances of buildings acquired via collective freehold acquisition. We also note that, given our decision not to recommend the introduction of the right to participate at

---

26 Landlord and Tenant Act 1987, s 42.

27 "Dormant accounts" are an abridged and unaudited form of annual company accounts which can be filed at Companies House in place of full company accounts where a company is dormant (ie not carrying out any business activity or receiving an income).

this time,[28] there is no longer an immediate need for prescribed articles to protect leaseholders who might wish to exercise that right in the future.

5.64 On the other hand, we maintain that there are benefits which could be gained from at least some prescription of articles, such as making a collective freehold acquisition claim easier, quicker and cheaper for leaseholders, or providing a framework for the running of the nominee purchaser company after the claim has succeeded. A significant number of consultees did agree with our provisional proposal.

5.65 On balance, therefore, we agree with those consultees who suggested that rather than a prescribed set of articles which must be used, a set of *optional* model articles of association should be produced. We think that model articles would have the potential to assist a large number of leaseholders, while also retaining flexibility for leaseholders to take a different approach where it is desirable to do so. In the light of our recommendation above that leaseholders may use any form of limited liability corporate body as a nominee purchaser, we suggest that a model constitutional document ought to be produced for each of the main forms of corporate structure which leaseholders are likely to adopt. We would anticipate that the majority of groups of leaseholders making a collective freehold acquisition claim would choose to make use of such a document, either exactly as written or with no more than very minor amendments.

5.66 The precise contents of these model constitutional documents will require further work, and slight variations are likely to be required between those which are produced for each form of corporate structure. However, we think that each of the model documents ought to cover the following matters:

(1) the objects of the corporate body;

(2) the appointment and removal of directors and their powers, responsibilities and decision-making processes;

(3) the admission and removal of members (including the transfer of membership where an individual residential unit is sold) and related matters, such as limitation of members' liability, provision for "cash calls" on members, and members' voting rights;

(4) administrative matters, such as the organisation and running of meetings (including an annual general meeting) and the production of company accounts;

(5) the ability to arrange relevant insurances, such as directors' and officers' liability insurance; and

(6) how any income (for example, premiums from the grant of lease extensions, profits from the sale of parts of the building, or fees for granting consents to leaseholders) is to be dealt with.

[28] See para 5.3 above and paras 5.222 and 5.246 below.

We will refer the consultation responses which we received in response to this question to Government for consideration when drawing up the detail of model articles dealing with each of the above matters.

5.67 We note that a number of consultees suggested that prescribed or model articles for a nominee purchaser company could be based on the existing prescribed articles for RTM companies.[29] We do not think that it would be possible simply to adopt the RTM articles without considerable modifications. To begin with, nominee purchaser companies exist for a different purpose from RTM companies, meaning that their stated objects would necessarily have to be different. For the same reason, not all of the provisions within the RTM articles would be suitable for a nominee purchaser company. For example, the provisions governing voting rights in an RTM company are designed to give the landlord a vote,[30] which is not necessary where the landlord's interest in the building has been acquired. Conversely, there are also issues raised by collective freehold acquisition for which the RTM articles make no provision, such as the distribution of income which the nominee purchaser receives as landlord. Nevertheless, we agree that on a number of the above matters which are relevant in both contexts – such as the appointment and removal of directors and their decision-making processes, and company administrative matters – the RTM articles are likely to provide a useful framework for developing model constitutional documents for nominee purchasers. Regard should also be had to the articles which are prescribed for commonhold associations.[31]

Recommendation 18.

5.68 We recommend that an optional model constitutional document should be produced for each type of corporate body which might be used as the nominee purchaser on a collective freehold acquisition claim.

Restriction on future dealings with the freehold title

5.69 Our proposal for restrictions on a nominee purchaser's ability to dispose of premises acquired on a collective freehold acquisition was designed largely to prevent leaseholders who participated in the claim from acting to block non-participants' ability to join in at a later date, using our proposed new right to participate. Since we are not recommending the introduction of the right to participate at this time, it follows that the immediate need for the proposed restriction on disposals also falls away.[32]

5.70 There is, of course, an argument that the retention of premises acquired via a collective freehold acquisition within one of the mandated limited liability corporate

---

29 We have recommended in the RTM Report that those prescribed articles should remain under a new RTM regime (subject to a small number of changes). See the RTM Report, paras 6.38 to 6.102

30 See the RTM Report, paras 6.44 to 6.85.

31 Commonhold Regulations 2004 (SI 2004 No 1829), sch 3, as amended by the Commonhold (Amendment) Regulations 2009 (SI 2009 No 2363).

32 Our decision not to recommend the introduction of the right to participate at this time, including the challenge of developing appropriate anti-avoidance measures, is discussed at paras 5.222 to 5.246 below.

forms is a good thing in any event. This means of ownership ensures ongoing clarity for leaseholders, and that a sensible decision-making structure remains in place. However, we think that it would be disproportionate to prevent a nominee purchaser from dealing with its freehold title purely because we are concerned that, in rare cases, the leaseholders who are members of that body might choose to transfer the freehold into a less desirable ownership structure (such as individual names). We agree with consultees that this kind of restriction is likely to diminish the value of the freehold title, to the detriment of the leaseholders who have purchased it. For example, any development value paid by the leaseholders to their landlord as part of the price paid for the freehold would effectively be wiped out if the nominee purchaser cannot realise that value by selling part of the building or land acquired.

5.71 We also acknowledge that there can be many legitimate reasons why a group of leaseholders, having acquired their freehold, might decide at a later date to dispose of it. One such reason (mentioned by a few consultees) might be that a building has reached the end of its useful life and requires redevelopment. Another might be that the leaseholders simply no longer wish to own and manage the building. It seems unfair that the participating leaseholders in these scenarios might be required to incur the cost and inconvenience of applying to the Tribunal for permission to dispose of the freehold title, just because one or two other leaseholders either have not participated in the collective freehold acquisition, or refuse to agree to the disposal.

5.72 Accordingly, we have decided not to take forward our provisional proposal.

MULTI-BUILDING COLLECTIVE FREEHOLD ACQUISITION CLAIMS

5.73 As noted above, one of the limitations of the current collective enfranchisement regime is that the right is restricted to the acquisition of a single, self-contained building or part of a building. More than one building cannot be the subject of the same claim, even if those buildings form part of an estate and are currently owned and managed together. In the Consultation Paper, we therefore proposed that the right of collective freehold acquisition should extend to permitting leaseholders on an estate comprising multiple buildings – whether those buildings are houses or blocks of flats – to acquire the freehold of the whole estate.[33] We named this concept "estate enfranchisement". We asked consultees whether they agreed with this proposal.[34]

5.74 In terms of the operation of estate enfranchisement, we suggested that it should be available wherever the leaseholders in multiple buildings contribute to a common service charge. We thought that this might be an appropriate way of identifying those buildings which constitute an estate. We also set out a suggested approach for dealing with cases where there has already been some prior enfranchisement of houses or buildings forming part of an estate, and suggested that individual buildings should continue to be able to carry out individual freehold acquisitions or collective freehold acquisitions following an estate enfranchisement.[35] We asked consultees for their views on this suggested approach and on any other issues relating to the

---

33 See CP, paras 6.93 to 9.65.

34 See CP, Consultation Question 25, Pt 1, para 6.96.

35 See CP, paras 6.95(2) and (3).

operation of estate enfranchisement.[36] Separately, in Chapter 8 of the Consultation Paper, we proposed that the usual qualifying criteria and participation requirements for a collective freehold acquisition claim should apply equally to an estate enfranchisement claim, but by reference to the units on the estate as a whole rather than to the units of a particular building.[37] We asked consultees whether they agreed with this proposal.[38]

5.75 It should be noted that our proposal for estate enfranchisement did not extend to suggesting that, where a building forms part of an estate, the leaseholders should be *obliged* to bring an estate enfranchisement claim rather than a claim in respect of an individual building on the estate. While practical complications can arise where one of several buildings which share facilities or services carries out an enfranchisement claim, these are not generally insurmountable, and do not, in our view, provide sufficient justification to deprive leaseholders of a right which they currently enjoy. In many cases, it will be more difficult to organise a claim involving multiple buildings than a claim in respect of a single building. To insist on estate enfranchisement, where this is possible, would therefore have the effect of reducing access to enfranchisement for many leaseholders. Accordingly, our proposal was for the introduction of estate enfranchisement as an additional option for leaseholders on an estate, rather than as a replacement for their existing collective freehold acquisition rights.

5.76 The RTM Consultation Paper contained a similar proposal to enable leaseholders to make a right to manage claim in respect of more than one building.[39] However, in that context, we proposed a different approach which we termed the "flexible model". Under the "flexible model", we suggested that leaseholders should not be limited to acquiring the RTM in respect of either the whole of an estate or a single building. Instead, it should be possible to make a claim in respect of any number of buildings which form either the whole or just part of an estate – though each of these buildings would have to qualify individually for the RTM. We also proposed that it would be necessary for the buildings forming the subject of a multi-building RTM claim to be linked by payment of a common service charge, as with our proposal for estate enfranchisement, or by shared appurtenant property.[40] We explained that enfranchisement might justify a different approach because of its focus on ownership rather than management.[41]

Consultees' views

The concept of estate enfranchisement

5.77 A significant majority of consultees who responded to our question about estate enfranchisement supported our proposal. The concept was especially popular with leaseholders and their representative bodies. These consultees spoke of the potential of the proposal to give leaseholders more control over their surroundings and to

---

36 See CP, Consultation Question 25, Pt 2, para 6.97.

37 See CP, para 8.156.

38 See CP, Consultation Question 54, para 8.157.

39 See RTM CP, Ch 4.

40 See RTM CP, paras 4.24 to 4.31 and 4.51 to 4.70.

41 See RTM CP, paras 4.48 and 4.70.

improve the management of estates. Nicola Jenkinson wrote that it would "give greater powers to homeowners to control the costs of maintaining the estate and take the power away from the management companies", while Emma Latham (a leaseholder) thought the proposal was a "brilliant way to build community and have autonomy in looking after one's space".

5.78 Other consultees focussed on the cost savings which might result from our proposal, both in terms of the procedural costs of enfranchisement and in respect of ongoing management costs thereafter. In relation to the former, Julian Wilkins & Co Chartered Surveyors explained that "often it makes more sense to purchase a whole development rather than an individual building or each building individually. This… is likely to reduce costs of the enfranchisement". As to the latter, Franciszka Mackiewicz-Lawrence commented that management of an entire estate "should allow the estate to benefit from economies of scale in terms of services provision". Similarly, Shepard Way Residents Association thought the proposal would "help avoid the confusion, disagreements and costs which are likely to arise where two or more parties are responsible for managing different parts of an estate, originally designed to be managed as a single unit".

5.79 In relation to costs, however, we note that some consultees appeared to believe that estate enfranchisement would result in the removal of estate service charges altogether. This is a misunderstanding. As with the collective freehold acquisition of a single building, an estate would still require maintenance following the claim, which would have to be paid for by the leaseholders pursuant to the service charge provisions of their leases. The difference is that these charges would be paid not to an external freeholder but to the nominee purchaser company, which would be owned and controlled by the participating leaseholders.

5.80 Those who did not support the concept of estate enfranchisement thought that it would be too great a burden for leaseholders to take on and that uptake would be low. Irwin Mitchell LLP were of the view that most groups of leaseholders would not have the level of expertise required to run a whole estate. Howard de Walden Estates Ltd (a landlord) doubted whether leaseholders would want to take advantage of the right, as "the common service charge would most likely only apply to ground maintenance, lighting, etc. which would not of itself warrant acquisition of an estate". Some consultees suggested that the involvement of a greater number of leaseholders in a freehold acquisition claim would make the claim itself more difficult to carry out.

5.81 Other consultees expressed wider concerns with our proposal. Church & Co Chartered Accountants thought that, once exercised, the proposed estate enfranchisement right would limit the opportunity for further "infill" development on the estate and therefore "reduce future housing provision within existing towns and cities". This was also a concern for local authorities, with the London Borough of Islington pointing out that they cannot afford to purchase additional land on the open market and "must make the best use of the land assets they have". Westminster City Council observed that development by local authorities is important to provide new affordable homes, whereas a nominee purchaser could potentially develop unused land on estates for private financial gain. The Wellcome Trust (a charity landlord) thought our proposal went "far beyond what the statute intended", while Cadogan, a landlord, said:

> The concept of being able to enfranchise "an estate" is unfair on the freeholder and unnecessary. The objective of enfranchisement is to provide continuity to leaseholders. The objective of the freeholder is to manage "the estate" to benefit all. The two objectives are entirely different.

5.82 Several consultees also queried how the right would interact with the right of individual freehold acquisition for houses on an estate, and the right of collective freehold acquisition for individual buildings. One leaseholder was concerned that those who had already enfranchised would be disadvantaged by our proposal:

> Where some residents on an estate have purchased a part of their freehold in the past, and the remaining residents club together to buy the full estate, there would need to be some protection for those existing freehold owners. People buy their freehold because they want to feel as though they own their home - that right should be respected and not watered down by any estate purchase.

5.83 Similarly, several consultees raised concerns stemming from our proposal in Chapter 8 of the Consultation Paper that, for an estate enfranchisement claim, the qualifying criteria and actual participation requirements which apply to an ordinary collective freehold acquisition claim should be applied across the estate as a whole rather than on a per-building basis. These consultees pointed out that, on this proposal, a building could be acquired as part of an estate enfranchisement claim which would not qualify on its own for an ordinary collective freehold acquisition claim – for example, a building with a significant proportion of social housing tenants.[42] Local authorities expressed concern that social housing tenants could end up with new landlords who do not have the necessary expertise to meet their needs, or could end up feeling marginalised if they are no longer able to influence the management of their estate.[43]

5.84 Likewise, Long Harbour and HomeGround pointed out that "whole buildings could be included within a freehold claim where there are no participating leaseholders". Morgoed Estates Ltd, another landlord, contended that this may "lead to a situation where some lessees, who are content with existing arrangement, may fall under the control of tenants of other blocks".

5.85 Finally, both The Law Society and The National Housing Federation considered that it was inappropriate for estate enfranchisement to be available in respect of "mixed-use" estates.

Workability

5.86 Despite the level of support for estate enfranchisement in principle, we received a large number of responses casting doubt on the workability of our proposal. The key

---

[42] We proposed in the CP, and recommend in Ch 6 below, that the new enfranchisement regime should retain the requirements under the current law that at least two-thirds of the residential units in a building must be let on long leases for the building to be eligible for a collective freehold acquisition claim, and that the owners of at least half of the residential units in the building must participate in such a claim. See CP, paras 8.135 to 8.144 and paras 6.239 to 6.521 and 6.266 to 6.281. Where a building contains a significant number of residential units let to social housing tenants, it is less likely that these requirements will be satisfied.

[43] We understand that estates owned by local authorities will often have a form of "Residents' Council", which can be joined by both leaseholders and short-term tenants.

concern, expressed by freeholders and professionals in particular, was the question of how an "estate" is to be defined.

5.87 A majority of consultees who commented on this issue did not agree with our suggestion that estate enfranchisement should be available wherever buildings contribute to a common service charge. As the National Housing Federation pointed out, the way that service charge pools are organised will not necessarily correspond to what we might ordinarily consider to be the boundaries of an "estate". A number of local authority consultees gave specific examples to demonstrate this point, such as a communal heating system which supplies multiple estates, or perhaps a terrace of on-street houses. The London Borough of Camden provided a detailed response explaining that some of its leaseholders pay a service charge made up of several elements, each common to a different combination of buildings. They felt that it would "create mayhem" if leaseholders had a number of parallel collective freehold acquisition rights in respect of different "estates".

5.88 Comments of this sort were not confined to consultees from the social housing sector. A number of commercial freeholders and professionals observed that whole streets or properties situated around a garden square – or perhaps even larger areas, such as those sometimes described as the "great estates" of London – might be eligible for estate enfranchisement on the basis of a common service charge. Damien Greenish (a solicitor) and the Portman Estate (a landlord) gave identical responses, stating:

> If the only criterion is to be multiple buildings contributing to a service charge, that potentially means an entire estate where the buildings contribute a service charge under an Estate Management Scheme would be potentially enfranchiseable. This would have devastating consequences for some of the London Estates.

5.89 Accordingly, many consultees felt that estate enfranchisement should be confined to modern, purpose-built housing estates "within defined boundaries where… the houses enjoy common facilities over roads, services etc", and "modern developments comprising several blocks which share services". Notably, though, no consultee offered a definition or set of objective criteria which would capture these developments, while excluding those groups of buildings with a more tenuous connection described above. Indeed, several consultees expressed concern that attempts to define an estate had the potential to be a fruitful source of litigation, much like the definition of a house in the 1967 Act.[44]

Discussion and recommendations for reform

A new right: multi-building collective freehold acquisition

5.90 The idea of being able to acquire, together, the freehold of several buildings located on an estate was clearly popular with consultees, and we consider that the introduction of such a right would be a desirable development. There are obvious practical benefits which flow from managing closely-related buildings together, such as smoother delivery of services and economies of scale in terms of costs. Perhaps less tangibly, we think that leaseholders who are engaged with their wider surroundings beyond just the building in which they live are likely to experience an

---

[44] See CP, paras 7.32 to 7.58.

increased sense of control over their home lives and an enhanced connection to their neighbours and community.

5.91 We do not think that consultees who argued against the creation of the right gave convincing reasons for doing so. In response to those consultees who considered that leaseholders would not have the expertise required to run an estate, we note that leaseholders are likely to appoint professional managers to do so. Enfranchisement will, however, enable the leaseholders to determine who is appointed to that role, and to benefit from the economies of scale that will come from managing multiple buildings jointly. In respect of concerns about the loss of land which might have been used for future housing provision, we consider that similar concerns could be raised in the case of any ordinary collective freehold acquisition claim which involves the acquisition of land with development potential. In any event, the potential future use of land for another desirable purpose must always be balanced against the rights of existing leaseholders to take control of their homes.

5.92 However, consultees have identified a significant question over the feasibility of the scheme which we proposed in the Consultation Paper: is it possible to come up with a coherent definition of an "estate"?

5.93 On further consideration, we accept that the suggestion we put forward in the Consultation Paper – that an estate consists of all of the buildings which contribute to a common service charge – is unsatisfactory. It is clear from consultees' responses that there are likely to be many groups of buildings which have a shared service charge responsibility but which one would not, objectively, describe as forming an estate. A good example is that of a terrace of leasehold houses which share a garden square, with the upkeep of the garden funded via a service charge provision within the lease of each house. These are not the kinds of properties at which our estate enfranchisement proposal was directed.

5.94 Similarly, we think that asking whether buildings share appurtenant property, as suggested in the RTM Consultation Paper, is likely to be an unsatisfactory tool by which to attempt to define an estate. It will not always capture all groups of buildings which in ordinary language would be described as an estate, and might equally capture other groups of buildings which common sense would suggest should not be the subject of a single collective freehold acquisition claim.

5.95 We are inclined to agree, for the most part, with those consultees who considered that estate enfranchisement should be available only in respect of a typical, modern housing estate with shared access roads, or a development of several blocks of flats within a shared boundary and served by shared facilities. It was precisely such developments that we had in mind when we formulated our provisional proposal. However, we acknowledge that it would be extremely difficult to come up with a workable definition of this kind of "estate", given the inevitable variation in design and features which exists from one property development to another.

5.96 Additionally, we can understand why consultees disagreed with our suggestion that on an estate enfranchisement claim, the qualifying criteria and participation requirements which apply to any collective freehold acquisition claim should be applied across an estate, rather than requiring each building included within the claim to satisfy these

criteria in its own right.[45] Our suggestion was aimed at keeping matters as simple as possible, but of course would have the result that buildings which do not currently satisfy the qualifying criteria to be eligible for a normal collective freehold acquisition claim might be acquired as part of an estate claim. We accept that this approach could be especially problematic in relation to buildings which are of a character which is fundamentally unsuitable for collective freehold acquisition, such as buildings of which the majority is intended for commercial use, buildings containing a large number of social housing tenants rather than long leaseholders, or buildings held by a commonhold association.[46]

5.97 Our proposed approach could also enable some leaseholders on an estate to acquire the freehold of a building which qualifies for a collective freehold acquisition claim but contains very few leaseholders who are participating in the claim – or perhaps even none at all. We recognise that, from the perspective of the leaseholders in such a building, the estate enfranchisement would merely serve to replace one external landlord with another. The claim would not represent the wishes of the owners of a majority of the residential units in the building, in the way that a normal collective freehold acquisition claim does.[47]

5.98 For all of these reasons, we have decided to move away from the approach outlined in the Consultation Paper. Instead of looking to define an estate, we recommend that leaseholders be permitted to bring a collective freehold acquisition claim to acquire any two or more buildings (or, indeed, self-contained parts of buildings) together – whether those buildings are houses or blocks of flats – using one claim notice and one nominee purchaser. This would be possible even if there is no particular "link" between the buildings or parts of buildings, but each must satisfy all of our recommended qualifying criteria and participation requirements for a collective freehold acquisition (or, in the case of a house, the criteria for an individual freehold acquisition).[48] We call this a "multi-building collective freehold acquisition". It is obviously desirable that the law on collective freehold acquisition aligns with that of the right to manage where appropriate, and we recommend the same approach to RTM claims in the RTM Report.[49] On reflection, we do not consider that the fact that enfranchisement is focussed on ownership rather than on management requires or merits a different approach in the two regimes. The same issues are likely to arise where the right is being exercised in relation to more than one building, regardless of whether the RTM or enfranchisement is under consideration.

5.99 This recommendation provides maximum choice and flexibility to leaseholders, rather than restricting them to acquiring either a single building or a whole estate (however that might be defined). It will enable leaseholders to choose to own and manage a

---

45 Our recommendations as to the qualifying criteria and participation requirements for a collective freehold acquisition claim are set out in detail in Ch 6 below, from para 6.233 onwards.

46 These types of buildings do not meet the qualifying criteria for a collective freehold acquisition claim: see Ch 6 below, from para 6.233 onwards.

47 See paras 6.267 to 6.281 below: the leaseholders of at least half of the total number of residential units in a building must participate in a collective freehold acquisition.

48 See Ch 6 below.

49 See the RTM Report, Ch 5.

number of buildings together wherever they consider this to be desirable, rather than in accordance with an inflexible statutory definition of an estate. While we would hope that where it makes for better management, leaseholders would still endeavour to acquire the entirety of a clearly-defined estate, there is not necessarily any reason to prevent the acquisition of part only of such an estate where that is what is available or possible. Acquiring two out of three buildings on an estate is, after all, no more likely to be problematic than acquiring one, which is what the law of collective enfranchisement permits at present. At the same time, the requirement that each building must satisfy the qualifying criteria and participation requirements will ensure that any multi-building claim has the support of a majority of the residential units in each building, and does not include buildings which are not suitable to be the subject of an enfranchisement claim.

5.100 That said, we appreciate that dispensing with the need for any kind of link between the buildings to be acquired may seem at first glance to be a bold recommendation. In theory, for example, the leaseholders of a building in Liverpool and those of a building in London could carry out a joint collective freehold acquisition claim to acquire both buildings in the name of the same nominee purchaser. But, since we also recommend a requirement that each building to be included in a multi-building claim must meet the usual qualifying criteria and participation requirements for a collective freehold acquisition, this is not actually so significant a departure from the current law as it might sound. At present, where any two buildings (related or otherwise) qualify for collective enfranchisement, each can make a claim naming the same nominee purchaser, so that the buildings ultimately end up in common ownership. Indeed, this is a common method used by leaseholders on developments consisting of several blocks of flats to achieve the effect of "estate enfranchisement" at the moment. Our recommendation, in effect, simply removes the need for the leaseholders in this scenario to make two separate claims. Most importantly, though, we think it is highly unlikely that leaseholders would wish to carry out a multi-building collective freehold acquisition of buildings which do not have some form of suitable connection between them, such that it is sensible for them to be owned and managed together. If a sufficient number of leaseholders are in support of two or more buildings being managed together, we consider that there is likely to be a good reason for their decision and we therefore see no reason to prevent such a claim proceeding.[50]

5.101 In reality, much of the concern which consultees expressed with our provisional proposal stemmed from our suggestion that it would not be necessary for each individual building within an estate enfranchisement claim to meet the qualifying criteria and participation requirements for a collective freehold acquisition. Combined with the likely difficulty of defining an estate, it was this suggestion that led some landlords to fear that they would lose substantial properties which they had truly never envisaged losing to enfranchisement, or which are not suitable for enfranchisement. The need for qualifying criteria and participation requirements to be met by each building included within a multi-building collective freehold acquisition claim now addresses this concern.

---

[50] One can imagine, for example, two similar blocks of flats next door to one another. Although there may be no formal connection between the two, they might enjoy cost savings by employing the same managing agents, cleaners and gardeners to attend to both blocks.

Recommendation 19.

5.102 We recommend that leaseholders should be permitted to bring a collective freehold acquisition claim to acquire any two or more buildings (or self-contained parts of buildings) together, using one claim notice and one nominee purchaser. However, each building (or part of a building) must satisfy all of the usual qualifying criteria and participation requirements for a collective freehold acquisition (or, as the case may be, the criteria for an individual freehold acquisition).

The operation of multi-building collective freehold acquisition claims

5.103 As we identified in the Consultation Paper, the introduction of a right to acquire the freehold of multiple buildings together raises a number of practical questions.

5.104 First, there is the question of whether a building or part of a building which has already been the subject of an ordinary collective freehold acquisition claim can be acquired as part of a subsequent multi-building claim. A number of consultees expressed the view that those who have already purchased their freehold should not stand to have this taken from them by reason of a later multi-building claim. We agree, although we note that the effect of our recommendation above is that this would not be possible in any event. Because the qualifying criteria and participation requirements must be met in respect of each building to be included in a multi-building claim, it follows that no building could be acquired without the consent of the owners of a majority of the residential units in that building. Equally, though, there is nothing to prevent the leaseholders in a building which previously been the subject of an ordinary collective freehold acquisition claim from taking part in a later multi-building claim, bringing their building into joint ownership and management with another building (or buildings), should a sufficient number of them wish to do so. We think that this is right. One building may have been in a position to enfranchise before another, and thus have done so, but the ideal long-term outcome might still be for them to be managed together.

5.105 We think it is unlikely that former leaseholders of houses who have already bought their own individual freeholds would later want to participate in a multi-building claim. To do so would, we think, require them to grant themselves a lease of their house, so that they are eligible to participate, and they would of course remain a leaseholder after the multi-building claim completes. Again, though, we see no reason to prevent this course of action. There may be occasional cases where the owner of a house wishes to be a member of the company which owns and manages their wider surroundings.

5.106 Next, there is the related question of whether it is possible for a building to be "joined" to another building which has previously enfranchised (thus creating a multi-building arrangement), or to a number of buildings which have previously carried out a multi-building claim (thus adding another building to the arrangement). This possibility is, in effect, not very different from that described at 5.104 above. It could be achieved by way of a collective freehold acquisition claim brought by the building which wishes to join, in which the name of the nominee purchaser from the previous collective freehold

acquisition claim is given as the intended nominee purchaser for the later claim. As well as the participation of a sufficient number of leaseholders in the building which is joining, the consent of that nominee purchaser would therefore be necessary.

5.107 Finally, we have considered whether it should be possible for the leaseholders in a building which has been acquired as part of a multi-building collective freehold acquisition claim to break away from that multi-building arrangement by carrying out their own collective freehold acquisition claim against the nominee purchaser used in the multi-building claim. We think that it should. There may be cases where a number of buildings which were acquired together are being managed badly, and it is therefore in the interests of one of those buildings to be owned and managed individually going forward. However, we have recommended later in this chapter that there should be a defence to a collective freehold acquisition claim where the premises which it is sought to acquire have been the subject of a successful collective freehold acquisition claim within the preceding two years.[51] As we discuss further at paragraph 5.218(2) below, we see no reason why that defence should not equally be available in the case of a claim by the leaseholders of one building to break away following a previous multi-building collective freehold acquisition. As such, it may not be possible to make such a claim until at least two years have elapsed from the completion of the multi-building collective freehold acquisition claim.

5.108 We do not think that any recommendations are needed to provide for the outcomes described in the above paragraphs. They follow as a consequence of our recommendations at paragraph 5.102 above and at paragraph 5.221 below.

PREMISES TO BE ACQUIRED ON A COLLECTIVE FREEHOLD ACQUISITION

5.109 In the Consultation Paper we made provisional proposals designed to increase the extent of the land which leaseholders are entitled to acquire when they make a collective freehold acquisition claim. We also aimed to simplify the law so that it is easier for leaseholders to work out what premises they are entitled to acquire.

5.110 First, we provisionally proposed that leaseholders should acquire both the building which is the subject of the claim, including any common parts of that building, and any other land let with the flats within it – for example, garages or parking spaces which have been let to individual leaseholders. We did not propose that the "other land" described here needed to be within the curtilage of the relevant building. We thought that widening the extent of land which leaseholders are able to acquire in a collective claim would remove arguments based on the current alternatives that can be offered by landlords, and would allow leaseholders to acquire more of the property that they had been enjoying as part of their leases. We also thought that our proposal would make it easier for leaseholders to understand what land they are entitled to claim and thereby reduce the need for legal advice on such issues.[52]

5.111 Second, we provisionally proposed that leaseholders should be entitled to acquire other land over which they exercise rights in common with others, provided the exercise of such rights is shared only with other occupiers of the same building. Under

---

51 See paras 5.214 to 5.221 below.

52 See CP, paras 6.98 to 6.99.

the current law, instead of transferring the freehold of such land, the landlord has the option to grant such permanent rights over that or other land as will ensure (insofar as possible) that the leaseholders will enjoy the same rights over that property as those currently enjoyed. Under our proposal, the leaseholders could instead call for the freehold of that land to be transferred. In other words, we proposed the removal of the current unfettered right for the landlord to replace a transfer with the grant of rights only over such land.[53]

5.112 We asked consultees whether they agreed with each of these proposals.[54]

Consultees' views

The building (including common parts) and other land which is let with the flats

5.113 The vast majority of consultees agreed with our provisional proposal that leaseholders making a collective freehold acquisition claim should acquire the freehold to the building which is the subject of the claim, including any common parts of that building, and any other land let with the flats within it. They supported our proposal that the leaseholders should not be limited to acquiring land that is within the curtilage of the building. Only a few consultees disagreed.

5.114 Some consultees suggested refinements that might be made to our proposal.

(1) First, some consultees stated that common parts or other land let with the flats should not be acquired where this would create a flying freehold. For example, Irwin Mitchell LLP commented that "care will need to be taken to avoid flying freeholds arising where the surface of car parking spaces in underground car parks are let".

(2) A couple of consultees suggested that leaseholders should be able to *choose* whether to acquire any land outside of the building in which the flats are situated (rather than being required to do so).

5.115 Consultees who agreed with our provisional proposal pointed out that it has two significant benefits. First, several consultees (particularly leaseholders) indicated that the issue was one of control: that leaseholders seeking to acquire their freeholds wanted control of their buildings. For example, Kathryn McGouran and Graham McGouran (both leaseholders) commented that "most leaseholders wish to have complete control over the buildings and associated land". Leasehold Solutions said that "this is the purpose of leaseholders buying their freehold … they should take full control of their building or estate".

5.116 Second, a couple of consultees commented that our proposal would avoid the potential for conflict between the nominee purchaser and a party who retains common parts or other land. For example, Franciszka Mackiewicz-Lawrence, said that "fractured management of the various areas is likely to be expensive and contentious". Midland Valuations Ltd (surveyors) agreed:

---

53 See CP, paras 6.100 to 6.102.

54 See CP, Consultation Question 26, paras 6.103 to 6.104.

It is ludicrous to exclude common parts or any other land let with the flats within the building. All this does is to cause conflict with the entity retaining such common parts or other land or serves as a way that the entity can hold the purchasers to ransom.

5.117 Those consultees who opposed our proposal raised particular concerns regarding split freehold titles and land with development potential.

(1) In a straightforward case, other land which is let with the flats in a building will be owned by the same landlord. But several consultees, including The Wallace Partnership Group and Howard de Walden Estates Ltd (both landlords), and Paul Tayler Ltd (surveyors), pointed out that this will not always be the case. Sometimes, these parts of a development will fall within a different freehold title, which these consultees felt would lead to difficulties. The Wallace Partnership Group suggested that, in these cases, leaseholders should only be able to acquire the other land "subject to the agreement of the landlord in question".

(2) It was also pointed out that a building and its common parts, as well as other land let with the flats in the building, can have development potential. Some consultees simply expressed the view that this value would have to be factored into the premium for the collective freehold acquisition. But others argued that this should be a reason for those areas not to be acquired by the leaseholders. Apex Housing Group (managing agents) said:

> We broadly agree… provided that any existing rights to develop common areas and/or rooftop space are taken into account… we suggest that the freeholder be able to propose to retain some of the common parts, including airspace, for development purposes. It may be that if this reduces the enfranchisement premium, the leaseholders would be happy for this to happen.

Church & Co Chartered Accountants wrote:

> On many sites, whilst preserving the leaseholders existing rights to a carparking space, the area above such areas is ripe for incremental development. To transfer these areas freehold to the leaseholders will stop such development. Both the labour mayor of London and the conservative government have policies in place that request additional density of housing within the existing built environment. To change enfranchisement in this way would catastrophically affect their policy.

5.118 Other consultees were simply concerned about the potential impact of our proposal on the outgoing landlord. For example, Wedlake Bell LLP (solicitors), said that "where the freeholder has a need to use the common parts and/or any other land let with the flats and proper protection in the form of easements in favour of the lessees is provided, then the need to expropriate such property interests is not made out". The Hampstead Garden Suburb Trust thought that landlords should in some cases be entitled to retain communal areas. They wrote:

> There should be the option for landlords of larger estates to apply to retain communal areas under their own management where they retain a long-term interest in the estate. Otherwise such landlords' good estate management, such as

investing in staff and good records required for effective estate management, will be damaged and eventually disincentivised.

Similarly, Stephen Desmond thought that "consideration should be given to what rights (if any) the transferring freeholder would be entitled to reserve, but only in the event that the transferor does retain adjoining land and, perhaps, where the rights are equivalent to those enjoyed under the leases for the benefit of such 'retained' land".

A difficulty concerning our proposal about "other land let with the flats"

5.119 Our proposal that leaseholders making a collective freehold acquisition claim should acquire *any* land let with the flats in the building faces the same problem, however, that arises in relation to our equivalent proposal in respect of lease extensions and individual freehold acquisition claims. We discuss this problem in detail in Chapters 3 and 4.[55] The difficulty is that a lease of one or more flats within a building may also include entirely unrelated property.

5.120 Some consultees raised this difficulty in relation to collective freehold acquisitions. The Portman Estate commented that leaseholders should not be entitled to include within their extended lease land which has nothing to do with their flat. It considered that there must be some connection between the land and the unit over and above the fact that both are let under the same lease.

5.121 Berkeley Group Holdings PLC also raised a similar issue. They thought our proposals were "too wide and blunt for more complex developments". They suggested the freehold acquisition of all the common parts should not be permitted where, for example, "the block is situated above a communal structure, such as a communal basement car park that serves the wider estate" (unless the whole estate was being collectively acquired). They thought that in such circumstances "regard should be made to the character of the land let".

Land over which the leaseholders exercise exclusive rights

5.122 The vast majority of consultees also agreed with our provisional proposal that leaseholders should be able to acquire land over which the occupiers of their building exercise exclusive rights.

5.123 Some consultees said that this proposal has clear benefits. A number of leaseholders described our provisional proposal as "common sense" or as being "obvious and straightforward". Christopher Balogh said that our proposal "is in the interests of clarity and certainty and of the avoidance of costs". A couple of consultees referred again to the issue of control. A residents' association which wished to remain anonymous said "we do not want to be held to ransom by the freeholder retaining small parcels of land". A leaseholder who wished to remain anonymous wrote:

> This would give us control of our own car park and our own gardens – currently rented out for profit by our freeholder. Please do this, give us some teeth.

5.124 Other consultees suggested that landlords do not have a legitimate interest in retaining land used solely by the leaseholders within a particular building. Hayes Point

---

[55] See paras 3.125 to 3.137 and paras 4.21 to 4.26 above.

Collective Freehold Ltd and Jennifer Ellis (a surveyor) told us that landlords sometimes use the ability to retain land as a "ransom" in the claim: in other words, a landlord may agree to transfer land which they are not strictly obliged to transfer, if the leaseholders will pay a substantially enhanced premium.

5.125 Philip Rainey QC said that he agreed with our proposal provided that leaseholders will still retain the right under the current law to claim land that is not used exclusively by the residents of a single building. However, he suggested that leaseholders should have the absolute right to acquire land where "it is used in common only by enfranchising blocks [but is also] subject to a public right of way".

5.126 On the other hand, the same concerns discussed above relating to split freehold titles and land with development potential were raised in relation to this proposal.[56] Indeed, many consultees, irrespective of whether they supported our provisional proposal, noted that giving leaseholders an unfettered right to acquire other land might restrict development, or may increase the premium that leaseholders have to pay. Bretton Green Ltd (a developer) considered that "there may be other reasons why that land is kept separate, for example if it could offer access to third-party land which might be developed". They asked: "Why should leaseholders be given that windfall gain or gain control of access to third-party land"?

5.127 Several landlords and a couple of professionals objected to our provisional proposal with complaints of general unfairness to landlords. Long Harbour and HomeGround, as well as the PLA, said that our proposals go beyond the purpose of enfranchisement law, by allowing leaseholders to acquire greater rights over other land than they enjoyed under their leases, and depriving the landlord of land that was not included in the leaseholders' demises. These consultees raised concerns about ensuring sufficient compensation is paid to landlords, with Long Harbour and HomeGround commenting that our proposal might be a disproportionate interference with the human rights of landlords.

5.128 A couple of consultees thought that it would be unfair for leaseholders to be able to "cherry-pick" land which was easy to manage and leave the freeholder with the remainder. Others warned that our provisional proposal might lead landlords to terminate existing rights (where possible), in order to avoid being required to sell the land subject to the rights as part of a collective freehold acquisition claim.

Other comments made by consultees

5.129 Finally, in response to this consultation question, the London Borough of Camden drew our attention to an odd outcome under the current law. They wrote:

> One issue we have discovered is that enfranchising leaseholders can only acquire the freehold of garden land they have rights over. This creates the absurd situation where we must first deny the right of the leaseholders to acquire the freehold of a rear garden used solely by a secure tenant and then we voluntarily offer the freehold of the garden so that it can form part of the leaseback! If we do not then the freehold

[56] See para 5.117 above.

of the rear garden land will be left with Camden, and, if only accessible via the tenant's flat, will be land locked.

5.130 The Places for People Group Ltd (a developer) queried how our proposals might work on an estate where multiple buildings are being acquired, commenting that there should be as little uncertainty or negotiation as possible over what land is to be acquired as part of the claim. He was of the view that "splitting those obligations between different freeholders is usually problematic in practice". He suggested that the land beyond the building which is to be included could be determined depending on who will, following the proposed claim, hold the freehold of the majority of the estate.

Discussion and recommendations for reform

The building (including common parts)

5.131 We remain of the view that leaseholders making a collective freehold acquisition claim should, first and foremost, acquire the building in respect of which their claim is made – including the common parts of that building.[57] This is the case under the current law, and there is no reason for that to change; it is the essence of the right of collective freehold acquisition. We do not think that landlords should be able to retain any parts of the building which is the subject of the claim, even if there are parts which have development potential. Where that is the case, the development potential may be reflected in the premium or, under the options for reform that we have made to Government in our Valuation Report, the leaseholders may take a restriction on development so that the freeholder obtains payment if and when the leaseholders decide to carry out development.[58] Nor are we concerned, as some consultees suggested, that there is any danger of creating flying freeholds through the acquisition of common parts, since our recommendation is intended to refer to common parts *within the building* which is being acquired. Rather, there would be a danger of creating flying freeholds if the common parts in that building are *not* acquired in their entirety.[59]

5.132 It should, of course, be remembered that we have recommended a new ability for leaseholders to acquire any two or more buildings (or self-contained parts of buildings) together – whether those buildings are houses or blocks of flats – in one collective freehold acquisition claim.[60] Our recommendation here will apply equally to such a claim: leaseholders should acquire the freehold of each of the buildings (or parts of buildings) which are included within their claim, including the common parts of each.

---

57 Note that in the recent decision of *LM Homes Ltd v Queen Court Freehold Co Ltd* [2020] EWCA Civ 371, [2020] 3 WLUK 203, it was held that the airspace and subsoil form parts of the "building" of which the qualifying tenants were entitled to claim the freehold.

58 See Valuation Report, paras 6.155-6.179.

59 We explain in Ch 4 above, at para 4.11, what is meant by a flying freehold, and why it is considered problematic.

60 See paras 5.73 to 5.108 above for our discussion of multi-building collective freehold acquisition.

Other premises let with the residential units in the building

5.133 As noted above, our provisional proposal that leaseholders making a collective freehold acquisition claim should acquire *any* land let with the flats in the building faces the same problem, however, that arises in relation to our equivalent proposal in respect of lease extensions and individual freehold acquisition claims. The difficulty is that a lease of one or more flats within a building may also include entirely unrelated property.

5.134 For the reasons we gave in our discussion of this problem in Chapters 3 and 4,[61] we do not think we can proceed with our proposal. We do not think that leaseholders should be entitled to acquire the freehold to land which is unrelated to the residential units which give them the right to enfranchise. We are also concerned that, in some cases, a leaseholder's lease might also contain very extensive additional property.

5.135 Instead, therefore, we recommend that leaseholders should be entitled to acquire certain premises let with *and associated with* the residential units in the building which is the subject of the claim. As with our recommendation in respect of lease extensions and individual freehold acquisitions discussed in Chapters 3 and 4, "associated premises" would include any garage, outhouse, garden, yard or appurtenance let with the residential units. There is no reason that we can see why landlords should be able to retain the freehold to premises of this kind. Arguments made by consultees regarding the potential impact on the landlord of losing these premises or regarding development potential, discussed above at paragraph 5.131, carry even less weight (in our view) where the premises have already been let, in many cases on a long lease.

5.136 There are several points to note about this recommendation.

(1) First, we spoke of land let with "flats" in our provisional proposal, whereas this recommendation refers to premises let with "residential units". This is because we are recommending the creation of a new scheme of qualifying criteria based around the single concept of a residential unit, rather than one which categorises leasehold homes into houses and flats.[62] In addition, we have recommended the introduction of multi-building collective freehold acquisition,[63] through which it will be possible for leasehold houses to participate in a collective freehold acquisition claim. Our recommendation, where a multi-building collective freehold acquisition claim is concerned, is therefore that leaseholders should be entitled to acquire premises which are let with and associated with any residential unit in any of the buildings which are being acquired.

(2) Second, we do not suggest that the associated premises which can be acquired should be limited to those which are let *to long leaseholders who have enfranchisement rights*. Rather, it is sufficient if they are let with and associated with any residential unit in the building being acquired. We think that this is

---

61 See paras 3.125 to 3.137 and paras 4.21 to 4.26 above.

62 See Ch 6 below.

63 See para 5.102 above.

appropriate because there might be (for example) some within a row of garages, or a few parking spaces within a car park, which are associated with residential units which are let only on short tenancies. It would be nonsensical if leaseholders were entitled to acquire only some of the garages within the row, or the whole car park within the exception of a few isolated spaces. Framing the recommendation in this way also resolves the issue identified by the London Borough of Camden at paragraph 5.129 above.

(3) Third, under the equivalent provision of the current law, the premises which may be acquired are limited to those which fall within the "curtilage" of the relevant building. We think that our new enfranchisement scheme should be clear about what premises are sufficiently closely related to the relevant building to be included in a collective freehold acquisition claim. We think that the concept of "curtilage" is needed in order to achieve this. However, as we explain in Chapters 3 and 4, we intend to explore with Parliamentary Counsel whether the language of the current law can be updated or improved.[64] Given the support of consultees for expanding the extent of the premises that may be acquired by leaseholders, we will also explore whether a clearer concept might be used that is more generous to leaseholders. But our recommended scheme may already loosen the current law sufficiently, given our recommendation set out below about land used exclusively by residents within a building.

5.137 We also think that there should be one exception to the above recommendation. A few consultees suggested that leaseholders should not be permitted to acquire premises let with the flats in the building where this would create flying freeholds. We set out the difficulties which flying freeholds present in Chapter 4 above, at paragraph 4.11. In the light of these difficulties, we agree that leaseholders should not be able to acquire premises let with the residential units in the building where this would give rise to flying freeholds.

5.138 Finally, we make two additional points of clarification.

(1) First, we agree with those consultees who suggested that leaseholders should be able to choose whether to acquire any premises outside of the building which is being acquired (rather than being required to do so). Our proposal was intended to give leaseholders the option whether or not to claim other premises let with the flats in the building, as per the existing law. We now recommend that that should be the case in relation to other premises let with the residential units in the building.

(2) Second, we do not agree with the suggestion received from the Wallace Partnership Group that, where premises outside of the building which is being acquired are not owned by the same landlord as the building, leaseholders should only be able to acquire those premises "subject to the agreement of the landlord in question". It is possible under the current law to acquire the freehold interest in premises owned by a separate landlord if those premises are also let to a qualifying leaseholder and are within the curtilage of the building which is being acquired. We do not think the existing law should be changed to make it

[64] See Ch 3 at para 3.136, and Ch 4 at para 4.26.

worse for leaseholders. The acquisition of premises outside the building should not be impossible simply because they are owned separately to the building. Otherwise, it would be possible for landlords to obstruct collective freehold acquisition claims by dividing the freehold into two titles owned by two associated companies.

Land over which the owners or occupiers of the residential units have rights

5.139 We recommend that leaseholders making a collective freehold acquisition claim should be entitled to acquire any land which is used exclusively by the owners or occupiers of the residential units in the building which is the subject of the claim. This is a significant departure from the current law, which permits landlords to retain any land which is not within the building being acquired or let to a long leaseholder of a flat within the building. Instead, they simply have to grant the leaseholders permanent rights over that land – or any other land – which reflect the rights which they enjoy under their leases, or convey the freehold of such other land.

5.140 We think that this recommendation will make a collective freehold acquisition claim more valuable for many leaseholders. Rather than being subject to the whim of landlords, who may simply elect to retain land where there is really no good reason for them to do so, leaseholders will be able to acquire ownership and control of more of the land surrounding their homes. We do not agree with those consultees who expressed concerns about the potential impact of such a recommendation on landlords, especially where the land in question has development potential. As mentioned above, development potential may be reflected in the premium which the leaseholders pay or, under the options for reform that we have made to Government in our Valuation Report, the leaseholders may take a restriction on development so that the freeholder obtains payment if and when the leaseholders decide to carry out development.

5.141 Again, there are several points to note about this recommendation:

(1) As with our previous recommendation, we do not suggest that the associated land which can be acquired should be limited to that which is used by long leaseholders who have enfranchisement rights. Rather, it is sufficient if it is used by the owners or occupiers of any residential unit in the building being acquired – for example, a garden or garage which the tenant under a short tenancy granted by the landlord is entitled to use.

(2) We agree with Philip Rainey QC that the existence of a public right of way over land should not prevent leaseholders from acquiring that land where it is otherwise used exclusively by the owners or occupiers of residential units in their building. We think that there might also be other, similar rights which should be treated in the same way.

(3) Where the leaseholders' claim is a multi-building collective freehold acquisition, the question is whether the land is used exclusively by the owners or occupiers of the buildings which are included in the claim – whether that is of one of those buildings or some of them or all of them. By way of example, where a multi-building collective freehold acquisition claim is brought in respect of two out of three buildings on an estate, the leaseholders will be able to acquire a bin store

which only the occupants of one of those blocks are entitled to use, and a car park which only the occupants of both of those blocks are entitled to use. They will not, however, be able to acquire a large garden which the occupants of all three blocks on the estate are entitled to use.

5.142 Again, we think that there should be an exception to the recommendation where the acquisition of the land would create flying freeholds, and that leaseholders should be able to choose whether to acquire this type of land (rather than being required to do so).[65]

5.143 As for other land over which the owners or occupiers of the residential units in the relevant building have rights, but which is not used by them exclusively (for example, land which is shared with another building), we recommend a new approach. We did not make a proposal as to the treatment of such land in the Consultation Paper, but we now think that it should be possible for it to be acquired in some circumstances, rather than permitting landlords simply to grant leaseholders permanent rights in all cases. We recommend that leaseholders should be able to ask to acquire such land. Landlords may object to this proposal, but where they do, it should be open to leaseholders to refer the matter to the Tribunal for a decision as to whether or not the leaseholders should acquire the land. Again, this is likely to enable leaseholders to acquire ownership and control of more of the land surrounding their homes.

5.144 We recommend a presumption that the leaseholders should acquire the land, rebuttable if the Tribunal should determine that it is not just and convenient in all the circumstances for the leaseholders to acquire the land, taking into account in particular:

(1) whether the land is also used by the occupants of other buildings and, if the land is acquired, whether there would be disruption to the service charge liabilities of tenants or leaseholders in those buildings;

(2) whether other interests in favour of third parties and the landlord are or can be sufficiently protected (for example, the transfer to the nominee purchaser could be made subject to the existing rights of third parties and any further rights which the landlord might need and which are not compensated for in the premium); and

(3) the proportion of those persons having rights over the land which are participating in the claim.

5.145 Where the Tribunal decides that the leaseholders should not acquire the land, leaseholders would still receive permanent rights over the land, reflecting the rights which they enjoy under their leases, as per the current law.

Protection for landlords

5.146 Finally, we acknowledge that as we make recommendations to increase the ability of leaseholders making collective freehold acquisition claims to acquire land beyond the relevant buildings, it is necessary to consider the potential impact of these

---

65 See paras 5.137 to 5.138(1) above.

recommendations on landlords. We agree with those consultees who observed that it would be unfair for leaseholders to be able to "cherry-pick" land which was easy to manage, but leave the landlord with the remainder. Equally, landlords should not be left with small parcels of useless land. Thus, we recommend an equivalent of the current provision under which landlords may require leaseholders to acquire land which is of no useful benefit to the landlord if it is severed from the building and other land being acquired.[66]

5.147 We also think that landlords should be entitled to reserve easements and other property rights over the land acquired by the leaseholders, for the benefit of land retained by the landlord. The reservation of such rights must be reasonable in the circumstances of the case. For example, the land in question might be the only means of access to a neighbouring parcel of land which the landlord intends to develop and thus the landlord might require a right of way.

5.148 If there is any dispute about the exercise by a landlord of the entitlements described above, the Tribunal should have jurisdiction to determine the matter as part of its general jurisdiction to determine the terms on which the freehold may be acquired.

Recommendation 20.

5.149 We recommend that leaseholders making a collective freehold acquisition claim:

(1) should acquire the building in respect of which their claim is made, including the common parts of that building;

(2) should be entitled (but not obliged) to acquire associated premises let with the residential units in the building which is the subject of the claim, provided there is no other building or structure above or below the land (to avoid creating flying freeholds);

(3) should be entitled (but not obliged) to acquire any land which is used exclusively by the owners or occupiers of the residential units in the building (or by those persons exclusively save for use pursuant to a public right of way), provided there is no other building or structure above or below the land (to avoid creating flying freeholds); and

(4) should be entitled to request to acquire other land over which the owners or occupiers of the residential units in the relevant building have rights, but which is not used by them exclusively (for example, land which is shared with another building). If the landlord does not agree to this request, the leaseholders should be able to refer the matter to the Tribunal for a decision as to whether or not they should acquire the land.

5.150 We recommend that, where a matter is referred to the Tribunal in accordance with paragraph (4) of the above recommendation, there should be a rebuttable presumption that the leaseholders should acquire the land in question. The presumption should be rebuttable if the Tribunal should determine that it is not just

66 1993 Act s 21(4).

and convenient in all the circumstances for the leaseholders to acquire the land, taking into account in particular:

(1) whether the land is also used by the occupants of other buildings and, if the land is acquired, whether there would be disruption to the service charge liabilities of tenants or leaseholders in those buildings;

(2) whether other interests in favour of third parties and the landlord are or can be sufficiently protected; and

(3) the proportion of those persons having rights over the land which are participating in the claim.

5.151 We recommend that a landlord against whom a collective freehold acquisition claim is made should be able:

(1) to require leaseholders to acquire land which is of no useful benefit to the landlord if it is severed from the building and other land being acquired; and

(2) to reserve easements and other property rights over the land acquired by the leaseholders, for the benefit of land retained by the landlord.

LEASEBACKS

5.152 Under the current law, there will be some situations in which leaseholders carrying out a collective enfranchisement claim are obliged to grant the landlord a 999-year lease, at a peppercorn rent, of certain parts of the premises being acquired. These leases are generally described as "leasebacks", and will be granted by the nominee purchaser immediately after the collective enfranchisement claim completes.

5.153 At present, leasebacks are required to be granted in certain cases where a flat is let on a secure or introductory tenancy,[67] or let by a freeholder who is a housing association to a tenant who is not a qualifying tenant. A landlord can also require the leaseholders to grant him or her a leaseback of any unit which is not let to a qualifying tenant (such as a flat let on a short tenancy, or a commercial unit), or any flat or unit which the landlord occupies and of which he or she is the qualifying tenant.[68]

---

67 A secure tenancy is a tenancy under which a dwelling house is let as a separate dwelling by a landlord which is a prescribed public body to a tenant who occupies the dwelling as his or her principal home: see the Housing Act 1985, ss 79 to 81. An introductory tenancy is a "trial tenancy" granted by a local authority to a new tenant. The purpose is to assess whether the tenant will be a good tenant before they are granted a secure tenancy. Tenants under introductory tenancies have fewer rights than secure tenants and lesser security of tenure. See Housing Act 1996, ss 124 to 143.

68 See CP, paras 6.16 to 6.26 for more detailed discussion of the current law on leasebacks. We discuss what is meant by a "qualifying tenant" briefly at para 6.2(1) of the CP, and in more detail at paras 7.54 to 7.67 of that paper.

5.154 We did not propose any changes to the above regime of mandatory leasebacks and leasebacks at the landlord's election in the Consultation Paper. However, we recognised that all leasebacks have the effect of reducing the premium which the leaseholders would otherwise have to pay to acquire the freehold of the premises. That is because a 999-year leaseback is a valuable interest. It means that virtually the whole of the value of the relevant part of the premises remains with the landlord (or with any sub-tenants), and thus the premium payable by the leaseholders need not include that value. We therefore provisionally proposed that leaseholders making a collective freehold acquisition claim should be able to require the landlord to take a leaseback of any parts of the premises (other than common parts) which are not let to leaseholders participating in the claim.[69]

5.155 We thought that this proposal would help to make collective freehold acquisition a possibility for more groups of leaseholders. We are aware that the need to fund the purchase of the landlord's interest in any units which are not let to qualifying leaseholders, and in the flats of any qualifying but non-participating leaseholders, can affect the ability of some groups of leaseholders to enfranchise. Some landlords are willing to agree to leasebacks of these parts of the premises, on a voluntary basis. Others, however, refuse to do so, perhaps knowing that without such leasebacks, the leaseholders will never be able to afford to pursue the collective enfranchisement claim to its conclusion. This proposal gives those leaseholders another option: instead of having to pay for the reversionary value of those flats and units as part of their claim, they can ensure that value remains with the landlord by requiring him or her to take a leaseback.

5.156 We asked consultees whether they agreed with our provisional proposal.[70]

Consultees' views

Consultees who agreed with our proposal

5.157 A sizeable majority of consultees (consisting mostly of leaseholders and legal or valuation professionals) agreed with our provisional proposal, highlighting its potential to reduce the premium payable by leaseholders and thus improve access to enfranchisement. Even those consultees who disagreed with our proposal as a matter of principle acknowledged that it would have this effect. We heard from a number of leaseholders and leaseholder-owned management companies who felt that the proposal would have been helpful during their own collective enfranchisement claims. As 1 West India Quay Residents' Association put it, "the cost implications of buying the freehold means enfranchisement is only a theoretical right".

5.158 Some consultees commented more specifically on the ways in which the proposal would help to reduce the premium for a collective freehold acquisition claim. A number of consultees told us that leasebacks would be most useful in respect of buildings in which the freeholder has retained a number of flats (that is, has not sold them on long leases). Currently, unless the landlord is willing to agree to voluntary leasebacks of those flats, leaseholders making a collective enfranchisement claim will have to pay what is effectively the market value of the flats, making the claim prohibitively

---

69 See CP, paras 6.129 to 6.131.

70 Consultation Question 31, para 6.132.

expensive. Other consultees told us that it will often be unaffordable for leaseholders to purchase the landlord's reversionary interest in a valuable commercial unit without the assistance of a leaseback.

5.159 Andrew Pridell Associates Ltd (surveyors), amongst others, noted an additional benefit of our proposal for leaseholders. As mentioned above, landlords at present are free to accept or refuse leaseholders' offers of voluntary leasebacks of non-participating flats or other units in the premises. This means that it is often not possible to say with any certainty at the beginning of a claim which parts of the premises the leaseholders will ultimately have to acquire, and therefore to pay for. These consultees noted that our proposal would give leaseholders control over what they will acquire from the outset, making it easier to assess at an early stage what the cost of the claim is likely to be.

5.160 Philip Rainey QC agreed with our proposal, but pointed out that it will not help in all circumstances. He gave the example of a building which is let on a 999-year head lease. In this case, a leaseback of some units to the landlord would not reduce the premium by any significant amount, because the bulk of the value in those units is held not by the landlord but by the head lessee. Because all intermediate leases have to be acquired by the nominee purchaser as part of a collective enfranchisement claim, this value would still have to be paid to buy out the head lessee.

5.161 John Stephenson (a solicitor) also supported our proposal, but felt that it should be limited to leasebacks of clearly defined spaces, such as flats and garages. Otherwise, he argued, there would be "arguments about pavement vaults, coal cellars and cupboards". A few other consultees made a similar point.

5.162 Finally, several consultees commented that, in their view, our provisional proposal provided a means of increasing access to enfranchisement without causing detriment to landlords. Julian Briant (a surveyor) wrote:

> If the landlord does not wish to retain they can sell the units on the open market at a time of their choosing.

Consultees who disagreed with our proposal

5.163 Most of those who disagreed with our provisional proposal were landlords or law firms. These consultees argued that it is fundamentally unfair to require landlords who have acquired a freehold interest in property to take a leasehold interest in its place, with several commenting that freehold and leasehold ownership are materially different in nature. Hamlins LLP wrote:

> If a freeholder is going to be compulsorily forced to part with its property interest then it should have the option of being able to walk away entirely from that interest and not essentially help leaseholders fund their purchase by taking leasebacks. A few consultees expressed the view that there would be a very limited market for leasebacks to be sold, if the former landlord does not wish to retain the interest.

5.164 Some consultees also raised concerns about former landlords retaining an interest in premises over which they no longer have any control, particularly where they might continue to owe obligations to sub-lessees. James Souter (a solicitor) considered that

our proposal "would leave the landlord in a regrettable position of not only losing their freehold but then continuing to have an interest in the building whilst being excluded from its management".

5.165 Finally, several consultees observed that the increased use of leasebacks would make the enfranchisement process more complicated and result in complex ownership arrangements within enfranchised buildings.

Discussion and recommendations for reform

5.166 We are not convinced by the arguments of those who opposed our provisional proposal to extend the use of leasebacks. In particular, we do not accept that our proposal is inherently unfair to landlords. If the grant of a leaseback to a landlord will reduce the premium payable to that landlord significantly, then it must follow that the leaseback constitutes a valuable interest – whether that value derives from rental income, the ability to sell a sub-lease of the property, or the hope of a future lease extension claim. We are also aware that landlords not infrequently enter into these kinds of leaseback arrangements already – particularly in regard to commercial units – so it is apparent that not all landlords are opposed to the practice. With regard to concerns about the loss of control of management, we expect that leaseholders who enfranchise will frequently employ the services of a professional managing agent. We think that they are particularly likely to do so where they are tasked with managing premises which contain commercial units or other property which extends much beyond the participants' own homes. We do not therefore consider that the loss of control will mean that the building is not professionally managed.

5.167 Overall, we think that the concerns raised by consultees are outweighed by the potential of our provisional proposal to make collective freehold acquisition claims considerably more affordable in many cases, and therefore accessible to many more leaseholders. Our proposal will also give leaseholders greater certainty at the beginning of a collective freehold acquisition claim as to the likely costs of the claim. We acknowledge that some leaseholders who enfranchise would prefer to remove their landlord entirely from the picture, and will thus be unlikely to make a leaseback election. For others, though, we think that our proposal will make a collective freehold acquisition claim a possibility where it might not have been before. We therefore think that our proposal should be taken forward.

5.168 Further, we have recommended in Chapter 6 of this Report that collective freehold acquisition claims should be permitted in respect of buildings in which up to 50% of the floor space is in non-residential use (as opposed to just 25%, as at present).[71] The idea is to ensure that more buildings (which can fairly be described as residential in nature) are eligible for collective freehold acquisition. However, commercial units tend to be valuable, and we recognise that to purchase the whole of a building containing 50% commercial space might very well be unaffordable for the leaseholders who occupy the remainder of the building. Without the ability to require the landlord to take leasebacks of that space, we think that the recommended increase to the non-residential limit is therefore likely to be of limited practical benefit to leaseholders.

---

[71] See paras 6.317 to 6.338 below.

5.169 We do, however, agree with those consultees who suggested that our proposal should be limited to leasebacks of units, rather than any part of the premises being acquired. It was not our intention to suggest that leaseholders should be able to require the landlord to take leasebacks of any parts of the premises which they do not wish to pay for.

5.170 We therefore recommend that leaseholders making a collective freehold acquisition claim should be able to require the landlord to take a leaseback of any units (other than common parts) which are not let to leaseholders participating in the claim. As with mandatory leasebacks at present, we anticipate that leaseholders should be required to indicate in their claim notice the leasebacks which they will require the landlord to take. We think that the leaseback should be for a term of 999 years at a peppercorn ground rent, as under the current law. Further consideration will need to be given to the other terms of the leaseback.[72]

5.171 Philip Rainey QC is correct that this recommendation would not, on the current law, be of much assistance where a unit is the subject of a very long head lease which needs to be bought out as part of the claim.[73] However, we recommend in Chapter 13 below that in future, leaseholders should be able to choose whether or not to acquire any (or any part of any) intermediate lease of the premises.[74] Accordingly, where an intermediate lease is of significant value, leaseholders could elect not to acquire it, meaning that this value would not form part of the premium payable. In addition, though, there would be nothing to prevent the leaseholders nevertheless requiring the landlord to take leasebacks of each of the units not let to participating leaseholders, so that they do not have to pay for any reversionary value which does reside with the landlord either.

Recommendation 21.

5.172 We recommend that (in addition to the provisions of the current law concerning the grant of leasebacks to the landlord) leaseholders making a collective freehold acquisition claim should be able to require the landlord to take a leaseback of any units (other than common parts) which are not let to leaseholders participating in the claim.

OTHER TERMS OF THE TRANSFER

5.173 Our discussion in the Consultation Paper of the terms on which a nominee purchaser should acquire the freehold on a collective freehold acquisition closely followed our discussion of the terms of individual freehold acquisitions. We raised the same issues for consideration by consultees and asked consultation questions containing identical provisional proposals.

---

72 Pt IV of sch 9 to the 1993 Act is likely to be informative in this regard.

73 See para 5.160 above.

74 See Ch 13, at paras 13.46 to 13.51.

5.174 In general, consultees raised the same points and expressed the same views in relation to our questions about the terms of collective freehold acquisitions as they did in relation individual acquisitions. Many simply referred back to the responses they had given to our questions about individual acquisitions. Importantly, consultees did not raise points that lead us to think that different general principles should apply to collective freehold acquisitions than apply to individual acquisitions or that we should take a fundamentally different approach to collective acquisitions.

5.175 We have already considered the terms of individual freehold acquisitions in detail in Chapter 4. We expanded on our discussion in the Consultation Paper and made detailed recommendations about what pre-existing rights and obligations should continue to affect the freehold or should be taken over by the leaseholder when the freehold is acquired.[75] We also made detailed recommendations about what new rights and obligations may be created on an individual freehold acquisition.[76]

5.176 Consistently with the views of consultees, we believe that the general principles we set out in Chapter 4 generally also apply to collective freehold acquisitions.[77] Moreover, applying the recommendations in Chapter 4 to collective freehold acquisitions, insofar as we are able, will also ensure that the enfranchisement regime as a whole is as simple and streamlined as possible.

5.177 We recognise, however, that there are some differences between individual and collective freehold acquisition which may require us slightly to modify the details of the scheme set out in Chapter 4 before it can be applied to collective acquisitions. We set out some of the key differences below.

5.178 First, many elements of our scheme for individual freehold acquisitions are prescriptive; they specify what new property rights must be created during the freehold acquisition process. An individual freehold acquisition that does not involve the grant or reservation of these rights will be an acquisition that is not on statutory terms. As such, as we explain in Chapter 14, it should require approval from the Tribunal. But due to the additional complexity involved in collective freehold acquisitions, our scheme for collective freehold acquisitions is not prescriptive. The participating leaseholders and the landlord are free to agree that additional or alternative property rights should be created (or released) without requiring the Tribunal's approval.

5.179 Second, unlike individual freehold acquisitions, collective acquisitions involve multiple leaseholders. The participating leaseholders (and other leaseholders in the building) may enjoy different rights under their leases and may be bound by different property rights affecting the freehold. For example, in a six-flat building, the residents of flats A, B and C may have a right to use a different communal garden from the residents of flats D, E and F. The leaseholders may be obliged to pay the landlord (and, potentially, the landlord may be obliged to pay a third party) different sums for the upkeep of the different gardens. And an easement or a restrictive covenant granted by the landlord may affect one of the gardens but not the other. There may also be a disparity between the rights enjoyed by participating leaseholders and those enjoyed

---

75 See paras 4.171 to 4.173 and 4.217 to 4.218.

76 See paras 4.337, 4.351 and 4.370 to 4.371.

77 See para 4.85.

by non-participating leaseholders (who may or may not have qualifying leases). The London Borough of Camden gave an example which we set out at paragraph 5.129 above.

5.180 Third, the nominee purchaser is likely to acquire the freehold to property that was not actually let to any of the participating leaseholders – or, indeed, to any of the leaseholders in the relevant building – under their leases. It may acquire the common parts of the building or other appurtenant property which the leaseholders are entitled to use (exclusively or non-exclusively), but which is not exclusively occupied by any one particular leaseholder. By contrast, on an individual freehold acquisition, the leaseholder's existing lease is likely to include all of the property that he or she is seeking to acquire.[78] As we suggested at paragraph 5.147 above, in relation to any additional property acquired by the nominee purchaser, it is more likely to be reasonable for the landlord (or the leaseholders) to require the creation of new property rights over and above those contained in the leaseholders' leases.

5.181 Nevertheless, the fundamentals of the policy in Chapter 4 should still apply. The leaseholders should generally acquire the freehold subject to all existing property rights, but not those that are inconsistent with their enjoyment of the property under their existing leases. They should not generally have to take over personal obligations that were binding on the landlord unless these were imbedded in a chain of contracts governing the proper management of a housing estate or the relationship with neighbouring landowners. New property rights may be created where they will replicate property rights granted or reserved in the leaseholders' leases. But there will need to be slightly broader scope for the creation of new property rights where the leaseholders are going to be acquiring additional property not demised under their leases. Finally, the leaseholders should not usually be required to undertake new personal obligations, particularly what we called "fleecehold" obligations, which are designed to continue generating a profit for the former landlord.

5.182 Consequently, provided that suitable modifications are made to take account of the points raised above, we intend our recommendations in Chapter 4 to apply also to collective freehold acquisitions. We think that the relevant modifications should be matters of detail, applying the principles embodied in our recommendations in Chapter 4 in a more fine-grained manner.

MORTGAGES AND RENTCHARGES

5.183 In the Consultation Paper we made two provisional proposals about the effect of a freehold acquisition on mortgagees and the owners of rentcharges.[79]

(1) First, we proposed that any mortgage secured on the freehold title should automatically be discharged by the transfer of the freehold. But the nominee purchaser should be subject to a duty to pay the whole purchase price or, if less, the sum outstanding under the mortgage, to the mortgagee, or alternatively into court. We proposed that any sums due from the nominee

---

78 However, we noted in Ch 4 that, in exceptional cases, a leaseholder may acquire more extensive premises on an individual freehold acquisition than he or she occupied under the lease (see para 4.311).

79 See CP, Consultation Question 27, at paras 6.107 and para 6.108.

purchaser to the landlord should be reduced by the sum paid to the mortgagee or into court.

(2) Second, we provisionally proposed that a landlord should be under a duty to use his or her best endeavours to redeem any rentcharge on the freehold (except for estate rentcharges).

5.184 Both of these provisional proposals were designed to ensure that leaseholders are not prejudiced by additional costs or delay as a result of third-party interests affecting the freehold title they are entitled to acquire.

5.185 These proposals exactly mirrored the proposals we made regarding landlords' mortgages and rentcharges in relation to individual freehold acquisition claims. These proposals, and our consequent recommendations, are discussed in detail in Chapter 4 of this Report.[80] We explain that, for individual freehold acquisitions, we have decided to make a recommendation in line with our provisional proposal regarding mortgages. But we decided not to proceed with our recommendation regarding rentcharges; indeed, we do not intend to make any provision for rentcharges in our new enfranchisement scheme.

5.186 We do not intend to repeat the analysis and arguments from Chapter 4. We explain in Chapter 4 that we do not think the automatic discharge provisions under the 1967 Act are engaged on an individual freehold acquisition if the leaseholder pays less than the price determined under the statute for the freehold. We interpret the 1993 Act in the same way. We think the duty on the nominee purchaser under paragraph 2 of schedule 8 to "apply the consideration payable, in the first instance, in or towards the redemption of any such mortgage" is a duty to pay the price for the freehold as determined under the 1993 Act towards the redemption of the mortgage. It is referring to the consideration payable under the Act. If the statutory price is not paid towards the redemption of the mortgage or into court, the mortgage will remain on the freehold title but only secure the mortgage debt up the value of any part of the statutory price that was not so paid.[81] We intend for our provisional proposal to replicate these elements of the current law.

5.187 Moreover, almost all consultees who responded to our consultation questions about the effect of individual and collective freehold acquisitions on mortgages secured against the landlord's titled gave the same responses to both questions. No consultees identified any special issues that arise only in relation to collective freehold acquisitions or suggested we should pursue a different policy for mortgages or rentcharges burdening building consisting of flats. As a result, our discussion in this chapter will be briefer than the discussion in Chapter 4, and will primarily focus on points raised by consultees that we have not previous addressed.

---

80 Paras 4.372 to 4.410 above.

81 1993 Act, sch 8, para 2(2).

Consultees' views

Landlords' mortgages

5.188 Just over half of consultees agreed with our provisional proposal but a significant minority disagreed. As we mentioned in Chapter 4, many of those consultees mistakenly thought we were suggesting that leaseholders should be obliged to pay the whole of the amount outstanding on the landlord's mortgage. Those who supported our proposal said it would make the process of collective freehold acquisition quicker and simpler for leaseholders, was common sense and logical, and should not be controversial.

5.189 Some consultees (including one mortgage lender) raised concerns about whether mortgagees are informed of pending enfranchisement claims. Gerald Grigsby suggested that "to speed up the process … the freeholder should be obliged to notify the lender on receipt of an application and to permit the lender to authorise the purchasers legal representative to pay over the price or such lesser figure at the lenders request". We make a recommendation about formal notification requirements on landlords in Chapter 10 which should provide some answer to these concerns.[82] But landlords would be well advised to contact their mortgagees informally early in the process to ensure that the purchase price does not end up being paid into court.

5.190 Other consultees raised concerns about negative equity, an issue we discuss in more detail in Chapter 4.[83] The underlying concern raised by consultees was that the valuation of a freehold as part of a collective freehold acquistion claim might not be sufficient to pay off the mortgage.[84] The Law Society, agreeeing with our provisional proposal, pointed out that, depending on how the legislation changes the premium to be paid by the leaseholders, that there are likely to be more situations where the premium payable is not sufficient to meet the mortgage outstanding. Paul Church, who agreed with our proposal "only to the extent that the premium paid is sufficient to repay the mortgage", pointed out that changing the rules regarding valuation "is significant especially for the large or institutional investors who may well have borrowed 75% or even 80% of [open-market] valuation". The Wellcome Trust thought our provisional proposal "could affect a lender's willingness to provide finance to a landlord or potential purchaser".

5.191 However, under the existing law, the lender cannot refuse to provide a release simply because the price payable does not meet the amount outstanding on the mortgage. Lenders take a commercial risk when offering a loan facility. The risk of enfranchisement occuring where leaseholders can acquire the interest over which the lender takes its security is a risk that lenders need to weigh up when making a commercial decision whether or not to offer lending facilities with security over properties where enfranchisement rights are available. We do not think leaseholders should be prejudiced because of the commercial decisions between landlords and lenders.

---

82 Recommendation 77, para 10.106 below.

83 Paras 4.398 to 4.400 above.

84 This was also a key issue raised by consultees who responded to our question about individual freehold acquisitions.

5.192 We accept that if Government decides that the premium payable on enfranchisement should be below market value, the effect would be to reduce the value of the freehold (in relation to a statutory acqusition) and thereby reduce the security provided by any mortgage burdening the freehold. But whatever decision is made by Government in relation to the price payable on enfranchisement, we do not think the collective enfranchisement regime should make it any more difficult or expensive for leaseholders to acquire their freeholds simply because the landlord has chosen to mortgage his interest. It would cause significant prejudice to leaseholders if they had to choose between paying off the entirety of the landlord's mortgage or acquiring the property still subject to that mortgage. If it were otherwise, landlords might even mortgage their properties as a way of discouraging enfranchisement.

Recommendations for reform

5.193 We have therefore decided to confirm our provisional proposal. We recommend that the nominee purchaser should be under a duty to pay the purchase price (or a sufficient proportion of it to redeem the mortgage) directly to the landlord's mortgagee or alternatively into court. If the nominee purchaser makes this payment, the mortgage should automatically be discharged. If the nominee purchaser does not comply with its duty regarding the purchase price (and the mortgage is not redeemed by the landlord or the landlord's conveyancers), the mortgage will remain on the freehold title. However, we recommend that it should only then secure the mortgage debt up to the value of (any proportion of) the purchase price that was not paid to the mortgagee or into court.

5.194 The text of our recommendation also clarifies an issue that was implicit rather than explicit in our provisional proposal. The same provisions that we recommend for mortgages secured on the freehold title should apply to mortgages on intermediate leasehold interests which are acquired as part of a collective freehold acquisition.

Recommendation 22.

5.195 We recommend that, where a collective freehold acquisition is made and the landlord's estate (or a superior leasehold estate or common parts lease that will also be acquired through the claim) is subject to a mortgage:

(1) the nominee purchaser should be under a duty to pay:

(a) the whole of the statutory price; or

(b) (if less) the sum outstanding under the mortgage;

to the mortgagee or, alternatively, into court;

(2) if the nominee purchaser complies with the duty in (1) above, any mortgage secured against the freehold title or against a superior leasehold title also acquired, should automatically be discharged, with the discharge taking effect at law on the registration of the transfer;

(3) if the nominee purchaser does not comply with the duty in (1) and the mortgage is not otherwise discharged, it will remain on the freehold title after acquisition by the nominee purchaser, but will only secure the mortgage debt up to the value of such part of the statutory purchase price as was not paid in accordance with the duty in (1); and

(4) any sums due from the nominee purchaser to the landlord should be reduced by any sums paid under (1) above.

Rentcharges

5.196 We discuss the nature of rentcharges in Chapter 4 and examined our provisional proposal in the Consultation Paper for compulsory redemption of rentcharges by landlords on an individual freehold acquisition.[85] We made exactly the same provisional proposal in relation to collective freehold acquisitions and consultees raised exactly the same issues in response. A sizable majority agreed with our provisional proposal and a significant minority disagreed. But many consultees unfortunately misunderstood our proposal, or simply commented that all rentcharges should be abolished.

5.197 There was also significant disagreement about who should bear the costs of redeeming a rentcharge. For example, Birmingham Law Society went as far as suggesting that "the landlord should provide an indemnity for any non-estate rentcharge not redeemed" and Andrew Baker (a leaseholder) stated that "where the rentcharge is not redeemed, any subsequent liability should reside with the landlord and solely the landlord". By contrast, Long Harbour and HomeGround, for example, thought that the landlord should be obliged to apply for redemption but the redemption should actually be undertaken by the leaseholders and at their cost.

5.198 As with the equivalent question discussed in Chapter 4, many consultees were concerned about a requirement for landlords to use "best endeavours" to redeem a rentcharge. Hamlins LLP said "an obligation to use best endeavours is far too vague and is likely to lead to disputes (and so costs) which is contrary to the Commission's Terms of Reference". James William Masterman commented that "best endeavours is not strong enough. How will this be held to account"? Similarly, David Silverman (a leaseholder) thought "best endeavours" "didn't go far enough". He said that "leaving a landlord to use "best endeavours" is nonsense … it's like "self regulation" they can't and won't do it". Similarly, Gordon Clifton (a leaseholder) said that "any suggestion of "best endeavours' in this context will be exploited or ignored". He continued by saying that "leasehold is full of examples where everyone ignores leaseholders if it is otherwise inconvenient".

5.199 As we explain in Chapter 4, we have decided not to proceed with our provisional proposal regarding rentcharges. In brief, we noted in Chapter 4 that consultees disagreed about whether the landlord or the leaseholder should bear the costs of redeeming a rentcharge. We noted that leaseholders may adjust the price they pay for

[85] Paras 4.81(2) and 4.405 to 4.410.

the freehold to take account of any subsisting rentcharge. It has not been possible to create new income-generating rentcharges since 1977 and existing income-generating rentcharges will cease to exist in 2037. And we noted that leaseholders can seek to redeem rentcharges under the Rentcharges Act 1977 after acquiring the freehold.

5.200 These points apply equally to collective freehold acquisitions as to individual freehold acquisitions. Although it could benefit leaseholders if landlords were obliged to redeem rentcharges, the benefit would be limited (indeed, it could become a detriment) if landlords could pass the costs of redemption on to leaseholders. We are not sure why the costs should not be able to be passed on given that landlords would effectively be giving leaseholders a better title than they themselves enjoy. Furthermore, even if these costs cannot be passed on to leaseholders, we think that rentcharge redemption may make the landlord's interest worth more (as it will then be unencumbered) and that leaseholders will be required to pay for that increase in value as part of the purchase price. We are also concerned that requiring landlords to redeem a rent charge may delay the transfer of the freehold, particularly in cases where the rent owner under a rentcharge is missing or difficult to locate.

5.201 As such, we do not think our provisional proposal will assist leaseholders in practice, and thus do not recommend that landlords should be required to discharge rentcharges where leaseholders have made a claim for collective freehold acquisition. After acquisition, leaseholders can use existing statutory provisions available to redeem the rent charge if they so wish and control the process themselves. However, we expect that price paid by the leaseholders for the freehold interest will be reduced to take account of subsisting non-estate rentcharges.

MANAGEMENT ISSUES FOLLOWING A COLLECTIVE FREEHOLD ACQUISITION

5.202 As we noted in the Consultation Paper, collective freehold acquisition claims are not just about acquiring *ownership* of buildings. In many cases, a key motivation for leaseholders to make such claims will be the ability to control the management of those buildings which ownership usually brings.[86]

5.203 The RTM Report makes recommendations for reform of the law governing the right to manage (leaseholders' statutory right to take over the management of their building without buying the freehold of the building). Those recommendations include several designed to ensure that management of the building runs smoothly after the right to manage has been acquired successfully. Similarly, the Commonhold Report contains a number of recommendations relating to the management of both new commonhold developments and buildings which have converted to commonhold.

5.204 However, we do not replicate any of those recommendations in this Report. The focus of the enfranchisement project is on the substance of the enfranchisement rights, the creation of a coherent scheme of qualification for those rights and the procedure by which those rights may be exercised. We do not examine the way in which buildings should continue to be managed after an enfranchisement claim has completed.

---

[86] See CP, paras 6.1 and 6.34.

5.205 Nevertheless, we suggest that the management of buildings following collective freehold acquisition claims is kept under review. If issues should arise under the new collective freehold acquisition regime, Government should consider making provision in terms similar to the recommendations made in the RTM and Commonhold Reports. We think that there are two recommendations in the RTM Report which might be particularly relevant.

(1) Recommendation 76 provides that the Tribunal should have the power to order a variation to a lease where the management of premises in accordance with the lease has become unworkable by reason of the acquisition of the RTM over those premises or other premises.[87]

(2) Recommendation 78 provides that RTM companies should be permitted to recover certain prescribed costs of management as an additional service charge in circumstances where the leases of the premises over which the RTM has been acquired do not provide for this to happen.[88]

A RESTRICTION ON SUCCESSIVE COLLECTIVE FREEHOLD ACQUISITION CLAIMS

5.206 In the Consultation Paper, we considered several possible ways of addressing the ping-pong problem described at paragraph 5.4(4) above. We provisionally proposed that where there has been a successful collective freehold acquisition claim, no further collective freehold acquisition claim should be permitted in respect of the same premises for a period of five years. We considered that this would give the leaseholders who participate in a collective freehold acquisition a fair opportunity to establish that they can manage the premises satisfactorily, without interference from competing factions of leaseholders. At the same time, there would remain scope for another group of leaseholders to acquire the premises in the future, should they still wish to do so after the dust has settled.[89] We asked consultees whether they agreed with our proposal.[90]

Consultees' views

A prohibition on successive claims

5.207 A number of professionals told us that, in their experience, the ping-pong problem arises only rarely. However, a small number of consultees did tell us that they had direct experience of the issue or had heard of the problem in practice.

5.208 Over half of the consultees who responded to this question agreed that there should be a time-limited prohibition on successive collective freehold acquisition claims. These consultees emphasised the disruption which is typically brought about by a collective freehold acquisition claim. The FPRA commented that a ping-pong claim "could be a serious distraction for the directors of the company who should be

87 See RTM Report, paras 10.147 to 10.154.

88 See RTM Report, paras 10.204 to 10.224.

89 See CP, paras 6.133 to 6.137.

90 See CP, Consultation Question 32, paras 6.138 to 6.139.

concentrating on the management of the block". Leasehold Solutions and LKP were of the view that our proposal would stop "tit for tat" actions.

5.209 On the other hand, two members of our advisory group argued strongly against the introduction of such a prohibition. Bruce Maunder-Taylor (a surveyor) considered that the possibility of a successive claim by a competing faction of leaseholders can be a "useful threat to persuade an incompetent or dictatorial board of directors to provide reasonable management at reasonable cost". Philip Rainey QC wrote:

> Successive collective claims are commonly made as a relatively simple way to correct a mistake made first time around, such as a failure to identify an intermediate lease which needs to be acquired, or a failure to include all the land, or losing part of the claim by failing to register the notice against one of a number of interests, and that interest is sold. Banning such claims simply creates a trap or bind which is not there at the moment, when the new Act should be removing traps.

Together with a couple of other consultees, Mr Rainey QC suggested that an alternative means of addressing the ping-pong problem would be to increase the participation requirement for a collective freehold acquisition claim from 50% of the number of residential units in the building to 51%, or perhaps 50% plus one more unit.[91] Then, the leaseholders who did not participate in an initial claim would not able to bring a subsequent claim. At most, they would represent 49% of the residential units in the building.

5.210 Charlie Coombs observed that if our proposal were to be adopted, it would be necessary to consider the interaction with our recommendation for the introduction of multi-building collective freehold acquisition claim above. He asked: "If one part of the estate has enfranchised in the last say 5 years, would that prohibit an estate enfranchisement"?

The duration of the prohibition

5.211 Fewer than half of consultees who responded to this question agreed that a prohibition on successive collective freehold acquisition claims should be for five years. Those who disagreed made suggestions ranging from one year to 20 years, with two or three years being particularly popular suggestions.

5.212 Consultees who thought the prohibition should be for less than five years focussed on the circumstances which might mean that a second collective freehold acquisition claim is justified within that timeframe. Irwin Mitchell LLP noted that "the effect of a bad enfranchisement on a leaseholder for five years may create great difficulties, particularly if it affects the saleability of individual flats". Similarly, The Association of Leasehold Enfranchisement Practitioners ("ALEP") commented that a five-year prohibition could "cause undue hardship in situations where there is a genuine need to change ownership". Others pointed out that flats tend to change hands relatively quickly, and suggested that new groups of leaseholders should have the ability to exercise a new collective freehold acquisition claim.

---

[91] See Chapter 6 at paras 6.267 to 6.281 for a full discussion of the participation requirement for collective freehold acquisition claims.

5.213 Consultees who thought the prohibition should be for longer than five years were limited in number, but felt that this was justified given the expense involved in making a collective freehold acquisition claim.

Discussion and recommendations for reform

5.214 We remain of the view that some form of restriction on successive collective freehold acquisition claims should be introduced. Even if the ping-pong problem does not arise particularly frequently, we have been told that it does create difficulties on occasion, and we think that our reforms present an opportunity to address it. We do not agree, however, that it can be adequately addressed by increasing the participation requirement for a collective freehold acquisition claim to 51%, as some consultees have suggested. Successive claims would still be possible with a higher participation requirement, provided some participants in the original claim were prepared to join a group of leaseholders wishing to bring a later claim. Indeed, in many of the finely-balanced cases in which the emergence of competing factions of leaseholders is a realistic prospect, it would require only one leaseholder to make this transition for a successive claim to be a possibility. In any event, as we explain further in Chapter 6 below, we do not think it is desirable as a matter of qualifying criteria generally to increase the participation requirement for collective claims.[92]

5.215 That said, we acknowledge that there may be instances where it is desirable to bring a collective freehold acquisition claim even where one has taken place in respect of the same premises in the very recent past – for example, where the leaseholders who carried out that claim have entirely failed to manage the premises appropriately thereafter. We think that consultees are right to be concerned about the potential detrimental effect on leaseholders of a five-year prohibition on successive claims in these situations. In particular, consultees have pointed out that leaseholders' reasons for wishing to carry out a further collective freehold acquisition claim might equally render their homes unable to be sold. This is not a scenario which we should expect leaseholders to tolerate for up to five years. Further, it occurs to us that there may equally be situations where the leaseholders who participated in an original collective freehold acquisition claim recognise that they are no longer in a position to own and manage the premises, and would have no objections to a subsequent claim. Where this is the case, a blanket prohibition is in no party's interests.

5.216 For these reasons, we have decided not to take forward our provisional proposal for a prohibition on successive collective freehold acquisition claims for a period of five years. Instead, we recommend that there should be a defence to a collective freehold acquisition claim, available to the nominee purchaser under a prior successful collective freehold acquisition claim of the premises, where that prior claim completed within the preceding two years. We think that it is best for a restriction on successive collective freehold acquisition claims to take the form of a defence rather than a prohibition so as to facilitate claims to which the previous nominee purchaser does not in fact object. A time limit on the availability of this defence is also necessary to strike a balance between giving a nominee purchaser fair opportunity to settle into its role without interference from other leaseholders, and ensuring that those leaseholders'

[92] See para 6.277 below.

statutory enfranchisement rights are not unduly restricted. We think that a two-year limit strikes this balance appropriately.

5.217 We are mindful of Philip Rainey QC's observation that a successive collective freehold acquisition claim is often brought in order to correct a mistake made in a prior claim – such as a failure to include all of the land or interests which it was intended to acquire. However, we think that our change in policy to the provision of a defence available to the nominee purchaser, rather than a prohibition on a successive collective enfranchisement, will address this concern.

5.218 As for the interaction between this recommendation and the introduction of multi-building collective freehold acquisition, we make two observations.

(1) First, we suggest that the defence should not be applicable where the premises which have been the subject of a previous collective freehold acquisition claim are only one part of wider premises to be acquired on a subsequent multi-building claim. In other words, it should be possible for a building to be acquired as part of a multi-building claim even where it has been the subject of an ordinary collective freehold acquisition within the past two years. We think that this scenario is quite different from where a successive claim is brought in respect of exactly the same premises. It does not necessarily involve competing factions of leaseholders. Rather, it is entirely possible that the same group of leaseholders who previously carried out a collective freehold acquisition of their building now wishes to be part of a bigger, multi-building claim.[93]

(2) By contrast, where the leaseholders in one building seek to break away from a multi-building arrangement by carrying out their own collective freehold acquisition claim, we suggest that the defence should apply. As with the above scenario, we acknowledge that this kind of claim does not necessarily involve competing factions of leaseholders within the building which is breaking away. However, it does have the potential to cause disruption for leaseholders in the building or buildings which were part of the prior multi-building claim and which will now be left behind. For that reason, we think that the nominee purchaser of the multi-building claim should be able to block a "break-away" claim within the first two years following the multi-building claim.[94]

5.219 Finally, we are conscious that this recommendation could operate to make it more difficult for leaseholders who want to convert their building from a leasehold to a commonhold structure to do so at a time of their choosing. A collective freehold acquisition claim is usually a necessary part of a conversion to commonhold (unless the landlord consents to conversion).[95] Thus, if one group of leaseholders has already undertaken a recent collective freehold acquisition, another group of leaseholders who wish to convert to commonhold might have to wait for two years to pass before their conversion claim can begin.

---

93 See discussion of this type of multi-building claim at para 5.104 above.

94 See discussion of "break-away" claims at 5.107 above.

95 See the Commonhold Report, at paras 4.6 to 4.40.

5.220 Our policy objective for the commonhold project is to "reinvigorate commonhold". We do not want to put any barriers in the way of the conversion of existing leasehold buildings to commonhold. We therefore recommend that there having been an enfranchisement within the last two years should be no defence to a collective freehold acquisition claim where the ultimate purpose of the claim is to facilitate the conversion of the building to commonhold. Where this recommendation leads to dispute, we suggest that the Tribunal should have jurisdiction to determine whether the reason for the collective freehold acquisition claim is to facilitate conversion to commonhold. The Tribunal may seek undertakings from the applicant leaseholders to ensure a conversion does proceed after the collective freehold acquisition takes place.

Recommendation 23.

5.221 We recommend that there should be a defence to a collective freehold acquisition claim, available to the nominee purchaser under a prior successful collective freehold acquisition claim of the premises, where that prior claim completed within the preceding two years. This defence should not be available, however, where the purpose of the intended claim is to facilitate the conversion of the building to commonhold.

THE RIGHT TO PARTICIPATE

5.222 In the Consultation Paper, we explained that it is not necessary for all of the leaseholders in a building to participate in a collective enfranchisement claim. We noted that there are good reasons why this is the case, and we made no proposal to change the position. However, we did acknowledge that this approach can be perceived as unfair to some individual leaseholders.

(1) First, it is possible that some leaseholders who would be eligible to participate in a proposed claim may not even be aware that one is being considered. There is no requirement for leaseholders organising a collective enfranchisement claim to tell all of the eligible leaseholders what they are planning, or invite them to join.

(2) Second, there will often be leaseholders who are not able to afford to participate in the claim, or who choose not to participate for some other reason.

In either case, it will only be possible for these leaseholders to acquire a share in the freehold at a later date by reaching some kind of agreement to that effect with those who did participate in the claim, or by persuading a new group of leaseholders to bring a fresh collective enfranchisement claim. There is no right for a leaseholder to insist on "joining" the collective enfranchisement claim (that is, by being added to the legal structure which owns the freehold) at a later date. In other words, it is possible for some leaseholders in a building effectively to be unable to take advantage of their

own enfranchisement rights, whether at all or at a time of their choosing, because others in their building have already done so.[96]

5.223 We considered whether the position of those who are not invited to join a proposed collective freehold acquisition claim might be addressed by requiring leaseholders who plan to make such a claim to serve "invitation notices" on all leaseholders who are eligible to participate. However, for the reasons set out in the Consultation Paper, we concluded that that approach was unworkable. We also noted that a previous legislative attempt to introduce mandatory invitation notices has never been brought into force.[97]

5.224 Instead, we proposed to introduce a new enfranchisement right – the right to participate. This right would enable all leaseholders who did not participate in a collective freehold acquisition claim (for whatever reason), as well as those who have only since become qualifying leaseholders, to purchase a share of the freehold interest held by those who did participate at a later date. Additionally, we felt that the existence of the right to participate might even encourage leaseholders making a collective freehold acquisition claim to invite others to join in the first place, and might also be a partial solution to the ping-pong problem discussed above at 5.4(4).[98]

5.225 We asked consultees whether they agreed with our proposal to introduce the right to participate. We also asked whether the right to participate, if introduced, should be available only in respect of collective freehold acquisition claims completed following commencement of the new enfranchisement regime, or also in respect of collective enfranchisement claims completed before that date.[99]

5.226 In setting out our proposal, we recognised that several issues would need to be addressed if the right to participate were to operate successfully.[100] These included:

(1) the circumstances in which the right would be available;

(2) the terms upon which a leaseholder exercising the right would be able to acquire a share of the freehold;

(3) how the premium payable by a leaseholder exercising the right ought to be calculated;

(4) the procedure for exercising the right;

(5) provision for the payment of costs associated with exercising the right; and

(6) how leaseholders can be made aware that the right is available to them.

---

96 See CP, paras 6.144 to 6.148.

97 See CP, paras 6.149 to 6.153.

98 See CP, paras 6.154 to 6.155.

99 See CP, Consultation Question 34, Pts 1 and 2, paras 6.157 and 6.158.

100 See CP, para 6.156.

5.227 We invited consultees to share their views on how these issues may be resolved, and to tell us of any further difficulties which they could foresee with the operation of the proposed right to participate.[101]

Consultees' views

Support for the right to participate

5.228 The vast majority of consultees agreed with our proposal to introduce the right to participate. The proposal was supported by both leaseholders and freeholders, and also by a majority of valuers. These consultees generally thought it would be fair for all leaseholders to have a chance to participate in acquiring their freehold. One leaseholder commented that a right to participate "is absolutely key to achieving a fairer system which stops individuals from being locked out". It was emphasised that it is rare for all leaseholders to be in a position to enfranchise at the same time, whether due to financial or other reasons.

5.229 Other consultees who were in favour of the right to participate argued that it would lead to improved relations between leaseholders. 1 West India Quay Residents' Association considered that the right "promotes harmonious flat living and good neighbourliness". Hayes Point Collective Freehold Limited argued that a collective freehold acquisition should reflect the interests of the community of leaseholders. They wrote:

> Artificially restricting participation to a sub-group of leaseholders would, over time, lead to a growing conflict between members and non-members, raising all sorts of long-term issues…

5.230 Some responses suggested that the right to participate should go further than our proposal in the Consultation Paper. For example, Christopher Denny (a leaseholder) thought that the nominee purchaser company should be required to offer a share to non-participants, rather than wait for a subsequent right to participate claim to be made.

Arguments against the right to participate

5.231 Consultees who were opposed to the right to participate were mainly legal professionals and members of our advisory group. These consultees stated that where a leaseholder is deliberately excluded from a collective enfranchisement claim, this is usually for good reason. For example, that leaseholder may be uncontactable or disengaged, or difficult to work with in some other way. It was said that the leaseholders who have carried out a collective freehold acquisition should not be forced to share the freehold they have acquired with someone who they consider "is not conducive to the good of the group as a whole". Trowers & Hamlins LLP (solicitors) were concerned that giving difficult leaseholders the right to join a nominee purchaser company could potentially "derail the workings of a new freehold company".

5.232 Some consultees also considered that the right to participate would remove the sense of urgency which stems from the "now or never" nature of a collective enfranchisement claim under the current law. This could potentially make it more

---

[101] See CP, Consultation Question 34, Pt 3, para 6.159.

difficult for leaseholders to garner the necessary support to push a collective freehold acquisition claim through. Similarly, a number of consultees suggested that the existence of the right to participate might encourage some leaseholders to "sit back and allow others to do all the hard work", knowing that they will still be able to avail of the same terms at a later date. As Philip Rainey QC put it:

> A buy-in right will…mean that savvy lessees will not commit; they will want to let the others take the risk, and devote time and effort.

Damian Greenish observed that this kind of unfairness is likely to increase conflict between leaseholders rather than to reduce it.

5.233 Finally, a few consultees referred to the numerous issues which would have to be resolved in order for the right to participate to operate successfully – in particular, how the price to be paid by a leaseholder exercising the right could be fairly calculated. Philip Rainey QC was of the view that "the problems are insuperable; and if capable of resolution, only at a cost to the flexibility and usability of the right to enfranchise which is not worth paying".

Retrospectivity

5.234 A large number of consultees responded to our question about whether the right to participate should apply only to future collective freehold acquisition claims or also in respect of previous collective enfranchisement claims. Of those, the vast majority thought that the right should be available in respect of previous claims. It was said that if the right to participate were not to apply retrospectively, a two-tiered leasehold system might develop, with flats which do not carry the right to participate being less valuable than those which do. Some consultees were concerned that flats which do not benefit from the right to participate would not only be worth less, but would also be difficult to sell.

5.235 Consultees who thought that the right to participate should apply only to future collective freehold acquisition claims took the view that the right can only successfully operate where the nominee purchaser which owns the freehold is a company. This will not necessarily be the case with collective enfranchisement claims which completed under the existing law. Other consultees focussed on the potential unfairness of applying the right to participate retrospectively. For example, Hamlins LLP wrote:

> It might be unfair to leaseholders who brought a collective claim under one piece of legislation and in the knowledge they were permitted to exclude certain leaseholders to have the law retrospectively force them to accept membership from all leaseholders.

Other issues associated with the right to participate

5.236 Consultees provided many useful comments on the various issues we raised concerning the operation of the right to participate.

5.237 We received very few comments regarding the terms on which a leaseholder exercising the right to participate will be able to acquire membership of the nominee purchaser company, or on the procedure for exercising the right. Boodle Hatfield LLP agreed that there will need to be provisions in the nominee purchaser's articles (or

other constitutional document) to prevent any new participant being treated differently from original participants (for example, being awarded a different class of shares with different voting rights).

5.238 However, many consultees expressed views on when, exactly, the right to participate should be available. Opinion was divided as to whether a former landlord who has taken a leaseback of a flat in the building should be entitled to exercise the right. Leaseholders typically felt that he or she should not be so entitled. Boodle Hatfield LLP, adopting the contrary view, wrote:

> We see no reason why a landlord who has taken the leaseback should not be entitled to participate. That would be grossly unfair, and particularly so in the case of a compulsory leaseback.

A handful of consultees felt that the right to participate should only be available to owner-occupiers, and one consultee suggested imposing a 12-month ownership requirement before the right could be exercised. Other consultees suggested various time limitations on the availability of the right, such as making it available only at certain regular intervals, only after two or three years have elapsed since the original claim, or only within 10 years of the original claim.

5.239 A considerable number of consultees also commented on the question of valuation. Some consultees argued that the price payable by a leaseholder exercising the right to participate must be based on the value of what they are acquiring at the date on which they choose to participate. Boodle Hatfield LLP pointed out that this would necessarily be complicated, since it would be necessary to take account of changes in the value of the freehold, other changes such as the grant or extension of long leases, and even the fact that the leaseholder has delayed joining in. Others thought that the premium should be based on what the leaseholder would have paid at the time of the original collective freehold acquisition claim, perhaps with adjustments for inflation. The Law Society raised questions about how whatever premium is paid is to be distributed:

> Should the original participants be rewarded for their efforts in having established the scheme? If original participants have sold their flats in the meantime; would the new participants be required to pay their compensation direct to the original participant or to the current owner of the relevant original participant's flat who might then receive a windfall? What difficulty would there be in tracing the original participants if they have moved?

5.240 On the question of costs, consultees generally considered that a leaseholder exercising the right to participate should pay their own valuation and legal costs as well as those of the nominee company.

5.241 Finally, we received various suggestions as to how leaseholders could be made aware that a collective freehold acquisition claim has taken place (and, therefore, that the right to participate is available to them). Some consultees suggested that an entry to that effect could be made by HM Land Registry on the register of to the freehold of the property. Irwin Mitchell LLP suggested that:

> …on any acquisition, the Land Registry be obliged to note the purchase price, the associated costs and the participating flats, so that any subsequent purchaser can easily access the information required to calculate the compensation that they should pay to the original participants.

Others thought that the right to participate could be advertised to leaseholders by way of a statement on service charge demands or by a separate invitation to participate on completion of the collective freehold acquisition claim. One consultee, Millbrooke Court Residents Association, suggested that a leaseholder should be required to take a share of the freehold when they apply for a lease extension.

Discussion

5.242 We have been told by many consultees that there is a need for the right to participate, and the responses to the Consultation Paper show overwhelming support for our proposal. We remain of the view that the right to participate, in principle, could be beneficial to many leaseholders. We think that it would enable many more leaseholders to participate in a collective freehold acquisition claim – albeit later, at a time when they are able to do so. Its introduction would therefore accord with our Terms of Reference, which require us to improve access to enfranchisement rights.

5.243 However, it is also clear from the responses we received to the Consultation Paper that there are many important questions which would need to be resolved in order for the right to participate to operate satisfactorily. A key issue is the question of how the premium payable by a leaseholder exercising the right to participate should be calculated, and whether it is possible to devise a scheme which would produce a fair outcome in all circumstances. We also think that provision would be required to prevent attempts by the participants in a collective freehold acquisition claim to block or frustrate the future exercise of the right to participate – such as by selling the freehold on to an individual or entity which is not made up of the participating leaseholders, or by amending the articles of the nominee purchaser so that it is impossible (or at least not worthwhile) for new members to join. We think that it would be challenging to make such provision without stifling considerably the very freedom and control which leaseholders exercising the right of collective freehold acquisition seek to acquire.

5.244 We have devoted considerable time to trying to solve these questions, and all of the other issues we have identified which would need to be resolved before the right to participate can be introduced. We set out these issues, together with the possible solutions which we have explored and the difficulties which remain, in a note which will be published on the Law Commission's website following publication of this Report.

5.245 If the right to participate is to be introduced, we want to ensure that the detail of the scheme is thorough and that the right will operate effectively for both those who participated in a collective freehold acquisition originally and those who seek to join later. We are not yet at this stage. We have concluded, with some reluctance, that the outstanding difficulties which we have identified are too significant for us to recommend the introduction of the right to participate at present.

5.246 We recognise that this outcome will come as a disappointment to many leaseholders. We want to be clear: we still consider the introduction of the right to participate to be desirable, in principle. However, we recognise that it raises many challenging questions which require separate and detailed consideration. A number of professional consultees suggested that it might be useful to carry out further work on the right to participate, including further consultation with stakeholders. We are inclined to agree. We would welcome discussions with government around when and how that might be done.

CONCLUSION

5.247 In this chapter, we have set out a number of recommendations intended to improve the right of collective freehold acquisition, to make the process of exercising that right and cheaper for leaseholders, and to make sure that suitable ownership structures are put in place for the management of buildings following the completion of collective freehold acquisition claims. In the next Part of this Report, we turn to the criteria which leaseholders must satisfy in order to exercise any of the enfranchisement rights discussed in this Part.

Part III: Who should be entitled to exercise enfranchisement rights?

Chapter 6: Qualifying criteria

INTRODUCTION

6.1 In this chapter, we set out our recommendations for reforming the law governing eligibility for enfranchisement rights. We recommend a "unified" scheme of qualifying criteria, based around the new concept of a "residential unit". We think this scheme will address the numerous problems and inconsistencies created by the current law in this area, by providing a logical and coherent scheme of qualifying criteria. We also think that this scheme will benefit both leaseholders and landlords by reducing the scope for dispute (and therefore reducing costs in many cases).

6.2 Below, we first set out, briefly, some of the key problems of the current law. We subsequently explain our objectives for reforming this area of the law, and summarise the approach which we provisionally proposed in the Consultation Paper. We then turn to the individual elements of the unified scheme, analysing the responses we received to the consultation questions on those components, and we make a series of recommendations for reform.

PROBLEMS WITH THE CURRENT LAW

6.3 The current law of qualifying criteria is explained in Chapter 7 of the Consultation Paper. There are separate frameworks of qualifying criteria for leaseholders of houses (under the 1967 Act) and leaseholders of flats (under the 1993 Act).[1]

6.4 As we explained in the Consultation Paper, there are three general concerns about the current regime as a whole.

6.5 First, the legislation is complex and inaccessible. There are many pages of provisions relating to qualifying criteria spread throughout the 1967 and 1993 Acts. Many of the relevant tests, such as the low rent test, are highly complex and archaic.[2] Although a certain degree of complexity is unavoidable in attempting to cater for a wide variety of different properties and circumstances, most of the complications in the current law stem from the piecemeal amendments which have been made by one statute after another over the past few decades.

6.6 Second, there are significant inconsistencies in the treatment of leaseholders of houses and of flats, which include the following.

(1) There are differing definitions of a "lease" in the 1967 and 1993 Acts.

---

1 The qualifying criteria in respect of houses were discussed at para 7.6 of the CP onwards, and those in respect of flats are discussed at para 7.51 of the CP onwards.

2 The "original" and "alternative" low rent tests were explained at paras 7.25 to 7.31 of the CP.

(2) Leaseholders of houses face more extensive and artificial qualification criteria under the 1967 Act than leaseholders of flats do under the 1993 Act: not least the low rent test and the financial limits which must be met.

(3) The way in which business use is treated by the 1967 Act and the 1993 Act differs. The 1967 Act permits owners of business leases to qualify for enfranchisement rights (so long as they satisfy certain requirements); the 1993 Act excludes such leaseholders from qualifying for rights under the Act. Furthermore, the 1993 Act restricts collective enfranchisement to premises which do not exceed 25% non-residential use; the 1967 Act has no such threshold, merely relying on the definition of a "house" to exclude significant business use.[3]

6.7 Third, the expansion of enfranchisement rights has inappropriately benefited non-owner-occupiers. As we explained in the Consultation Paper, the primary objective of enfranchisement legislation was to remedy perceived injustices suffered by leaseholders occupying their premises as their home. The legislation has moved on significantly from this position, with many commercial investors now being able to take advantage of enfranchisement rights.[4]

6.8 Furthermore, we set out numerous specific criticisms of the qualifying criteria under the 1967 and 1993 Acts. Many of the criticisms of the 1967 Act are fundamental, and include the following.

(1) The Act gives leaseholders of houses enfranchisement rights, but even after being considered by the highest court in the land five times, the question of what a house is has not been settled. Particular difficulties are caused by properties which are in mixed commercial and residential use, properties which have been unused or left vacant for a significant period, and properties which overhang other premises.[5]

(2) The qualifying criteria for the acquisition of the freehold of a house and those which apply regarding lease extensions of a house differ. For example, the "low rent test" applies when leaseholders seek lease extensions of their houses, but not when they claim the freehold. There is no apparent justification for this and other disparities.[6]

(3) The manner in which the 1967 Act addresses business leases, by reference to the Landlord and Tenant Act 1954 ("the 1954 Act"), is unsatisfactory. The 1967 Act purports to apply additional requirements to owners of business leases before they qualify for enfranchisement rights. However, these requirements are relatively easy to avoid (by subletting non-residential parts of premises, for example), and apply arbitrarily: for instance, by subjecting a leaseholder who

---

3 These three specific examples of inconsistencies between the 1967 Act and the 1993 Act were discussed in more detail at paras 7.87 to 7.92 of the CP.

4 See CP, paras 2.5 to 2.10, and paras 7.93 to 7.95.

5 We considered these issues in detail in the CP, at paras 7.96 to 7.107.

6 See CP, paras 7.106 to 7.107.

runs a shop and lives in the flat above to additional criteria, but not applying those criteria to a leaseholder who sublets the entire building or leaves it empty.[7]

(4) The low rent test, its purported abolition,[8] and the resulting legal landscape are confusing. It can be difficult to establish which, if any, test applies (of the several alternative versions) to a specific claim. Furthermore, applying the relevant test can be difficult, requiring the identification of historic rateable values which can be impossible to obtain.[9]

(5) The financial limits which apply in respect of lease extension claims are complex and outdated.[10]

(6) We made several other criticisms of narrower issues in the Consultation Paper.[11]

6.9 We also set out various specific criticisms of the 1993 Act, which included the following.

(1) The two-year ownership requirement, which must be met before lease extension rights are available, is easily and frequently circumvented (by assigning the benefit of a notice of claim). It therefore does not achieve its aim of preventing investors from benefiting from enfranchisement rights, and has caused numerous disputes regarding the validity of purported assignments of a notice of claim.[12]

(2) The definition of a self-contained building or part of a building in collective enfranchisement claims has given rise to a considerable amount of case law, particularly in the context of increasingly complex modern developments.[13]

(3) The rule which prevents someone who owns three or more flats in a particular premises from qualifying in respect of any for the purposes of a collective enfranchisement is easily avoided by sophisticated leaseholders. The rule can also, in certain circumstances, prevent whole blocks from enfranchising.[14]

(4) The rights which head lessees of blocks of flats have in terms of being able to extend the leases of individual flats (often via so-called "*Aggio*" lease

---

7 See CP, paras 7.108 to 7.111.

8 See CP, paras 7.25 to 7.28, where we discussed the effect the Housing and Regeneration Act 2008 has had on the low rent test.

9 We explained these and other criticisms of the low rent test at paras 7.112 to 7.114 of the CP.

10 See CP, para 7.115.

11 See CP, paras 7.116 to 7.117.

12 See CP, paras 7.118 to 7.121.

13 See CP, paras 7.122 to 7.123.

14 See CP, paras 7.124 to 7.126.

extensions) arguably predominantly benefit commercial investors who may have no residential interest in the premises.[15]

(5) The requirement that the leaseholders of not fewer than half of the flats in the premises to be acquired must participate in a collective enfranchisement claim is enhanced in various situations, arguably unfairly. For instance, in the case of a two-flat building, both leaseholders must participate, which can cause difficulties; and where there is a missing landlord, two-thirds of the leaseholders must participate in the claim.[16]

THE UNIFIED SCHEME OF QUALIFYING CRITERIA

6.10 Our Terms of Reference for the leasehold enfranchisement project set out a number of policy objectives. Those of particular relevance to the issue of qualifying criteria include:

(1) to simplify enfranchisement legislation;

(2) to consider the case to improve access to enfranchisement and, where this is not possible, reforms that may be needed to better protect leaseholders, including the right for leaseholders of houses to enfranchise on similar terms to leaseholders of flats; and

(3) to make enfranchisement easier, quicker and more cost effective, including by reducing or removing the requirement for leaseholders to have owned their lease for two years before enfranchising.

6.11 The criticisms set out briefly above and in more detail in the Consultation Paper, many of which were reiterated to us and expanded upon at consultation events and in consultation responses, are compelling. We remain of the view that the current law of qualifying criteria is "confused, complex, outdated and sometimes inconsistent".[17]

6.12 As we explained in the Consultation Paper, the law in this area has developed piecemeal over the past 50 years, through numerous Acts of Parliament. There has been a gradual expansion of enfranchisement rights, carried out in such a way as to bring us to a landscape of legal complexity and incoherence. We do not think that making a series of minor changes to the current scheme will result in a sufficiently simple and coherent framework of qualifying criteria; if anything, it is likely to add to the piecemeal nature of enfranchisement legislation.

6.13 Instead, we suggested in the Consultation Paper that the best way to achieve our policy objectives is to create a new, cohesive framework of qualifying criteria. The purpose of such a new framework would be to identify, with clarity and certainty, the leaseholders who qualify for each enfranchisement right (and which rights they qualify

---

15 See CP, paras 7.127 to 7.128.

16 See CP, paras 7.129 to 7.131.

17 See CP, para 8.5.

for). We provisionally proposed a new, unified scheme of qualifying criteria in the Consultation Paper, arguing that this approach has two key advantages.

(1) First, implementing a new, unified scheme of qualifying criteria will inherently resolve many of the inconsistencies between the treatment of houses and flats.

(2) Second, the scheme we proposed in the Consultation Paper was substantially simpler than the current law, making the system easier to navigate and, we suggested, reducing costs for both leaseholders and landlords.

6.14 We continue to think, following consultation, that creating a new, unified scheme of qualifying criteria is the best approach we can take in this area of the law. Below, we set out a brief summary of the scheme we provisionally proposed in the Consultation Paper. We then consider in more detail the elements of the scheme, summarise the responses we received from consultees in respect of those elements, and make recommendations for reform.

6.15 In the Consultation Paper, we also referred to the question of which type of leaseholders should, in principle, qualify for enfranchisement rights. We explained that, historically, the policy behind enfranchisement was directed at improving the position of long residential leaseholders who occupy their properties as their homes. We therefore explored, and consider further in this chapter, whether the enfranchisement rights of commercial investors should be limited, and, if so, how.[18]

A summary of the unified scheme

6.16 The scheme which we provisionally proposed involved asking a series of questions to determine whether a given leaseholder qualifies for enfranchisement rights (and if so, which).[19] This approach was illustrated by the flowchart at figure 5, to which reference is made throughout the rest of this chapter. We provide an updated flowchart of the scheme recommended in this Report at the end of this chapter.[20]

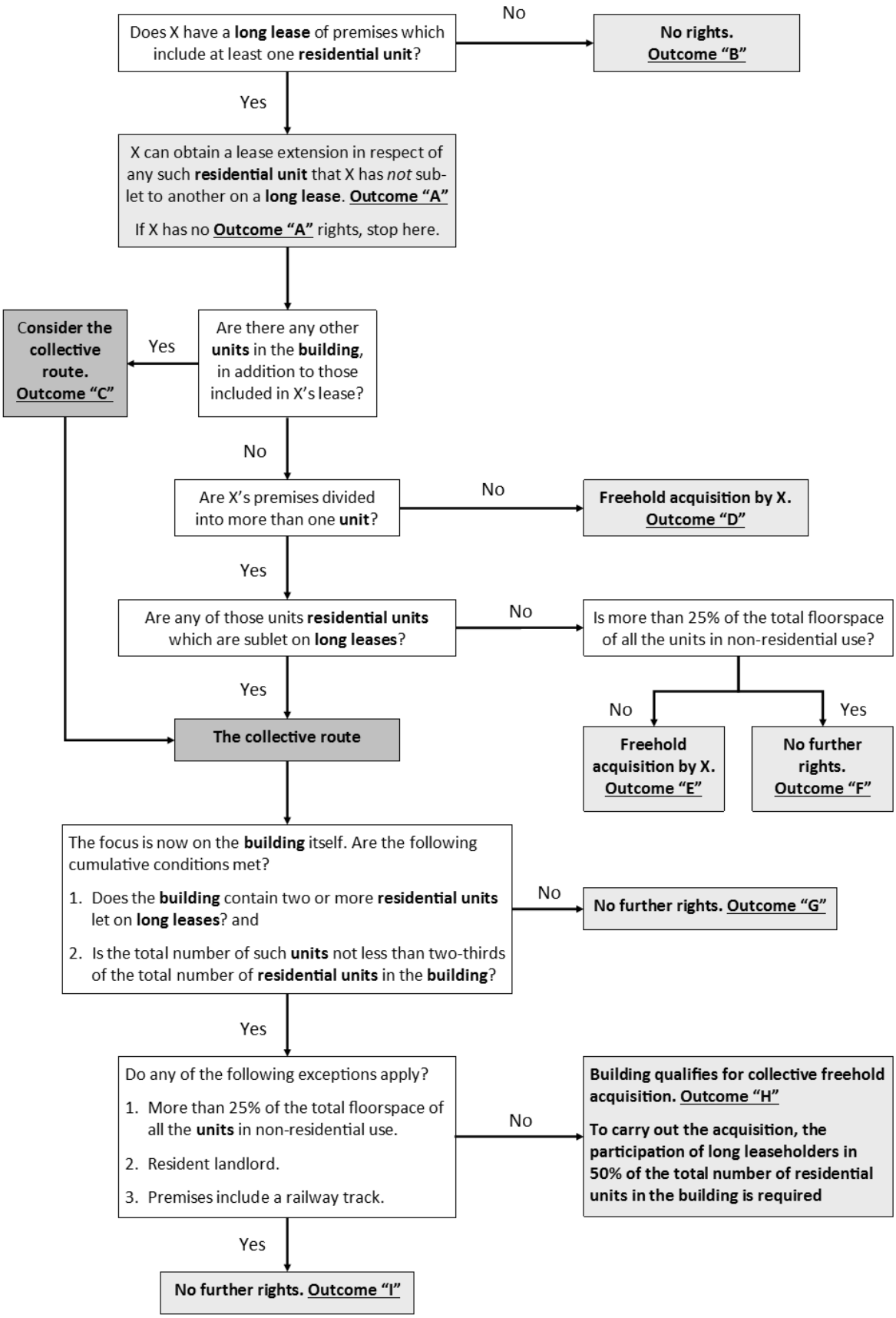
---

18 See below at para 6.372 onwards.

19 Our proposed scheme was set out in more detail in para 8.16 onwards of the CP.

20 See fig 6 below.

Figure 5: Flowchart of the scheme of qualifying criteria provisionally proposed in the Consultation Paper



6.17 The initial question on the flowchart aimed to establish whether a given leaseholder ought to qualify for, at the very least, a lease extension. If he or she does, further questions were asked to work out whether he or she could acquire the freehold of the premises, either individually or collectively with his or her neighbours. In other words, whether the leaseholder is entitled to a lease extension is a gateway question and the answer must be "yes" for any enfranchisement rights to be engaged. The initial question asked:

> Does X have a long lease of premises which include at least one residential unit?[21]

6.18 If not, X would not pass the gateway, falling instead within outcome "B" on the flowchart: he or she would have no enfranchisement rights at all. However, if the answer to the first question was "yes", X would fall within outcome "A", and would have a lease extension right.

6.19 If the answer to the first question was "yes", and so the gateway was passed, further questions were asked to determine whether X also had a freehold acquisition right of some kind. There were four such questions, to be asked in sequence. We consider these in more detail below at paragraph 6.145 below, but set them out in summary here.

(1) The first question was whether there are any other units in the building in addition to those let under X's lease.

  (a) If so, X would not be able to acquire the freehold of the building individually, but might be able to carry out a collective freehold acquisition: outcome "C".

  (b) If not, X could progress to the second question.

(2) The second question was whether the premises let under X's lease contain more than one unit.

  (a) If not, X would be able to acquire the freehold of the building individually: outcome "D".

  (b) If the premises do contain more than one unit, the third question must be turned to.

(3) The third question was whether any of the units in X's premises are residential units sublet to another person on a long lease.

  (a) If so, X cannot acquire the freehold individually, but might be able to undertake a collective freehold acquisition: see paragraph 6.20 below.

  (b) If not, the fourth question must be asked.

---

[21] The concepts "residential unit" and "long lease" are considered below at paras 6.27 to 6.45 and paras 6.69 to 6.82 respectively.

(4) The fourth question was whether the floor space of the non-residential units exceeds 25% of the floor space of all the units combined.

(a) If so, X has no rights beyond the initial lease extension right: outcome "F".

(b) If not, X can acquire the freehold of the building individually: outcome "E".

6.20 In those situations where a collective freehold acquisition is possible, further questions were asked about the building as a whole, and the other units in it. Several cumulative conditions needed to be met.

(1) The building must contain two or more residential units let on long leases.

(2) The number of residential units let on long leases must be not less than two-thirds of the total number of residential units in the building.

(3) The combined floor space of any non-residential units must not exceed 25% of the total floor space of all the units in the building.

(4) Where the building contains four or fewer units, the landlord must not be resident in the building.

(5) The freehold of the premises must not include track of an operational railway.

6.21 Where those conditions were all met, the building would fall within outcome "H" on the flowchart, and would qualify for a collective freehold acquisition (which required the participation of not less than half of the residential units in the building in order to succeed). If any one of the conditions was not met, the result was that a collective freehold acquisition would not be possible: outcomes "G" and "I".

QUALIFYING FOR A LEASE EXTENSION

6.22 We now turn to the substantive questions that we posed to consultees in the Consultation Paper, and discuss our resulting recommendations for reform.

6.23 The first question on the flowchart included in the Consultation Paper, and set out above at figure 5, was as follows.

Does X have a long lease of premises which include at least one residential unit?

6.24 This is a question which is both fundamental to, and a gateway into, our scheme of enfranchisement rights. If the answer is "no", X has no enfranchisement rights. If the answer is "yes", the flowchart demonstrates that X can, at the very least, obtain a lease extension of any such residential unit that X has not sublet to another on a long

lease (outcome "A").[22] X might also have the right to a lease extension of the building or self-contained part of the building which contains this residential unit.[23]

6.25 We therefore begin by examining the individual elements of this question. First, we consider residential units: a crucial concept in our provisionally proposed scheme in the Consultation Paper and in our recommended scheme. We subsequently discuss business leases, and then the definition of a "long lease" for the purposes of enfranchisement rights (including specific exceptions to the definition, and the treatment of concurrent and consecutive long leases).

6.26 Finally, before turning to the schemes of qualification for individual and collective freehold acquisitions, we discuss the removal of certain conditions from the scheme of qualifying criteria: financial limits, the low rent test, and the two-year ownership requirement.

Residential units

6.27 In the Consultation Paper, our starting point in designing a new, unified scheme of qualifying criteria was to remove the distinction between houses and flats. We provisionally proposed the creation of a new single concept of a residential unit. We acknowledged that the introduction of a new term carries a risk of litigation, but argued that the coherence which follows from the use of a unifying term (and which is lacking in the current law) outweighs that risk.

6.28 We explained that the concept of a residential unit was fundamental under our proposed scheme, since in order to have any enfranchisement rights as a leaseholder, we suggested that it should be necessary to have a lease over premises which included a residential unit. We therefore set out in some detail what we understood residential unit to encompass; however, the use of the term residential unit, and the "definition" we provided, were merely intended to describe the underlying policy of the new regime, rather than being an attempt to identify the exact statutory wording to be used.[24]

6.29 In essence, we provisionally proposed that a "unit" should be a separate, independent set of premises which constitutes a building or forms part of a building. For a unit to be "residential", we suggested that it should be constructed or adapted for the purposes of a dwelling. We explained these terms in significantly more detail in the Consultation Paper, giving examples of premises which might meet or fail to meet the definition.[25]

6.30 We also explained that we thought of units as either "residential" or "non-residential", with the two being mutually exclusive. We made it clear that under our approach we

---

22 The premises that can be included in this lease extension are discussed at paras 3.113 to 3.147 above. We also discuss which leaseholder qualifies for enfranchisement rights where there is a chain of leasehold interests at paras 13.9 to 13.10 below: in summary, only the most inferior long leaseholder who meets the enfranchisement qualifying criteria will have enfranchisement rights.

23 We discuss this additional lease extension option at paras 6.132 to 6.138 below.

24 See CP, para 8.36 (n 523).

25 See CP, paras 8.42 to 8.56. We also consider the definition of a building in detail at paras 6.187 to 6.215 below.

envisaged that units which are in mixed use would constitute residential units: in such cases, it is expected that the leaseholder resides in the premises, even if they also work there or are expected to do so.[26]

6.31 We therefore asked consultees whether they agreed with our proposal to replace the language of houses and flats with the new concept of a residential unit. We also asked whether consultees thought our proposed approach to and definition of the term residential unit would work in practice.[27]

Consultees' views

6.32 The vast majority of consultees agreed with our proposal to adopt the term residential unit, and thought that our suggested definition would work well in practice.

6.33 Many consultees agreed with our argument in the Consultation Paper that using a single term would be simpler than preserving the distinction between houses and flats. For example, the Royal Institution of Chartered Surveyors ("the RICS") wrote that "the notion of having a single system for houses and flats… would simplify the current process". Long Harbour and HomeGround (a landlord and an asset manager), among others, described the term residential unit as "straightforward and user friendly".

6.34 Numerous other consultees referred specifically to the current difficulties associated with the definition of a house, and suggested that our unified term would reduce the number of disputes which would arise. The Leasehold Knowledge Partnership ("LKP"), for instance, wrote that our proposed approach "simplifies leasehold and prevents ludicrous legal battles trying to decide what a house is".

6.35 Some consultees, while supporting our proposal, raised specific types of premises which may cause some difficulties. A few leaseholders expressly supported the inclusion of live/work units in the definition of a residential unit, as we suggested in the Consultation Paper. One anonymous leaseholder argued that this should be the case "whatever percentage live/work is allocated". Furthermore, some professionals raised cases, such as derelict properties, storage rooms, or common areas in blocks of flats, where the application of the test of whether premises constitute a residential unit might be tricky. The case of mixed-use buildings was also raised by a few consultees, with two expressing concern about scenarios such as where there is a flat above (but interconnected with) several floors of offices, and querying whether rights should extend to such buildings.[28]

6.36 Of the very few consultees who disagreed with our provisional proposal, some argued that the introduction of a new term would risk rendering the current case law on houses and flats obsolete. There is also the risk of creating, as James Souter (a solicitor) argued, "the prospect of litigation over any new definition whatever the

---

[26] See CP, paras 8.48 and 8.49.

[27] See CP, Consultation Question 38 (first and second parts), paras 8.57 to 8.58. The third part of Consultation Question 38 (at para 8.59) concerned business leases and is considered below.

[28] Damian Greenish (a solicitor); Boodle Hatfield LLP (solicitors).

ultimate wording". Others argued that houses and flats are different, both structurally and in terms of occupancy. One consultee wrote that:

> houses tend to be for the most part owner-occupied, whereas within our own portfolios 60% of flats are buy-to-let investments. Blocks of flats have many and varied interests within them and are therefore managed in different ways and for different reasons to houses.[29]

6.37 Two further points about the suggested definition we included in the Consultation Paper, which were raised both by consultees who supported and who were against our provisional proposal, should be noted.

(1) Some consultees made comments about the wording of our suggested definition itself. Damian Greenish, for example, who broadly agreed with our proposal, wrote that it might be better to define "residential" by reference to whether the unit is "designed or adapted for living in" (adopting the 1967 Act's approach rather than our provisionally preferred approach of "constructed or adapted for the purposes of a dwelling" which reflected the 1993 Act). Caxtons Commercial Ltd (surveyors), which disagreed with our proposal, suggested simply adopting the approach of other legislation, namely, the concept of a "dwelling" within class C3 of the Town and Country (Use Classes) Order 1987,[30] along with ancillary communal areas.

(2) There was also some concern both among consultees who supported and those who disagreed with our provisional proposal that the introduction of a unified term might have a knock-on effect in the context of Government's ban on leasehold houses.

Discussion and recommendations for reform

6.38 We remain of the view that it is desirable to replace the language of houses and flats with a new, unified term. As we explain above, much of the complication in the current law stems from the fact that there are two parallel and inconsistent schemes of qualifying criteria, one for houses and one for flats. The move towards a single concept provides a logical starting point for a uniform and coherent scheme of qualifying criteria. The unified term we provisionally proposed adopting in the Consultation Paper, and which we use in this Report, is residential unit, as it captures the types of property that we think should be included in the enfranchisement regime, and accurately expresses our policy recommendations. We note, however, that the final statutory term may differ, following the legislative drafting process.

6.39 We think that the meaning of residential unit should be along the lines of the view we expressed in the Consultation Paper. In other words, also subject to statutory drafting, for premises to constitute a residential unit they should meet two conditions, which are drawn from the definitions of a "flat" and a "unit" in the 1993 Act.[31]

---

29 The Wallace Partnership Group, a landlord.

30 SI 1987 No 764.

31 See CP, para 8.41.

(1) First, the premises must be a separate, independent premises which either constitutes a building or part of a building (therefore being a unit).[32] Whether premises are "separate" should depend, we think, on whether or not there is "physical separation between the various spaces", as it was recently held.[33] To be "independent", we consider that the premises should be reasonably capable of being used on its own, for its intended purposes, without reliance on other premises.[34]

(2) Second, the premises must be constructed or adapted for use for the purposes of a dwelling (therefore being residential).[35] In respect of those consultees who commented on the specific wording used in the Consultation Paper to describe what makes a unit residential, we note that these are matters which will be considered fully in drafting the legislation. We envisage that a unit will not be residential "unless at some stage in its history it has reached a stage of construction to be suitable for use for the purposes of a dwelling" (in the words of a recent case); a future intention to make a unit residential will not be sufficient to render it a current residential unit.[36] This is not to say that a unit originally constructed as a dwelling will always be residential, regardless of subsequent adaptation for other use.[37]

6.40 We remain of the view that it is desirable for a unit either to be designated as residential or non-residential: a binary choice. As we explained in the Consultation Paper (and as was supported in general by consultees), this brings various types of genuinely mixed-use property, such as live/work units and classic interconnected flats above shops, within the scheme of enfranchisement rights (as they would constitute residential units). In those cases, the leaseholder is expected to live in the premises, it is configured accordingly, and so the unit is constructed or adapted for use for the purposes of a dwelling (even if there may also be some non-residential use): in other words, it is a residential unit.

---

32 If a unit is contained within a larger set of premises, the larger premises will not themselves be a unit; there can be no "unit within a unit". In other words, a unit will be the smallest part of a premises which meets the definition: see CP, para 8.43.

33 *Aldford House Freehold Limited v Grosvenor (Mayfair) Estate, K Group Holdings Inc* [2019] EWCA Civ 1848, [2020] Ch 270, which concerned the definition of a flat under the 1993 Act, at [17]. As Lewison LJ stated in [19], the fact that the separation is "potentially reversible with little effort" does not mean that two sets of premises are not separate from each other.

34 As we explained in the CP, at para 8.44, the fact that premises are accessible only by means of a communal staircase or hallway would not render the premises incapable of "independent" use. Nor would premises cease to be "independent" if the lease of a house or flat does not include structural elements such as the walls and roofs.

35 See CP, paras 8.42 to 8.56. The construction or adaptation should not be in breach of covenant (save where the breach has been consented to or waived by the landlord).

36 *Aldford House*, above, at [36].

37 As we explained at para 8.46 of the CP, we favour adopting the approach of the Court of Appeal in *Hosebay Ltd v Day* [2010] EWCA Civ 748, [2010] 1 WLR 2317, and approved by the Supreme Court on appeal ([2012] UKSC 41, [2012] 1 WLR 2884): where premises are constructed for one use and are later adapted for another, the purpose of the original design or construction should no longer be determinative and can be overridden by subsequent adaptations.

6.41 As mentioned above, however, a couple of consultees expressed a concern on the topic of larger mixed-use units. The example was given of a largely commercial building, such as an office block, which contains a small element of residential accommodation, such as a single flat. These consultees were concerned that, if the flat were not sufficiently separate from the offices, the whole building could be considered a single residential unit. As we explain in the RTM Report, we do not think this situation will arise often, because it would require the residential accommodation to be fully integrated with the commercial building.[38] A flat above an office block would likely constitute a residential unit on its own if it had, for example, a lockable door, since it would be a "separate, independent premises" (and, as a result, the offices would constitute one or more "non-residential units"). In such a case, rights would likely attach only in respect of the residential unit, and even then the situation might be excluded on the grounds that the residential unit is let with other premises to which it is "ancillary".[39]

6.42 However, we do accept that this situation could arise in rare circumstances. Examples we have considered include, for example, bedsit-style accommodation on a factory floor to allow the constant supervision of machinery, or a loft-style flat not separated by a door from a start-up office space. Nevertheless, we do not think that the residential accommodation in these examples would lead to the whole building being classified as a residential unit; we doubt that the building as a whole would be considered to be "constructed or adapted for use for the purposes of a dwelling", as its predominant or overwhelming purpose is clearly commercial usage.[40]

6.43 We acknowledge that the creation of a new term may cause some litigation, at least to begin with.[41] Indeed, some consultation responses provided useful examples of arrangements of premises which might cause difficulties in the context of a new statutory term, including, for instance, derelict premises. We raised and discussed other such properties, such as student flats and complex modern developments including gyms and shared entertaining spaces, in the Consultation Paper.[42] We agree that these difficult cases will need to be taken into account in drafting a statutory definition of a residential unit.

6.44 Nevertheless, we do not think that the existence of borderline or difficult cases detracts from the benefits of our proposed new approach. Given the near-infinite variations possible in properties, there will always be some more difficult cases, which may entail some legitimate disputes. However, we think that in the vast majority of cases, whether premises constitute a residential unit will be clear: ordinary houses and flats will meet the definition. We therefore think that the risks of introducing a new concept are outweighed by the benefits of that approach, which we think will include a simpler and more consistent scheme of qualifying criteria and rights.

---

38 See paras 2.33 to 2.35 of the RTM Report.

39 See below at para 6.86 for a discussion of this situation.

40 This differs from a live/work unit of the kind which is seen more frequently, where a leaseholder lives and works in their property: in which case, as we state above, this will constitute a residential unit.

41 We expanded upon this point in the CP, at para 8.40.

42 See CP, para 8.45 onwards.

Recommendation 24.

6.45 We recommend that the qualifying criteria for enfranchisement rights should be based on the unified concept of a "residential unit", which will replace the language of "houses" and "flats".

6.46 In the RTM Report, we have also recommended moving to the concept of a residential unit as the basis of qualifying to exercise that right.[43]

6.47 Separately, we discuss a consequence which arises as a result of this move away from houses and flats in respect of head lessees of blocks of flats in the context of individual freehold acquisition at paragraphs 6.216 to 6.232 below.

Business leases

6.48 As we explained in the Consultation Paper, the requirement that a unit must be residential will, in many cases, by itself ensure that enfranchisement rights are only available to leaseholders who are granted leases for residential purposes. However, we raised the possibility that someone could take a long lease of a residential unit with the intention of using it for the purposes of a business: for instance, using it as a design studio or a private physiotherapy studio. Assuming the unit kept its residential configuration, such leaseholders might, without more, have enfranchisement rights.[44]

6.49 Enfranchisement legislation has, however, always been directed at benefiting substantively residential leaseholders. This is a policy approach which we proposed to maintain. We therefore suggested excluding business leases from enfranchisement rights, as an additional check on top of the residential unit requirement to ensure that enfranchisement rights remain relevant to residential leaseholders only.[45]

6.50 However, as we mention above at paragraph 6.8(3), and as we explored in detail in the Consultation Paper, the current treatment of business leases by both the 1967 and 1993 Act is unsatisfactory: it is both fairly ineffective, and imposes seemingly unintentional additional conditions on certain deserving leaseholders. We set out two potential options for improving the position.

(1) First, we raised the possibility of tightening up the references to the 1954 Act so as to include leases where premises are occupied by a third party for business premises, or where premises have been left vacant. This could be achieved by defining a business lease as:

(a) a lease which falls within Part II of the 1954 Act;

---

43 See Recommendation 3, at para 3.37 of the RTM Report.

44 See CP, para 8.50.

45 See CP, Consultation Question 38 (third part), para 8.59.

(b) (in relation to premises occupied by a third party for business purposes) a lease which would fall within Part II of the 1954 Act if the premises were occupied by the leaseholder; or

(c) (in relation to vacant premises) a lease which would fall within Part II of the 1954 Act if the premises were occupied by the leaseholder and used for the purposes intended under the lease.

(2) Second, we suggested an approach which concentrated on the terms of the lease itself: a lease could be excluded if the terms of the lease do not permit residential use.[46]

6.51 We indicated that we preferred the second approach for the sake of simplicity (as it will, in most cases, be simple to establish whether a lease permits residential use as a matter of contractual construction), but we asked consultees for their views on the two options.

Consultees' views

6.52 A sizeable majority of consultees agreed with our provisional proposal to exclude business leases from enfranchisement rights as a matter of principle. Most of the consultees who made substantive comment on this topic were landlords, solicitors and other professionals. For example, Carter Jonas LLP, surveyors, wrote that:

> enfranchisement rights should only apply to residential property as the 67 Act was enacted to preserve the right for people to live in their home. It has moved on from that but the principle remains the same.

6.53 Only very few consultees disagreed with the policy aim of excluding business leaseholders from the scheme of enfranchisement rights. One, Adam Stamboulid, argued that:

> businesses should have the right to buy their freehold so they are not exploited by the same loopholes as residential leaseholders.

Several other consultees did not agree with our aim to include mixed-use properties within the enfranchisement regime.[47]

6.54 When considering how best to exclude business leases from the enfranchisement regime, many consultees agreed with the second option in the Consultation Paper: to determine whether residential use is permissible within the terms of the lease. Some suggestions were made as to how to frame the exclusion, with one consultee proposing that rights should be restricted "to those leases which require residential use (not simply ancillary)". Christopher Jessel, a solicitor, suggested that the exclusion "should be broadly drawn so that it should not be necessary to have a specific

---

[46] We made an equivalent provisional proposal in the context of qualifying for the right to manage: see the RTM Report, at para 4.112 onwards.

[47] For instance, Howard de Walden Estates Ltd (a landlord).

covenant against residing but any indication, such as 'to use only for…' or a reference to a planning use class should be sufficient".

6.55 However, a couple of consultees expressed some concern about this second option, on the grounds that "even if residential use may be possible, based on evidence, it may be clear that units are not being used for residential use at the time of a claim".[48] It was also suggested that concentrating on the lease terms may be difficult or unhelpful in respect of certain types of leases.

> What if the user permits any use with landlord consent? What about existing leases, which have been offices say for 100 years, and have no planning consent for any other use, but the lease does not expressly prohibit residential use?[49]

6.56 Instead, some consultees preferred the first option (based on the 1954 Act) that we set out in the Consultation Paper. For example, Damian Greenish wrote that the option based purely on the terms of the lease would enable the enfranchisement of "essentially commercial properties", and that the "alternative, using the 1954 Act, will ensure that the policy of seeking to benefit genuine residential leaseholders will be better fulfilled".

6.57 Various other options for excluding business leases from enfranchisement rights were suggested by consultees. These alternatives ranged from combining both of the approaches we suggested in the Consultation Paper,[50] to providing that "premises which are at the relevant time wholly or partly in non-residential use should not qualify".[51]

Discussion and recommendations for reform

6.58 We remain of the view that business leases should continue to be excluded from the enfranchisement regime. This is in line with the policy approach of enfranchisement, which aims to benefit substantively residential leaseholders. However, in light of consultation responses we have further considered the best mechanism for achieving this aim.

6.59 Although a significant number of consultees agreed with our provisional preference for excluding business leases by reference to the lease terms themselves (the second of the options we set out in the Consultation Paper), we agree with those consultees who raised concerns that leaseholders could qualify for enfranchisement rights despite using their premises solely for business purposes. Similar concerns were expressed in relation to the corresponding proposal in the RTM Consultation Paper, in respect of which a number of consultees pointed out that there are many leases which contain wide user covenants permitting a variety of uses.[52] We do not think that those who are

---

48 Long Harbour and HomeGround.

49 Philip Rainey QC.

50 Philip Rainey QC, who contended that "all four of the tests set out in para 8.52 and 8.53 should be adopted, as a panoply of restrictions which should together catch all business units".

51 Howard de Walden Estates Ltd.

52 See the RTM Report, at para 4.122.

using their premises solely for business purposes should qualify for enfranchisement rights merely because the lease does not prohibit such use.

6.60 We have considered again the alternative approach to the exclusion of business leases of adopting the current law's reference to the 1954 Act, with modifications to address premises which are sublet for business purposes, or which are left vacant: the first of the options we set out in the Consultation Paper. However, we are concerned that this approach would exclude mixed-use properties, which are occupied for both business and residential purposes. Although some consultees supported the exclusion of mixed-use premises, we do not think that this is desirable. There is (and will continue to be) a small but significant number of leaseholders of residential units which are occupied for residential and business purposes (for example, a physiotherapist who has a consulting room in his or her flat). As we discuss above, we consider that these leaseholders of genuinely mixed-use premises should qualify for enfranchisement rights.[53]

6.61 Therefore, we consider that to determine whether a long leaseholder qualifies for enfranchisement rights, it is necessary to take into account both:

(1) the purposes for which the lease allows the premises to be occupied;[54] and

(2) whether and how the premises are in fact occupied.

This has led us to conclude that the best mechanism for excluding business leases from enfranchisement rights is as follows.[55]

6.62 First, a leaseholder will not qualify for rights if his or her lease does not, at the time the claim is made, permit the premises to be occupied for residential purposes. This will be the case regardless of the purposes for which the premises are in fact occupied (or whether they are occupied at all). In such cases, the premises are clearly intended to be occupied for business purposes only and not for residential purposes. A leaseholder who is occupying his or her premises for residential purposes despite the lease permitting only non-residential use will not have enfranchisement rights.[56]

6.63 Second, a leaseholder will qualify if the lease, at the time the claim is made, only allows the premises to be occupied for residential purposes. This will, again, be the case regardless of the purposes for which the premises are in fact occupied (or whether they are occupied at all). In such cases, the premises are clearly intended be occupied for residential purposes, and enfranchisement is intended to benefit residential leaseholders. We think that enfranchisement rights should continue to be

---

53 See para 6.140 above.

54 Whether a lease permits a certain type of use is a question of construction of the lease as a whole, rather than being evaluated solely by reference to the user clause: see *Sequent Nominees Ltd (formerly Rotrust Nominees Ltd) v Hautford Ltd* [2019] UKSC 47, [2020] AC 28.

55 We recommend the same approach to excluding business leases in the RTM Report, at paras 4.122 to 4.130.

56 In our view, a leaseholder should not fall within the enfranchisement regime by reason of having occupied the premises for purposes which are in breach of a covenant in their lease.

available to a leaseholder who is occupying his or her premises for business purposes despite the lease permitting only residential use.[57]

6.64 Third, a leaseholder will qualify if the lease, at the time the claim is made, permits both residential and non-residential use, save where the premises are occupied solely or exclusively for business purposes. The leaseholder would therefore qualify if the premises were left unoccupied, or were occupied solely for residential purposes or for mixed purposes. However, in line with consultees' concerns, leaseholders would not qualify if the premises are, in fact, being occupied solely for business purposes. For example, someone with a lease of premises comprising a shop and a flat which permitted mixed use would not qualify if both the flat and shop were used solely for business purposes. On the other hand, this leaseholder could potentially qualify for enfranchisement rights if the flat were occupied for both residential and business purposes.

6.65 It will be possible for a leaseholder to move between these three general categories. For example, if a leaseholder has a lease which states that the premises are to be used for business purposes but also that use can be changed to residential with the consent of the landlord (not to be unreasonably withheld), the leaseholder will not currently have enfranchisement rights. This is a lease that, at the moment, falls within the first broad category above: it does not permit residential use. The leaseholder could not simply begin using the premises residentially, for he or she would be in breach of the lease. However, if the leaseholder obtains the consent of the landlord to change his or her use of the premises to residential use, then enfranchisement rights will become available (assuming the other relevant qualifying criteria are met).

6.66 It is important to reiterate that this approach is distinct from the inquiry discussed above as to whether a unit is residential. Whether a unit is residential concerns the physical layout and design of premises. Whether a leaseholder has a "business lease" concerns a mixture of the terms of the lease and the actual use (or disuse) of the premises. Both criteria, along with the "long lease" requirement discussed immediately below, must be met in order for a leaseholder to pass the first stage on the flowchart at figure 5 above, and therefore to have the right to a lease extension (and possibly also to a freehold acquisition, whether individual or collective).

[57] There is a difference between refusing to allow leaseholders to gain statutory rights because of a breach of covenant (as in para 6.62 above), and taking away rights that they would otherwise have where they are in breach of covenant. The landlord in the latter cases will be able to take action to require the leaseholder to cease the non-residential use in accordance with the lease.

Recommendation 25.

6.67 We recommend that a leaseholder should not qualify for enfranchisement rights if, at the time the claim is made:

(1) the terms of his or her lease do not permit the premises to be used for residential purposes; or

(2) the lease permits both residential and non-residential use, and the leaseholder is occupying the premises solely for non-residential purposes.

6.68 Conversely, where a leaseholder has a lease which only permits the premises to be used residentially, he or she should not fall within the business lease exclusion, irrespective of the current use of the premises.

Long lease

6.69 Having discussed the concepts of a residential unit and business lease, the remaining element of the first question on the flowchart at figure 5 above to discuss is the definition of a "long lease".

6.70 In the Consultation Paper, we explained our view that there should be a single definition of a lease which draws on the existing definitions under the 1967 and 1993 Acts:

(1) a lease may be a sub-lease, or an agreement for a lease or sub-lease;

(2) it may subsist at law or in equity; but

(3) a tenancy at will or at sufferance will not be a lease.[58]

6.71 What, then, makes a "lease" a "long lease"? In simple terms, we provisionally proposed maintaining the current law under section 7 of the 1993 Act (which is similar in substance to section 3 of the 1967 Act). In other words, we proposed that a lease must be granted for a term of years exceeding 21 years in order to be a long lease. We also made it clear that, if the lease meets that definition, it does not matter whether the lease is or becomes terminable before the end of the term by notice given by or to the leaseholder, or by re-entry, forfeiture, or otherwise.[59]

6.72 The reasons for proposing to maintain the current law were twofold.

(1) We suggested that the criterion serves to distinguish between those who are likely to have paid a substantial premium for a lease, and those who hold

---

58 See CP, para 8.61. A tenancy at will is a tenancy, usually entered into while negotiations for a lease are pending, which may be brought to an end by either party at any time (on reasonable notice). A tenancy at sufferance arises where a tenant remains in possession of a property following expiration of his or her lease, without the landlord's consent.

59 See CP, Consultation Question 39, para 8.67; and see CP, paras 8.62 to 8.66, for more detail.

property on a shorter lease (under which a market rent is payable). It distinguishes, in effect, between owners and renters.

(2) The criterion did not appear to us to cause any difficulties in its application, and was widely known and understood in the market.

6.73 We also explained that section 7 of the 1993 Act (and similar provisions in the 1967 Act) sets out that certain types of lease will be long leases whether or not the term exceeds 21 years; conversely, it also provides that other types of leases will not be long leases no matter how long their term.[60] We provisionally proposed maintaining these provisions.

Consultees' views

6.74 The majority of consultees agreed with our provisional proposal. Several agreed with the reasons we gave. For instance, the Chartered Institute of Legal Executives ("CILEx") concurred that the 21-year requirement is "already effective and well understood", while the National Trust wrote that:

> it is fair that under this length a leaseholder could not have had a realistic expectation that they would be able to remain in the property beyond the period granted by their lease. They are unlikely to have paid any substantial premium to purchase the lease and are usually renting at a monthly rent.

6.75 Some consultees argued that reducing the 21-year requirement would be unfair to landlords, as it would "result in very considerable disruption to the arrangements that have been put in place".[61] A few consultees argued that it is desirable to preserve the ability to grant short leases without them being subject to enfranchisement rights; reducing the 21-year requirement, however, would "adversely prejudice landlords, and restrict their ability to grant short leases".[62] Restricting that ability would, it was contended by Gerald Eve LLP (surveyors), "reduce choices in the market and would thus adversely affect both leaseholders and freeholders".

6.76 Of the consultees who disagreed with our provisional proposal, some seemed to misunderstand the approach as excluding leases which had fewer than 21 years left to run (even if initially granted for more than 21 years). Others argued in response to this question that leases should never be granted which are for less than 21 years, or that all leases should be for 999 years.

6.77 Aside from those responses, we heard both from consultees who thought the 21-year period was too long and those who thought it was too short.

(1) A couple of consultees supported a longer period. For example, a 51-year period was suggested on the basis that this is the threshold for different tax treatment (income tax or capital gains tax) on the grant of a new lease.

---

60 See CP, paras 7.17 to 7.22 in respect of the 1967 Act, and paras 7.59 to 7.61 in respect of the 1993 Act.

61 The Country Land and Business Association, a landlord representative body.

62 CMS Cameron McKenna Nabarro Olswang LLP, solicitors.

(2) On the other hand, some consultees supported reducing the 21-year period, either to a shorter period (suggestions included 5 or 7 years), or to all leases regardless of their length.

6.78 Finally, several consultees raised the position of so-called "statutory tenants": people who had been granted leases for less than 21 years, but who have held over and have resided in their homes for longer than 21 years. Many of these tenants, we were told, have full repairing and insuring leases. It was argued, for example by Barbara Warburton, that the "length of our residency and our obligations to the property as of ownership should outweigh" the fact that the landlord had not offered a longer lease initially.

Discussion and recommendations for reform

6.79 Our starting point continues to be, as it was in the Consultation Paper, that the 21-year requirement is well understood and well known. It has been a long-standing pre-requisite of the enfranchisement scheme, which is aimed at affording rights to those who "own" their homes under a lease, having paid a significant premium for it (even up to full freehold value), rather than those who "rent" their homes under shorter-term arrangements.

6.80 To alter the period of 21 years would dramatically affect the ambit of the enfranchisement regime. Increasing the period would disenfranchise some leaseholders who currently enjoy enfranchisement rights in a way which we consider to be unacceptable. Conversely, reducing the period, while it may bring certain leaseholders within the scope of enfranchisement rights (such as the "statutory tenants" from whom we received consultation responses), would significantly expand the ambit of the enfranchisement regime, and potentially have far-reaching consequences on the housing market (for example, by restricting the ability of landlords – of all types – to grant short leases in the future). We do not consider that sufficiently good justification for altering the period was forthcoming from consultation responses.

6.81 As we mention above, some of the consultees who disagreed with our provisional proposal read it as stating that a lease of which the term has fallen below 21 years will not qualify for enfranchisement rights. This is incorrect: the 21-year period refers to the initially "granted" term of the lease.[63] A lease granted, for example, for 99 years, but which has only 20 years left to run, would still qualify as a long lease and so enjoy enfranchisement rights. Furthermore, points made by some consultees concerning the banning of all leases which are granted for less than 21 years are not relevant to this particular criterion for determining qualification for enfranchisement rights, and are beyond the scope of our work.

[63] 1967 Act, s 3(1); 1993 Act, s 7(1).

Recommendation 26.

6.82 We recommend that, in order to qualify for enfranchisement rights, a leaseholder should have a lease that was granted for more than 21 years.

Specific inclusions within and exceptions to the definition of a "long lease"

6.83 As we explained in the Consultation Paper, under both the 1967 and 1993 Acts, there are certain types of leases which are specifically included in or excluded from the definition of a long lease.[64] Some of the key examples of these types of leases are as follows.

(1) The tenant of an agricultural holding under the Agricultural Holdings Act 1986, or a farm business tenancy under the Agricultural Tenancies Act 1995, does not have rights under the 1967 Act.[65]

(2) The leaseholder of a house which is "ancillary to" other premises let to him or her under the same lease does not have rights under the 1967 Act.[66]

(3) Leases which are terminable by notice after a death, marriage or civil partnership are treated as long leases unless they meet particular criteria, under both the 1967 and 1993 Acts.[67]

6.84 As part of our provisional proposal on maintaining the 21-year requirement in respect of the definition of a "long lease", we suggested making equivalent provision in our new scheme of qualifying criteria so that these particular types of leases continued to be excluded.[68] Very few consultees commented on this suggestion, and all who did supported the various exceptions and inclusions which we set out. We therefore remain of the view that we expressed in the Consultation Paper, that the respective provisions in the 1967 and 1993 Acts should be mirrored in the new scheme.

6.85 One further point is worth making in respect of one of these categories: the exclusion for houses which are "ancillary to" other premises. This provision is, at present, rarely applicable.[69] In the context of these reforms, however, it may have a slightly more

---

64 See CP, paras 7.21 to 7.22, and 7.59 to 7.61.

65 1967 Act, s 1(3)(b).

66 1967 Act, s 1(3)(a).

67 1967 Act, s 3(1) (in respect of which the position is more complex, as described in para 7.21(1) of the CP), and s 7(2) of the 1993 Act. The criteria which, if met, exclude these leaseholders from rights are that the notice is capable of being given at any time after the death, marriage or civil partnership of the leaseholder, that the length of the notice is not more than three months, and the terms of the lease preclude both its assignment and the subletting of the whole of the premises comprised in it.

68 See CP, para 8.65.

69 The authors of *Hague* write at para 4-02 that there is only one known case on this point: *Brightbest Ltd v Meyrick* (26 March 2014) Winchester County Court (unreported). In that case, the authors of *Hague* explain

significant role to play, not least because it will no longer be confined in its application to the exclusion of houses which are ancillary to other premises, but will apply to the leaseholder of any residential unit which is ancillary to other premises.

6.86 Take, for example, the hypothetical scenario raised by a couple of consultees (referred to at paragraph 6.35 above) of a largely commercial building, such as an office block, which contains a small element of residential accommodation, such as a single flat, used for accommodating a director.[70] At present, a long leaseholder of the whole building might be able to obtain a lease extension over the flat. Under our new scheme, however, if the layout of the block were such that the residential space constituted a residential unit, it is possible that enfranchisement rights (even the right to a lease extension) would not attach to that residential unit. This result would stem from the fact that the residential unit is let to a leaseholder together with other premises (the offices) to which it is "ancillary".[71] We consider that this outcome is desirable, as it prevents effectively long (investor) leaseholders of numerous units in a building acquiring lease extensions over the residential units: to allow enfranchisement in such circumstances would not benefit a homeowner. Of course, if the residential unit were, instead, held by a different leaseholder to the leaseholder of the offices, it would no longer be "let with" the other premises, nor would it be "ancillary to" those other premises, and therefore the residential leaseholder would have enfranchisement rights.

Concurrent and consecutive long leases

6.87 Following our discussion of what constitutes a "long lease" in the Consultation Paper, we dealt with three specific related provisions in the current law.

(1) Two or more separate ("concurrent") long leases between the same landlord and leaseholder in respect of the same premises (and appurtenant property) can be treated as if they were a single long lease.

(2) Renewals of long leases, or periods when a long lease is (or was) continued by statute, such as under Part I of the 1954 Act, are treated as long leases.

(3) Consecutive long leases are treated as a single long lease (at present, under the 1967 Act only).[72]

6.88 We provisionally proposed maintaining the current law in respect of the first two, regarding concurrent long leases, and renewals or statutory continuations of long leases. We also proposed extending the 1967 Act's approach to treating consecutive long leases as a single long lease across the board, making it clear that there is no limit to the number of long leases which can be joined together in this way.[73]

---

that "ancillary" was defined as meaning "that which is subordinate to some other thing" (referring to *Dictionary of English Law: Earl Jowitt*, 1959).

70 See para 6.41 above.

71 The same result may arise in respect of, say, a caretaker's cottage let with (and situated in the middle of) school grounds.

72 We explained these three provisions at paras 8.68 to 8.70 of the CP.

73 See CP, Consultation Question 40, paras 8.71 to 8.72.

Consultees' views

6.89 The vast majority of consultees agreed with our provisional proposals relating to all three specific situations, most without giving any reasons. Furthermore, of the small minority of consultees who disagreed, very few explained their view.

6.90 Three important points were made, however: one in respect of each of the three elements of our provisional proposal.

6.91 First, in respect of the provision relating to "concurrent" long leases, some consultees argued that the "same landlord" condition should be removed. For concurrent long leases to be treated as a single long lease for enfranchisement purposes, they must be between the same leaseholder and immediate landlord. One consultee suggested that this condition:

> is currently abused as a method of excluding Act rights – you grant an intermediate lease of part of the unit, and then two leases (which together demise the whole unit) to the occupational tenant – one from the freeholder, one from the intermediate lessee. The "same landlord" test is failed and the tenant has no rights.[74]

6.92 Another consultee gave the specific example of a flat and a garage, which are sometimes held on different leases with different freeholders, "despite them effectively being the same premises from a practical perspective and accordingly the tenant then ultimately will "lose" their garage as the lease will run out whereas the flat lease can be extended".[75] As a result of these issues, there was support for relaxing the "same landlord" part of the test.

6.93 Second, several consultees specifically disagreed with our provisional proposal on extending the 1967 Act's "chaining" approach to consecutive long leases, allowing them to be treated as a single long lease. Damian Greenish contended that the provision's only function under the new regime would be "to allow a leaseholder to go back to earlier leases to look for improvements which might be discounted in the valuation". He referred to the valuation proposals which were contained in Chapter 15 of the Consultation Paper, in which it was suggested that the discount for leaseholders' improvements may no longer need to form part of the premium payable on enfranchisement. Mr Greenish argued that if the discount were removed from the calculation, the provision relating to consecutive long leases would serve no purpose. Furthermore, if the discount were retained, he asked whether it is:

> really equitable for the leaseholder to go back, on some occasions to previous centuries, to look for improvements which might be discounted? Would it not be better to restrict relevant improvements (if they are retained) to those carried out during the term of the current lease, or at least put a time limit on how far back you can go; the term of the current lease or, say, 21 years whichever is the shorter?

6.94 Philip Rainey QC argued along similar lines. He wrote that the provision relating to consecutive long leases:

---

74 Philip Rainey QC.

75 Heather Keates, a conveyancer.

leads to ridiculous arguments in 1967 Act cases about whether an extension completed in (say 1820) should be disregarded – indeed sometimes whether the construction of the existing house should be disregarded. Why go back generations looking for improvements carried out by unconnected predecessors? The disregard for tenant's improvements should be limited to the current lease, and the chain provision omitted (as it was omitted from the 1993 Act).

6.95 Third, a couple of consultees commented on the provision relating to renewal tenancies, but specifically where a renewal requires a premium to be paid. Long Harbour and HomeGround contended that such leases should only be considered a single long lease once "the second lease has commenced". Another consultee argued that this reflected their understanding of the current position, writing that in their view:

> the leases are considered together as a single long lease only when the second lease has commenced and that this should remain the case.[76]

Discussion and recommendations for reform

6.96 Taking concurrent leases of the same premises (and appurtenant property) first, we remain of the view that these should be treated as a single long lease. It seems right that a leaseholder should not be disadvantaged by a landlord granting them two separate long leases over different parts of his or her residential unit, or over the residential unit and, for instance, an adjoining garage.

6.97 Furthermore, we are persuaded, to a large extent, by the arguments made by consultees relating to the "same landlord" requirement. Consultees' comments revealed that this requirement is a potential avenue for abuse, and we do not think that a leaseholder should have his or her enfranchisement rights restricted because a landlord grants a long lease over part of a residential unit, and grants a separate long lease over the remaining part of the residential unit via an intermediate landlord. We therefore think that the "same landlord" element of the provision should be relaxed.

6.98 Therefore, where there are separate long leases held by a single leaseholder of two or more parts of a residential unit, or part of a residential unit and the premises associated with it,[77] these leases should be treated as a single long lease.[78] This change would help a leaseholder who has been granted, for example, a lease of a traditional house by a landlord, and a separate lease of a garage and garden by a company owned by that landlord. As the garage and garden are likely to form part of the premises associated with the house, the two leases will be treated as one, and the leaseholder qualify for a lease extension in respect of both. Similarly, a leaseholder who has been granted two long leases by two separate landlords, one of the inside of his or her house and one of the walls and roof, will be able to treat them as one long lease in carrying out an enfranchisement claim.

---

76 Irwin Mitchell LLP, solicitors.

77 The issue of which "premises" are associated with a residential unit is discussed at paras 3.125 to 3.137 above.

78 We note the different context of the rule that separate collective freehold acquisition claims must be made over different self-contained parts of a building where those parts are held by different freeholders: 1993 Act, s 4(3A).

6.99 We also think that the position of the 1967 and 1993 Acts in respect of renewals or statutory continuations should be maintained, as we provisionally proposed. This would include the condition, as several consultees mentioned, that the leaseholder has become the leaseholder under the renewal or statutory continuation lease "on the coming to an end of" a previous long lease.

Recommendation 27.

6.100 We recommend preserving the current law in respect of renewals or statutory continuations.

6.101 We also recommend preserving the current position in respect of concurrent long leases, but whilst relaxing the "same landlord" condition so that a leaseholder of separate long leases of:

(1) two or more parts of a residential unit; or

(2) part of a residential unit and the premises associated with it,

should be able to treat those separate long leases as a single long lease for the purposes of enfranchisement.

6.102 However, the 1967 Act's "chaining" provision in respect of consecutive long leases, and whether to preserve it in our new scheme, is directly related to whether to retain the discount for leaseholders' improvements in calculating premiums. In the Valuation Report, we suggested the option for Government to retain the discount for leaseholders' improvements, to be applied at the election of leaseholders where appropriate. However, we also noted that the discount could be removed (or limited in terms of applying only to discounts made within a certain time limit) if done as part of a package of reforms that would reduce premiums overall.[79]

6.103 Many of the points which were made by consultees in relation to this question mirrored those made in respect of the equivalent question on valuation. For example, we heard from consultees who advocated placing a limit on how far back in time a leaseholder can point to improvements which trigger a discount, such as requiring that the improvements were made within the existing lease or within the last 21 years (whichever is shorter).

6.104 The decision which Government makes in terms of valuation overall, and in terms of the discount for leaseholders' improvements, will determine the approach to the chaining provision. If Government decides to abolish the discount, then the chaining provision will be rendered obsolete; if Government preserves the discount, or preserves it in a limited way, then the chaining provision will need to be altered in order to reflect that. We discuss these options in more detail in the Valuation Report.[80]

---

79 Sub-option (6), at para 6.223 of the Valuation Report.

80 See the Valuation Report, paras 6.242 to 6.249.

CONSEQUENTIAL ABOLITION OF CERTAIN QUALIFYING CRITERIA

6.105 As we explained in Chapter 7 of the Consultation Paper, there are currently numerous other qualifying criteria in the 1967 and 1993 Acts which must be met before enfranchisement rights are available. We specifically discussed:

(1) the financial limits and low rent test from the 1967 Act; and

(2) the two-year ownership rule in the 1967 Act and in respect of lease extensions under the 1993 Act.

6.106 As we explain above, we provisionally proposed (and now recommend) a scheme of qualifying criteria where the right to a lease extension becomes available where a leaseholder simply has "a long lease of premises which include at least one residential unit". In the Consultation Paper, therefore, we provisionally expressed the view that the scheme of qualifying criteria should move away from these additional financial and ownership requirements.

6.107 We take each of these two additional categories of qualification requirement in turn, before then turning to the scheme of qualification for freehold acquisition rights.

Removal of financial limits and the low rent test

6.108 In the Consultation Paper, we argued that both the financial criteria for qualification under the 1967 Act, and the low rent test are difficult to operate in practice. We contended that they cause complexity and confusion. It can, for example, be extremely difficult to identify a property's rateable value on the appropriate day, or at all.[81]

6.109 We suggested that there is no good policy reason to maintain any such financial criteria in our new scheme of qualifying criteria, and therefore proposed to abolish these criteria.[82]

Consultees' views

6.110 Almost no consultee disagreed with our provisional proposal to remove financial limits and the low rent test. Many agreed with the arguments we made in the Consultation Paper, with the financial criteria and low rent tests called "outdated and arbitrary" by CILEx. The criteria were said to create a "level of obfuscation which should not exist" by LKP, among others. One surveyor, Andrew Richard Perrin, explained that one of the difficulties which arises in respect of the financial criteria stems from the fact that:

> rateable values are a considerable headache to obtain as statutory bodies have either disposed of or are not prepared to give the necessary information.

---

81 We set out the criticisms of the low rent test and the use of rateable values at paras 7.112 to 7.115 of the CP.

82 See CP, Consultation Question 41, para 8.74.

6.111 A small number of consultees raised specific points relating to particular situations in which the financial criteria are relevant. In essence, these situations can be broken down into three categories.

(1) Several consultees raised the point that the financial criteria are crucial to determining whether, under the current law, a leaseholder of a house qualifies for the more favourable basis of valuation under section 9(1) of the 1967 Act. Philip Rainey QC, for instance, wrote that "if the s 9(1) valuation (or some variation upon it) is to be retained it must be limited to units which would have met the limits under the old law". Some of the tiny minority of consultees who disagreed with our provisional proposal to abolish financial criteria did so on this basis, arguing that our proposal, for example, would "have an impact for leaseholders who may currently claim the freehold under section 9(1)".[83] Another consultee contended that:

> the protection afforded to leaseholders in low value properties should be retained… [and] if qualifying criteria based on financial limits are to be removed it is difficult to envisage how this protection will be applied.[84]

(2) A few other consultees discussed the application of the financial criteria in the context of "excluded tenancies" (in "designated rural areas") and heritage property.[85] The Portman Estate, a landlord, suggested the use of a saving provision in order to preserve the financial criteria to apply to those situations. One consultee who disagreed with our provisional proposal – the Country Land and Business Association – expanded on the issue of "excluded tenancies". The Association accepted that "the reference to a low rent test and rateable values is an often-difficult test to apply and in view of the development of the law, it now seems an anachronistic practice", but argued that there is a role for types of excluded rural tenancies, and that special regard should be had to these situations.

(3) A couple of consultees agreed that the financial criteria should be abolished with a view to "streamlining" the current law, but argued that enfranchisement rights should be confined to "privately-owned residential units with exclusions for institutional property such as care homes and student accommodation" (the RICS). The British Property Federation concurred, arguing that:

> residential blocks, including care homes and student accommodation blocks are often let on long leases and could inadvertently qualify, so these type of "investment or commercial lettings" should not permit enfranchisement rights. Enfranchisements should therefore be restricted to privately owned residential units, or units that are effectively owner-occupied or let by owners on short leases.

---

83 Nesbitt and Co, surveyors.

84 Wallace Partnership Group Ltd.

85 Under ss 1AA and 32A of the 1967 Act respectively.

Discussion and recommendations for reform

6.112 Our provisional proposal to remove the financial criteria and low rent test as qualifying criteria for enfranchisement rights was fairly uncontroversial. These aspects of the current law cause complexity and uncertainty. We do not think, as we wrote in the Consultation Paper and as was confirmed by the vast majority of consultees, that there is a good policy justification to retain the criteria, and particularly not to extend them across the board to all properties (rather than them applying only to houses, as is the current position).

6.113 Consultees did make several useful suggestions about situations in which the financial criteria and low rent test may still have a role to play. In some of these cases, which we deal with in more detail elsewhere, we agree that the financial criteria and low rent test may need to be preserved. In respect of section 9(1), for example, we have set out options for Government in the Valuation Report in terms of how to address that valuation basis.[86] Insofar as section 9(1) is retained in the new valuation scheme, whether indefinitely or under a sunset clause, the qualification criteria for that valuation basis will need to be preserved. We discuss "excluded tenancies" in designated rural areas in Chapter 7 of this Report, where we explain that there may be a limited ongoing role for the application of the low rent test in this context, depending on whether Government wishes to preserve this exemption from freehold acquisition rights.[87] However, as we also explain in Chapter 7, we are recommending an approach to "heritage property" that does not involve preserving the financial criteria or low rent test.[88]

6.114 Finally, the comments made by consultees regarding restricting enfranchisement rights to privately-owned residential units rather than institutional properties (such as care homes) relate principally to other areas of our recommended scheme. For instance, whether there will be enfranchisement rights over student accommodation is a question which goes to the definition of a residential unit, and the types of leases which qualify for rights, rather than the removal of financial criteria.[89] Retention of the financial criteria and low rent test is not therefore necessary to ensure that such properties are excluded from the enfranchisement regime.

Recommendation 28.

6.115 We recommend that all qualifying criteria for enfranchisement rights based on financial limits (both the low rent test and rateable values) be removed, except where expressly preserved for a specific purpose (such as, for example, potentially in relation to retaining section 9(1) of the 1967 Act as a basis of valuation).

---

86 See Ch 9 of the Valuation Report, and particularly our summary of the options for Government at para 9.122 onwards.

87 See paras 7.270 to 7.273 below.

88 See below at paras 7.236 to 7.241, and Recommendation 49 (at para 7.242).

89 See para 6.43 above.

6.116 We note one further point at this stage. We have been told of the existence of a small number of long leases which have been granted at (or close to) a market rent, often accompanied by a very low or no initial premium. At present, many of these leases fall outside the enfranchisement regime. Several are excluded, for example, because the landlord is the National Trust, which is currently exempt from freehold acquisitions, and the leases do not meet the low rent test to be eligible for a lease extension under the 1967 Act.

6.117 Our recommendation that all qualifying criteria based on financial limits be removed may, however, bring some of these leases within the scope of enfranchisement rights in the future.[90] This is especially the case in the light of our recommendations on certain exceptions: a crucial example of this is the change of approach we recommend relating to the National Trust.[91]

6.118 We think the inclusion of these types of lease within the enfranchisement regime does not itself give rise to concern. However, depending on the approach to valuation taken by Government, further thought may need to be given to these "market-rent leases". It is possible that specific provision might be required in respect of these unusual leases, so as to ensure that "sufficient compensation" is paid by way of premium when enfranchisements are carried out. Further consideration will be required in this regard once Government has decided on its preferred approach to valuation.

Removal of the two-year ownership requirement

6.119 As we explain above, we also provisionally proposed that the requirement to own premises for two years before exercising enfranchisement rights be abolished. We set out a number of criticisms of the requirement in the Consultation Paper, including the ease with which it can be avoided by well-informed leaseholders (by assigning the benefit of the notice of claim once served). Moreover, where the requirement is not avoided, the two-year period can constitute a significant reduction in the remaining term of the lease, which can increase the cost of the extension or freehold acquisition.[92] We argued that those criticisms were compelling.

6.120 We also noted in the Consultation Paper that our Terms of Reference (referred to at paragraph 6.10 above) specifically require us to make enfranchisement easier and quicker by "reducing or removing" the two-year ownership requirement. We suggested that it was preferable to remove the requirement altogether.[93]

6.121 As a consequence of that proposal, we explained that an inconsistency between the position of trustees in bankruptcy and that of personal representatives would be resolved. At present, a trustee in bankruptcy cannot rely on the bankrupt leaseholder's period of ownership in order to satisfy the two-year ownership requirement; the personal representatives of a deceased leaseholder, however, can rely on that prior

---

90 Though we note that a proportion of these market-rent leases are likely to continue to be excluded under our new scheme on the basis of other provisions, such as the exclusion for business leases.

91 See para 7.120 onwards.

92 See CP, paras 7.118 to 7.121.

93 See CP, Consultation Question 42, para 8.77.

ownership.[94] Under our new scheme, without the need to establish any minimum period of ownership, in both cases the present ownership of the long lease would be enough to found an enfranchisement claim.[95]

Consultees' views

6.122 Around 450 consultees – a notably high number compared to the average of around 300 who responded to each question in this chapter – answered this question, almost all of whom agreed with our position of removing the two-year ownership requirement. Consultees supported our suggestions that the requirement is easily avoided, that it causes delays and complications for leaseholders.

6.123 Several consultees agreed with our view that the ownership requirement is easily avoided, but only by well-informed leaseholders. One leaseholder put the point as follows.

> Those in the business of leasehold already know how to get round this, but the average 'home-owning' leaseholder does not and has no access to the legal expertise necessary.[96]

As a result, the two-year ownership requirement can "jeopardise or discriminate against the interests of those leaseholders who are unaware that the limitation can be easily sidestepped".[97]

6.124 Moreover, leaseholders who are trying to sell can be adversely affected by the requirement, as their buyer will be concerned at being unable to enfranchise for two years, not least because of the risk that the assignment will not be correctly carried out.[98] Onward Homes, a housing association, argued that abolishing the requirement should "help leaseholders who are trying to sell as they are often forced to extend the lease prior to sale as the new buyer can't get a mortgage due to the length of time remaining on the lease".

6.125 Numerous consultees agreed that the consequences to the premium of a two-year delay in exercising enfranchisement rights can be significant. One, for example, wrote that the abolition of the requirement would be "welcome in empowering leaseholders to reduce their premiums earlier on by exercising their rights of enfranchisement".[99]

(1) Some argued that the value of the property can increase in the two-year period, resulting in an unaffordable premium.

---

94 See CP, para 7.117.

95 We explained the inconsistency at para 7.117 of the CP.

96 Josephine Rostron.

97 CILEx.

98 As we explained in para 7.120 of the CP, the benefit of the notice may be assigned with the lease, but is not capable of subsisting apart from the lease. It is essential, therefore, that there is a legal assignment of both the lease and the notice together – a requirement, we understand, which has led to a number of disputes over whether a valid assignment has taken place.

99 CILEx.

(2) Others wrote that removing the two-year ownership requirement would especially help leaseholders "of long leases that have only a short unexpired residue left of the original term without the buyer requiring a seller to serve an enfranchisement notice".[100]

(3) Particular attention was paid by a couple of consultees to the possibility, during the two-year ownership period, of falling under the 80-year threshold so that marriage value is included in the premium. We note that whether this problem would remain under our new scheme is dependent on the reforms Government implements with respect to valuation in enfranchisement claims.[101]

6.126 Very few consultees disagreed with our proposal to abolish the two-year ownership requirement. Most of those few did so on the basis that such a change would enable investors more easily to take advantage of the enfranchisement regime, contrary to the original purpose of the requirement. It was argued that removing the requirement would create a "speculators' market",[102] and that it would "attract abuse by those with no long-term interest who just wish to make a quick profit".[103] This was said to move away from the foundations of enfranchisement, which a couple of consultees contended was based in the moral entitlement of occupying long leaseholders to own their own homes.

6.127 Some consultees went further and suggested tightening up the two-year ownership requirement. Some examples were as follows.

(1) Verina Glaessner argued that the period of ownership required should be five years "in order to ensure that properties are used for residential purposes".

(2) A couple of consultees contended that the two-year requirement should be extended to act as a qualification criterion in respect of collective freehold acquisitions.

(3) One consultee, Stephen Desmond, while agreeing with our proposal to remove the requirement, suggested retaining the period "in respect of a tenant who is a non-natural person".

Discussion and recommendations for reform

6.128 Although we explained that the purpose of the ownership requirement was to prevent investors from benefiting from rights intended for residential leaseholders, we argued at consultation – and continue to think – that it has not achieved that objective. For sophisticated commercial investors, the ownership requirement is easy to avoid; for ordinary leaseholders, it can comprise a serious obstacle to exercising enfranchisement rights, often by being responsible for the premium increasing over

---

100 The Law Society.

101 In the Valuation Report, we included the option for Government to remove marriage value altogether, or to remove the 80-year cut off (if done as part of a package of reforms that would reduce premiums overall): see, in particular, our explanation of Scheme 1 (at para 5.85 onwards) and Option 5 (at para 6.217 onwards) respectively.

102 Geraint Evans, a surveyor.

103 Sir John Cass's Foundation, a charity landlord.

the two-year period. These points have been confirmed to us both by consultees and by our advisory groups.

6.129 We do not think that the ownership requirement should be extended or tightened up in any of the ways suggested by consultees: for instance, by extending the period to five years. Such a change would create further barriers to the exercise of enfranchisement rights for leaseholders, and would also be contrary to our Terms of Reference to improve access to enfranchisement, particularly by "reducing or removing" the two-year ownership requirement. Moreover, given that many speculators and investors already take advantage of the (relatively simple) workarounds of the two-year requirement, we are not persuaded that removing the requirement will have a significant impact in terms of attracting more investors who wish to make a quick profit from the enfranchisement regime.

6.130 We therefore think that the ownership requirement should be removed from the scheme of qualifying criteria. This would afford flexibility to leaseholders, who would be able to make an enfranchisement claim immediately on buying a lease, rather than waiting and watching their premium increase for two years (particularly where the lease already has a relatively short term remaining). As we mention at paragraph 6.121 above, this would also consequentially resolve the current inconsistency between the position of trustees in bankruptcy and of personal representatives.

Recommendation 29.

6.131 We recommend that the requirement to have owned premises for two years prior to exercising enfranchisement rights be abolished.

LEASE EXTENSIONS: AN ADDITIONAL OPTION FOR LEASEHOLDERS

6.132 We discuss above the criteria that must be met by a leaseholder in order to qualify for a lease extension: he or she must have a "long lease of a residential unit". Meeting those criteria qualifies the leaseholder for a lease extension over that unit, and any other residential units in respect of which he or she qualifies for rights (as well as any "premises" associated with that unit or those units).[104]

6.133 However, during the consultation period and our further policy development in response to consultation responses, we have thought further about an additional lease extension option for leaseholders which might arise in specific circumstances.

6.134 Take, for instance, the long leaseholder of a building containing a flat and a shop, where the shop takes up only 20% of the floorspace of the building. The starting point under our flowchart is that the leaseholder is able to acquire a lease extension over the flat: this is a residential unit, over which he or she has a long lease. This basic

[104] We discuss the "premises" that a leaseholder will be able to include in lease extension claims in at paras 3.113 to 3.147 above.

lease extension would *not* include the shop, however, as it is not a residential unit in respect of which the leaseholder qualifies for rights.

6.135 However, this leaseholder would also be entitled to an individual freehold acquisition of the entire building, including both the flat and the shop.[105] This raises a question: why should the leaseholder be able to acquire the freehold of the whole of the building, but only to obtain a lease extension over the flat? We do not think this difference is easily justified. If the leaseholder can acquire the whole building on his or her own, then we think he or she must be able to obtain a lease extension over the whole building too. That is not to say that we think that the leaseholder *must* do so; instead, we think that the leaseholder should have the choice over whether the obtain a lease extension over the flat alone, or over the whole building. That choice might be particularly informed, we note, by the premium payable, which would likely vary depending on the extent of the premises included in the lease extension claim.

6.136 Of course, if the leaseholder in this situation were to divide the flat into two flats, and to grant a long lease of one of those flats to another person, he or she would no longer qualify for an individual freehold acquisition of the building. In that case, we think that this additional lease extension right should equally fall away. The leaseholder would, however, retain the basic right to a lease extension of the flat that he or she has retained (Outcome "A" on the flowchart at figure 5 above).

6.137 In other words, we think that this additional lease extension option should arise where a leaseholder has the right to an individual freehold acquisition. This option has a knock-on effect in the context of the "premises" which can be included in a lease extension claim by the leaseholder, as we explain in Chapter 3.[106]

Recommendation 30.

6.138 We recommend that a leaseholder who qualifies for an individual freehold acquisition of a building (or self-contained part of a building) should also be entitled to an additional lease extension option, which covers the whole of that building (or that self-contained part of the building).

QUALIFYING FOR AN INDIVIDUAL FREEHOLD ACQUISITION

6.139 If a leaseholder has no right to a lease extension in respect of premises including a residential unit or units, the possibility of freehold acquisition, either individually or collectively, simply does not arise. This conclusion is evident from the flowchart set out at figure 5 above: there are no rights for a person who answers "no" to the first question, and therefore falls within outcome "B".

6.140 If, however, a leaseholder does have a lease extension right (in other words, he or she answers "yes" to the first question and so falls within outcome "A" on the

---

105 We discuss the criteria which must be met in order to qualify for an individual freehold acquisition immediately below, at para 6.139 onwards.

106 See above at para 3.130 onwards.

flowchart), there arises the subsequent question of whether he or she can acquire the freehold of the building, either individually or collectively.

6.141 We now consider this proposed four-stage approach further, first looking at the scheme itself, and then considering the 25% non-residential limit which we provisionally proposed including in individual freehold acquisitions. We then examine the definition of a building in the context of our new scheme.

The scheme of individual freehold acquisitions

6.142 We explained in the Consultation Paper that under the current law, the long leaseholder of a house can usually acquire the freehold of that house individually, whereas the long leaseholder of a flat must use the collective route. We suggested that this position must be essentially preserved, in order to avoid the issues that arise wherever there are flying freeholds, such as flats held on a freehold basis.[107] However, we argued that merely asking whether a leaseholder has a lease of a house or of a flat, which might appear simple, is, in fact, a deceptively difficult approach.

6.143 Instead, as we summarised above, we provisionally proposed taking a different approach to determine whether a leaseholder can acquire the freehold of his or her building individually. Our provisionally proposed approach aimed to identify whether a long leaseholder owns all of the units (or, perhaps, the only unit) in a building. We suggested that the right of individual freehold acquisition should be available where:

(1) a leaseholder has a long lease over premises which include at least one residential unit which is not sublet to another person on a long lease;

(2) there are no units in the building save for the unit(s) let to the leaseholder under his or her long lease; and

(3) the premises let to the leaseholder comprise either:

(a) one unit; or

(b) more than one unit, but:

(i) none of those units are residential units that are sublet to another person under a long lease; and

(ii) the floor space of any non-residential unit does not exceed 25% of the floor space of all the units combined.

---

[107] We explain at para 4.11 above what is meant by a flying freehold, and why it is considered problematic. It is because of these difficulties that flats are almost universally owned on a leasehold, rather than freehold, basis: see para 1.20. We note that commonhold enables the freehold ownership of flats, by providing a structure to manage the relationship between individually-owned freehold flats, therefore avoiding the problems usually associated with flying freeholds: see the Commonhold Report at paras 2.4 to 2.6.

6.144 If all the conditions above are met, the building is, to all intents and purposes, in the ownership of a single long leaseholder, and therefore the freehold of that building can be acquired by that long leaseholder.[108]

6.145 We also represented this approach by reference to a series of four questions, which were to be asked in sequence.[109] We set these questions out in our flowchart, which is at figure 5 above.

(1) The first question was whether there are any other units (whether residential or non-residential) in the building in addition to those let under the leaseholder's lease. If so, the leaseholder would not be able to acquire the freehold of the building individually, but might be able to carry out a collective freehold acquisition: outcome "C". This result occurs because if there are other units within the building other than those within the leaseholder's premises, it necessarily follows that the leaseholder does not own an entire building. If there are no other units in the building other than those within the leaseholder's premises, the second question could be turned to.

(2) The second question was whether the premises let under the leaseholder's lease contain more than one unit. If they do not, the leaseholder would be able to acquire the freehold of the building individually (outcome "D"), since what he or she will have is a building containing a single residential unit, much like a traditional house. If, however, the premises do contain more than one unit, the third question must be turned to.

(3) The third question was, where the leaseholder's premises do contain more than one unit, whether any of those units are residential units sublet to another person on a long lease. If so, the leaseholder cannot acquire the freehold individually, since there is more than one leaseholder in the building who qualifies for enfranchisement rights; however, he or she might be able to undertake a collective freehold acquisition. If there are no such sublet units, the leaseholder owns the whole of a multi-unit building, of which one of the units is residential. For example, the leaseholder might own a traditional house which has been converted into flats. In such cases, the fourth question must be asked.

(4) The fourth question was whether the floor space of the non-residential unit(s) exceeds 25% of the floor space of all the units combined. If so, the leaseholder has no rights beyond the initial lease extension right (outcome "F"). However, if the percentage limit is not exceeded, the leaseholder has a building which is predominantly residential in character, and can acquire the freehold individually: outcome "E".

6.146 We first asked consultees whether they agreed with our scheme for qualifying for an individual freehold acquisition overall.[110]

---

[108] The premises which can be included in the individual freehold acquisition are discussed at paras 4.6 to 4.37 above.

[109] We considered these four questions in detail at paras 8.83 to 8.94 of the CP.

[110] See CP, Consultation Question 43, para 8.95.

Consultees' views on the scheme overall

6.147 The vast majority of consultees agreed with our proposed four-stage approach to determining whether individual freehold acquisition rights are available. Most gave no reasons. A number of consultees, however, expressly agreed with our arguments from the Consultation Paper that our suggested approach distinguishes in a conceptually clearer and more reliable way between those cases where an individual freehold acquisition is practically workable, and those where it is not, than the alternative of houses and flats. AML Surveys and Valuations Ltd (surveyors), for instance, wrote that the approach "simplifies matters and makes the process easier".

6.148 Others agreed with our provisional proposal, but slightly qualified their agreement with a comment such as "careful definition of the term 'unit' is required" (Long Harbour and HomeGround), or that it "should be subject to detailed discussion with professionals" (the RICS). Some consultees made comments about specific types of properties which, it was suggested, needed to be catered for. Mixed-use buildings were raised in that context, as were live/work units. The Law Society, for example, wrote that:

> the review by the Law Commission of current legislation and its complexities demonstrates the need for simplification. The provisional proposals clarify the position in each case while retaining the structure of the existing law. The legislation will need to address how a designation applies to one unit that has dual use, for example - a live/work unit.

This point was also made by an anonymous leaseholder, who agreed with our proposed scheme on the basis that live/work units should be "specifically included in the definition of a 'residential unit' with a clear message [that] the allocation of work space to living space is excluded".

6.149 The most common argument made against the four-stage approach concerned the introduction of a 25% non-residential limit as a qualifying criterion in individual freehold acquisitions. These views are considered immediately below.

6.150 Various other substantive points were, however, raised. Christopher Jessel, for instance, argued against our proposed scheme.

> This appears… to allow enfranchisement where there may be residential premises subject to short leases. If those premises are held by sub-lease from the long leaseholder of the whole then enfranchisement may be acceptable but if they are held from any other landlord it is not clear why the long leaseholder should be entitled to acquire the freehold over the head of an unconnected short-term tenant.

6.151 A couple of individual consultees who gave "other" views in respect of our proposals contended that our scheme leaves it open to a freeholder "where the building comprises only two residential units one of which is owned by himself to prevent enfranchisement by extinguishing the lease of his own flat or merging it with freehold". This is an issue which is considered separately below, at paragraph 6.301 onwards.

Consultees' views on the 25% non-residential limit in individual freehold acquisitions

6.152 As mentioned above, most of the consultees who disagreed with our proposed four-stage scheme did so on account of the suggested 25% non-residential limit. In the

Consultation Paper, we asked consultees specifically about the non-residential limit in a three-part question, in which we provisionally proposed that:

(1) it is appropriate to apply a maximum percentage limit on non-residential use to individual freehold acquisition claims concerning premises containing multiple units;

(2) the limit should be the same as that in collective freehold acquisition claims;[111] and

(3) the limit should be 25% of the internal floor space (excluding common parts).[112]

We consider the first two parts of the question first, before turning to the actual numerical limit which we suggested adopting (25%).

6.153 First, however, it is important to reiterate that our provisional proposal concerning the introduction of a non-residential limit into the scheme of qualifying for an individual freehold acquisition would only apply in buildings containing multiple units.[113] A single-unit building, such as a traditional house, would constitute a single residential unit. There would be no question of the non-residential limit applying, even if part of the house (such as a home office) were used for business purposes. The same would be true of a live/work unit, which would, as we explained in the Consultation Paper at paragraphs 8.48 and 8.49, be considered a residential unit: it is sufficient that use as a dwelling is one of the purposes for which the unit is configured.

A non-residential percentage limit in principle

6.154 A sizeable majority of consultees agreed with our proposal to apply a non-residential percentage limit in individual freehold acquisitions, with many of the same consultees also concurring that the limit should be the same as that in collective freehold acquisition cases. We had argued in the Consultation Paper that the application of a non-residential percentage limit was a clear and relatively simple means of identifying the buildings to which enfranchisement rights should attach: namely, buildings in predominantly residential use, and many consultees expressly agreed. The Wellcome Trust (a charity landlord), among others, wrote that only "predominately residential" buildings should be affected by our reforms. Other consultees argued that the percentage limit restricted the level to which investors can use enfranchisement to their benefit.

6.155 A number of consultees agreed with our proposed introduction of a percentage limit, but made specific suggestions about how to do so. For example, Philip Rainey QC wrote that it would be "useful to clarify what is, or is not, a 'common part'". Another anonymous consultee suggested that reforming legislation should "sharpen up the definition of floor area by reference to the latest RICS cost of measuring practice".

---

111 See CP, paras 8.113 to 8.118.

112 See CP, Consultation Question 46, paras 8.119 to 8.121.

113 We consider the application of a non-residential percentage limit in the context of collective freehold acquisition at paras 6.317 to 6.340 below.

6.156 Some consultees, however, disagreed in principle with the imposition of a percentage limit in individual freehold acquisition claims. It was suggested that the existence of a percentage limit enables developers and freeholders a mechanism to avoid being enfranchised against. Katie Kendrick, a leaseholder, for instance, argued that "many buildings are built in a manner simply to exclude enfranchisement being possible", and a couple of other consultees argued that developers will simply build over the applicable percentage of commercial space.

The actual percentage: 25%

6.157 Consultees' views on the actual percentage which should be applied were more balanced. Over half agreed with our provisional proposal to apply a 25% limit, but most gave no reasons for their view. Having explained that we wished to hear from consultees about the appropriateness of a 25% limit in individual freehold acquisitions, we provisionally proposed adopting it because that is the current limit in collective enfranchisement claims under the 1993 Act.[114] Several consultees agreed with this point: the 25% limit is "well understood and works reasonably well" (as Howard de Walden Estates Ltd put it).

6.158 We also suggested in the Consultation Paper that as any numerical limit would result in some people falling outside the scheme, it might be better to maintain the current and well-known limit of 25% rather than to increase or reduce it without proper justification. The Law Society made a similar point.

> While the designation of a maximum limit is an arbitrary exercise, 25% seems to allow sufficient non-residential use without dominating the residential character of the premises overall. As it is the current limit that applies to collective freehold acquisition claims, there appears to be no call for a different limit in this context. Whatever limit is imposed, there will always be cases of marginal excess that are considered by the victims as unfair, but that should not be a reason for making exceptions.

6.159 We did, however, set out in the Consultation Paper some of the difficulties associated with adopting a 25% limit in the context of individual freehold acquisitions. We gave the example of a flat above a shop, which may fall foul of this limit.[115]

6.160 Some consultees referred specifically to that example. Orme Associates Property Advisers wrote, for instance, that extending the 25% limit to individual freehold acquisitions "overturns the long-established rights of leaseholders with say a shop and flat to enfranchise or an office and flat to enfranchise". Shoosmiths LLP and Bryan Cave Leighton Paisner LLP (both solicitors) also considered the situation of a flat above a shop, arguing that:

> whilst in principle a percentage limit gives consistency between individual and collective enfranchisement claims, we think that some allowance will need to be given in relation to existing leaseholders of such properties.

---

114 See CP, para 8.118.

115 The specific situation of a flat above a shop is considered further below, at para 6.172 onwards.

The "allowance" suggested by those consultees was a sunset-type provision, which would allow existing leaseholders to acquire the freehold for a limited period even if the 25% limit were exceeded.

6.161 Many consultees, along with a significant number of people at consultation events, supported a higher percentage than 25%. The Leasehold Advisory Service ("LEASE"), for example, proposed a limit of 33% "in the spirit of increasing the envelope of enfranchisement to as many leaseholders as possible". Several consultees supported a higher limit based on their experiences of the 25% limit as it currently applies in the context of collective enfranchisement: the National Leasehold Campaign, for instance, supported adopting a 50% threshold.

> … the 25% rule is open to abuse and IS being used to ensure that leaseholders cannot enfranchise. I would like to see the 25% rule increased to 50%.

6.162 The Millbrooke Court Residents' Association made a similar argument.

> Why 25%? Blocks have been built with only 74% residential purely to prevent enfranchisement or even right to manage. Clearly there is an advantage to a landlord in preventing enfranchisement. A more reasonable figure would be 50%.

6.163 Pennington Manches LLP (solicitors), among other consultees, also supported 50% on the basis that the Landlord and Tenant Act 1987 uses that threshold, and argued that:

> twenty five percent is simply an arbitrary figure and if the Commission wish to bring in legislation to allow more claims to be made then this figure should be increased to say fifty percent.

6.164 Finally, some consultees commented on the meaning of "common parts", which we suggested in the Consultation Paper should be excluded from the calculation of the percentage of non-residential use for the purposes of the non-residential limit. One consultee, for instance, wrote that the lack of clarity on the definition of "common parts" continues to give rise to appeals.[116] Another suggested defining "common parts" as "parts common to both residential and commercial sections".[117]

Discussion and recommendations for reform

6.165 We think that the scheme for qualification for individual freehold acquisition rights which we set out in the Consultation Paper, and represented in figure 5, should be adopted. Our suggested approach allows for a unified scheme based around the concept of a residential unit, encompassing all types of premises, and identifying in a conceptually clear manner those properties which should be subject to an individual freehold acquisition.

6.166 We also think that there should be a percentage of non-residential use above which a building should fall outside the scheme of individual freehold acquisitions. We think that a numerical limit more effectively and appropriately delimits the rights than the

---

116 Philip Rainey QC.

117 Millbrooke Court Residents' Association.

current test of a property being "reasonably" called a house. We also still think that the limit should be the same as that applied in the context of collective freehold acquisitions: this provides desirable consistency across the new unified scheme of qualifying criteria.

6.167 We have, however, reconsidered our provisional view that the numerical limit be set at 25%.

6.168 As we explain below at paragraphs 6.326 to 6.337 (in the section concerning collective freehold acquisitions), we think that the percentage of non-residential use which should be permitted (excluding common parts) should be 50% for collective freehold acquisitions. We set out why we have reached that conclusion in those paragraphs. In essence, however, a 50% limit maintains an objective level to be applied, while preserving enfranchisement rights for leaseholders in buildings which are more residential in nature and configuration than not. We think that the reasoning in those paragraphs applies also to individual freehold acquisitions, and that the same 50% limit should be applied.

6.169 We consider our recommended change to a 50% limit on non-residential use across the scheme of enfranchisement generally further below.[118] A particular consequence in terms of individual freehold acquisitions, however, concerns flats above shops: something we raised in the Consultation Paper, and which consultees commented on. We consider this situation immediately below, as we asked a specific question about these properties in the Consultation Paper.

6.170 Finally, as we note in the context of the non-residential percentage limit in respect of collective freehold acquisitions, we will consider consultees' technical comments (such as those relating to the definition of "common parts") further in instructing Parliamentary Counsel on the draft Bill which will follow this Report.[119]

---

[118] See, in particular, para 6.336 below.

[119] See para 6.339 below.

Recommendation 31.

6.171 We recommend that the right of individual freehold acquisition should be available where:

(1) a leaseholder has a long lease over premises which include at least one residential unit which is not sublet to another person on a long lease;

(2) there are no units in the building save for the unit(s) let to the leaseholder under his or her long lease; and

(3) the premises let to the leaseholder comprise either:

(a) one unit; or

(b) more than one unit, but:

(i) none of those units are residential units that are sublet to another person under a long lease; and

(ii) the floor space of any non-residential unit does not exceed 50% of the floor space of all the units combined.

Flats above shops

6.172 As we mention above, in the Consultation Paper we considered a specific type of building – a flat above a shop (for instance, at the end of a row of terraced houses).[120] Under our new scheme of qualification for individual freehold acquisitions, we explained that if the flat and shop were sufficiently interconnected, they would likely form one residential unit, and the leaseholder would be able to acquire the freehold: outcome "D" on the flowchart.

6.173 However, we explained that it would be possible for the flat and the shop to form two separate units instead, perhaps because there are no shared facilities between the two. In these situations, our provisional proposal to apply a non-residential percentage limit in multi-unit individual freehold acquisitions would apply. Under the current law, if the shop comprised, for instance, 30% of the floorspace of the building, the leaseholder might be able to acquire the freehold: the building might reasonably be considered a house. However, under our provisional approach, we acknowledged that the 25% limit would be exceeded, and the leaseholder would not have individual freehold acquisition rights (outcome "F" on the flowchart at figure 5 above). Put simply, we explained that our suggested application of a percentage limit to multi-unit individual freehold acquisitions may result in certain leaseholders losing enfranchisement rights that they currently have.

6.174 We set out a number of reasons why this possibility may not cause undue concern. We also considered several ways of avoiding any potential consequence of

[120] See CP, paras 8.167 to 8.179.

disenfranchising leaseholders of these flats above shops. Our suggestions were as follows.

(1) We considered adding a proviso to the definition of a residential unit, such that a non-residential unit (a shop, for instance) could be treated as residential if its use for non-residential purposes is "ancillary" or "complementary" to residential use off another unit (a flat, for instance).

(2) We considered proposing a higher percentage limit for non-residential use in two-unit buildings.

(3) We raised the possibility of including a "sunset" clause. This would preserve the right for leaseholders who would have qualified for individual freehold acquisition rights under the 1967 Act to continue to benefit from that for a defined period of time.

6.175 However, we explained that in respect of each of those options there were difficulties. We therefore provisionally proposed that these two-unit buildings (including a flat above a shop) should not be treated any differently to ordinary buildings in respect of the non-residential percentage threshold. We did, however, ask consultees who disagreed with that approach to set out their views on how these two-unit buildings should be treated differently.[121]

Consultees' views

6.176 Well over half of consultees agreed with our view that the non-residential percentage limit (of 25%) should apply to two-unit buildings as it would do to all others. Many did so on the basis that our proposed scheme of qualification for individual freehold acquisitions was aimed at achieving certainty and simplicity (and at reducing litigation and disputes), and that the approaches we suggested to provide specifically for flats above shops ran against those aims. For instance, one consultee, Paul Church, wrote that our potential approaches would be "overly complicated and give rise to future problems", and the Birmingham Law Society suggested that the "options are such as would generate copious litigation of fact-specific cases and the Commission would not be acting to simplify the law".

6.177 A couple of consultees supported the inclusion of an "ancillary" use provision in the definition of a residential unit. However, other consultees agreed with our assessment in the Consultation Paper that such a provision would cause significant difficulties and potentially create disputes, with one consultee writing that the concept of ancillary use "involves a difficult question of fact and decisions applying this concept are not always consistent".[122]

6.178 There was some support from consultees for the use of a "sunset clause". For example, two consultees suggested in identical terms that:

---

121 See CP, Consultation Question 56, paras 8.180 and 8.181.

122 Stephen Desmond.

> … for tenants of existing leases, there should be a preserved period during which they can continue to acquire the freehold title even if the non-residential element is more than 25% of the building. This should be time limited to, say, a maximum of ten years from the date that the new legislation takes effect.[123]

6.179 However, the most popular option was the application of a higher non-residential percentage limit in two-unit buildings. LEASE, who agreed with our provisional proposal to treat two-unit buildings the same as others in respect of the non-residential percentage limit, reiterated its view that the limit should be 33%. This figure was also suggested by Orme Associates Property Advisers, which argued that this would give the leaseholders (who have the greatest financial interest in the building) rights, and that it would put:

> the management of the building in the hands of the flat owners who are more likely to benefit from having control of the building being in full time occupation.

Leasehold Solutions (surveyors), LKP and the National Leasehold Campaign all advocated for a 50% limit, while Pearn Ltd suggested 40%.

6.180 Some consultees suggested other approaches. For example:

(1) one suggested that it may be desirable for the Tribunal[124] to be able to authorise, in limited circumstances, a freehold acquisition claim which is prevented by the non-residential percentage limit;[125] and

(2) another proposed treating flats above shops as a specific exception, giving them a form of "special status".[126]

Discussion and recommendations for reform

6.181 Given our recommended change to the non-residential percentage limit (increasing it to 50% from 25%), referred to above, we do not think that two-unit flats above shops should be treated differently to other buildings.

6.182 At the consultation stage, we had, as we explain above, provisionally proposed applying a 25% non-residential limit across the scheme of freehold acquisitions. Against that backdrop, we were not convinced of the desirability of carving out an exception for two-unit buildings (or for flats above shops specifically). One of the options we included, however, for how to address these types of premises was to have a higher percentage applicable in two-unit buildings. This was a relatively popular suggestion.

6.183 Given the relative popularity of that suggestion, our view on how to address flats above shops has been informed by our recommended wider change to increase the

---

123 Shoosmiths LLP and Bryan Cave Leighton Paisner LLP.

124 The First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

125 CILEx.

126 Bert Lourenco.

non-residential limit to 50%. We think that, in many cases, this increase will bring flats above shops within the new scheme of qualification for freehold acquisition rights.

6.184 We do not think that any of the alternative approaches which we set out in the Consultation Paper should be pursued on top of this change to the non-residential percentage limit. Implementing a sunset clause would preserve in the new legislation much of the uncertainty and complexity of the current legislation and associated case law on the types of property that qualify for rights. Our recommended reforms to the qualifying criteria regime are designed to achieve certainty and consistency wherever possible, and a statutory sunset clause in this context would detract from these aims. Furthermore, creating a new "ancillary" or "complementary" use provision for this specific context would be extremely complicated, and would be difficult to operate in practice. We think that the concerns raised by our advisory group – not least that the introduction of an "ancillary" or "complementary" use proviso would be likely to lead to significant litigation – remain pertinent.[127]

6.185 In the interests of creating certainty across the board, therefore, we do not think that two-unit buildings, or flats above shops, should be treated any differently to other buildings in this regard. In addition to the fact that applying a 50% non-residential limit will include many flats above shops, we continue to think that the following two points (which we made in the Consultation Paper) mitigate any remaining concerns about these types of premises.

(1) The line of case law bringing flats above shops within the scheme of enfranchisement rights, in order to give leaseholders of such properties security of tenure, originated prior to the 1993 Act.[128] The 1993 Act created security of tenure in respect of the flat by way of a lease extension: a position which we are retaining and enhancing under our proposals. In other words, a leaseholder who lives in the flat will, at the very least, be able to extend his or her lease of that flat.

(2) By the time the new enfranchisement legislation is enacted, it will have been possible for well over 50 years for leaseholders of these types of premises to purchase the freehold under the current legislative scheme and case law, should that have been desirable. Under the new enfranchisement regime, however, we are not persuaded that these specific properties, consisting of two separate units (rather than being an interconnected shop and flat) should be treated differently to all other types of buildings.

---

[127] We discussed this and other concerns raised by our advisory group in respect of creating a new "ancillary" or "complementary" use proviso in this context at para 8.175 of the CP.

[128] See CP, para 7.100(1).

Recommendation 32.

6.186 We recommend that two-unit buildings (and, so, flats above shops) should not be treated any differently to other buildings in terms of the scheme of qualifying for individual freehold acquisition rights.

The definition of a building

6.187 At this stage, another fundamental definition needs to be considered: what is a "building"? As we explain below, the concept of a building is crucial with respect to lease extensions and freehold acquisitions, both individual and collective.

6.188 In the Consultation Paper, we explained that we referred to a building in two contexts.[129] That is not to say that the word building is intended to have two meanings. Our reasoning was, instead, as follows.

(1) For premises to constitute a residential unit (and hence to attract lease extension rights), they must be a separate, independent set of premises which constitutes a building, or forms part of a building. The "building" element of the definition stems from the need to restrict enfranchisement rights to residential premises located predominantly within houses or blocks of flats, and not extending those rights to, for instance, houseboats or caravans. We therefore suggested that a building should have a simple meaning, based on case law which we examined in the Consultation Paper.[130] We proposed that a building should be:

> a built or erected structure with a significant degree of permanence, which can be said to change the physical character of the land.

(2) Turning to freehold acquisitions, the matter is more complex because of the need to avoid the creation of flying freeholds. In other words, where there are material issues of "overhang" and "underhang", freehold acquisition rights should not be available.[131] We therefore proposed adopting the approach of the 1993 Act, such that freehold acquisition rights should only be available where the premises to be acquired constitute a "self-contained building" or "self-contained part of a building". A self-contained building must be structurally detached, and a self-contained part of a building must:

(a) be a vertical division of a building (in other words, no overhang or underhang is allowed);

---

129 See CP, paras 8.97 to 8.103.

130 See CP, paras 7.35 to 7.36.

131 "Overhang" and "underhang" arise where a building is divided partly horizontally and partly vertically. In these cases, part of a building will lie above or below another part of the building, potentially giving rise to the issue of flying freeholds, explored at para 4.11 above.

(b) be able to be redeveloped independently of the rest of the building; and

(c) have independent services provided for the occupants of the part from those provided for the rest of the building, or the services must be capable of being provided independently without requiring works which are likely to result in a significant interruption to the provision of the services.

By way of example, we envisaged that an ordinary, vertically-divided terraced house would meet the definition of a self-contained part of a building. However, an L-shaped house, of which a significant part (say, 20%) lies above the next-door house's ground floor garage, would not meet this definition.

6.189 We were clear in the Consultation Paper that the more restrictive conditions (that premises over which a claim is made must be a self-contained building or self-contained part of a building) only apply in respect of freehold acquisition claims. The question of whether a particular building in which a residential unit is located meets this more exacting definition will not affect a long leaseholder's initial right to a lease extension of that unit. The leaseholder of the L-shaped house in the example set out above would, as a result, be able to obtain a lease extension, despite his or her house not meeting the self-contained part of a building test. We therefore asked consultees whether they agreed with both our general, wide definition of a building for lease extension claims, as well as our more restrictive definition of a self-contained building or self-contained part of a building for freehold acquisition claims.[132]

6.190 We acknowledged, however, that the more restrictive definition we suggested adopting for freehold acquisitions, adopted from the 1993 Act, was not without its problems. We had been told of landlords, for instance, who had constructed complex buildings in such a way as to be able to argue that they fall outside the definition. We therefore considered whether the Tribunal should be able to authorise an individual or collective freehold acquisition, in strictly limited circumstances: where the building or part of the building which the claim is being made over is not "self-contained", but despite that the freehold acquisition would not reasonably be expected to cause any practical problems for any interested party. We suggested that this discretion might reduce the need for leaseholders to engage in costly argument over whether their building or part of a building is self-contained; instead, they could simply ask the Tribunal to allow the claim. We asked consultees whether they thought that it was desirable (and workable) to create this kind of discretion.[133]

6.191 Below, we discuss the views we received regarding our suggested approach to the meaning of a building, and the potential for a Tribunal discretion to be introduced, before setting out our recommendations for reform in respect of both these proposals.

---

[132] See CP, Consultation Question 44, paras 8.104 and 8.105.

[133] See CP, Consultation Question 45, para 8.109, with the associated explanation at paras 8.106 to 8.108.

Consultees' views

Views on the definition of a building

6.192 The vast majority of consultees supported both our basic definition of a building and the more restrictive definition applicable to freehold acquisition claims. Consultees agreed that the approach we had suggested would provide a sensible basis on which to assess claims. One confidential consultee wrote that our proposed approach was significantly more workable and less open to dispute than the current law. The Law Society argued that our proposal:

> reduces the task of assessment to two tests which, while they each involve a subjective element, should produce little difficulty in reaching an appropriate conclusion. The general nature of the tests largely removes the problems associated with the current tests.

6.193 A few consultees raised the possibility of litigation being caused by the introduction of these definitions and their application across our new scheme of qualifying criteria. The Property Bar Association ("the PBA"), for instance, argued that:

> there are attractions to these stripped back definitions and they are likely to have longevity on their side. However, as construction methods and styles change those will also probably generate further calls on the courts to consider how the definitions apply.

While the PBA did not seem to suggest that those further calls on the courts rendered our proposed changes undesirable, another consultee, Hamlins LLP (solicitors), did, arguing that:

> introducing new legal definitions risks increased litigation and costs which is against the Commission's terms of reference. We query whether this would be better than retaining the current and fairly well-understood definitions of house and flat.

6.194 Some consultees made specific points about our proposed basic definition of a building, relevant primarily to lease extension claims.

(1) For example, Christina Goddard, a leaseholder, specifically suggested that there would be argument over the definition of a "significant degree of permanence", asking "would this be 10 years, 100 years, 500 years or what"? However, Christopher Jessel did not find this unduly troubling, writing that "as with 'house' it is possible that the courts would be faced with argument about what a 'significant degree of permanence' means but I expect cases of a 21-year lease of land with an impermanent building would be infrequent".

(2) A few other consultees argued that there was a need to exclude certain properties, which may fall within the grey area of what constitutes a building. Long Harbour and HomeGround raised beach huts and converted garages as examples of where exclusions should be provided. Other consultees argued that there was a need to include certain properties which fall into that grey area. The Birmingham Law Society suggested "additional wording to allow for 'Eco' houses built into the landscape which are designed not to change the physical character of the land".

6.195 Other consultees made comments on our proposed restrictive definition of a self-contained building or self-contained part of a building, relevant to freehold acquisition claims. Only a tiny minority of consultees disagreed with our suggested approach. Many consultees agreed that the 1993 Act's approach was "fairly clear and unproblematic" (the Law Society), and supported adopting "clear language already adopted in existing legislation" (LEASE). A few consultees expressly referred to the need to prevent flying freeholds, agreeing with our reasoning in the Consultation Paper. Berkeley Group Holdings PLC (a developer), for instance, contended that "a narrow approach to the definition of a building and the continued requirement that it must be self-contained is important particularly in light of increasingly complex developments".

6.196 However, the fact that a self-contained part of a building must be clearly vertically divided under the 1993 Act was less popular with consultees in the context of our new scheme. Katie Kendrick and Leasehold Solutions argued in identical terms that "if a building line is not totally vertical, if there is an underground car park on an estate or if the building clearly forms part of an estate then there should be allowances to this rule made". The Birmingham Law Society also suggested allowing some deviation in the vertical definition. It argued that certain types of building, such as terraced or semi-detached houses with a small amount of deviation into the next-door house (to accommodate a wardrobe, for example), should be included, as "this design was very common in local authority housing in the 20th Century". Another example given by the Birmingham Law Society as a type of property that should meet the definition of a self-contained part of a building involved a house where part of one of the rooms, accessible only from the house, extends over a tunnel entrance.

6.197 A similar point was made by Philip Rainey QC, who expressed support for our provisional proposal, but also concern:

> that 'overlapping houses' which currently qualify for freehold acquisition because the overlap is non-material will lose their rights. It is also the case that small overlaps disqualify large blocks in collectives. The Commission should consider extending the 1967 Act non-material overlap provisions rather than removing them – it would give the Tribunal a power to allow some deviation, and an objective basis upon which to exercise that power.

6.198 Finally, a couple of consultees wrote about the other conditions in the 1993 Act's definition of a self-contained part of a building, suggesting that shared structures and services will need consideration. Bruce Maunder-Taylor (a surveyor) argued that the definition "needs tidying up", and that "whether or not there are separate services gives rise to a lot of argument".

6.199 We consider these arguments, and set out our views on the way forwards, below. First, however, we briefly set out the views of consultees regarding our suggestion that the Tribunal should be able to authorise, in limited circumstances, a freehold acquisition where it is otherwise prevented by the requirement that a building or part of a building be self-contained.

Views regarding a new Tribunal discretion

6.200 The majority of consultees supported the creation of a Tribunal discretion in this context. The Law Society called this a "sensible suggestion", and wrote that "backed by professional expert assistance, a reasoned decision could be made". LKP and Leasehold Solutions agreed in identical terms that:

> we need to include a 'common sense' option and there is a myriad of examples which would sit outside of any rigid legislation.

Other consultees argued that the discretion would help for borderline cases, to avoid hardship caused by rules on overhang and underhang. For example, Christopher Jessel wrote that:

> this relates partly to the issue of whether part of a structure is over or under another structure. Pending reform of positive covenants of support and protection and repair this could still be possible where the overlap is marginal. As buildings can vary it will be impossible to define this in the Bill and it would be better to give the Tribunal a discretion.

6.201 However, fundamental concerns were raised both by consultees who were supportive of a Tribunal discretion, and those who were against it.

6.202 Many consultees wrote that such a discretion would possibly increase uncertainty in our new scheme of qualifying criteria. Some consultees considered this in general terms: Philip Rainey QC, for example, wrote that "a broad 'discretion' is hopeless, because no one will know how that discretion is supposed to be exercised… leading to considerable uncertainty and potential for litigation". Anchor Hanover, a retirement housing provider, contended that a Tribunal discretion "would only serve to add opacity to the legislation". Similarly, Grosvenor (a landlord) stated that it would "introduce significant uncertainty for parties and add complexity by requiring clear definition as to how that discretion is exercised".

6.203 A number of consultees contended that the suggestion to introduce a discretion detracted from the rest of the scheme of qualifying criteria which we provisionally proposed in the Consultation Paper. The British Property Federation wrote that "it is not helpful on the one hand to set out clear qualification rules and then to say that the Tribunal will have jurisdiction to determine that a building can be enfranchised notwithstanding that it does not comply with those rules". Damian Greenish argued that "having carefully designed the proposed new regime to provide clarity and certainty, this proposal introduces the opposite". Other consultees contended that the uncertainty which such a discretion would arguably create would cause numerous disputes. The Wellcome Trust argued that the discretion "may result in an increase in the number of matters being litigated, which will increase party's costs".

6.204 Furthermore, a couple of legal professionals concentrated on potential prejudice caused to landlords by the suggested discretion.

(1) One argued that "fundamentally a landlord should know whether his building is potentially enfranchiseable. Case law will fill in the gap, and not necessarily in a way that the Commission anticipated or intended".[134]

(2) Another concurred that a "freeholder is entitled to know whether his building is or is not likely to be compulsorily acquired and clarity is an important element of the confiscatory legislation".[135]

6.205 Finally, a series of more technical problems or worries were raised by some consultees, including regarding setting the limits of the discretion (though a few consultees did make constructive suggestions in this regard).

Discussion and recommendations for reform

6.206 To begin with, we think that it is sensible to continue to restrict enfranchisement rights to residential premises within houses or blocks of flats, rather than expanding them to premises such as houseboats. We are not, at this stage, drafting a statutory definition of "building". However, we remain of the view that enfranchisement rights should be limited to the types of property that currently qualify: those which consist of residential premises within "a built or erected structure with a significant degree of permanence, which can be said to change the physical character of the land". How that outcome is best achieved will be a matter for consideration with Parliamentary Counsel, at the legislative drafting stage.

6.207 The context of freehold acquisitions is more complicated. In the Consultation Paper, our provisional approach was to adopt a strict starting point based on the 1993 Act, so that buildings over which claims are made have to be structurally detached, and parts of buildings have to be vertically divided (along with meeting certain other conditions, such as being capable of being independently redeveloped). The strict starting point was to be tempered, however, by the creation of a Tribunal discretion to allow claims which did not meet the test.

6.208 Consultees' views and concerns have, however, led us to reconsider the potential Tribunal discretion. The suggestion for a Tribunal discretion was grounded in a desire both to prevent leaseholders' claims from failing on technicalities (and to assist in borderline cases involving overhang and underhang), and, to some extent, to improve the bargaining position of leaseholders (disincentivising landlords from arguing about minimal vertical deviations, for instance, when it would be likely the Tribunal would have exercised its discretion to allow the claim). Consultees' responses have identified a number of significant problems with the creation of a discretion, including that it introduces significant amounts of uncertainty into the scheme of qualifying criteria, that it makes it difficult for landlords to know whether their properties are enfranchiseable, and that it increases the potential, to some degree, for disputes to arise about the enfranchiseability of a building.

6.209 We largely agree with those concerns. We think that a fairly broad Tribunal discretion may cause more problems than it solves, creating uncertainty and the potential for disputes, contrary to the aims of our new scheme of qualifying criteria. We do not,

---

134 Philip Rainey QC.

135 Damian Greenish.

therefore, recommend the creation of a distinct discretion for the Tribunal in the vein we suggested in the Consultation Paper.

6.210 We have also thought further about the strict concepts of a self-contained building and a self-contained part of a building, adopted from the 1993 Act. We remain of the view that it is desirable to prevent the acquisition of the freehold of premises with significant overhang or underhang, in the interests of preventing the creation of flying freeholds. However, we equally do not wish to exclude premises such as terraced houses with small degrees of overhang or underhang (such as, as one consultee raised, a wardrobe extending into the next-door house) from the scheme of freehold acquisitions. There is a balance which needs to be struck here. In the context of larger, more complex developments, for instance, we think that there are certain levels of deviation (say 2%, for example) from the strict vertical division condition which should not exclude a "part of a building" from being "self-contained"; however, greater levels of overhang, such as those which arise where multiple blocks of flats are built over a shared car park, should, we think, exclude those blocks from qualification for freehold acquisition rights (though leaseholders of the entire structure of blocks of flats and the car park may be able to claim the freehold of the whole).

6.211 We therefore think that some degree of deviation from a strict vertical division condition in respect of a self-contained part of a building should be allowed: the condition should be relaxed. One option of how this might be achieved would be, as several consultees suggested, by adopting the 1967 Act's approach to deviation, perhaps by setting out that a part of a building would not be self-contained where a "material part lies above or below a part of the structure not comprised in the [part of the building]".

6.212 As we mention above, this possibility drew support, including from Philip Rainey QC, who wrote that it "would give the Tribunal a power to allow some deviation, and an objective basis upon which to exercise that power". We think that this approach – of allowing the possibility of some non-material deviation within the scheme in respect of a self-contained part of a building – is much more attractive than the broad Tribunal discretion that we had provisionally proposed to allow a claim even where the statutory tests are failed. It confines this specific Tribunal power to a narrow scope, and preserves the rights of leaseholders of houses with small overlaps to acquire their freeholds (while possibly also bringing into the freehold acquisition scheme some larger blocks of flats with small vertical deviations, not amounting to significant overhang or underhang).

6.213 Other than a slight relaxation of the 1993 Act's approach to vertical division in respect of a "self-contained part of a building", we think that the other limbs of the 1993 Act definition should be retained. A self-contained building should need to be "structurally detached",[136] and a self-contained part of a building should need to meet the independent redevelopment and services conditions.

[136] The meaning of "structurally detached" was recently considered in detail in *Consensus Business Group (Ground Rent) Ltd v Palgrave Gardens Freehold Company Ltd* [2020] EWHC 920 (Ch) at [95] onwards.

Recommendation 33.

6.214 We recommend that the meaning of "building" should, in line with current case law, be a built structure with a significant degree of permanence which can be said to change the physical character of the land.

6.215 We also recommend that the premises which may be the subject of a freehold acquisition claim (whether individual or collective) should be identified in line with the 1993 Act's definition of "self-contained building" and "self-contained part of a building", with a relaxation of the currently strict approach to the 1993 Act's vertical division condition.

Individual freehold acquisition rights of head lessees of blocks of flats

6.216 One final point merits consideration before we turn to the scheme of qualifying criteria in respect of collective freehold acquisitions. By collapsing the distinction between houses and flats, as we discuss above, our provisional proposals might allow the head lessee of a purpose-built block of flats – who will invariably be a commercial investor – to acquire the freehold of that block individually (assuming there are no long sub-leases of any of the flats). Under the current law, that head lessee would not be able to acquire the freehold of the block because the purpose-built block of flats would not "reasonably" be called a house (therefore falling outside the 1967 Act).

6.217 In the Consultation Paper, we argued that this change would not constitute an expansion of the rights of commercial investors in reality. We suggested that under the current law, there are ways in which head lessees of such blocks would be able to acquire the freehold by granting long leases to special purpose vehicles and subsequently carrying out a collective enfranchisement.

6.218 Given those arguments, we asked consultees whether they thought that the ability of a head lessee of a block of flats to acquire the freehold of the block individually is a significant problem with our proposed scheme, as compared with the reality under the current law.[137]

6.219 It is important to reiterate that this was a narrow question. Some consultation responses to this question raised concerns about head lessees of buildings being able to exercise collective freehold acquisition rights. This question, however, considered the specific consequence of our adopting the term residential unit, and the possibility of an individual freehold acquisition arising out of that: something which the current law does not technically allow. We address the manner in which leaseholders and head lessees of multiple units or entire buildings are or might be restricted from exercising collective enfranchisement rights later in this chapter, at paragraphs 6.356 to 6.371. Additionally, we discuss more generally the enfranchisement rights of commercial investors, and whether they should be restricted, at the end of this chapter.

[137] See CP, Consultation Question 57, para 8.184.

Consultees' views

6.220 Consultees were evenly split between those who thought that this change was a significant problem, those who thought that it was not, and those who had other views.

6.221 Many consultees agreed with our assessment in the Consultation Paper that head lessees can already acquire the freehold through workarounds, and therefore "the outcome will not be different from [the] current law" (as Jo Darbyshire, a leaseholder, put it). This point was summed up by one consultee as follows.

> The ability of a head lessee of a block of flats to acquire the freehold of that block does run contrary to the policy of the 1993 Act, which is aimed at empowering the owners of individual flats. However, under the existing enfranchisement regime there is a workaround available for investor tenants to exercise rights should they so wish. We therefore do not consider that the proposed reforms will create a significantly different position in comparison to the existing position.[138]

6.222 Furthermore, one consultee, Jennifer Ellis (a surveyor), argued that it is not logical to focus on the owners of leases of entire blocks as requiring special treatment. She wrote that "as long as non-residents have rights, you will not be able to stop investors having rights, so why distinguish between one form of ownership (a whole block) and others (flat by flat)"?

6.223 Some consultees, despite not thinking that the change was a significant issue, explained that the workaround we described in the Consultation Paper (granting long leases to special purpose vehicles and subsequently carrying out a collective enfranchisement) was more difficult than we had indicated. For example, Philip Rainey QC wrote that:

> It is more difficult, expensive and time consuming than might be thought for a head lessee to "do an Aggio" and then acquire the freehold as a second stage.[139] Modern head leases in the PRS sector often prohibit the creation of long sub-leases. Nevertheless, it can be done and is done, so the ability for head lessees to enfranchise if there are no sub-leases probably does not amount to much of a change.

6.224 Equally as many consultees, however, wrote that this change did constitute a significant problem. Some argued that it would be "a significant departure from the original intention of the enfranchisement legislation and would simply provide one company with greater rights to own a freehold than the one that already owns it for commercial gain, contrary to the Government's expressed intention".[140] Others pointed to the fact that an individual freehold acquisition by a head lessee would have no benefit for the residents in the building: "rather than improving matters for homeowners it just gives power to one class of investor over […] another" (as Hamlins LLP, among others, put it).

---

138 The Property Litigation Association ("the PLA").

139 We explain "*Aggio*" lease extensions at para 3.189 onwards.

140 Long Harbour and HomeGround.

6.225 A number of consultees who were concerned with this change, along with some of those who were in favour, also noted that the workaround we had set out actually applied in narrower circumstances than might be thought.

6.226 As mentioned above, a similar number of consultees made other comments, without saying whether they thought that this consequence of our proposed scheme was a significant problem. A couple of these consultees wrote that, while this change in respect of head lessees potentially acquiring individual freehold acquisition rights does not in reality enlarge the rights of commercial investors, it would seem:

> of interest to use the opportunity of current leasehold reform to create restrictions on the ability of head lessees, particularly when they are commercial owners, to collectively enfranchise and force freehold acquisition.[141]

On a related note, Mark Chick, a solicitor, argued that if head lessees are to have this form of individual freehold acquisition right, then "there is good ground for considering either no major reform to the basis of valuation or a twin track approach that differentiates between owner-occupiers and investors as this will otherwise present a significant windfall to any block owner under a long lease where there all of the flats are held 'in hand' under the terms of the head lease".

6.227 Others wrote that they doubted an effective limitation could be placed on this change to prevent these head lessees from acquiring the freehold of a block of flats individually. For instance, Bruce Maunder-Taylor argued that there is a "whole industry out there waiting for the next set of artificial limitations imposed by statute for industry wheels to start churning and produce money".

Discussion

6.228 The potential right for a long leaseholder of an entire block of flats to acquire the freehold of that block individually, assuming there are no long sub-leases, is a new one. We acknowledge that in certain circumstances this change, which is a consequence of our new scheme, will allow a commercial investor to acquire the freehold of his or her building more easily than under the current law.

6.229 However, we think the situations in which this might happen will not be common. For this potential right to arise there cannot be, as we have explained, a single other long leaseholder or long sub-lessee in the premises. As soon as there is, the collective freehold acquisition route must be pursued (or attempted), rather than the individual route.

6.230 Furthermore, it is possible for these kinds of head lessees to acquire the freehold of blocks of flats currently; although we appreciate that there may be more complexity and expense involved than we had indicated in the Consultation Paper. We acknowledge that this ability of head lessees to acquire the freehold of entire blocks does move away from the original policy of enfranchisement legislation, which was to give rights to residential (homeowner) leaseholders. However, it is a move which has already happened. It is also a move which might be very difficult to reverse, in a way

---

[141] Maddox Capital Partners Ltd, a landlord.

which both prevents avoidance but also does not disenfranchise leaseholders who currently enjoy enfranchisement rights.

6.231 Having considered the views of consultees on this point, we do not think that this potential for a head lessee to carry out an individual freehold acquisition is unduly worrying. We therefore do not recommend creating any new form of restriction in order to prevent this.

6.232 However, it is worth mentioning that in the Valuation Report, we raise the possibility for Government to introduce differential pricing for different types of leaseholder.[142] If Government decides to pursue a two-track approach, it may wish to require a higher premium from head lessees who are acquiring an entire blocks of flats (as one consultee suggested).[143]

COLLECTIVE FREEHOLD ACQUISITIONS

6.233 We now turn to the scheme of qualification for collective freehold acquisitions. It is evident from the flowchart at figure 5 that there are two situations in which a collective freehold acquisition might be possible.

(1) First, there is the situation where there are multiple persons with long residential leasehold interests over different parts of a building: in other words, where X has a long lease which does not extend to an entire building. This would be the case in a typical block of flats, where X has a long lease of one of the flats.

(2) Second, there is the situation where there is a head lessee who has a long lease of an entire self-contained building (or part of that building), but who has granted long residential sub-leases to other persons.

6.234 As we explained in the Consultation Paper, a slight shift in thinking is necessitated when considering collective freehold acquisitions. The question is no longer whether an individual leaseholder has an enfranchisement right over his or her premises; we are concerned instead with whether a whole building (or part of a building) in which there are residential units held on long leases can be acquired by some or all of the long leaseholders. We note that our discussion above concerning the definition of building and self-contained part of a building for freehold acquisition purposes – preserving the 1993 Act's approach but relaxing the strict "vertical division" component" – is directly applicable to collective freehold acquisitions.[144]

6.235 In this section, we consider first the "potential participation requirements" which must be met for a collective freehold acquisition to be possible: the minimum requirements in terms of the make-up of the building which must be met for a collective freehold acquisition to be possible. We then discuss the "actual participation requirement": the number and proportion of leaseholders who are required to participate in a collective freehold acquisition claim for it to succeed. The final part of this section concerns additional requirements and exceptions in respect of collective freehold acquisition

---

142 Sub-option (4), at para 6.180 onwards of the Valuation Report.

143 Mark Chick.

144 See paras 6.207 to 6.213 above.

claims: namely, the non-residential percentage threshold, the "three-or-more flats requirement", and other narrow exceptions.

6.236 We also suggested in the Consultation Paper that the right of collective freehold acquisition should extend beyond the acquisition of a single building (or part of a building) to the acquisition of an estate comprising multiple buildings. We provisionally proposed that the criteria which must be met in order to qualify to acquire the freehold of an estate should correspond to those which apply in respect of ordinary collective freehold acquisitions.[145] We consider the responses we received, and set out our policy recommendations, in Chapter 5 above.

Potential participation requirements

6.237 In the Consultation Paper, we explained that the current law sets minimum requirements that must be met for a collective freehold acquisition potentially to be possible by means of two criteria.

(1) At least two-thirds of all the flats in the building must be held by "qualifying tenants".[146]

(2) There must be at least two flats in the building held by "qualifying tenants".[147]

6.238 We argued that the result of these two criteria are that, for a collective enfranchisement claim to be made, a significant majority of all the flats in the premises must be owned by leaseholders who are able to participate in that claim. We therefore proposed preserving both criteria, though adapting them linguistically to reflect the terminology of our proposed scheme of qualifying criteria based on residential units. We now expand upon and discuss further each of the two criteria in turn.

Two-thirds of residential units to be held on long leases

6.239 We explained in the Consultation Paper our view that the requirement that two-thirds of the flats in the relevant building must be held by qualifying tenants stems from a desire to identify those buildings to which enfranchisement rights should attach. We argued that the two-thirds requirement is designed to restrict collective enfranchisement to buildings which are in majority long residential leasehold ownership.

6.240 We also explained that we were not aware of any issues with the two-thirds requirement, that it seemed well-known and understood, and that it might be harder (in A1P1 terms)[148] to justify the right of collective freehold acquisition if that right could be exercised over a building in which long leaseholders do not collectively hold the majority interest.

---

145 See CP, Consultation Question 54, para 8.157.

146 See CP, para 7.78 onwards.

147 See CP, para 7.74 onwards.

148 Article 1 of Protocol 1 to the European Convention of Human Rights.

6.241 Therefore, we provisionally proposed retaining the requirement going forward, though altering the terminology so that for a building to qualify for a collective freehold acquisition not less than two-thirds of the residential units in the building must be let on long leases.[149]

Consultees' views

6.242 The majority of consultees agreed with our provisional proposal to maintain the two-thirds requirement in our new scheme, many for the reasons we gave in the Consultation Paper. For instance, Graham Webb, a leaseholder, agreed that the two-thirds requirement "ensures a majority of flats are potential participators – desirable for fairness reasons". The Law Society concurred that "there appears to be no reason to depart in the proposed scheme from the current requirement".

6.243 Some consultees made additional arguments in favour of preserving the two-thirds rule. The housing association Notting Hill Genesis wrote that the requirement is an "important safeguard for [a registered social landlord] as it prevents the acquisition of a freehold by leaseholders in a block with a significant number of tenants". Several consultees referred to the fact that the requirement provides landlords with some "assurance" about the enfranchiseability of their buildings (as the RICS put it), which enables them to "create blocks with short leases and thereby creates a mixture of different types of tenure thereby keeping different types of occupiers satisfied" (AML Surveys and Valuation Ltd).

6.244 However, a significant minority of consultees disagreed with this provisional proposal. Many did so without explaining their view, with some simply stating a different limit (such as 50% rather than two-thirds). Most consultees who disagreed with our proposal cited unfairness to leaseholders as the basis for that disagreement. Catherine Williams (a leaseholder) wrote that "there is no logical reason to place this restriction except to 'put off' leaseholders and make enfranchisement more difficult". Another confidential consultee argued that it allows avoidance of the enfranchisement legislation, by incentivising developers to construct buildings that are specifically excluded from the legislation (or to buy up units in order to exclude the block). Martin Chamberlain, a leaseholder, argued that the leaseholder should not be restricted in their rights by the use of the rest of the building – "as this is unlikely to be something the leaseholder has any ability to affect".

6.245 Many of the consultees who disagreed with our proposal, however, slightly misunderstood the suggested approach, and construed it as a question about the meaning of "long leases". This misunderstanding possibly stems from our suggestion of how to bring the two-thirds requirement into our new scheme: "not less than two-thirds of the residential units in the building must be let on long leases". A number of consultees were concerned that this would exclude leases with less than 80 years remaining.[150]

---

149 See CP, Consultation Question 48, para 8.142, with the explanation at paras 8.135 to 8.141.

150 We discuss the definition of a "long lease" above, at paras 6.69 to 6.82.

6.246 A few consultees, finally, made related comments, such as CILEx which argued that the two-thirds requirement should be relaxed in cases where a building contains shared ownership leases.

Discussion and recommendations for reform

6.247 To begin with, we should reiterate that the two-thirds requirement does not and would not play a part in determining whether each individual long leaseholder can obtain a lease extension of their respective residential units; this right is assessed, as we discuss above, independently of the configuration or use of the rest of the building. When it comes to acquisition of the freehold by a number of leaseholders, however, we think that the requirements need to be different, looking at the composition of the building as a whole and at the other interest holders in it.

6.248 We remain of the view that the two-thirds requirement serves, and would continue to serve, a useful purpose in limiting collective freehold acquisition rights to buildings which are in majority long residential ownership.[151] There is a clear case for making this restriction. Crucially, it preserves the distinction between individual and collective freehold acquisitions, each of which has a different basis.

(1) Individual freehold acquisitions involve a leaseholder who effectively owns an entire building. By virtue of that ownership, the leaseholder has the right to acquire the freehold of the building. In non-legalistic terms, the leaseholder's interest in his or her home takes primacy over that of the freeholder and any intermediate landlords.

(2) Collective freehold acquisitions involve a leaseholder in a building where there are other units that are owned by other persons. This leaseholder will have the right to a lease extension, which is something that he or she can acquire on his or her own. However, the range of interests and unit holders present mean that something more is required before the right to a freehold acquisition of the entire building is engaged: there must be a sufficient number and proportion of residential long leaseholders in the building for them be able to purchase the freehold, as doing so impacts both on other leaseholders in the building and the freeholder.

6.249 We appreciate that the two-thirds requirement can act as a barrier to the exercise of enfranchisement rights, in the sense that there will continue to be buildings in which there is not a sufficient proportion of leaseholders to meet the threshold. However, it is important to note that this would not be a new obstacle; it is a condition which exists now, and is one which we think is justifiable in respect of granting freehold acquisition rights to leaseholders only when they collectively hold the majority interest in a building.

6.250 In terms of the concerns of consultees about "long leases", we discuss the definition of a long lease earlier in this chapter, at paragraphs 6.69 to 6.82. However, to be clear, the aim of the wording we suggested adopting ("not less than two-thirds of the residential units in the building must be let on long leases") is to preserve the current

---

[151] In our RTM Report, we also recommend preserving the equivalent two-thirds rule, which we refer to in that context as the "qualification threshold": see para 3.140 onwards.

position that at least two-thirds of flats in a building must be let to qualifying tenants (and a qualifying tenant must be a leaseholder under a "long lease"). The change of wording suggested will not create any additional requirements on top of the current two-thirds requirement. A leaseholder with 5 years remaining on his or her lease will be able to participate in a collective freehold acquisition claim if the lease was initially granted for longer than 21 years.

Recommendation 34.

6.251 We recommend maintaining an equivalent of the current requirement that, for a collective enfranchisement to be possible, at least two-thirds of the flats in the premises to be acquired must be held by qualifying tenants.

6.252 As with the "two-or-more flats" requirement discussed below, the "two-thirds" requirement has implications in the context of two-unit buildings, particularly where one is held by a long leaseholder but the other is owned by the freeholder. We consider this situation below, at paragraphs 6.301 to 6.314.

6.253 Finally, it should be noted that we explore the position of shared ownership leaseholders in respect of the two-thirds requirement (and more generally), as raised by several consultees in response to this provisional proposal, in Chapter 7.[152]

Two or more residential units

6.254 In the Consultation Paper, we considered what the "two-or-more flats" requirement adds to the "two-thirds" requirement. We suggested that the two-or-more flats requirement exists to prevent the collective enfranchisement of a building containing only a single flat. We gave the example of a house divided into a flat and an office, each held on a long lease by a separate person. There is only one flat in the building, as the office is not "constructed or adapted for the purposes of a dwelling".[153] More than two-thirds of the flats are held by a "qualifying tenant", and therefore, if the two-or-more flats requirement did not exist, the building might qualify for a collective enfranchisement by the leaseholder of the flat. This seems an undesirable result, given that there is only one long leaseholder and one flat in this building.

6.255 We therefore provisionally proposed maintaining the two-or-more flats requirement in our new scheme, though phrasing it differently: the question needs to be whether there are two or more residential units let on long leases.[154]

Consultees' views

6.256 Our proposal to adapt and retain the two-or-more flats requirement in our new scheme was supported by a sizeable majority of consultees, with many calling it a "reasonable" suggestion. Most consultees who agreed with our proposal gave no

---

152 See para 7.6 onwards.

153 See CP, para 7.56 onwards, for an explanation of the definition of a flat.

154 See CP, Consultation Question 47, para 8.134, with the explanation at paras 8.129 to 8.133.

reasons for their views, although CILEx expressly concurred with our view that it is a "logical requisite for 'collective' enfranchisement to involve 'collective' participation and by extension maintain the two-or-more requirement". CILEx also argued that "the current position does not appear to be problematic" and therefore cautioned against making a change: a similar point to that made by Orme Associates Property Advisers, which argued that "there are no problems currently in this regard with a minimum of two flats".

6.257 Some consultees did, however, disagree with retaining the two-or-more flats requirement, mostly on the basis that it constituted a barrier to enfranchisement rights. Several simply argued along the lines that "each individual should have the right to enfranchise regardless of other tenants in a block" (as Helen Butcher, a leaseholder, wrote). The National Leasehold Campaign contended that the "requirement needs to be lowered to provide greater opportunity for enfranchisement for leaseholders". A couple of consultees, including LKP, referred to leasebacks in asking that:

> … if the other lease is a business lease which the freeholder is forced to accept back as a head lease why should this exclusion exist? If it remains then the leaseholder is held prisoner by the freeholder.

Discussion and recommendations for reform

6.258 We are not persuaded by the argument made by some consultees relating to leasebacks. That argument can be taken to an extreme: why should a leaseholder of a single flat in a ten-storey block of offices not be able to buy the freehold of the building on his or her own, given that the freeholder could be forced to take a leaseback of the offices? Indeed, the argument was made by other consultees, as we highlight above, that each individual should have the right to enfranchise irrespective of the other unit owners in a building. We disagree with these contentions, in the context of collective freehold acquisitions.[155]

6.259 Instead, we think that an equivalent of the two-or-more flats requirement should be preserved in our new scheme. This requirement serves a logical and useful purpose in delimiting the right of collective freehold acquisition: it restricts the right so that it only applies where there is a minimum potential participation level of more than one long leaseholder of a residential unit in a building.[156]

6.260 Take the example to which we refer above, of a single long leaseholder in a building containing his or her residential unit and a separately-owned non-residential unit such as an office. At present, this leaseholder cannot acquire the freehold of the building: he or she does not have a lease of a house (and so falls outside the 1967 Act), nor are there two or more flats held by qualifying tenants in the building (and so the 1993 Act does not apply). Under our recommended scheme, this position is replicated with regard to individual freehold acquisitions. The leaseholder would not be entitled to an

---

[155] However, as we reiterate at para 6.262 below, we agree that each individual leaseholder should have the right to a lease extension in respect of their residential unit or units.

[156] The question of how many leaseholders must actually participate in order to effect a collective freehold acquisition is considered generally below at para 6.266 onwards, and specifically in respect of two-unit buildings at para 6.282 onwards.

individual freehold acquisition, as there is a unit in the building other than the one owned by him or her.[157]

6.261 If an equivalent of the two-or-more flats requirement is preserved in our recommended new scheme of qualifying criteria, the position in the current law would also be replicated with regard to collective freehold acquisitions. The leaseholder would not be able to acquire the freehold "collectively" as there are not two-or-more residential units let on long leases. We think that this result is justified, for two main reasons.

(1) First, to allow a leaseholder in this situation to acquire the freehold collectively would be to move away from the basis for the right of collective freehold acquisition: essentially, that a building is in majority long residential ownership, and that the interests of multiple leaseholders collectively should take primacy over the other unit owners and interest holders.[158]

(2) Second, to remove the two-or-more flats requirement and therefore to allow a leaseholder in this situation to meet the potential participation requirements for a collective freehold acquisition would create an inconsistency within the scheme of that right. Instead of the building containing an office and a residential unit, consider a building containing two residential units. In such cases, both units must be held on long leases so as to fulfil the two-thirds requirement; if only one of the residential units were held on a long lease, as we discuss and conclude at paragraphs 6.301 to 6.314 below, the long leaseholder would not have the right to undertake a collective freehold acquisition. We do not think there is a valid distinction in this context between:

(a) a two-unit building where both are residential units but only one is held on a long lease; and

(b) a two-unit building where one of the units is non-residential.

Therefore, we consider that these two scenarios should be treated the same. In other words, in neither case should the potential participation requirements for a collective freehold acquisition be met.

6.262 We emphasise that this outcome does not mean that a single long leaseholder of a residential unit in a building containing other units has no enfranchisement rights. Any long leaseholder of a residential unit will have the right to a long lease extension at a peppercorn ground rent, represented by outcome "A" on the flowchart at figure 5.

6.263 In terms of how to adapt the two-or-more flats requirement for our scheme, nothing consultees said gave rise to any concerns about our suggested approach: "two or more residential units let on long leases".[159]

---

157 See para 6.248(1) above for a brief discussion of the basis for the individual freehold acquisition right.

158 See para 6.248(2) above.

159 See CP, para 8.133.

Recommendation 35.

6.264 We recommend maintaining an equivalent of the current requirement that, for a collective enfranchisement to be possible, there must be a minimum of two or more flats held by qualifying tenants in the premises to be acquired.

6.265 The implication of this approach in the context of two-unit buildings, where one is held by a long leaseholder but the other is owned by the freeholder, is considered below at paragraphs 6.301 to 6.314.

Actual participation requirement

6.266 As we explained in the Consultation Paper, the 1993 Act requires "not less than one-half of the total number of flats" in the self-contained building (or self-contained part of the building) to participate in a collective enfranchisement claim. We referred to this as an "actual participation requirement", to contrast it with the "potential participation requirements" referred to above.[160]

The required level of participation

6.267 We argued that the basis of the requirement that at least half of flats must participate in a collective enfranchisement claim was that it prevents a minority of leaseholders from acquiring and controlling the freehold. We suggested that this was a reasonable limit on the right to acquire the freehold collectively, and therefore proposed maintaining the requirement as follows: the leaseholders of at least half of the total number of residential units in the premises to be acquired must participate in a collective freehold acquisition.[161] We also suggested that this level of participation should be required even where the landlord is missing (contrary to the current law, which requires two-thirds participation in such cases).[162]

Consultees' views

6.268 Our provisional proposal to maintain the current threshold was supported by well over half of consultees. Some did so on the basis we set out in the Consultation Paper: that the requirement prevents a minority of leaseholders from acquiring and controlling the freehold. The requirement was called "democratically reasonable" (by David Pugh). One consultee, Peter Muir, who had fallen foul of this requirement in his personal case, agreed: "although this requirement ultimately stalled our acquisition, this seems reasonable". The Law Society wrote that:

> for a lower limit to be set would probably be regarded as oppressive to the majority of leaseholders and there seems to be no pressing reason for departing from the threshold limit in the 1993 Act.

---

160 See CP, para 7.81, for an explanation of the current law.

161 See CP, Consultation Question 49, para 8.144.

162 See CP, para 10.142, for an explanation of the current law.

6.269 Numerous consultees contended that the requirement "strikes the right balance between allowing leaseholders to participate in a collective freehold acquisition and protecting landlords and sub-tenants from a minority takeover" (in the words of Notting Hill Genesis). Bruce Maunder-Taylor agreed, writing that:

> any more than 50% would be onerous and put enfranchisement out of reach to many. Any less than 50% exposes the majority to the risk of minority control leading to no better situation than with an "onerous" landlord.

6.270 A significant minority of consultees, however, disagreed with our provisional proposal, though there was no consensus over whether the limit we proposed to maintain was too high or too low.

6.271 Most of those who were against maintaining the current actual participation requirement argued that it should be reduced. Comments were made by several consultees about the fact that undertaking a collective enfranchisement claim can be very difficult – "it's not easy to organise time wise and financially" (Nina Rautio, a leaseholder) – and that the current actual participation can be "prohibitive" (an anonymous consultee).

6.272 Some consultees therefore suggested a general reduction in the level of participation required, without suggesting a specific percentage. Others made express suggestions, which ranged from supporting a particular percentage (10%, 15% and 40% were all proposed), to altering the leaseholders to whom the percentage is applied; for instance, Mehboob Neky (a leaseholder) suggested that the threshold should be 33% "of resident owners to account for overseas investors who don't participate in any decisions in the property". A few consultees suggested reducing the level of participation required in certain circumstances, such as where shared ownership leases are involved (as CILEx suggested), or to create a Tribunal discretion to relax the limit (as Christopher Jessel raised in his response). Others wrote that in the light of our proposed introduction of the right to participate, it may be justifiable to reduce the threshold. For example, CILEx suggested that while the:

> underlying rationale for this limitation in the context of the 1993 Act is justified in that it prevents a minority group of leaseholders from exercising power over the freehold, it has been suggested that the above proposals for non-participating leaseholders to retain their right to a collective enfranchisement would lessen the need for this restriction.

6.273 However, many of the consultees who disagreed with our provisional proposal in fact argued that the threshold should be higher than it is now. Most of these views stemmed from a desire to prevent "ping-pong" enfranchisement claims occurring.[163] Consultees' suggestions ranged from adopting a 51% threshold (or "more than 50%"), to setting the necessary level of participation at "50% plus one". Philip Rainey QC, for example, wrote that he was "strongly of the view that the threshold should be the

---

[163] As we explain at para 5.4(4) above, "ping-pong" enfranchisement claims involve one group of leaseholders successfully exercising the right to enfranchise, only for another group in the same building (or part of the building) to do so immediately thereafter, with the result that the freehold and management move back and forth between them (potentially repeatedly).

same as in Part 1 of the 1987 Act, i.e. 'more than 50%'", as this "avoids 'ping-pong' and equally sized groups of tenants racing to get their notice in first".

Discussion and recommendations for reform

6.274 We do not think it is desirable either to reduce or increase the level of participation required for a collective freehold acquisition to take place.

6.275 We understand that requiring the leaseholders of at least half of the residential units in a building to participate in a claim can cause significant difficulties, particularly in large buildings. Reducing the threshold would likely increase the number of leaseholders who are able to exercise freehold acquisition rights. Consultees' suggestions as to how the threshold might be lowered were, to some degree, attractive. However, we think it is extremely difficult to justify allowing the leaseholders of a minority of the residential units in a building to be able to acquire the freehold. Given the fact that we are not proposing the introduction of the right to participate at this stage,[164] reducing the actual participation requirement becomes even more difficult to justify: to do so would be to allow the leaseholders of a minority of residential units to acquire the freehold, perhaps to the exclusion of the leaseholders of a majority of the residential units in the building, who would then have no right to buy in. It would also potentially mean that there could be several competing groups of leaseholders of residential units in the same premises who are capable of bringing a collective freehold acquisition claim.

6.276 We note that "ping-pong" claims were raised by several consultees as a problem with the current law: two groups of leaseholders, each of which represents half of the residential units in the building, may acquire the freehold of the premises from each other more than once. However, as we have explained in Chapter 5 above, we do not think that increasing the participation requirement to 51% will necessarily solve this issue.[165] We have recommended an alternative approach to addressing the problem of ping-pong claims instead: there should be a defence to a collective freehold acquisition claim where the premises which it is sought to acquire have been the subject of a successful collective freehold acquisition claim within the preceding two years.[166]

6.277 In any event, we think that increasing the threshold is undesirable. To do so would arguably be contrary to our Terms of Reference which we agreed with Government, which state, among other things, that we should "consider the case to improve access to enfranchisement". Increasing the threshold, even to 51% or to 50% plus one, would, perhaps, not have a dramatic impact in large buildings. However, in smaller blocks, such a change would be significant. In a block of four flats held by long leaseholders, only two are currently required to participate to make a collective enfranchisement claim; if we were to increase the threshold, the minimum number required to support the claim would be three.

---

164 See paras 5.222 to 5.246 above.

165 See para 5.214 above.

166 See Recommendation 23, at para 5.221 above.

6.278 We therefore agree with the majority of consultees, who argued that the current level strikes the right balance between the interests of the freeholder and of the leaseholders in a block. It is reasonable to expect that the leaseholders of at least half of the residential units in a building will join together in order to acquire the freehold of their premises compulsorily from the freeholder, but we think that requiring a majority would be too onerous a condition. Consequently, we recommend preserving the current middle way.

6.279 We think that this should be the case irrespective of the makeup of the rest of the premises: in other words, regardless of whether there are inactive or absent leaseholders. We understand the frustration of leaseholders who might wish to undertake a collective claim at those other leaseholders, but we do not think that this changes the level of participation which should be required for a claim to be made.

6.280 Finally, we discuss the position of shared ownership leaseholders, which was raised by consultees (as we mention above), later in this Report.[167]

Recommendation 36.

6.281 We recommend that the leaseholders of at least half of the total number of residential units in the premises to be acquired must participate in a collective freehold acquisition.

Two-unit buildings with two long leaseholders

6.282 Following on from our provisional proposal in the Consultation Paper to preserve the current required level of participation for a collective freehold acquisition to be successful, we made a related provisional proposal relating to two-unit buildings where both units are held by long leaseholders. We explained that under the current law both leaseholders in such situations are required to participate in a collective enfranchisement.[168] We explain below, at paragraph 6.297, that the scope of this provision is wider than simply covering two-unit buildings; in fact, it applies where a building, which may contain more than two units, contains only two leaseholders who qualify for enfranchisement rights. For the sake of simplicity, however, we discuss this provision in the context of two-unit buildings to begin with.

6.283 In the Consultation Paper, we provisionally proposed that under our new scheme the requirement that the leaseholders of "at least half of the total number of residential units in the premises" are required to participate should apply to these buildings as it does across the scheme.[169] In other words, we suggested that one of these leaseholders should be able to undertake a collective freehold acquisition on his or

---

167 See para 7.6 onwards.

168 The Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) Order 2002 (SI 2002 No 1912) sch 2, para 2.

169 See CP, Consultation Question 50, para 8.147.

her own. We contended that this would assist leaseholders who wish to acquire the freehold, where the leaseholder of the other unit is unable or unwilling to participate.

6.284 We acknowledged, however, that there were two main counter-arguments to our suggestion, which were, in essence, that our provisional proposal would allow one leaseholder: (1) to carry out a "collective" freehold acquisition; and (2) to take control of the building. However, we responded that it is in the nature of collective freehold acquisitions that participating leaseholders take control of premises to the exclusion of the non-participating leaseholders. Furthermore, we pointed to our proposals relating to the right to participate, which would allow the non-participating leaseholder a right to join in the ownership and control of the freehold at any point.[170]

Consultees' views

6.285 There were particularly strong views regarding this provisional proposal, which were held both by consultees who supported it and those who disagreed with it. A sizeable majority of consultees, however, agreed with our provisional proposal.

6.286 Some agreed that our proposal constituted a "sensible conflict-avoidance measure" (as the RICS wrote). Many consultees echoed the sentiment we expressed in support of the suggestion in the Consultation Paper – for instance, two leaseholders, Denise Clarke and Jeanette Allen, both wrote that:

> In maisonettes, it's most important that the leaseholder who wants to purchase their freehold is not prevented from doing so if the other leaseholder does not want to purchase their own freehold also.

Another confidential consultee argued similarly, based on the principle that all leaseholders should have a right to participate in their own freehold. The Residential Landlords Association was also:

> supportive of the proposal to remove the requirement of both leaseholders participating in a collective agreement. This would be particularly advantageous for maisonette properties, empty properties or non-participatory properties.

6.287 Numerous consultees referred to the right to participate in their response, with many caveating their support for this provisional proposal by agreeing "as long as the leaseholder who remains has a future right to participate and buy their portion of the freehold from the other leaseholder/freeholder" (as David Silvermam, a leaseholder, put it). LKP also argued that:

> if one leaseholder wishes to be free from the grasp of their freeholder and the other is uncontactable or unwilling, they should be allowed to buy the freehold as long as we have a right of inclusion.

Berkeley Group Holdings PLC also agreed with our proposal, but argued that "this should be subject to a mandatory requirement to invite participation in the collective

---

170 See CP, para 8.146.

freehold acquisition, coupled with a future right at any time to participate. This will ensure transparency and fairness".

6.288 However, a significant minority of consultees disagreed with our proposal. Some did so on the basis of the first of the arguments we raised in the Consultation Paper: that it enables one leaseholder to take control of the building. For instance, Geraint Evans wrote that our proposal created "a mechanism for one neighbour to bully the other". Daniel Watney LLP, surveyors,[171] expressed concern about "vexatious acquisitions with financial dominance of one leaseholder potentially holding sway", and Mark Chick contended that "there is too much scope for abuse by one party against the other". Some consultees were particularly concerned about specific situations: for example, John Stephenson (a solicitor) argued that our proposal was "not fair on the non-participant, especially if the freehold is already owned by the two leaseholders jointly", and Irwin Mitchell LLP asked "where one leaseholder currently owns the freehold, why should the other leaseholder be able to acquire it instead"?

6.289 Other consultees disagreed with our provisional proposal on the basis of the second of the arguments we raised in the Consultation Paper: that it allowed "collective" freehold acquisition by a single leaseholder. Damian Greenish argued that:

> this requirement should be retained; otherwise it is no longer a collective claim. If one leaseholder wishes to claim and the other does not (and may not wish for his neighbour to acquire the freehold) why should the first leaseholder's desire to acquire the freehold trump the second leaseholder's desire for the status quo?

The Law Society, among other consultees, made a similar point, writing that this proposal to allow "one leaseholder to acquire the freehold might very well pour salt on the wounds of the other".

6.290 Finally, a number of other points were made by consultees against this proposal, including that it would create "considerable potential for dispute" (Fieldfisher LLP, solicitors), and that it would "encourage speculative investors particularly in London to buy up one flat of conversions of two flats and compulsorily acquire the freeholder's interest" (as the PBA wrote).

Discussion and recommendations for reform

6.291 In some ways, this provisional proposal was very attractive. It would have allowed a single leaseholder in a block of two residential units, where the other leaseholder was difficult to contact or uninterested in joining in a claim, to acquire the freehold of his or her building, along with the associated management rights and degree of control. As a starting point, our proposal would have increased access to enfranchisement rights for leaseholders in this situation.

6.292 However, the concerns many consultees have raised in their responses have been persuasive. We are worried that this right will provide an opportunity for, as consultees wrote, one leaseholder to exclude the other, and to take control of the building. From

---

[171] On behalf of Dame Alice Owen's Foundation, the Charity of Richard Cloudesley, and the Dulwich Estate (charity landlords).

the point of view of the non-participating leaseholder, there is potentially no benefit to the change in freehold ownership in these cases. These concerns are accentuated by the fact that we are, as mentioned above, not in a position to recommend the introduction of a right to participate at this stage.[172] Given the lack of a statutory right to buy in to a previous collective freehold acquisition, there is a tangible possibility that this proposal would allow a better-advised (or, perhaps, wealthier) leaseholder to acquire the freehold to the exclusion of the other. Furthermore, we are concerned that, following such a "collective" freehold acquisition, the participating leaseholder would be in a position to merge his or her leasehold title with the freehold title of the building. The result of is this is that the non-participating leaseholder would then have no freehold acquisition rights at all, since there would no longer be two residential units let on long leases in the building.

6.293 The arguments we made in the Consultation Paper for our provisional proposal were, to a large extent, based on our proposals regarding the right to participate. Indeed, numerous consultees caveated their support for our provisional proposal on the basis that the right to participate is introduced. Not only was the right to participate crucial in countering concerns that this provisional proposal might enable one leaseholder to take control of the building, but it also allayed concerns that this provisional proposal allowed a "collective" freehold acquisition by a single leaseholder.[173] Without the right to participate, however, these concerns arise again, alongside the other worries raised by consultees and referred to above.

6.294 We therefore do not think, given our current position on the right to participate, that it is desirable as a matter of policy to recommend the change we suggested in our proposal on this topic. We acknowledge that this position means that this category of leaseholders will continue to be excluded from the ability to obtain the freehold of their buildings. However, we think that to recommend including them, at this stage, would cause more problems than it would solve. Indeed, it would possibly even exclude, in the long term, more leaseholders than those who are prevented from exercising freehold acquisition rights at the moment.

6.295 We reiterate, furthermore, that in these cases, the single long leaseholder will still have a right to a 990-year lease extension in the event that he or she is unable to persuade the other long leaseholder to participate in a collective freehold acquisition claim. Furthermore, our understanding is that, in many cases, a leaseholder who is, in principle, keen to participate in a collective enfranchisement claim under the current law in these two-unit buildings, but who may lack the resources or funds to do so, can often be amenable to "lending" his or her signature to the other participating leaseholder. The result of this is that a collective enfranchisement can be carried out, to the benefit of both leaseholders (albeit that the leaseholder who lends their signature to the other will not ordinarily acquire the same level of control in the freehold as if they had paid for their share). This potential will be preserved under our new scheme.

---

[172] See paras 5.222 to 5.246.

[173] As we explained in para 8.146(2) of the CP, the right to participate could provide the potential for the acquisition to become truly "collective" at a later stage.

Recommendation 37.

6.296 We recommend maintaining the requirement that, in the case of a building containing only two leaseholders who qualify for enfranchisement rights, both leaseholders must participate in a collective freehold acquisition claim.

6.297 As we note above (at paragraph 6.282) this recommendation to preserve the current law also covers certain buildings containing more than simply two units, but in which there are only two leaseholders who qualify for enfranchisement rights. An example of this would be a building with three flats, where two are let on long leases and one is retained by the freeholder and let on a short tenancy. In this situation, both of the long leaseholders would have to participate in the claim (as the building only contains two qualifying tenants of flats). The above recommendation preserves this position: both leaseholders would have to participate under our new scheme.

6.298 We consider this position to be desirable, for the same reasons as we set out above. If anything, some of the arguments we raise are more persuasive in the latter case. For example, one of our major concerns about removing the requirement for both leaseholders in a two-unit building to participate is that it might allow a single long leaseholder to take control of a building to the exclusion of the other long leaseholder. This is particularly relevant for a building containing three residential units, where one is retained by the freeholder and two are held by long leaseholders. Removing the requirement for both leaseholders to participate would enable one leaseholder to take control of the building to the exclusion of the other leaseholder, and of the freeholder, neither of whom would have the right to buy in to the freehold acquisition. Preserving this requirement, therefore, serves a useful purpose in setting a base limit of participation (that at least two long leaseholders must participate) for a collective freehold acquisition even in some buildings involving more than two units.

6.299 As we have explained, much of the basis for our decision to recommend preserving the current position in respect of two-unit buildings stems from the fact that we are not able, at this stage, to recommend the introduction of the right to participate. We note therefore that if, in due course, the right to participate is introduced, further consideration should be given to these situations, as the possibility of the other leaseholder being able to participate in the collective enfranchisement at a later date would alleviate many of our current concerns.

6.300 Indeed, as we explain in the Right to Manage Report, this is one of the reasons that our recommendations differ on this topic between enfranchisement and the right to manage. With respect to the right to manage, we recommend that where there are two long leaseholders of residential units in the relevant premises, the claim can be carried out by one of those leaseholders. Unlike in enfranchisement, however, the other leaseholder has an ongoing right to join the right to manage company. This is

something which we have not, at this stage, been able to replicate through an enfranchisement right to participate.[174]

Two-unit buildings with a freeholder-retained unit

6.301 In the Consultation Paper, as we mentioned above at paragraphs 6.237 to 6.238, we provisionally proposed maintaining equivalents of the two-or-more flats requirement and the two-thirds requirement in our new scheme. We also provisionally proposed, as set out immediately above, that in a two-unit building, where both units are residential and held by long leaseholders, one of those leaseholders should be able to carry out a collective freehold acquisition.

6.302 Given those provisional proposals, we then discussed the situation where there is a two-unit building, where one of the units is held by a long leaseholder but the other is retained by the freeholder. We identified a potential inconsistency in the rights of the leaseholder of one of the two units: whether he or she had collective freehold acquisition rights depended on whether the freeholder had decided to let the other unit out on a long lease or not. We suggested that it may therefore be appropriate to make an exception to both the two-or-more flats and the two-thirds requirements for these types of properties. An exception would enable the leaseholder to acquire the freehold of the building, while the freeholder would have the right to take a leaseback of his or her unit, and then be able to exercise the right to participate.

6.303 We set out, in detail, the policy and practical arguments both for and against the creation of such an exception, following which we asked consultees for their views on the issue.[175]

6.304 However, in the light of the recommendation we make immediately above for two-unit buildings generally, the background to this question has changed. In two-unit buildings with two long leaseholders, we have concluded that both leaseholders will have to participate for a collective freehold acquisition to be possible. Either of the two leaseholders can obtain a lease extension (outcome “A” on our flowchart at figure 5), but a single leaseholder cannot obtain the freehold by a collective freehold acquisition on his or her own. This is, in effect, the same result as in respect of a leaseholder in a two-unit building where the second unit is retained by the freeholder: he or she has a lease extension right, but cannot acquire the freehold on his or her own (primarily because of a combination of the two-or-more flats requirement and the two-thirds requirement).

6.305 Consequently, the justification for creating an exception in the two-unit situations where one unit is retained by a freeholder – that the position of the leaseholder is inconsistent with two-unit buildings where both are held by leaseholders – falls away. Nevertheless, we have considered the views which consultees expressed to us, in order to determine whether there remain any additional justifications for creating an exception to the two-or-more flats and the two-thirds requirements in these cases. As is the case in relation to two-unit buildings where both are held by leaseholders, the

---

174 We explain our recommendation in respect of the right to manage in more detail in the RTM Report, at paras 3.157 to 3.183. See particularly the comparative table at para 3.177 of the RTM Report.

175 See CP, Consultation Question 55, para 8.166, with the associated explanation and discussion at paras 8.160 to 8.165.

inability of a single leaseholder to qualify for a collective freehold acquisition in a two-unit building in which one unit is retained by the freeholder should be reconsidered if the right to participate is subsequently introduced.

Consultees' views

6.306 Consultees' views were fairly numerically balanced regarding whether an exception should be created so that a single leaseholder in a two-unit building, where the other unit is retained by the freeholder, qualifies for a collective freehold acquisition. There was, however, a clear division between leaseholders and individuals (who generally supported the creation of an exception), and professionals, law firms and freeholders (who were predominantly against it).

6.307 Most of those who supported the possible exception did so on the basis that, from the point of view of the leaseholder, the need for some form of freehold acquisition right is a powerful one. This is a point we made in the Consultation Paper. We were told that these kinds of properties are common across the UK (by, for instance, the National Leasehold Campaign). Furthermore, consultees argued that leaseholders in this situation "are arbitrarily discriminated against" by virtue of living in a two-unit building, and that there is "no legal recourse to re-balance" the power imbalance between the freeholder and themselves (as J Williams, a leaseholder, put it).

6.308 A couple of other points were made in favour of an exception, including that such an approach might create an incentive to run these types of building properly, as leaseholders in these buildings may currently struggle to hold their landlords to account if they are not complying properly with their covenants. The PLA and CMS Cameron McKenna Nabarro Olswang LLP wrote that this exception would support our Terms of Reference in expanding access to enfranchisement rights. They cautioned that the exception might allow one individual "to monopolise the freehold to the disadvantage of another individual, and this could result in an increase in litigation claims and costs". However, they suggested (as we discuss elsewhere)[176] that "a prohibition on successive enfranchisements within a particular period of years might help to address this issue".

6.309 Finally, several consultees who supported an exception suggested that it would be particularly helpful where there is an "absent" landlord.

6.310 However, many consultees were firmly against providing an exception. Many agreed with the arguments we set out in the Consultation Paper against the exception:[177] arguments which were described as "compelling" by, for instance, Philip Rainey QC. Among other consultees, the Portman Estate asked:

> what is the difference in principle between the example given and a single leaseholder of a flat in a three-flat block?

6.311 Numerous consultees disagreed with the suggested exception for reasons of fairness. Several consultees argued that the freeholder should be able to retain the freehold interest unless there is a clear majority of leaseholders prepared to participate in a

---

[176] See paras 5.206 to 5.221 above.

[177] See CP, para 8.163.

collective freehold acquisition. Along similar lines, Irwin Mitchell LLP wrote that there was no "reasonable justification" for why it should be possible for "one leaseholder who does not own the freehold… suddenly [to] be able to swap positions with the other". The Law Society argued likewise:

> why should the non-freehold owning part[y] be able to compel a sale to them?

Furthermore, Tapestart Limited, a landlord, argued that the price paid by the leaseholder initially would have reflected the fact that, while a lease extension would have been possible, a collective enfranchisement would not.

6.312 A series of other arguments were made by consultees, such as concerning the position of mortgage lenders. UK Finance (an association representing mortgage lenders) wrote that, if there were such an exception, "there seems to be a possibility that a mortgagee may lose its security over the freehold unit/title, whether or not the premium is sufficient to fully repay all sums due and irrespective of any leaseback of the retained unit".

Discussion

6.313 As we explain above, in the light of the fact that we are not recommending the introduction of a right to participate at this stage, we do not think that we can recommend creating an exception to the two-or-more flats and the two-thirds requirements in these two-unit cases. To do so would be to allow a leaseholder of a single unit in a two-unit building, where the other unit is held by the freeholder (but not where the other unit is held by another leaseholder), to acquire the freehold, with no associated right for the freeholder to buy in. The relationship between freeholder and leaseholder merely switches: there is no sharing of control or ownership.[178]

6.314 As is the case with other situations involving the position of a single leaseholder in a two-unit building, we think the inability of the leaseholders to undertake a collective freehold acquisition should be reviewed if a right to participate is subsequently introduced.

Further requirements and exceptions

6.315 We now consider one further requirement for a building to qualify for a collective freehold acquisition: the percentage of non-residential use allowed. We then turn to exclusions from the right of collective freehold acquisition: in respect of buildings with a resident freeholder, or built over operational railway tracks.

6.316 Finally, we consider the "three or more flats" exception, which prevents a leaseholder of three or more flats in a building from qualifying in respect of any of them for collective enfranchisement purposes.

---

[178] We consider a related point at para 6.292 above.

The 25% non-residential limit in collective freehold acquisitions

6.317 In the Consultation Paper, we explained that for a building to qualify for a collective enfranchisement, no more than 25% of the internal floor area (excluding common parts) can be occupied or intended to be occupied for non-residential use.[179]

6.318 We discuss our recommendation for the application of a percentage non-residential limit in individual freehold acquisitions above, at paragraphs 6.166 to 6.171. We conclude, in respect of individual freehold acquisitions, that there should be an applicable percentage non-residential limit, and that it should match the limit in collective freehold acquisition claims.

6.319 In the Consultation Paper we provisionally proposed to preserve the 25% limit in our new scheme. We suggested that, as any numerical limit in this context is, to an extent, arbitrary, maintaining the current position (to which the markets have adapted) is better than changing it. We asked consultees whether they agreed with our view.[180]

Consultees' views

6.320 Just over half of consultees agreed with our proposal to maintain the 25% limit on non-residential use, most without giving any reasons. Some consultees argued that the 25% limit "reflects the strength of the value of the ownership of any commercial premises" (Julian Briant, a surveyor). Others, including the PLA and the Wellcome Trust, contended that the limit maintains the scope of enfranchisement rights as affecting "buildings which are predominantly residential". Cadogan, a landlord, explained that the limit is "important to our ability to effectively manage our commercial estate".

6.321 A number of consultees pointed to the current law's use of 25% as the limit, as we did in the Consultation Paper, as justifying preserving that limit. The RICS wrote that the current approach "works adequately", and the Birmingham Law Society wrote that "the consistent use of 25% seems appropriate".

6.322 A significant minority of consultees, however, disagreed with our provisional proposal, as was also the case in respect of our suggested application of a 25% limit to individual freehold acquisitions (and for many of the same reasons).[181] Some consultees called the limit "arbitrary and limiting" (Stephanie Holm, a leaseholder, for example). In the context of collective freehold acquisitions specifically, numerous consultees wrote that mixed-use developments are becoming more common, and that preserving the 25% limit risks restricting rights away from deserving leaseholders. One consultee argued that this was a context in which the inequality of arms between leaseholders and freeholders comes heavily into play, writing that it is:

> unfair just to cut off residential lessees from similar rights merely because the developer took enough time and trouble to develop more than 25% commercial

---

179 See CP, para 7.80.

180 See CP, Consultation Question 52, at para 8.153, with the associated explanation at paras 8.150 to 8.152.

181 Consultees' views on the application of a percentage non-residential use limit in individual freehold acquisitions, and on what that percentage should be, are considered at paras 6.152 to 6.164 above.

space, or an unscrupulous landlord (with or without planning permission) granted a business tenancy of one or more flats to tip the balance. Whether he was right or wrong to do so is not the point. The point is that the litigation battle has to be engaged in which the wealthy freeholder operating on tax deductible expenses always has a big advantage.[182]

6.323 Many consultees, therefore, argued for a higher limit than 25%. We heard from those who thought the limit should be 33%,[183] those who argued it should be 50%,[184] and those who did not think there should be a limit at all (as the landlord can be forced to take leasebacks of the commercial units).[185] The most common suggestion was 49% or 50%: in other words, allowing leaseholders to acquire the freehold collectively where they are in the majority. As Greg Passeri, a leaseholder, put it:

> … this would ensure that in any mixed development where residential leaseholders are in the majority, they retain the same rights as solely residential developments. This has the effect of being less arbitrary (majority rule).

6.324 We heard from leaseholders in two particular developments (and from their respective residents' associations) who have been prevented from exercising collective enfranchisement rights by the 25% limit. A number of relevant arguments were made by the Residents' Association of Canary Riverside, including that the 25% rule "assumes every percentage of floorspace is somehow 'equal' irrespective of whether it is residential or commercial", and that it also "completely ignores lease terms". In the case of Canary Riverside, we were told that residential leases are for 999 years at a peppercorn ground rent, therefore transferring "all of the value to the residential leaseholders". The 1 West India Quay Residents' Association, and a number of individual leaseholders, explained that in their case the building has 53% residential use, and advocated for a 49% non-residential limit.

6.325 Some consultees also made suggestions as to how the limit is applied. Some disagreed with the percentage limit applying to floorspace, with one leaseholder explaining that in his case there are six flats above a single shop, but the respective floor areas prevent a collective enfranchisement. Others contended that the percentage limit should apply to a different measure, such as the number of non-residential units as a proportion of all units, their respective property values, or their contributions to the running costs of the building. One consultee, Franciszka Mackiewicz-Lawrence, a leaseholder, referred to the issues caused by the definition of "common parts", and argued that common parts which are exclusive to the residential parts of the building (and, among other things, terraces exclusive to specific residential units) should not be excluded from the calculation.

---

182 Bruce Maunder-Taylor.

183 LEASE, for instance.

184 The National Leasehold Campaign, Jo Darbyshire, Steven Harding (a surveyor), and Roger Dunn, among others.

185 LKP, for instance.

Discussion and recommendations for reform

6.326 As we mention in the context of individual freehold acquisitions above (at paragraph 6.157), one of the primary reasons we provisionally proposed maintaining the 25% non-residential limit in our new scheme was because that is the limit which exists in the current law, and the market has adapted to it. We argued that it would be possible for a developer to build to avoid any limit, no matter what number was chosen.

6.327 We did acknowledge in the Consultation Paper that our provisional proposal may lead to dissatisfaction in particular cases. However, through consultation responses and comments made at consultation events, we have heard of significantly higher levels of dissatisfaction than we had previously been aware. Numerous consultees and stakeholders told us how they have been prevented from exercising collective enfranchisement rights because their building falls slightly above the 25% non-residential limit. It has become apparent that the 25% limit provides a significant bar to the ability of leaseholders to undertake a collective freehold acquisition, and that the arbitrary nature of the limit makes the bar to enfranchisement a source of considerable frustration for many leaseholders. Despite the fact that a majority of consultees supported our provisional proposal to retain the 25% limit, we have found the arguments advanced by a significant minority to be compelling. Fundamentally, the purpose of the limit is to confine enfranchisement to predominantly residential blocks – and we have been persuaded that a 25% limit on non-residential use does not achieve that purpose. On this basis, we think that the 25% non-residential limit should be increased. The question, then, is to what level should the limit be increased?

6.328 There has always been some debate as to where to draw the line in respect of the level of non-residential use permitted in a building before collective enfranchisement rights cease to be available. The original limit set by the 1993 Act was only 10%, and at that stage there was resistance towards increasing the percentage because of concerns that investors may be reluctant to lease commercial spaces in blocks owned or managed by residential leaseholders.[186]

6.329 Nevertheless, within a decade of the creation of the collective enfranchisement regime, the limit had been raised to 25% by the 2002 Act, in order to make enfranchisement rights more widely available.[187] At that time, it was thought that a 25% limit would protect the landlord where the non-residential unit or units were the majority interest in the building, in terms of value: it was said that "a 25 percent commercial content equals approximately half the value of the building to the landlord".[188]

6.330 One option to include more leaseholders within the enfranchisement regime would be another incremental increase to the percentage of non-residential use permitted in a building. However, we do not think this is a satisfactory approach. An increase, say, to 35% would bring some more leaseholders within the scheme of collective freehold

---

186 *Hansard* (HC), 9 February 1993, vol 218, col 883.

187 See CP, at para 2.27.

188 *Hansard* (HL), 15 March 2001, vol 623, col CWH 206.

acquisition, but it would continue to allow developers to build around the limit in order to exclude blocks of flats from enfranchisement rights.

6.331 Instead, we have thought further about the purpose of a non-residential limit. Enfranchisement rights are aimed at residential leaseholders of residential buildings. What determines whether a building is residential, and therefore whether it should attract enfranchisement rights? It is important to keep in mind that this is a subjective question. In implementing a coherent and logical scheme of qualifying criteria, however, an objective measure needs to be applied in order to attempt to answer that question. In other words, some form of objective and legally certain limit must be placed on buildings which determines whether they are residential or non-residential in nature.

6.332 A 25% non-residential limit in respect of floorspace is, as we explain above, designed to set the boundary of the enfranchisement regime at half the value of a building to a landlord. However, we think that this no longer fairly or appropriately delimits which buildings should be included within the enfranchisement regime. Enfranchisement rights should, in principle, attach to leaseholders in buildings which can fairly be described as residential.

6.333 We do not think that the test of whether a building is residential should be based on the respective value of the residential and commercial aspects, even if this is determined (as at present), crudely, by the respective proportions of residential and non-residential floorspace. Instead, this issue should be thought of as one relating to the physical makeup and character of the building. We therefore think that where at least half of the floorspace of a building is being used residentially, that building can be thought of as residential. On the other hand, where a landlord has let out more than half of a building for non-residential use, the building can no longer fairly be said to be residential.

6.334 As a result, we think that increasing the non-residential percentage limit to 50% (as was suggested by, among other consultees, the National Leasehold Campaign) is appropriate. This change would put as objective a test as is possible onto the subjective question of which buildings are residential in nature, based on the predominant type of ownership in a building (by floorspace). In all but the most complex cases, ascertaining whether this limit is met will not require significant expertise and cost.

6.335 We appreciate that there will inevitably be some marginal cases that fall close to the limit, and some that will be excluded by it. However, the certainty and simplicity provided by this objective test is desirable, and the increase in the limit to 50% will, we think, render such cases rare. For a developer to construct a building which falls above this limit, there must have been a real desire to build a genuinely and overtly commercial building, such that the right to a collective freehold acquisition should no longer apply. Buildings falling below this limit, however, can generally be thought of as being residential and, assuming the residential leaseholders meet the other qualification criteria, should be eligible for collective freehold acquisition.

6.336 We recognise that this change would have potentially wide-reaching consequences in terms of the number of premises which might be eligible for enfranchisement. However, we regard this both as a positive change – enfranchising leaseholders in

buildings which are in majority residential use – and in line with our Terms of Reference as regards improving access to enfranchisement. Incidentally, it is worth noting, as several consultees pointed out, that the limit of 50% is one which applies in other related contexts, such as the right of first refusal.[189]

6.337 Additionally, in the context of our work to reinvigorate commonhold, we also think that a move to a 50% non-residential limit will have a positive impact. As we explain in the Commonhold Report, in order to convert to commonhold (without the consent of the freeholder), the leaseholders will need to satisfy the qualification criteria for a collective freehold acquisition. This recommended relaxation of the non-residential limit will therefore enable more leaseholders of mixed-use buildings to convert to commonhold.[190]

Recommendation 38.

6.338 We recommend that the percentage limit on non-residential use in collective freehold acquisitions be increased from 25% to 50%.

6.339 Consultees' comments on how the limit is actually applied were useful. We were particularly interested in suggestions relating to "common parts", and whether areas which are only able to be used by residential unit holders should be included as residential floor space for the purposes of the calculation. We will consider these technical comments further in instructing Parliamentary Counsel on the draft Bill which will follow this Report.

6.340 It is also important to note that our recommendations on leasebacks will be relevant in the context of this recommended change to the non-residential limit.[191] We recommend that leaseholders will be able to require landlords to take leasebacks of commercial units. In cases involving buildings with a significant proportion of commercial units, which tend to be valuable, this will be a crucial ability for leaseholders to reduce the premium they have to pay to acquire the freehold.[192] In such cases, it is likely that the former freeholder will remain the landlord of the non-residential units following the collective freehold acquisition. This outcome is rendered even more probable as, even if the leaseholders do not choose to require the

189 Landlord and Tenant Act 1987, s 1(3). The right of first refusal is the right for leaseholders of flats to be offered the freehold of their building before it is sold to a third party.

190 See the Commonhold Report, at para 4.27. This recommendation also aligns with our recommended move towards a 50% non-residential limit in the context of the right to manage: see the RTM Report at paras 3.115 to 3.126.

191 See para 5.152 onwards.

192 See para 5.168 above.

freeholder to take a leaseback of the non-residential units, he or she may (as under the current law) elect to take a leaseback of those units.[193]

Further exclusions: resident landlords and operational railway tracks

6.341 As we explained in the Consultation Paper,[194] there are additional exclusions to collective enfranchisement rights, including:

(1) where the premises are made up of four or fewer units and contain a "resident landlord" (and specific other conditions are met);[195] and

(2) where the premises include an "operational railway track".[196]

6.342 We explained that no issues in relation to either of these exceptions had been raised with us, and asked consultees whether they agreed with our resulting provisional proposal to preserve both exclusions in our new scheme.[197]

Consultees' views

6.343 Our proposal in respect of both the resident landlord and the operational railway tracks exclusions was supported by a sizeable majority of consultees. However, that support was not spread equally between the two exclusions.

6.344 There was almost uniform agreement with our suggestion to preserve the operational railway tracks exclusion. Transport for London (on behalf also of London Underground Ltd and Docklands Light Railway Ltd) considered the exclusion to be "of great importance in the exercise of… statutory functions and the provision of an effective transport service". One consultee, Graham Webb, agreed that it is "a matter of national interest" that the freehold of railways is retained by the operators, and we were also told that the application of the exclusion is rare.

6.345 However, the suggestion to maintain the resident landlord exclusion proved more controversial. Some consultees agreed with our view from the Consultation Paper: CILEx, for example, wrote that it "has not collected opinions from members that either of these restrictions pose any problems in practice", and that their "provisional stance would be that where the current position does not appear problematic, it would be better to maintain what has already been tried and tested". Other consultees agreed that the exclusion is "very restrictive" and "rare in practice".[198] In fact, a couple of

---

193 See paras 5.153 to 5.154. It may be desirable for a freeholder to request a leaseback in these situations because it preserves an income stream from a business tenant.

194 See CP, para 7.80.

195 Premises have a resident landlord if (a) they are not (and do not form part of) a purpose-built block of flats; (b) the same person has owned the freehold of the premises since before they were converted into two or more flats or other units; and (c) the landlord (or an adult member of his or her family) has occupied a flat or other unit within the premises as his or her only or principal home for the preceding 12 months: 1993 Act, s 10.

196 1993 Act, s 4(5).

197 See CP, Consultation Question 53, para 8.155.

198 John Stephenson, and Orme Associates Property Advisers, respectively.

consultees suggested widening the scope of the resident landlord exclusion, with one suggestion being to adopt a test from different legislation,[199] and another being to loosen the condition that, for the exclusion to apply, it must be the freeholder who converted the property into flats who is "resident" in the premises.[200]

6.346 Numerous consultees argued for the removal of the resident landlord exclusion, although some mistakenly believed that the exclusion applies whenever a freeholder resides in the building or owns one of the flats.[201] We did, however, hear from consultees who told us that they had been prevented from acquiring the freehold (or a share of the freehold) because of the exclusion. Some consultees also disagreed with the exclusion in principle, with one, Helen Butcher, writing that if a freeholder is not "prepared to sell the freehold interest then they should let the unit as a normal tenancy" rather than selling it on a long leasehold basis. Bruce Maunder-Taylor also supported removing the exclusion, explaining that he had:

> only dealt with one resident landlord exception, there would have been no prejudice to him had he allowed the enfranchisement which was only started because he was such an incompetent manager of the service charge account. I really do not understand the justification for this exception, after all, the alternative is a s 24 Order, then 2 years later take a compulsory acquisition claim.

6.347 Some consultees supported the abolition of the resident landlord exclusion on the basis of our suggested right to participate. One confidential consultee, for example, argued that under our proposals, the resident landlord whose property is being enfranchised would have the opportunity to retain a stake in the freehold (either by participating in the enfranchisement claim as a leaseholder, or by later exercising the right to participate).

Discussion and recommendations for reform

6.348 To begin with, we are convinced of the need to retain the exclusion from collective freehold acquisition rights where premises include track of an operational railway. Not only was this overwhelmingly supported by consultees, but it is a logical exclusion which applies infrequently.

Recommendation 39.

6.349 We recommend that the exception from collective enfranchisement rights in respect of premises containing operational railway tracks should be carried forward into our new scheme.

---

199 The Landlord and Tenant Act 1987, suggested by John Stephenson.

200 Sheila Jalving, a leaseholder, who suggested that a freeholder who has resided in a house which has been converted into flats for a specified amount of time should also receive the benefit of the exclusion.

201 As we set out at para 7.80(2) of the CP, the scope of the exception is significantly narrower than that. In order to apply, it requires, for instance, the freeholder to have converted the property into flats himself or herself, and it cannot be engaged where the property is a purpose-built block of flats or where there are more than four flats. Furthermore, there is a residence condition, which is an ongoing requirement.

6.350 We have, however, reconsidered our view with respect to the resident landlord exclusion. Arguably, the exclusion does serve a useful purpose in providing security to a freeholder who wishes to lease out part of his or her property. Furthermore, the exclusion does not apply very often: as we mention above, the conditions which must be met for it to apply restrict the exclusion to small blocks that are the freeholder's home, and which the freeholder himself or herself converted into flats.

6.351 That latter condition – that the freeholder must have converted the premises into flats himself or herself – was imposed in 2002,[202] and represented a further narrowing of the applicability of the exclusion. We think that there is a strong argument to go further now, and to remove the resident landlord exclusion altogether.

6.352 The resident landlord exclusion comprises a barrier to the exercise of freehold acquisition rights (albeit one that is infrequently applicable). The relevant question is whether to treat a landlord who converts their house into a small number of flats, but remains living in one of the flats, differently from the subsequent landlord, who buys the freehold shortly afterwards and who lives there too. Conversely, the question is whether leaseholders who live in flats which have been newly converted from a house by the landlord should be treated differently to leaseholders who live in flats which were converted by a previous freeholder and then sold to the current landlord. We think that the two landlords, and the two sets of leaseholders, should be treated the same way. In both cases, the building, assuming the relevant qualifying criteria are met (such as there being a sufficient number of long leaseholders in the flats), is one which should attract enfranchisement rights, as the building will be in majority long residential leasehold ownership.

6.353 We therefore are of the view that the resident landlord exclusion should be removed from the scheme of qualifying criteria for enfranchisement rights. This also reflects our view in respect of qualifying for the right to manage.[203]

6.354 It should be noted that in the light of our recommendations in respect of two-unit buildings, considered above at paragraph 6.282 onwards, it would remain possible for a freeholder to divide his or her house into two flats, and to sell one on a long leasehold basis, without being exposed to freehold acquisition rights. Freehold acquisition rights only become available where the freeholder creates more than two flats held on long leases (or if he or she creates two flats and sells them both on long leases). In such cases, where the leaseholders hold, in effect, the majority interest in the building, we think that they should be able to acquire the freehold collectively (assuming the necessary conditions, such as the two-thirds requirement, are met).

Recommendation 40.

6.355 We recommend that the resident landlord exclusion be abolished.

---

202 CLRA 2002, s 118.

203 See the RTM Report, at paras 4.45 to 4.52.

Leaseholders of multiple residential units in a building

6.356 Under the current law, a leaseholder of more than two flats in a building is prevented from being a qualifying tenant of any of them for collective enfranchisement purposes.[204]

6.357 This provision has been heavily criticised, particularly on account of the fact that it is easy to circumvent, thereby failing to achieve its objective of excluding speculators from benefiting from enfranchisement rights.[205] It can also have the effect of preventing a whole block from enfranchising, and we gave the example in the Consultation Paper of a building containing seven flats let on long leases, of which three are owned by the same person. No collective enfranchisement would be possible, since the four remaining flats do not constitute two-thirds of the flats in the building.[206]

6.358 We argued that we could not think of any other useful purpose being served by the exclusion, and therefore provisionally proposed abolishing it in our new scheme.[207]

Consultees' views

6.359 The vast majority of consultees agreed with our provisional proposal, many for the reasons given in the Consultation Paper. For example, one leaseholder, Tracey Horton, agreed that the exclusion is an "unnecessary obstacle", and that "depending on [the] number of flats in a building, the pattern of ownership by just one person can have the result of disqualifying the entire building from being eligible". Numerous consultees concurred that the exclusion is most unfair on "those who do not have the money or the will to transfer one or more leases out of the single name in order to then qualify, compared to those wealthy and well-advised people who are prepared to take that step".[208]

6.360 Other consultees argued that the exclusion currently prevents leaseholders of multiple flats, who may indeed be investors, from engaging constructively in the enfranchisement process, even where it may be in everyone's interest to do so. A body representing private rented sector landlords – the Residential Landlords Association – wrote that there are "significant numbers of [private rented sector] landlords who may wish to engage in a collective agreement to improve the quality of housing but are restricted in doing so". Victoria Bradbury wrote that "there are those who own multiple flats and are often excluded from participating in acquisition of leasehold, which they are keen to do primarily for building upkeep purposes". Brockenhurst Parish Council contended that it should not be excluded from participating in a freehold acquisition claim merely because it holds the long leases over four flats in a block of fifty: a situation in which concerns about one leaseholder monopolising the freehold following a collective freehold acquisition do not arise.

---

204 See CP, para 7.75.

205 See CP, paras 7.124 to 7.126.

206 See CP, para 7.79.

207 See CP, Consultation Question 51, para 8.149, with the associated explanation at para 8.148.

208 Bruce Maunder-Taylor.

6.361 Some consultees who agreed with our proposal, however, warned of consequences which may arise as a result of removing this exclusion. For instance, Mark Chick wrote that the change may result in "multiple investors who will then 'buy up' blocks and this may not be the best experience for remaining leaseholders". However, we also heard from consultees who argued that:

> whilst there may be sense in preventing circumstances which could result in one leasehold owner monopolising the freehold once acquired, we do not consider this concern overrides the current proposal which facilitates a collective claim, albeit it could allow a commercial head lessee investor to enfranchise.[209]

6.362 Only some consultees disagreed with our provisional proposal to remove this exclusion. Most did so on the basis that removing the rule would allow investors to buy up multiple flats in a building, and to take control of the building following a collective freehold acquisition claim "at the expense of the other residents" (as Church & Co Chartered Accountants put it). The Sir John Cass's Foundation wrote that this provisional proposal will not help leaseholders, and instead will "encourage professional landlords to take advantage of the provisions". Geraint Evans argued that our suggestion "simply encourages speculators and takes properties out of the market that could otherwise be acquired by owner-occupiers". It was also argued that the rule causes no detriment to leaseholders.

> The rule provides an extra check-and-balance against commercial investors participating in a collective freehold claim. Its inclusion causes no difficulties for a "true" homeowner and its retention, therefore, is not to their detriment and can only reinforce the policy to restrict or limit rights for commercial investors.[210]

6.363 Several consultees agreed with our view that the current exclusion is easily circumvented, but suggested other approaches. For instance, Damian Greenish argued that:

> the restriction should be applied to a proportion of the flats so that an investor could not dominate. For example, it might be a percentage (rather than a fixed number) of the qualifying tenants in single or connected ownership. Secondly, the definition of what constitutes connected parties could be considerably tightened. For example, the reference to "person" in subsection 5(5) could be extended to include family members and trustees for them and the reference to "associated company" in subsection 5(6) could also be improved by looking at other (and tighter) statutory definitions.

6.364 This point was echoed by Consensus Business Group, a landlord, suggesting that the three-or-more flats rule should be removed and "replaced by a rule based on owner-occupation". Grosvenor argued that the three-or-more flats rule could be enhanced by "applying a test of beneficial rather than legal ownership or aggregating interests of associated parties". Others, such as Long Harbour and HomeGround, contended that

---

209 The British Property Federation.

210 Boodle Hatfield LLP.

the restriction should only apply to companies which own three or more flats, rather than to individuals.

Discussion and recommendations for reform

6.365 We remain firmly of the view that this rule – that a leaseholder of three or more flats in a building is not a qualifying tenant in respect of any – is ineffective in excluding investors from collective enfranchisement rights. It is easily avoided by sophisticated investors, and thus only penalises less well-informed leaseholders of multiple units. We do not think that there is any good justification for retaining the exclusion in its current form.

6.366 We have considered the view put to us by several consultees that, rather than abolishing the exclusion, we should improve the drafting of the current rule so that it more effectively achieves its intended purpose. However, we think that it is likely that any similar rule would continue to be circumvented by sophisticated investors. Instead, we think that the better route is to remove the restriction altogether. Although this may create (or, rather, preserve) a risk that some speculators may take advantage of enfranchisement rights, we consider that the benefits of this simple approach outweigh that risk.

6.367 Crucially, we think that removing the restriction will provide the opportunity to enfranchise to a number of leaseholders who should benefit from enfranchisement rights, but who currently do not do so. Take the building which we gave as an example in the Consultation Paper: one containing seven flats let on long leases, of which three are owned by the same person. This building is ineligible for collective enfranchisement, as there are only four qualifying tenants (and therefore the two-thirds requirement is not fulfilled). However, it may well be in the interests of the four qualifying tenants to carry out a collective freehold acquisition: indeed, the investor who owns the three other leasehold flats may also wish to participate. It may be asked why, from the point of view of the five owners in the building, it is desirable that they be prevented from acquiring the freehold jointly. In this case, the four owners of their individual flats would still have the largest say in the control of the building following the claim (assuming every owner participated).

6.368 One of the reasons given by consultees who were opposed to removing this restriction was that it prevents, or should prevent, investors from buying multiple flats in a building, and taking a disproportionate level of control in the building following a collective freehold acquisition claim. We are not persuaded by this argument, however. The example provided by Brockenhurst Parish Council demonstrates that this restriction can bite to prevent a leaseholder from joining a collective freehold acquisition claim, even where there is no real prospect of him or her taking disproportionate control. Even where one leaseholder would have a significant level of control following a collective freehold acquisition (say, if he or she held ten or fifteen of the fifty flats), it may still be better for the other leaseholders to gain some form of share (and therefore a voice) in the freehold ownership of their building, rather than for it to be retained by a third-party landlord. Indeed, we heard from many consultees, both ordinary leaseholders and freeholders (and private rented sector landlords), who expressed a desire to participate constructively in collective claims with such investors, in the interests, for example, of good building management.

6.369 As well as the fact that the exclusion is a barrier to the exercise of collective freehold acquisition rights, it is notable that, as one consultee raised, that there is no comparable restriction in the context of the right to manage.[211]

6.370 We are therefore of the view that this restriction should be removed, in the interests of facilitating collective freehold acquisitions. We think that, given the ease with which this requirement can be and has been avoided, this change will have little impact on freeholders; however, we consider that it may have a positive impact on leaseholders who may have been caught out by this exclusion, or whose buildings have been rendered ineligible for collective enfranchisement by the presence of a leaseholder who owns three or more flats.

Recommendation 41.

6.371 We recommend that the current prohibition on leaseholders of three or more flats in a building being qualifying tenants for the purposes of a collective enfranchisement claim should be abolished.

RESTRICTING COMMERCIAL INVESTOR RIGHTS

6.372 In the final section of this chapter, we consider whether the enfranchisement rights of commercial investors should be restricted, and, if so, how. In Chapter 2 of the Consultation Paper, we explained that the policy behind enfranchisement has historically been aimed at long residential leaseholders who occupy their properties as their homes. We argued that the 1967 and 1993 Act do a reasonable job of limiting the ability of business leaseholders to take advantage of enfranchisement rights.[212] However, we contended that the legislation is not particularly effective at restricting the enfranchisement rights of those who own or purchase residential property as investment property.[213]

6.373 We therefore suggested that there may be scope to go further with respect to these commercial investors, and to restrict their access to enfranchisement rights. The two methods we mentioned in the Consultation Paper were:

(1) the reintroduction of a residence test (where a person has a long lease of an entire self-contained building which is subdivided into units), possibly combined with a maximum number of units (in excess of which the leaseholder would have no enfranchisement rights in respect of the whole building); or

(2) an altered definition of “residential unit”, to exclude units which are let on short residential tenancies.

6.374 However, we acknowledged that there are issues with both options. In particular, we were concerned that both changes would constitute significant departures from the

---

211 Orme Associates Property Advisers; and see para 3.39 of the RTM CP.

212 We discuss business leases in detail at paras 6.48 to 6.68 above.

213 See CP, para 8.11.

current law which could affect owner-occupying leaseholders and, given the wide category of "commercial investors" (including, for example, pension funds and charitable trusts), could have a significant impact on the property market or on the wider economy.

6.375 In the light of those suggestions and concerns, we asked consultees first whether they considered it desirable to restrict the rights of commercial investors further than the current law, and, if so, second whether they thought one of our suggested approaches or another route would be most appropriate.[214]

Consultees' views

Views on whether to restrict the rights of commercial investors

6.376 Just over half of consultees thought it would be desirable to restrict the rights of commercial investors. Many agreed with our view from the Consultation Paper that enfranchisement rights were "designed to protect homeowners not commercial investors" (as CMS Cameron McKenna Nabarro Olswang LLP wrote): something described as "right and proper" by one consultee.[215] Some consultees pointed to the difference between owner-occupier leaseholders who, as we set out in the Consultation Paper, may have no choice over whether to acquire a leasehold interest, and commercial investors, who can be expected to take professional advice and make commercially informed decisions. In the latter case, some consultees contended that there is no need for the protections offered by enfranchisement rights, although other consultees suggested that commercial investors should have lease extension (but no freehold acquisition) rights.

6.377 The PBA, among others, argued that "one class of commercial investors (i.e. those that invest in long leases of flats) should not be given an unfair advantage over another class of commercial investors (i.e. ground rent investors)". This point was emphasised by specific types of consultee, such as charity landlords. The John Lyon's Charity, for example, wrote that:

> the nature of the Charity's portfolio means that any diminution in enfranchisement receipts will be a direct windfall for investors against a corresponding loss for the Charity's beneficiaries.

6.378 Some consultees, although expressing support for the idea of limiting the rights of commercial investors in principle, acknowledged the associated difficulties. For instance, Damian Greenish stated that it "is very difficult to achieve that without removing rights from some leaseholders who presently have them".

6.379 Furthermore, a significant minority of consultees did not consider it desirable to limit the rights of commercial investors further than the current law. Several consultees referred to the fact that any attempt to do so could have unintended consequences. Cluttons (surveyors), for example, wrote that:

---

214 See CP, Consultation Question 58, paras 8.192 and 8.193, with the associated explanation at paras 8.185 to 8.191.

215 Geraint Evans.

> this removes rights from those who presently have them and may have the unintended consequence of limiting the receipts of existing leaseholders (who cannot themselves afford to extend) when they sell, because the demand for such interests will exclude demand from investors.

6.380 Others made the point we highlighted in the Consultation Paper: that commercial investors come in all shapes and sizes. Graham Webb for instance, wrote that:

> someone choosing to purchase and live in a leasehold house/flat may be doing it in order to make a capital gain from a commercial prospective. Other people may find themselves with an empty flat/house because of personal circumstances, and rent it out so as to help cover the property's running/finance costs.

Another consultee, James Masterman, also made a similar point.

> Not all non-owner-occupiers are "commercial investors". UK nationals working and living abroad for example, often wish to maintain a property in the UK to return to. Such individuals letting whilst absent abroad, should not be excluded from the new enfranchisement rights.

6.381 The other key points made by consultees included that attempting to restrict commercial investors' rights would create complexity. The National Leasehold Campaign contended that "we need to keep adhering to the principle that we keep this simple where possible". Similarly, the PLA wrote that the options we set out in the Consultation Paper were "likely to lead to an increase in litigation and disputes, whilst running contrary to the direction that amendments to the legislation have taken over the last 20 or so years". Boodle Hatfield LLP made a similar point, writing that "the two possible options also considerably complicate enfranchisement". Some consultees argued that complexity would bring the possibility of avoidance. The Wellcome Trust, for example, wrote that restricting rights in this way would be "too difficult", and that "there will always be workaround[s] that investors can utilise as per the existing regime".

6.382 Finally, a number of other consultees argued that there are, in fact, situations where commercial investors having enfranchisement rights can be invaluable for leaseholders attempting a collective enfranchisement. For example, the 1 West India Quay Residents' Association contended that restricting commercial investors from:

> helping owner-occupier leaseholders from buying out the freehold landlord will make the collective freehold acquisition regime completely pointless.

Views on how to restrict the rights of commercial investors

6.383 The most popular option for how to restrict the rights of commercial investors was the first of the approaches we suggested in the Consultation Paper: the reintroduction of a residence test. Many consultees were of the view that the abolition of the residence test had been a "mistake as it allows investors to exercise rights".[216] Some consultees proposed how the test might look in practice. For example, Morgoed Estates Ltd (a landlord) suggested asking whether the leaseholder has been "in occupation for 50%

[216] Professor James Driscoll.

or more for his period of ownership, with a minimum of two years' ownership". However, other consultees cautioned that further thought would have to be given to the implications of reintroducing a residence test. For example, the PBA wrote that:

> Before the reintroduction of the residence test is considered it would be important to consider in detail the available evidence about why the residence test was brought in in the originally, why it was abolished and what the impact of that has been.

6.384 Many consultees also expressed support for the second of the options we laid out in the Consultation Paper, which was an altered or reduced definition of a residential unit. Church & Co Chartered Accountants argued that "all leases that are sublet should be excluded from the rights to enfranchise". Several other consultees agreed that this was a reasonable approach. However, some consultees referred to the complexity which may be caused by introducing such a condition. Furthermore, issues of avoidance (for instance, through other forms of occupational agreements, such as licences) were raised. One consultee, for example, wrote that:

> the commercial long leaseholder who had previously let on short residential tenancies could presumably avoid this restriction by simply terminating the short tenancy shortly before the claim for enfranchisement.[217]

6.385 Several consultees suggested other approaches to excluding commercial investors from enfranchisement rights. For example, two law firms suggested in identical terms that a long leaseholder should not be able to enfranchise when a third party:

> has the power to exercise a controlling influence over the management or policies of a tenant whether through ownership of securities, by contract, or otherwise so that it can direct the tenant to exercise the right to enfranchise; and that third party either granted the lease to the tenant or the tenant's predecessor in title or has similar powers in relation to 25% or more of the qualifying tenants of the building.[218]

6.386 Other options put forward included defining a commercial investor by reference to the number of properties he or she owns (for example, more than two), or introducing a form of presumption that leases held by companies are commercial leases, unless proved otherwise.

Discussion

6.387 In theory, it may be desirable to restrict the enfranchisement rights of commercial investors. A key reason for doing so might be because they tend to be better advised and informed than ordinary leaseholders in terms of the nature of the leasehold assets which they are purchasing, and the risks involved. There is arguably less of an imperative to assist these more sophisticated purchasers with the difficulties of leasehold, by enabling them to enfranchise: a right primarily aimed at helping *homeowners* obtain security of tenure in (and control of) their homes.

6.388 However, in practice we do not think that implementing such a distinction – in respect of which leaseholders have rights and which do not – is workable or desirable. It

---

217 The PBA.

218 Bryan Cave Leighton Paisner LLP and Shoosmiths LLP.

would be difficult to distinguish accurately between commercial investors who should not benefit from enfranchisement rights, and those who should, and attempting to restrict the former may well disenfranchise the latter. Consultees raised problems with both of the options we suggested in the Consultation Paper, from the avoidance mechanisms which might arise through a reduced definition of a residential unit, to the difficulties a reintroduced residence test may cause for various types of leaseholders (for example, those required to hold their lease through a company).

6.389 Moreover, we agree with consultees that introducing a restriction would add a layer of complexity to our scheme of qualification criteria which is not desirable because of the opportunity for disputes it creates. Additionally, as consultees alluded to, excluding commercial investors from enfranchisement rights may also have a negative impact on ordinary leaseholders in terms of qualifying for a collective freehold acquisition, particularly in areas where buildings have a high proportion of flats owned by buy-to-let landlords.

6.390 We therefore think that it is too blunt an instrument simply to exclude commercial investors altogether.

6.391 However, as we discussed in Chapter 15 of the Consultation Paper, and as we concluded in the Valuation Report, there is potential for a distinction between owner-occupier and other categories of leaseholder to be made in respect of the premium payable for the exercise of enfranchisement rights. In the Valuation Report, we explained the mechanisms which could be employed in order to implement such a distinction, depending on where Government wishes to draw the line.[219]

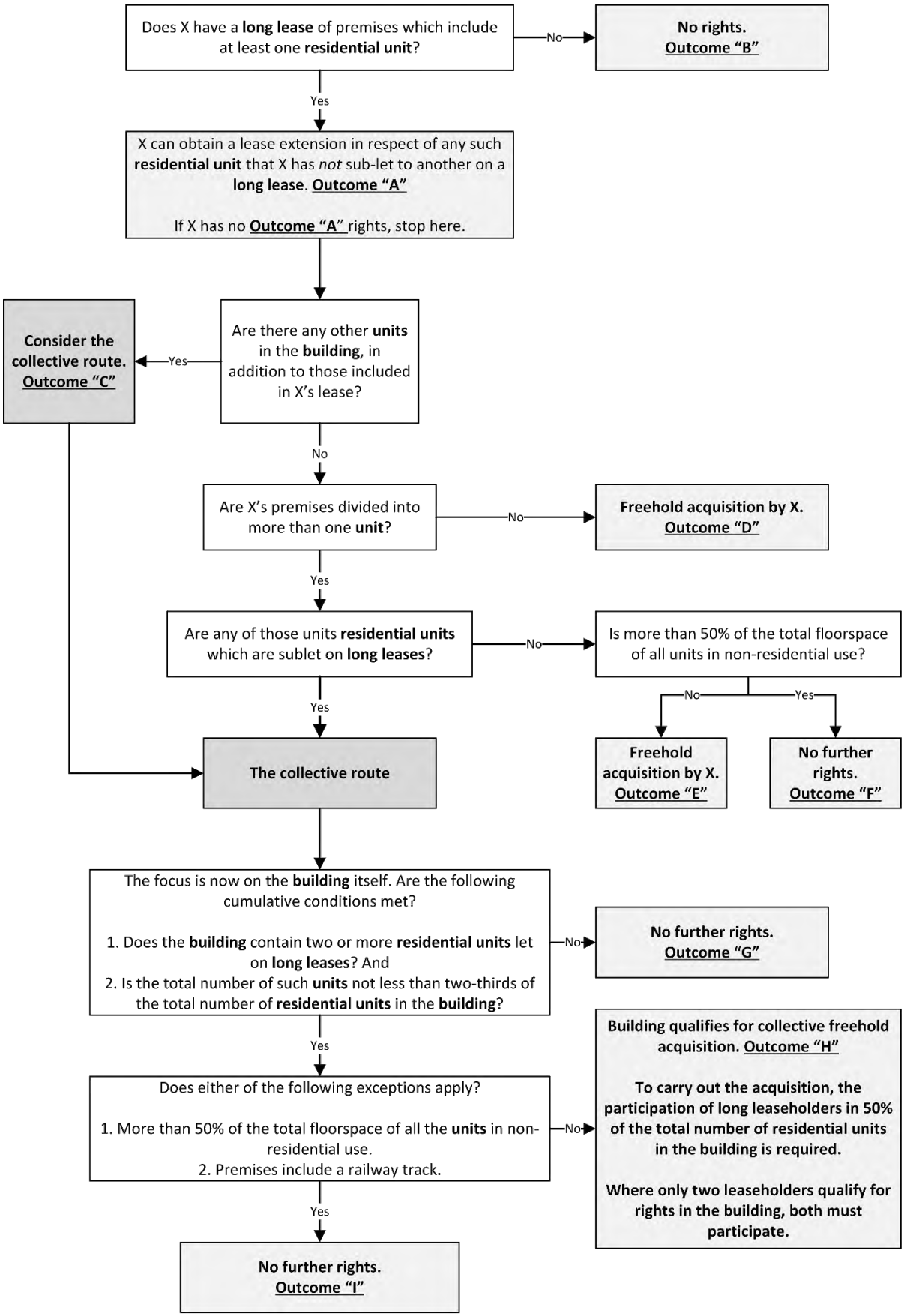
CONCLUSION

6.392 In this chapter, we have set out our recommended scheme of criteria which must be met for a leaseholder to qualify for one or more of the range of enfranchisement rights. At the heart of our recommendations is a desire to simplify the current regime by moving towards a unified and coherent scheme, making enfranchisement quicker, easier and more cost-effective, while improving leaseholders' access to enfranchisement rights where possible. In the next chapter, we turn to the related topic of exemptions from and qualifications to this scheme of qualifying criteria.

6.393 Taking into account the recommendations we have made throughout this chapter, we have updated the flowchart included at figure 5 above. Our recommended scheme of qualifying criteria can now be visualised as in figure 6 below.

[219] See Sub-option (4), at para 6.180 onwards of the Valuation Report.

Figure 6: Flowchart of the scheme of qualifying criteria recommended in this Report



Chapter 7: Qualifying criteria: exceptions to the usual rules

INTRODUCTION

7.1 The current law of enfranchisement provides for a number of situations in which particular leaseholders who would otherwise qualify for enfranchisement rights in fact have more limited rights, or, in some cases, none at all. This may be because of the identity of their landlord, or the nature of the property on which their home is situated. This chapter discusses these exceptions to the usual qualifying criteria for enfranchisement rights.

7.2 We begin by considering the operation of enfranchisement rights in relation to shared ownership leases. Our Terms of Reference refer explicitly to shared ownership leases. We have been asked by Government:

> To ensure that shared ownership leaseholders have the right to extend the lease of their house or flat, but not the right to acquire the freehold of their house or participate in a collective enfranchisement of their block of flats prior to having "staircased" their lease to 100%.

We therefore make a number of recommendations to assist with the implementation of this policy decision by Government.

7.3 We then consider a number of further exemptions from enfranchisement claims, including those for the National Trust and the Crown. Leaseholders whose landlords have the benefit of an exemption from the ordinary operation of enfranchisement rights typically feel aggrieved that they are unable to extend their leases or purchase their freehold in the same way as other leaseholders. The lack of lease extension rights in particular leaves leaseholders with a wasting asset that will, at some point, become unsaleable and unmortgageable. This difficulty is recognised in our Terms of Reference, which require us to improve access to enfranchisement rights. We therefore make a number of recommendations designed to increase the availability of enfranchisement rights to leaseholders affected by these exemptions. In a small number of cases, where the context raises policy questions beyond the scope of our project, or where we do not have sufficient information to make a recommendation, we refer the issue to Government for further consideration following publication of this Report.

7.4 Finally, despite our Terms of Reference, we recommend the creation of one new exemption from enfranchisement claims: an exemption from freehold acquisition claims for community-led housing developments.

7.5 The issues discussed in this chapter were set out in Chapter 9 of the Consultation Paper, where we asked a number of consultation questions inviting consultees to share their views about the future of the existing exemptions from enfranchisement claims. These consultation questions tended to attract a smaller number of responses

than those posed in other chapters of the Consultation Paper, which deal with issues of general application. This is not surprising, given that the exemptions from enfranchisement claims are encountered by only a small percentage of those who engage with the enfranchisement regime overall. But this does not, of course, diminish the importance of the arguments made by consultees in respect of these issues or the recommendations we have made in response.

SHARED OWNERSHIP LEASES

Introduction

7.6 "Shared ownership" is a concept designed to make home ownership more affordable for those on low or middle incomes. Today, shared ownership properties make up an important portion of the residential property market, having proved particularly popular with first-time buyers.[1] However, it is clear to us from the consultation responses we have received, as well as from other anecdotal evidence we have heard, that members of the public do not always understand exactly how shared ownership schemes operate. Before we discuss the application of the enfranchisement regime to shared ownership leases, we think it is helpful to set out the precise legal arrangement which the purchaser of a shared ownership property is entering into.

How does shared ownership really work?

Shared ownership is often described as "part-buy, part-rent". It is marketed as enabling a purchaser to buy a "share" of a house or flat (usually between 25% and 75%), while paying rent on the remainder of the property. Because the purchaser only needs to secure a mortgage for the share of the property he or she is purchasing, the deposit required will be much lower than that which would be required to purchase the same property in full. Over time, the purchaser can buy additional shares in the property – a process known as "staircasing". Each time a purchaser buys an additional share, the rent payable on the remainder of the property will decrease accordingly. In most cases, it is possible to staircase to 100%.[2]

However, this is not an accurate description of how shared ownership actually works. In fact, the very term "shared ownership" is something of a misnomer.[3]

---

1 See the recent House of Commons Library briefing paper: H Cromarty, *Shared ownership (England): the fourth tenure?* (House of Commons Library Briefing Paper No 08828, February 2020) pp 7 to 9, at https://researchbriefings.files.parliament.uk/documents/CBP-8828/CBP-8828.pdf. While there is no information presented on the percentage of shared ownership leaseholders who are first-time buyers, the product is marketed at such buyers and the data reproduced in this paper about the previous tenures occupied by such buyers indicate the prevalence of first-time buyers.

2 In some cases, there is a cap on the percentage share which a shared ownership leaseholder is entitled to acquire through staircasing, in order to ensure that the property remains a shared ownership property (and, thus, a form of affordable housing) forever. For example, this may be desirable in the case of homes in rural areas, where the provision of new housing can be challenging, or in the case of properties aimed at the retirement sector: see further discussion of this issue at paras 7.72 to 7.73 below.

3 See, for example, S Bright, N Hopkins and N Macklam, "Owning part but losing all: using Human Rights to protect home ownership", N Hopkins (ed) *Modern Studies in Property Law: Volume 7* (2013) pp 15 to 38.

(1) First, it is not actually the case that the provider of the shared ownership property and the purchaser "share" ownership of the property. There is no jointly-owned asset. Instead, what happens is that the provider of the property grants the purchaser a long lease of the property (whether the property is a house or a flat).

In most respects, a shared ownership lease is just like any other lease: the provider of the shared ownership property will be the landlord, and the purchaser will become the leaseholder. The provider is always above the purchaser in the chain of property interests – they hold either the freehold interest or a superior leasehold interest in the property. Thereafter, the lease will operate on a day-to-day basis like any other lease, with the shared ownership leaseholder having the same obligations (including the obligation to pay service charges) as any other leaseholder.

The key difference between an ordinary lease and a shared ownership lease is simply that the shared ownership lease will contain various provisions reflecting the fact that the price paid on the grant or purchase of the lease represented only a percentage of the full market value of the property. In particular:

> (a) the lease will provide for the leaseholder to pay rent in respect of the "unacquired share" of the property,[4] together with staircasing provisions enabling them to increase the "acquired share" over time, if they wish;
>
> (b) there is likely to be provision for regular review of the rent payable on the "unacquired share", and restrictions which apply on sale of the lease, such as provision of a right of first refusal for a housing association provider; and
>
> (c) the lease will normally also provide for what should happen in the event that the leaseholder does "staircase" to 100%. In the case of a house, the freehold interest in the property should be transferred to the leaseholder, either automatically or upon notice being served by the leaseholder. In the case of a flat, however, the leaseholder will remain a leaseholder – albeit an ordinary leaseholder to whom the specific shared ownership provisions of the lease set out above no longer apply. This is because, at present, flats in England and Wales are almost universally owned on a leasehold basis.

(2) Second, and more importantly, it can be said that shared ownership leases do not really confer "ownership" either, in the sense that the ordinary member of the public would understand that term. The purchaser does own the lease, of course. But as a matter of law, a shared ownership lease is generally an assured shorthold tenancy (albeit one with a very long fixed term).[5] This means that the leaseholder has much more limited security of

---

4 The rent payable on the "unacquired share" of a shared ownership property will often be subject to controls intended to ensure the rent remains affordable. Shared ownership developments which are built using public funding, for example, will have an initial annual rent which does not exceed 3% of the value of the unacquired share and annual rises limited to RPI + 0.5%.

5 Most long leases are not assured tenancies, because they are at a low rent: Housing Act 1988, s 1(1)(c) and (2), and sch 1, Pt 1, paras 3 to 3C. However, almost all shared ownership leases will exceed the rental limits stated in schedule 1, because of the rent payable on the "unacquired share". See *Richardson v Midland Heart* [2008] L & TR 31.

tenure than a leaseholder under an ordinary lease. Specifically, the landlord will be able to terminate the lease in reliance on the grounds for possession under schedule 2 of the Housing Act 1988, should any of those apply. A particular risk is presented by "Ground 8", which provides that a court must make a possession order where two months' rent is unpaid.[6] In this scenario, the shared ownership leaseholder is at risk of losing his or her lease and the entire purchase price paid for it.[7]

This kind of outcome would not generally be faced by an ordinary leaseholder who fails to pay his or her rent or service charges,[8] and is inconsistent with the ordinary person's understanding of home ownership. Essentially, it is apparent that the "share" which a shared ownership leaseholder acquires when he or she buys the property does not actually give the leaseholder any real equity in the property. All that he or she acquires, in reality, is a tenancy, plus the right to the relevant percentage of the equity in the event the property is sold – a right which will not survive a possession order being made. To put it another way, a shared ownership leaseholder has paid a premium, in effect, for the right to staircase to 100% in accordance with the terms of the lease, at which point he or she will own the property in the same way as any other freeholder (in the case of a house) or leaseholder (in the case of a flat).

Bearing these points in mind, it will be obvious that the language of "buying shares" in a shared ownership property, and the idea of being (say) a 25% "owner", does not necessarily reflect the reality. It would be better to recognise the shared ownership lease for what it is: a device which effectively enables aspiring homeowners to purchase a property in portions over time, if they would be unable to raise the usual purchase price in one go. The rent payable on the "unacquired share" can be viewed as the cost of accessing this "payment plan"

However, that view ignores the current reality that, in fact, the vast majority of shared ownership leaseholders will never staircase to 100%. For these leaseholders, shared ownership still provides greater security of tenure for them and their families than the private rental sector – provided they continue to pay the rent required by the lease.[9] We also recognise that the language of "acquired/unacquired shares" and percentage

---

6 At the date of service of the "Section 8 notice" relating to the proceedings for possession, and at the date of the hearing: Housing Act 1988, sch 2, Pt 1, Ground 8.

7 This was the result in *Richardson v Midland Heart Ltd* [2008] L & TR 31. It should be noted, however, that Government has committed to changing the law so that long leaseholders will not be classed as assured tenants simply because (as explained in n 5 above) they pay a high ground rent: see Department for Communities and Local Government, *Tackling Unfair Practices consultation – Summary of consultation responses and Government response* (December 2017) p 21, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/670204/Tackling_Unfair_Practices_-_gov_response.pdf. We assume that Government's work in this area will also extend to shared ownership leaseholders paying rent on the unacquired share which exceeds the limits in sch 1 to the Housing Act 1988.

8 Although forfeiture of a long lease can be a draconian remedy, a leaseholder is entitled to seek relief from forfeiture, and this jurisdiction is usually exercised generously. See Megarry and Wade, *The Law of Real Property* (9th ed 2019) Ch 17.

9 This is because a "section 21 notice" to end an assured shorthold tenancy can only take effect after the fixed term of the tenancy has ended: see Housing Act 1988, s 21. In the case of a shared ownership lease, the fixed term will likely be 99 years or more.

ownership, while inaccurate, does operate as a useful shorthand for describing the relative positions of a shared ownership leaseholder and his or her landlord. Having acknowledged its shortcomings, we therefore make use of this terminology in this Report.

Shared ownership leases and enfranchisement

7.7 As we have set out above, the shared ownership product is delivered by means of a long lease – regardless of whether the property being purchased is a house or a flat. A shared ownership lease has the same fundamental limitations as any other lease. Its value tends to reduce over time as the remaining term of the lease reduces, and the leaseholder's control over his or her home is limited by the terms of the lease. Given that many shared ownership leaseholders will never staircase all the way to freehold ownership or ordinary leasehold ownership, the question of whether enfranchisement rights – which offer a means to alleviate these limitations – are available to shared ownership leaseholders is an important one.

7.8 We set out the current law on this question in detail in the Consultation Paper. In summary, shared ownership leases of houses which meet various statutory criteria are excluded from enfranchisement rights under the 1967 Act.[10] There is some uncertainty (stemming from conflicting court and Tribunal decisions[11]) as to whether shared ownership leases of flats meet the definition of a "long lease" – and therefore qualify for enfranchisement rights – under the 1993 Act.[12] However, we understand that many providers of shared ownership leases do offer lease extensions to their shared ownership leaseholders, and we have heard anecdotal evidence of collective enfranchisement or right to manage claims proceeding on the assumption that shared ownership leaseholders are qualifying tenants under the Act.

7.9 The enfranchisement reform project offers an opportunity to streamline and clarify the law in this area. To this end, Government has decided that, going forward, all shared ownership leaseholders should be able to extend their leases. This will ensure that these leaseholders have security in their homes, and that they are able to sell or mortgage their leases as required. However, Government has also decided that shared ownership leaseholders should not be able to carry out an individual freehold acquisition claim, nor participate in a collective freehold acquisition claim prior to having staircased to 100% ownership. This is because the shared ownership lease is specifically designed to enable those who cannot afford to purchase a property outright to do so in stages, via the staircasing provisions which form part of almost all shared ownership leases. It would not be right if leaseholders were able to circumvent

---

10 See CP, paras 9.10 to 9.23.

11 The First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

12 See CP, paras 9.24 to 9.29 for discussion of the confusion as to whether shared ownership leases of flats qualify for enfranchisement rights.

these provisions by relying on statutory enfranchisement rights to acquire the freehold of their house or building.[13]

7.10 This policy decision from Government is reflected in our Terms of Reference for our project. We have been asked:

> To ensure that shared ownership leaseholders have the right to extend the lease of their house or flat, but not the right to acquire the freehold of their house or participate in a collective enfranchisement of their block of flats prior to having "staircased" their lease to 100%.

7.11 We therefore asked three questions in the Consultation Paper about how Government's policy might best be implemented.

Lease extension rights for shared ownership leaseholders

7.12 As we explain above, Government has decided that all shared ownership leaseholders should be able to extend their leases.

7.13 In the Consultation Paper, we proposed that these leaseholders should be entitled to a lease extension which is of the same length as that available to any other leaseholder, that the leaseholder's share of the property must remain the same after the extension, and that the terms of the extended lease must replicate any terms of the existing lease which relate to its shared ownership nature.[14] We asked whether consultees agreed with this proposal.[15] We also asked for consultees' views on:

(1) how shared ownership lease extension premiums should be calculated;

(2) whether there are any other issues of valuation or procedure which arise where the provider of the shared ownership lease is themselves a lessee; and

(3) any other issues arising in relation to lease extension claims by shared ownership leaseholders.[16]

Our provisional proposal

Consultees' views

7.14 The vast majority of consultees who responded to the first part of this consultation question indicated that they agreed with our provisional proposal. These consultees included professional representative bodies and leaseholder representative bodies, a number of freeholders, numerous firms of professionals, several members of our advisory group, and a significant number of self-identified leaseholders.

---

13 It should be noted that, under the recommendations made in the RTM Report, shared ownership leaseholders will, however, be able to participate in a right to manage claim to take over the management of their building: see paras 4.8 to 4.21 of that Report.

14 See CP, para 9.35.

15 See CP, Consultation Question 61, para 9.37.

16 See CP, Consultation Question 61, para 9.38.

7.15 From the comments received from consultees, it is clear that many of those who agreed with this proposal believed that this question was asking whether shared ownership leaseholders should have the right to a lease extension at all, rather than how such an extension should take effect. These consultees tended to simply express their support for lease extension rights to be available to shared ownership leaseholders. However, a number of consultees did engage with the specific issues set out in the question.

(1) Suggestions for the duration of the extended lease ranged from 90 to 999 years.[17] Notably, though, no consultee stated expressly that shared ownership leaseholders should be entitled to a lease extension of a different length from that available to all other leaseholders.

(2) Most consultees were in favour of the terms of the lease which relate to its shared ownership nature being carried forward to the extended lease, and in favour of the leaseholder's "share" in the property remaining unchanged.

7.16 Very few consultees disagreed with our proposal. Again, comments revealed that some consultees had read the question as relating to the principle of giving lease extension rights to shared ownership leaseholders rather than to the terms on which such extensions should take place. A small number of professional consultees suggested that the right to a lease extension should only be available after leaseholders have staircased up to 100%, contrary to Government's stated policy position. Some consultees cited the valuation complications that would arise from permitting shared ownership leaseholders to extend their leases as a reason to stay clear of such a right. But no consultee gave any substantive reason why the proposal which we made as to the operation of lease extension rights for shared ownership leaseholders should not be adopted.

Discussion and recommendations for reform

7.17 We can see no reason to differentiate between ordinary and shared ownership leaseholders when it comes to the length of a lease extension. Further, it is necessary to preserve the particular character of a shared ownership lease when it is extended, so as to ensure that the original bargain struck between landlord and leaseholder is honoured. This requires the leaseholder's share in the property to remain the same following the lease extension, as well as the carrying over of all terms relating to the shared ownership arrangement – such as staircasing provisions, and the requirement to pay rent on any unacquired share".

7.18 We therefore recommend that our provisional proposal should be taken forward. Shared ownership leaseholders should be entitled to a lease extension which is the same length as that available to ordinary leaseholders. The share in the property held by the leaseholder should remain unchanged, and the terms of the lease which make the lease a shared ownership lease should be carried forward into the new extended lease.

---

[17] An even broader range of lease extension lengths was suggested in relation to the general question about lease extension length in Ch 4 of the CP (see paras 3.41 to 3.47 above). However, suggestions between 90 and 999 years were most common.

Recommendation 42.

7.19 We recommend that:

(1) shared ownership leaseholders should be entitled to a lease extension which is of the same length as that available to all other leaseholders;

(2) the "share" in the property held by the leaseholder should remain unchanged after the lease extension; and

(3) the terms of the lease extension should replicate any terms of the existing lease which relate to its shared ownership nature.

The valuation basis for shared ownership lease extensions

Consultees' views

7.20 A number of consultees considered that the premium payable by shared ownership leaseholders who extend their lease should be calculated in the same way as for all other leaseholders.

7.21 A majority of consultees, however, felt that the premium payable should correspond to the share in the property which the leaseholder holds at the time of the claim. So, for example, a leaseholder owning a 50% share would pay half of the premium which would be payable if the same claim were made by an ordinary leaseholder. Some of these consultees, including Irwin Mitchell LLP (solicitors) and the Law Society, suggested that this approach was justified by the higher staircasing premiums which the landlord would likely receive from the leaseholder thereafter, given the increase in the value of the lease attributable to the lease extension. As Richard Stacey put it:

> When a lessee comes to staircase (purchase further equity) they pay for the additional share based on the higher (extended lease) value. Furthermore, the cost of extending the lease is not seen as an eligible improvement but considered lease maintenance. For the above reasons it seems fairer for the lessee to pay for the lease extension in line with the percentage they own.

7.22 Other consultees made comments demonstrating a misunderstanding of the shared ownership product. These consultees appeared to believe that a shared ownership lease is owned jointly by the shared ownership provider and the purchaser, such that the premium for a lease extension ought to be divided between them according to their respective shares.

7.23 We understand from consultees' comments and from other anecdotal evidence that current practice, where lease extensions are granted to shared ownership leaseholders, is split between charging the leaseholder the normal premium, and charging them the usual premium in proportion to their share.

Discussion and recommendations for reform

7.24 We have set out various options for calculating reduced enfranchisement premiums in the Valuation Report. In summary, we concluded that the valuation schemes based on a simple formula which we discussed in the Consultation Paper (Options 1A and 1B in that Paper) should not be pursued. If applied to all cases, these schemes would present difficulties and would not be compliant with Article 1 of the First Protocol to the European Convention on Human Rights.[18] Instead, we put forward three alternative schemes based on current valuation methodology which could reduce premiums in all or some cases.[19] All three of these schemes produce an enfranchisement premium which includes amounts to reflect the value to the landlord of "the term" (the landlord's right to receive ground rent for the remainder of the lease) and "the reversion" (the landlord's right to have the property back at the end of the lease). The main difference between the three schemes is whether or not the premium produced also incorporates other amounts, known as marriage value and hope value.[20]

7.25 It is now for Government to decide how enfranchisement premiums should be calculated under a new enfranchisement regime. It is therefore impossible for us to say with certainty whether the valuation methodology under the new enfranchisement regime will require any adaptations in order to be applied to lease extension claims by shared ownership leaseholders.

7.26 For the purposes of this section of this Report, however, we will proceed on the basis that Government will choose to legislate for a valuation methodology which includes, at the very least, the elements of term and reversion, as those are the common elements of the three schemes that we have presented to Government.

7.27 We can understand why a majority of consultees suggested that a shared ownership leaseholder should pay only a proportion of the premium that would normally be payable on a lease extension, in accordance with the share of the property which he or she holds. As well as being simple, it feels instinctively right that a leaseholder who "owns" less of his or her property should pay less to extend his or her lease.

7.28 On the other hand, however, a shared ownership leaseholder is not, for the most part, all that different from every other leaseholder. As explained above, the terms of a shared ownership lease do differ from an ordinary lease in certain key respects, reflecting the fact that the leaseholder has paid a lower premium for the lease and must compensate for that through regular rental payments. We have also noted that a shared ownership leaseholder enjoys more limited security of tenure than a leaseholder under an ordinary lease. But otherwise, a shared ownership leaseholder is able to enjoy his or her property in the same way as any other leaseholder, and will benefit, like any other leaseholder, from the extension of the term and the enhanced marketability of the lease which a lease extension provides. Indeed, shared ownership

---

18 See the Valuation Report, paras 5.10 to 5.42. We explain the relevance of Article 1 of Protocol 1 to the European Convention on Human Rights to enfranchisement premiums at paras 1.41 to 1.55 of that Report.

19 These schemes appear somewhat similar to Options 2A, 2B and 2C presented in the CP, although their underlying rationale is different. See the Valuation Report, paras 5.5 to 5.9 and paras 5.77 to 5.93.

20 See the Valuation Report, paras 2.40 to 2.55.

leaseholders are subject to the same repairing obligations and service charge liabilities as other leaseholders.

7.29 Against these competing considerations, simply requiring the leaseholder to pay a proportion of the normal lease extension premium, in line with the share which they hold in the property, seems a crude solution. Instead, we think it is preferable to consider whether there is any principled justification for reducing either element of the usual premium under a term and reversion methodology.

7.30 The "term" element of a lease extension premium consists of the cost to the leaseholder of "capitalising" (that is, buying out) the rent payable under the lease. On the face of it, this would appear likely to represent a very significant cost to a shared ownership leaseholder, given the monthly rent which must be paid on the unacquired share of the property. However, we have recommended in the previous section that a leaseholder's share of the property should remain constant when his or her lease is extended, and that the requirement to pay rent on the unacquired share should remain as an obligation in the new extended lease. It follows that this rent is not, therefore, to be bought out on a lease extension in the usual way, and, accordingly, should not play any part in the calculation of the lease extension premium. If ground rent is payable in addition to the rent payable on the unacquired share,[21] though, we consider that a shared ownership leaseholder should be required to buy out this sum just like any other leaseholder. There is no reason why a shared ownership leaseholder should receive any discount on this element of the lease extension premium, given that they would have to pay the ground rent in full if they did not extend the lease.[22]

7.31 The "reversion" element of a lease extension premium seeks to compensate the landlord for the fact that his or her right to regain possession of the property at the end of the lease is to be substantially delayed by the lease extension. At first glance, a lease extension of a shared ownership lease would appear to have the same effect on the landlord as a regular lease extension: under our recommendation regarding the length of a lease obtained on enfranchisement, the landlord will be kept out of the property for a further 990 years beyond the end of the existing lease term.[23] The leaseholder's percentage share in the property should be immaterial when compensating the landlord for the deferment of his or her right to possession. However, the amount which a leaseholder usually pays to his or her landlord as the

---

21 The model shared ownership leases published by Homes England would suggest that shared ownership leaseholders do not generally pay a ground rent until they have staircased to 100%, at which point the rent on the unacquired share is replaced by a minimal ground rent (such as a peppercorn). However, we have heard from a number of shared ownership providers who have told us that ground rents of up to several hundred pounds per annum are routinely included in their shared ownership leases. Our leaseholder survey also revealed that, of 19 shared ownership leaseholders who submitted responses, 15 had some sort of ground rent obligation.

22 A shared ownership leaseholder with an "onerous" ground rent would, however, be able to take advantage of our suggested cap on the level of ground rent which is to be taken into account in this calculation, if this valuation option is adopted by Government: see paras 6.119 to 6.154 of the Valuation Report. Alternatively, if no such cap is introduced, but our recommendation at para 3.112(1) above is adopted, he or she would be able to extend the term of the lease without buying out the ground rent, in the same way as any other leaseholder. We explain what is meant by an "onerous" ground rent at para 3.93 above.

23 See Recommendation 2, at para 3.62 above, and Recommendation 42, at para 7.19 above.

reversion element of the premium is calculated to reflect the fact that the landlord will be kept out of the property for longer, with *no income* during that time in lieu of his right to possession. In other words, the leaseholder effectively has to pay the landlord the full cost to the landlord of the deferment of the landlord's right to possession. In the case of a shared ownership lease, though, our recommendation above that the leaseholder should continue to pay rent on the unacquired share of the property after the lease has been extended means that the landlord will be receiving rental income in respect of the unacquired share during the period of deferment of his or her right to possession – that is, beyond the end date of the original lease and right up to the expiry of the 990-year extension.

7.32 We think that, in the light of this rental income, the compensation payable to the landlord for the deferment of his or her right to possession can be reduced somewhat. We suggest that the leaseholder should pay only a proportion of the reversion element of the ordinary lease extension premium, corresponding to the share which he or she holds in the property. For the duration of the extended lease, the leaseholder must pay a monthly rent on the unacquired share, and the landlord therefore effectively *retains the value of the reversionary interest* in that unacquired share. The leaseholder should only have to pay for that part of the value of the reversionary interest which the landlord has lost as a result of the lease extension claim (which corresponds, as a proportion of the normal cost of the reversion, with the leaseholder's share of the property at the time of the claim).

7.33 In summary, therefore, we recommend that the premium payable on the extension of a shared ownership lease should consist of:

(1) the usual cost of buying out any ground rent payable under the lease (but not any rent payable in respect of the unacquired share of the property); and

(2) a proportion of the usual cost of deferring the landlord's reversionary interest in the property, corresponding to the share which the leaseholder holds in the property.

7.34 We set out in the text box below an example demonstrating how this recommendation would work in practice, and in particular how the premium payable by a shared ownership leaseholder for a lease extension would compare to the premium payable by an ordinary leaseholder with an otherwise identical lease.

Figure 7: Comparison between calculation of a lease extension premium for an ordinary leaseholder and a shared ownership leaseholder

Ordinary lease extension claim

A lease has 100 years unexpired and is subject to a ground rent of £50 per annum.

Following a 990-year lease extension, the lease will have a term of 1090 years and a peppercorn ground rent.

The premium for that lease extension could be calculated as follows:[24]

– £800 for the term (namely the value of the landlord's right to receive £50 per annum for the remaining 100 years of the original lease, since that entitlement will be removed), plus

– £2,000 for the reversion (namely the value of the landlord's right to possession of the property in 100 years, which will be delayed by 990 years).

Total: £2,800.

Shared ownership lease extension claim

A shared ownership lease has 100 years unexpired and is subject to a ground rent of £50 per annum. The leaseholder currently has a 25% share in the property, and therefore also pays a monthly rent on the 75% unacquired share.

Following a 990-year lease extension, the lease will have a term of 1090 years and a peppercorn ground rent. The leaseholder will still have a 25% share in the property, and the leaseholder will still pay a monthly rent on the 75% unacquired share. That obligation to pay a monthly rent on the 75% unacquired share will continue for the full duration of the 1090-year lease (unless the leaseholder increases his or her share in the property, in which case the monthly rent will be reduced accordingly, or staircases all the way to 100% ownership, in which case it will be eliminated entirely).

Adopting the same basis for calculating lease extension premiums as above, the premium payable for that lease extension would be calculated as follows:

– £800 for the term (the same as in the case of an ordinary lease extension claim, since the landlord's right to receive £50 per annum for the remaining 100 years of the original lease will be removed, just as in the ordinary case, and the additional monthly rent which a shared ownership leaseholder must pay in respect of his or her unacquired share will remain), plus

– £500 for the reversion (namely 25% of the amount which the ordinary leaseholder would pay for the reversion. As we have explained above, the landlord will continue to receive a monthly rent in respect of the 75% unacquired share during the 990 years for which his or her right to possession of the property has been delayed. The landlord does not therefore lose the value of his or her reversionary interest in the 75% unacquired share, so the leaseholder should not pay for it).

Total: £1,300.

[24] The calculations are indicative, and are based on the rates that we adopted in the worked examples in the Valuation Report, but rounded for simplicity.

7.35 It can be seen from this example that a shared ownership leaseholder with a 25% share in the property would, on our recommendation, pay a substantially lower premium than an ordinary leaseholder with an otherwise identical lease. The premium would not, however, be as low as 25% of the ordinary premium. That is because, as explained above, it is only the reversion element of the premium in respect of which it is possible to justify a reduction on the basis that the lease is a shared ownership lease.

7.36 We think that this approach represents a logical and principled answer to the difficult question of what a shared ownership leaseholder should pay to extend his or her lease. Additionally, by ensuring that such leaseholders are not simply treated the same as ordinary leaseholders in this respect, our recommendation acknowledges their unique position and the role of the shared ownership product in enabling those on low and middle incomes to obtain secure and affordable housing.

7.37 As noted above, this recommendation is based on a valuation methodology which uses term and reversion, as those are the common elements of the three valuation schemes that we have put forward to Government as options to reduce the price payable for enfranchisement. It will be necessary to revisit this recommendation if Government decides to adopt a different valuation methodology. For example, if Government decides to adopt a scheme that includes marriage or hope value in the calculation of enfranchisement premiums, then it will be necessary to consider how those elements should apply in the case of lease extensions of shared ownership leases.

Recommendation 43.

7.38 We recommend that the premium payable on the extension of a shared ownership lease should consist of:

(1) the usual cost of buying out any ground rent payable under the lease, but not any rent payable in respect of the unacquired share of the property; and

(2) a proportion of the usual cost of deferring the landlord's reversionary interest in the property, corresponding to the share which the leaseholder holds in the property.

The position when shared ownership providers are lessees

7.39 We understand that there are many instances where the provider of shared ownership properties is not actually the freeholder of the building containing those properties. Instead, the freehold is typically owned by a property developer or commercial investor, and the shared ownership provider (usually a housing association) has a long lease – often described as a "head lease" – of all or part of the building. The shared ownership lease itself will be a sub-lease. In this scenario, the shared ownership provider is unlikely to have a sufficiently long lease to grant the shared ownership leaseholder a 990-year lease extension. The provider will have no right to

extend their own lease, by reason of the general principle that where there is more than one long leaseholder of a property, enfranchisement rights are available only to the "most inferior" leaseholder who meets the relevant qualifying criteria – that is, the leaseholder who is lowest in the chain of leases.[25]

7.40 It is not unusual, generally speaking, for the immediate landlord of a leaseholder making a lease extension claim to have an insufficiently long leasehold interest of his or her own to grant the lease extension sought. Chains of leasehold interests are common in residential buildings. Normally, the leaseholder in this scenario would simply make his or her claim against the freeholder or other superior landlord who is capable of granting the lease extension sought – referred to as the "competent landlord".[26] As part of the lease extension claim, the head lessee's lease will be deemed to be surrendered and regranted (taking effect as a concurrent lease), and will then expire at the same time it would have done had there been no lease extension. At this point, the head lessee will drop out of the picture and the competent landlord will become the leaseholder's immediate landlord.

7.41 This outcome, however, may not be ideal where a shared ownership lease is involved. We were aware, at the time of writing the Consultation Paper, of concerns that it is not appropriate for a shared ownership leaseholder to end up with a commercially-motivated landlord in place of their original landlord, which is likely to have been a housing association or other registered provider of social housing.[27] It is also questionable whether it is fair to impose the specific payment arrangements of shared ownership leases on such a landlord (including the reduction in upfront premium payable for a lease extension, under our recommendation above), and to require them to manage rent reviews and staircasing applications.

7.42 We therefore asked consultees to share their views on issues which arise where the provider of a shared ownership lease is themselves a lessee.

Consultees' views

7.43 A small number of consultees provided comments referring to the scenario outlined above, although we did not receive very much information as to why, in particular, it is a problem if a shared ownership provider ceases, at some point in the future, to be the shared ownership leaseholder's landlord. Long Harbour and HomeGround (a landlord and an asset manager) wrote that "it would not be appropriate for the competent landlord to be a superior landlord in the usual way as this would not cater for the shared ownership element of the lease extension". Richard Stacey told us that it is common for shared ownership providers simply to grant their leaseholders a lease extension with a term as long as they are able to grant, given the costs and complications involved in applying to the competent landlord.

---

25 See paras 13.14 to 13.15 below.

26 For a fuller explanation of chains of leasehold interests and the concept of the "competent landlord", see paras 13.9 to 13.13 below.

27 Where a collective freehold acquisition claim is made in respect of a building which contains units let on shared ownership leases by a housing association, those units will be the subject of a mandatory "leaseback" to the housing association, which will thereby remain the immediate landlord of the shared ownership leaseholder. See discussion of leasebacks at paras 5.152 to 5.172 above.

7.44 Some consultees suggested that providers of shared ownership leases should be entitled to extend their head lease, so that it subsists for the duration of the extended shared ownership lease. Indeed, two consultees pointed out that the inability of social housing providers to extend their head leases is not a problem which is confined to the shared ownership context. For example, even where a social housing provider's head lease is the only long lease in respect of a given property (that is, the provider's sub-tenants are tenants under short tenancies), the provider will only be able to claim lease extensions in respect of the individual flats, and not in respect of the common parts included within the head lease. This can give rise to complications when the head lease expires in relation to those parts, so that they revert to the freeholder. Octavia Housing, a housing association, therefore called for a general right for social housing providers to extend the entirety of their head leases, over individual units and common parts, regardless of the nature of the relevant sub-tenancies. They said:

> Our view is that registered providers (as organisations with a social purpose whose objectives are to provide affordable homes with security of tenure), regardless of whether they are the sole leaseholders or are intermediate lessees, should have rights to extend leases for individual units and common parts.

Discussion

7.45 We think that there are three possible approaches to addressing the issues discussed above.

(1) The current law could be retained. As set out above, this would mean that where a shared ownership leaseholder extends his or her lease, it may well exceed the duration of the provider's head lease. After the term of the provider's head lease expires, the freeholder would become the immediate landlord of the shared ownership leaseholder (unless of course a voluntary extension of the head lease is negotiated). A social housing provider who has granted only short sub-tenancies out of its head lease would remain able to extend its lease in relation to individual units within the head lease, but not in respect of the common parts.

(2) A right to extend a head lease in certain circumstances could be introduced. It would be necessary to decide whether this right should be limited to cases where units are let on shared ownership leases, or should be a general right for a social housing provider to extend its head lease, including in relation to common parts. There might also be an argument that this right should not be limited to social housing providers, now that some private developers are beginning to offer shared ownership leases.

(3) Alternatively, there could be an obligation on the provider of a shared ownership lease to seek an extension of its head lease – at the very least in relation to that individual unit – whenever the shared ownership leaseholder claims a lease extension. We recognise that this approach is likely to have financial implications for providers, but this might be considered appropriate if it is important to ensure that a private landlord does not become the immediate landlord of a shared ownership leaseholder by reason solely of a lease extension claim.

7.46 We do not consider that we are in a position to decide between these approaches on the information currently available to us. Further engagement with the social housing sector is needed to explore the extent of the issues in more detail and to establish whether it is desirable for housing providers to be entitled – or obliged – to extend their head leases (whether in the context of shared ownership or otherwise). We also consider that this question raises wider considerations about the role of the social housing sector in the provision and management of housing stock. These are matters that go beyond the scope of our project and may not appropriately be addressed solely by reference to the situation in which a leaseholder exercises enfranchisement rights.

7.47 We therefore do not make a recommendation to Government on this issue. We suggest that Government is best placed to further consider the questions raised and to decide between the approaches outlined above. Depending on the decision reached by Government, it may then be necessary to give further consideration to consequential issues of valuation and procedure.

Shared ownership leases and collective enfranchisement

7.48 As we explain above, Government has decided that shared ownership leaseholders should not be able to carry out an individual freehold acquisition claim, nor participate in a collective freehold acquisition claim, before they have staircased to 100% ownership.

7.49 In the Consultation Paper, we acknowledged the potential for this policy decision to have an impact on the ability of other leaseholders in a building containing shared ownership properties to carry out a collective freehold acquisition claim.[28] Specifically, this concern related to our provisional proposals (and now final recommendations) that two-thirds of the residential units in a building must be let on a long lease in order for the building to be eligible for collective freehold acquisition ("the two-thirds requirement"), and that the leaseholders of at least half of the residential units in the building must participate in the claim ("the 50% participation requirement").[29] If shared ownership leases are not to be treated as long leases for the purposes of the two-thirds requirement, it is possible that some buildings containing a number of shared ownership properties will not qualify for collective freehold acquisition.[30] And either way, the 50% participation requirement is likely to present some challenge wherever a number of shared ownership leases are involved.

7.50 We therefore asked consultees whether they thought that the proposed qualification requirements for a collective freehold acquisition claim (namely, the two-thirds requirement and the 50% participation requirement) should be relaxed where the building contains residential units let on shared ownership leases. If so, we asked how this should be done. The options presented were:

---

28 See CP, paras 9.39 to 9.40.

29 See CP, paras 8.135 to 8.144, and paras 6.239 to 6.251 and 6.267 to 6.281 above.

30 A shared ownership lease will, of course, be a "long" lease in the sense that it is granted for a term exceeding 21 years. However, within our scheme of qualifying criteria, we use the phrase to indicate not only a lease with a certain minimum term but one which enjoys enfranchisement rights. See paras 6.17 to 6.18 and 6.69 to 6.104 above.

(1) to ignore shared ownership properties altogether when determining the number of residential units in a building, and whether the necessary percentage requirements are met; or

(2) to treat shared ownership leases as long leases for the purposes of these rules, even though they cannot participate in the collective freehold acquisition themselves.

7.51 Both of these suggestions have the potential to benefit different buildings depending on how the various residential units in any given building are owned.

(1) The first option amounts to a relaxation of both of the requirements mentioned above. Adopting this option would mean that more buildings containing shared ownership properties are eligible for collective freehold acquisition, and would also make it somewhat easier for groups of leaseholders in all buildings containing shared ownership properties to satisfy the 50% participation requirement.

(2) The second option amounts to a relaxation of the two-thirds requirement, so that more buildings will qualify for collective freehold acquisition. However, it retains the strict requirement that the leaseholders of at least 50% of the residential units in the building must participate in the claim, which may be difficult to satisfy where there are multiple units let to shared ownership leaseholders, who are simply not permitted to participate.

7.52 On further reflection, there is also a third option. It would be possible to count shared ownership properties when determining the number of residential units in a building, but not to count them as long leases for the purpose of satisfying the two-thirds requirement. However, the 50% participation requirement could be relaxed so that only 50% of the leases which count for the purposes of the two-thirds requirement need to participate in the claim. This approach would not increase the number of buildings containing shared ownership properties which are eligible for collective freehold acquisition, but would ensure that it is considerably easier for leaseholders in those buildings which are eligible to mobilise the number of participants required to make a claim.

7.53 There are also other ways in which either or both of these qualifying criteria might be relaxed. However, we do not propose to discuss all of these options here.

Consultees' views

7.54 A number of consultees – consisting mainly of leaseholders and leaseholder representative groups – considered that the qualification requirements for a collective freehold acquisition claim should be relaxed where the building contains residential units let on shared ownership leases. The range of arguments made in favour of this position was, however, notably narrower than that made against relaxation. These consultees did not make very many substantive arguments in favour of Option 2 beyond simply asserting that the presence of shared ownership leases in a building should not frustrate the ability of the building as a whole to exercise the right to a collective freehold acquisition. Additionally, a number of consultees simply used this question to argue in favour of shared owners being entitled to participate in collective

freehold acquisition claims, in contrary to Government's decided policy. Of those consultees who answered the second part of the question, the majority supported the second proposed means of relaxation.

7.55 A greater number of consultees were opposed to relaxation, however. These consultees feared that relaxation of the usual qualification criteria would lead to collective freehold acquisition claims which are not appropriate, for one reason or another.

(1) Notting Hill Genesis, a housing association, pointed out that if all shared ownership properties within a building are ignored entirely for the purposes of the relevant qualifying criteria (as per the first option set out in the Consultation Paper), it might be possible for a group of leaseholders occupying only a minority of flats in the building to bring a collective freehold acquisition claim. Berkeley Group Holdings PLC echoed this concern, warning that further dilution of the qualifying criteria could concentrate control of freeholds in a small number of leaseholders.

(2) A number of consultees objected to the idea of registered providers of social housing losing control of buildings containing a significant number of shared ownership leases. Philip Rainey QC suggested that the preservation of social housing stock is more important than the enfranchisement rights of other leaseholders in such buildings. Church & Co Chartered Accountants felt that collective freehold acquisition claims in these cases would also hinder the social housing sector's ability to provide long-term affordable housing.

Discussion and recommendations for reform

7.56 We do not consider that it would be appropriate to relax the two-thirds requirement (by any means) to ensure that buildings which contain multiple units let on shared ownership leases remain eligible for collective freehold acquisition. The purpose of the two-thirds requirement is to identify those buildings in respect of which it would be appropriate for a collective freehold acquisition claim to be made. In our view, buildings in which the proportion of shared ownership units is significant enough that the two-thirds requirement is not satisfied will not, in general, be suitable candidates for collective freehold acquisition. Of course, the presence of a small number of shared ownership units should not prevent a building that is nevertheless able to meet our recommended qualifying criteria from being the subject of a collective freehold acquisition. But we believe that the point at which those criteria are no longer capable of being fulfilled is an appropriate indicator of those cases in which it would be inappropriate for the building to be acquired by a group of leaseholders.

7.57 Additional problems would result if a relaxation of the two-thirds requirement (as it is formulated in the first option set out in the Consultation Paper) were combined with a relaxation of the 50% participation requirement. As Notting Hill Genesis pointed out, this approach would enable a small number of long leaseholders, who represent a minority of the residential units in a building containing mostly shared ownership leaseholders or tenants under short tenancies, to mount a successful collective freehold acquisition claim. This is not a desirable outcome. The role of collective freehold acquisition is not to enable ownership and control to be vested in a minority of those who have an interest in the relevant building.

7.58 Finally, we do not think it would be advisable to relax only the 50% participation requirement, as suggested at paragraph 7.52 above. A collective freehold acquisition claim does not just affect those who own ordinary long leases of residential units within the building being acquired. Everyone who lives there can be affected, to a greater or lesser extent. We do not think it would be right to ignore the presence of those who are not long leaseholders with enfranchisement rights, and enable a majority of only the long leaseholders who do have enfranchisement rights to effect a change in the ownership and management of the building. A group of long leaseholders representing a majority of all the residential units in the building should continue to be required.

7.59 We therefore recommend that the qualifying criteria for collective freehold acquisition claims should not be relaxed where a building contains units let on shared ownership leases.

7.60 It should be noted that the impact of this recommendation on the ability of other leaseholders in a building containing shared ownership properties to carry out a collective freehold acquisition claim may not actually be as great as might first appear. As we have noted above,[31] the provider of a shared ownership lease will often be a lessee themselves, under a long head lease of the building or part of the building, rather than the freeholder of the building. Where this is the case, the shared ownership units would, in fact, be let on a long lease for the purposes of the two-thirds requirement (that is, by virtue of the provider's head lease, if our recommendation at paragraph 6.371 above that the "three-or-more-flats rule" be abolished is taken forward). The possibility that the building will be ineligible for a collective freehold acquisition claim by reason of failing to satisfy the two-thirds rule would thus be eliminated (in the case of a head lease of the whole of the building) or substantially reduced (in the case of a head lease of part).

Recommendation 44.

7.61 We recommend that the qualifying criteria for collective freehold acquisition claims should not be relaxed where a building contains units let on shared ownership leases. Specifically:

(1) residential units which are let on shared ownership leases should be counted when determining the number of units in a building;

(2) shared ownership leases should not be counted as long leases for the purposes of satisfying the two-thirds rule; and

(3) there should be no relaxation of the requirement that leaseholders of at least half of the total number of residential units in a building must participate in a collective freehold acquisition claim (even where that total number includes units let to shared ownership leaseholders who are not entitled to participate in such a claim).

[31] See para 7.39.

Excluding shared ownership leases from freehold acquisition rights

7.62 As we explain above, Government has decided that shared ownership leaseholders should not be able to carry out an individual freehold acquisition claim, nor participate in a collective freehold acquisition claim, prior to having staircased to 100% ownership. This prohibition means that we must be able to define exactly what is meant by a shared ownership lease for these purposes.

7.63 There is no overarching statutory definition of a shared ownership lease. Indeed, while the effect of the 1967 Act and related secondary legislation is to exclude most shared ownership leases of houses from enfranchisement rights, it does not attempt to achieve this by defining a shared ownership lease. Instead, leases of houses which meet one or other of various sets of criteria – reflecting the typical terms of a shared ownership lease – are excluded from enfranchisement rights.[32] Similarly, the 1993 Act simply states that a "long lease" includes "a shared ownership lease… where the tenant's total share is 100%", without offering any definition of a shared ownership lease.[33]

7.64 A number of other statutes contain the following definition of a shared ownership lease:

> a lease of a dwelling-house -
>
> > (a) granted on payment of a premium calculated by reference to a percentage of the value of the dwelling-house or of the cost of providing it, or
> >
> > (b) under which the lessee (or the lessee's personal representatives) will or may be entitled to a sum calculated by reference, directly or indirectly, to the value of the dwelling-house.[34]

7.65 While this definition captures the basic essence of a shared ownership lease, and has the obvious attraction of simplicity, we do not consider that it is a sufficient basis on which to deprive a leaseholder of freehold acquisition rights. The ability to acquire the freehold of one's home (whether individually, or together with neighbours) is an extremely important right for leaseholders which addresses or mitigates the two fundamental shortcomings of leasehold ownership: the fact that a lease is a wasting asset, and lack of control. We want to ensure that there is no scope for the exclusion of shared ownership leases from freehold acquisition rights to be used as a way for landlords to avoid enfranchisement claims. Leaseholders should only be excluded from freehold acquisition rights where their leases are genuine shared ownership

---

32 A summary of the relevant provisions can be found at paras 9.10 to 9.23 of the CP. The criteria which must be satisfied vary depending on the identity of the landlord.

33 See CP, paras 9.24 to 9.29 for discussion of the confusion as to whether shared ownership leases of flats qualify for enfranchisement rights.

34 This definition was inserted by ss 156, 157 and 166 of the Localism Act 2011 into provisions of the Law of Property Act 1925, Land Registration Act 2002 and Landlord and Tenant Act 1985 respectively. However, in each case that definition is expressed to be for the purposes of that provision or Act only.

leases, containing the relevant payment arrangements and staircasing provisions which make it inappropriate for freehold acquisition to be available.

7.66 In the Consultation Paper, we therefore proposed that a shared ownership lease should be excluded from freehold acquisition rights only where the lease:

(1) entitles the leaseholder to acquire additional shares in the property at any time, up to a maximum of 100%, in increments of 25% or less (save in the case of properties in designated protected areas, where a lower maximum entitlement should be permissible);

(2) provides that the price payable for such shares shall be proportionate to the market value of the property at the time of acquisition of the shares, and provides for a corresponding reduction in rent payable by the leaseholder; and

(3) entitles the leaseholder to require the landlord's interest to be transferred to him or her, free of charge, at any time after he or she has acquired 100% of the shares in the property.

7.67 These criteria are drawn from those which currently provide for the exclusion of shared ownership leases from enfranchisement rights under the 1967 Act. However, we could see no reason for the criteria to differ depending on the identity of the landlord, as is presently the case.[35]

7.68 We asked consultees whether they agreed with our proposed approach, and with the specific criteria we proposed.[36]

Consultees' views

7.69 A relatively small number of consultees responded to this consultation question. A majority of those who did, from a range of backgrounds, agreed that shared ownership leases should be excluded from freehold acquisition rights where the lease meets a uniform set of criteria. Those who were opposed to this proposal did not generally give a reason for their view, or used the question to express a view on whether shared ownership leaseholders should have lease extension or freehold acquisition rights.

7.70 A majority of consultees also agreed with the criteria we proposed, with a small number offering substantive comments on the individual criteria.

(1) Several consultees queried why it was necessary for additional shares in the property to be acquired in increments of 25% or less, suggesting that current practice is that shared owners can and do buy additional shares of greater than 25%. Octavia Housing commented that buying larger shares saves on legal and valuation fees.

(2) A number of landlords told us that the criteria should be expanded so as to capture other shared ownership properties where the maximum share available

---

35 See CP, paras 9.10 to 9.23 for a detailed discussion of the different criteria which determine whether shared ownership leases granted by different kinds of landlord are excluded from enfranchisement rights.

36 See CP, Consultation Question 63, paras 9.48 to 9.49.

to the shared ownership leaseholder is capped in order to preserve the property as affordable housing. Anchor Hanover, a retirement housing provider, told us that many of their shared ownership developments only permit staircasing to a maximum of 75%, so that the properties are always available to purchase at less than their full market value.

(3) Octavia Housing also pointed out that the proposed requirement to transfer the landlord's interest to the shared ownership leaseholder once the leaseholder has reached 100% ownership will be undesirable and complicated where the landlord's interest is itself a leasehold interest.

(4) Trowers & Hamlins LLP, solicitors, suggested that the criteria should be more expansive, so as to include leases that are "intended to be shared ownership leases".

Discussion and recommendations for reform

Criterion 1 – staircasing provisions

7.71 The aim of our first proposed criterion was to ensure that, in general, shared ownership leaseholders are excluded from freehold acquisition rights only where their lease makes it possible – and realistic (subject to the financial resources of the leaseholder) – for the leaseholder to staircase to 100% ownership. In this way, leaseholders will not be precluded from owning their freehold forever. Once a leaseholder has staircased to 100%, they may be entitled under the terms of the lease to have the freehold of the property transferred to them free of charge. This is generally the case with shared ownership leases of houses. In the case of shared ownership leases of flats, a leaseholder who has staircased to 100% will have the right to participate in a collective freehold acquisition claim like any other leaseholder, in accordance with Government's policy decision.[37]

7.72 That said, we were aware that there are some shared ownership leases which do not provide for staircasing to 100% ownership, but which it would also be appropriate to exclude from freehold acquisition rights. Specifically, there is a category of shared ownership leases granted in respect of properties in "designated protected areas" which restrict leaseholders to owning a specified maximum share in their property. The idea is that the property can then only ever be sold as a shared ownership property, thus keeping the property within the affordable housing sector. Freehold acquisition rights for these leaseholders would have the potential to disrupt this careful, intentional arrangement, which is designed to preserve the availability of affordable housing in rural areas.[38] We therefore proposed that while there should be a general requirement that shared ownership leases should permit staircasing to 100% ownership, this requirement should not apply in these specific cases.[39] We

---

37 In the case of a shared ownership lease granted within a block of flats held on commonhold, the position will be different. We recommend in the Commonhold Report, at para 11.73, that where a shared ownership leaseholder in a commonhold staircases to 100%, the provider's freehold title to the unit should be transferred to him or her.

38 See CP, paras 9.18 to 9.23 for further discussion of this issue.

39 The criteria which govern the exclusion of shared ownership leases from enfranchisement rights under the 1967 Act provide that leases in designated protected areas will be excluded provided that (among other

remain of this view. We recognise that there are significant challenges in providing affordable housing in rural communities and we see the logic of restricting the circumstances in which the freeholds of affordable properties may be purchased.

7.73 A number of consultees have told us, however, that this exception from the general requirement should not be restricted to properties in designated protected areas. For example, Anchor Hanover told us that they offer retirement properties on shared ownership leases under which the maximum share which a leaseholder can acquire is 75%. We do not hold details of all variations of shared ownership lease which are currently in existence, but it may well be that there are other shared ownership leases outside of designated protected areas containing similar restrictions. We have even seen suggestions that there are some leases – particularly in the retirement sector – where leaseholders purchase a "share" of the property, but there is no expectation of further staircasing, and therefore no staircasing provisions in the lease at all.

7.74 As we explain above, we consider it to be important, as a general rule, that shared ownership leases provide for staircasing to 100% if freehold acquisition rights are not to be available. But we appreciate that there may be some circumstances (in addition to the case of properties in designated protected areas) in which this concern is outweighed by a wider policy aim of ensuring that certain properties remain within the shared ownership sector forever. The retirement sector may well contain appropriate examples; we note that at present, shared ownership "leases for the elderly" which meet certain conditions are not required to make provision for staircasing in order to be excluded from enfranchisement rights under the 1967 Act.[40] Similarly, in response to a different consultation question, the National CLT Network and the UK Cohousing Network called for the special treatment of properties in designated protected areas in this regard to be extended to community-led housing schemes, on the basis that there is the same need to ensure that difficult to replace properties remain affordable in perpetuity.

7.75 We do not consider, however, that we are in the best position to assess when, exactly, it would be appropriate for shared ownership leases under which staircasing is capped (or perhaps not permitted at all) to be excluded from freehold acquisition rights. This question raises wider considerations about the provision of affordable housing and management of housing stock, which go beyond the scope of our project. We also recognise that the ways in which shared ownership is used within the housing market may change over time, and that it may be necessary for new exceptions to a general rule to be created in response to future innovation within the sector.

---

things) the leaseholder is entitled to acquire at least an 80% share in the house. See 1967 Act, s 33A, sch 4A, para 4A and Housing (Shared Ownership Leases) (Exclusion from Leasehold Reform Act 1967) (England) Regulations 2009 (SI 2009 No 2097) ("2009 regs"), reg 8(2). The designated protected areas are identified in the Housing (Right to Enfranchise) (Designated Protected Areas) (England) Order 2009 (SI 2009 No 2098).

40 See 1967 Act, s 33A and sch 4A, para 4 and Housing Association Shared Ownership Leases (Exclusion from Leasehold Reform Act 1967 and Rent Act 1977) Regulations 1987 (SI 1987 No 1940) ("1987 regs"), reg 3 and sch 2. However, these provisions relate to leases granted by a registered housing association, and would not therefore apply to leases granted by a private retirement housing provider such as Anchor Hanover.

7.76 We therefore recommend that, in general, a shared ownership lease should be excluded from freehold acquisition rights only where the lease entitles the leaseholder to acquire additional shares in the property at any time, up to a maximum of 100%. However, Government should look to create appropriate exceptions to this general rule in the case of properties in designated protected areas, in respect of "leases for the elderly",[41] and in other circumstances where there are good policy reasons to restrict leaseholders to acquiring a lower maximum share in the property.

7.77 Of course, staircasing must be realistic and achievable – not just technically possible – if it is to be a right of any value to leaseholders. We do not think that it would be a realistic or achievable prospect for many leaseholders if a shared ownership lease were to provide that the leaseholder could only ever staircase in substantial increments of, say, at least 50%. Such provision might have the effect that some leaseholders would never be able to increase their "share" of the property. It was for this reason that we proposed a requirement that the lease must entitle the leaseholder to acquire additional shares in increments of 25% or less.[42] To put it another way, the minimum additional share available for purchase should be no greater than 25%, which is considered achievable.[43] It was not our intention, however, to suggest that leaseholders should be prohibited from choosing to staircase in greater increments if their lease permits and if they so wish. We acknowledge that there are some leaseholders who do purchase larger additional shares, and that for those who can afford to, this approach may be more cost-effective than carrying out multiple smaller staircasing transactions.

7.78 We therefore recommend that, where staircasing is possible, a shared ownership lease should be excluded from freehold acquisition rights only where the minimum share which a leaseholder may purchase is no greater than 25%.

Criterion 2 – payment arrangements

7.79 Our second proposed criterion did not attract any comment from consultees. We consider that it accurately reflects how staircasing transactions should (and do) operate, and we recommend that this should be a requirement for a shared ownership lease to be excluded from freehold acquisition rights.

Criterion 3 – effect of staircasing to 100%

7.80 Our third proposed criterion was intended to ensure that shared ownership leaseholders are excluded from freehold acquisition rights only where, upon staircasing to 100% ownership, they will be in the same position as any other comparable homeowner. It was based on a similar criterion which must be satisfied in

---

41 As defined in 1987 regs, sch 2, para 1.

42 A similar criterion exists among those which govern the exclusion of shared ownership leases from enfranchisement rights under the 1967 Act. See 1967 Act, s 33A and sch 4A, paras 3, 3A and 4A; 1987 regs, reg 2 and sch 1, para 2(a); and 2009 regs, regs 5(2) and 9(2).

43 Indeed, the model shared ownership leases produced by Homes England currently provide for the acquisition of additional shares in increments of 10%, and Government has recently announced proposals to reduce this to 1%: https://www.gov.uk/government/news/changes-to-shared-ownership-to-help-more-people-get-on-the-property-ladder. The staircasing provisions of the model lease are one of the "fundamental clauses" which shared ownership leases of homes funded by Homes England must include.

order for a shared ownership lease of a house to be excluded from enfranchisement rights under the 1967 Act.[44] What is envisaged is that where a freeholder has sold a house on a shared ownership lease, the leaseholder should be able to call for the freehold of the house to be transferred to him or her upon reaching 100% ownership. Since houses are generally owned on a freehold basis, it is reasonable to assume that the house would originally have been purchased on that basis, had it not been necessary for the leaseholder to use a shared ownership structure.

7.81 In its consultation response, Octavia Housing pointed out that this proposal will result in complications where the provider of the shared ownership lease is itself a leaseholder. This will frequently be the case in relation to blocks of flats sold on shared ownership leases, but could also apply to developments of individual houses. Often, the provider's lease will be a head lease covering other residential units and common parts in addition to the residential unit of the shared ownership leaseholder. To transfer the provider's interest in the shared ownership leaseholder's property to the leaseholder would effectively require an assignment of part of the provider's lease. This is not straightforward and might lead to complications regarding the management of the wider development.

7.82 We have also identified a further complication in the case of blocks of flats. Even if the provider of the shared ownership lease is the freeholder of the block, it is not appropriate for the leaseholder to be able to call for the provider's interest in the flat to be transferred to him or her. This would have the effect of creating "flying freehold" interests.[45] Again, any original purchaser would have been limited to acquiring a leasehold interest in the property.[46]

7.83 In the light of these concerns, we accept that the third criterion which we proposed is likely to be unworkable in the case of many shared ownership properties. However, we are equally conscious that where a property that would otherwise have been sold on a freehold basis has instead been sold on a shared ownership lease, the leaseholder should be able to have the freehold transferred to them on reaching 100% ownership.

7.84 We therefore recommend that the third criterion should be a requirement for a shared ownership lease to be excluded from freehold acquisition rights (prior to reaching 100% ownership) in any case where the relevant property could otherwise be the subject of an individual freehold acquisition claim against the provider of the shared ownership lease.[47] In any other case, there should instead be a requirement that the

---

44 See 1967 Act, s 33A and sch 4A, paras 3(2)(f) and 3A(2)(f); 1987 regs, reg 2 and sch 1, para 4; and 2009 regs, reg 7.

45 We explain at para 4.11 above what is meant by a flying freehold, and why it is considered problematic.

46 This complication does not arise where the block is held on commonhold. In that case, the provider of the shared ownership lease would hold the freehold title to the unit. Commonhold has been designed to facilitate the freehold ownership of flats and avoid the difficulties usually associated with flying freeholds. In the Commonhold Report at para 11.73 we recommend that, where a shared ownership lease is granted within a commonhold building, the provider's freehold title to the unit is transferred to the shared ownership leaseholder on staircasing to 100%. That reflects the fact that an ordinary purchaser in commonhold would be able to buy the freehold of the unit.

47 In other words, where the property is a house, and the provider of the shared ownership lease is the freeholder.

lease provides that the terms of the lease which relate to its shared ownership nature will no longer apply after the leaseholder's share in the property has reached 100%.

Further possible criteria: the "fundamental clauses" of the shared ownership model leases

7.85 Homes England have produced a number of model leases for use by providers of shared ownership leases. While it is not obligatory for providers to use these leases, they contain a number of "fundamental clauses" which must be included in shared ownership leases in order for providers to qualify for public funding for the development of the properties. We understand from our discussions with Government that the use of these clauses can also be important for the availability of mortgage finance for shared ownership leases sold by private providers. They therefore play a role in the self-regulation of the privately-provided shared ownership lease market.

7.86 In the Commonhold Report, we recommend that shared ownership leases should be exempt from the general ban on the grant of residential leases of over seven years within a commonhold.[48] The Report recommends that, to qualify for this exemption, a shared ownership lease must contain the prescribed fundamental clauses.

7.87 We do not consider, however, that this should be a requirement for a shared ownership lease to be excluded from freehold acquisition rights. In commonhold, it is desired to confine the grant of long residential leases to instances in which objectionable leasehold practices cannot be reproduced.[49] To this end, the fundamental clauses – such as the standardised rent review and staircasing provisions – provide a considerable level of protection for leaseholders. In enfranchisement, however, we are seeking to exclude from freehold acquisition rights all of those leases which correspond with the basic idea of shared ownership as providing an alternative means of buying property. This is likely to include both grant-funded shared ownership schemes and shared ownership leases within privately funded developments, meaning that it will not always be the case that the fundamental clauses are included. Additionally, we wish to capture shared ownership leases which are already in existence, which may predate the development of the current fundamental clauses. The exemption from the ban on long residential leases in a commonhold, on the other hand, relates to the grant of new leases within a commonhold.

7.88 Consequently, we do not recommend that a shared ownership lease must include the fundamental clauses of the Homes England model lease in order to be excluded from freehold acquisition rights.

Our recommendation

7.89 We recommend that, for the purposes of the exclusion of shared ownership leases from freehold acquisition rights, a shared ownership lease should be defined as a lease of a residential unit:

---

48 See the Commonhold Report, paras 11.4 to 11.19.

49 Commonhold CP, para 12.29.

(1) granted on payment of a premium calculated by reference to a percentage of the value of the residential unit or of the cost of providing it, or

(2) under which the lessee (or the lessee's personal representatives) will or may be entitled to a sum calculated by reference, directly or indirectly, to the value of the residential unit.[50]

7.90 In addition, we recommend a number of further criteria which must be satisfied in order for the exclusion to apply. In summary, the lease must:

(1) entitle the leaseholder to acquire additional shares in the property at any time, up to a maximum of 100% (save in the case of properties in designated protected areas, in respect of "leases for the elderly", and in other circumstances where Government determines that there are good policy reasons to restrict leaseholders to acquiring a lower maximum share in the property), and the minimum share which a leaseholder may purchase must be no greater than 25%;

(2) provide that the price payable for such shares shall be proportionate to the market value of the property at the time of acquisition of the shares, and provide for a corresponding reduction in rent payable by the leaseholder;

(3) in the case of properties that could otherwise be the subject of an individual freehold acquisition claim against the provider of the shared ownership lease, entitle the leaseholder to require the landlord's interest to be transferred to him or her, free of charge, at any time after the leaseholder's share in the property has reached 100%; and

(4) in the case of all other properties, provide that the terms of the lease which relate to its shared ownership nature will no longer apply after the leaseholder's share in the property has reached 100%.

7.91 Of course, the precise drafting of these criteria will be a matter for Government, with the assistance of Parliamentary Counsel. We also acknowledge that any statutory definition of a shared ownership lease for these purposes will likely have to align with that adopted for the purposes of Government's ban on the grant of leases of houses (which is to include an exception for shared ownership leases). We consider that this exception is likely to require a broad definition of the shared ownership product that encompasses both publicly-funded and privately-funded shared ownership schemes, and as such we think that the criteria we have recommended are likely to be appropriate for use in that context also. However, we will work with Government to fashion a shared statutory definition that can be used for both the exemption of shared ownership leases from the leasehold house ban exemption and the exclusion of such leases from freehold acquisition rights.

---

[50] This definition is based on that adopted in several statutes pursuant to amendments brought about by the Localism Act 2011. See n 34 above.

Recommendation 45.

7.92 We recommend that, for the purposes of the exclusion of shared ownership leases from freehold acquisition rights, a shared ownership lease should be defined as a lease of a residential unit

(1) granted on payment of a premium calculated by reference to a percentage of the value of the residential unit or of the cost of providing it; or

(2) under which the leaseholder will or may be entitled to a sum calculated by reference, directly or indirectly, to the value of the residential unit.

7.93 In addition, we recommend that for the exclusion to apply, the lease should:

(1) entitle the leaseholder to acquire additional shares in the property at any time, up to a maximum of 100% (save in the case of properties in designated protected areas, in respect of "leases for the elderly", and in other circumstances where Government determines that there are good policy reasons to restrict leaseholders to acquiring a lower maximum share in the property), and the minimum share which a leaseholder may purchase must be no greater than 25%;

(2) provide that the price payable for such shares shall be proportionate to the market value of the property at the time of acquisition of the shares, and provide for a corresponding reduction in rent payable by the leaseholder;

(3) in the case of properties that could otherwise be the subject of an individual freehold acquisition claim against the provider of the shared ownership lease, entitle the leaseholder to require the landlord's interest to be transferred to him or her, free of charge, at any time after the leaseholder's share in the property has reached 100%; and

(4) in the case of all other properties, provide that the terms of the lease which relate to its shared ownership nature will no longer apply after the leaseholder's share in the property has reached 100%.

THE NATIONAL TRUST

Introduction

7.94 The National Trust is a registered charity with a statutory basis. Its purpose is to preserve land and buildings of national, architectural or historic interest, and places of natural interest or beauty, for the benefit of the nation, forever.[51]

7.95 Much of the National Trust's land is "inalienable", meaning that it may not be disposed of or mortgaged by the Trust, or compulsorily acquired against the Trust's wishes

[51] See the National Trust Act 1907, s 4(1) and the National Trust Act 1937, s 3.

without special parliamentary procedure.[52] In essence, land held in this way by the National Trust will be held on that basis in perpetuity.

7.96 As the law currently stands, long leaseholders of inalienable National Trust land have very limited statutory enfranchisement rights. Leaseholders of houses may claim a lease extension under the 1967 Act – the usual single lease extension of 50 years at a modern ground rent available to all leaseholders of houses – but have no right to acquire the freehold of their property.[53] Leaseholders of flats are excluded entirely from enfranchisement rights under the 1993 Act.[54] We understand that where a lease extension is requested but the leaseholder in question is not statutorily entitled to one, the National Trust will often agree to extend the lease so that it continues for up to a maximum of 99 years from the present day. But the availability of these voluntary extensions is never guaranteed.

7.97 The reason for this special treatment for the National Trust stems from the unique status of the Trust and its purpose of preserving land and buildings for the benefit of the nation, forever. It is said that if National Trust leaseholders were entitled to acquire the freehold of their properties, or to extend their leases either repeatedly or for a very long time, the Trust's ability to ensure these properties are used for the benefit of the nation would be greatly reduced, if not eliminated altogether. A right to purchase the freehold of National Trust land would, additionally, conflict with the principle of statutory inalienability.

7.98 On the other hand, we have heard from many National Trust leaseholders who face, at the very least, uncertainty about their futures. Some are faced with the possibility of being unable to remain in their properties beyond the end of their lease, while others have told us that they are unable to sell or mortgage their properties, leaving them unable to get on with their lives.

7.99 In the Consultation Paper, we set out the above position and asked consultees for their views on how leases of inalienable National Trust properties should be treated under a new enfranchisement regime. We did not set out a provisional view of our own. Instead, we identified three possible options. Such leases could:

(1) be excluded altogether from statutory enfranchisement rights;

(2) have the same enfranchisement rights as any other lease; or

---

52 By s 21(1) and sch 1 of the National Trust Act 1907, certain National Trust properties are expressly stated to be inalienable. The National Trust also has power, under s 21(2) of the 1907 Act, to determine by resolution that other land or properties which it owns are to be held for the benefit of the nation, upon which such land or buildings shall thereafter be inalienable. Further, properties granted to the Trust pursuant to the National Trust Act 1939 are inalienable, by reason of s 8 of that Act. In total, around 95% of National Trust land is inalienable.

53 1967 Act, s 32.

54 1993 Act, s 95. It should be noted, however, that the vast majority of National Trust leaseholders have a lease of a house rather than a flat. The National Trust has told us that it has around 85 flats, and around 30 further lease arrangements where tenants occupy part or parts of a property (which may or may not be described as a "flat" in the ordinary sense of the word).

(3) have more limited enfranchisement rights than other leases.[55]

7.100 We also asked consultees to share their views as to how the enfranchisement rights of leaseholders of inalienable National Trust land should be limited, if the third option above were to be selected.[56] Our own suggestions included giving these leaseholders the same right to a lease extension as other leaseholders but no freehold acquisition rights, providing a more limited right to a single, shorter lease extension for these leaseholders, or restricting the availability of improved enfranchisement rights in respect of inalienable National Trust land to leaseholders whose leases were granted after the introduction of the new regime.[57]

7.101 It has not been suggested that the National Trust should benefit from any special treatment in relation to any land which it owns which is not inalienable. The remainder of our discussion of the National Trust focusses exclusively on inalienable National Trust land (which, as we have noted, makes up the vast majority of the National Trust's land). Accordingly, all references to leases of National Trust land or to any exemption from enfranchisement rights for the National Trust in the remainder of this chapter should be read as relating only to inalienable land.

Consultees' views

Option 1 – exempting the National Trust from enfranchisement rights altogether

7.102 A relatively small number of consultees, from a range of backgrounds, felt that the National Trust should be entirely exempt from statutory enfranchisement claims. Although some of these consultees were leaseholders, it does not appear that any are leaseholders of the Trust.

7.103 The main reason given by consultees who supported a complete exemption for the National Trust was that such an exemption is necessary to enable the Trust to discharge its function of preserving the special properties which it owns, for the benefit of the nation, forever. Consultees considered that the Trust would only be able to meet this aim by retaining the ability to control the long-term use of its properties, uninhibited by the exercise of enfranchisement rights by its leaseholders. As Damian Greenish, a solicitor, commented:

> It is not fair to say that the grant of a long lease is contrary to the purpose of the Trust; namely, preserving land and buildings permanently for the benefit of the nation… . The grant of a long lease has always played a role in the long-term management of estates and in the maintenance of long-term ownership and stewardship… . The National Trust should be wholly exempted.

7.104 A number of consultees also observed that many National Trust properties were gifted to the Trust, with the intention of the benefactor being that the property would belong to the Trust forever. A right to enfranchisement would "frustrate the purpose of such a gift".

---

55 See CP, Consultation Question 64, para 9.60.

56 See CP, Consultation Question 64, para 9.61.

57 See CP, para 9.58(3).

7.105 Consultees who selected this option did not appear especially concerned about the consequences for leaseholders of having no statutory enfranchisement rights, with several commenting that National Trust leaseholders would have known of this at the time of purchase, or ought to have been so advised by their conveyancing solicitor (even if such advice was not in fact given). The Country Land and Business Association, a landlord representative body, wrote:

> It is unfortunate that some (and we suspect that this is a comparatively small number) National Trust tenants discover after their purchase that they have purchased a wasting asset. However, strictly speaking the blame for this should be directed at their conveyancer, not the National Trust.

Option 2 – giving National Trust leaseholders the same rights as regular leaseholders

7.106 This option was the most popular of the three we put forward in the Consultation Paper. It was supported by a large number of leaseholder representative bodies, individual leaseholders and other individuals, as well as a small number of freeholders and firms of professionals. However, it should be noted that a significant number of those who chose Option 2 – including a number of National Trust leaseholders – explained in their answers that, if freehold acquisition were not possible for National Trust leaseholders, they would be content with a right to unlimited lease extensions.

7.107 The most common argument made by consultees supporting Option 2 was simply that all leaseholders should receive the same treatment under a new enfranchisement regime, regardless of the identity of their landlord. However, other consultees gave more specific explanations as to why, in their view, an exemption from enfranchisement rights for the National Trust cannot (at least in most cases) be justified.

7.108 A number of National Trust leaseholders explained that the majority of the National Trust's long leasehold properties are just ordinary homes, of no great historic or architectural significance, and thus do not merit an exemption from enfranchisement rights. As Karen Burrell, a leaseholder and committee member of the Tenants Association of the National Trust ("TANT"), explained, "inalienable status is not appropriate or necessary for unremarkable ancillary residential dwellings".

7.109 Other consultees pointed out that many of the leases granted by the National Trust are "repairing" leases, granted when the properties in question were in a very poor condition, which place full responsibility for the upkeep of the property on the leaseholder. As well as the unfairness of taking back possession of properties in which leaseholders have invested heavily over the years, these consultees argued that the National Trust's apparent lack of concern for the properties demonstrates that they were not considered significant in the first place.

7.110 Accordingly, it was said that in relation to the majority of its residential properties, the National Trust is no different from a commercial landlord, managing its portfolio to obtain an income from rent, and from lease extension premiums.

7.111 Finally, a significant number of consultees argued that the supposed justification for an exemption for the National Trust – namely, the need to take care of historically significant properties and/or to preserve the integrity of a wider area – could be

achieved by other means, utilising listed building status, other planning restrictions and restrictive covenants.

Option 3 – giving National Trust leaseholders more limited enfranchisement rights than other leaseholders

7.112 Some kind of compromise position was supported by a number of professional representative bodies, multiple law firms and surveyor firms, several individuals who were on our advisory group and other individual professionals, and the National Trust itself. As with Option 1, this option was also supported by a number of leaseholders, although we do not believe that these individuals are leaseholders of the Trust.

7.113 By far the most popular suggestion as to how the enfranchisement rights of National Trust leaseholders might be limited was that such leaseholders should be entitled to multiple or unlimited lease extension rights, but not to acquire the freehold of their properties – in other words, the option set out at paragraph 9.58(3)(a) of the Consultation Paper. Consultees considered that this would enable the Trust to retain sufficient control over the properties – through leasehold covenants, for example – while giving leaseholders much-needed security of tenure in their homes as well as the ability to mortgage and sell their properties. As noted above, a number of National Trust leaseholders who supported Option 2 indicated that, if Option 2 were not possible, they would be content with this kind of compromise.

7.114 A small number of consultees supported the option of a more limited lease extension right for National Trust leaseholders, such as the right to a single lease extension "topping up" the term to 99 years. Unsurprisingly, however, this suggestion was roundly rejected by National Trust leaseholders and their representative body, TANT. They pointed out that, based on current lending practice, a 99-year lease term will only provide good security for a relatively brief window of around 19 years. The National Trust itself also observed that, while this option could be made to work from the Trust's perspective, it would be unlikely to resolve the concerns of its leaseholders. An alternative suggestion, made by Shoosmiths LLP and Bryan Cave Leighton Paisner LLP, both firms of solicitors, was that the Trust could have the right to oppose a lease extension where it has reasonable grounds to believe that it will need to carry out major preservation works to the property within the term of the extended lease.

7.115 Only two consultees considered that it would be appropriate for normal enfranchisement rights to be available only for new National Trust leases. However, several consultees did suggest that that not all National Trust properties ought to be treated the same way – in other words, that some should be exempt from enfranchisement, but not others. Consultees suggested different ways of identifying the "core" or "important" properties which should benefit from an exemption, with popular suggested criteria being whether the property in question is of significant historic interest, or was gifted to the National Trust.

The National Trust's consultation response

7.116 As noted above, the National Trust itself was one consultee which, in effect, supported "Option 3": a compromise between no enfranchisement rights for leaseholders of inalienable National Trust land, and full enfranchisement rights. Acknowledging the difficulties faced by its leaseholders under the current law, the Trust's consultation

response set out a detailed proposal designed to protect the special places it cares for on behalf of the nation, while giving much greater security to its leaseholders.

7.117 Broadly speaking, the proposal includes the following elements.

(1) The following leases of inalienable National Trust land would be excluded entirely from the new enfranchisement regime:

(a) leases of residential units which are, or are embedded within, or are in the curtilage of, a National Trust visitor attraction property; and

(b) lease arrangements made with members of the family who originally transferred the relevant property to the Trust, and leases directly replacing or derived from such arrangements.[58]

(2) All other "ordinary" long leases of inalienable National Trust land would be excluded from freehold acquisition rights, but would enjoy the same lease extension rights as any other long lease – provided the leaseholder is an individual and not a corporate entity. This would be the case whatever length of lease extension is ultimately decided upon.

(3) However, the Trust would have the right to buy back the extended lease (at market value) each time the leaseholder wishes to dispose of his or her property (whether by sale, transfer, grant of long sublease over 21 years, gift or other disposition). Where the leaseholder is a corporate entity, the "right to buy back" would be triggered by a change in the controlling interests of the corporate entity, so that corporate structures cannot be used to avoid triggering the right. The price payable by the Trust on exercising the right would not include the uplift in value resulting from the Trust's interest in the freehold or surrounding land.

(4) Additionally, there would be no right for a leaseholder of inalienable National Trust land or another freeholder's land who also has ancillary rights over inalienable Trust land to the freehold acquisition of those ancillary rights. The leaseholder would be entitled only to an extension of the term of those leasehold ancillary rights, possible only with the Trust's consent, which is not to be unreasonably withheld or delayed.

7.118 Although this proposal was submitted as the National Trust's response to our consultation, we have since been advised that it is a joint proposal which was developed in collaboration with TANT (which we understand represents a significant proportion of National Trust leaseholders). TANT's representatives have confirmed to us that TANT supports the proposal, and believes that it "strikes a suitable balance between the National Trust's desire to protect the inalienable status of its land for future generations to enjoy and its leaseholders' desire to be able to live in their homes for as long as they want". However, TANT's representatives also advised that their strong preference was for a 999-year lease extension – since this would offer

[58] The National Trust also suggested that leases which have been granted at a market rent rather than in exchange for a premium should be excluded from enfranchisement rights. This suggestion, which is not just of relevance to the National Trust, is discussed above at para 6.116 onwards.

leaseholders long-term security and would also be readily understood by leaseholders – and that it was only on this basis that TANT was able to support the proposal.

7.119 Finally, the National Trust has subsequently contacted all 498 of its "ordinary" residential leaseholders to explain the joint proposal and to invite leaseholders' views on that proposal. We understand that, of the 110 leaseholders who responded to that invitation, 97% expressed support for the proposal.

Discussion and recommendations for reform

The need for a compromise position

7.120 The treatment of National Trust leases under a reformed enfranchisement regime requires careful consideration.

7.121 On the one hand, we do not consider that the National Trust should be entirely exempt from all statutory enfranchisement claims.

(1) In the first place, we have already noted that most National Trust leaseholders have a lease of a house rather than of a flat, and therefore currently have a right to a single, 50-year lease extension under the 1967 Act. It would be contrary to our Terms of Reference – which require us to improve access to enfranchisement rights – as well as unfair in any event to remove this right by introducing a total exemption for the Trust.

(2) More importantly, as a matter of principle, it is clear that many of the Trust's leasehold properties are "ordinary" homes which have been purchased by "ordinary" homeowners. These properties are not of significant historical or cultural importance and, having been sold on long leases, do not appear to require protection from normal use beyond what the terms of the lease can provide. It can be difficult to see why enfranchisement claims – particularly lease extension claims – should present a problem in respect of such properties.

(3) Finally, the precarious position of National Trust leaseholders cannot be denied. There is a strong case for giving these homeowners security in their homes, by one means or another. We are not convinced by the argument that National Trust leaseholders bought their properties on the basis that they would only be able to occupy the property in question for the term that subsisted at the point of purchase. Leaseholders who purchased their property some time ago may well have been reassured by the right to a single extension under the 1967 Act, which has previously been considered to offer sufficient security of tenure, or by a belief that further, voluntary lease extensions would be available to them.

7.122 On the other hand, however, neither do we consider that it would be appropriate for all National Trust leaseholders to enjoy the full set of enfranchisement rights which are available to other leaseholders.

(1) In providing a statutory power for the National Trust to declare certain land or buildings which it owns to be held for the benefit of the nation, and for such land or buildings therefore to be inalienable, Parliament has acknowledged the Trust's important role in preserving these special places for the benefit of the

nation, forever.[59] A number of consultees observed that only by retaining ultimate ownership of land will the Trust be able effectively to control its use and development and therefore to fulfil the Trust's purpose. In any event, a right for National Trust leaseholders to acquire the freeholds of their properties would clearly conflict with the existing legal status of that land as inalienable, as sanctioned by Parliament.

(2) We also accept that even very long or repeated lease extensions could be problematic for the National Trust in some cases. The Trust has explained to us that the grant of a long lease is not incompatible with the Trust's purpose if that is considered to be the best use of the land in question for the time being. But circumstances change, and it may be that in future a property can be better used for the benefit of the nation by some other means. This is particularly so in relation to those National Trust properties which are of significant cultural, historical or architectural value.

7.123 Accordingly, we are of the view that a compromise position must be adopted, which can provide security to the ordinary people who purchase National Trust homes while ensuring that the Trust is still able to fulfil its valuable purpose.

Devising a compromise: consensus amongst consultees

7.124 Our consultation responses relating to the treatment of National Trust leases revealed significant consensus in two respects, each of which points to a possible means of compromise.

7.125 First, with some exceptions, there appears to be a broad consensus – certainly between the National Trust itself and many of its leaseholders, as well as amongst law firms and valuers – that National Trust leaseholders should have more generous lease extension entitlements than they do at present. Relatively few consultees argued that National Trust leaseholders should have no enfranchisement rights whatsoever. Further, while more consultees argued for National Trust leaseholders to have full enfranchisement rights than for any other option, only a few of these consultees made a specific argument as to why freehold acquisition rights should be available. Indeed, as noted above, a number of National Trust leaseholders in this category explained that, if freehold acquisition were not possible, they would at least be adequately protected by a right to unlimited lease extensions. An obvious potential means of compromise would therefore be, as suggested in the Consultation Paper, to give National Trust leaseholders normal lease extension rights, but no freehold acquisition rights.

7.126 Second, many consultees, including the Trust, have noted that there are different types of properties which make up the Trust's portfolio, and which may warrant different treatment. Specifically, there is a clear distinction between those properties which are of particular significance to the Trust, being of great cultural, historical or architectural value to the nation, and those which are, in reality, just ordinary homes, despite having been declared inalienable.

---

[59] See n 52 above.

7.127 We consider that any compromise position should take account of both of these areas of consensus.

Our recommendation: refining the National Trust's proposal

7.128 The proposal set out by the National Trust in its consultation response (summarised above at paragraph 7.117) is a very welcome contribution to the debate on the future enfranchisement rights of National Trust leaseholders. Drawing on both of the elements of consensus identified above, it offers a compromise with the potential greatly to enhance the rights of the "ordinary" leaseholders who have found themselves in difficulty under the current law. And, importantly, it already has the support of a significant group of National Trust leaseholders. As explained above, the proposal was developed by the Trust working in conjunction with TANT, and was almost universally welcomed by leaseholders responding to a recent consultation carried out by the Trust.

7.129 Since our consultation closed, we have worked with the National Trust to explore various aspects of its proposal further and establish in greater detail how the proposal might work in practice. We have also met with representatives of TANT to satisfy ourselves that the proposal meets the needs of National Trust leaseholders. Following these discussions, we have concluded that, with some variations, the National Trust's proposal is workable and appropriate. We think that it offers the best means of improving the position of National Trust leaseholders while ensuring the special places owned by the Trust can continue to exist for the benefit of the nation in the future. We welcome the proactive and cooperative approach that both the National Trust and TANT have taken and are grateful to them for their ongoing engagement with us in developing our recommendations for reform.

7.130 Our recommendation for reform therefore closely resembles the National's Trust consultation response. It consists of three parts.

(1) No new enfranchisement rights for specified National Trust leases

7.131 In its consultation response, the National Trust suggested that the following National Trust leases should be excluded entirely from the new enfranchisement regime:

(1) leases of residential units which are, or are embedded within, or are within the curtilage of, a National Trust visitor attraction property; and

(2) lease arrangements made with members of the family who originally transferred the relevant property to the Trust, and leases directly replacing or derived from such arrangements.

7.132 One of the most obvious ways in which the National Trust uses its portfolio of inalienable properties for the benefit of the nation is by making its most noteworthy properties – or parts of them – available to the public as visitor attraction properties. But the Trust's visitor attraction offering is not static. The Trust has explained to us that, over time, it may look to alter (and particularly to increase) the extent of its properties which are open to the public. The ability to grant long leases over visitor attraction properties or parts of such properties, safe in the knowledge that the property can be recovered at the end of the lease term (or following a single 50-year statutory lease extension), therefore plays a valuable role in the Trust's strategic long-

term planning. Enfranchisement rights for the owners of these leases would frustrate this ability.

7.133 As for the second category of leases described above, we have been told that the National Trust has entered into a small number of bespoke lease arrangements with those who have gifted a property to the Trust, or with their family members. In these cases, the properties involved are generally of significant historic, cultural or architectural importance. They have been gifted to the Trust to be held for the benefit of the nation – sometimes as part of an inheritance tax settlement for the donor – and the donor or their heirs have been granted leases of all or part of the properties in return. However, the Trust has told us that it was never anticipated by either party to these specifically-negotiated arrangements that the leaseholder would have the right to a perpetually renewable lease. Rather, the Trust granted these leases in the expectation that it would be able to take a view at the end of each lease term (or, in some cases, following a single 50-year statutory lease extension) as to the most appropriate future use of the particular property involved. In particular, many of these leases relate to properties which are already visitor attraction properties – and would thus also fall within the first category identified above – or which may be able to be used as such in the future. The Trust considers that making more generous lease extension rights available to these leaseholders would therefore not only curtail the Trust's ability to manage these properties in future – by increasing access to the public, for example – but would also be contrary to the spirit underlying the original gift of the properties concerned.

7.134 We accept the arguments set out above. In respect of leases of visitor attraction properties and "donor" leases, we recommend that the National Trust should enjoy a complete exemption from all enfranchisement claims under our new regime – including claims for the new, longer lease extension which we have recommended.[60] These are specific cases where an exemption is necessary in order to enable the Trust to continue to fulfil its important purpose. However, we are mindful that a number of leases which would fall within this exemption do currently benefit from the right to a single 50-year lease extension under the 1967 Act. We do not wish for the owners of these leases to be in a worse position following the enactment of our recommendations than they are at present, and so we also recommend that the 1967 Act lease extension right should remain available to any National Trust leaseholders who currently qualify for it.

7.135 The remaining question, then, is how the specific National Trust leases which fall within the recommended exemption can be identified. We were initially concerned, on receiving the National Trust's proposal, that it might be difficult to work out which National Trust properties are "visitor attraction properties", or how far the "curtilage" of those properties extends. After all, the Trust has acknowledged that the properties which are open to the public may change over time, and we have previously identified in the Consultation Paper that the term "curtilage" has given rise to some difficulties in interpreting the 1967 and 1993 Acts. Similarly, we were concerned that the proposed "donor lease" limb of the exemption might inadvertently capture a lease to a distant family member which was in fact a normal commercial transaction unconnected with the original gift. However, the Trust has since explained to us that the number of

---

[60] See Recommendations 1 and 2, at paras 3.36 and 3.62 above.

leases which would fall within either limb of the proposed exemption is so small that it would be possible simply to list these in a schedule or in secondary legislation. We agree that this approach would be greatly preferable to seeking to draw up a statutory definition.

(2) Lease extensions for the majority of National Trust leaseholders

7.136 Next, the Trust proposed that all other long leases of National Trust land should be excluded from freehold acquisition rights, but should carry the same lease extension rights as any other long lease – provided the leaseholder is an individual and not a corporate entity. This proposal was also premised on the introduction of a "right to buy back" for the Trust (discussed in the following section), which would operate wherever a lease extended under the new regime is disposed of. It should be noted that this proposal would apply to the vast majority of National Trust leaseholders.

7.137 Generally speaking, we think that this proposal is sound. As we have explained, a right of freehold acquisition for National Trust leaseholders would present difficulties for the Trust in fulfilling its statutory purpose,[61] but equally its leaseholders need the security provided by longer or repeated lease extensions. This kind of compromise was also supported by many consultees beyond the National Trust and its leaseholders, including a number of law firms and valuation professionals. And while the proposed right to buy back is a novel suggestion, we consider that it will preserve, to some extent, the Trust's ability to manage how a given property is used in the future, without causing detriment to leaseholders.[62] In a consultation recently carried out by the National Trust, the overwhelming majority of its leaseholders were supportive of the Trust's proposal, including the right to buy back.

7.138 However, we do not agree with the National Trust's suggestion that lease extension rights under the new regime should be available only to leaseholders who are individuals and not those which are corporate bodies. The Trust's argument in this respect is that the use of a corporate entity to hold a leasehold interest is usually a considered decision, taken with the benefit of professional advice, which indicates a commercial investment rather than ordinary home ownership. Nevertheless, individuals and corporate bodies are not generally treated any differently under the enfranchisement regime.[63] And although we explored the possibility of introducing a distinction between owner-occupiers and other leaseholders in the Consultation Paper – whether in terms of qualification criteria or the premium payable – we have concluded that there are drawbacks to that approach.[64] We do not consider that the position should be different simply because the National Trust is the freeholder.

---

61 See para 7.94 above.

62 We discuss further at paras 7.141 to 7.144 below why we think the introduction of the right to buy back is appropriate, and how we think it can operate successfully and fairly.

63 As originally enacted, both the 1967 Act and the 1993 Act contained a form of "residence test", requiring that the leaseholder had occupied the property in question as his or her home for a set period of time for enfranchisement rights to be available to him or her. However, these qualification criteria were removed by the 2002 Act. See CP, Ch 2.

64 See CP, paras 8.185 to 8.193 and 15.30 to 15.38; the Valuation Report, paras 6.180 to 6.204; and paras 6.372 to 6.391 of this Report.

7.139 Nor do we agree with the suggestion from representatives of TANT that lease extensions for National Trust leaseholders should be for 999 years rather than 990 years, as we have recommended for all other leaseholders. As we explain in Chapter 3, there are good reasons why we have recommended a lease extension length of 990 years.[65] We do not consider that there is any reason to treat National Trust leaseholders differently from all other leaseholders in this regard.

7.140 We therefore recommend that all National Trust leases which do not fall within the exemption outlined in the previous section should be excluded from freehold acquisition rights, but should carry the same lease extension right as all other long residential leases.

(3) The National Trust's right to buy back

7.141 As mentioned above, the National Trust's proposal that its "ordinary" leaseholders should have the same lease extension rights as all other leaseholders was premised on the introduction of a new "right to buy back" for the Trust. In essence, the Trust proposed that, once a lease has been extended under our new regime, the Trust would thereafter have a right of first refusal to purchase the lease from the leaseholder – at market value – each time the leaseholder wishes to dispose of it.

7.142 We acknowledge that the introduction of more extensive lease extension rights for the majority of National Trust leaseholders would significantly reduce the control which the National Trust has over its residential property portfolio, some of which may be very special properties. That is particularly the case because, under our recommendation in Chapter 3, at paragraph 3.62, a lease extension will be for 990 years. The right to buy back is designed to minimise this loss of control. While its introduction would mean that National Trust leaseholders are not able to deal with their extended lease in quite the same way as other leaseholders, we consider that it would allow the Trust to fulfil its role in relation to its special properties with very minimal intrusion on its leaseholders' lives. On the one hand, the right to a very long lease extension will allow National Trust leaseholders to remain in their homes for as long as they wish, and remedy the problems for saleability and mortgageability that result from a decreasing term. It is only once a leaseholder no longer wishes to live in his or her property that the Trust can exercise the right to buy back. On the other hand, this right adequately accommodates the Trust's interest in reviewing the use of its inalienable properties at appropriate intervals, to ensure that they are being used most effectively for the benefit of the nation. As the Trust has explained, it is very likely that most leases will be the subject of a disposal at some point in the course of a lifetime or so, giving the Trust the opportunity to recover possession at that point if a change in usage is considered beneficial.

7.143 Moreover, since receiving the National Trust's consultation response, we have thought extensively about how the right to buy back could operate in a way which is fair to both parties. We have also held detailed discussions with the Trust and representatives of TANT in this regard. Following careful consideration, we have concluded that, if the following approach is adopted, the right to buy back would strike

---

65 See paras 3.52 to 3.62 above.

an appropriate balance between the interests of the National Trust and its ordinary leaseholders.

(1) The right to buy back should be available only in respect of leases which have been extended under our new enfranchisement regime.

(2) The right to buy back should be engaged each time a leaseholder proposes to dispose of their leasehold interest by sale, transfer, grant of a long sublease over 21 years, or gift. These are the kinds of dispositions which indicate that the leaseholder no longer wishes to hold the property as originally intended. Where the leaseholder is a corporate entity, the right should also be triggered by a change in the controlling interests of the corporate entity, so that corporate structures cannot be used to avoid triggering the right. Importantly, the Trust has indicated that it does not expect the right to be engaged by the transfer of a lease on the death of a leaseholder, or pursuant to a divorce or family separation. National Trust leaseholders would be at liberty to deal with their properties as they wished in these circumstances. We agree that this is a fair approach to the applicability of the right to buy back, although further thought will need to be given to precisely how those dispositions which are intended to trigger the right can be defined in legislation.

(3) The price which the National Trust will pay on exercising the right to buy back should be the market value of the relevant lease. The Trust has suggested that this ought not to include any additional uplift attributable to the Trust's interest in the freehold or the surrounding land, and we agree. Otherwise, the leaseholder would enjoy a windfall compared to what he or she could obtain by selling the lease on the open market. Accordingly, the market value of the lease will simply be the amount for which the lease could be sold on the open market to a willing buyer (taking into account that the lease now has lease extension rights like any other lease).

(4) A procedure will need to be put in place for the exercise of the right to buy back. We consider that this would be best provided for by means of secondary legislation, and should make provision for:

    (a) the leaseholder to notify the National Trust of his or her intention to dispose of their lease;

    (b) a set period for the National Trust to indicate whether it wishes to exercise the right to buy back;

    (c) a period of negotiation to agree on the appropriate purchase price (with use of a single joint expert where the parties cannot agree);

    (d) a short period following determination of the price for the parties to decide whether to proceed or withdraw; and

    (e) completion.

(5) Generally, the parties should bear their own costs of the transaction. Leaseholders have to incur costs in the course of any voluntary disposition, and

we do not anticipate that the cost of the right to buy back procedure is likely to be much more costly than a normal sale. However, we think that the National Trust should be liable for any costs incurred by the leaseholder where the Trust withdraws from a transaction before completion.

(6) Finally, the National Trust has suggested that it should be able to protect its right to buy back by applying for a restriction to be entered on the register of any lease that has been extended under the new enfranchisement regime. This restriction would require HM Land Registry to obtain confirmation from the Trust that it has been offered the chance to avail of the right to buy back before any disposition of the lease can be registered.

7.144 We therefore recommend that, where a National Trust leaseholder has extended their lease under our new regime, the Trust should thereafter have the right to buy back the lease (in accordance with the principles set out above) whenever the leaseholder seeks to dispose of their property.

Recommendation 46.

7.145 We recommend that:

(1) in respect of certain, specified leases of inalienable National Trust land (being leases of visitor attraction properties and "donor" leases), the National Trust should enjoy a complete exemption from all enfranchisement claims under our new regime. Where these leases would currently benefit from the lease extension right under the 1967 Act, that right should remain available;

(2) all other leases of inalienable National Trust land should be excluded from freehold acquisition rights, but should benefit from the same lease extension right as all other long residential leases; and

(3) where a leaseholder of inalienable National Trust land has extended his or her lease under our new regime, the lease should thereafter be subject to a right of first refusal in favour of the National Trust. The Trust should be entitled to "buy back" the lease (at market value) whenever the leaseholder seeks to dispose of it.

Appurtenant rights over inalienable National Trust land

7.146 Finally, as noted above, the National Trust in its consultation response also raised the issue of "appurtenant rights" over inalienable National Trust land.[66]

7.147 A long leaseholder of plot A may be granted "appurtenant rights" affecting plot B – in other words, property rights over a piece of neighbouring land (plot B) which are linked to (or "appurtenant to") the leaseholder's ownership of plot A. A good example of an appurtenant right is a right of way, which is a kind of easement.

---

66 See para 7.117(4) above.

7.148 We have made general recommendations in Chapters 3, 4 and 5 regarding a leaseholder's right to claim appurtenant rights over plot B as part of a lease extension or freehold acquisition claim relating to plot A.[67] We will need to consider further, after Government has decided how to proceed in relation to those recommendations, whether those recommendations should apply in the ordinary way where plot B is inalienable National Trust land, or whether some form of special treatment is required.

THE CROWN

Introduction

7.149 Both the 1967 Act and the 1993 Act provide that enfranchisement rights shall not, generally speaking, apply to any lease of land in which there is a superior Crown interest.[68] A "Crown interest" refers to an interest in the land which is comprised in the Crown Estate, or which belongs to the Duchy of Cornwall, the Duchy of Lancaster, or a government department. In this Report, we refer to the Crown Estate, the Duchies and the Government departments collectively as "the Crown".

7.150 Leaseholders of the Crown do not, therefore, enjoy statutory enfranchisement rights. However, the Crown has given an undertaking to Parliament that, in most cases, it will act "by analogy" with the legislation to give its leaseholders the same rights that they would enjoy if their landlord were not the Crown.[69] The undertaking also provides that, in these analogous cases, the Crown agrees to be bound by arbitration in the event of a dispute over valuation or other terms.[70]

7.151 The undertaking does not apply in the following situations:

(1) where the relevant property stands on land which is held inalienably;

(2) where particular security considerations apply (on the advice of the Royal and Diplomatic Protection Group of the Metropolitan Police or other security agencies);

(3) where the property is in, or intimately connected with, the curtilage of historic Royal Parks and Palaces; and

---

67 See paras 3.241 to 3.300, 4.293 to 4.251 and 4.339 to 4.351 above.

68 1967 Act, s 33(1) and 1993 Act, s 94(1). An exception may apply in the case of a claim by a sub-lessee against a landlord under a head lease from the Crown. The claim can proceed if the landlord (or a superior landlord under a lease from the Crown) is entitled to grant such a lease extension without the concurrence of the "appropriate authority", or the "appropriate authority" notifies the landlord that, as regards any Crown interest affected, it will grant or concur in granting the freehold or lease extension sought: 1967 Act, s 33(1)(a) and (b) and 1993 Act, s 94(2).

69 This undertaking was first given in 1992, and was reconfirmed by Baroness Scotland of Asthal (then Parliamentary Secretary, Lord Chancellor's Department) in a written reply following the Third Reading of the Commonhold and Leasehold Reform Bill, which proposed amendments to the 1967 and 1993 Acts (ultimately brought into effect by the 2002 Act): *Hansard* (HL), 11 December 2001, vol 629, col 196.

70 The undertaking provides that the Leasehold Valuation Tribunal – now the First-tier Tribunal – is to be empowered to act as arbitrator and will hear such disputes on voluntary reference.

(4) where the property, or the area in which it is situated, has a long historic or particular association with the Crown.

A number of geographical areas within the Isles of Scilly and the wider Duchy of Cornwall estate are specifically stated to fall within the fourth category above – namely the "Off Islands" (St Agnes, Bryher, St Martins and Tresco), the Garrison on St Mary's, the village of Newton St Loe and parts of central Dartmoor.

7.152 In these cases – known as the "excepted areas" – the Crown is free to act as it wishes. However, we understand that two of the Crown bodies named above have adopted voluntary policies in respect of properties located in these areas.[71]

(1) The Crown Estate has adopted a well-publicised voluntary policy of granting lease extensions "within the spirit of the legislation".[72] A leaseholder may apply to extend the term of his or her existing lease by 90 years, subject to a maximum aggregate term of 150 years.[73] The terms of the lease will be a matter for negotiation between the parties and a rent will be payable. The Crown Estate applies this policy regardless of whether the property in question is a house or a flat. Freehold acquisition, however, is not available. The policy makes provision for disputes over the price to be paid for the new lease to be referred to an independent surveyor for arbitration.

(2) The Duchy of Cornwall has told us that its policy is to apply the 1967 Act to see if the leaseholder would qualify for enfranchisement rights were it not for the Crown exemption. Leaseholders who satisfy the criteria for a lease extension will be offered a 50-year extension at a modern ground rent, in line with the legislation. Leaseholders who satisfy the criteria for freehold acquisition will also be offered a 50-year lease extension (again at a modern ground rent) in lieu. If a leaseholder qualifies for both a lease extension and freehold acquisition, it is possible for him or her to have two 50-year lease extensions, thus adding 100 years to his or her lease. However, to achieve this outcome, the leaseholder must apply for a lease extension first and then for a lease extension in lieu of freehold acquisition. Leaseholders who do not qualify for any rights under the 1967 Act may be offered shorter lease extensions to give them some security of tenure.

7.153 In the Consultation Paper, we asked consultees to share their experiences of making enfranchisement claims against the Crown.[74]

---

71 At the time the CP was written, we were only aware of the Crown Estate's voluntary policy and we erroneously assumed that this policy was applied by all of the Crown bodies. We now know that this is not the case.

72 See: https://www.thecrownestate.co.uk/media/2836/excepted-areas-guide.pdf.

73 The Crown Estate Commissioners may not grant a lease in excess of 150 years: Crown Estate Act 1961, s 3(2). While this restriction is disapplied in respect of lease extensions granted by analogy with the enfranchisement legislation (1967 Act, s 33(3) and 1993 Act, s 94(3)), the Crown Estate Commissioners continue to apply the 150-year limit to leases granted over properties in the excepted areas.

74 See CP, Consultation Question 65, para 9.66.

Consultees' views

7.154 For the purposes of analysis, we have divided the responses we received to our question about the Crown according to the particular Crown body to which consultees were referring.[75]

The Crown Estate

7.155 Consultees had differing experiences of making enfranchisement claims against the Crown Estate. Some law firms and leaseholders said that they had found the process to be protracted and costly. Richard Stacey reported that in his experience the Crown Estate tends to propose premiums at the top end of the valuation range and is not prepared to negotiate. Other consultees, including a number of law firms, surveyors' firms and individual professionals, observed that their dealings with the Crown Estate had been straightforward and transparent, with voluntary lease extensions readily forthcoming.

7.156 In its own consultation response, the Crown Estate stated (amongst other points) that:

(1) many of its leaseholders are "sophisticated, professionally-advised customers, often with a detailed knowledge of the Prime Central London property market", who understand that they are buying a time-limited interest; and

(2) it is transparent in relation to the terms that are on offer and the enfranchisement process.

The Duchy of Cornwall

7.157 We received a significant number of consultation responses from leaseholders of the Duchy of Cornwall – particularly those based on the Isles of Scilly – and their supporters. Several of these consultees provided responses in identical terms.

7.158 First, a number of consultees raised fundamental objections to the Duchy's exemption from enfranchisement claims, arguing that the Duchy is in reality a private estate which operates for profit and which should not be entitled to an exemption. Particular criticism was levelled at the fourth category of excepted area: properties or areas with "a long historic or particular association with the Crown", with certain geographic areas listed within the undertaking itself as having such an association.[76] Consultees pointed out that the equivalent category in the undertaking that was in place between 1967 and 1993 was considerably narrower, covering only houses that were of "special architectural or historic interest".[77] It was said that the homes of most Duchy leaseholders are ordinary properties which would not be viewed as being of any architectural or historic significance, but which now fall within the exemption simply because of their geographic location. For example, consultees who reside in Newton St Loe in Somerset reported that the Duchy of Cornwall has refused their

---

75 Where a consultee has simply referred to "the Crown", we have generally taken this to refer to a claim against the Crown Estate specifically (unless the context suggests otherwise).

76 See para 7.151 above.

77 Written Answer, *Hansard* (HL), 31 May 1967, vol 747, col 42W.

enfranchisement applications on the basis of this exception, despite the Duchy having only acquired the Newton Park Estate in 1946.

7.159 In relation to the Isles of Scilly, in particular, a number of consultees observed that the Duchy has no regular physical presence on the islands, and some even queried the Duchy's ownership of the islands. Others argued that, practically speaking, an exemption from enfranchisement rights is not required in order to safeguard the islands. Several consultees commented that it is the Isles of Scilly Wildlife Trust which maintains the "untenanted" land on the islands, rather than the Duchy. Others contended that the presence of numerous statutory bodies on the islands (such as Historic England and the Council of the Isles of Scilly) as well as the planning law regime provide sufficient protection for the islands' heritage and environment. Richard McCarthy, a leaseholder, suggested that restrictive covenants within freehold transfers could be used to restrict the use of houses on the islands to use as a primary residence, thus maintaining a "sustainable community" on Scilly.

7.160 Finally, a number of consultees described negative experiences of making enfranchisement claims against the Duchy of Cornwall. Several leaseholders referred to the difficulty of negotiating with the Duchy. Jacqueline Perkins reported that her lease extension took three years to negotiate and the legal costs were around £5,000. A number told us that they had simply been refused an extension. Others claimed that the lengths of lease extension offered tended to be unsatisfactory, leaving leaseholders unable to sell or mortgage their properties. We were told of lease extension lengths of 19, 21 and 30 years being offered, with several consultees commenting that the maximum they had heard of was one 50-year extension.

The Duchy of Lancaster

7.161 We did not hear from any consultees with direct experience of making enfranchisement claims against the Duchy of Lancaster. One leaseholder of the Duchy of Cornwall told us that he had been advised by the Duchy of Lancaster in correspondence that there were very few properties subject to the enfranchisement legislation on the Lancaster estate, with only three claims having been received in ten years. This consultee also told us that, according to that correspondence, the Duchy of Lancaster's general policy would be to refuse enfranchisement only if the property concerned is of historical significance.[78]

Government departments

7.162 We did not receive any consultation responses relating to enfranchisement claims against government departments.

Direct engagement with the Crown

7.163 As we undertook to do in the Consultation Paper, we have met with representatives of the Crown Estate and the Duchy of Cornwall, and held a telephone conference with representatives of the Duchy of Lancaster. The purpose of these conversations was to discuss the current exemption enjoyed by the Crown, the issues raised with us by consultees, and the likely position of the Crown under a new enfranchisement regime.

---

[78] It should be noted that this information is not entirely consistent with what we were told by the Duchy of Lancaster itself. See paras 7.171 to 7.172 below.

In particular, we were keen to establish whether the Crown would be prepared to give an undertaking to apply any new enfranchisement legislation by analogy where possible, bearing in mind our likely recommendations in respect of the substance of the enfranchisement rights, qualifying criteria, procedure, and valuation. We were also interested to hear the Crown's view on the fourth category of excepted areas ("a long historic or particular association with the Crown"), given the concerns expressed by consultees – and by leaseholders of the Duchy of Cornwall especially – in relation to this category.

7.164 As we did not receive any consultation responses from leaseholders of government departments, we have had no contact with departments in relation to this particular aspect of the current law.

The Crown Estate

7.165 The Crown Estate's representatives described its long leasehold portfolio, and explained how it applies the enfranchisement legislation by analogy in non-excepted areas and its voluntary policy in excepted areas (as set out at paragraph 7.152(1) above). We explained briefly some of the changes which might be made to enfranchisement law under our recommendations, and asked whether an undertaking would still be forthcoming in those circumstances. The Crown Estate stated that as a matter of principle it could see no reason why it would not be content to give another undertaking. It suggested that it would make sense for a single undertaking to be made on behalf of all Crown bodies. We also asked the Crown Estate about its experiences of relying on the fourth category of excepted areas. The Estate's representatives explained that their list of properties which they consider to be within excepted areas has been in place since 1993, and has given rise to very little debate. Most, but not all, of the Estate's properties within excepted areas are covered by one or other of the first three categories.

The Duchy of Cornwall

7.166 The Duchy of Cornwall's representatives provided us with background information about the Duchy and its purpose, as well as a detailed breakdown of the Duchy's residential leasehold portfolio. They also explained how the Isles of Scilly are owned and managed. We were told that the Duchy has owned the islands for around 700 years. At times, the whole of the islands has been let to others, with the Duchy having only taken on direct management responsibility in the last 100 years.

7.167 Currently, on the principal island of St Mary's, the Duchy is the statutory harbour authority. Public roads are maintained and other public functions provided by the Council of the Isles of Scilly. On the inhabited off-islands of St Agnes, Bryher and St Martins, roads and quays are owned and managed by the Duchy. The whole of the island of Tresco is let on a single lease, with the leaseholder responsible for the management of the island's infrastructure. South West Water has recently taken over responsibility for water services on all of the inhabited islands, and for wastewater services on St Mary's and Tresco, where a sewerage network exists.

7.168 All "unenclosed land" on the islands (that is, all uninhabited and untenanted areas, including most of the coastline) is leased to the Isles of Scilly Wildlife Trust for 90 years, at a rent of one daffodil each year. The Trust is a charitable organisation

dedicated to preserving the natural beauty of those parts of the islands contained within its lease.

7.169 The Duchy's representatives also explained how the Duchy deals with enfranchisement claims from its leaseholders. In the non-excepted areas, the Duchy simply follows the 1967 Act by analogy. It does not hold any flats let on long leases so the 1993 Act has no application. In the excepted areas, the Duchy applies the voluntary policy described at paragraph 7.152(2) above. However, the Duchy explained that many of its leaseholders are not able to avail of either statutory rights or the voluntary policy, since their leases do not satisfy the strict qualifying criteria under the 1967 Act. For example, the low rent test and the designated rural areas exemption were both cited as common hindrances encountered by leaseholders.[79] The Duchy also pointed out that to avail of two 50-year extensions under the voluntary policy, leaseholders were required not only to qualify for both a lease extension and a freehold acquisition, but to apply for them in that order. It was said that not all leaseholders are well-advised in this respect, and as such, requests of this kind are rare. These factors may account for some of the consultation responses we received from Duchy of Cornwall leaseholders stating that they had been refused a lease extension altogether, or offered an extension of less than 50 years.

7.170 Finally, the Duchy's representatives advised us that the Duchy would be happy to offer a new undertaking in relation to a reformed enfranchisement regime. However, they disagreed with comments received from some consultees that the fourth category of excepted areas in the current undertaking is too broadly worded. For example, in relation to the Isles of Scilly, the Duchy's representatives explained that even though the specific properties affected might be quite ordinary, it is the long association of the islands as a whole with the Duchy which justifies exemption from ordinary enfranchisement rights. They also disagreed with consultees' suggestions that the unique nature of the islands could be adequately protected by other means.

The Duchy of Lancaster

7.171 The Duchy of Lancaster's representatives told us that, although they had not carried out an audit of the Duchy's property portfolio, they did not believe it to contain more than half a dozen long residential leases. James Maxwell, solicitor at Farrer & Co, who spoke to us on behalf of the Duchy, stated that in 20 years of advising the Duchy, he had not come across a single enfranchisement claim. While this is contrary to what one consultee claims to have been told by the Duchy in previous correspondence,[80] it is apparent that enfranchisement claims against the Duchy of Lancaster are extremely rare.

7.172 The Duchy of Lancaster's representatives considered that some of the Duchy's long leasehold properties would fall within the fourth category of excepted areas, including some which have a "particular" rather than "historic" association with the Crown, but did not appear to have an agreed policy for dealing with claims relating to such properties. As with the Crown Estate and the Duchy of Cornwall, the Duchy of Lancaster's representatives indicated that the Duchy would be happy to offer a new

---

79 We discuss the low rent test at CP paras 7.25 to 7.31 and paras 8.73 to 8.74, and in this Report at paras 6.108 to 6.115. We discuss the designated rural areas exemption at paras 7.266 to 7.273 below.

80 See para 7.161 above.

undertaking in relation to a reformed enfranchisement regime. They also expressed support for treating the two Duchies consistently, given that the current Duke of Cornwall will one day also be the Duke of Lancaster.

Discussion and recommendations for reform

7.173 As with the National Trust, the Crown's portfolio of leasehold properties is diverse. On the one hand, there are grand historic properties which are widely known to have a significant royal connection. On the other, there are quite ordinary homes which are owned by one of the Crown bodies, but in respect of which no royal connection is at all apparent. And of course, there are also many leasehold houses or flats which lie somewhere between these two extremes, such as those located in or very near to the Royal Parks and Palaces.

7.174 The current legal position is clearly an attempt to accommodate this diversity. While the Crown is not bound by the enfranchisement legislation, it has given an undertaking which ought to ensure that most of its "ordinary" properties will have the same enfranchisement rights as other leaseholders. The properties not covered by the undertaking – those in the "excepted areas" – will, in general, be those in respect of which there is a good reason for the usual enfranchisement rights to be unavailable.

7.175 We are of the view that a similar approach should be adopted under a new enfranchisement regime. Firstly, the Crown is in a unique position, legally and constitutionally. We think that a strong justification would be required for us to depart from the general exemption from enfranchisement claims that is currently given to the Crown.[81] We also acknowledge that, despite the strength of views and dissatisfaction conveyed to us by some consultees, particularly those on the Isles of Scilly, there will always be certain cases where at least some sort of exemption from the usual enfranchisement rights will be justified. Since each of the Crown bodies we have spoken to has confirmed to us that it would be happy to give an undertaking on similar terms to that which is in place at present, we consider that there is little to be gained from seeking to remove the Crown's exemption for "ordinary" cases and leave it in place for these "special" cases. Such an approach would not result in a substantive change to the position that currently subsists for the ordinary cases, in which the Crown is obliged by undertaking to apply the enfranchisement legislation by analogy.[82]

7.176 We also note that in the RTM Report we have not recommended any change to the current law, under which the Crown can be the subject of a right to manage claim. The resulting position – whereby the Crown is exempt from enfranchisement claims, but not from the right to manage – therefore reflects the current law in respect of both regimes.[83]

---

81 We note that Lord Berkeley introduced a Private Member's Bill to the House of Lords in January 2020 that would abolish various exemptions and immunities held by the Duchy of Cornwall, including the Duchy's exemption from the current enfranchisement regime.

82 We acknowledge that we have not spoken to any government departments, which also fall within the exemption for the Crown under the current law. However, we have not heard of any issues arising from the application of the exemption to government bodies. We therefore propose to continue to treat government departments in the same way as the other Crown bodies.

83 See the RTM Report at paras 4.100 to 4.105.

7.177 We therefore recommend that the Crown's exemption from statutory enfranchisement rights remains in place, on the basis that the Crown will give an undertaking to act by analogy with the new enfranchisement regime save in certain special cases. The effect will be that in all but those cases, leaseholders of the Crown will have exactly the same enfranchisement rights as any other leaseholder, and will benefit from all of the other reforms we recommend in this Report and in the Valuation Report.

7.178 Regarding the precise categories of special cases which will not benefit from the Crown's new undertaking, we are mindful of consultees' concerns relating to the scope of the "excepted areas" under the current law. However, we do not think that we are well placed to resolve those concerns, which raise wider questions of policy as to the management of the Isles of Scilly in particular, and whether the unique nature of the islands could be maintained without this special treatment. We do, however, make two suggestions in respect of this issue for the Crown bodies to consider.

(1) First, we are aware that even in the excepted areas under the current undertaking, two of the Crown bodies offer lease extensions according to their respective voluntary policies. We have summarised these policies at paragraph 7.152 above. In the case of the Crown Estate's policy, repeated claims can be made, and the length of each lease extension will only be less than that which would ordinarily be granted where the aggregate term would otherwise exceed 150 years. In the case of the Duchy of Cornwall's policy, leaseholders are entitled to a maximum of two 50-year extensions, but we understand that this limitation is based on the rigid application of the 1967 Act rather than on a principled objection to longer lease extensions. We therefore invite the Crown bodies to consider whether a new undertaking to Parliament could provide that lease extensions shall be available by analogy with the legislation in all cases – leaving only freehold acquisition claims in the special cases to be dealt with on a discretionary basis.

(2) Second, we suggest that the first three categories of excepted areas under the current undertaking should remain excluded from any future undertaking. We have not heard of any issues relating to these categories, and we consider that the reasons for exempting properties in these categories from freehold acquisition rights (if our suggestion above is adopted) are self-evident. However, we are mindful of the consultation responses we have received from Duchy of Cornwall leaseholders in particular, explaining that their homes are perfectly ordinary properties, but nevertheless fall within the fourth category of excepted areas because the surrounding area is deemed to have a "long historic or particular association with the Crown". We agree that the wording of the fourth category of excepted areas is somewhat vague, with its reach being potentially much wider than the equivalent category in place prior to 1993. We therefore invite the Crown bodies, in formulating any future undertaking, to consider how any equivalent category might be framed so as to capture only those where exemption is truly necessary.

7.179 Finally, in the event that our first suggestion above is not adopted, we acknowledge that those who fall within the special cases excluded from any new undertaking will have to depend on voluntary action by their landlords in order to avail of any enfranchisement rights, including a lease extension. This may place such

leaseholders in a position which is considerably less favourable than that of other leaseholders. For example, as set out above at paragraph 7.152, leaseholders of the Crown Estate who fall within the excepted areas at present can avail of lease extensions "within the spirit of the legislation", meaning that they can claim repeated lease extensions of up to 90 years – but this is subject to a maximum aggregate term of 150 years. Duchy of Cornwall leaseholders are in an even worse position, being entitled even in the best-case scenario to just two 50-year lease extensions. Neither can make a freehold acquisition claim.

7.180 We appreciate that, to a large extent, these limitations within the Crown bodies' voluntary policies reflect limitations within the existing law of statutory enfranchisement rights. However, many of these limitations will be removed or reduced by recommendations which we make elsewhere in this Report – such as our recommendation that the length of a lease extension be increased significantly,[84] and our recommendations in respect of qualifying criteria.[85] We would encourage the Crown bodies, when setting their voluntary policies in future, to ensure that these policies reflect the law which is in force at that time. We consider that this would improve considerably the position of Duchy of Cornwall leaseholders in particular, some of whom we are told are currently excluded from enfranchisement rights because the Duchy's voluntary policy reflects aspects of the current law such as the low rent test, which will be abolished under our new regime.[86]

7.181 Similarly, we note that there is no requirement under the current law for the Crown Estate to limit lease extensions to a maximum aggregate term of 150 years, even in excepted areas. We understand that this limit reflects the statutory limit on leases granted by the Crown Estate Commissioners in section 3(2) of the Crown Estate Act 1961, but that limit is expressly disapplied in the case of lease extensions granted by analogy with the enfranchisement legislation.[87] We recommend that this limit is similarly disapplied in relation to lease extensions granted by analogy with future enfranchisement legislation.

---

84 See Recommendation 2, at para 3.62 above.

85 See Ch 6 above.

86 See Recommendation 28, at para 6.115 above.

87 1967 Act, s 33(3) and 1993 Act, s 94(3).

Recommendation 47.

7.182 We recommend that the Crown should remain exempt from statutory enfranchisement rights, on the basis that the Crown bodies will give an undertaking to act by analogy with the new enfranchisement regime save in certain special cases.

7.183 We recommend that the restriction imposed by section 3(2) of the Crown Estate Act 1961 on the term for which a lease may be granted by the Crown Estate Commissioners should not apply where the lease in question is to be granted by way of renewal of an existing long lease and, but for the Crown's exemption from statutory enfranchisement rights, there would be a statutory right for the leaseholder of the existing lease to acquire a new lease.

Escheat

7.184 Finally, we note that we have received a small number of consultation responses concerning the position of leaseholders who discover that the freehold title to their property has become subject to the doctrine of "escheat".[88] Leaseholders in this position are unable to bring any statutory enfranchisement claim. It seems that they will also be unable to negotiate the purchase of a voluntary lease extension from the Crown and, depending on the circumstances, may not be able to negotiate a voluntary purchase of the freehold either. We have also been told by consultees that, where a voluntary transaction can be agreed, this tends to be more expensive and time-consuming than a statutory enfranchisement claim would be.

7.185 The operation of the doctrine of escheat, and its impact on leaseholders unfortunate enough to be caught up in it, is beyond the scope of the enfranchisement reform project. However, we would encourage the Crown to consider carefully the manner in which it deals with leaseholders whose properties are subject to escheat, and whether any provision can be made to improve the situation of these leaseholders.

COMMUNITY-LED HOUSING

Introduction

7.186 Community-led housing ("CLH") is a small but growing sector of the housing market. CLH developments enable small groups of individuals or larger communities to have more control over their own homes or the wider area in which they live, and to run a housing development in a way which they consider to be of benefit to themselves and/or to their community. Very often, CLH developments are also intended to provide a supply of housing which remains genuinely affordable for local people for the long term. In addition to assured tenancies, long residential leases are widely used in CLH developments.

---

88 For a simple explanation of the doctrine of escheat, see: https://www.burges-salmon.com/-/media/files/non-pub-pdfs/escheat-guidance-flyer.pdf?la=en.

7.187 In the Consultation Paper, we described several different models which CLH may adopt, including community land trusts and co-housing schemes. We explained that various representative bodies from the CLH sector have claimed that the risk of freehold acquisition pursuant to enfranchisement legislation is a threat to the security of the sector and its future growth, and called for an exemption from such claims. While there is already one means by which some CLH organisations can secure exemption from freehold acquisition claims, by obtaining a "Community Right to Build Order", it can be costly and cumbersome to pursue this route.[89]

7.188 We therefore asked consultees whether there should be a new exemption from enfranchisement rights for CLH developments. We also sought consultees' views on the scope of any such exemption, how it should work, and any other issues that consultees considered to be relevant.[90]

Consultees' views

Whether there should be an exemption

7.189 Consultees were largely supportive of an exemption from freehold acquisition claims for the CLH sector. Those who argued in favour of an exemption included law firms with experience in the sector, residents of CLH developments, commercial landlords, valuers and professional representative bodies. Only a small number of consultees felt that the CLH sector should also be exempt from lease extension claims, and no particular reason was advanced for this view.

7.190 In a joint consultation response, the National CLT Network and the UK Cohousing Network summarised the main arguments for an exemption from freehold acquisition as follows:

> In the case of Community Land Trusts, leasehold enfranchisement undermines their statutory purpose. For example, it may require a CLT to sell an affordable home to its owner, which would not be in keeping with its purpose to manage the affordable home for the social, economic and environmental interests of its local community.
>
> In the case of cohousing communities, leasehold enfranchisement undermines their stated purpose, which we would like to see put on a statutory footing. For example, a resident of the community may seek enfranchisement, which would remove an obligation on them to fulfil the community's objectives with that home, potentially including the payment of a ground rent to sustain the community.
>
> Without such an exemption, Community Land Trusts and cohousing communities can only fully protect their homes from enfranchisement by seeking a Community Right to Build Order. However, as the Consultation Paper notes this process can be lengthy and costly. The rationale for exempting homes built under a Community Right to Build Order should apply equally to those owned by a Community Land Trust or cohousing community.

---

89 See CP, paras 9.67 to 9.73.

90 See CP, Consultation Question 66, paras 9.74 to 9.75.

7.191 Other consultees also stressed the importance of CLH as a source of affordable housing, arguing that properties in CLH developments should be prevented from passing into the regular housing market. However, some consultees observed that the social housing sector also provides affordable housing, yet is subject to enfranchisement claims. They suggested that leaseholders of CLH developments should have enfranchisement rights, just as leaseholders of housing associations do.

7.192 Of the consultees who were opposed to special treatment for the CLH sector, most appeared to be leaseholders – although we did not get the impression that these were leaseholders within CLH developments. Several of these consultees expressed concern that any exemption from enfranchisement rights for CLH developments would be used by regular commercial landlords to evade legitimate enfranchisement claims. A few consultees who opposed an exemption argued that long leases were unnecessary to CLH schemes, suggesting that assured shorthold tenancies ought to be used instead.

The scope of an exemption

7.193 As with shared ownership leases, it must be possible to define what is meant by CLH, if there is to be any kind of exemption from enfranchisement rights for the sector.

7.194 The National CLT Network and the UK Cohousing Network pointed us towards the existing statutory definition of community land trusts found in section 79 of the Housing and Regeneration Act 2008 and put forward a proposal for a new statutory definition of cohousing. They stated that the exemption should apply to CLH developments which meet these definitions. However, they also suggested that a generic definition of CLH might be adopted, which would encapsulate a wider range of forms of CLH. They pointed out that for the purposes of Homes England's Community Housing Fund, schemes will qualify as CLH where:

(1) meaningful community engagement and consent occurs throughout the development process;

(2) a local community group or organisation owns, manages or stewards the homes and in a manner of their choosing; and

(3) there are clearly defined benefits to the local area or specified community which are legally protected in perpetuity.

7.195 Wrigleys LLP, solicitors, suggested that any definition should be based around the key principles of CLH. In particular, it should be a requirement that the development operates not for material private profit but for the benefit of a community. They were also of the view that the definition should include a non-exhaustive list of the legal structures which CLH organisations may adopt – such as a community land trust, co-operative society, community benefit society or community interest company (among others).

7.196 Several consultees noted that Government has proposed that CLH developments will be exempt from the future ban on the grant of new leases of houses, and the future ban on ground rents in long leases. These consultees suggested that the definition of

CLH used for those purposes should be the same or at least complementary to that used for the purposes of any exemption from enfranchisement rights.

How an exemption should work

7.197 We noted in the Consultation Paper that the representative bodies from the CLH sector who had previously called for an exemption for the sector from freehold acquisition claims did not suggest that such an exemption should apply automatically to all CLH schemes. Instead, they suggested that CLH organisations should be required to decide in respect of each housing development whether the exemption is to apply.

7.198 The National CLT Network and the UK Cohousing Network expanded on this suggestion in their consultation response. They said:

> We have previously suggested that exemptions could follow from the Community Land Trust or cohousing community issuing a notice to the effect. It could be reflected in the lease. We do not have a fixed view on how this should work, so long as the process is simple and efficient.
>
> We would not want any legislation or regulations to fetter the rights of Community Land Trusts or cohousing communities to exercise the exemption. For example, by providing that they can only be exempt in designated areas, or under certain conditions. It should be for the local community to determine the applicability of the exemption, following their objects and local circumstances.

7.199 Wrigleys LLP also took the view that the exemption should apply only where it is expressly adopted in respect of a given development. They wrote:

> We believe that this could be done by way of a clause in the lease which would document the decision to make the exemption. Perhaps there could be an exchange of notices along the lines of those prescribed in section 38A of the Landlord and Tenant Act 1954? This is a procedure that is familiar to the property industry and so should be a relatively straightforward process to implement. It would have the benefit of ensuring that tenants are specifically alerted to the decision to opt out of enfranchisement.

7.200 Tapestart Limited, a landlord, suggested that it should be possible for CLH organisations to declare that a site benefits from the exemption, perhaps by lodging a certificate with the local authority or with HM Land Registry.

Discussion and recommendations for reform

An exemption from freehold acquisition rights

7.201 Our Terms of Reference require us to consider the case to improve access to enfranchisement. We are, consequently, aware that the introduction of any new exemption from or limitation on enfranchisement rights may appear to be inconsistent with the general thrust of our recommendations. There must be a strong rationale for recommending a new instance in which enfranchisement rights are curtailed.

7.202 That said, we consider that such a rationale exists in respect of freehold acquisition rights for leaseholders of CLH developments. Our reasoning is as follows.

(1) First, and most importantly, CLH developments arise from motivations which are very different from those of ordinary commercial developers. Generally, they are created by small groups of people in response to their own housing needs or the needs of their local community. The housing is often provided at a price which is below market value and the development may also provide other wider benefits for the local community. Crucially, the development is not created with a view to accumulating material private profit, and will generally be owned and/or controlled democratically by the residents themselves, or by other members of the community.

We consider that these characteristics – affordability, community benefit and democratic control – are valuable ones which should be fostered within our challenging housing market, and this requires an exemption from freehold acquisition rights. Since leasehold ownership is one of the primary means used to deliver CLH developments, the integrity of those developments and the attributes referred to above would stand to be undermined if its residents were able to exercise freehold acquisition rights, whether individually or collectively. For much the same reasons, Government has announced that CLH developments will also be exempt from the forthcoming ban on the grant of new leases of houses, and the ban on ground rents in new leases.[91]

(2) Second, we do not think that long leaseholders within CLH developments generally expect to be able to enfranchise, or plan to do so. In general, these homeowners have purchased their homes because they want to be part of the CLH community and identify with its values and objectives, which include retaining the homes within the CLH structure (and, where applicable, at an affordable level) in perpetuity.

(3) Additionally, as set out above, Community Right to Build Orders under the Town and Country Planning Act (as amended by the Localism Act 2011) already allow CLH developments to ensure that they are not subject to freehold acquisition claims.[92] This kind of exemption has, therefore, already received Government approval. However, we consider that it should be available more readily, without the CLH organisation being required to pursue the lengthy and complex procedure involved in obtaining a Community Right to Build Order.

(4) Finally, we consider that the impact on CLH leaseholders of an exemption from freehold acquisition rights is likely to be relatively small. As we noted above, many of these leaseholders will have no desire to enfranchise. Most will already have a say in how their homes are managed, and perhaps even a share in the ownership of the development, via the CLH organisation itself. And, of course, they will retain their individual right to seek a lease extension at any point. Lease extensions do not pose a threat to the integrity of CLH developments in the way that freehold acquisition claims do. All long leaseholders of CLH

---

91 See *Implementing reforms to the leasehold system in England – Summary of consultation responses and Government response* (June 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/812827/190626_Consultation_Government_Response.pdf.

92 See para 7.187.

developments will therefore continue to have permanent security of tenure in their homes, as well as the ability to mortgage and sell their properties.

7.203 We therefore recommend that an exemption from freehold acquisition claims should be available in respect of CLH developments. However, leaseholders of such developments should still enjoy the same lease extension rights as all other leaseholders.

A definition of community-led housing

7.204 As mentioned above, Government has announced that CLH developments will be exempt from the leasehold house ban and ground rent ban. We will work with Government to develop a definition of CLH which can be used both for the purposes of exemptions from those bans and for the purposes of an exemption from freehold acquisition claims. However, we agree with those consultees who suggested that we should devise an overarching definition, based around the key principles of CLH, which can apply to the wide variety of forms and legal structures under which CLH developments can operate. At present, we think that those principles should include:

(1) a stated intention to benefit a defined group or community;

(2) the absence of the accumulation of material private profit; and

(3) a system of decision-making which is within the control or influence of members of the relevant group or community.

The operation of the exemption

7.205 It would be possible for a development which falls within our definition of CLH simply to be automatically exempt from freehold acquisition rights. This is, after all, how exemptions and exclusions from enfranchisement rights generally operate. However, we note that a number of consultees, including the National CLT Network and the UK Cohousing Network, suggested that CLH organisations should be required to indicate, by some means or another, that the exemption is to apply to a given development.

7.206 We agree that it would not be appropriate for the exemption from freehold acquisition rights for CLH developments to arise automatically wherever a housing development meets our definition of CLH. This is because it may not always be obvious whether or not this is the case. It is not so easy to tell, for example, whether a development exists for the benefit of a defined community as it is to tell whether a lease is granted by a Crown body, or whether it contains the specific provisions required for a shared ownership lease to be excluded from freehold acquisition rights. We think that a leaseholder (or prospective leaseholder) has a right to know, with certainty, whether or not his or her lease benefits from freehold acquisition rights. As such, we think that there needs to be an express statement to this effect in relation to each CLH development.

7.207 For much the same reason, though, we do not agree that it should simply be for a CLH organisation to declare that the exemption applies to a particular development. In some cases, there might be legitimate cause for debate over whether the development in question satisfies each of the elements of the definition of CLH. We are mindful also of the concern expressed by some consultees that ordinary landlords

may attempt to characterise developments as CLH purely as a means to block future enfranchisement claims.

7.208 Some degree of independent oversight is needed to prevent the owners of developments which do not, in reality, display the key characteristics of CLH from declaring those developments to be exempt from enfranchisement claims. On the other hand, we recognise that it would be undesirable to place significant administrative burdens in the way of genuine CLH organisations seeking to avail of the exemption. On balance, we consider that it would be appropriate to require a CLH organisation seeking to avail of the exemption in respect of an existing or prospective development to make an application to the Tribunal for a declaration that the development is or will be exempt, because it satisfies or will satisfy the definition of CLH. While it should be possible for holders of long leases within the development to challenge such an application, we envisage that such challenges would be rare, and that most applications could be resolved relatively speedily and without the need for a hearing.

7.209 We therefore recommend that the exemption from freehold acquisition rights for CLH developments should apply where the CLH organisation has obtained a declaration from the Tribunal to that effect, on the basis that the development satisfies or will satisfy the definition of CLH. Further, we consider that the development should cease to benefit from the exemption if at any time it no longer satisfies the definition of a CLH.

Recommendation 48.

7.210 We recommend that a new exemption from freehold acquisition claims should be available in respect of community-led housing. The exemption should apply to a development where the community-led housing organisation has obtained a declaration from the Tribunal to that effect, on the basis that the development satisfies or will satisfy the definition of community-led housing. The development will cease to benefit from the exemption if at any time it no longer satisfies the definition of community-led housing.

LEASE-BASED FINANCIAL PRODUCTS

Home purchase plans

7.211 Conventional mortgage arrangements are not compliant with Sharia law, which prohibits the payment of interest. Accordingly, a range of financial products have been developed in order to enable property to be purchased in compliance with this prohibition. A number of these products, which are often referred to as “home purchase plans”, involve the use of a long lease, typically granted for a term of between 25 and 35 years.[93]

[93] See, for example, Al Rayan Bank, https://www.alrayanbank.co.uk/home-finance/home-purchase-plan/; UBL Bank, https://www.ubluk.com/islamic-banking/product-and-services/home-finance/islamic-home-purchase-plan/; Ahli United Bank, https://www.ahliunited.com/uk/uk-property-finance/islamic-home-purchase-plan/.

Ijara wa iqtina

7.212 Under an Ijara wa iqtina home purchase plan, the finance provider will purchase the property outright (either on a freehold or a leasehold basis). The customer will then enter into two agreements with the provider. The first will be an agreement to pay to the provider the purchase price of the property in fixed monthly instalments, usually over a term of 25 years. The second will be a long lease, giving the customer the right to live in the property in return for a monthly rent. The rent payable will decrease over time as the purchase price is gradually paid to the provider. When the purchase price has been paid in full, the provider will transfer its interest in the property to the customer. We understand that an enfranchisement claim is often treated as an event that will terminate the Ijara arrangement.

Diminishing Musharakah

7.213 Under a Diminishing Musharakah agreement, the finance provider and the customer co-own the purchased property (whether it is freehold or leasehold), in shares which correspond to their respective contributions to the purchase price. The parties will enter into a lease giving the customer the sole right to occupy the property for the duration of the agreement. The customer's monthly repayments consist partly of rental payments under the lease, and partly of capital payments under the agreement which are used to buy out the provider's share in the property over time. As the customer's share grows and the provider's share decreases, the rent payable under the lease also decreases. Once the customer owns 100% of the equity in the property, the provider will transfer the legal title into the customer's sole name.

7.214 As security for the customer's obligations to make payments of rent under the lease and capital payments, the customer's interests in the property under the lease and the Diminishing Musharakah agreement are subject to a charge in favour of the provider. Again, we understand that an enfranchisement claim is often treated as an event that will terminate the agreement.

Discussion

7.215 We did not ask any questions about home purchase plans in the Consultation Paper. In the Commonhold Consultation Paper, however, we asked several questions about the compatibility of these financial products with commonhold. We also invited consultees to share their views on how the relationship between a bank and a customer who has purchased property through a lease-based home purchase plan can be preserved following a collective freehold acquisition claim.[94] Few answers were submitted to the latter question, and only a small number of consultees engaged with the substantive issues. We did not receive any responses arguing for or against the exclusion of leases granted pursuant to Sharia law-compliant financial products from enfranchisement rights.

7.216 In the Commonhold Report, we recommend that leases granted pursuant to home purchase plans should be exempt from the general ban on the grant of long leases within a commonhold.[95] We note, too, that Government intends to provide exemptions

---

94 See Commonhold CP, paras 12.69 to 12.89.

95 See the Commonhold Report, paras 11.142 to 11.145.

from both the leasehold house ban and the ground rent ban for such leases.[96] These exemptions are essential in order for these financial products to remain available to assist prospective homeowners in purchasing freehold houses and commonhold units, in addition to homes available on a leasehold basis.

7.217 We have considered whether there is reason for leases granted pursuant to home purchase plans also to be excluded from enfranchisement rights. These leases exist to facilitate a particular financial arrangement between two parties, as an alternative to a loan requiring the payment of interest. It would therefore be undesirable if an enfranchisement claim were able to disrupt the ordinary operation of this carefully considered commercial relationship.

7.218 However, these leases are not expressly excluded from enfranchisement rights under the current law, and we are not aware that this causes any issues in practice. That is, we are not aware of home purchase plan customers taking advantage of their technical legal rights to disrupt the arrangement they have entered into with their finance provider, or even if an enfranchisement claim would cause difficulty for the provider. Indeed, it may be that it is of no benefit to the customer to make an enfranchisement claim, as that would terminate an agreement that is, overall, facilitative for them. There may also very well be a question of affordability of enfranchisement in respect of a lease granted pursuant to one of these products, depending on what Government decides regarding the options we have put forward in the Valuation Report for calculating enfranchisement premiums.

7.219 Given that we do not have a solid evidence base demonstrating a clear case for or against the exclusion of leases granted pursuant to home purchase plans from enfranchisement rights, we do not consider that we are able to make a recommendation one way or the other. We suggest that Government should examine further the interaction between such leases and the current enfranchisement regime, with the assistance of appropriate evidence from the Islamic finance sector, and consider whether there is a case for their exclusion from enfranchisement rights in the future, in particular arising from reform of the calculation of enfranchisement premiums.

7.220 When considering whether or not to make an exception, Government should also consider the implications of their decision on the regime for buildings held on a leasehold structure to convert to commonhold.[97] As conversion of a building to commonhold results in the freeholder losing his or her interest in the building, we recommend in the Commonhold Report that, where the freeholder does not consent to the conversion, leaseholders will need to acquire the freehold compulsorily through a collective freehold acquisition claim as part of the conversion process (although

---

96 See *Implementing reforms to the leasehold system in England – Summary of consultation responses and Government response* (June 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/812827/190626_Consultation_Government_Response.pdf.

97 As we explain in Ch 3 of the Commonhold Report, conversion to commonhold is the process by which leaseholders in a building can take advantage of the commonhold model (and obtain the freehold of their flats) by replacing the existing leasehold structure with a commonhold ownership and management structure.

leaseholders will be able to streamline the two processes: see the Commonhold Report at paragraphs 7.18 to 7.61. In the Commonhold Report, we adopt the same eligibility requirements to convert as are required to bring a collective freehold acquisition claim. Whether or not an exception is made to exclude customers under lease-based financial products from enfranchisement rights therefore has ramifications in the context of conversion to commonhold.[98]

7.221 Whatever the conclusion, we suggest it will be necessary to ensure that, where the superior interest in the property owned by the finance provider (or by the finance provider and the customer jointly) is itself a leasehold interest, the usual enfranchisement rights remain available in respect of that lease, and that it is not susceptible to being acquired as an intermediate lease as part of a collective freehold acquisition claim.

Other lease-based financial products

7.222 There are also a small number of other financing arrangements which make use of a long lease, typically aimed at elderly homeowners or prospective homeowners.

Lifetime leases

7.223 Lifetime leases are often used by older people to purchase a property for their retirement at a price lower than that which would be payable on the open market. The provider purchases the property and grants the customer a lease for the duration of their life at a premium. The discount applied to the purchase price of the property to calculate the premium for the lease will reflect the age of the customer or customers, and therefore the amount of time the provider considers is likely to pass before it can recover possession of the property.

Home reversion plans

7.224 Home reversion plans are a form of equity release. They involve the sale of the customer's property to the provider, who then grants the customer a "leaseback" for life. The sale price paid by the provider to the customer for the property will be some way below market value; the extent to which it is below market value will depend on the age and state of health of the customer. A customer whose life expectancy is considered by the provider to be low will receive a higher percentage of the property's market value than one who is expected to live for many years to come, as the provider calculates that it will recover possession of the property sooner.

---

98 Particularly if Government adopts conversion "Option 2", which would require all leaseholders who are eligible to participate in the conversion process to take the freehold of their flat (or "unit" in the context of commonhold) on conversion. This would necessarily frustrate the financial arrangement between the customer and the finance provider. Consequently, if Government does not exclude customers from enfranchisement rights, it would be necessary to ensure that the finance provider, rather than the customer, takes the commonhold unit on conversion, so as not to undermine the financial arrangement.

Discussion

7.225 We did not ask any questions about the relationship between these kinds of financial products and the operation of enfranchisement rights in the Consultation Paper.[99] As with leases granted pursuant to Sharia law-compliant financial products, we note that Government has advised that both lifetime leases and leases granted under home reversion plans will be exempt from both the leasehold house ban and the ground rent ban for such leases. But we do not have any evidence to suggest whether there is a need for such leases also to be excluded from enfranchisement rights. Accordingly, we once again suggest that Government should consider this issue further, in the light of available evidence from appropriate sources. Again, where the interest held by the provider is itself a leasehold interest, the usual enfranchisement rights should remain available in respect of that lease, and it should not be susceptible to being acquired as an intermediate lease as part of a collective freehold acquisition claim.

OTHER EXCEPTIONS AND QUALIFICATIONS

7.226 The final section of Chapter 9 of the Consultation Paper summarised a number of other exceptions and qualifications to the availability of enfranchisement rights. We asked a broad question, inviting consultees to tell us about their experiences of these exceptions and qualifications, and to share their views on whether they should be retained in any new enfranchisement regime.[100]

Heritage property transferred for public benefit

The current law

7.227 The Inheritance Tax Act 1984 ("the 1984 Act") makes provision for relief from inheritance tax on the transfer of certain "heritage" assets, such as significant works of art, historic buildings or land which is of outstanding scenic, historic or scientific interest.

7.228 Specifically, section 30 of the 1984 Act provides that a transfer of property will be "conditionally exempt" from inheritance tax where the property has been "designated" under section 31, and the recipient has given undertakings to preserve the property and provide reasonable public access thereto. Section 31(1) of the 1984 Act empowers the Treasury to designate:

(1) objects or collections of objects which are of national, scientific, historic or artistic interest;

(2) land which is of outstanding scenic or historic or scientific interest;

---

99 Some leases for life, which meet certain criteria, are excluded from enfranchisement rights under the 1967 Act and the 1993 Act: see CP, paras 7.21(1) and 7.59. In general, however, it would appear that such leases will qualify for enfranchisement rights even though their duration is at all times uncertain and may, in reality, end up being less than 21 years. This is because leases granted for the duration of a lifetime will take effect as a 90-year lease, by virtue of s 149(6) of the Law of Property Act 1925. We do not make any recommendations in this Report which would change this position: see para 6.84 above.

100 See CP, Consultation Question 67, para 9.96.

(3) buildings for the preservation of which special steps should be taken by reason of their outstanding historic or architectural interest; and

(4) areas of land which are essential for the protection of the character and amenities of such buildings, or objects historically associated with such buildings.

Decisions by HM Treasury and HM Revenue & Customs whether to designate particular property will be based on advice received from bodies such as Natural England and English Heritage.

7.229 The tax can become payable if a "chargeable event" occurs subsequently. This will be the case if the undertakings are breached, the property is sold, or the owner of the property dies or otherwise disposes of the property other than by another conditionally exempt transfer under which the new owner provides replacement undertakings.[101]

7.230 Land or buildings which have been designated under section 31 may also be exempt from claims to acquire the freehold of a house and premises under the 1967 Act. Section 32A of the 1967 Act states that a notice to acquire the freehold of a house and premises will be of no effect if two conditions are met.

(1) The first condition is that any part of the house or premises has been designated under section 31 of the 1984 Act (or an application for such designation is pending), and no chargeable event has subsequently occurred.[102]

(2) The second condition is that the leaseholder's lease:

(a) was created after section 32A was introduced (namely, after 1 November 1993); or,

(b) if it was created before that date, does not satisfy the other qualifying criteria for enfranchisement rights under the 1967 Act (as those criteria stood prior to 1 November 1993).[103]

7.231 It should be noted that lease extensions remain available to leaseholders who are affected by the above exemption (provided all other qualifying criteria for a lease

---

101 1984 Act, s 32.

102 Alternatively, the exemption will apply where any part of the house or premises is the property of a body not established or conducted for profit, and a direction has been given in relation to it under s 26 of the 1984 Act (or an application for such a direction is pending). Under s 26 of the 1984 Act (which has now been repealed), the Treasury was empowered to make a direction in relation to a list of categories of property which had been, or were to be, transferred to a body not established or conducted for profit, very similar to the categories of property listed in s 31. In addition, s 32A of the 1967 Act provides that the reference to designation under s 31 of the 1984 Act should also be read as referring to designation under s 34 of the Finance Act 1975 or s 77 of the Finance Act 1976, and that the reference to a direction under s 26 of the 1984 Act should also be read as a reference to a direction under para 13 of sch 6 to the Finance Act 1975. It appears to us that these provisions of the Finance Act 1975 and the Finance Act 1976 were the direct predecessors of ss 26 and 32A of the 1984 Act. We have limited information as to the numbers of properties which were the subject of a direction under s 26 of the 1984 Act or para 13 of sch 6 to the Finance Act 1975, or which were designated under s 34 of the Finance Act 1975 or s 77 of the Finance Act 1976. For convenience, we therefore refer only to designation under s 31 of the 1984 Act throughout our discussion.

103 See further discussion of this condition at paras 7.239 to 7.240 below.

extension claim under the 1967 Act – such as the low rent test – are satisfied). There is no equivalent to section 32A in the 1993 Act.

Policy background

7.232 We met with HM Treasury and HM Revenue & Customs to discuss the policy behind the inheritance tax relief provided for by section 30 of the 1984 Act, and the corresponding exemption from freehold acquisition rights provided by section 32A of the 1967 Act.

7.233 They explained to us that this form of inheritance tax relief is designed to avoid the risk of valued heritage assets being lost to the nation as a result of a substantial inheritance tax bill. A requirement to pay inheritance tax on these kinds of assets could mean that they end up being sold or broken up in order for the tax to be paid. A painting, for example, might be sold to an overseas buyer. An historic stately home, on the other hand, might be pulled down and the land sold off in piecemeal fashion. Providing a process by which a transfer of heritage assets can be granted a conditional exemption from inheritance tax liability means that these outcomes can be avoided and the assets preserved for the nation. As a quid pro quo for the exemption, however, the beneficiary of the transfer will be required to give appropriate undertakings relating to the preservation of the property concerned, providing for its management, upkeep and even in some cases improvement. The beneficiary must also give an undertaking guaranteeing reasonable access to the property for the general public. In this way, our substantial heritage assets can be made available for the enjoyment of the whole nation.

7.234 In the case of heritage assets which are real property, the exemption from freehold acquisition rights under section 32A of the 1967 Act supports arrangements of this sort. HM Treasury and HM Revenue & Customs explained to us that a freehold acquisition claim would interfere with the operation of a conditional exemption from inheritance tax liability under section 30 of the 1984 Act. This is not just because the transfer of a freehold interest pursuant to an enfranchisement claim – even of only a small part of the conditionally exempt property – is, strictly speaking, a sale of the property (and therefore a chargeable event under section 32 of the 1984 Act). Rather, such a transfer is likely to impact on compliance with the undertakings given in lieu of the inheritance tax exemption (again, a chargeable event), and on the entire arrangement carefully agreed between the beneficiary of the exemption and HM Revenue & Customs. Aside from the burden that would fall on the beneficiary of the exemption if the inheritance tax previously waived suddenly becomes due, the property would likely no longer be available for the enjoyment of the public.

7.235 Government has confirmed that it continues to support the conditional exemption rules in the 1984 Act and the related exemption from freehold acquisition rights under s32A of the 1967 Act. As HM Treasury told us, “the Government supports the exemption as it encourages public access to assets of national significance”.

Discussion and recommendations for reform

7.236 We did not receive any consultation responses relating to section 32A of the 1967 Act, either from landlords who benefit from it or leaseholders whose properties are affected by it. We understand that there may in fact be very few houses designated under section 31 of the 1984 Act which are let on long leases.

7.237 That said, it is clear from our discussion with HM Treasury and HM Revenue & Customs that there is the potential for arrangements pursuant to the conditional exemption rules in sections 30 to 32 of the 1984 Act to be significantly undermined by a freehold acquisition claim. We therefore consider that houses designated under section 31 of the Act should remain exempt from freehold acquisition rights. Moreover, given our recommendation for the creation of a unified scheme of qualifying criteria for flats and houses, based around the new concept of a residential unit, we consider that this exemption should, in future, apply to all residential units – meaning to flats as well as to houses.[104] In other words, properties which have been designated under section 31 should be exempt from both individual and collective freehold acquisition claims. We acknowledge that this expansion of the current exemption may, in theory, result in the removal of the right to collective enfranchisement from some leaseholders who currently have that right. However, we gather from HM Treasury and HM Revenue & Customs that the likelihood that there are any designated properties which are eligible for a collective freehold acquisition claim is slim.

7.238 Of course, as we noted above, leaseholders who are affected by the current section 32A exemption are still able to avail of the right to a single 50-year lease extension under the 1967 Act. Similarly, under a new enfranchisement regime, all leaseholders of designated properties would have the same right to a 990-year lease extension as all other leaseholders. HM Revenue & Customs has confirmed to us that it would not consider a lease extension, or even the grant of a new long lease, to be a chargeable event under section 32 of the 1984 Act, provided it does not result in a failure to comply with any undertakings given.

7.239 Finally, we noted above that on the current law, designated properties will be exempt from claims to acquire the freehold only where the leaseholder's lease:

(1) was created after section 32A was introduced (namely, after 1 November 1993); or,

(2) if it was created before that date, does not satisfy the other qualifying criteria for enfranchisement rights under the 1967 Act (as those criteria stood prior to 1 November 1993).

This condition refers to the various financial criteria which houses and leases were required to satisfy in order to qualify for enfranchisement rights under the 1967 Act (as originally enacted).[105] The purpose of this condition was to ensure that the introduction of section 32A in 1993 did not take enfranchisement rights away from any leaseholder who already had such rights – in other words, to ensure that the effect of section 32A would be prospective only.

7.240 In Chapter 6, we recommend that financial criteria should play no part in a new scheme of qualifying criteria for enfranchisement rights.[106] In line with this recommendation, we suggest that these criteria should no longer play a role in determining the application of the exemption of designated heritage properties from

---

104 See paras 6.27 to 6.45 above.

105 See CP, paras 7.25 to 7.31 and 7.49 to 7.50

106 See paras 6.108 to 6.115 above.

freehold acquisition claims either. This approach will have the consequence of removing freehold acquisition rights from leases of designated properties granted prior to 1993 which fulfilled the pre-1993 financial criteria under the 1967 Act. However, we consider that this restriction of rights in the interests of simplicity can be justified. We have reason to believe from our discussions with HM Treasury and HMRC that the number of leases so affected is likely to be very small. Under our recommendations those leaseholders will be able to obtain a 990-year lease extension.

7.241 We therefore recommend that properties which have been designated under section 31 of the Inheritance Tax Act 1984, for the purposes of a conditional exemption from inheritance tax under section 30 of that Act, should be exempt from individual and collective freehold acquisition claims under a new enfranchisement regime.

Recommendation 49.

7.242 We recommend that properties which have been designated under section 31 of the Inheritance Tax Act 1984, for the purposes of a conditional exemption from inheritance tax, should be exempt from individual and collective freehold acquisition claims under our new enfranchisement regime.

Sections 28, 29 and 30 of the 1967 Act

7.243 Sections 28, 29 and 30 of the 1967 Act operate to exclude or qualify enfranchisement rights in various situations where the landlord of the house is one of various types of public body.

(1) Section 28 provides an exemption from claims to acquire the freehold or a lease extension where the landlord is one of various specified public bodies, and the property will be required for "relevant development" within the next ten years.

(2) Section 29 enables a local authority landlord, and some other kinds of landlord, to require that any conveyance or lease extension executed under the 1967 Act includes a covenant on the part of the leaseholder restricting development of the land, so as to reserve the land for possible development by the authority.

(3) Section 30 enables a New Town authority landlord to require that any conveyance or lease extension executed under the 1967 Act includes a covenant against leasing the property or any part of it without the local authority's written consent, and a covenant giving the local authority reserving rights of first refusal upon any sale of the property or any part of it.[107]

There are no equivalent provisions in the 1993 Act.

7.244 We received very few consultation responses referring to these provisions. The National Housing Federation, a body representing housing associations, argued that the section 29 power should be retained and extended to private landlords. Another

[107] See CP, paras 9.80 to 9.86 for more detail as to these provisions.

consultee expressed the view that it should be abolished entirely. Damian Greenish stated that none of these provisions are very widely used.

7.245 We recommend that sections 28 to 30 of the 1967 Act should not be replicated in a new enfranchisement regime. We have not received any evidence from the public bodies who may avail of these provisions to suggest that they are routinely relied upon or arguing for their retention. Further, we note that no similar provisions were included in the 1993 Act, when enfranchisement rights for leaseholders of flats were created.

Recommendation 50.

7.246 We recommend that specific provisions relating to land held by various public bodies, contained in sections 28 to 30 of the 1967 Act, should not be replicated in our new enfranchisement regime.

Charity freeholders and housing association head lessees

7.247 The enfranchisement rights contained in the 1967 Act are not available to the leaseholder of a lease granted pursuant to the "Right to Buy" provisions of the Housing Act 1985 where the landlord is a housing association and the freehold of the property is owned by a charity.[108] This is the effect of section 172 of the Housing Act 1985.

7.248 The apparent rationale for this exemption was outlined by the Earl of Selkirk in Parliament, prior to the enactment of the Housing Act 1985.[109] According to the Earl of Selkirk's explanation, various universities had begun to sell head leases of excess land to housing associations to provide additional housing for the community. It was apparently understood that the universities would be able to recover this land on the expiry of the housing associations' head leases. When the Right to Buy was introduced, however, there was concern that the universities might stand to lose this land permanently as a result of enfranchisement claims by the Right to Buy leaseholders. Section 172 was intended to prevent this. It is unclear why the provision as enacted requires the freehold merely to be owned by "a body of persons or a trust established for charitable purposes", rather than by a university specifically.

7.249 This exemption for charity freeholders was the subject of intense criticism by several affected leaseholders, who feel that they have been unfairly disadvantaged. While some of these leaseholders did report that the freeholders of their properties were universities, others reported that a range of charity freeholders had relied upon the exemption. One leaseholder reported that his freeholder – which is not a university body – had taken an inconsistent approach to offering voluntary freehold acquisitions. Dr Jacqueline Meeks, also a leaseholder, suggested that as an alternative to section 172, the conveyance executed pursuant to an enfranchisement claim could contain a

---

108 The "Right to Buy" refers to the right of some social housing tenants to purchase the property which they are living in, at a significant discount on market value. It is provided for by Pt V of the Housing Act 1985.

109 *Hansard* (HL), 10 May 1984, vol 451, col 1019.

covenant providing for compulsory repurchase by a former university freeholder should the property be needed for the university's educational purposes in the future.

7.250 We did not hear from any interested charities or any charity representative bodies in respect of this exemption. Womble Bond Dickinson (UK) LLP, a firm of solicitors which we understand represents some charity freeholders who rely on the exemption, argued that the exemption should remain. They argued that the charity freeholders had not received any share of the Right to Buy premiums paid by the long leaseholders to the housing association head lessees. If a leaseholder were then entitled to purchase the freehold of their property from the charity, this would be to the detriment of the charity, who would be losing "charitable assets".

7.251 We have not been able to identify a strong case for this exemption to be continued in a new enfranchisement regime. We do not, in general, treat charities any differently from other landlords under our recommendations, and we do not see any particular reason to do so in this instance – particularly where the scope of the existing legislative provision appears to be wider than what was originally intended.[110] We do not consider the argument advanced by Womble Bond Dickinson to be relevant to the present issue, which concerns whether it is appropriate for these charity freeholders to be subject to the loss of their reversionary interest through enfranchisement. In any event, it is unconvincing to suggest that a charity freeholder could reasonably expect to receive additional money over and above what it received for grant of a head lease, simply because the head lessee later received a premium for the grant of a sub-lease.

7.252 Further, it occurs to us that with the removal of the residence test from the 1967 Act in 2002, the section 172 exemption may no longer have the desired effect in any event.[111] Now, a housing association head lessee is likely to have enfranchisement rights in respect of individual houses which it has built on charity freeholder land where these are let on short tenancies. While we appreciate that a housing association may be less inclined to exercise these rights than a Right to Buy leaseholder, this does mean that the charity freeholder is already exposed to the risk of losing its freehold interest in the land as the law stands.

7.253 Our inclination is that the section 172 exemption should be abolished. We are conscious, however, that our evidence base does not include any consultation responses from charities who benefit from this exception, and so we do not feel able to make a firm recommendation to Government to this effect. We therefore suggest that Government should consider seeking to engage further with the landlords who rely on this exemption in order to establish whether there is a case for it to be retained (either in its current form, or in a modified form which applies only to university freeholders).

Charitable housing trusts

7.254 As we set out in the Consultation Paper, charitable housing trusts enjoy an exemption from freehold acquisition rights under the 1967 Act, and an exemption from both collective enfranchisement and lease extension rights under the 1993 Act. These

---

110 See also our general discussion of charity landlords at paras 7.277 to 7.278 below.

111 See CP, paras 2.23 to 2.25.

exemptions apply to leases that form part of the accommodation provided by the trust as part of its charitable purposes, where the trust is the leaseholder's immediate landlord.[112]

7.255 Case law has, however, significantly limited the application of the 1993 Act exemption.[113] In *Brick Farm Management Ltd v Richmond Housing Partnership Ltd*,[114] Mr Justice Stanley Burnton (as he then was) held that, for the purpose of enfranchisement rights under the 1993 Act, long leases belonging to a charitable housing trust were not provided in pursuit of its charitable objectives. Only social housing would amount to accommodation provided by the trust in pursuit of its charitable objectives, and social housing would generally only include properties let on short tenancies. The long leases in question were not therefore within the scope of the exemption, and did have enfranchisement rights.

7.256 In fact, there may be some long leases which can quite fairly be considered a form of social housing. It is increasingly recognised in housing scholarship that social housing can be rented or owner-occupied. For example, shared ownership leases, which are long leases, are seen by some scholars as a form of social owner-occupation.[115] Nevertheless, we believe that there are relatively few long leases which fall into this category, and that the practical effect of the *Brick Farm* decision is therefore to rob the exemptions for charitable housing trusts of any substantial practical application.

7.257 We received relatively few consultation responses regarding the exemptions enjoyed by charitable housing trusts. The National Housing Federation argued in favour of the existing exemption but suggested that lease extensions should nonetheless be available to long leaseholders of charitable housing trusts under a new enfranchisement regime. David Dixon, a leaseholder, expressed dissatisfaction at the conduct of his landlord, suggesting that long leases are used as a means to subsidise social housing units in the same developments. Mr Dixon argued that all enfranchisement rights should be available to leaseholders of charitable housing trusts.

7.258 While we recognise that there may be instances of charitable housing trusts granting long leases in pursuit of their charitable objectives, we think that the sale of properties on long leases is primarily a commercial, rather than charitable, activity. On this basis, we recommend that long leaseholders of these properties should enjoy the same enfranchisement rights as all other leaseholders. We are also mindful of the fact that the *Brick Farm Management* case amounted, in substance, to the extension of enfranchisement rights to most leaseholders of charitable housing trusts. Such leaseholders therefore have a legitimate expectation of being able to exercise enfranchisement rights. We do not believe that there is any good reason to reverse this position.

---

112 See CP, paras 9.89 and 9.90 for a fuller explanation of these exemptions.

113 See CP, paras 9.91 to 9.93.

114 *Brick Farm Management Ltd v Richmond Housing Partnership Ltd* [2006] EWHC 1004 (Ch), [2005] 1 WLR 3934.

115 See, for example, S Bright and N Hopkins, "Home, Meaning and Identity: Learning from the English Model of Shared Ownership" (2011) 28 *Housing, Theory and Society* 377.

Recommendation 51.

7.259 We recommend that charitable housing trusts should no longer enjoy any exemption from any enfranchisement rights. Long leaseholders of charitable housing trusts should be entitled to bring both lease extension and freehold acquisition claims.

Cathedral precincts and ecclesiastical landlords

7.260 Under the 1993 Act, there is no right to acquire the freehold or claim a lease extension in respect of property which is located within the precincts of a cathedral church.[116] There is no equivalent exemption under the 1967 Act.

7.261 Under both the 1967 Act and the 1993 Act, the Church Commissioners are required to sanction the terms of any freehold acquisition or lease extension relating to certain ecclesiastical land, including the price or premium payable.[117] These requirements are not restricted to freehold acquisitions or lease extensions of property located within the precincts of a cathedral church.

Exemption for properties within cathedral precincts

7.262 We received consultation responses from several leaseholders of the Dean and Chapter of Salisbury Cathedral expressing their dissatisfaction with the exemption from enfranchisement and lease extension claims for flats located within the precincts of a cathedral. These leaseholders told us that they have been trying to negotiate voluntary lease extensions of their flats for over six years, without success; while they have been able to reach agreement with their landlord, the Dean and Chapter, the grant of the lease extensions requires the approval of the Church Commissioners, which has not been forthcoming. We believe that the leaseholders from Salisbury who have written to us are the only leaseholders affected by this exemption. They have pointed out that leaseholders of houses in cathedral precincts, including their own neighbours, are subject to no equivalent exemption under the 1967 Act.

7.263 We acknowledge that cathedral precincts are considered to have a unique character and aesthetic. A desire to protect these attributes might be said to justify the 1993 Act exemption from freehold acquisition claims for blocks of flats located within these areas. However, this argument is unsustainable bearing in mind that it is possible for leaseholders of houses in the same cathedral precincts to buy their freeholds. We also understand that the Bill which became the 1993 Act did not originally include the exemption in section 96. The exemption was added during the Bill's passage through Parliament, via an amendment that was opposed by Government on the basis that planning legislation already provided sufficient protection for these areas. It is even harder to see why leaseholders of flats in cathedral precincts should not, at the very least, be entitled to lease extensions which would provide them with much-needed security in their homes. Even the National Trust, with its duty to manage its properties

---

116 1993 Act, s 96.

117 1967 Act, s 31 and 1993 Act, sch 2, para 8. The exception to these requirements is where such matters have been determined by a court or by the Tribunal.

for the benefit of the nation, forever, will be required to offer the vast majority of its leaseholders a 990-year lease extension under our recommendations.

7.264 We think there is a strong case for the exemption from enfranchisement rights under the 1993 Act for properties located within cathedral precincts to be abolished. We are mindful, however, that we have not had any direct engagement with the Church Commissioners on this issue. Accordingly, we do not think it would be appropriate for us to make a recommendation to Government to that effect. We therefore suggest that Government should seek the views of Church Commissioners on the possible removal of this exemption, and give further consideration to the future of this exemption in light of those views.

Church Commissioners' sanction

7.265 The provisions of the 1967 and 1993 Acts which require the Church Commissioners to sanction the terms of any freehold acquisition or lease extension relating to certain ecclesiastical land do not, in our view, provide a means by which the Church Commissioners are able to dictate the terms of those transactions to leaseholders. Rather, those provisions enable the Church Commissioners to have oversight of transactions being carried out by cathedral Chapters and Diocesan Boards of Finance. In all cases it remains open to leaseholders to have the terms of a conveyance or a lease extension – including the price payable – determined by the Tribunal. We do not therefore recommend any change to these provisions.

Designated rural areas

The current law

7.266 In the Consultation Paper, we explained that leases of houses must satisfy the low rent test in order to qualify for a lease extension under the 1967 Act. In Wales, the low rent test must also be satisfied for a leaseholder to be able to acquire the freehold of his or her house. In England, however, the low rent test generally no longer applies to freehold acquisition claims. The exception to this rule is in the case of "excluded tenancies".[118]

7.267 A lease of a house will be an "excluded tenancy" where:

(1) the house is located in an area designated as a "rural area" by order of the Secretary of State;

(2) the freehold of the house has since 1 April 1997 been owned together with adjoining rural land which is not occupied for residential purposes; and

(3) the lease was either granted on or before 1 April 1997, or was granted after that date but on or before 26 July 2002 for a term of years certain not exceeding 35 years.[119]

---

[118] We set out the law on the low rent test in full at paras 7.25 to 7.31 of the CP.

[119] 1967 Act, s 1AA(3). The following statutory instruments have designated particular geographical areas to be rural areas for the purposes of this provision: Housing (Right to Acquire or Enfranchise) (Designated Rural Areas in the West Midlands) Order (SI 1997 No 620); Housing (Right to Acquire or Enfranchise) (Designated

Excluded tenancies will not qualify for freehold acquisition unless they satisfy the low rent test.

7.268 We provisionally proposed in the Consultation Paper that the low rent test (together with other financial criteria) should no longer form part of the qualifying criteria which leaseholders must satisfy in order to qualify for enfranchisement rights. In the main, this proposal would have the effect of making lease extensions available to more leaseholders of houses throughout England and Wales and increasing the number of leaseholders of houses in Wales who are entitled to acquire the freehold of their home. It was almost universally supported by consultees, and we have made a recommendation in those terms in Chapter 6 above.[120] However, we did not specifically consider in the Consultation Paper whether there is a case to restrict the entitlement of leaseholders of houses in designated rural areas to freehold acquisition rights, whether by means of a requirement that their lease meet the low rent test or otherwise.

Consultees' views

7.269 A couple of consultees made comments relating to the availability of enfranchisement rights to leaseholders in rural areas.

(1) The Country Land and Business Association made a general case for treating leases in certain rural areas differently from those in urban areas, irrespective of rental levels. The Association suggested that leasehold houses are typically cheaper than equivalent freehold houses and therefore make a valuable contribution to the housing stock in areas where the affordability of houses is a significant issue for local people. It also observed that the ability to build new homes in rural communities can be significantly constrained where freeholders do not want to grant interests which could lead to them losing their freehold interest in the land. In some communities, such as on landed estates, in National Trust villages and on the Isles of Scilly, housing associations and other social landlords simply cannot afford to support the provision of new homes. The Association therefore urged us to consider whether there are special measures which could be adopted to cater for the unique requirements of isolated rural communities. Finally, the Association pointed out that the current provisions which define an excluded tenancy – in particular the requirement that the leasehold property adjoins rural land which is not used for residential purposes – can lead to inconsistent outcomes. For example, an end-of-terrace house surrounded on three sides by non-residential land, would be an excluded tenancy, whereas a house in the middle of the same terrace would not be.[121]

Rural Areas in the East) Order (SI 1997 No 623); Housing (Right to Acquire or Enfranchise) (Designated Rural Areas in the North East) Order (SI 1997 No 624); Housing (Right to Acquire or Enfranchise) (Designated Rural Areas in the North West and Merseyside) Order (SI 1997 No 622); Housing (Right to Acquire or Enfranchise) (Designated Rural Areas in the South East) Order (SI 1997 No 625); Housing (Right to Acquire or Enfranchise) (Designated Rural Areas in the South West) Order (SI 1997 No 621).

120 See paras 6.108 to 6.115 above.

121 We do not think that this analysis is correct. In *Lovat v Hertsmere Borough Council* [2011] EWCA Civ 1185, [2012] QB 533 it was held that "adjoining land" means neighbouring land that may or may not touch, or physically adjoin, the house.

(2) The National Trust put forward a different argument for restrictions on freehold acquisition rights in rural areas. The Trust suggested that restrictive covenants in leases – which are more readily enforceable than freehold restrictive covenants – can be important to prevent the use of rural properties as second homes or as holiday lets. This helps to maintain the integrity of rural communities and to ensure a sufficient population of permanent residents so that local facilities such as schools, shops, churches can remain viable. The Country Land and Business Association made a similar point in response to a different consultation question.

Discussion

7.270 Clearly, the current exclusion of some leases in rural areas from freehold acquisition rights will be of narrow application. The definition of an excluded tenancy applies to only a relatively small number of leases granted prior to 26 July 2002, and freehold acquisition rights will only be unavailable if the lease also fails to satisfy the low rent test. The comments which we received from the Country Land and Business Association and the National Trust, however, appear to make a case for some sort of more widely applicable exemption from freehold acquisition rights for properties in rural areas.

7.271 We recognise the concerns put forward by these consultees regarding the availability and affordability of housing stock in some rural areas, and the importance of maintaining permanent rather than transient rural populations. Indeed, it is in order to ensure the long-term affordability of certain rural properties that there is an exception, in the case of properties in "designated protected areas", to the general rule that a shared ownership lease will only be excluded from enfranchisement rights where the leaseholder is permitted to staircase to 100% ownership.[122]

7.272 However, we do not consider that we are in a position to make a recommendation for any more expansive an exemption from freehold acquisition claims for rural properties than that which currently exists. The concerns identified above raise policy questions concerning the provision of rural housing stock and support for rural communities which are not most appropriately dealt with in a project concerned with enfranchisement. It would, further, be contrary to the Terms of Reference of our project – which require us to consider the case for improving access to enfranchisement rights – to recommend the introduction of wider exclusions from enfranchisement rights than those which exist at present without a very strong rationale for doing so. In any event, we are not necessarily convinced that widely applicable restrictions on freehold acquisition claims are the best means by which to address these concerns. We do not agree with the Country Land and Business Association's assertion that leasehold houses tend to be cheaper than equivalent

---

[122] See discussion at paras 7.71 to 7.76 above. The areas named as "designated protected areas" in the Housing (Right to Enfranchise) (Designated Protected Areas) (England) Order 2009 (SI 2009 No 2098) appear to be largely the same as those named as "designated rural areas" in the statutory instruments set out in n 119 above. We have recommended that this exception should be retained in a new enfranchisement regime.

freehold houses as a matter of course.[123] We think that it is only where a lease itself is structured so as to ensure its future affordability that a restriction on freehold acquisition rights is likely to have the effect of ensuring the property remains affordable for the long term. We therefore refer the general treatment of long leases in rural areas under a new enfranchisement regime to Government for further consideration.

7.273 Similarly, we do not make a recommendation as to whether the existing, limited exemption for properties let on excluded tenancies should be carried forward into a new enfranchisement regime. We do not consider that we have sufficient information as to the policy justifications which underlie this narrowly-defined exemption; as Lord Justice Rimer noted in *Lovat v Hertsmere Borough Council*,[124] there is no readily available evidence on this point. We therefore invite Government also to consider this question. In the event that Government wishes to replicate this exemption in future legislation, it will be necessary to consider whether the low rent test should continue to apply for these purposes, so as to ensure the exemption captures exactly those properties which it does in its current formulation, or whether an alternative formulation might be adopted which could identify the same or substantially the same category of houses without retention of the low rent test.

OTHER EXEMPTIONS REQUESTED BY CONSULTEES

7.274 A small number of consultees argued that there should be new exemptions from enfranchisement rights for charities, retirement housing, and social housing. We did not consult on the possibility of introducing exemptions for these sectors and we do not consider that it would be desirable to do so.

7.275 First, as mentioned above, the general aim of our reforms is to increase access to enfranchisement, not to remove enfranchisement rights which already exist. Leaseholders in all of these cases currently have enfranchisement rights (except where they fall into one or other of the other exceptions discussed above) and it would be inappropriate for us to recommend that these rights are taken away without a compelling reason for doing so.

7.276 Second, we are not convinced that there is a good rationale in any case for any of these sectors to be exempt from enfranchisement claims.

Charities

7.277 Several consultees suggested that all landlords who are charities should be exempt from enfranchisement claims, on the basis that a charity's proceeds from its property portfolio are used to advance its charitable purposes. As the Charities' Property Association put it:

> A wider charity exemption for charity freeholders could be justified on the basis that that they are distinct from commercial freeholders in having a public interest / public

---

123 We observed that residential long leases tend not to be sold on premiums that are substantially different from those paid for freehold interests at para 1.40 of the CP. See also Competition and Markets Authority, *Leasehold housing – Update report* (February 2020) para 77(c).

124 [2011] EWCA Civ 1185, [2012] QB 533 at [22].

benefit purpose rather than a private interest. That applies whether the property is held for operational reasons or as an investment: while the charity is operating as a landlord, it is not profiting in the true sense from leaseholders as all proceeds are reinvested towards its charitable purposes, which, under charity law, must meet the public benefit requirement and be in the public interest.

7.278 We do not consider that any landlord should be exempt from enfranchisement claims solely on the basis that they are a charity.[125] Like all landlords, charities generally grant long leases as a means of making money from their property assets. We do not see why the purpose or purposes for which that money will be used should have any bearing on whether enfranchisement rights are available to the leaseholder.

Retirement housing

7.279 Some providers of retirement housing suggested that we should recommend a new exemption from freehold acquisition rights for the retirement housing sector. These consultees argued that their residents are well-advised about the nature of leasehold ownership, receive good value for their payments of ground rent and rarely wish to buy the freehold of their properties. They stressed that income from ground rents is vital to the retirement sector's business model and that the removal of these income streams would endanger its financial viability. They stated that any enfranchisement premiums received in lieu of ground rents would be an inadequate replacement.

7.280 We acknowledge that there may be retirement developments where leaseholders have purchased their homes in large part because of the significant communal facilities and package of additional services which are on offer from a particular provider. It may well be correct that these leaseholders are glad not to have the responsibility of managing their properties and simply have no interest in enfranchisement. We also note that Government intends for retirement properties to be exempt from the forthcoming ban on new leases of houses, given that leasehold is considered a suitable form of ownership for such schemes. However, we do not think that the fact that many leaseholders of retirement properties may never wish to enfranchise is a reason to take away the option for them to do so. The retirement sector operates across a broad spectrum – it could equally include a development populated by active retirees who are just as willing and well-equipped as a group of younger leaseholders to manage their own property. It would be wrong to deprive these leaseholders of the statutory rights which other leaseholders enjoy simply because their homes are classed as retirement properties.

7.281 We also acknowledge that there may be retirement developments where services are provided to leaseholders which a group of enfranchising leaseholders is unlikely to be well placed to provide – such as personal or medical care. In the RTM Report, we have recommended that management functions which involve or are connected with the provision of regulated health or social care should not be acquired by an RTM company on the exercise of the RTM. Instead, these functions will remain with the landlord. But this approach is not an option in the context of enfranchisement, which involves the acquisition of the landlord's interest. Nor do we think it would be practical to provide that enfranchisement is only available where these kinds of services are not

[125] Of course, some charities will be able to benefit from one or more of the exemptions outlined earlier in this chapter. For example, a community-led housing development may be constituted as a charity.

applicable. The needs of leaseholders in retirement developments (and therefore the provision of services) may well vary considerably over time as properties are bought and sold, and indeed as individual leaseholders age. It would be undesirable for the availability of enfranchisement rights consequently to vary from time to time.

7.282 Ultimately, all retirement developments (which otherwise meet the relevant qualifying criteria) have enfranchisement rights at present, and we are not aware of any difficulties arising from inappropriate enfranchisement claims. We think it is relatively safe to assume that in developments where the management of the properties post-enfranchisement would be practically very challenging for the leaseholders (say, because of significant care requirements), it is very unlikely to happen.

7.283 Finally, we do not consider that the arguments made by retirement housing providers about the importance of ground rent income provide any justification to deprive leaseholders of retirement properties of enfranchisement rights. Other commercial and institutional freeholders have also told us that ground rents are essential to ensure the proper stewardship of residential buildings for the long term. We do not accept this argument. [We note also that Government has recently revised its original indication that retirement properties would be exempt from the forthcoming ban on ground rents in new leases, stating that this exemption will be available only for twelve months following the implementation of the ban.]*

** The sentence in square brackets is incorrect. It was included in the report in error by the Law Commission. We will explore options for remedying this error when Parliament is sitting.*

Social housing

7.284 The London Borough of Camden told us about its experiences where leaseholders have carried out a collective enfranchisement of a building containing a unit let on a secure tenancy (which will be the subject of a mandatory leaseback to Camden). It wrote:

> Once enfranchisements have taken place we have many examples of where we have had to threaten tenants with eviction or pay compensation to our new landlords because of tenant's behaviour or denying access. In addition, the new unit service charge levied on Camden can be larger than when the building was under Camden management. This can be due to the new freeholders not benefiting from the economies of scale Camden was able to enjoy in procuring services, or just managing agents trying to get away with what they can. Tenants themselves are not happy with the new position they find themselves in and can feel threatened. A tenant can also no longer easily arrange a repair for the flat or building.
>
> The result is that Camden views leaseback units as disproportionately expensive to manage. Therefore, over time, Camden is looking into decanting leaseback units and selling them on. It follows that that every enfranchisement with a leaseback will at some point in the future mean the unit is lost. This was clearly not the original intention of the mandatory leaseback protection but it is the reality in practice.

Camden described the enfranchisement of buildings containing social housing tenants as "a form of social cleansing" and called for an exemption for local authorities in respect of buildings containing secure tenants.

7.285 Mixed-tenure local authority and housing association buildings have been eligible for collective enfranchisement since the passing of the 1993 Act. To change this would substantially reduce the existing enfranchisement rights of a very large number of leaseholders. This would be contrary to our Terms of Reference which require us to consider the case to improve access to enfranchisement rights.

CONCLUSION

7.286 In this chapter, we have set out our recommendations as to the exemptions from enfranchisement rights which should exist under a new enfranchisement regime. Our recommendations are intended to improve access to enfranchisement rights, where possible, and to ensure clarity for both landlords and leaseholders where exemptions do continue to exist.

7.287 We now turn to the question of how enfranchisement claims may be made.

Part IV: How should enfranchisement rights be exercised?

Chapter 8: Procedure – making a claim

INTRODUCTION

8.1 In Chapters 10 and 11 of the Consultation Paper, we outlined the current law governing the procedure for making or responding to an "enfranchisement claim",[1] and made proposals for reform. The chapters covered a substantial amount of material, and we have identified – and discuss in this Report – some additional complications which were not discussed in the Consultation Paper.

8.2 The Consultation Paper contained a fundamental proposal: that a single procedure should be followed regardless of the enfranchisement right being claimed.[2] We have decided to adopt this proposal and, in this and the following two chapters, we make recommendations for the creation of such a procedure. We think that our recommended procedure will help to end the confusion that can currently be caused by the existence of different procedural regimes. We also think our single procedure will be simpler and easier to understand than the procedures under the current law.

8.3 To make our recommendations regarding procedure easier to read, we have divided the material into three parts, as follows.

(1) First, in this chapter, we examine the procedure for making an enfranchisement claim.

(2) Second, in Chapter 9, we move on to consider the procedure for responding to a claim.

(3) Finally, in Chapter 10, we discuss issues that arise following service of the claim, including the effect of serving a "Claim Notice",[3] protecting the claim on assignment of the relevant lease(s) or sale of the landlord's interest, the position of mortgagees, and registration issues.

8.4 In developing provisional proposals, considering consultation responses, and making final recommendations for reform, we have sought to:

(1) simplify the process, making it easier for all parties to understand;

(2) remove any procedural traps that allow one party to take tactical advantage of another, or lead to a windfall gain or loss for either party;

(3) encourage parties to identify and resolve disputes at an early stage;

---

1 We use "enfranchisement claim" (as defined in the Glossary) to describe claims under the current law and our recommended procedural regime.

2 CP, para 11.13.

3 A Claim Notice (as defined in the Glossary) is a notice which is served by the leaseholder(s) in order to begin an enfranchisement claim under our recommended regime: see paras 8.109 to 8.117 below.

(4) reduce the need for parties to incur legal costs to navigate the process successfully; and

(5) ensure that enfranchisement claims can be concluded within a reasonable time.

8.5 In this chapter, we set out the basis for our recommended procedural regime. We start by discussing the issues with the current law and we then set out an overview of our recommended regime. We explain how leaseholders may commence enfranchisement claims, and set out the forms – an "Information Notice",[4] and a Claim Notice – which allow leaseholders to do so. We then go on to explain our recommended regime for service of the Claim Notice, including the routes which allow leaseholders to benefit from deemed service or take forward their claim in the absence of their landlord. Finally, we discuss the requirements for leaseholders to serve copies of the Claim Notice on other landlords and third parties to the relevant lease.

PROBLEMS WITH THE CURRENT LAW

8.6 The current law creates separate procedures for claims involving houses and for claims involving flats. Inconsistencies between these two procedures can cause the parties, or their advisers, to make mistakes that can lead to extra costs being incurred, or, in some cases, to the failure of the claim.[5]

Notices and service

8.7 In most cases, enfranchisement claims in respect of either houses or flats must be started by the leaseholder serving a notice of claim on the appropriate landlord. The landlord sets out his or her response to that claim in a counter-notice. But while forms have been prescribed for use in claims involving houses, no forms have been prescribed for use in claims involving flats. And the forms that have been prescribed for houses are complicated and difficult for leaseholders to complete accurately.

8.8 Under the current law, there are different ways in which a leaseholder must prove that a notice of claim has been served on the appropriate landlord, depending on whether the claim relates to a house or a flat. A notice of claim about a house can, in limited circumstances, be treated as having been properly served even if it has not in fact been received by the landlord. But that is not the case for a notice of claim about a flat. A leaseholder of a flat who proceeds with a claim without having received a response to his or her notice of claim takes the risk that the landlord will later prove that the claim had not been properly started as he or she had not received the notice of claim. This can both waste costs that the leaseholder has incurred in progressing the claim, and lead to a delay in the leaseholder realising his or her enfranchisement rights.

---

4 An Information Notice is a notice which may be served by leaseholder(s) who are unsure about the identity or addresses of those holding superior interests in the building: see paras 8.75 to 8.89 below.

5 The procedure for claiming a lease extension, or the freehold, of a house is set out in the 1967 Act (and subsequent regulations), while the procedures for claiming a lease extension of a flat, or making a collective claim in relation to the freehold of a building, of are contained in the 1993 Act (and subsequent regulations). These procedures are described in detail in the CP, Ch 10.

8.9 Therefore, the current law on the content and service of notices creates uncertainty for the parties, and often leads to disputes that may only be resolved at a court hearing. The number and cost of such disputes are increased further by incentives for the parties to challenge the validity or proper service of a notice of claim. Some landlords aim to block claims by arguing that a notice of claim is defective or has not been properly served, with a view to discouraging the leaseholders from making a further claim and/or increasing the price the leaseholders will have to pay when a future claim succeeds. And leaseholders of flats are currently entitled to obtain the freehold or lease extension claimed at the price set out in their notice of claim if they can show that the landlord has failed to serve a valid counter-notice within time. The risk of such an outcome can itself lead a landlord who has not served a counter-notice to argue that the notice of claim is not valid, or has not been properly served, in order to show that he or she was not required to serve a counter-notice.

8.10 One leaseholder gave us the following example of the problems around service of notices under the current law.

Leaseholder example: disputes about service of notices

"All 6 leaseholders commenced the process one and a half years ago and the landlord has been very difficult.

We engaged (and continue to engage) an experienced leasehold enfranchisement solicitor to manage the process for us and he served notices as required by legislation. (One notice sent to the landlord in Guernsey and the second sent to his address for service (his solicitors) in England).

The landlord's solicitors responded 2 months later to say the notice had been served defectively because it had not been served at the landlord's address (given in the service charge demands) in the British Virgin Islands.

Our solicitor had to seek counsel's opinion and counsel recommended serving a second notice in the BVI. Now that the time period for the 2nd notice has expired the landlord's solicitors have claimed the original notice is valid - which gives us limited time to apply to a Tribunal".

8.11 Under the current law, leaseholders also carry the burden of serving notices of claim, or copies of such notices, on others. Joint landlords, split landlords or other reversioners, and third parties to the leaseholder's lease (such as a management company or a guarantor) must all be served with notices of claim.[6] Leaseholders are also required to serve an original notice of claim on other parties to their lease.[7] And

[6] "Joint landlord", "split freehold" and "split reversion" are both defined in the Glossary. We use the term "split landlord" or "split reversioner" to refer to a landlord who holds his or her interest under a split freehold or split reversion (as applicable).

[7] There may be parties to the lease other than the landlord or leaseholder – for example, a management company or a guarantor. We refer to any party to the lease which is not the landlord or the leaseholder as a

any intermediate landlords must also be located and given copies of the notice of claim.[8] These requirements can cause delay in starting a claim, and increase costs for leaseholders.

8.12 Leaseholders of flats who are unsure about the identity or addresses of those holding superior interests in the building can serve an information notice requiring their immediate landlord, or other landlords, to provide relevant details to the leaseholders within 28 days. But if the recipient does not respond, the leaseholders must incur further costs by serving a default notice, and then applying to the court for an order forcing the landlord to respond.

8.13 If a leaseholder remains unable to serve a notice of claim because the appropriate landlord cannot be identified or found, then he or she must rely on procedures that allow the freehold to be transferred, or the lease extension to be granted, in the absence of the landlord. These procedures are complex and difficult for leaseholders to follow, leading to delay and further costs. Indeed, the further costs can in some cases exceed the price to be paid to the absent landlord. There are also anomalies within the procedure. For example, the number of leaseholders required to bring an application to allow the collective enfranchisement claim to progress with a missing landlord is higher than the number required to bring that claim had the landlord not been missing. And a leaseholder of a house cannot make an application for a lease extension where the landlord is missing.

Time limits

8.14 The current law sets time limits for taking procedural steps in any claim. But the approach to any failure to meet those deadlines differs between claims concerning houses and those concerning flats. In a claim relating to a flat, where leaseholders miss a deadline, the claim will be treated as withdrawn. Leaseholders are then required to pay their landlord's non-litigation costs, and are prohibited from bringing a fresh claim for 12 months. As a result, the deadlines act as traps for unwary leaseholders, and landlords have an incentive to encourage or allow leaseholders to fall into them. A failure to meet a deadline in a claim concerning a house has no such consequences.

8.15 Disputes between the parties about the terms on which the freehold or a lease extension is to be obtained are determined by the Tribunal.[9] But once an outline agreement has been reached, the jurisdiction of the Tribunal comes to an end;[10] any disputes about the proposed written terms of any transfer or lease extension must be resolved by the county court.[11] This division can prolong the resolution of a dispute about the detailed terms of any transaction. And as applications to the Tribunal must be made within a prescribed period, and an application to the county court must be

---

"third party" or a "third party to the lease". This language mirrors that in the CP, para 11.102 and following. We discuss our proposals regarding service of the Claim Notice on these third parties at paras 8172 to 8.201 below.

8 An "intermediate landlord" (as defined in the Glossary) is a person who holds an intermediate lease.

9 The First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

10 This outline agreement is usually referred to as agreeing "Heads of Terms".

11 We consider the broader division of powers between the Tribunal and the county court in Ch 11.

made within a period calculated from the date on which the outline agreement was reached, disputes can arise as to whether, and if so, when, that agreement was reached. This again creates incentives for landlords to challenge a leaseholder's application to the county court on the basis that an outline agreement had not been agreed (and that it is too late to apply to the Tribunal), or that such terms had in fact been agreed at an earlier point (and it is too late to apply to the county court). Such disputes increase costs and delay and can frustrate the legitimate exercise of enfranchisement rights.

8.16 One leaseholder gave us the following example of the problems around dispute resolution under the current law.

Leaseholder example: disputes about valuation and costs

"In 2017 I tried to extend the lease on my flat firstly by voluntary negotiation but that was not successful so I reverted to the [statutory process under the 1993 Act].

I followed the process and subsequent negotiations but due to the fact that the landlord was asking for twice the market value to extend the lease for 90 years (£20,000 when the value was £10,000) I ended up going to the First-tier Tribunal. As a result of the decision it was agreed that the value at that time was £9,000 and the matter proceeded to the next stage.

When it came to the conveyancing, I instructed a solicitor who then proceeded to deal with the matter. However, the freeholder's solicitor then presented a legal bill for £4,000 which I disputed and ended up going back to the Tribunal who in turn ruled that reasonable costs should be £1,200 which was about right.

I then proceeded to the next stage but due to poor legal advice from my solicitor 6 months had elapsed and the freeholder refused to proceed saying that we were out of time. This resulted in me having to accept that this was the case and not proceed any further.

As it stands it has cost me in excess of £5,000 to try and extend my lease using the current legislation only to have to start the process again with more costs and more under-handed legal tactics".

Other problems

8.17 Each of the current enfranchisement rights has separate conveyancing procedures set out in regulations. This creates unnecessary complexity and the potential for both confusion and for mistakes to be made.

8.18 A leaseholder who has served a notice of claim may wish to sell his or her premises before the claim is concluded. At present, he or she must formally assign the benefit of that notice at the correct point in time or the notice will cease to have effect. This is

a further trap for the unwary leaseholder, and an opportunity for the landlord to force the new owner to start the enfranchisement process from scratch.[12]

8.19 The complexities and traps for the unwary within the current law mean that few leaseholders can operate the procedures without professional assistance. Legal and valuation costs can be significant for both parties. In some cases, those costs will be disproportionate to the value of the property being claimed.[13]

8.20 Some of the problems described above create opportunities for gaming, or for one party to try to take tactical advantage of another. On occasion, these opportunities can work to the advantage of leaseholders. But for the most part, these opportunities are to the advantage of landlords as the (usually) more experienced and/or better-resourced party.[14]

AN OUTLINE OF OUR RECOMMENDED PROCEDURAL REGIME

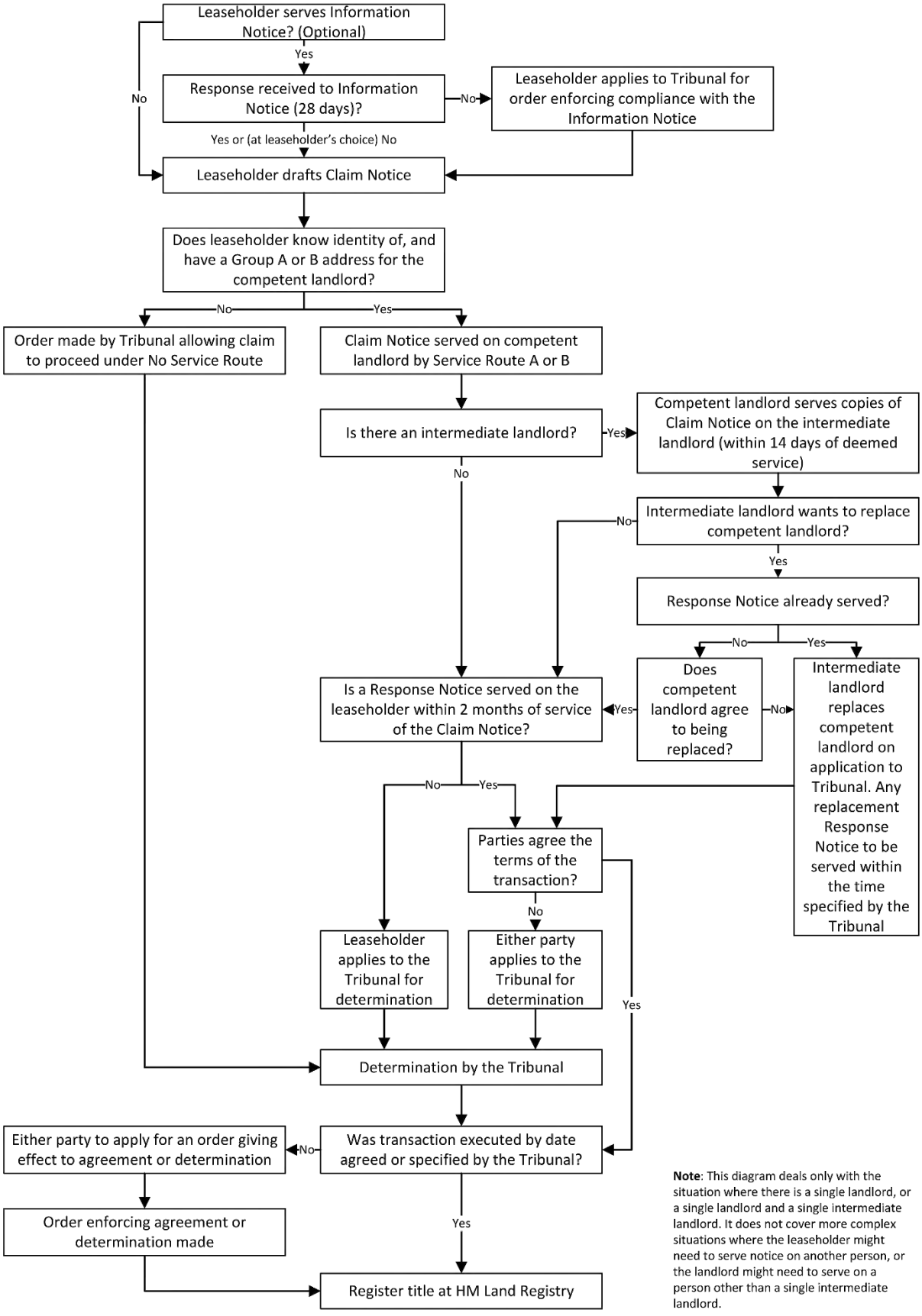
8.21 In this section, we provide a short overview of our recommended procedure for bringing, responding to, and completing an enfranchisement claim. Further detail appears in the remainder of this chapter, as well as in Chapters 9 and 10. At figure 8 below, we set out a diagram which briefly summarises the main elements of the reformed procedural regime which we explain further below.

[12] In addition, the new owner is unable to start a new individual claim until he or she has held the lease for two years. We are recommending, however, that this requirement is removed: see para 6.131 above.

[13] The current law requires leaseholders to pay their landlords' reasonably incurred non-litigation costs. We consider that topic in Ch 12.

[14] We discuss the "inequality of arms" between landlords and leaseholders in the Valuation Report, paras 1.71 to 1.73.

Figure 8: Summary of our reformed procedural regime



Making and responding to a claim

8.22 A single procedure should apply to all types of enfranchisement claim. Leaseholders or their advisers would no longer have to select the correct procedure for their particular type of claim. The parties should be able to download and complete a single set of pro forma enfranchisement notices (being an "Information Notice", "Claim Notice" and "Response Notice").[15]

8.23 If a leaseholder needs to know more about the ownership of his or her building before bringing a claim, he or she should be able to serve an Information Notice on his or her landlord (or one of his or her landlords), requiring him or her to provide details of other landlords in the building. A landlord who has not responded within 28 days could be ordered to do so by the Tribunal, and to pay the leaseholder's costs of making that application.

8.24 A leaseholder who wishes to bring an enfranchisement claim should complete a Claim Notice, setting out details of the claim. The claim itself could then be started in one of two ways: by serving the Claim Notice on the leaseholder's "competent landlord"[16] (via two alternative processes which we refer to as the "Service Routes") or by applying to the Tribunal for permission to proceed without serving the Claim Notice (which we refer to as the "No Service Route").

8.25 If the leaseholder knows the identity of, and has an appropriate address for, his or her competent landlord, he or she should deliver or post the Claim Notice to the competent landlord at that address. If the leaseholder does so, the claim should be treated as having been properly started even if the landlord were able to prove that he or she had not received the Claim Notice. We refer to this as deemed service.

8.26 Where a leaseholder has served a Claim Notice, the competent landlord should have 14 days in which to serve copies of the Claim Notice on any intermediate landlords or third parties, and two months in which to complete and serve a Response Notice on the leaseholder. The Response Notice should set out the details of the competent landlord's response to the Claim Notice, and should also attach a draft contract, lease extension or freehold transfer. The competent landlord should not be entitled to apply to the Tribunal for more time to serve a Response Notice, but if the landlord has not served a Response Notice, he or she could apply for permission to join the claim (and to serve a Response Notice).

8.27 The competent landlord should be responsible for dealing with the claim, and his or her actions should bind all other landlords in the building. But an intermediate landlord should be able to seek to take over the response to the claim from the competent landlord.

8.28 Following the period of 21 days after a Response Notice has been served, the leaseholder or the landlord should be able to ask the Tribunal to resolve any dispute

---

15 Information Notices are discussed at paras 8.75 to 8.89 below; Claim Notices are discussed at paras 8.109 to 8.117 below. A Response Notice (as defined in the Glossary) may be served by a competent landlord in response to a Claim Notice; Response Notices are discussed at paras 9.5 to 9.38 below.

16 The competent landlord (as defined in the Glossary) is the first superior landlord whose own interest in the building is sufficient to be able to grant or transfer the interest claimed by the leaseholder.

that remains between them, including about the written terms of any lease extension or freehold transfer. As set out above, we think there should be limited grounds on which arguments about the validity of a Claim Notice or Response Notice could be made. This means that it should be less likely that disputes concerning the validity of such notices arise between the parties or that a party will be able to raise a successful challenge on these grounds.

8.29 Where the competent landlord has failed to serve a Response Notice in time, the leaseholder should be able to ask the Tribunal to determine the claim in the landlord's absence. The Tribunal should do so if the leaseholder has correctly served the Claim Notice and has carried out certain prescribed checks. The Tribunal should make its own assessment of the claim (including the premium to be paid), without being bound by the terms set out in the Claim Notice. The competent landlord should not be entitled to apply to the Tribunal for more time to serve a Response Notice, but if the landlord has not served a Response Notice, he or she could apply for permission to join the claim (and to serve a Response Notice). Once the Tribunal's determination has been made, the competent landlord should not be able to apply for permission to join the claim and should only be able to apply set aside that decision on limited grounds.

8.30 If the leaseholder has not been able to serve the Claim Notice on the competent landlord, he or she should apply to the Tribunal for permission to proceed with the claim. We refer to this application process as the "No Service Route".[17] The Tribunal should make that order provided the leaseholder can show that he or she was not able to serve the Claim Notice on the competent landlord. Where a claim is determined following such an order, the competent landlord should only be able to apply to set aside that decision on limited grounds.

8.31 Any determination of a claim by the Tribunal should include the date by which the lease extension or freehold transfer should be completed. If the transaction has not been completed by that date solely because one party has failed to sign the lease extension or freehold transfer, the other party should be able to apply to the Tribunal for an order that the grant or transfer be executed on behalf of a party who has failed to sign. Where the transaction has not completed because the premium has not been paid, the Tribunal may order that the determination be set aside and the claim be struck out or, where the parties have entered into a formal contract, that the contract be discharged unless the premium is paid by a certain date.[18]

8.32 A leaseholder's claim should not be treated as withdrawn simply because he or she has failed to apply to the Tribunal for a determination of the claim. But if no such application is made within 6 months of the service of a Response Notice, a landlord (or other leaseholders)[19] should be able to ask the Tribunal to strike out the Claim Notice, provided that the leaseholder had been given 14 days' notice of the proposed application. A Claim Notice should, however, cease to have effect if no application had been made within 2 years following deemed service of that notice, or where the

---

17 We explore the No Service Route further at paras 8.245 to 8.254 below.

18 Alternatively, where the parties have entered into a formal contract, either party may apply to the county court for an order of specific enforcement of that contract: see para 11.27 below.

19 See para 9.4(5) below.

nominee purchaser company is wound up, struck off, or becomes insolvent prior to determination of the claim.

Completing a claim

8.33 Once a Claim Notice and Response Notice have been served, our recommended regime addresses various issues which may affect the progress of the claim to completion. These issues are not entirely about procedure, but they have consequences for what steps the parties should take to complete their claims.

8.34 Under the current law, a Claim Notice creates a statutory contract with the landlord for the grant of a new lease or the transfer of the freehold. A leaseholder needs to protect the claim by registering a notice or a land charge;[20] otherwise, if the landlord sells the property, the claim will not be binding on the new landlord, and the leaseholder will have to start again. Additionally, if the leaseholder wishes to sell the lease before completion of the claim, he or she will have to be careful to assign the benefit of the claim to the purchaser; otherwise, the new leaseholder will have to start again.

8.35 The service of a Claim Notice should no longer create a statutory contract. To prevent claims accidentally being lost when the leaseholder or the landlord sells their titles, the benefit of a Claim Notice should automatically be transferred on the assignment of the affected lease, unless the assignment provides otherwise. The new leaseholder should, however, be able to disclaim the assignment of the Claim Notice before taking any step in the proceedings and the landlord could continue serving the original leaseholder until he or she learns of the assignment of the Claim Notice. If a landlord transfers his or her property after the service of a Claim Notice, the Claim Notice should automatically be binding on the new landlord without needing to be registered.

8.36 Where the leaseholder's or the landlord's title is subject to a mortgage, certain procedural requirements should apply.

(1) Landlords should be under an obligation to inform their mortgagees about the grant of a lease extension not less than 21 days before completion, and to notify their leaseholders that they have done so. Leaseholders should be required to pay the premium for the lease extension into court if they do not receive the relevant notification, or if the mortgagees request them to do so.

(2) Where a lease is subject to a mortgage and the leaseholder obtains a statutory lease extension, the mortgage should automatically transfer to the new lease. The leaseholder should be required to provide the mortgagee with a copy of the new lease within one month of its registration. He or she should be liable for any losses suffered by the mortgagee if a copy is not provided.

8.37 Our recommended regime also addresses issues that may arise when enfranchisement claims are completed.

8.38 Leaseholders should have a right to seek the merger of the leasehold and freehold titles on completion of the freehold acquisition. Property rights that benefit or burden

---

[20] A notice or a land charge is may be registered by making an application at HM Land Registry. Whether a notice or land charge is appropriate will depend upon whether the property which is the subject of the claim is registered.

the lease (including a mortgage) should automatically transfer to the freehold on merger. However, merger should not be available in situations where:

(1) the freehold is still subject to a mortgage following the freehold acquisition;

(2) the lease is subject to a registered estate contract; or

(3) the leaseholder has not complied with a restriction registered against the lease.

8.39 There may be situations where the landlord is not permitted to grant a lease extension or to transfer the freehold without the consent of a third party. Such an arrangement may be protected by a restriction registered against the landlord's title which prevents the registrar registering the grant or transfer sought by the leaseholder in an enfranchisement claim. Under those circumstances:

(1) mortgagees and those with a beneficial interest in the landlord's property should be deemed to consent to a statutory lease extension or freehold acquisition, and the leaseholder can overreach beneficial interests in the property by paying the purchase price into court; and

(2) given our recommendations that estate contracts, options and contracts that prevent the landlord granting a new lease or transferring the freehold (or only allow the landlord to do so subject to conditions) should be suspended on the service of a Claim Notice and discharged when the claim is completed,[21] landlords will be required to notify affected third parties not less than 21 days before completion of the relevant grant or transfer, and also within 14 days after completion.

8.40 Finally, any executed lease extension, leaseback or transfer should contain a statement recording that it was executed pursuant to the relevant statutory provisions. But this information should not then be included on the register of title.

A SINGLE PROCEDURE FOR ALL ENFRANCHISEMENT CLAIMS

8.41 In the Consultation Paper we proposed that a single procedure should apply to all enfranchisement claims.[22] We considered that this would avoid inconsistencies between separate procedures and reduce the risk that any party, or their advisers, would make a mistake by confusing one set of rules with another.

Consultees' views

8.42 Our provisional proposal met with almost universal approval from consultees. Most agreed that adopting a single procedure would simplify the enfranchisement process and accord with our Terms of Reference. Consultees believed that simplification would bring a variety of benefits. Most thought it would make the process easier for the parties to understand. Others thought it would lead to greater fairness by reducing the opportunity for one party to take advantage of another.

---

21 See paras 3.333 and 3.335; 4.174(2), 4.217 and 4.218; and 5.173 to 5.182 above.

22 CP, Consultation Question 70, para 11.13.

8.43 Several consultees believed it would make disputes less likely to arise, while others thought it would reduce the need for costly professional assistance. And another consultee, the Residential Landlords Association, considered that it would encourage more leaseholders to engage with the process.

8.44 A handful of consultees disagreed with our provisional proposal, and almost all of these consultees believed that it would not be possible to devise a single enfranchisement procedure that would fit every type of enfranchisement claim. For example, Trowers & Hamlins LLP, solicitors, considered that:

> this is likely to oversimplify the system. A lot of specific information is required for each type of claim and it would be difficult to achieve this.

Some consultees noted that each enfranchisement right was fundamentally different. Others sought to draw a distinction between collective freehold acquisitions and other types of claim. A couple of consultees believed that "simpler" cases, such as individual freehold acquisition claims made in respect of new-build homes, should be dealt with in a separate process.

Discussion and recommendations for reform

The benefits of adopting a single procedure

8.45 We think that the benefits of simplifying the enfranchisement procedure are clear. A simplified regime would be easier to understand and fairer than the current law; it would reduce disputes and challenges, and consequently limit costs. We also think that adopting a single procedure for all enfranchisement claims can play a key role in that simplification. Leaseholders would no longer have to select the correct procedure before starting their claim, or identify the correct set of procedural rules that apply thereafter.

8.46 However, we think that some consultees overstated the benefits that would automatically flow from the adoption of a single regime. Those advantages will only be properly realised if the single procedure is itself crafted to avoid complexity, unnecessary challenges and disputes. Much therefore turns on the detail of the further recommendations for reform that we set out in the remainder of this Report.

The practicality of adopting a single procedure

8.47 We agree that each type of enfranchisement claim is different. We also agree that some types of claim are more likely to be more complex than others.

8.48 In our view, our recommended procedural regime (as set out in the following chapters of this Report) satisfactorily accommodates all enfranchisement claims and therefore supports the use of a single procedure for all of those claims. We remain of the view that there is no convincing case for treating each enfranchisement right separately. This would lead to an increase rather than a reduction in the number of separate procedures.

Recommendation 52.

8.49 We recommend that a single procedure should be adopted for all enfranchisement claims.

A SINGLE SET OF PRESCRIBED FORMS

8.50 In the Consultation Paper, we provisionally proposed that a single set of prescribed forms should be introduced for bringing and responding to enfranchisement claims. These forms would be an Information Notice, a Claim Notice, and a Response Notice.[23]

8.51 Our provisional proposal recognised the advantages of prescribing pro forma notices for a party to complete over requiring that party to draft his or her own notice, or to rely on a pro forma notice produced by a third party. At the same time, we noted that in the future it might be possible to develop an online portal that would generate a form on the basis of a party's replies to a series of structured questions.

8.52 Our provisional proposal was also in part an extension of our proposal for the adoption of a single procedural regime for all enfranchisement claims. A leaseholder who wished to make an enfranchisement claim would not have to choose correctly between a number of different Claim Notices.

Consultees' views

8.53 Our provisional proposal again met with almost universal approval from consultees. The arguments raised in support closely echoed those set out in respect of our proposed adoption of a single procedural regime.[24] Many considered that a single set of prescribed forms would help to create a simpler process. Others felt that the proposal would help to reduce mistakes and disputes, and lead to lower costs and reduced delay. For example, David Newton, a leaseholder, wrote that our proposal would "make the process simpler, faster and fairer", and noted that the "[current] process must be made less stressful and less open to abuse by the freeholder and their legal representatives". Some of those who expressed their approval noted that any prescribed forms would need to be as simple as possible.

8.54 A few consultees raised objections to our provisional proposal, and their responses echoed the arguments raised in respect of our proposed adoption of a single procedural regime.[25] They argued that different forms should be produced for each of our proposed enfranchisement rights. This, it was said, would prevent the confusion that could be caused by some leaseholders being faced with long forms containing sections that were not relevant to their claim, and would make each form easier to

---

23 CP, Consultation Question 71, para 11.17. We also asked whether a single Claim Notice should be used for all enfranchisement claims: see CP, Consultation Question 74, para 11.40. The consultation responses to both questions are considered together in this section.

24 See paras 8.42 and 8.43 above.

25 See para 8.44 above.

complete. For example, the Association of Leasehold Enfranchisement Practitioners noted that:

> if there are to be several enfranchisement rights, our view is that it may make sense for there to be separate types of prescribed form to refer to each of the rights… To do otherwise may lead to the required form being unduly long and "off-putting".

Others argued that a separate form should be produced for collective freehold acquisition claims, or for multi-building collective freehold acquisition claims.[26]

8.55 The key issue was summarised by the Law Society in the following terms.

> A single prescribed form for all enfranchisement claims may in practice lead to the wrong sections being completed. However, an inexperienced claimant could equally fail to select the correct dedicated form.

Discussion and recommendations for reform

The benefits of a single set of prescribed forms

8.56 As we noted above, we remain of the view that a simplified regime would be easier to understand and fairer; it would reduce disputes and challenges, and consequently limit costs.[27]

8.57 We also think that adopting prescribed forms is an important part of that simplification. Leaseholders would no longer have to purchase a blank form from a third party, or be required to draft their own document or instruct professional advisers to do so. In addition, we think that creating a single set of pro forma notices that parties need to complete will reduce the risk of mistakes being made when selecting the correct notice.

8.58 But, as noted above, we think that consultees have to some extent overstated the benefits that would automatically result from prescribing a single set of forms.[28] Those benefits can only be properly achieved if the pro forma documents are drafted as simply and clearly as possible. As some consultees observed, much will depend upon the design and wording of the form in ensuring that simplicity is achieved.

The risks created by requiring or permitting the use of prescribed forms

8.59 Prescribing forms for starting or responding to an enfranchisement claim requires us to consider what should happen where a party does not use those forms. Should a notice other than the relevant prescribed form be invalid? Should the degree to which a notice differs from the prescribed form have any effect on its validity?

8.60 Any rule that an enfranchisement notice would be invalid if it differed from the prescribed form creates a risk that leaseholders and others would serve invalid notices. This may result in both time and money being wasted even where the form of the notice was one that the person receiving that notice could readily understand. And

---

26 Collective freehold acquisition claims, including those involving multiple buildings, are considered in Ch 5.

27 See para 8.45 above.

28 See para 8.46 above.

many of the benefits of adopting prescribed forms can be achieved without compelling a party to use such a form. But allowing notices to be served on leaseholders or landlords in a variety of formats could increase the costs of understanding and dealing with the notice. And providing that a notice would be valid if it is sufficiently similar to the prescribed form would create room for disputes that could increase the costs of enfranchisement unnecessarily.

The risks created by adopting a single set of forms

8.61 In the Consultation Paper we noted that the adoption of a single form for all enfranchisement claims is likely to create some risk of confusion, as it will include parts or questions that will not need to be completed in every enfranchisement claim.[29] While our proposal may remove any risk that a party will select the wrong form, there may be an increased risk that a party will fill out the single form incorrectly. We set out our assessment of the risks of confusion associated with Claim Notices and Response Notices below.

Assessing the risk of confusion: Claim Notices

8.62 We set out the information that would need to be provided in our proposed Claim Notice at paragraph 11.35 of the Consultation Paper.[30] Most of that information must be provided regardless of the type of enfranchisement claim advanced. Leaseholders are, however, required to identify the particular enfranchisement right being asserted, and the legal basis for that claim. We do not, however, consider that either of these requirements is likely to cause significant confusion.

8.63 The inclusion of collective freehold acquisition claims within a single Claim Notice does, however, introduce further complexity. First, some parts of the Claim Notice might need to allow more space for answers to be given. For example, the description of the premises in a multi-building collective freehold acquisition claim would likely take up more space than a description of the premises in an individual freehold acquisition claim. Second, the Claim Notice would need to allow the names and flat numbers of all the leaseholders bringing the claim to be set out. Third, some details would only be required in the case of a collective claim. For example, the number of residential units in a building, the number of those units held by leaseholders who are eligible to participate, the names and addresses (in other words, the flat numbers) of non-participating leaseholders, and the name and address of the nominee purchaser company all need to be given. In addition, leaseholders would need to state whether they require the landlord to take a leaseback of any parts of the premises.[31]

8.64 The need to provide additional details in the case of a collective freehold acquisition claim gives rise to two distinct issues. First, the single form will contain questions that do not need to be answered by those who are not making a collective claim. Those parties will need to leave that part of the single form blank. Second, the parts of the form that require leaseholders to insert details of participating and non-participating

---

29 CP, para. 11.37.

30 Those details are also set out in the text box following para 8.109 below.

31 Leasebacks and their role in our proposed enfranchisement regime are considered at paras 5.152 to 5.172 above.

leaseholders would need to be designed in such a way as to allow for the details of an indeterminate number of leaseholders to be given.

Assessing the risk of confusion: Response Notices

8.65 We set out the information that would be required in our proposed Response Notice at paragraph 11.52 of the Consultation Paper.[32] The Response Notice is simpler than the Claim Notice. It is likely to give rise to fewer of the problems identified above.[33] But a landlord who denies that the leaseholder is entitled to bring the particular enfranchisement claim made will be required to set out the basis of his or her denial. The checklist of statutory criteria against which the landlord will do so will, necessarily, vary between enfranchisement rights. In addition, the landlord responding to a collective claim will have to indicate his response to any leasebacks that have been proposed by leaseholders.

The balance of risks: must a prescribed form be used?

8.66 We think that the balance of risk lies in favour of requiring enfranchisement notices to be in a prescribed form rather than any other form, regardless of whether that other form contains the information required by our statutory regime, or has substantially the same effect as the prescribed form. This position will capture the advantages of adopting prescribed forms and avoid costs and time being wasted in dealing with a notice that is not in the prescribed form, or in arguing that it is sufficiently close to the prescribed form to be valid. We accept that this rule would need to be clearly set out for leaseholders in order to minimise the number of enfranchisement claims that are invalid as a result.

8.67 We set out our recommendations as to the validity of Claim Notices and Response Notices in Chapter 9.[34] However, we want to be clear that any right to challenge the validity of a notice based on its form alone should be limited. A landlord who has been properly served with a Claim Notice or an Information Notice should only have the right to challenge the relevant notice on this ground either at the same time as service of the Response Notice or reply to the Information Notice, or within the time limit for such service or reply (if earlier).[35] A leaseholder should only have the right to challenge a Response Notice on this ground within 14 days following the leaseholder's receipt of the Response Notice. This would avoid the invalidity of the notice being raised at a later stage when the costs incurred by both sides will have increased.[36]

---

32 Those details are also set out in the text box following para 9.6 below.

33 See paras 8.62 to 8.64 above.

34 See paras 9.63 to 9.69 below.

35 See para 9.95 below.

36 At paras 9.66 to 9.69, we make recommendations regarding waiver and amendment of defects in Claim Notices and Response Notices. Unless a party challenges the form of the notice in accordance with our recommendation at para 8.74 below, any defect as to the form of the notice would be automatically treated as waived, and the notice could then be amended pursuant to our recommendation in Ch 9.

The balance of risks: a single set of prescribed forms

8.68 Many of the issues identified above arise, or are more problematic, as a result of current technological limitations. As noted above, it may be possible in the future for Claim Notices for any enfranchisement claim to be generated in response to answers given by leaseholders using a common online portal.[37] Leaseholders would be able to start by selecting the enfranchisement right that they are intending to exercise, and then be presented only with questions relevant to the exercise of that right. Once all relevant questions had been answered, the portal would produce a Claim Notice setting out all required details. Leaseholders would not need to select the correct form, and would not face the problem of being presented with extraneous questions. For the moment, however, it remains necessary to balance the potential simplicity of a single set of forms against the risk of creating overcomplicated forms that will include sections or questions that are irrelevant to many enfranchisement claims.

8.69 Given the information that is common to all enfranchisement claims, and the limited additional information that would need to be provided for lease extension claims, or individual freehold acquisition claims, there is little justification for creating separate forms for each of these claims. The balance of risk seems strongly in favour of using a single set of forms for such rights.

8.70 Whether collective freehold acquisitions should also be included within a single set of forms is more finely balanced. As we set out above, answers to some questions may take up more space in some collective freehold acquisition claims. Additionally, collective freehold acquisition claims will require the details of all participating and non-participating leaseholders to be set out, as well as further details of the claim.[38] If a single Claim Notice were to be adopted, it would include a number of questions that would only need to be completed in the case of a collective freehold acquisition claim. It would also need to have sufficient space for the details of participating and non-participating leaseholders to be included.

8.71 We think it would, however, be possible to include the additional questions required by a collective freehold acquisition claim in a separate part of the Claim Notice, with a clear statement that it only need be completed by those who were seeking to bring a collective freehold acquisition claim. Indeed, a clear reference to the need to complete this section could also appear alongside the part of the form where the type of claim being brought had been selected.

8.72 It would be also be possible to allow the names of other leaseholders who are participating in a collective freehold acquisition claim to be added by the use of additional sheets that would then be attached to the main form.[39] In addition, greater clarity could be achieved by providing pro forma additional pages. And a similar approach could be adopted in respect of the list of non-participating leaseholders.

---

37 See para 8.51 above.

38 See para 8.63 above. Additional pages could also be used where leaseholders found that the space provided for other answers within a Claim Notice was insufficient.

39 This approach is taken by the First-tier Tribunal (Property Chamber) in its application forms for a determination under s 27A of the Landlord and Tenant Act 1985 (in relation to service charges) and for a variation of leases under Pt IV of the Landlord and Tenant Act 1987.

Recommendation 53.

8.73 We recommend that a single set of forms (namely an Information Notice, a Claim Notice and a Response Notice) should be prescribed for use in all types of enfranchisement claim.

8.74 If the relevant prescribed form is not used, the notice should not be valid. Any challenge to the validity of an enfranchisement notice on this basis may only be raised in writing and:

(1) (in relation to an Information Notice) at the same time as any reply to that notice by the landlord or (if earlier) within the time limit for such reply;

(2) (in relation to a Claim Notice) at the same time as service of the Response Notice by the landlord or (if earlier) within the time limit for service of the Response Notice; or

(3) (in relation to a Response Notice) within 14 days following receipt of the Response Notice by the leaseholder.

INFORMATION NOTICES

8.75 In the Consultation Paper we provisionally proposed that leaseholders should be able to serve an Information Notice on their immediate, or other superior, landlord to find out who owns relevant superior interests in their building.[40] We anticipated that leaseholders may choose to do so where they do not have sufficient information to identify the person on whom a Claim Notice should be served.

8.76 Anyone receiving an Information Notice would be required to provide the name and address of his or her own landlord and any other superior landlord of whom he or she was aware. A recipient of such a notice who failed to provide that information would be liable to pay any of the leaseholder's costs that had been wasted because of that failure.

Consultees' views

8.77 Our provisional proposals met with almost universal approval from consultees. Many consultees noted that leaseholders are often not aware of the details of those who hold superior interests in their building. As a result, leaseholders can struggle to establish the identity and address of the person who should be served with a notice of claim. Other consultees considered that the ability to serve such a notice would save time and expense.

8.78 Many consultees also believed that it was right that a landlord should face some form of sanction if he or she did not respond to an Information Notice. Landlords would

[40] CP, Consultation Question 73, para 11.30. We consider the issue of who should be served with the Claim Notice at paras 8.146 to 8.171 below.

otherwise continue to be able to frustrate or prolong the enfranchisement process by withholding information that leaseholders need. The Law Society considered that:

> it is only fair that the sanction of liability for wasted costs should apply where the recipient of the notice fails to respond to it.

A couple of consultees noted, however, that an Information Notice should contain a clear warning of the potential consequences were the recipient to fail to respond.

8.79 A few consultees opposed our provisional proposal. Some were concerned that it would impose an unreasonable burden on landlords particularly when, it was argued, in most cases the information sought could readily be obtained from HM Land Registry. Others thought that the obligation should only require a landlord to provide details of which he or she was aware, rather than requiring the landlord to make enquiries of his or her own. And a few consultees believed that a period of at least a month should be allowed for the landlord to provide a reply.

8.80 Some of the consultees who opposed our provisional proposal were concerned about our proposed sanction for failure to respond to an Information Notice. A few considered a liability to pay wasted costs was unfair. Others thought it open to abuse by unscrupulous leaseholders. For example, Martin Ward wrote that:

> it would be a charter for unscrupulous tenants to claim to have sent an Information Notice, whilst not having ever done so or having carelessly sent it to an incorrect address, simply to be able to claim their costs for serving the notice.

8.81 Other consultees expressed concern about the circumstances in which a landlord would be liable to pay wasted costs, and about factual disputes that might arise as to whether those circumstances had arisen in any particular case. There might, for example, be arguments about whether the notice had been served, or whether the failure had caused any costs to be incurred. Finally, a couple of consultees considered that the landlord's potential liability should be either fixed or capped, while Philip Rainey QC considered that a civil penalty regime should operate in place of any obligation to pay wasted costs.

Discussion and recommendations for reform

8.82 Our provisional proposal that a leaseholder should be able to serve an Information Notice does not break entirely new ground. Leaseholders of flats can already request the relevant information from their immediate or other superior landlord.[41] But our proposal that a landlord who has failed to respond to an Information Notice should be liable to pay any costs of the leaseholder that have been wasted as a result is new.[42]

8.83 While this provisionally-proposed sanction concerned some consultees, we do think that a landlord's liability can be tailored in such a way as to create a reasonable and

---

41 CP, paras 10.74 to 10.76 (in respect of lease extensions) and 10.119 to 10.121 (in respect of collective enfranchisement claims).

42 There is no direct sanction for a failure to comply with such a notice under the current law. Instead, a leaseholder may, having served a default notice on the landlord, apply to the county court for an enforcement order: see 1993 Act, s 92. Ultimately, a failure to comply with an enforcement order could be punished as a contempt of court.

fair incentive for landlords to comply with an Information Notice that has been served on them. We think that:

(1) a landlord should have a period of 28 days in which to respond;

(2) a landlord should not be liable for wasted costs if he or she had not received the Information Notice, or he or she can demonstrate a reasonable excuse for failing to comply within that period; and

(3) a landlord should only be required to provide information that is either within his or her own knowledge, or is held within his or her own records. No wider investigation should be expected.

8.84 We do not think, however, that the sum payable by the landlord for failing to comply with an Information Notice should be either fixed or capped. First, unless the fixed amount or cap is set at a high enough level, some landlords would opt to incur the liability rather than provide the requested information. And a fixed amount or cap set at a level that eliminated such conduct would be of little advantage to most landlords. Second, liability for a less predictable sum may itself focus the minds of some landlords who might otherwise be tempted not to comply.

8.85 Our proposal also has the benefit of bringing forward the point at which a landlord who chooses not to respond properly (and in time) to an Information Notice risks incurring costs. Leaseholders could begin to incur costs that are potentially recoverable from the landlord as soon as the deadline for responding to the Information Notice has passed. In contrast, under the current law, a landlord can safely await the service and expiry of a default notice, knowing that liability for any costs will only begin once an application to court for an enforcement order is made.

8.86 We believe, however, that our provisional proposal does have one disadvantage compared to the current law. Leaseholders would not be able to force a landlord to provide the information that they need by serving a default notice and thereafter seeking an order from the court. Instead, leaseholders would have to choose whether to proceed with an enfranchisement claim based on the information that they have. If they were to choose to proceed, they would run the risk that they will waste costs as a result. Those costs might only be recoverable by bringing legal action against the landlord, where the leaseholders would take the risk that the landlord might not be able to satisfy any judgment awarded against him or her in that action.

8.87 We have therefore concluded that a power for leaseholders to force compliance with the terms of an Information Notice should be included within our new regime. Where an Information Notice has not been complied with, leaseholders should be able to apply to the Tribunal for an order requiring the relevant information be provided.[43] But we also think that where a landlord has failed to provide a response, he or she should be given an opportunity to correct that default before any application to the Tribunal is made. A leaseholder would therefore need to comply with the terms of a pre-application protocol that would require the leaseholder to inform the landlord of the leaseholder's intention to make an application to enforce the Information Notice, and

[43] As we explain at para 11.21 below, any failure to comply with the order made by the Tribunal would need to be enforced by the county court.

give the landlord a short period in which to correct that default before the application was made. If the protocol is complied with, and an order is made by the Tribunal, the costs of the application would be paid by the landlord.

8.88 As a result, leaseholders who had not received a response to an Information Notice would be able to choose to take enforcement action against the landlord rather than simply relying upon the landlord's liability for any wasted costs that will result from that failure.

Recommendation 54.

8.89 We recommend that:

(1) leaseholders should be permitted to serve an Information Notice on their immediate landlord and/or another superior landlord;

(2) a landlord who has received an Information Notice should respond within 28 days by providing the names and addresses of his or her immediate landlord and/or any superior landlord, so long as this information is either within his or her own knowledge, or can be obtained by checking his or her own records; and

(3) where a landlord has received but failed to respond to an Information Notice within time, the leaseholder who gave that notice may either:

(a) apply to the Tribunal for enforcement (including an order that the landlord pay the leaseholder's costs of the application) having taken the steps required by a pre-application protocol; or

(b) proceed to start an enfranchisement claim in reliance upon the liability of the landlord for any costs of the leaseholder that were wasted because of that failure.

INVITING OTHER LEASEHOLDERS TO PARTICIPATE IN A CLAIM

8.90 In Chapter 5, we set out consultees' views on our proposed right to participate.[44] This proposed right would enable leaseholders who have been left out of a collective freehold acquisition, or for some other reason did not participate in that claim, to purchase a share of the freehold interest held by those who did participate at a later stage. As we explain in Chapter 5, the existence of complexities in this area means we not been unable to make a recommendation that the right to participate should be introduced at this stage.[45]

8.91 Our conclusion in relation to the proposed right to participate is significant in the context of another provisional proposal. As we set out in the Consultation Paper, the

[44] See above, at para 5.228 onwards.

[45] We explain that conclusion at para 5.245 and 5.246 above. See also para 2.53(1) above.

2002 Act contained amendments to the 1993 Act which aimed to maximise participation in a collective enfranchisement claim. Those provisions would require all qualifying tenants to be served with an "invitation notice" informing them about a proposed claim and inviting them to participate in the claim before a notice of claim could be given to the landlord. However, the provisions were the subject of substantial criticism and have never been brought into force.[46] In the Consultation Paper, we explained how our proposed new right to participate would help to ensure that eligible leaseholders have an opportunity to participate in a collective freehold acquisition claim. We therefore proposed that leaseholders seeking to bring a collective freehold acquisition claim would not be required to serve notices on other leaseholders inviting the latter's participation in the proposed claim.[47] We have considered that proposal in light of consultees' responses and our conclusion regarding the right to participate.

Consultees' views

8.92 Several consultees emphasised the relevance of our proposed right to participate, flagging that the existence of that right might itself encourage leaseholders intending to bring a claim to invite others to join at an earlier stage. One consultee, Philip Bullivant of PM Property Lawyers Limited, solicitors, supported our provisional proposal so long as the right to participate was created.

8.93 Just over half of consultees responding to this question agreed with our provisional proposal on its own merits – in other words, without reliance on the right to participate. Some considered that any requirement to serve notices inviting participation on other leaseholders would present a barrier to leaseholders bringing collective freehold acquisition claims. Other consultees thought that serving such notices would be impracticable, as it could be difficult to identify the correct legal owner, and leasehold premises were often held by investors who did not live in the relevant flat. And some consultees believed that such a requirement would present landlords with another opportunity to try to block legitimate enfranchisement claims.

8.94 Other consultees thought that a requirement to serve notices inviting participation would be unnecessary as leaseholders intending to bring a collective freehold acquisition claim were likely to want to try to get as many leaseholders involved as possible as a way of reducing the financial contribution that each would have to make towards the costs of acquiring the freehold. Others, however, echoed the views of consultees on the right to participate and told us that inviting the participation of other leaseholders was not always sensible. Some leaseholders would simply not get along with other leaseholders.

8.95 However, a significant minority of consultees disagreed with our provisional proposal (and therefore supported the idea that some form of notice inviting participation ought to be given). Some of the reasons given by consultees were similar to the responses in support of our proposed right to participate: that no leaseholder should be able to exclude other leaseholders from an opportunity to acquire the freehold of the building, and that allowing such exclusion would lead to the excluded leaseholders being subject to the control and management of the participating leaseholders, leading to

---

46 CP, paras 6.149 to 6.151.

47 CP, Consultation Question 75, para 11.43.

conflict between leaseholders within the building. For example, consultees who supported our proposal thought that reasons for excluding leaseholders could rarely be objectively justified and therefore notices inviting participation ought to be served.

8.96 Other consultees were concerned about the interaction between this provisional proposal and other provisional proposals within the Consultation Paper. Long Harbour and HomeGround, a landlord and an asset manager, considered that it would not be reasonable to allow leaseholders to be deliberately excluded from a claim where landlords could then be required to take leasebacks of non-participating units.[48] A couple of consultees believed that our proposed ban on further collective freehold acquisition claims being made for a period after a first claim had succeeded made it more important that all leaseholders were invited to take part in the first claim.[49] And another consultee, Richard Stacey, a surveyor, believed that our provisionally proposed abolition of the existing three or more flats rule would make giving notice to other leaseholders more important.[50]

8.97 However, some consultees did not believe that an obligation to invite other leaseholders to participate would place as great a burden on leaseholders as others have argued. For example, one consultee, Pennington Manches LLP, solicitors, noted that leaseholders' advisers would normally have identified ownership within a building at an early stage. Other consultees proposed ways of easing the burden on leaseholders proposing to bring a collective freehold acquisition claim. For example, a couple of consultees proposed that the landlord should be required to ensure that all leaseholders are made aware of any claim he or she has received. Berkeley Group Holdings PLC, a developer, believed that residents' associations could play a key role. Consultees who thought that the responsibility for serving such notices should remain with the leaseholders intending to bring the claim suggested a variety of means of making that process easier. Consultees proposed, among other things, service by post at the flat itself, or at the address held by HM Land Registry, coupled with a notice displayed prominently at the building itself.

8.98 A few consultees considered that it should not be necessary to serve a notice inviting participation prior to commencing a claim, or that once served, a claim should be capable of being started immediately. The key, it was said, was that other leaseholders had a chance to join in before the claim was concluded. Other consultees believed that the failure to serve a notice should not invalidate a claim.

8.99 A couple of consultees proposed that some of the other problems identified by critics of the amendments made by the 2002 Act could be addressed by restricting the content of the notice. It was suggested that the notice should be restricted to informing leaseholders that a claim was being made and of the recipient's right to join in, but that the proposed terms of acquisition should not be set out in the notice. One consultee believed that leaseholders should retain the discretion to prevent some leaseholders (for example, those associated with the existing landlord) from

---

48 CP, para 6.132; see also our recommendation at para 5.172 above.

49 CP, paras 6.138 and 6.139; see also our recommendation at para 5.221 above, which modifies our provisional proposal.

50 CP, para 8.149; see also our recommendation at para 6.371 above.

participating. The Law Society suggested that a prescribed form of notice should be adopted.

8.100 A few consultees thought that serving notices inviting participation should be voluntary rather than compulsory. Millbrooke Court Residents' Association considered that it would be "good form" to send notices to everyone. And Graham Webb, a leaseholder, believed that serving notices should be "strongly recommended", and that, in practice, only "particularly difficult" leaseholders are excluded from participation.

Discussion and recommendations for reform

8.101 As noted above, consultees were almost evenly split on our provisional proposal that notices inviting participation need not be served on other leaseholders. Looking at the responses of different categories of consultee, a more complex picture emerges. Groups representing professionals, as well as law firms, surveyors' firms and freeholders, were more likely to oppose our provisional proposal than others. In contrast, leaseholders, and consultees who were members of one of our advisory groups, were more likely to support our provisional proposal than others.

8.102 In light of these consultation responses, we have sought to balance the conceptual and practical benefits of including as many leaseholders as possible in a collective freehold acquisition claim at an early stage against the difficulties that can arise from any requirement to give notice of such a claim to other leaseholders. We have also considered these issues in light of our conclusions regarding the right to participate. In particular, we accept that the argument for requiring notices inviting participation is stronger where there is no right to participate in a collective freehold acquisition at a later date.

8.103 Various consultees discussed the merits or otherwise of blocking some leaseholders from taking part in a claim (whether because they are perceived to be difficult, or are associated with the landlord). Fundamentally, the collective freehold acquisition process is a consensual one, designed to be carried out by a group of leaseholders who have a common interest. The process requires agreement between the participating leaseholders on matters such as participation agreements and division of purchase price, and such consent is unlikely to be reached if the initial group of leaseholders are required to invite others to participate in the claim (particularly if some of those other leaseholders are associated with the landlord). A mandatory requirement to serve notices inviting participation could therefore lead to difficulties in progressing the claim from the outset.

8.104 As we note above, some consultees believe that there are already incentives for leaseholders to try to include as many of the leaseholders in their building as possible when bringing a claim. Increasing the number of leaseholders participating can reduce the contribution any individual leaseholder will be required to make. But there may well be cases in which the potential financial benefit of involving other leaseholders will not be sufficient to persuade participating leaseholders to reach out to other leaseholders before bringing the claim. For example, some leaseholders may be able

to afford a higher contribution without the need for other leaseholders to join the claim, or the leaseholders may prefer to rely on a white knight investor.[51]

8.105 We have also considered the practical issues associated with serving notices on other leaseholders and the cost and delay that can result. There is a risk that landlords might become aware of a claim at a premature stage if one of the leaseholders is associated with the landlord. And a landlord might seek to challenge any claim on the basis of a failure to serve notices inviting participation. We have looked at whether it might be possible to reduce these risks - for example, by creating a notice that did not reveal all the details of the proposed claim, or by making it easier to serve the other leaseholders. But it would be difficult to address these risks without also reducing the potential benefit to other leaseholders. For example, making it simpler to serve a notice will also increase the prospect that the other leaseholders will not in fact receive the notice. In any event, any meaningful obligation to serve notices prior to bringing a claim must necessarily carry with it a consequence for default. As such, landlords might still turn to the participating leaseholders' failure to serve notices of invitation as a means of defeating a collective claim (as they have in the context of the right to manage).[52]

8.106 We have also considered whether some of the (albeit reduced) benefits of serving notices inviting participation could be retained, at least in part, if the service of such notices was voluntary rather than compulsory. The danger, of course, is that leaseholders proposing to bring a claim would see no benefit to serving a notice on other leaseholders and simply choose not to do so. It would still, therefore, be possible for certain leaseholders to exclude others from the claim. Therefore, we do not think that voluntary notices will provide a satisfactory solution.

8.107 Therefore, we think there are convincing reasons why leaseholders should not be required to serve notices inviting participation at the outset of a claim. And we do not think that our position on the right to participate is sufficient to shift the balance in favour of introducing mandatory notices inviting participation. While we believe that many leaseholders intending to bring a collective claim would decide to invite other leaseholders to join in, or to give them notice of their intention to bring such a claim, we do not think that requiring notices inviting participation to be given would be a satisfactory way to increase participation in a claim.

Recommendation 55.

8.108 We recommend that leaseholders intending to bring a collective freehold acquisition claim should not be required to give other leaseholders notice of the proposed claim.

---

51 A "white knight" is a third party who contributes to the premium payable on a collective enfranchisement in respect of the non-participating leaseholders' share of that premium.

52 RTM CP, para 6.82.

CLAIM NOTICES

8.109 In the Consultation Paper we proposed that Claim Notices should include full details of the leaseholder's claim, and proof of the leaseholder's title.[53] The information that we considered should be provided in or enclosed with the Claim Notice was set out at paragraph 11.35 of the Consultation Paper, and is set out in the text box below.

Details to be included in a Claim Notice

- The names of each of the leaseholders who are bringing the claim.
- In respect of each named leaseholder:
  - the address of the leasehold premises that is relevant to his or her entitlement to bring the claim; and
  - prescribed details of the lease under which that leasehold interest is held.
- In the case of a collective freehold acquisition:
  - the number of residential units in the building;
  - the number of residential units held by leaseholders eligible to participate in the claim;
  - the names and addresses of those eligible leaseholders who are not participating in the claim; and
  - the name and address of the nominee purchaser.
- The name of the landlord on whom the notice is to be served (the competent landlord), if known.
- The address of the premises held by the competent landlord that is, or includes, (whether in whole or in part) the interest claimed.
- The type of enfranchisement right being claimed in respect of those premises.
- The legal basis of the leaseholders' claim to be entitled to bring that claim.
- A plan showing the location of the premises claimed.
- A plan showing the extent of the premises claimed.

[53] CP, Consultation Question 74, paras 11.39 and 11.40. The same question also invited consultees views as to whether a single prescribed claim notice should be adopted regardless of the type of enfranchisement claim being made. The responses to that question are considered at paras 8.53 to 8.55 above.

- The terms on which it is proposed the interest should be acquired. In particular:
    - (in the case of collective freehold acquisitions) whether the leaseholders require the landlord to take a leaseback of any parts of the premises;
    - the price to be paid; and
    - the terms of any transfer/lease extension.
- An address within England and Wales at which any Response Notice must be served.
- The date by which any Response Notice must be served.
- The addresses at which the Claim Notice is to be served, together with the category of prescribed address into which those addresses are considered to fall.
- Confirmation that the leaseholders have carried out specified checks prior to completing the notice (if required).

8.110 We thought that requiring more than the basic details of the claim at the outset had two advantages. First, it requires leaseholders to consider what it is they are seeking, and on what terms, before a claim is started. Second, it allows landlords to understand the detail of that claim at an early stage.[54] While we acknowledged that a more detailed form increases the risk that errors will be made, we also drew attention to our proposal to limit the bases on which challenges to the validity of any notice could be mounted.[55]

Consultees' views

8.111 The vast majority of consultees agreed with our provisional proposal. Many of those consultees echoed the reasoning set out in the Consultation Paper. Several consultees thought that requiring leaseholders to provide information at the start would save both time and costs, as landlords would otherwise need to request that information from leaseholders separately. Other consultees, however, were keen that leaseholders' costs should not be increased as a result of our provisional proposal. Some consultees cautioned that any prescribed Claim Notice would need to be carefully designed to reduce the likelihood of errors. It should be written in plain English so that anyone would be able to understand it.

8.112 Some consultees felt that the requirement to prove title upfront would reduce the number of unjustified claims being made, and the costs incurred as a result. While

54 CP, para 11.33.

55 CP, para 11.34.

some consultees considered that inclusion of a leaseholder's registered title number should be sufficient, others thought, in contrast, that copies of the leaseholder's lease and any deeds of variation should be included.

8.113 Almost all of the consultees who opposed our provisional proposal believed that it was unnecessary for leaseholders to include details of their lease in the Claim Notice, or to enclose proof of title. It was argued that this information should already be known to the landlord. One consultee questioned the practicality of enclosing the registered titles of all leaseholders in some of the larger collective freehold acquisition claims.

8.114 We also note that some of the responses we received to other questions in the Consultation Paper are relevant to the information which should be included in the Claim Notice. In particular, in responding to our proposals on the terms of a lease extension,[56] some consultees suggested that the terms which were being chosen from our proposed prescribed list should be set out in the Claim Notice. CMS Cameron McKenna Nabarro Olswang LLP, solicitors, argued that leaseholders should be required to make elections from our prescribed list in order to minimise costs, while the Wellcome Trust, a charity landlord, suggested that including any elections from the prescribed list in the Claim Notice would ensure that "the leaseholder is not afforded a further opportunity to elect prescribed terms".

Discussion and recommendations for reform

8.115 We continue to believe that Claim Notices should contain full details of claims, as set out in our provisional proposal. Our Terms of Reference ask us to make enfranchisement "easier, quicker and more cost-effective (by reducing the legal and other associated costs), particularly for leaseholders". Reducing the information and documentation that needs to be provided in, or with, the Claim Notice would reduce the costs incurred by leaseholders at that stage. However, we believe that this saving would, in many cases, prove to be a false economy in the longer term. The costs saved at that point might readily be outweighed by the additional costs incurred (by both sides) later. This might simply be the costs of making or dealing with any subsequent requests for documents that had not been required by the prescribed Claim Notice. Or it might be the ongoing costs of dealing with a dispute, incurred because information or documents had not been provided at an earlier stage.

8.116 We can also see merit in adopting consultees' suggestions that the Claim Notice should list the categories of lease variations which may be requested by the leaseholder.[57] Our proposal that the Claim Notice should include the terms of any lease extension reflects the position under the current law. However, this requirement is broad. If the Claim Notice is made more specific, the leaseholder will be clear as to which variations they may request, which should reduce the possibility that new points are raised at a later stage. Therefore, we think that the prescribed form of Claim Notice should set out the category of variation which the leaseholder requires on a lease extension, together with further details of the nature of the variation (for example, the extent to which the demise of the lease requires amendment). We also

---

56 CP, paras 4.91 to 4.93.

57 While we are not taking forward our proposal for a list of prescribed terms for lease extensions, we are recommending limited categories of variation which either party may require on a lease extension: see para 3.209 and 3.210.

anticipate that this section of the Claim Notice would contain a claim for an extension of all property rights (on a lease extension claim) or grant of all permanent property rights (on an individual or collective freehold acquisition claim) the recipient is able to grant, and would allow the leaseholder to set out any appurtenant rights benefiting the lease which will not be extended or granted for the benefit of the freehold title (as appropriate).[58] This conclusion does not affect our recommendations regarding the validity of Claim Notices.[59] We do not think that the leaseholder will need to select the relevant variations and/or specify the relevant appurtenant rights in order for the Claim Notice to be valid.[60]

Recommendation 56.

8.117 We recommend that Claim Notices should include full details about the leaseholder's claim and proof of the leaseholder's title.

SIGNING ENFRANCHISEMENT NOTICES

8.118 In the Consultation Paper we asked questions about signing notices and the need for statements of truth. We asked first whether a party giving an enfranchisement notice should be required to sign the notice. We then asked about the circumstances in which an enfranchisement notice would be invalid because it had not been signed by all the leaseholders bringing the claim. Finally, we asked whether Claim Notices should contain a statement of truth confirming that prescribed pre-service checks had been carried out.

Should enfranchisement notices be signed?

8.119 In the Consultation Paper, we noted the current requirements that notices of claim under either the 1967 or 1993 Acts must be signed by each leaseholder or by their authorised agent.[61] We also described the problems that have arisen where landlords try to challenge the validity of notices given under Part 2 of the 2002 Act in respect of the statutory right to manage on the basis that those notices have not been validly signed.[62]

8.120 We set out the possibility of removing any requirement that enfranchisement notices be signed, and noted the arguments that might be made against such a proposal.[63] We noted that signatures continue to serve the important function of indicating that the

---

58 See paras 3.298 and 3.299; 4.337 and 4.351 above. We discuss how these recommendations should be extended to collective freehold acquisitions at para 5.181 to 5.182 above.

59 See para 9.64.

60 For example, where an *Aggio* lease is being extended, we recommend that the parties should agree terms separately (rather than following our categories of variation): see para 3.210 above.

61 For the position under the 1967 Act, see CP at paras 10.10 and 10.48. For the position under the 1993 Act, see CP at paras 10.70 and 10.113.

62 CP, para 11.18.

63 CP, para 11.19.

signatory has authorised the giving of the notice, and that removing signatures would likely lead parties to demand separate proof of such authorisation.

8.121 Our provisional proposal was that there should continue to be a requirement for enfranchisement notices to be signed.[64] But we thought that it should be made as easy as possible for parties to do so. We suggested that it should be possible to apply signatures by hand or electronically. Further, we thought that clear rules should set out who is able to sign a notice on behalf of a party (for example, on behalf of a company), and a person who has been authorised to sign on behalf of a party should be able to do so.

Signatures and the validity of an enfranchisement notice

8.122 In the Consultation Paper, we then considered the ways in which we might limit the ability of a landlord to challenge the validity of a notice on the basis that it had not been properly signed.[65] We provisionally proposed that an enfranchisement notice would remain valid so long as it had been signed (by or on behalf of) the minimum number of leaseholders required to bring a claim. We asked whether consultees agreed with that proposal and, if not, what minimum requirements should be set.[66]

Statements of truth

8.123 At paragraphs 8.334 to 8.336 below, we recommend a series of specified checks (which we referred to in the Consultation Paper as "pre-service checks") that should be carried out by leaseholders before starting a claim using what we call the Service Routes or No Service Route. These checks were initially proposed as a counter-balance to our proposals regarding the deemed service of Claim Notices, and to identify the steps that must be taken before applying either for a determination of a claim where no Response Notice has been served, or for an order under the No Service Route.[67]

8.124 In the Consultation Paper, we proposed that each signatory to a Claim Notice should complete a statement of truth confirming that those checks had been carried out.[68]

Consultees' views

Should enfranchisement notices be signed?

8.125 A sizeable majority of consultees considered that a party giving an enfranchisement notice should be required to sign that notice. Many consultees gave reasons that echoed the concerns about unsigned notices that had been set out in the Consultation Paper.[69] Some consultees emphasised that bringing an enfranchisement claim is a

---

64 CP, para 11.21.

65 CP, para 11.22.

66 CP, Consultation Question 72, para 11.25.

67 We set out consultees' responses to those provisional proposals at paras 8.261 to 8.264 below.

68 CP, Consultation Question 72, para 11.26.

69 CP, para 11.20.

serious step, and that landlords were entitled to know that a claim was being genuinely made.

8.126 While one consultee, Morgoed Estates Limited, a landlord, considered that an enfranchisement notice should be personally signed by the leaseholder giving the notice, most consultees believed that a person should be able to sign on behalf of a leaseholder if he or she had been authorised to do so. However, one consultee, the Property Bar Association, noted that clear rules would need to be established as to who would be allowed to sign on behalf of a leaseholder. And another, Carter Jonas LLP, surveyors, noted that delay could be caused by a party seeking evidence of such authorisation from another party. A number of consultees also expressed the view that signatures should be capable of being applied electronically.

8.127 Some of the consultees who opposed our provisional proposal had wrongly interpreted that proposal as requiring leaseholders to sign notices themselves, and believed that the signature of an authorised person should be sufficient. Others, however, believed that an enfranchisement notice should not need to be signed at all. Some consultees thought that this would reduce the scope for arguments about validity of notices. For example, the Leasehold Advisory Service ("LEASE") stated that:

> we do not consider that a signature should be obligatory as this would reduce the scope for arguments by the landlord as to the validity of the signature and by extension the validity of the notice.

Others considered that landlords should simply request to see the leaseholder's authorisation for signature of the Claim Notice if in any doubt. Many consultees expressed satisfaction with the current position. For example, Hamlins LLP, solicitors, stated that:

> we do not see any issues with the current procedure which allows solicitors to sign on behalf of their clients or for the parties to sign the notice direct.

Signatures and validity of notices

8.128 A sizeable majority of consultees agreed that an enfranchisement notice should remain valid provided it had been signed by (or on behalf of) the minimum number of leaseholders required to bring the claim. Some consultees considered that this proposal could reduce delays and avoid unnecessary challenges to some notices.

8.129 Other consultees, however, while agreeing that notices signed by the minimum number of leaseholders required to bring the claim should remain valid, believed that landlords should nevertheless be entitled to assume that those leaseholders who were said to be participating but had not signed the notice (or had signed incorrectly) were in fact not participating in the claim. For example, Irwin Mitchell LLP, solicitors, believed that:

> those who have signed incorrectly [should not be considered] to be participating, unless it is later clarified to the contrary. This will have an effect on valuation and so would need to be expressly provided for in the legislation.

8.130 In contrast, some consultees considered that all leaseholders who were said to be bringing the claim should be required to sign an enfranchisement notice, such that a failure to do so would make the notice invalid. Requiring them all to do so would avoid uncertainty and future disputes. Damian Greenish, a solicitor, noted that, if it were to be made easier for a leaseholder to sign a notice, requiring all leaseholders to sign the notice should not be a problem.

8.131 Some consultees made different proposals. One consultee, Hayes Point Collective Freehold Limited, proposed that collective freehold acquisition claims should be signed on behalf of the nominee purchaser rather than by or on behalf of participating leaseholders. Another consultee, Stephen Desmond, proposed that the nominee purchaser's solicitors should be able to provide a certificate stating that they had seen evidence of the participating leaseholders' identities. And another, James Moyse, a leaseholder, believed that it should be made easier to contact other leaseholders within a building.

Statements of truth

8.132 A sizeable majority of consultees agreed with our provisional proposal that Claim Notices should contain a statement of truth confirming that the prescribed pre-service checks had been carried out. For some consultees, such a requirement would also help to make leaseholders aware of the significance and seriousness of bringing an enfranchisement claim. AML Surveys and Valuations Limited, surveyors, considered that any statement of truth should be signed by solicitors who had carried out those checks. Consensus Business Group, a landlord, felt that a failure to carry out those checks should render the Claim Notice invalid.

8.133 Of those consultees who opposed our provisional proposal, some considered that the obligation to sign a statement of truth was simply too onerous. For example, LEASE considered our proposal was an unnecessary obstacle to making the process for leaseholders quicker, easier and cheaper and:

> opens the door to potential litigation by the landlord as to the accuracy of the statement regarding the nature and extent of any checks that have allegedly been carried out.

Another consultee, the Property Litigation Association, was concerned that our proposal gives rise to the need for advice about the possible implications of making a false statement, and the potential for satellite disputes between the parties. In contrast, a couple of consultees queried the benefit of requiring such a statement at all, as it would not prove to be reliable evidence that the checks had in fact been carried out.

Discussion and recommendations for reform

Should enfranchisement notices be signed?

8.134 We think that signatures remain an established indicator that those entitled to bring (or defend) the claim have authorised the giving of an enfranchisement notice. Removing the need for such notices to be signed would likely merely invite requests for evidence of authorisation from the party giving the notice. It is unlikely, therefore, that such a

policy would have the effect of simplifying the process or reduce the number of disputes arising.

8.135 There is clearly significant practical advantage in allowing one person to sign an enfranchisement notice on behalf of another, particularly where the signature of that notice by the other cannot practicably or speedily be obtained. There is a further advantage in allowing one person to sign a notice on behalf of several individuals, particularly where it is unlikely that those individuals can readily be gathered in one place, or those individuals might not always be easy to reach. While the ability to apply an electronic signature may reduce these difficulties in some cases, in others, problems would remain.

8.136 The disadvantage of allowing others to sign on behalf of a party is that the recipient of a notice might seek to query whether the signatory in fact had the authority of the party or parties to sign. However, in most cases – such as where a solicitor has been instructed to act on behalf of a group of leaseholders – challenges to the authority provided to the signatory would appear unlikely, and more readily rebuffed.

8.137 Overall, we think that the advantages of allowing signature by an agent or representative of a party outweigh the difficulties that might follow. Indeed, many consultees expressed the view that the existing law (as established across England and Wales by statutory changes introduced in 2014)[70] is fit for purpose.

8.138 In any case, there is a clear view that electronic signatures should be accepted.[71] This might have the potential to reduce some of the difficulties that led to the need to introduce signature by authorised agents or representatives.

Signatures and validity of notices

8.139 We should also note that some consultees interpreted our question as proposing that a defect in the signing of an enfranchisement notice should be the only basis on which the validity of an enfranchisement notice could be challenged, and responded accordingly.[72]

8.140 In a lease extension, or individual freehold acquisition, the Claim Notice will need to be signed by or on behalf of the leaseholder (or joint leaseholders). But in a collective freehold acquisition claim, we do not think it necessary for each participating leaseholder to sign the Claim Notice. We agree that being able to identify the number of leaseholders who are participating in a collective freehold acquisition claim is important. It allows a landlord to check that the leaseholders are entitled to bring that claim, and to establish the basis for valuation.[73] But the issue being considered here is

---

70 1993 Act, s 99(5), as amended by the Leasehold Reform (Amendment) Act 2014, s 1. Note, however, that the 2014 Act has since been repealed by the Housing (Wales) Act 2014, which amended s 99(5) of the 1993 Act to the effect that the new signature rule would apply to Wales as well as England.

71 Electronic execution of documents (2020) Law Com No 386.

72 We considered the broader circumstances in which an enfranchisement notice could be challenged as invalid in the CP at para 11.9(6) and (7), and paras 11.116 to 11.119. These issues are addressed further at paras 9.39 to 9.69 below.

73 Whether the number of participators will affect the premium to be paid in a collective freehold acquisition will depend upon which valuation option is chosen by Government in response to the Valuation Report.

not about whether a notice to such a claim that has not been signed by all those said to be bringing the claim should be corrected or clarified, but whether such a notice would remain valid. We think that, provided the Claim Notice has been signed by the minimum number of leaseholders required to bring that claim, it should be valid.

8.141 We also think that a leaseholder should be presumed to be a participating leaseholder in a collective freehold acquisition claim if he or she is included in the list of participating leaseholders contained in the Claim Notice, even if he or she has not signed (or authorised another to sign) the notice. If a Claim Notice has not been signed by or on behalf of one or more participating leaseholders, then the landlord will be able to clarify, in correspondence, whether those leaseholders are participators or not. However, such a notice would only be valid if it were signed by the minimum number of leaseholders to bring the relevant claim.

Statements of truth

8.142 We explain at paragraph 8.255 onwards our conclusion that we should modify our proposed scheme relating to pre-service checks. The result of that change means that it would no longer make sense for a Claim Form to include a statement of truth that pre-service checks had been undertaken where the Service Routes were being followed.[74]

8.143 However, we think that, where an application is made to the Tribunal under the No Service Route, there should be a requirement for the Tribunal to be provided with the results of the specified checks, or be assured that they do not reveal information that would enable the identity of the landlord to be determined and/or a Group A or B address for the landlord to be identified.[75] Whether the Tribunal wishes to see the results of the specified checks in any particular case will be a question for the Tribunal. However, we think, as a minimum, the application should be accompanied by a statement of truth setting out that the specified checks have been carried out in order to satisfy the Tribunal that appropriate checks had taken place.[76]

8.144 Given the concern that has been raised by a number of consultees about introducing a statement of truth into each Claim Notice, we have considered whether it is necessary to include such a statement at that stage of the process. We have looked at whether a checklist relating to the pre-service checks could be included within the Claim Notice, but a statement of truth as to those checks be required only as part of an application to the Tribunal for an order under the No Service Route.[77] We have concluded that it would be better to include the statement of truth at that later stage. The Claim Notice would provide guidance on the pre-service checks to leaseholders who wished to be able to apply for an order, but avoid the creation of another possible basis of challenge by the landlord on the grounds that the pre-service checks had not been completed.

---

74 For details of the Service Routes see paras 8.206 to 8.244 below.

75 See para 8.284 below.

76 See para 8.254 below.

77 Where the statement of truth would need to be signed by or on behalf of all the leaseholders bringing the application.

Recommendation 57.

8.145 We make the following recommendations.

(1) Enfranchisement notices should be signed by the party who is giving the notice, or by anyone authorised to sign the notice on his or her behalf. Signatures applied electronically should be valid.

(2) A Claim Notice in a collective freehold acquisition claim should not be invalidated simply because it has not been signed by or on behalf of all the leaseholders recorded as bringing the claim. A Claim Notice should remain valid so long as it has been signed by or on behalf of the minimum number of leaseholders required to bring that claim.

(3) In circumstances where the Tribunal requires assurance that specified checks have been carried out and/or the result of such checks, a statement of truth as to the carrying out of the specified checks should form part of any application to the Tribunal under the No Service Route. The Claim Notice should not need to contain a statement of truth that such checks have been completed, but it should contain guidance for leaseholders as to the carrying out of such checks.

WHO SHOULD BE SERVED WITH A CLAIM NOTICE?

8.146 In the Consultation Paper, we considered who should be served with a Claim Notice by the leaseholder. We provisionally proposed that leaseholders should serve the Claim Notice on their competent landlord, and that, in the case of joint or split freeholds or other reversions, only one such landlord need be served.[78]

8.147 As to the first of those proposals, we had considered whether a Claim Notice should be served on the leaseholder's immediate landlord, or on the landlord who holds a sufficient interest in the property to be able to grant the interest claimed by the leaseholder (that is, the competent landlord).[79] We concluded that it was important to place the claim in the hands of the person who had the power to grant the interest claimed, and that any difficulties in locating the competent landlord would be balanced by our proposal to transfer responsibility for serving copies of the notice on other landlords to the competent landlord.[80]

8.148 As to the second of those proposals, we had considered whether it was necessary to serve the Claim Notice on each joint freeholder or split reversioner. We thought that a leaseholder need only serve the Claim Notice on one joint competent landlord, and the competent landlord to one part of the premises where there was a split freehold or

---

78 CP, Consultation Question 78, para 11.60.

79 CP, para 11.56. The immediate landlord would also be the competent landlord if his or her interest in the property were sufficient to allow him or her to transfer or grant the interest claimed by the leaseholder.

80 CP, paras 11.102 to 11.106, and paras 8.172 to 8.201 below.

other reversion.[81] As we set out in the Consultation Paper, the justification for this approach is that the leaseholder has played no role in the creation of, and derived no benefit from, complex ownership structures. Even if the competent landlord was not the party who originally created the complex structure, the competent landlord is more likely to have knowledge of it than the leaseholder if he or she made a commercial decision to acquire the previous landlord's title. This justification applies equally to the transfer of responsibility for serving Claim Notices on other intermediate landlords from leaseholders to landlords.[82]

8.149 We appreciate that our proposed regime for service of Claim Notices for enfranchisement is more complex than for exercise of the right to manage.[83] In the enfranchisement context, the position can be complicated by the fact that multiple parties' proprietary rights may be affected by the claim – including third parties whose land is subject to rights benefiting the relevant leaseholder. By contrast, in the course of exercising the right to manage, the number of affected parties will be smaller and the claim does not affect the parties' proprietary rights – and so the consequences of failing to serve the affected party are different. We are seeking to balance the need to be clear about which parties must be notified of the claim against our aim to make the enfranchisement process simpler and more cost-effective for leaseholders. This balancing exercise means that we need to be more prescriptive as to the service of Claim Notices in the enfranchisement context than for the right to manage. However, in both cases, we are seeking to ensure that the person who is best placed to deal with the relevant claim is served with the Claim Notice.

Consultees' views

8.150 The vast majority of consultees agreed with our provisional proposal that a Claim Notice should be served on the leaseholder's competent landlord. However, few of those consultees provided further comments in support. Most consultees focussed instead on our related proposal that it should be for the competent landlord rather than the leaseholders to serve copies of the Claim Notice on other landlords.[84]

8.151 Some consultees who supported our proposal to allow leaseholders to serve limited categories of landlord took the view that leaseholders' claims should not be made more difficult as a result of complexities in the ownership structure of the building that they had played no part in creating. Others noted that it would ease problems that can be experienced by leaseholders in trying to track down two or more landlords. For example, Christopher Denny, a leaseholder, considered that:

> landlords should not be able to reject a claim just because all of the joint freeholders couldn't be tracked down by the [leaseholder].

---

81 CP, para 11.60.

82 CP, paras 11.102 to 11.106, and paras 8.172 to 8.201 below.

83 In the RTM Report (at para 8.50) we recommend that the right to manage company should only be required to serve the claim notice on the freeholder (or freeholders), and not any intermediate landlords.

84 CP, Consultation Question 82, para 11.106; see paras 8.172 to 8.201 below.

However, other consultees thought that the current requirement to serve all joint landlords was appropriate and should remain, to remove the possibility that some joint landlords would not be made aware of the claim.

8.152 Some consultees opposed our proposal on the basis of our definition of competent landlord. A couple of consultees expressed concern that the competent landlord would not always be the landlord with the most valuable reversionary interest in the premises, and that there was therefore a risk that the competent landlord would fail to protect that other landlord's interest sufficiently when dealing with the leaseholder's claim. Philip Rainey QC made the point in the following terms.

> I do not agree that the competent landlord should necessarily be the freeholder in freehold claims. If there is a 999-year head lease, the value lies with the head lessee. If they are not the competent landlord, and they don't get served, then what? What if the freeholder is a dormant, single asset company – with no assets to pay damages when the tenants get the property for nothing? In my view, a very long lessee should be the competent landlord. Under the 1967 Act, a 30-year reversion suffices. This should be replicated across the board.

8.153 Most of the other comments from consultees considered that the competent landlord was not the only landlord who should be served. One consultee considered that leaseholders should be able to serve either the competent landlord or the landlord who collects ground rent from the leaseholders. Another consultee, Christopher Jessel, a solicitor, proposed that leaseholders should be able to serve the competent landlord by sending the Claim Notice to any of a wide range of parties, including agents, rent collectors, and management companies.

8.154 Several consultees considered that the competent landlord and all other intermediate landlords should all be served by leaseholders. One consultee, Places for People Group Ltd, a developer, thought that the prejudice to intermediate landlords would be greater than any prejudice that could be caused to leaseholders by having to serve notices on a larger number of landlords. Other consultees felt that as most titles were registered, and leaseholders would want to protect any notice by registering it against all such interests, an obligation to serve all landlords would not be an onerous task.

8.155 However, other consultees focussed on the need for a leaseholder to serve all landlords of a split freehold or other reversion. The Property Bar Association noted that the landlords may have no shared interest and may not be connected, and one could not assume that the landlord who was served would notify the other landlord of the claim. Another consultee, the Wallace Partnership Group Limited, a landlord, considered that although the leaseholders may have played no part in the creation of split interests, they should have been made aware of them on the assignment or grant of their lease. A few consultees proposed that serving other landlords should be made less onerous, either by permitting service at an address held by HM Land Registry or by making clear that a failure to serve another landlord would not invalidate a Claim Notice.

Discussion and recommendations for reform

Identifying the competent landlord

8.156 The problem identified by some of our consultees is that the competent landlord might have little financial interest in the outcome of the claim. For example, his or her interest in the property may be held subject to intermediate interests, the owners of which would be due the bulk of any price paid by the leaseholder. This could lead to the competent landlord agreeing a price that undervalues the interest, whether as a result of indifference, or active collusion with the leaseholders bringing the claim.

8.157 Recommendations that we are making elsewhere in this Report would reduce this risk. First, landlords would be required to serve copies of the Claim Notice on intermediate landlords (and would be liable for any losses suffered by the intermediate landlord as a result of a failure to do so).[85] Second, intermediate landlords would have both a right to be heard in any claim and a right to apply to the court to replace the competent landlord as the person with conduct of the response to the claim.[86] Third, the landlord with conduct of the response to the claim would owe a duty of care to other landlords that, if breached, could lead to an award of damages being made against the competent landlord.[87]

8.158 The remaining difficulty identified by consultees is that the competent landlord who has sold the interest at an undervalue might have insufficient funds or assets to satisfy any award of damages made against him or her in favour of the intermediate leaseholder whether as a result of a failure to serve the intermediate landlord, or a breach of the competent landlord's duty of care. The absence of any effective remedy against the competent landlord might make it more likely that the competent landlord will choose not to protect the interests of other intermediate landlords. We consider that the risk of these exceptional circumstances arising is balanced by our other recommendations that will limit the risk that an intermediate landlord will lose out, as set out above.

8.159 There might also be circumstances in which leaseholders would seek to work with the competent landlord to undervalue intermediate interests. This could be a particular problem where the leaseholder and competent landlord are associated in some way. We do not believe, however, that this possibility should cause us to alter our provisional proposal. An intermediate landlord who has suffered a loss as a result of a competent landlord's failure to serve a copy of the Claim Notice on him or her may have a cause of action against any leaseholder who had conspired with the competent landlord to cause loss to the intermediate landlord.[88] Given that the leaseholder will retain his or her existing lease, or have acquired an extended lease,

---

85 See para 11.106 and para 8.201 below.

86 See paras 9.108 and 9.109 below.

87 See para 13.45 below.

88 Unlawful means conspiracy is a tort committed where two or more people (in this instance, the competent landlord and one or more leaseholders) act together with the shared intention of using unlawful means to cause loss to another (in this instance, an intermediate landlord). The unlawful means would be a breach of the competent landlord's statutory duty to serve a copy of the Claim Notice on the intermediate landlord and/or the competent landlord's duty of care: see para 13.45 below.

as a result of the queried transaction, it is likely that any judgment entered against the leaseholder would be satisfied under these circumstances.

8.160 Therefore, we do not think that the category of unusual circumstances in which the competent landlord and/or leaseholder might cause the intermediate landlord to suffer loss should lead us to alter our provisional proposal. We remain of the view that serving the competent landlord places the claim directly in the hands of the landlord who has the power to grant or transfer the interest claimed.[89] Therefore, we are adopting our provisional proposal as a final recommendation.

Joint landlords, and split freeholds or other reversions

8.161 Our provisional proposal placed the responsibility for serving joint landlords (whether of the same title, or a separate title) with copies of the Claim Notice on the competent landlord, and not on the leaseholders. The objective of this approach is to ease the burden and difficulties experienced by leaseholders intending to bring an enfranchisement claim. There would only be one landlord that they need to serve with the Claim Notice to start the claim. This will remove the risk that a claim will fail or otherwise be frustrated because of a failure to serve a further landlord. It will also – to the extent that the costs of serving the other landlords are not recoverable from the leaseholders – reduce the costs of starting the claim.[90]

8.162 The underlying rationale for shifting the burden and costs from leaseholder to landlord is that leaseholders do not have a role in, and do not benefit from, the creation of complex ownership structures. While this is likely to be true in the case of vertical complexity (that is, the creation of intermediate interests), the position differs in some cases of horizontal complexity (that is, the creation of joint interests, or split reversions). While a leaseholder is unlikely to have played any role in whether he or she has a single landlord or a joint landlord, it is possible that a split reversion was created by combining two leasehold properties that had previously been held separately, rather than by the sub-division of the reversion to an existing lease. However, given the limited number of these cases, we think that this is insufficient to justify a deviation from the general rule that enfranchisement claims should not be frustrated by the complexity of superior interests.

8.163 We also think that while it would be reasonable to expect one joint landlord to provide other joint landlords with a copy of any Claim Notice, it would not be reasonable in all cases to expect one split reversioner to serve a copy of such a notice on all other split reversioners. In some cases, each reversioner will be fully aware of the existence of other reversioners and will be able to serve them with a copy of any notice. For example, split reversioners may be related parties who had previously subdivided the reversion between them. But in other cases, a reversioner may not be aware that there is another reversioner affected by a claim and/or will have no existing relationship or connection with that other reversioner. For example, a lease extension claim might include a residential unit and a garage that had been let on a separate lease, or part of the landlord's reversion may have been sold to another party, but

---

89 See paras 7.39 to 7.47 above, where we discuss the position in cases in which a shared ownership leaseholder seeks a lease extension where the immediate landlord is not also the competent landlord.

90 Our provisional proposals about whether a landlord should be entitled to recover his or her non-litigation costs from his or her leaseholders are considered at paras 12.15 to 12.56 below.

remain subject to rights granted by a lease. Moreover, our recommendation that a collective freehold acquisition claim can include more than one building is likely to mean that such a claim could involve separate freeholders of each block who had no existing relationship or connection between them. In such cases, we think that it would be unreasonable to expect a landlord of part of the property claimed in a Claim Notice to serve a copy of that notice on every other landlord of other property included in that claim.

8.164 We have therefore concluded that the burden of serving all split reversioners should be on the leaseholder. He or she is normally better placed to know that the claim involves property held by more than one such landlord. However, we do not believe that it would be proportionate for a failure to serve a Claim Notice on all split reversioners to invalidate an enfranchisement claim. Instead, we think that the enfranchisement claim should be treated as having been validly started provided one of the split reversioners had been served with the Claim Notice, but that the Tribunal should have power to give directions as to the service of any other split reversioners who had not already been served, and for their future participation in any claim.[91]

8.165 We do, however, think that it is justified for one joint landlord to serve copies of the Claim Notice on other joint landlords. We therefore recommend that our provisional proposal is adopted. If a joint landlord has been served with a Claim Notice by a leaseholder, but is unable to identify or locate the other landlord, we think that he or she should be able to apply to the Tribunal for an order dispensing with the need to serve the other landlord. The Tribunal will be able to make that order, or give directions for service, including by alternative means.

Owners of other land

8.166 In Chapter 3, we conclude that, where a leasehold title benefits from property rights over other land which is not demised to the leaseholder (whether that other land is owned by the landlord or a third party, and regardless of when the rights were granted), the leaseholder should be able to claim an extension of those rights as part of a lease extension claim.[92]

8.167 The leaseholder is more likely than the landlord to know whether his or her lease benefits from appurtenant rights affecting third-party land. Indeed, these rights may have been negotiated by the leaseholder independently of the grant of the lease. Consequently, we think that the policy set out above in respect of split reversions should also apply to the service of a lease extension claim seeking extended rights over other land. Leaseholders should serve the Claim Notice on the owners of land affected by appurtenant rights who are capable of granting the relevant extension of those rights.

8.168 We also recommend in Chapter 3 that a lease extension *must* include an extension of appurtenant rights affecting the lease and granted in the lease itself. In many cases, these rights will affect land belonging to the landlord (who will have been served with the Claim Notice in any case). But the affected land may have been sold to a third

---

91 Where the interests of the split reversioner are being affected, he or she will need to be involved (or his participation dispensed with) if the relevant transaction is to take place.

92 See paras 3.287 to 3.290 and 3.298 above.

party. However, if the leaseholder fails to serve a third party over whose land appurtenant rights are to be claimed, this failure will not invalidate the claim. Instead, the Tribunal would be able to give directions relating to the late service of the Claim Notice, and the subsequent participation of the owner of the affected land in the claim.

8.169 We make similar recommendations in Chapter 4 regarding individual and collective freehold acquisitions and discuss how they should be extended to collective freehold acquisitions in Chapter 5.[93] Leaseholders, in acquiring their freeholds, will be entitled to claim the grant of (permanent) property rights for the benefit of the freeholds that will replicate property rights that benefited their leasehold titles. These property rights may originally have been granted by a neighbour separately from the relevant leases; the leaseholders are best placed to know whom they should serve with their claims in order to obtain a grant of the relevant rights.

8.170 But as with lease extensions, on a freehold acquisition, leaseholders *must* claim a freehold version of property rights benefiting the lease that were granted in the lease itself. These rights are likely to affect land retained by the landlord, who will be served with the claim in any case. However, if the relevant land now belongs to a third party and that third party has not been served, the failure should not invalidate the claim, but the Tribunal will be able to give directions relating to the late service of the Claim Notice.

Recommendation 58.

8.171 We make the following recommendations.

(1) Leaseholders making an enfranchisement claim should serve the Claim Notice on their competent landlord (that is, the first superior landlord who holds a sufficient interest in the premises to be able to grant the interest claimed).

(2) In the case of joint landlords of a single premises, leaseholders should only be required to serve the Claim Notice on one such landlord. It should be for the landlord who has been served by the leaseholder to serve copies of the Claim Notice on the other joint landlords. If the landlord served with a Claim Notice is unable to serve copies on the other joint landlords, the landlord should be able to apply to the Tribunal for an order dispensing with service, or giving directions for service.

(3) In the case of split reversions, a leaseholder should be required to serve the Claim Notice on each split reversioner. However, provided one split reversioner has been served, a failure to serve the other split reversioners should not invalidate the claim.

[93] See paras 4.337 and 4.351 and 5.181 to 5.182 above.

(4) In the case of owners of other land bound by property rights benefiting the lease:

(a) if the right is granted within the lease, a leaseholder should be required to serve the Claim Notice on the owner of that other land, but failure to serve the owner of other land should not invalidate the claim.

(b) if the right is not granted within the lease, a leaseholder should be required to serve the Claim Notice on the owner of that other land in order to claim the relevant right.

In the case of (3) and (4)(a) above, the Tribunal should have power to give directions relating to late service of the Claim Notice, and future participation of the unserved split reversioner or owner of other land (as the case may be) in the claim.

SERVING COPIES OF A CLAIM NOTICE ON OTHERS

8.172 We conclude above that leaseholders must serve the Claim Notice on their competent landlord.[94] We also conclude that leaseholders should be required to serve the Claim Notice on all owners of a split freehold or other reversions, and the owners of other land over which a leaseholder has rights (whether such rights are granted within or separately to the lease), but that leaseholders should only be required to serve the Claim Notice on one joint landlord.[95]

8.173 In the Consultation Paper we considered the related question as to who should be responsible for notifying intermediate landlords and third parties to the leaseholder's lease (such as a management company) of the leaseholder's proposed claim.[96] We provisionally proposed that it should be the competent landlord – rather than the leaseholder – who was responsible for doing so. We also proposed that a competent landlord who failed to serve a copy of the Claim Notice on an intermediate landlord should be liable for any losses that result.[97]

8.174 We argued that the current law, which requires leaseholders to serve intermediate landlords and third parties, places an unreasonable burden on leaseholders, who would have played no role in the creation of such interests. We also argued that the fact that some leaseholders may have been aware of these other interests when they

94 See para 8.171(1).

95 See para 8.171(2) above. If a leaseholder wishes to claim rights over other land where such rights are granted separately to the lease, he or she must serve a Claim Notice on that party in order to claim those rights. If the leaseholder does not serve a Claim Notice in this way, the relevant right cannot be claimed.

96 We set out our recommendations in relation to the service of owners of other land bound by property rights benefiting the lease at para 9.171(4) above.

97 CP, Consultation Question 82, para 11.106.

acquired their own interests was not enough to justify placing the burden of service on the leaseholders.[98]

8.175 We did, however, acknowledge the risk that our provisional proposal would lead to some intermediate landlords not being made aware of the leaseholders' enfranchisement claim. In doing so, we also noted that some of our options for valuation reform would reduce the likelihood that prejudice would be caused to an intermediate landlord who was, because of non-service, unable to argue his or her case. Nevertheless, we proposed that a competent landlord who failed, without reasonable cause, to serve a copy of a Claim Notice on an intermediate landlord should be liable for any loss caused to the intermediate landlord.[99]

Consultees' views

The burden of serving copies

8.176 Well over half of consultees agreed with our provisional proposal that competent landlords should be responsible for serving intermediate landlords and third parties with copies of the Claim Notice. Some expressed the view that placing responsibility on the competent landlord was fair. One consultee, LEASE, thought that the landlord was simply in a better position to do so. Another consultee, the Birmingham Law Society, believed that transferring the burden to landlords was a fair balancing out of other changes set out in the Consultation Paper.[100]

8.177 Other consultees, while agreeing with our proposal, raised concerns. One consultee, Heather Keates, a conveyancer, thought that some less commercially-minded landlords might not fully understand the obligation to serve intermediate landlords and third parties. Other consultees stressed that the competent landlord's costs of serving copies should not be recoverable from leaseholders.

8.178 Some consultees also expressed support for our provisional proposal, but believed that we should adopt a procedure for the service of copies of a Claim Notice on intermediate landlords and third parties akin to our provisional proposals for serving the Claim Notice on competent landlords.[101] The Law Society proposed that leaseholders should be required to disclose information they held about intermediate landlords and third parties in the Claim Notice, and that landlords should be able to recover wasted costs from the leaseholders if that information had not been properly provided.

8.179 Almost all the consultees who opposed our provisional proposal considered that the burden of serving copies of a Claim Notice on intermediate landlords and third parties should remain with leaseholders. The reasons given for adopting that view varied. Some consultees believed that the burden should be on the leaseholder as it was he

---

98 CP, para 11.103.

99 CP, para 11.106.

100 The Birmingham Law Society referred to our provisional proposals in respect of deemed service (see paras 8.206 to 8.244) and the effect of a failure by the landlord to serve a Response Notice (see paras 9.125 and 9.126 below).

101 See our recommendation at para 8.171 above.

or she who was bringing the claim, or, as others argued, benefiting from the claim. Other consultees argued that the burden should be on the leaseholder because he or she was using the process to take away the landlord's property rights, or because, based on our provisional proposals, landlords might recover a smaller proportion of their incurred costs.[102]

8.180 Some consultees disagreed with our assessment that it was difficult for leaseholders to serve intermediate landlords. These intermediate landlords were often also the leaseholder's immediate landlord. Long Harbour and HomeGround, a landlord and an asset manager, noted that service of one or more Information Notices would provide leaseholders with the details required to serve copies on other landlords.

8.181 Other consultees thought that landlords may not have the information required to be able to serve some third parties, such as guarantors, or management companies which are owned or controlled by leaseholders. The Wellcome Trust, a charity landlord, thought that problems with landlords serving third parties would cause delay that would affect the time allowed for those receiving copies of the Claim Notice to respond.

8.182 Long Harbour and HomeGround believed that it was in leaseholders' interests to serve intermediate landlords and third parties as this would allow them control over the process and limit difficulties and uncertainties that could arise from any failure to serve copies on others properly. Caxtons Commercial Limited, surveyors, noted that leaseholders might prefer to serve copies themselves if landlords would be entitled to recover their costs of serving copies from the leaseholders.

8.183 Other consultees, including Philip Rainey QC, considered that the burden of serving intermediate landlords and third parties should remain with leaseholders, in part to avoid the problems that would arise from claims for damages between landlords.[103] Philip Rainey QC also considered that litigation arising from problems with service of copies of the Claim Notice should be between the acquiring leaseholder and the prejudiced intermediate landlord, not between landlords.

8.184 A few consultees proposed alternative arrangements. Damian Greenish proposed that both leaseholders and competent landlords should be required to serve copies of the Claim Notice on intermediate landlords and third parties. Stephen Desmond proposed that a leaseholder should be required to note on the Claim Notice the intermediate landlords and third parties that it had been able to serve, while the competent landlord should tell the leaseholders who else needed to be served with copies, and serve those copies.

Consequences of failing to serve copies

8.185 Some of the consultees who supported our provisional proposal about the effect of any failure to serve a copy of a Claim Notice on an intermediate landlord noted that our proposal reflected the position under the current law.[104] A couple of consultees

---

[102] Our proposals in relation to the landlord's ability to recover costs are considered in Ch 12 below.

[103] See para 13.45 below.

[104] CP, paras 10.16 and 10.78 (which together set out the current law) and 11.106 (which set out our proposals).

stressed that it was important that any dispute as to the service of copies of the Claim Notice should be between competent landlord and intermediate landlord or third party and should not affect the leaseholder's enfranchisement claim.

8.186 Other consultees who supported our provisional proposal were nevertheless keen that the competent landlord's liability to an intermediate landlord should be circumscribed. For example, Charlie Coombs, a surveyor, considered that a competent landlord should not be liable for failing to serve an intermediate landlord with a copy of the Claim Notice where he or she had not been aware of that intermediate interest or the intermediate landlord could not be found. The British Insurance Brokers' Association noted that competent landlords would need to ensure that they held sufficient insurance cover in respect of claims by intermediate landlords who had not been served.

8.187 Some of those consultees who opposed the second part of our provisional proposal did so on the basis that they believed our proposal represented an unjustified extension of the current liability of landlords. Other consultees were concerned about how such a claim would be dealt with, and under which jurisdiction.

8.188 A couple of consultees raised concerns that, under our provisional proposals, a failure to serve copies of a Claim Notice on an intermediate landlord could leave the intermediate landlord exposed to potential losses if the competent landlord was not able satisfy a judgment entered against him in respect of the intermediate landlord's losses.[105]

Discussion and recommendations for reform

The burden of serving copies

8.189 We continue to think that it should be the competent landlord's responsibility to serve intermediate landlords with copies of the Claim Notice. As we noted in relation to our recommendations for service of the Claim Notice on joint landlords and split reversioners, leaseholders do not normally have a role in, or benefit from, the creation of complex ownership structures.[106] This is equally true in the case of vertical complexity, such as the creation of intermediate interests, as for cases of horizontal complexity (such as split freeholds) which we discuss elsewhere in this Report. We therefore think it is unreasonable to place the burden of notifying intermediate landlords on leaseholders.

8.190 We accept, however, that notifying third parties of a proposed enfranchisement claim is more problematic. In the case of a management company that is a party to the leaseholder's lease (but not party to the claim) we believe that our rationale for requiring competent landlords to serve intermediate leaseholders applies. Leaseholders will have played no part in the decision to give a management company responsibility for discharging the landlord's management obligations in respect of the building. However, we agree that, where the competent landlord is not also the leaseholders' immediate landlord, it would be much easier for the leaseholders to

---

105 The same point was made in relation to our provisional proposal that leaseholders need only serve the Claim Notice on their competent landlord. See para 8.158 above.

106 See para 8.161 above.

locate and serve the management company than for the competent landlord to do so. This is because the leaseholders are more likely to have had day-to-day dealings with the management company while it manages the relevant building.

8.191 We also think that there is likely to be a further problem with guarantors. Although a guarantor will have been required by the landlord, the guarantor will have been put forward by the leaseholder as a person who is willing to underwrite the leaseholder's obligations under the lease. And while an immediate landlord should be able to locate a guarantor (as that guarantor would have been party to the relevant lease alongside the immediate landlord), that is less likely in the case of any superior landlord.

8.192 We therefore recommend that a leaseholder should be responsible for serving copies of the Claim Notice on third parties to the lease except where the competent landlord is also the leaseholder's immediate landlord. If that exception applies, the competent landlord should be responsible for serving copies of the Claim Notice on third parties. In each case, the Claim Notice would only need to be served on third parties insofar as the competent landlord or leaseholder (as relevant) is aware of the existence of that third party – for example, because a guarantor is party to a lease which was granted by or to the party who is serving the notice. We also think that there should be no obligation to serve a third party where the specified checks reveal that the third party has died (or, in the case of a company, no longer exists), or (in the case of a guarantor) has no continuing liability.

8.193 We also recommend that leaseholders and competent landlords should be able to rely upon the same designated address categories when serving copies of a Claim Notice as will apply to leaseholders serving a Claim Notice. If a party is unable to serve at such an address, he or she may apply to the Tribunal for an order dispensing with service of the Claim Notice on that intermediate landlord or third party.[107]

The costs of serving copies

8.194 We accept that transferring responsibility for serving intermediate landlords and (in certain circumstances) third parties from leaseholders to competent landlords, while allowing competent landlords to recover those costs from leaseholders, could increase leaseholders' costs of serving the Claim Notice. If that were the case, our recommendation would, viewed in isolation, be inconsistent with our Terms of Reference.

8.195 We have set out our recommendations in respect of the recovery of a landlord's non-litigation costs from his or her leaseholder in Chapter 12.[108] If Government were to adopt one of the options set out in the Valuation Report that is broadly market-value based, we recommend that a leaseholder should not be required to contribute to his or her landlord's non-litigation costs. If Government were to adopt one of the valuation options that is not broadly market-value based, or chooses to direct that prescribed rates be set below market levels, we recommend the adoption of a fixed costs regime in respect of the recovery of the landlord's non-litigation costs from a leaseholder who has made an enfranchisement claim.

---

107 See para 8.254 below.

108 See para 12.56 below.

8.196 If the first of these positions were adopted, the competent landlord's costs of serving copies of a Claim Notice on intermediate landlords and third parties would not be recoverable from leaseholders as part of our proposed enfranchisement regime. But if the second of these positions were adopted, then it would be possible for such costs to be considered when the level of the base costs is set within the fixed costs regime. While it would not be appropriate for us to recommend the level of those base costs, we do recommend that the competent landlord's costs of serving copies of the Claim Notice on intermediate landlords and third parties should not be a factor when that level is set.[109] If, as we have argued, it is unfair to place the burden of serving such copies on the leaseholder, it would also be unfair to expect the leaseholder to bear the cost of the competent landlord doing so.[110]

The consequences of failing to serve copies

8.197 Some consultees saw our provisional proposal as consistent with the landlord's existing liability to other landlords on whom they are required to serve a copy of the leaseholder's notice of claim. Others saw it as an unwelcome extension of the landlord's potential liability.

8.198 Our proposal did not extend the circumstances in which a landlord would be liable for an intermediate landlord's losses under the current law. We accept, however, that as the leaseholder will not be required to serve copies of the Claim Notice on intermediate landlords, the competent landlord's failure to do so is more likely to lead to the competent landlord incurring a loss than under the current law. But we think that the advantages of transferring responsibility for serving copies of the Claim Notice from leaseholders to landlords remain significant, and we note that competent landlords can avoid liability by complying with their obligation to serve copies of the Claim Notice. And, of course, the intermediate landlord risks suffering a loss if a competent landlord fails to serve a copy of the Claim Notice on that intermediate landlord.[111]

8.199 We agree with those consultees who noted that there will remain a risk that a competent landlord who is liable for an intermediate landlord's loss will not be able to pay. That issue is considered as part of our analysis of responses to Consultation Question 78.[112] We think that analysis applies equally here.

8.200 Finally, we discuss the timeframe for landlords to serve copies of the Claim Notice on intermediate landlords or third parties in Chapter 9.[113]

---

109 See para 12.111 below.

110 We have also recommended that terms of a lease or collateral agreement that purports to allow a landlord to recover its litigation or non-litigation costs arising out of an enfranchisement claim should be unenforceable: see para 12.204 below. This would prevent a landlord from relying on any provisions of the lease which require the leaseholder to pay the landlord's costs of serving copies of the Claim Notice.

111 We discuss the protections for an intermediate landlord in the course of the claim at paras 13.21 to 13.45 below.

112 See para 8.158 above.

113 See para 9.95 below.

Recommendation 59.

8.201 We make the following recommendations.

(1) Where a copy of the Claim Notice should be served on intermediate landlords:

(a) a competent landlord should be responsible for serving copies of the Claim Notice; and

(b) where the competent landlord fails to serve a copy of a Claim Notice on an intermediate landlord, the intermediate landlord should be able to bring a claim for damages in the county court against the competent landlord for any losses arising.

(2) Where a copy of the Claim Notice should be served on third parties to the relevant lease (including guarantors and management companies):

(a) a competent landlord who is also the leaseholder's immediate landlord should be responsible for serving copies of the Claim Notice;

(b) if the competent landlord is not also the leaseholder's immediate landlord, the leaseholder should be responsible for serving copies of the Claim Notice; and

(c) no party should be required to serve a copy of a Claim Notice on a third party who has died or (in the case of a company) no longer exists or (in the case of a guarantor) has no continuing liability.

THE TWO METHODS OF STARTING AN ENFRANCHISEMENT CLAIM

8.202 In most cases, leaseholders will be able to start an enfranchisement claim without difficulty. They will know both the identity of their competent landlord and the address at which he or she can be served with a Claim Notice. The landlord, after receiving that notice, will respond to the claim by serving a Response Notice.[114] And the parties will co-operate with each other thereafter. Any procedural system should be simple enough to allow such cases to proceed without difficulty. But that system must also be able to deal with situations that can cause real problems in practice for leaseholders.

8.203 In the Consultation Paper, we identified two alternative methods by which leaseholders could start an enfranchisement claim.[115]

(1) **The Service Routes**. A leaseholder could serve a Claim Notice on his or her competent landlord by delivering it, or sending it by post, to a designated address for the landlord. We proposed two groups of addresses, "Group A" and

[114] See para 9.5 to 9.38 below.

[115] CP, para 11.9(2).

"Group B". We referred to this method of service as either Service Route A or Service Route B. If the designated address for the landlord falls into Group A, the leaseholder is described as using Service Route A. If the designated address for the landlord falls into Group B, the leaseholder is described as using Service Route B.[116] We consider these routes in more detail below.

(2) **The No Service Route**. Where a leaseholder does not know the identity of the competent landlord, or is not able to identify any Group A or Group B address for that landlord, the leaseholder could apply to the Tribunal for an order allowing him or her to proceed with the claim.[117]

8.204 Neither of these methods of starting an enfranchisement claim break entirely new ground. At present, claims are either started by the leaseholder serving a notice of claim, or by making an application to the county court where the landlord is unknown or missing. However, we think that changes should be made to improve the ease with which enfranchisement claims can be started.

8.205 We asked consultees about these methods of starting a claim.[118] The vast majority of consultees supported our approach. We set out our analysis of the more detailed responses given in respect of each of these proposed methods of commencing a claim in the sections that follow.

SENDING A CLAIM NOTICE TO THE LANDLORD (THE SERVICE ROUTES)

8.206 As noted above, at present an enfranchisement claim will in most cases be started by the leaseholder serving a notice of claim.[119] Our recommended procedure is similar: a claim would normally be started by the leaseholder serving a Claim Notice on the competent landlord.[120]

8.207 In the Consultation Paper, we explained our belief that the current procedural rules do not provide sufficient certainty for leaseholders hoping to bring an enfranchisement claim. Leaseholders who have served a notice of claim on their landlord, but have not received a response, cannot be sure that the claim will be treated as having been started properly. In most cases it is open to the landlord to argue later that he or she had not responded because the notice had not been received. As a result, a leaseholder may have spent both time and money progressing a claim only to be told that he or she must start again.[121]

8.208 In the Consultation Paper, we provisionally proposed that Claim Notices sent by post or delivered by hand to competent landlords at a designated address should be deemed served (that is, treated as having been given to the landlord, even if that

---

116 CP, paras 11.74 to 11.78.

117 CP, paras 11.79 to 11.81.

118 CP, Consultation Question 79, para 11.82.

119 See para 8.7 above.

120 See paras 8.109 to 8.117 above.

121 CP, para 11.63.

should prove not to be the case).[122] Leaseholders who serve a Claim Notice in this way, but receive no response from their landlord, would be able to proceed with the claim knowing that the landlord could not later block the claim by arguing that he or she had not received the notice.

8.209 To balance the benefits of deemed service against the risk that a landlord would be genuinely unaware that a claim had been made, we provisionally proposed distinguishing between different types of addresses for service.[123] Categories of address with a high probability that any notice sent to it would be received by the landlord were placed in Group A. Categories of address with a lower, but reasonable, likelihood that any notice sent to it would be received by the landlord were placed in Group B.[124] Leaseholders would be required to serve at an address in Group A, if available. Reliance on a Group B address would require leaseholders to carry out a wider range of pre-service checks.[125]

8.210 We also proposed that an email address for the competent landlord could only be used where it had:

(1) been given by the landlord to the leaseholder as an address at which an enfranchisement notice could be served (when it would be a Group A address);

(2) been given by the landlord to the leaseholder as an address at which notices more generally could be served (when it would be a Group B address); or

(3) been recorded at HM Land Registry as an address at which notices can be served on the registered proprietor (when it would be an additional address to be served under Group B).

8.211 The Group A and Group B addresses that were proposed in the Consultation Paper, are set out below.

---

122 CP, Consultation Question 79, para 11.82(1).

123 CP, paras 11.68 to 11.70 and CP, Consultation Question 79, para 11.82(1).

124 As noted at para 8.203(1) above, a leaseholder who serves his or her landlord at a Group A address is described as using Service Route A. A leaseholder who is only able to serve his or her landlord at a Group B address is described as using Service Route B.

125 CP, paras 11.83 to 11.94 and Consultation Question 80, para 11.95. See also paras 8.255 and following below.

Addresses for service[126]

Group A

- any address (including an email address) that has been provided by the competent landlord to the leaseholder as an address at which an enfranchisement notice may be served; and
- the competent landlord's current address

Group B

- the competent landlord's last known address;
- the latest address given by the competent landlord for the purposes of:
  - section 47 of the Landlord and Tenant Act 1987;
  - section 48 of the Landlord and Tenant Act 1987; and
- the latest email address given by the competent landlord for the purposes of serving notices (including notices in proceedings).

We also proposed that, where the Claim Notice is served on a Group B address, the leaseholder should (in the case of registered land) also serve the notice at each of the addresses shown for the landlord as registered proprietor of the property at HM Land Registry.

8.212 We explain below, at paragraph 8.238 onwards, that we have made revisions to the Group A and Group B addresses for service as part of our work to finalise our recommendations.

Consultees' views

8.213 Many consultees believed that our provisional proposal would help prevent landlords from unreasonably arguing that a claim had not been correctly served. Some consultees noted that the proposal would prevent landlords from attempting deliberately to evade an enfranchisement claim.

8.214 Some consultees who supported our provisional proposal went on to suggest that adjustments should be made to the detail of our proposed deemed service regime. For example, the Birmingham Law Society proposed that, in the case of a company landlord, the company's registered address and its principal place of business (as shown on its published annual accounts) should be an address falling within Group A. A couple of consultees thought that a transitional period should be introduced to allow landlords to ensure that records of their addresses were up to date.

[126] The text in this Report is a summary of material in the CP. See CP, paras 11.69 to 11.70.

8.215 A variety of reasons were advanced by those consultees who opposed our provisional proposal. Some thought the proposal created too great a risk that landlords would lose property interests without being aware that a claim had been made. Other consultees believed that service of notices by ordinary post was insufficient, and that proof of delivery should be required. Another consultee, Anthony Brunt, a surveyor, noted that some landlords had been known to simply refuse to sign for, or collect, notices.

8.216 In contrast, several consultees opposed our provisional proposal on the basis that it was too complicated. Some suggested that the proposal was inconsistent with our Terms of Reference, and would be of no benefit to leaseholders in most cases. Other consultees proposed simplifications. For example, a couple of consultees considered that landlords should be required to keep an address at which enfranchisement notices could be served on them in a public register. Some consultees thought that the addresses held at HM Land Registry or Companies House should be used. The onus would then be on landlords to keep such records updated. Another consultee, John Lyon's Charity, a charity landlord, believed that the risk that landlords would not be aware of enfranchisement claims could be mitigated by a requirement to register notices against the registered titles of each superior landlord.

8.217 Consultees expressed opposing views about whether it was appropriate to allow service by email. Some considered that it should never be possible to serve by email. Other consultees considered that using email addresses was only appropriate when it had been specifically provided for use in serving statutory or legal documents. Some consultees felt that service by email should always be available.

Discussion and recommendations for reform

Is there a more straightforward model?

8.218 A service regime that provides for deemed service of a notice sent by a leaseholder to his or her landlord at an address that had been identified by the leaseholder searching a single, statutory register might appear to be preferable to our provisional proposal.

8.219 We think, however, that there are significant problems with relying on such a register. Any register is only as good as the information it contains. A significant proportion of landlords may decide not to register, or simply fail to do so. Leaseholders would then too often find that the register does not provide them with an address that they can use. Alternatively, landlords might fail to keep their registered addresses up to date. Enfranchisement claims may then be concluded without the landlord being aware that the claim has been made.

8.220 The risk that a landlord would not know that an enfranchisement claim had been made against him or her would itself encourage landlords to keep registered details up to date. Creating incentives for landlords to register in the first place is more difficult. Allowing a leaseholder whose landlord has failed to register an address to proceed with a claim as if the landlord were missing might encourage registration. It would, however, be disproportionate to allow such a claim to proceed where the landlord had failed to register an address, but the leaseholder knew of an address where he or she could likely be found. Further, if a failure to register were to require the leaseholder to resort to trying to find another address for the landlord, a more complex system of acceptable alternative addresses would still be required.

8.221 Establishing a new statutory register of landlords' addresses would also likely incur significant (and perhaps prohibitive) costs for Government. It might be the case that, by imposing registration fees, those fees would act as disincentives to registration. And a new register may create a degree of confusion for those landlords whose addresses may already have been registered (and be openly available) at HM Land Registry and/or Companies House.

8.222 It is also unlikely that a separate enfranchisement register would include addresses for a higher proportion of landlords than is already held by HM Land Registry[127] and/or, where the landlord is a corporate body, Companies House.[128] We do not recommend, however, as some consultees have argued, that Claim Notices should always be deemed served if sent to an address shown on the landlord's title at HM Land Registry.[129] We have reached that conclusion for three principal reasons.

(1) First, we are told that it is not uncommon for landlords' addresses to be out of date.

(2) Second, the addresses that appear on the face of the register maintained by HM Land Registry have not been provided as addresses at which enfranchisement notices can be served, but rather as addresses to which notices can be sent by HM Land Registry. We think that any change in the use to which such addresses could be put would create a degree of dissonance between the purpose for which addresses were provided and for which those addresses would be used. While Government could try to ensure that landlords were made aware of, and given a period to adjust to, any such change, it is likely that some landlords would be deemed served at an out-of-date address that had been provided before any such change had been introduced.

(3) Third, separate provision would need to be made in respect of those reversionary titles which are not currently registered at HM Land Registry.

8.223 We therefore think that reliance on a single (separate or existing) statutory register of landlords' addresses for service would not be as straightforward as some consultees suggested. We also believe that it would likely fail to deliver the benefits sought for leaseholders, or would do so only by creating an unreasonable risk that landlords will be unaware of enfranchisement claims being made against them.

---

[127] HM Land Registry data suggests that around 86% of the land mass of England and Wales has been registered. That figure will increase over time because unregistered land must be registered when certain events occur, for example, when it is sold. The Land Registration Rules 2003 (SI 2003 No 1417), r 198 requires that the registered proprietor of a registered estate must give to the registrar an address for service of notices and other communications by the registrar.

[128] The Companies Act 2006, s 86 provides that a "company must at all times have a registered office to which all communications and notices may be addressed" (see the Companies Act 2006, s 1 for the definition of a "company" in this context). A similar provision applies to limited liability partnerships because of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations (SI 2009 No 1804), reg 16.

[129] Addresses taken from HM Land Registry's records may be useful to verify a Group A or B address, or be used to supplement the service on a Group B address (which would only be necessary where there is no Group A address).

8.224 We also believe that the complexity of our provisional proposal has been overstated by some consultees. In the vast majority of claims, leaseholders will be able to serve their competent landlord at either his or her current address,[130] or at a recent address provided by him or her for the service of enfranchisement notices (that is, a Group A address). We note that companies and limited liability partnerships which are registered at Companies House will have a registered office, which would be a current address for the purposes of Group A. And, in the much smaller number of cases where service at a Group A address is not possible, most leaseholders should still be able to serve their landlord at addresses falling within Group B.

8.225 However, in finalising our recommendations, we have revised the Group A and Group B addresses. The result of those revisions is, we think, a simpler regime. We set out our conclusions below.[131]

Evidence of service

8.226 Under our provisional proposals, a leaseholder who, in the absence of a response to a Claim Notice from his or her competent landlord, sought a determination of his or her claim by the Tribunal would be expected to prove that the Claim Notice had been served by hand, or sent by post, to his or her landlord.[132] Evidence of posting might include a certificate of service completed by the person who had posted the Claim Notice and/or a Certificate of Posting.

8.227 Requiring leaseholders to use Royal Mail's "Signed For" service when posting notices would provide greater certainty that the Claim Notice had in fact reached the address to which it was sent.[133] However, use of the service would introduce a risk that some leaseholders would find themselves unable to prove that the Claim Notice had been delivered if a landlord sought to evade accepting receipt of that notice. In short, any service regime that requires only evidence of posting runs the risk that a notice will have been posted but not delivered, while any service regime that requires evidence of delivery runs the risk that a landlord will refuse to accept delivery, leaving the leaseholder unable to prove service of the notice. In addition, requiring leaseholders to use the Signed For service would represent a potential procedural trap for leaseholders, allowing the landlord to argue that the Claim Notice was not validly served where the Signed For service was not used, even if the landlord had in fact received the notice.[134]

---

130 The concept of a "current address" is one that features elsewhere, see the Civil Procedure Rules, r 6.9(3).

131 See para 8.238 and following.

132 CP, para 11.78.

133 The Landlord and Tenant Act 1927, s 23, as amended by the Recorded Delivery Service Act 1962, s 1, refers to the use of "registered post or recorded delivery". However, Royal Mail currently offers two levels of service above standard first-class and second-class delivery – "Royal Mail Signed For" and "Special Delivery Guaranteed" – both of which can provide proof of delivery. A "Certificate of Posting", which is date stamped and signed by Post Office staff, is evidence that the item has been accepted into the postal network.

134 We also note that using the Signed For service would increase leaseholders' costs of service, albeit by a modest amount.

8.228 While we have heard that some landlords seek to obstruct enfranchisement claims – and refusing to sign for a notice is one way of doing so – it is difficult to establish whether the risk of such obstructive behaviour by landlords is sufficient to justify rejecting any requirement that leaseholders prove delivery of the Claim Notice. Even without this difficulty, as our Terms of Reference ask us to make enfranchisement easier, quicker and more cost-effective, particularly for leaseholders, we have concluded that we should adopt the approach that is simplest for leaseholders unless there is evidence that this would cause substantial prejudice to landlords. Any prejudice that might otherwise be caused as a result of leaseholders acquiring their landlord's interest without his or her knowledge is likely to be mitigated by:

(1) the adoption of some of our options for reform of valuation that could narrow the range of likely outcomes and thereby reduce the impact of a landlord being absent at the point of determination;[135] and

(2) our recommendations that the Tribunal should be able to set aside a determination prior to completion on the basis that the Tribunal's determination was wrong (taking into account any written evidence on which the landlord seeks to rely).[136]

8.229 We have therefore concluded that leaseholders should not be required to prove receipt where they have followed the prescribed Service Routes.

Time of service

8.230 Where a Claim Notice is sent by post, the time at which it is served, or deemed to be served is important because it starts a prescribed period during which the landlord should respond to the Claim Notice with a Response Notice.

8.231 Section 7 of the Interpretation Act 1978 (the "1978 Act") establishes a general deemed service regime for documents that are to be served by post. That regime, among other matters, makes provision for service to be deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

8.232 Our recommendations incorporate a bespoke service regime and, therefore, the general regime established in section 7 of the 1978 Act will not apply. However, we are satisfied that our regime should incorporate an equivalent provision to that in section 7 of the 1978 Act regarding the time of service. Accordingly, where a Claim Notice is served by post, service will be deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Service by email

8.233 We think that the position set out in the Consultation Paper in respect of the service of Claim Notices by email strikes the correct balance between the adoption of modern

---

135 See the Valuation Report.

136 For our recommendations about the circumstances in which a landlord should be able to set aside a determination of the Tribunal that had been made in the absence of the landlord, see paras 9.127 to 9.151 below.

service methods, and an appropriate probability of receipt.[137] To allow deemed service to a wider range of email addresses for landlords would carry an unreasonable risk that notices would not in fact be received. Our recommendation relating to Group A and B addresses therefore makes provision for email addresses.[138]

Group B addresses and addresses held at HM Land Registry

8.234 As noted above, there can be difficulties in relying solely on the addresses for registered proprietors of land held by HM Land Registry.[139] However, those addresses can be used where no Group A address is available to help to increase the likelihood that a notice will be received by a landlord where a Group B address is used. In line with the provisional proposal in the Consultation Paper, we continue to think that it is appropriate that Service Route B requires leaseholders to serve Claim Notices on one of the Group B addresses, together with any addresses given for the competent landlord as registered proprietor at HM Land Registry.[140]

Use of the Service Routes and service of a Response Notice

8.235 In the Consultation Paper, we proposed that leaseholders should serve the Claim Notice in accordance with the Service Routes if they are able to do so. Leaseholders who have done so will be able to obtain a determination of the claim from the Tribunal even if the landlord does not respond. Leaseholders who have not done so will not be able to obtain such a determination.

8.236 We should make clear, however, that where a landlord has served a Response Notice he or she should not be able to defeat the leaseholder's claim solely on the basis that the Claim Notice had not been served in accordance with the Service Routes. The service of the Response Notice cures any defect in service of the Claim Notice.

8.237 Leaseholders may therefore decide to serve a Claim Notice on their landlord otherwise than as prescribed by the Service Routes, in the hope that the landlord will serve a Response Notice and the claim will be able to proceed. However, any such decision by a leaseholder runs the risk that the landlord will not serve a Response Notice, and the leaseholder will be unable to obtain a determination of the claim from the Tribunal because the requisite procedure has not been followed.[141]

A revision to Groups A and B

8.238 We indicate above that the aim of the Service Routes was to:

> balance the benefits of deemed service against the risk that a landlord would be genuinely unaware that a claim had been made …

---

137 See para 8.210 above.

138 See para 8.242(1) below.

139 See para 8.222 above.

140 It is possible that the last known address of the landlord (being a Group B address) might be the same as the address held at HM Land Registry. However, we do not think the address given for the competent landlord as registered proprietor at HM Land Registry can be used as the sole basis for the landlord's last known address.

141 See our recommendation at para 8.332 below.

8.239 To achieve that aim, in the Consultation Paper, we split the addresses for service of the Claim Notice into Group A and Group B. We considered that service on a Group A address was more reliable than service on a Group B address, which is why the proposed Service Routes regime required that:

(1) if a leaseholder has a Group A address for the competent landlord, then the leaseholder must serve the Claim Notice at that address; and

(2) if the leaseholder serves the Claim Notice at a Group B address, then the Claim Notice must also be served at any addresses given for the competent landlord as registered proprietor at HM Land Registry.

8.240 However, on re-examining Groups A and B, we have concluded that the aim set out above might not always be met by the categorisation proposed in the Consultation Paper. The reason for that is best considered by way of an example.

(1) On 1 January 2019, the competent landlord gives to the leaseholder an address at which a Claim Notice can be served.

(2) On 1 March 2020, the competent landlord serves a demand on the leaseholder which, in compliance with section 47 of the Landlord and Tenant Act 1987, contains the landlord's address.

(3) On 1 April 2020, the leaseholder serves a Claim Notice on the landlord.

Under the scheme proposed in the Consultation Paper, the address provided at (1) is a Group A address, while the address provided in the demand set out at (2) is a Group B address. The result is that a leaseholder bringing a claim in April 2020 would be expected to use the address given to it on 1 January 2019, and not the address provided on 1 March 2020.

8.241 We have concluded that the Service Routes must place greater emphasis on the age of the material that the leaseholder relies upon for an address for the competent landlord, rather than the nature of that material. Consequently, we have reformulated the Group A and B addresses as set out below. The italicised text highlights those elements that differentiate the revised Groups A and B.

Group	Group A	Group B
Addresses in group	*The competent landlord's current address.*	*The competent landlord's last known address.*
	The latest address (including an email address) that has been provided by the competent landlord: • to the leaseholder as an address at which an enfranchisement notice can be served; • for the purposes of sections 47 and 48 of the Landlord and Tenant Act 1987; or • for the purposes of serving notices generally (including notices in proceedings). But, in each case, only where the address has been provided *within the 12 months preceding the service of the Claim Notice*.	The latest address (including an email address) that has been provided by the competent landlord: • to the leaseholder as an address at which an enfranchisement notice can be served; • for the purposes of sections 47 and 48 of the Landlord and Tenant Act 1987; or • for the purposes of serving notices generally (including notices in proceedings). But, in each case, only where the address has been provided *more than 12 months preceding the service of the Claim Notice*.
Additional steps required for deemed service	*None.*	*Where the competent landlord's property is registered, the Claim Notice must also be served on each of the addresses given for the competent landlord as registered proprietor at HM Land Registry.*

Recommendation 60.

8.242 We recommend that:

(1) Claim Notices delivered by post or hand, or sent by email to competent landlords at prescribed categories of address, should be deemed served;

(2) where a Claim Notice is served by post, service should be deemed to have been effected at the time at which a letter would be delivered in the ordinary course of post; and

(3) the prescribed categories of address should be divided into two groups, Group A and Group B. A leaseholder should only send or deliver the Claim Notice to addresses falling within Group B if an address within Group A cannot be identified.

8.243 We further recommend that:

(1) Group A should consist of:

(a) the competent landlord's current address; and

(b) the latest address (including an email address) that has been provided by the competent landlord:

(i) to the leaseholder as an address at which an enfranchisement notice can be served;

(ii) for the purposes of sections 47 and 48 of the Landlord and Tenant Act 1987; or

(iii) for the purposes of serving notices generally (including notices in proceedings),

but, in each case, only where the address has been provided within the 12 months preceding the service of the Claim Notice.

(2) Group B should consist of:

(a) the competent landlord's last known address; and

(b) the latest address (including an email address) that has been provided by the competent landlord:

(i) to the leaseholder as an address at which an enfranchisement notice can be served;

(ii) for the purposes of sections 47 and 48 of the Landlord and Tenant Act 1987; or

(iii) for the purposes of serving notices generally (including notices in proceedings),

but, in each case, only where the address has been provided more than 12 months preceding the service of the Claim Notice;

(3) where a Claim Notice is served on a Group B address the leaseholder should (in the case of registered land) also serve the Claim Notice on each of the addresses given for the competent landlord as registered proprietor at HM Land Registry.

8.244 We further recommend that a landlord who has served a Response Notice in relation to an enfranchisement claim should not be permitted to argue that the Claim Notice was not properly served.

APPLYING TO THE TRIBUNAL FOR PERMISSION TO PROCEED (THE NO SERVICE ROUTE)

8.245 In the Consultation Paper, we set out our proposals for an alternative means of starting a claim that would be available where the leaseholders did not know the identity of the landlord, or did not have an address within Group A or B to allow for deemed service to take place. We proposed that leaseholders should be able to apply to the Tribunal in such cases for an order allowing the enfranchisement claim to proceed. If the criteria for making that order were not made out, the Tribunal would be able either to dismiss the claim, or give further directions.[142] We refer to this alternative method of starting a claim as the No Service Route.

8.246 The No Service Route is similar to the current power for leaseholders to apply to the county court for a vesting order, in some cases, where a landlord cannot be found (in other words, where there is an absent landlord). But, as we set out below, we think that the No Service Route has advantages over the current power.[143]

(1) First, it is a power that is available in respect of all enfranchisement claims.

(2) Second, the power will be available to leaseholders who are entitled to bring an enfranchisement claim; no further or more restrictive qualification criteria will apply.

(3) Third, our recommendations about pre-service checks should allow leaseholders to apply to the Tribunal with greater confidence that they have taken the steps needed to obtain an order allowing the claim to proceed.[144]

---

142 CP, paras 11.79 to 11.81; Consultation Question 79, para 11.82.

143 Criticisms of the current power are set out at para 8.13 above.

144 Pre-service checks are considered at paras 8.255 and following below.

Consultees' views

8.247 Several consultees supported our provisional proposal on the basis that it would help to resolve the problems presented by absent landlords. Other consultees believed that, while leaseholders should be able to apply to the Tribunal for permission to proceed with the claim, it should be for the Tribunal to decide what further steps (if any) leaseholders should take to try to identify or reach the landlord before any order is made. Establishing that pre-service checks had been carried out satisfactorily would not necessarily be sufficient.

8.248 In contrast, other consultees thought that requiring leaseholders to make an application to the Tribunal was either unfair or too onerous. Two consultees, Denise Clark and Jeanette Allen, both leaseholders, considered that:

> if landlords cannot be found it's their own problem. Why should it be down to the leaseholder to have to go to the trouble of going to the tribunal? It is not fair.

And Heather Keates was concerned that if an application to the Tribunal was required, leaseholders were likely to have to pay for additional legal assistance.

Discussion and recommendations for reform

8.249 The consultation responses received set out a spectrum of views about what should be required of leaseholders where a landlord cannot be identified or located. Some consultees believed that we should require less of leaseholders under these circumstances than we originally proposed. In contrast, others believed leaseholders should not be entitled to proceed with their claim merely because they have carried out the pre-service checks that we had proposed; it should be for the Tribunal to decide what steps should be taken in individual circumstances.

8.250 For the following reasons, we continue to think that where a leaseholder is not able to serve his or her Claim Notice using the Service Routes, an application to the Tribunal should be required.

(1) First, a check will need to be made that the Service Routes were not available to the leaseholder.[145]

(2) Second, if the claim can proceed, the Tribunal will need to determine the appropriate terms for the acquisition of the interest claimed.

8.251 Furthermore, we think that providing for a claim to proceed on application to the Tribunal strikes the correct balance between the interests of leaseholders and the absent landlord. It will also remove much of the unpredictability that arises at present from claims made to the county court. And as we have recommended elsewhere, a leaseholder who is required to make an application under the No Service Route will be able to recover his or her reasonable costs of making that application by deducting that sum from the premium payable for the lease extension or freehold acquired.

---

[145] We anticipate that the circumstances in which the No Service Route is appropriate will be rare. In almost all cases, we would expect leaseholders to have, at the very least, a last known address (in other words, a Group B address) at which to serve the landlord.

8.252 We should make clear that, while obtaining an order under the No Service Route is a substitute for serving a Claim Notice under the Service Routes, a leaseholder will still need to complete a Claim Notice and include that notice with his or her application to the Tribunal. The Claim Notice will set out the details of the leaseholder's claim, and will be considered by the Tribunal when reaching any determination.

8.253 We think that an application for an order under the No Service Route should require leaseholders to sign a statement of truth setting out that the specified checks[146] have been carried out.[147] This will help the leaseholder to focus attention on elements that the Tribunal will need to be satisfied about if an order is to be made.

Recommendation 61.

8.254 We recommend that:

(1) where it is not possible to serve a Claim Notice using the Service Routes, leaseholders should be able to apply to the Tribunal for an order allowing the enfranchisement claim to proceed ("the No Service Route"); and

(2) an application under the No Service Route will require leaseholders to complete a statement of truth setting out that specified checks have been carried out and their results.

PRE-SERVICE CHECKS

8.255 In the Consultation Paper, we provisionally proposed that leaseholders should be required to carry out specified pre-service checks before either serving a Claim Notice or applying to the Tribunal under the No Service Route.[148]

8.256 However, before discussing that proposal, we acknowledge that the language of "pre-service checks" is misleading. There are several reasons for that, in particular:

(1) we anticipate that "pre-service checks" will be undertaken in situations where the No Service Route is followed; and

(2) we have concluded that, where a Service Route is followed, a failure to undertake "pre-service checks" prior to service of the Claim Notice will not be an automatic bar to the Tribunal determining a claim in the absence of service of a Response Notice by the landlord.

---

146 See para 8.255 below.

147 See paras 8.142 to 8.144 above. Our recommendation departs from our provisional proposal that a statement of truth should be included within the Claim Notice itself: see CP, para 11.23.

148 See the CP, para 11.83 and following and CP, Consultation Question 80, para 11.95.

8.257 Nevertheless, in the text below, we continue to refer to pre-service checks to retain continuity with the Consultation Paper. However, we also use the more general term "specified checks".

8.258 In the Consultation Paper,[149] we proposed that:

(1) all leaseholders should undertake a search at HM Land Registry for:

(a) (in the case of registered land) the name and address(es) of the current registered proprietor of the competent landlord's interest; and

(b) (if the land is not registered) for any cautions against first registration in respect of the competent landlord's interest;

(2) a series of other checks should be carried out if leaseholders wish to rely on Service Route B rather than Service Route A.[150] The checks, as set out in the Consultation Paper, were:

(a) in the case of an individual landlord:

(i) a search of the Probate Register[151] to check whether a grant of probate has been issued to anyone in respect of that landlord; and

(ii) a search of the Insolvency Register to check whether that landlord has in fact become insolvent;

(b) in the case of a company landlord, a search at Companies House to confirm the status of the company; and

(3) there should be a requirement to place an advertisement in the London Gazette where a leaseholder did not know the identity of the landlord, or did not hold either a Group A or B address for the landlord.

8.259 These pre-service checks were intended to form an important part of our proposed deemed service regime. We wanted to establish a series of reasonable and proportionate checks that could be carried out by leaseholders. It was envisaged that the checks would perform the following functions.

(1) To assist leaseholders to identify the competent landlord, including, in certain circumstances, where a presumed landlord's interest had, in fact, passed to another, and provide for deemed service at an alternative address as follows:

---

149 See CP, Consultation Question 80, para 11.95.

150 As noted at para 8.203(1) above, a leaseholder who serves his or her landlord at a designated address falling within Group A is described as using Service Route A. A leaseholder who serves his or her landlord at a designated address falling within Group B is described as using Service Route B. Together, these routes are referred to as the "Service Routes".

151 We refer below to a search of probate records, rather than the probate register. That language more closely reflects language used on the Government's website which explains the procedure for England and Wales. See https://www.gov.uk/search-will-probate.

(a) where an individual landlord has died: the address of any personal representatives given in any grant of probate;

(b) where an individual landlord is insolvent: the address for his or her trustee in bankruptcy as shown on the Insolvency Service website; and

(c) where a company landlord is insolvent: the address for its administrator, liquidator, or receiver as listed at Companies House; if no such person has been appointed, the Official Receiver should be served. However, we note here that we have since concluded that the registered office of the company should also be used to serve a copy of the notice.

(2) To assist leaseholders to identify an address at which the competent landlord would be deemed to be served, which would help leaseholders to make effective use of the Service Routes.

(3) To establish preliminary steps that leaseholders would be required to take if an application to the Tribunal for an order under the No Service Route were to be successful.

8.260 We did not intend for the pre-service checks to have the effect of curing a failure to serve the correct competent landlord. So, for example, if a person, "P", is the competent landlord on 1 January, but has a trustee in bankruptcy, "T", appointed on 2 January, the property will transfer automatically to T on 2 January. If the Claim Notice is served on P after the appointment of T, then service will be ineffective.[152]

Consultees' views

8.261 The vast majority of consultees agreed with our provisional proposals. The Law Society considered that our proposals would "address the practical problems of effecting service and the ways in which the intended recipient may be reached". Other consultees believed the proposals would save both time and costs.

8.262 Although many consultees endorsed the checks we had proposed, others suggested some changes. In particular, one or more consultees made the following proposals.

(1) All leaseholders with a company landlord should be required to search addresses held by both HM Land Registry and Companies House.

(2) Leaseholders intending to rely on Service Route A should also carry out the checks that we had proposed should be carried out only by leaseholders intending to rely on Service Route B.

---

[152] It is likely, in such a case, that the problem will be identified. That might happen because the bankrupt individual passes the Claim Notice to his or her trustee in bankruptcy, and either the bankrupt landlord, or his or her trustee in bankruptcy highlights the issue to the leaseholder, or because the leaseholder undertakes a search of the individual insolvency register following service of the Claim Notice, but before attending the Tribunal. In that case, the leaseholder would need to start his or her claim again. However, if the leaseholder remained unaware of the issue and the matter proceeded to the Tribunal (because no Response Notice was received), then there is the potential for an order for determination to be obtained. In that case, the trustee would have to rely on our recommendations allowing the landlord to apply to set aside the order of the Tribunal under certain circumstances. See para 9.151 below.

(3) In contrast to (2) above, leaseholders who hold their competent landlord's last known address (an address falling within Group B) should not be required to carry out the checks we have proposed for leaseholders who hold Group B addresses.

(4) Our proposals for an alternative address for service where the competent landlord has died should refer to a grant of letters of administration as well as a grant of probate. In addition, a further option would be needed where there had not yet been a grant.

(5) A trustee in bankruptcy should not be served if the property has been released back to the bankrupt as not being required in the insolvency.

(6) The Treasury Solicitor should be served with the Claim Notice if a company landlord has been dissolved.

(7) The London Gazette was no longer the correct forum in which to place an advertisement. One consultee proposed that the advertisement should also be placed in a national daily newspaper, while another suggested the advertisement should also be placed in a local newspaper.

8.263 Other consultees considered that the Claim Notice would need to contain a checklist of the required pre-service checks and clear guidance for leaseholders. Another consultee, the National Leasehold Campaign, raised concerns that our proposal should not make the process of enfranchisement less accessible for leaseholders who did not have access to, or were uncomfortable using, the internet. And Lucy Carmichael was concerned that our proposal might limit the number of leaseholders who felt able to bring a claim without legal assistance.

8.264 Almost all those consultees who opposed our provisional proposal believed that it was too complex and would place too onerous a burden on leaseholders. For example, Sarah Cooper, a leaseholder, believed that:

> this is all too much to expect of an average person with no legal background. We should be able to conduct everything much more easily than this.

Some consultees thought that the problem of identifying and locating a competent landlord should be resolved by requiring the landlord to provide and maintain an address for service.[153] Others simply stated that if a landlord could not be found it should be an issue for landlords, rather than leaseholders.

Discussion and recommendations for reform

8.265 The consultation responses referred to above raise the following issues:

(1) Should leaseholders be required to carry out any pre-service checks before serving a Claim Notice?

[153] We consider this point at paras 8.218 to 8.224.

(2) What are the appropriate pre-service checks to help leaseholders identify an address at which their landlord will be deemed served?

(3) What are the appropriate pre-service checks for leaseholders to carry out to ensure that the right to receive an enfranchisement notice has not passed to another? Should leaseholders holding Group A addresses carry out these checks?

(4) Should leaseholders be required to place an advertisement where they: (a) do not hold a Group A or B address for their landlord; or (b) do not know the identity of their landlord? If so, is the London Gazette the appropriate place to publish that advertisement?

8.266 However, examining the above issues has also caused us to consider, and make clearer, the anticipated role of the Tribunal and the importance of the pre-service checks in allowing the Tribunal to fulfil that role, particularly where the leaseholder uses one of the Service Routes, but no Response Notice has been received. We address this point first.

The role of the Tribunal

8.267 We explain above that, where the No Service Route is followed:

> … a check will need to be made that the Service Routes were not available to the leaseholder.[154]

8.268 This was explained in the Consultation Paper as follows:

> On hearing such an application, the Tribunal will make an order allowing the leaseholders to proceed with their claim if satisfied that the criteria for making such an order … are satisfied.[155]

8.269 So, in the above cases, we anticipated the Tribunal would undertake a "check" in order for it to be "satisfied" that the No Service Route is appropriate. That will necessarily require the Tribunal to have confidence that the relevant pre-service checks were undertaken and that these checks did not disclose anything to cast doubt on whether the No Service Route was appropriate. We proposed that if the Tribunal is not satisfied, then it may either dismiss the claim, or give further directions.[156]

8.270 We also think that, where the leaseholder has served the Claim Notice using one of the Service Routes and no Response Notice has been received (and the landlord is not represented at the Tribunal), the Tribunal is undertaking a role similar to that for the No Service Route: the Tribunal is being satisfied with the identity of the landlord and that the address used to effect service of the Claim Notice was a Group A or

---

154 See para 8.250 above.

155 The criteria referred to are that the leaseholders: (a) do not know the identity of their landlord; or (b) do not have a designated address for a known landlord falling within either Group A or B.

156 CP, para 11.81.

Group B address.[157] A leaseholder who has completed the pre-service checks should be able to have a high degree of confidence that the Tribunal will be satisfied in these circumstances.[158]

8.271 However, in complex cases, the Tribunal might, on the evidence provided, reach different conclusions to a leaseholder. We think an example will help to illustrate this.

Example: pre-service checks

Eighteen months ago, a landlord who is an individual (the "Landlord"), provided an address for service of notices ("Address 1") to the tenant. Address 1 is in Birmingham.

Our regime requires HM Land Registry records to be examined in all cases. Those records show that the Landlord acquired the freehold 10 years ago, but show his or her address for service of HM Land Registry notices as being in Liverpool ("Address 2").

Address 1 is a Group B address. (It is possible that, with more information about the Landlord's current whereabouts, Address 1 could actually be a current address, but, in this example, the leaseholder does not have that information.)

Service Route B requires service of the Claim Notice at both Address 1 and Address 2, but also that certain pre-service checks are undertaken, including a search of probate records. In this case, the probate records reveal that two individuals with the same name as the Landlord have died since the date the leaseholder was given Address 1. The records identify that probate was granted by the probate registries in London and Liverpool.

The leaseholder considers the probate records and concludes that neither is relevant and that the Landlord is likely to be alive.

The leaseholder serves the Claim Form on both Address 1 and Address 2. No Response Notice is received.

8.272 In the above example, the Tribunal may agree with the conclusion reached by the leaseholder. However, it may instead conclude that the grant of probate by the Liverpool registry identifies a possible link between the deceased and Address 2, and decide that it is not satisfied that the pre-completion check is "clear" (in other words, the Tribunal is not satisfied that the landlord is alive).

---

157 Provided the Tribunal is satisfied that the address served is a Group A address or, (where there is no Group A address) a Group B address, then the Tribunal will not be assessing whether the Claim Notice was, in fact, received. A Claim Notice should be deemed to be served in the circumstances set out at para 8.218 and following above.

158 At paras 8.294 and 8.327 below, we recommend that regulations may be set to establish what weight is to be given to the results of pre-service checks.

8.273 However, we would not expect the Tribunal to dismiss the leaseholder's claim, which was made in good faith.[159] The Tribunal may issue directions for more information to be obtained regarding one or both of the deceased individuals, whose details have been revealed by the search of the probate records, with a view to achieving greater certainty about whether the landlord has died.

8.274 In the above example, the leaseholder discounted evidence that the Tribunal believes may be relevant. The Tribunal's power to issue directions should allow it to become satisfied with whatever concern it has, and avoid dismissal of the claim. As a last resort, we envisage that the Tribunal might direct that an advertisement be placed in the London Gazette, in the same way as if the No Service Route had been adopted.[160]

8.275 Having dealt with this preliminary point, we now move to the issues that have been raised by consultees.

Should any pre-service checks be required?

8.276 As we noted above, our proposed pre-service checks were directed at more than one objective.[161] Each check would help leaseholders to achieve one or more of the following:

(1) to confirm the identity of the competent landlord;

(2) to identify when a competent landlord's interest has passed to another because of death or insolvency; and

(3) to confirm or identify an address at which the competent landlord may be deemed served.

8.277 Because of the above, the pre-service checks:

(1) give a greater opportunity for the competent landlord to become aware of an enfranchisement claim where the No Service Route is followed; and

(2) provide material to help the Tribunal become satisfied as to the identity of the landlord and in the event that:

(a) a Service Route is followed and no Response Notice is received (and an application for an order for determination is being sought); or

(b) the No Service Route is followed (and an application for permission to proceed is being sought);

that a Group A or B address has been used to serve the competent landlord.

---

159 We do not suggest a specific requirement that applications be made in good faith. We use the phrase "good faith" here to indicate that the applicant leaseholder has drawn a conclusion without any intention to mislead the Tribunal, or to avoid the landlord becoming aware of the enfranchisement claim.

160 See para 8.322 and following below.

161 See para 8.259 above.

8.278 However, while our proposed checks are valuable, there is a question around whether they should be mandatory.

8.279 In the Consultation Paper we provisionally proposed that leaseholders should be required to carry out pre-service checks before serving a Claim Notice or applying for an order under the No Service Route. On reflection, we were not sufficiently clear about what we meant by leaseholders being "required" to do so. We did not intend for a Claim Notice to be invalid simply because a leaseholder had failed to carry out one or more of the checks. If an otherwise valid Claim Notice is received by the competent landlord, who then serves a Response Notice, the leaseholder's enfranchisement claim should continue, even in the absence of any checks.

8.280 However, while we did not intend for the pre-service checks to be mandatory, we did intend for there to be potentially significant consequences if the checks are not undertaken as a first step in the leaseholder's claim. Our provisional proposal was that, where specified checks were not carried out:

(1) where a leaseholder served a Claim Notice on a competent landlord at a Group A or Group B address, but the competent landlord did not serve a Response Notice, a leaseholder would not be able to obtain a determination of the claim at the Tribunal; and

(2) a leaseholder would not be able to obtain an order from the Tribunal under the No Service Route.

8.281 Essentially, a leaseholder who fails to carry out the pre-service checks takes a risk that his or her claim will not be able to proceed to determination.

8.282 We mentioned above that one purpose of the checks is to help ensure the Claim Notice is being addressed to the correct landlord. So, for example, checking the register of title at HM Land Registry will help to confirm the identity of the legal owner of the property which is the subject of the enfranchisement claim. And a search of the Individual Insolvency Register will help to identify whether an individual landlord has been made bankrupt in England or Wales and, therefore, whether title to the property may have vested in his or her trustee in bankruptcy.[162]

8.283 The answer to the question of the competent landlord's identity is, therefore, clearly one that both the leaseholder should, and the Tribunal will, be interested in. The leaseholder would therefore be well advised to undertake the checks prior to serving any Claim Notice to avoid wasted costs and delay.

8.284 However, while the Tribunal is interested in the identity of the competent landlord, we anticipate that it will be less interested in the timing of the checks. The Tribunal will need to be satisfied of the following matters.

(1) Where the Tribunal is considering whether to make a determination in the absence of a Response Notice, it must be satisfied that the result of the checks, had they been completed at the time the Claim Notice was served, would not

[162] See https://www.gov.uk/search-bankruptcy-insolvency-register.

have affected the decision to serve on the competent landlord identified on the Claim Notice, or the address at which the landlord was served.[163]

(2) Where the Tribunal is considering an application made under the No Service Route: the result of the checks would not have established, with sufficient certainty, the landlord's identity, or a Group A or a Group B address such that a Service Route could have been followed.

8.285 It follows that, in contrast to our provisional proposal, we do not recommend that a failure to complete the checks prior to service of a Claim Notice should prevent the Tribunal from making a determination under the Service Routes. However, it remains the case that the specified checks should be undertaken prior to the leaseholder making an application to the Tribunal under the No Service Route or the Service Routes.

8.286 While we have relaxed our provisional proposal, we think that leaseholders should, at the point that the Claim Notice is being prepared, be made aware of the matters the Tribunal will need to be satisfied with and the importance of the results of the specified checks (whether for a determination of the claim in the absence of a Response Notice, or under the No Service Route). The prescribed form of Claim Notice should make clear that, while a failure to carry out these checks will not cause the Claim Notice to be invalid, the results of those checks may later prevent a successful application being made to the Tribunal.

8.287 Before moving on to the detail of the specified checks, we acknowledge consultees' concerns around complexities in the regime. We have made recommendations to introduce a regime that enables leaseholders to proceed with confidence where a landlord is unknown, or is not engaging in the enfranchisement claim. However, we highlight here that the enfranchisement regime can result in the loss of a landlord's property. It is therefore appropriate that measures are introduced to help to ensure that landlords have an opportunity to be involved with the process. We have sought to make the regime as simple and proportionate as possible.

8.288 However, in any case, we believe some of the concerns around complexity are overstated. First, we think clear guidance will help to ensure that leaseholders have clarity on the steps that are required to help ensure that a claim can be resolved in the absence of a landlord's involvement. However, our regime does not need to rely on the deemed service checks and service requirements. Where a landlord is engaging

---

[163] In most cases, the checks we have suggested below can be undertaken to reveal historic information. For example, Companies House (https://beta.companieshouse.gov.uk/) allows for the filing history in respect of a company to be viewed, enabling details such as changes in registered office and the appointment of administrators to be identified. Online searches for probate records in England and Wales are currently undertaken by name and year (https://www.gov.uk/search-will-probate). HM Land Registry has a facility to provide an historic copy of the register of title (https://www.gov.uk/government/publications/historical-registertitle-plan-registration-hc1). However, the individual insolvency register maintained in England and Wales currently has details of bankruptcies removed within three months of them ending (https://www.gov.uk/search-bankruptcy-insolvency-register). However, if the circumstances of an application to the Tribunal are such that a search of the Individual Insolvency Register will not then reveal whether the landlord was bankrupt at the time of service of the Claim Notice (which can lead to a question of whether the correct person was served at the correct address) then we anticipate the Tribunal would issue directions to ensure that it is satisfied as to that risk. For example, the Tribunal may be satisfied by receiving the result of a search of material published in the London Gazette (see https://www.thegazette.co.uk/insolvency).

in the process, and has served a Response Notice, it does not matter whether pre-service checks were undertaken, or whether the Claim Form was sent to a Group A or B address.

The specified checks

8.289 In the Consultation Paper, we set out the pre-service checks that we thought should be completed by leaseholders.

8.290 Some consultees raised concerns that our proposed pre-service checks constitute additional work that leaseholders must either carry out, or pay to be carried out. We agree that is the case. However, we believe that it is appropriate for the leaseholder, as the party initiating the claim with a view to acquiring an interest from the landlord, to carry out specified checks in order to help ensure that the right person is served at an address where the notice is likely to be received. We have reached that conclusion for the following reasons:

(1) leaseholders will know in advance of making a claim what may be required of them and can plan accordingly;

(2) a failure to complete the specified checks would not have any bearing on the validity of a Claim Notice;

(3) the specified checks are aimed at ensuring there is a high likelihood that the Tribunal can be satisfied with the identity of the competent landlord and that a Group A or Group B address was used for service, or that it is not feasible to identify the landlord and/or a Group A or B address; and

(4) in our view, the checks represent a fair level of enquiry that ought to be carried out in order to assist the Tribunal to exercise its jurisdiction either:

(a) to determine the claim if no Response Notice has been served by the landlord; or

(b) to make an order under the No Service Route.

8.291 However, having considered the comments of consultees and re-examined the checks which were proposed in the Consultation Paper, we believe that there is the need for a more nuanced approach to setting the specified checks.

8.292 We recognised in our provisional proposals that the pre-service checks are context-dependant. For example, we proposed that checks of the probate records and individual insolvency register should only be necessary where there is an individual landlord and the Claim Notice is to be served on a Group B address. Our proposal recognised that:

(1) a Group B address is less reliable or up-to-date than a Group A address; and

(2) some searches have relevance only where, for example, the landlord is an individual.

8.293 Because of that context-dependency, we now think that the Secretary of State should be given power to specify the checks that should be undertaken. That conclusion is given greater weight because we have concluded that some checks:

(1) may not always be useful in the contexts we envisaged in the Consultation Paper; and

(2) may benefit from being supplemented or adapted over time with a view to ensuring the most valuable checks are undertaken in the most appropriate (and common) cases that come before the Tribunal, so that it can be satisfied:

(a) as to the identity of the landlord; and/or

(b) that a Group A or Group B address has been used to effect service on the landlord, or that no such address is available.

8.294 Furthermore, depending on the type of checks undertaken, we think that it would be possible to establish in secondary legislation the weight that should be attributed by the Tribunal to the results of the checks when considering whether it is satisfied about the matters set out at paragraph 8.293(2) above.[164]

8.295 We now set out the detail of the checks which we recommend that leaseholders should carry out if they apply for an order for a determination of the claim where a Response Notice has not been served, or under the No Service Route.

8.296 We note again that, where the Service Routes are followed, leaseholders are better placed if they carry out these checks prior to completing a Claim Notice. We think that leaseholders would be assisted if:

(1) the specified checks were to be set out in any guidance that is drawn up to explain the new enfranchisement regime; and

(2) the Claim Notice included a clear reference to the specified checks together with advice that they should be completed prior to its service.

The checks are important for the purposes of satisfying the Tribunal where no Response Notice has been received. However, they are also of significant value to the leaseholder. Their proper completion will help to avoid problems arising later.

Identifying deemed service addresses

8.297 Some consultees objected to our provisional proposals in respect of both deemed service and pre-service checks on the basis that the proposals are too complex. In most cases, those consultees considered that if leaseholders were entitled to serve a landlord at a single, easy-to-identify address, the need for pre-service checks would fade away. We do not believe, however, that any simplification of the method for

---

[164] An example might be where a search is made of the register of title to land at HM Land Registry (which verifies the legal owner of the landlord's property is a company registered under the Companies Act 2006) and a check of Companies House makes clear the registered address of that company, which is a Group A address (see para 8.224 above). In those cases, we think that the results of the checks could be determinative of both identity and address.

identifying an address for deemed service would reduce or eliminate the justification for pre-service checks. The use of a single address would be likely to increase the risk that the Claim Notice will not be received by the landlord, and therefore potentially justify requiring more stringent pre-service checks.

8.298 Some consultees who opposed our pre-service checks sought to find other ways to address the risk of non-receipt. Some thought we should make it more likely that an up-to-date address for a landlord can easily be found, either by compelling such a record to be kept, or by using the risk of non-receipt as an incentive for landlords to keep existing records up-to-date. Other consultees felt that landlords who did not receive a notice because of their own failure to keep records up-to-date deserve little sympathy if an enfranchisement claim were subsequently to be completed successfully without the landlord's knowledge.

8.299 While we understand that point of view, we do not think it would be reasonable or proportionate for the consequence of failing to keep an address up to date to be that the landlord is not notified of an enfranchisement claim, or for unacceptable risks to be taken around whether the correct landlord is served. For the reasons set out above, we do not consider that a simpler means of identifying an address for service of a Claim Notice should be adopted.[165] We also think that any such simplification would not, in fact, reduce the risk that a Claim Notice may be served but not received.[166] As such, the justification for pre-service checks designed to reduce that risk would likely remain.

8.300 We reiterate that, where a leaseholder has carried out the specified checks before serving a Claim Notice at a Group A or Group B address for the landlord, he or she will, in many cases, be confident that the Tribunal will be satisfied as to the identity of the landlord and that the Claim Notice was indeed sent to a Group A or Group B address for that landlord. He or she may therefore be confident that he or she will be able to obtain a determination of the claim if the landlord does not serve a Response Notice. In doing so, our proposals provide greater certainty for leaseholders intending to bring an enfranchisement claim.

Is the known landlord still the correct person to be served?

8.301 Carrying out specified checks which are designed to determine whether a known landlord has died or become insolvent provides protection for those who will have become entitled to receive an enfranchisement notice as a result of either event. We also think that carrying out such checks has benefits for leaseholders. If the specified checks reveal that the Claim Notice should be served on someone other than the person shown as the registered proprietor of the landlord's interest, leaseholders will be able to use the Service Routes with confidence. Conversely, if checks do not reveal either the death or insolvency of the landlord, leaseholders relying on a Group B address will be able to apply for a determination of their claim if no Response Notice is received.

8.302 We accept that these checks will be a further step for leaseholders to take before starting a claim. We also accept that the checks will not identify a death or insolvency

---

165 See para 8.218 and following above.

166 See para 8.297 above.

in all cases (or put beyond all doubt whether there has been a death or insolvency). In particular, our specified checks in respect of individuals would only assist in identifying deaths or bankruptcies for people in England and Wales. Therefore, there remains a (reduced) risk that, despite the checks, a Claim Notice will be sent to the wrong person. However, in situations where the landlord is believed to be an individual resident in England and Wales (and the specified checks do not suggest otherwise) the results of the specified checks are likely to be enough for the Tribunal to be satisfied with the identity of the landlord and to enable it to proceed with the claim. But even if that is not possible (perhaps because there is some other evidence that cast doubt) we would expect the Tribunal to issue directions to enable it to be satisfied, rather than dismissing the claim. Following the determination of the claim, if it emerges that the wrong landlord has been served, then the landlord who should have been served may apply for the determination to be set aside.[167]

8.303 We therefore think that recommending that specified checks are carried out is a proportionate means of reducing the risk that the wrong landlord will be identified, and will help to avoid further costs and delay in completion of a claim.

Pre-conditions to the No Service Route

8.304 In the Consultation Paper we provisionally proposed that an advertisement be placed in the London Gazette where the identity of the landlord is not known, or the leaseholders do not hold either a Group A or B address for a known landlord.[168] An advertisement may lead to the landlord's identity or address being revealed. If not, the placing of an advertisement should entitle leaseholders to use the No Service Route to apply for permission to proceed with the claim and its determination if no response is received within the 28-day period specified in the advertisement.

8.305 While consultees raised concerns about the publication(s) in which any advertisement should be placed, the need for an advertisement of some kind was not questioned.

8.306 We note that, where a Service Route is taken, but the Tribunal is not satisfied either as to the identity of the landlord or that the address used was a Group A or Group B address, then, provided the Tribunal is satisfied the leaseholder has acted in good faith,[169] we expect that it would issue directions for the leaseholder to take steps to enable it to become satisfied. Those steps could include the placement of an advertisement.

Deemed service address checks – the correct checks?

8.307 Our proposed pre-service checks included a search at HM Land Registry for the registered title, or any cautions against first registration, in respect of the interest held by the competent landlord.

8.308 Carrying out that check will help leaseholders to establish (or confirm) the identity of their competent landlords. HM Land Registry's records will also include the

---

167 The potential for an order to be set aside is not unlimited. For details of our recommendations as to when a landlord may make an application for the Tribunal's determination to be set aside, see para 9.151 below.

168 CP, Consultation Question 80, para 11.95.

169 See para 8.273 above for what is meant by "good faith" in this context.

address(es) given by the competent landlord as those at which he or she can be served with documents by HM Land Registry. In many cases, these addresses will help leaseholders to identify or confirm the competent landlord's current address, enabling the leaseholder to use Service Route A. In other cases, the address(es) may help the leaseholder to identify or confirm the competent landlord's last known address, enabling him or her (when all addresses revealed by the search at HM Land Registry are also served) to use Service Route B.[170] These are checks that most leaseholders are likely to carry out whether or not such checks are recommended or required.

8.309 However, we think that giving strong encouragement to leaseholders to carry out these checks prior to serving a Claim Notice has important benefits. The checks provide greater assurance that the competent landlord has (if possible) been correctly identified, and increase the prospect that the Claim Notice will be received. This forms a part of the justification for the Tribunal being able – at a later stage in the process – to make determinations in the absence of the landlord, and will be important in satisfying the Tribunal as to the identity of the landlord and the address used under the Service Routes, or that the landlord or a Group A or B address for the landlord cannot be located so that the No Service Route is permitted. As such, it is one of the identifiable steps that leaseholders know they will be required to take if Tribunal orders are to be made. We believe that the benefits that are likely to result from the specified checks outweigh the (non-mandatory) burden on leaseholders of carrying them out.

8.310 Some consultees expressed concern about the reliability of the addresses held by HM Land Registry, particularly in respect of companies. Any lack of reliability has the potential to undermine the rationale for requiring such checks to be made. Where land is registered, the register of title to land maintained by HM Land Registry provides strong evidence of the identity of a competent landlord, and reasonable evidence of relevant addresses of a substantial proportion of competent landlords.

8.311 However, there remains a clear argument that the addresses recorded at HM Land Registry are, in the case of company landlords, less reliable than the addresses held by Companies House.[171] As such, we agree with those consultees who suggested that all leaseholders whose competent landlord is a company registered in England and Wales should have searched both HM Land Registry and Companies House before an order can be made under either Service Route A or Service Route B in the absence of a Response Notice from the landlord.[172] Echoing the point made at paragraph 8.308 above, these are checks that most leaseholders would carry out whether or not such checks are recommended or required.

---

170 We have explained previously that the address(es) at HM Land Registry should not be the only basis on which a leaseholder concludes it holds a current or last known address for the landlord.

171 We explained previously that the Companies Act 2006, s 86 and the Limited Liability Partnerships (Application of Companies Act 2006) Regulations (SI 2009 No 1804), reg 16 requires companies and limited liability partnerships that are subject to those regimes to have a registered office at all times. We explain at para 8.224 above that the registered office address will be a Group A address for such landlords.

172 Where it is known that the landlord is a corporate body whose details are held by Companies House then the No Service Route is unlikely to be appropriate.

Death and insolvency – the correct checks?

Death of an individual landlord

8.312 A further aspect of our provisional proposals was intended to help leaseholders to check whether their known landlord's interest had in fact passed to another because of his or her death. As there is no central means in England and Wales for checking whether an individual has died, our provisional proposal relies on a proxy: checking the probate records for evidence of a grant of probate. We accept consultees' observations that this should also extend to checking for any grant of letters of administration.[173]

8.313 We acknowledge that an online search of the probate records is not currently as easy as one might hope. The need to input a year of death in any search would, in some cases, require leaseholders to check several possible years. We suggest that Government considers whether increased functionality could be introduced, with a view to allowing a search to be conducted over a range of dates. However, we note that, so far as issues relevant to this Report are concerned, a search should only need to be conducted in respect of a limited number of years.

8.314 Some consultees have noted that there will be cases in which an individual landlord has died, but probate has not been granted. If the leaseholders are aware of the landlord's death, but are unable to find a grant of probate or letters of administration, they will have to serve a Claim Notice on the Public Trustee. But if the leaseholders are not aware of the landlord's death, and cannot find a record of a grant of probate or of letters of administration, leaseholders are likely, in the absence of information to the contrary, to continue to treat the landlord as the correct party to be served. As a result, there may be some cases in which leaseholders obtain a determination against a landlord whose interest had passed to the Public Trustee prior to the claim being served.[174]

Insolvency

8.315 One consultee considered that where an individual competent landlord has been made bankrupt, he or she should continue to be served with the Claim Notice if the interest was not required in the insolvency and has been released back to the bankrupt.

8.316 A leaseholder can check whether an individual landlord has been declared bankrupt. A leaseholder cannot, however, check whether the landlord's interest was or was not required in the bankruptcy.[175] As such, we continue to believe that a Claim Notice

---

173 Probate is granted to executors who deal with the deceased's estate where the deceased left a will. Letters of administration are granted to the person(s) who deal with the deceased's estate in cases where the deceased did not leave a will.

174 We considered the Tribunal's power to set aside a determination at CP, paras 11.130 to 11.131 and Consultation Question 83, para 11.132. Our analysis of consultation responses received, and final recommendations are set out at paras 9.127 to 9.151 below.

175 Once a bankruptcy order has been made, the bankrupt's assets vest in their trustee in bankruptcy and are realised and distributed in accordance with the Insolvency Act 1986 and the Insolvency (England and Wales) Rules 2016 (SI 2016 No 1024).

should always be served on the trustee in bankruptcy if the individual has been made bankrupt. If the interest has, in fact, been released back to the bankrupt, we expect that the trustee would notify both the leaseholder and the competent landlord of the service of the Claim Notice. This would allow the leaseholder to serve a fresh Claim Notice on the bankrupt before significant expense is incurred.

Dissolution of a company landlord

8.317 We agree with the point made that a leaseholder will need to be able to identify the correct recipient of a Claim Notice where a company landlord has been dissolved. We have made a recommendation that it should be the Treasury Solicitor.[176]

Should leaseholders holding a Group A address also carry out specified checks?

8.318 We explain above that we think searches at HM Land Registry are relevant in all cases, and that, where a landlord is a corporate body, a search at Companies House should be undertaken in all cases.[177] This section therefore concerns those specified checks, other than searches at HM Land Registry, that are relevant where the landlord is an individual.

8.319 The revised Group A addresses are, by definition, more up-to-date than the Group B addresses. So, where it is possible to use a Group A address, there is a reduced risk that a landlord is dead or insolvent than if a Group B address is used.

8.320 Even where the landlord has died or become insolvent, we think it likely that, in many cases, personal representatives and insolvency practitioners will take steps to acquire post from address(es) that the landlord might have received a Claim Notice (had he or she still been alive, or remained solvent). We therefore think that those leaseholders who are holding Group A addresses for an individual landlord should not be expected to carry out a search of the probate records or the individual insolvency register before a determination of the claim can be made in the absence of a Response Notice from the landlord. In reaching this conclusion, we also take account of the fact that most leaseholders will hold an address for the landlord that falls within Group A, and that the overall costs of requiring checks would be increased if those leaseholders with Group A addresses were required to carry out such checks.

8.321 As noted above, another consultee argued that leaseholders holding the landlord's last known address should not need to carry out those checks.[178] But given the distinction drawn in our regime between the landlord's current address (in Group A) and his or her last known address (in Group B), and the explanation above, we think that, in the case of a Group B address:

(1) the additional risk of death or insolvency having occurred; and

---

176 There are some limited circumstances in which the Claim Notice might be better served on the Duchy of Cornwall, or the Duchy of Lancaster. Our recommendation refers to the Treasury Solicitor for simplicity, but we anticipate this point would become relevant at the time our recommendations are implemented.

177 See paras 8.307 to 8.308 and 8.311 above.

178 See para 8.262(3) above.

(2) the lower likelihood that the Claim Notice will be collected by a person who is looking after the deceased's or insolvent individual's affairs;

justifies requiring those checks to be carried out.

Advertisements

8.322 In the Consultation Paper, we stated that an advertisement placed in the London Gazette should invite any owners of an identified property to contact the leaseholders who placed the advertisement within 28 days.[179] Such an advertisement serves two purposes, namely:

(1) to help the leaseholders to identify an unknown landlord, or a known landlord's address for service; and

(2) to enable leaseholders to make an application to the Tribunal under the No Service Route if the identity or address remains unknown.

8.323 The first of these purposes could be achieved directly (by the competent landlord seeing the advertisement and responding), or indirectly (either by the competent landlord having had his or her attention drawn to the advertisement by another person and responding, or by another person providing information to the leaseholders as to the identity and/or whereabouts of the competent landlord).

8.324 Consultees did not dispute that placing an advertisement of some kind should be required where the identity of the landlord was not known, or where the leaseholders did not have an address at which the landlord could be properly served. However, as noted at paragraph 8.305 above, the best place for that advertisement was disputed.

8.325 We do not believe that requiring an advertisement to be placed in a publication other than the London Gazette, either in substitution for, or in addition to, that publication would be merited. The London Gazette is the official journal of record and a substantial number of different statutory notices are required to be placed in it. While other publications might have a wider circulation (whether nationally, or in the locality of the property), the purpose and function of the London Gazette is limited and well known. The information contained in the printed London Gazette is also available online. A notice placed in the London Gazette would therefore be more likely to lead to the identity, or address for service of a competent landlord being revealed than would advertising in another place. We also believe that requiring leaseholders to place an advertisement in another publication in addition would lead to an increase in costs without materially improving the prospects of locating a competent landlord.

The location of the competent landlord

8.326 We highlight above that several of our specified checks are aimed at resolving issues around the identity of the landlord, or the appropriate address(es) at which Claim Notices are deemed to be served on a landlord. Several of those checks are of particular value where the landlord is generally resident in – or, in the case of a corporate body, registered under the law of – England and Wales.

---

[179] CP, para 11.93.

8.327 We think the approach that we recommend significantly mitigates the risk that the wrong landlord is served, or the wrong address used. However, there are two further elements that mitigate that risk, and that will help where the landlord is not generally resident in – or, in the case of a corporate body, registered under the law of – England and Wales.

(1) We recommend above that the specified checks are incorporated in regulations.[180] That approach will enable changes and/or additions to be made more easily to the specified checks over time. It will also be easier for the checks to be tailored. It could, for example, incorporate specific checks that might be undertaken where a landlord is understood to be resident in Scotland, or Northern Ireland.

(2) Where the Tribunal is asked to make an order under the Service Routes, there is a general need for the Tribunal to be satisfied as to the identity of the landlord, and that a Group A or Group B address has been used to effect service. If there is an instance where it is clear, or highly likely, that the specified checks will be of no use (for example, where all of the evidence points to an individual being resident in Scotland, for example), then the Tribunal can issue directions to enable it to be satisfied in that particular case.

Split reversions

8.328 Our explanation of the Service Routes and No Service Route above concentrates on the situation where a leaseholder is seeking to exercise his or her enfranchisement rights against a sole competent landlord. However, it might be the case that the land which is the subject of the enfranchisement claim is owned by more than one person.

8.329 Where more than one person jointly owns land which is the subject of an enfranchisement claim – in other words, in cases where there is a joint landlord – we are recommending that leaseholders should only be required to serve the Claim Notice on one such person.[181]

8.330 However, in other cases – for example, where the claim is over more than one parcel of land, each of which is owned by a different person (which we refer to as a "split reversion") – we are recommending that the leaseholder should be required to serve a Claim Notice on each of those landlords.[182]

8.331 Where, in any case, there is a need to serve more than one person, the leaseholder will be expected to follow the approach set out above for each landlord. It may be that one person is served using Service Route A, while the No Service Route is used for another.

---

180 See para 8.293 above.

181 See para 8.171 above.

182 See para 8.201 above.

Recommendation 62.

8.332 We recommend that:

(1) where a Claim Notice is:

(a) deemed to be served on a landlord; and

(b) the leaseholder has received no Response Notice from the landlord within the specified time frame;

the leaseholder should be entitled to apply to the Tribunal for an order determining the claim in the landlord's absence;

(2) before making an order determining the claim, the Tribunal should be satisfied that the Claim Notice was served on the correct landlord at a Group A address or Group B address(es); and

(3) the Tribunal should be provided with the results of the specified checks, or be assured that the results of the specified checks would not have affected the leaseholder's decision to serve the Claim Notice on the landlord set out in the Claim Notice, or the address(es) to which the Claim Notice was sent.

Recommendation 63.

8.333 We recommend that:

(1) where a leaseholder is unable to take advantage of the Service Routes because:

(a) he or she is unaware of the identity of the landlord, or

(b) he or she is aware of the identity of the landlord but does not have an address for the landlord within Group A or Group B,

the leaseholder should be entitled to apply to the Tribunal under the No Service Route for an order allowing him or her to proceed with the claim;

(2) before making an order allowing the leaseholder to proceed with the claim, the Tribunal should be satisfied that the identity of the landlord is unknown, or that there is no address within Group A or Group B available for the landlord; and

(3) the Tribunal should be provided with the results of the specified checks, or be assured that they do not reveal information that would enable the identity of the landlord to be identified and/or a Group A or Group B address for the landlord to be identified.

Recommendation 64.

8.334 We recommend that:

(1) before applying to the Tribunal for an order under the No Service Route, a leaseholder should be required to place an advertisement in the London Gazette inviting owners of the premises to contact the leaseholder within 28 days;

(2) where a leaseholder knows the identity of the landlord, but does not have an address for the landlord falling within Group A or Group B, the leaseholder should be required to carry out specified checks, before placing an advertisement in the London Gazette in the manner described above; and

(3) if the specified checks or the advertisement do not reveal an address for service, the leaseholder should be able to make an application to the Tribunal under the No Service Route.

Recommendation 65.

8.335 We recommend that:

(1) the Secretary of State should be given the power to make regulations setting out the specified checks that should be undertaken by a leaseholder prior to making an application to the Tribunal for an order under either the Service Routes or the No Service Route; and

(2) the power of the Secretary of State to make regulations should:

(a) enable different specified checks to be set in different circumstances; and

(b) enable the weight that should be given to the results of the specified checks by the Tribunal to be set.

8.336 We further recommend that the specified checks should include:

(1) a check of the records held at HM Land Registry (which may assist in establishing or confirming both the identity of the landlord and a Group A or a Group B address);

(2) (where the landlord is understood to be a corporate body whose details are registered at Companies House) a check of the records at Companies House; and

(3) (where Service Route B is being used to serve a Claim Notice, and the landlord is understood to be an individual who is likely to be resident in England and Wales):

(a) a search of probate records; and

(b) a search of the Individual Insolvency Register.

Recommendation 66.

8.337 We recommend that, in certain circumstances (which the specified checks are designed, in part, to identify), the Group A address for service should be as set out below.

(1) If an individual landlord is dead, the Group A address for service should be the address of any personal representatives at the address given in any grant of probate or letters of administration or, where no such grant has been issued, the Public Trustee.

(2) If an individual landlord is insolvent, the Group A address for service should be the address for his or her trustee in bankruptcy as shown on the Insolvency Service website.

(3) If a corporate body is insolvent, the Group A address for service should be both:

(a) the corporate body's registered office address; and

(b) the address for its administrator, liquidator, or receiver as listed at Companies House; if no such person has been appointed, the Official Receiver should be served.

(4) If a corporate body has been dissolved, the Group A address for service should be the Treasury Solicitor.

8.338 For the avoidance of doubt, we do not recommend that a failure to carry out the specified checks should affect the validity of the leaseholder's enfranchisement claim.

Chapter 9: Procedure – responding to a claim

INTRODUCTION

9.1 In Chapter 8, we set out our recommended procedure for making an enfranchisement claim. In this chapter, we set out our recommendations for responding to a claim.

9.2 Initially, we consider the content of the competent landlord's Response Notice. The prescribed form Response Notice is one of the key elements of our recommended procedural regime. We have amended our provisional proposals in light of consultees' suggestions, and our recommended form of Response Notice aims to allow an enfranchisement claim to progress as smoothly as possible.

9.3 We then consider the circumstances in which a Claim Notice or a Response Notice may be invalid. In that context, we discuss the circumstances in which defects in Claim Notices or Response Notices may be waived and/or such notices may be amended to correct defects.

9.4 In the remainder of this chapter, we set out the process by which landlords may respond to an enfranchisement claim.

(1) We consider the circumstances in which other landlords should be able to make representations to the First-tier Tribunal (Property Chamber) in England, or the Leasehold Valuation Tribunal in Wales ("the Tribunal") as part of an enfranchisement claim, and when an intermediate landlord may apply to take over the conduct of a claim from a competent landlord.

(2) Where a landlord fails to serve a Response Notice within the prescribed time period, we address the terms on which that acquisition should be made and the ability of that landlord subsequently to apply to take part in the claim.

(3) Where a determination is made in the landlord's absence, we consider the circumstances in which that determination may be set aside.

(4) We set out the time period within which a Response Notice should be served, and identify which parties must be served with copies of the Response Notice.

(5) Finally, we set out the circumstances in which a competent landlord or other leaseholders[1] may apply to the Tribunal for the Claim Notice to be struck out. We also set out some limited circumstances in which a Claim Notice should be deemed to be withdrawn.

---

1 In this context, we use the term "other leaseholders" to refer to other groups of leaseholders who may wish to bring a collective freehold acquisition claim in relation to the same premises.

RESPONDING TO A CLAIM: LANDLORD'S RESPONSE NOTICE

9.5 In the Consultation Paper we provisionally proposed that a competent landlord who has received a Claim Notice must, within a prescribed period, serve a prescribed form of Response Notice on the leaseholder who had given him or her the Claim Notice. We described the information that a completed Response Notice should contain.[2]

9.6 We also provisionally proposed that other documents should be attached to the Response Notice. First, we proposed that the Response Notice should attach proof of the competent landlord's title, together with a declaration of any defects in that title. Second, we proposed that the notice should attach a draft contract, lease or transfer (depending on the enfranchisement claim being made) setting out the terms on which the competent landlord proposes the interest be acquired.[3] We considered that the first of these requirements would save the parties time and costs by ensuring that such proof is provided at an early stage. And we thought that the second of these requirements would allow the parties to identify any disputes as to precise terms at an early stage, and complement our proposal that the Tribunal should resolve any dispute about those terms at the same time as resolving other disputes.[4]

Details to be included in (or enclosed with) a Response Notice

A Response Notice should state:

- whether the landlord admits or denies the leaseholder's entitlement to the enfranchisement right claimed in the Claim Notice, and the basis of the admission or denial;
- whether the landlord accepts or reject the leaseholder's proposals, and the landlord's own proposed terms; and
- an address in England and Wales at which the landlord can be served.

A Response Notice should enclose:

- a draft contract, lease or transfer, and
- proof of the landlord's title.

Consultees' views

9.7 The vast majority of consultees agreed with our provisional proposals. Many consultees considered that it would save both time and money if landlords were required to set out their position clearly at an early stage. For example, Ian Holland, a leaseholder, believed that our proposal would, "allow both sides to know where they

---

2 See CP, Consultation Question 77, paras 11.48 to 11.52, and para 9.6 below.

3 See CP, paras 11.49(4) to 11.50.

4 See CP, para 11.121.

stand without lots of expensive and [time-consuming] wrangling". Thackray Williams LLP, solicitors, noted that where landlords currently choose to send draft leases or transfers with a counter-notice, the transactions tend to progress more easily and are less likely to need to be determined by the Tribunal. A couple of consultees noted that our proposal would make it more difficult for landlords to withhold information as a delaying tactic. Christina Goddard, a leaseholder, commented that the proposal "starts to move the balance of power towards the leaseholder".

9.8 Some consultees thought that there should be a sanction for landlords who fail to provide the information required. For example, the Leasehold Knowledge Partnership thought that competent landlords should be required to pay the leaseholder's legal costs as failure to provide such information is "a form of game-playing".[5]

9.9 In contrast, some consultees opposed our proposal that a landlord should be required to serve a Response Notice. On the one hand, a few consultees thought that landlords should simply not be able to oppose a proposed lease extension or transfer, or dispute the terms on which it is proposed to take place. On the other hand, a couple of consultees believed that landlords should not be required to serve a Response Notice if he or she is also raising deficiencies in the Claim Notice.[6]

9.10 Other consultees raised objections to, or raised points in respect of, parts of our provisional proposals. We set these out below.

Information to be provided within the Response Notice

9.11 Some consultees thought that other details would need to be included in the Response Notice in the light of other proposals set out in the Consultation Paper. Damian Greenish, a solicitor, made several suggestions. First, in respect of freehold acquisition claims, he thought that the Response Notice should set out whether (a) the competent landlord wanted any other land to be included in the claim,[7] (b) the property claimed is subject to an estate management scheme,[8] and (c) any part of the property is subject to any other claim notices.[9] Second, he thought that, where the competent landlord was also the freeholder, the Response Notice would need to record whether he or she wished to object to the claim on the grounds of redevelopment.[10] Third, he thought that the Response Notice should record to whom copies of the Claim Notice had been given.[11] And finally, he thought that the

---

5 The effect of a failure to serve a Response Notice is considered at paras 9.110 to 9.126 below.

6 The ability of a landlord to challenge the validity of a Claim Notice is considered at paras 9.39 to 9.69 below.

7 See CP, paras 5.28 to 5.30.

8 Estate management schemes were discussed in the CP, at paras 5.11 to 5.14, and paras 6.27 to 6.32. The existence of an estate management scheme is also relevant to our provisional proposals in the CP, paras 5.56 and 5.66 (in respect of individual freehold acquisitions) and paras 6.124 and 6.127 (in respect of collective freehold acquisitions). These two sets of provisional proposals are considered in Ch 4 and Ch 5.

9 See CP, para 5.30.

10 See CP, para 5.54 and 5.56.

11 See CP, para 11.161.

Response Notice should record any request made in respect of security for costs.[12] Our attention was also drawn to the need, if valuation were to depend on whether the leaseholder occupied the premises as his or her own home, for a declaration to that effect to be included within the Claim Notice, and an acceptance or rejection of the same to be included in the Response Notice.[13]

9.12 Another consultee, AML Surveys and Valuation Limited, surveyors, thought that the Response Notice should also include details of the person authorised by the competent landlord to conduct negotiations on his or her behalf, and a statement of valuation fees. This inclusion, it was argued, would have a number of benefits, including: making it harder for landlords to try to avoid negotiations with leaseholders on valuation, encouraging landlords to take professional advice at an early stage and preventing landlords from inflating fees to cover the costs of any negotiation on value or offering to settle a claim only on the basis of the payment of a global sum in respect of premium and costs.

9.13 In contrast, one consultee opposed any requirement for the landlord to set out within the Response Notice the terms on which any transaction should take place since some issues only became clear after a survey and valuation. Another consultee, Rupert Barnes, queried whether it was necessary for a landlord to provide an address for service within England and Wales rather than the United Kingdom as a whole.

Proof of title

9.14 A few consultees believed it was unnecessary to require competent landlords to prove their title. Those details could be obtained from HM Land Registry, or by serving an Information Notice. Others argued that such checks would ordinarily be carried out by a solicitor prior to service of any claim. In contrast, the Birmingham Law Society proposed that the competent landlord should also be required to deduce the title of each intermediate landlord.

9.15 Another consultee, Damian Greenish, queried precisely what defects in title we were proposing competent landlords should disclose.

Draft documents

9.16 Some consultees raised queries about which documents should be attached to the Response Notice. One consultee, David Hinchcliffe, thought that a contract should not be required, whereas Damian Greenish believed that contracts should continue to serve an important function in enfranchisement claims.[14] The Law Society proposed that a draft of any leaseback (whether as proposed by the leaseholder in the Claim Notice, or by the competent landlord) should also be attached to the Response Notice.

---

12 See CP, paras 13.96 to 13.98. Our final recommendation about security for costs is set out at paras 12.145 to 12.146.

13 See the Valuation Report at paras 6.180 to 6.204.

14 We set out our recommendation in relation to the use of contracts in enfranchisement claims at paras 10.27 to 10.28 below.

9.17 Other consultees were opposed to any requirement that draft documents should be attached to the Response Notice. For example, Places for People Group Limited, a developer, wrote that:

> A requirement to provide a draft contract, lease or transfer at this early stage of the claim would be onerous, particularly on complex estates subject to partial enfranchisement. The time pressure that this front loading would create is likely to lead to problems with the eventual terms of the transfer which would not be in the interest of any party.

Other consultees were concerned that landlords would need to incur the cost of instructing lawyers to draft documents before there was any certainty that terms would be agreed. Most of those consultees thought that leaseholders should be liable for those costs once they have been incurred.

9.18 One consultee noted that leaseholders would be less likely to serve a notice simply to open discussions with a landlord (rather than necessarily to complete the transaction) if the landlord were able to recover costs from the leaseholder. Morgoed Estates Limited, a landlord, proposed that draft documents should only be required once the price on which the interest is to be acquired has been agreed.

9.19 Some consultees thought that more time would need to be allowed for serving the Response Notice if the landlord were required to append draft documents. Particular concern was raised about the ability of landlords with small portfolios to comply with such a requirement. One consultee, Irwin Mitchell LLP, solicitors, thought that too tight a timescale might lead to only basic drafts being supplied with the Response Notice that would require significant work and negotiation thereafter. Another consultee, the Property Bar Association ("PBA"), proposed that a landlord should be able to elect to provide draft documents by a later date.[15]

9.20 A few consultees believed that a landlord should not be required to attach any draft documents if he or she indicated on the Response Notice that the leaseholder's right to enfranchise was denied.

Discussion and recommendations for reform

Admitting or denying an enfranchisement right

9.21 We acknowledge the frustration expressed by many leaseholders about the costs and delay that can be incurred when a landlord decides to oppose a leaseholder's right to enfranchise. But a leaseholder's entitlement to enfranchise must, in the absence of agreement, be determined by an appropriate tribunal. Asserting an enfranchisement right cannot be determinative of the existence of that right.

9.22 We think, however, that if a landlord intends to oppose the leaseholder's right to enfranchise, he or she must make an early statement of the grounds on which that right is opposed. That statement must be sufficiently clear and detailed to allow leaseholders to assess the merits of that opposition before incurring further costs. It must therefore

[15] The time within which a Response Notice should be served is considered at para 9.81 below.

not simply refer to any relevant statutory provisions on which the landlord seeks to rely, but also explain how those provisions apply to the claim which is being opposed.

Additional elements proposed by consultees

9.23 As noted above, some consultees argued that additional information would need to be included with the Response Notice if provisional proposals we made elsewhere in the Consultation Paper were adopted as recommendations. We agree with the suggestions made by Damian Greenish (as set out at paragraph 9.11 above) and recommend that, in light of other recommendations we are making,[16] such information should form part of the Response Notice. We also agree with the suggestion that, if Government chooses to implement a distinct valuation for residential rather than commercial leaseholders,[17] it would be sensible to include a statement by the leaseholder within the Claim Notice setting out their status (as an investor or owner-occupier). The landlord would then indicate in the Response Notice whether or not this status is accepted.[18]

9.24 However, we do not agree with the suggestion that details of the person authorised by the landlord to conduct valuation negotiations should also be included, together with a statement of the valuation fees.[19] First, as any authorised person would be the agent of the landlord, the landlord would still be able to avoid negotiations by withdrawing any authority for the agent to take part in them. Second, while the inclusion of a valuer's details might indicate that the landlord had taken professional valuation advice, it would be necessary to impose an obligation to propose a price that was consistent with any advice received to avoid adding unmerited weight to the landlord's proposal. Third, it seems likely that any requirement to include the costs of preparing a valuation report within the Response Notice would be likely to encourage the charging of fixed fees which may assume an element of negotiation in every case. This is not to say that the problems that this suggestion seeks to address are not real. But in our view, this would not be an effective way to tackle them. We also note that some of the options for reform set out in the Valuation Report would have the effect of reducing the significance of valuation evidence in enfranchisement claims. For example, if all relevant rates were to be prescribed, the input from valuers would be limited to providing an expert assessment of the freehold vacant possession value of the interest being claimed.[20]

Address for service on landlord

9.25 We think that the Response Notice should include an address for service for the landlord. While leaseholders should be required to try to identify an address for the

---

16 See paras 3.45 to 3.47, paras 4.34 to 4.37 and paras 12.145 to 12.146.

17 See para 6.202 of the Valuation Report.

18 The Valuation Report set out options for Government in respect of valuation in enfranchisement claims. One of the options included drawing a distinction between leases held by resident occupiers and those held by non-resident investors for the purposes of valuation.

19 See para 9.12 above.

20 The "freehold vacant possession value" is the amount that a property would be worth if held on a freehold basis and not subject to any leasehold interests. See para 2.32 of the Valuation Report.

landlord before starting their claim,[21] including the landlord's address for service in the Response Notice will bring an end to any ambiguity as to the correct address to use during the remainder of the claim. We also believe that an address for service within England and Wales remains required given the difficulties that can arise in trying to serve documents outside the jurisdiction, and note that landlords are already required to provide such an address for service.[22]

Proof of landlord's title

9.26 As we set out in the Consultation Paper, a landlord may provide official copies to prove its title where that title is registered.[23] Before issuing a claim, most leaseholders should have sought to identify their competent landlord. As set out in Chapter 8, where the leaseholder is relying on the competent landlord's last known address, the leaseholder will serve on each of the addresses given for the competent landlord as registered proprietor at HM Land Registry.[24] By doing so, the leaseholder may well obtain the same official copies that would be provided by the landlord under our provisional proposal.

9.27 Obtaining official copies carries a relatively low cost.[25] Yet landlords may resent incurring that cost if it duplicates work already done by leaseholders. Leaseholders may also see this as an unnecessarily incurred cost if it is one that can be passed on to them. In Chapter 12, we set out our recommendations in respect of the recovery of a landlord's non-litigation costs from his or her leaseholder. In particular, we recommended that no additional costs should be recoverable for service of copies of the Claim Notice on split reversioners, or intermediate landlords.[26] We think our analysis of these issues applies equally to the potential recovery of the landlord's costs of obtaining official copies.

9.28 There are, however, advantages in requiring landlords to enclose proof of title with their Response Notice. First, not all reversionary interests will be registered. Second, any specified checks carried out by a leaseholder will not pick up transfers of the landlord's interest that occur between that check and service of the Claim Notice. Third, any dispute as to title can be identified at an early stage before further costs are incurred.

9.29 We therefore think that landlords should be required to enclose evidence of their title with the Response Notice. But while in the case of unregistered land the landlord would need to attach an epitome of title,[27] we think that in the case of registered land,

---

21 See CP, paras 11.74 to 11.78, and paras 8.206 to 8.244 above.

22 Landlord and Tenant Act 1987, s 48. See CP, para 10.20.

23 CP, para 11.50. An "official copy" is produced by HM Land Registry and sets out the entries on the registered title of a property, together with the date and time of issue. When we refer to obtaining official copies in this Report, the reference is to obtaining an official copy of a registered title and the corresponding title plan.

24 See para 8.253 above.

25 The current cost of obtaining an official copy of the registered title and corresponding title plan is £6.

26 See para 12.111. We discuss the service of copies of the Claim Notice on other landlords at paras 8.172 to 8.201 below.

27 An epitome of title is a list of relevant title documents that prove ownership of unregistered land.

it should be sufficient for him or her to disclose all relevant registered title numbers within the Response Notice itself. We also acknowledge the concern raised by Damian Greenish about our provisional proposal that a landlord should disclose any defects in his or her title in the Response Notice. On reflection, we think that it is not practicable to include this requirement in addition to evidence of title, which ought to reveal any such defects. However, we consider that a landlord who has been served with a Claim Notice should be under a duty to inform the leaseholder of any disposal of any part of his or her title that is not reflected in the proof of his or her title served with the Response Notice. For example, the landlord may have provided official copies of the freehold title which shows him or her as the registered proprietor without any notice of a contract for sale. The landlord may then agree to sell the freehold to a third-party, in which case the landlord would be required to notify the leaseholder under our proposed duty.

9.30 We also think that competent landlords should be required to provide proof of title for any intermediate landlords whose interests are registered at HM Land Registry. Where an intermediate landlord's interest is not registered at HM Land Registry, the intermediate landlord would be required to provide the competent landlord with proof of his or her title within 14 days of receipt of the copy of the Claim Notice. We think it likely that, where the intermediate landlord's interest is registered, landlords would have already obtained official copies from HM Land Registry relating to the intermediate landlord's interest in order to be able to serve the Claim Notice on the relevant intermediate landlord. In addition, for the reasons we have set out elsewhere, it seems appropriate that this burden or cost should fall on the landlord rather than the leaseholder.[28]

Attaching draft documents

9.31 The primary object of requiring draft documents to be produced with the Response Notice is to allow any disputes between the parties as to the terms of these documents to be identified at an earlier stage than at present. We believe that by doing so, and by allowing the Tribunal to determine all matters in dispute in a single application, we can remove some of the delay that currently exists between the issue of a claim and its final determination.[29]

9.32 Of course, this requirement would also have the effect of advancing the point at which the costs of producing the draft documents are incurred. The likely size of those costs would depend in part on some of our other recommended reforms.[30] The impact of those costs on leaseholders would depend upon our final recommendations in respect

---

28 See paras 8.162 and 8.189.

29 In Ch 11, we recommend that all disputes and issues arising in an enfranchisement claim should – with limited exceptions – be dealt with by the Tribunal: see paras 11.29 to 11.32. The Tribunal should therefore not be limited to determining the broad terms of acquisition (as under the current law), but will be able to go on to determine the terms of a transfer or lease extension if those are also in dispute: see para 11.21(8) below.

30 For example, our recommendation that the Claim Notice should specify the leaseholder's proposed terms for a lease extension: see para 8.116 above.

of the recoverability of non-litigation costs incurred by the landlord in light of Government's response to the Valuation Report.[31]

9.33 Some opposition to our proposal was based on the risk that the costs would be wasted because either the leaseholder's right to enfranchise is successfully opposed, the claim is withdrawn, or substantial revisions to the documents are required in the course of negotiation. We consider that this potential disadvantage would arise in relatively few cases and would be balanced by the costs savings associated with identifying any issues regarding the terms of the documents at an early stage in the vast majority of cases.

9.34 Other opposition, however, related to the time frame within which such documents would have to be produced. We address those responses when discussing the prescribed period within which a Response Notice must be served.[32]

9.35 One consultee also proposed that the draft documents should include any leasebacks that were to be included, whether at the election of the leaseholders or landlord. While the advantages of early provision might also apply to draft leasebacks, we think that it would be unrealistic to expect draft leasebacks to be provided at this early stage due to the potential complexity of these documents and associated burden (both in terms of costs and time) on the landlord. However, we do think that the landlord should be required to specify whether he or she wishes to take a leaseback of any part of the premises in the Response Notice. That notice should also include the landlord's response to any request by leaseholders that the landlord take a leaseback as part of a collective freehold acquisition claim.[33]

Recommendation 67.

9.36 We recommend that a Response Notice should:

(1) state whether the leaseholder's claimed right to enfranchise is admitted or denied, and the basis of the admission or denial (including any intention to oppose the claim on the grounds of an intention to redevelop);

(2) state whether the landlord accepts or rejects the leaseholder's proposals, and set out the landlord's own proposed terms (even if the claim is denied);

(3) state whether the landlord wishes 'other land' to be included;

(4) state whether the landlord wishes to take a leaseback of any part of the premises and (if relevant) include the landlord's response to any request by leaseholders that the landlord take a leaseback;

---

31 See paras 12.27 to 12.56 below. We recommend that if Government chooses a broadly market-value based valuation methodology, leaseholders should not generally be required to contribute to their landlord's non-litigation costs; but if the valuation methodology chosen is not broadly market-value based, a fixed contribution to the landlord's non-litigation costs would be required.

32 See paras 9.82 to 9.91 below.

33 This request should be included in the Claim Notice: see the text box following 8.109 above.

(5) state, in respect of a freehold acquisition claim, whether:

(a) the property is subject to an existing Estate Management Scheme; and

(b) the property, or parts of it, are subject to any other Claim Notices;

(6) state whether the landlord is seeking any security in respect of his or her non-litigation costs;

(7) provide an address within England and Wales at which the landlord can be served;

(8) (if land is registered) provide the title numbers for:

(a) the competent landlord's interest, and

(b) the interests of any intermediate landlords;

(9) record the names and addresses of any intermediate leaseholder to whom a copy of the Claim Notice has been given.

9.37 We also recommend that competent landlords should be required to attach:

(1) a draft transfer, lease and/or contract (if one is to be used);

(2) (save where the relevant registered title numbers have been provided within the Response Notice itself (see paragraph (7) above) proof of:

(a) the competent landlord's title, and

(b) the title of any intermediate landlords;

(3) registered title numbers (or, in the case of unregistered land, proof of title) for the interests of any intermediate landlords.

9.38 We also recommend that from the date of receipt of the Claim Notice, any landlord (whether competent or intermediate) should be required to inform the leaseholders bringing the claim of any disposal of the whole or part of his or her title.

CHALLENGES TO THE VALIDITY OF NOTICES

9.39 In the Consultation Paper we considered the circumstances in which it should be possible for a party to argue that an enfranchisement notice served on them was invalid and of no effect.[34] We provisionally proposed that errors in an enfranchisement notice should not lead to invalidity unless the recipient of the notice was thereby

[34] See CP, paras 11.9(6) to (7) and paras 11.116 to 11.119. See also paras 8.212 to 8.227 of the RTM Report for further discussion of the general law regarding non-compliance with statutory duties.

unable to identify the nature of the claim or the person making it, or was otherwise prevented from responding to the notice.

9.40 On that basis, we identified a limited number of errors within both a Claim Notice and a Response Notice that should lead to the notice being invalid.

Proposed Grounds for Challenging Validity of Claim and Response Notices

A Claim Notice should only be invalid if:

- the prescribed form has not been used,
- the notice fails to make clear (to a reasonable recipient):
  - the enfranchisement right being claimed,
  - the identity of those bringing the claim,
  - the address at which any Response Notice should be served, or
- the notice has not been signed (by or on behalf of the minimum number of leaseholders required to bring that claim).

A Response Notice would only be invalid if:

- the prescribed form has not been used,
- the notice fails to make clear (to a reasonable recipient):
  - whether the claim is admitted or denied,
  - the landlord's address for service, or
- the notice has not been signed.

9.41 We also proposed that any party would be entitled to amend his or her notice by serving an amended notice on the receiving party at any time before the claim is settled or determined by the Tribunal. And we proposed that a landlord served with an amended Claim Notice should be entitled to serve an amended Response Notice.[35]

Consultees' view

Enfranchisement

9.42 We did not ask consultees directly about the proposals regarding the criteria for validity of notices in the Consultation Paper, instead posing a broader question about our proposed single procedure for all enfranchisement claims. But we received some

[35] See CP, para 11.9(8).

consultation responses which addressed the question of when a Claim Notice should be treated as invalid.[36]

9.43 Some consultees thought that the failure of a sufficient number of leaseholders to sign the Claim Notice should be the only circumstance in which a Claim Notice could be invalid. This, it was argued, would prevent landlords trying to frustrate claims. We have made recommendations about the signature of Claim Notices at paragraph 8.145 above.

9.44 Other consultees were opposed to limiting the grounds on which a notice might be invalid. Some consultees stressed the serious nature of an enfranchisement claim, and therefore the importance of setting minimum standards for the validity of notices. Other consultees noted that if Claim Notices were to be made easier to complete, they should be invalid if not completed properly. And some consultees considered that a limited timetable in which landlords must respond to claims would make it more important for Claim Notices to be accurately completed to facilitate service of the Response Notice within the requisite period, while others thought that any uncertainty created by a poorly completed Claim Notice would lead to further costs being incurred when the Response Notice is served.

9.45 Some consultees thought that a valid notice would need to contain "all relevant" or "key" information. Others believed that any error in the completion of the prescribed form should render a Claim Notice invalid. But a few consultees believed a notice should remain valid if it would be understood by a reasonable recipient.

The RTM Consultation Paper

9.46 In the RTM Consultation Paper, we proposed to apply our approach to the validity of enfranchisement notices to notices served in RTM claims.[37] However, in the RTM Consultation paper, we also added a further criterion for validity: that the counter notice should state the basis for any denial of the RTM company's claim to acquire management. And we also proposed that the landlord should be required to state all possible objections in their counter notice and should not generally be permitted to raise new arguments at a later stage.[38] We explained in the RTM Consultation Paper that this additional ground was not included in the Enfranchisement Consultation Paper because we felt that the fact leaseholders are required to apply to the Tribunal for a determination of the terms of the acquisition or lease extension provided an opportunity for the landlord to raise their grounds for objection. By contrast, where the RTM is claimed, it is not always necessary to involve the Tribunal and so we felt it is more important for RTM companies to understand why their claim is being opposed from the outset.

9.47 In addition, the RTM Consultation Paper contained a proposal that the Tribunal be given wide powers to waive a defect in a notice, permit an amendment to a notice to rectify the issue, or to make any other appropriate directions (with the Tribunal's

---

36 See para 8.139 above.

37 See RTM CP, paras 6.86 to 6.87.

38 See RTM CP, para. 6.61.

powers being more constrained in the context of counter notices).[39] We proposed that such an order would make valid a notice that would otherwise be invalid, and could be made either unconditionally or conditionally. We also set out a range of factors that we thought the Tribunal should have regard to when considering whether or not to exercise this power.[40] We also noted that these additional powers had not been proposed in the enfranchisement consultation paper, but that the need for such a power was felt to be more pressing in the context of the RTM.[41]

9.48 As set out in the RTM Report, we have decided in light of consultees' responses to our provisional proposals to adopt these proposals in the context of the right to manage.[42]

Discussion and recommendations for reform

Validity of notices

9.49 We continue to think that the circumstances in which parties should be able to spend time and money challenging the validity of a Claim Notice or a Response Notice should be significantly reduced. Some notices are drawn up in a way which makes it impossible for the recipient to understand the claim that is being made, or sensibly to respond to it. Our recommendations in Chapter 8 regarding the prescribed form of notices should assist with this problem.[43] We believe that prescribed forms will make it easier for both parties to discern what points are being made by the party serving the notice. But many challenges made under the existing regime are often of a purely technical character. They are simply raised either to frustrate the claim or to obtain an advantage over the other party.

9.50 Many of these concerns apply in the context of the right to manage, where we are recommending a further category of challenge for leaseholders where the landlord's notice does not specify the basis for any denial of the claim.[44] The aim of that proposal is to ensure that the RTM company is made aware of the landlord's grounds of opposition at an early stage of the claim. As we noted in the RTM Consultation Paper, landlords raising grounds of opposition to an RTM claim at a late stage has been a particular problem. But while this has been less of a feature of the current enfranchisement regime, we think it important to ensure that landlords should be required to identify the grounds on which an enfranchisement claim is opposed in the Response Notice. It is advantageous for leaseholders to be made aware of the basis on which a landlord admits or denies a claim at an early stage, even if the matter subsequently comes before the Tribunal.

---

39 RTM CP, para 6.96 and 6.97.

40 RTM CP, para 6.94.

41 As recognised by the Court of Appeal at *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, [2018] QB 571 at [77] by Lewison LJ.

42 See paras 8.238 to 8.262 of the RTM Report.

43 See paras 8.73 to 8.74.

44 See para 8.258 of the RTM Report.

9.51 We therefore recommend that the limited categories of challenge to the validity of either a Claim Notice or Response Notice identified in the Consultation Paper should be adopted, with one modification: that (if the landlord is denying the claim) the Response Notice must specify the grounds for the landlord's denial if it is to be valid.[45] The Tribunal should resolve disputes regarding the validity of notices, which it should decide according to the objective standard of a reasonable recipient.

Waiver and amendment of defects in Claim Notices and Response Notices

9.52 Our proposals in the Consultation Paper addressed the amendment and re-service of Claim Notices and Response Notices. We proposed that any party should be able to amend his or her notice prior to the settlement or determination of a claim.[46] We continue to believe that the parties should have a power to amend their respective notices, and set out further details of this power below. However, we have also concluded in light of the strong support for the proposals in the RTM Consultation Paper,[47] that it should also be possible to waive[48] defects in a notice that would otherwise make the notice invalid. Again, we set out further details below.

9.53 In general, if a notice contains a defect that makes the notice invalid, that defect can be waived either by agreement between the parties, or by the party who gave the invalid notice applying to the Tribunal for an order that the defect be waived.[49] If the defect is waived, the notice will be treated as if it were valid. A valid notice – where any defect does not affect its validity, or where a defect affecting its validity has been waived – can be amended to correct a defect either by agreement between the parties or by the party who gave that notice applying to the Tribunal for permission to amend the notice.

9.54 We also think that the parties should be able to amend a notice – whether by agreement or by the permission of the Tribunal – where the notice is neither invalid nor defective, but the party nevertheless wishes to change its position.

9.55 The operation of these powers can be best illustrated by taking three examples. First, a party may wish – perhaps in light of new information that has arisen since the notice was served – to alter a notice that is neither invalid nor defective. Second, a party may wish to correct a defect in a notice that does not make that notice invalid. In both cases, the party seeking to amend his or her notice should inform the other party of

---

45 But the Response Notice should not be invalid because there are other grounds of opposition that have been, or could have been, raised by the landlord prior to the service of the notice but that have not been included in the notice. Equally, a landlord's subsequent application to add to the grounds on which he relies by amending his or her Response Notice (see para 9.54 below) will not make the original notice invalid.

46 See CP, paras 11.9(8) and 11.118.

47 See para 9.47 to 9.48 above.

48 Waiver occurs where a defect in a notice that would normally make that notice invalid is ignored, and the notice is treated as if it were valid. Amendment occurs where a notice that is valid (or is treated as valid as a result of any defect being waived) is altered (whether to correct a defect or otherwise).

49 However, see para 8.67, where we recommend that parties should have limited rights to challenge the validity of enfranchisement notices on the basis that the prescribed form has not been used. Unless a party challenges the defect within the relevant time periods set out in Chapter 8, that defect should automatically be waived.

the proposed change, and invite that other party to agree in writing to the amendment being made. If the other party does not provide consent, an application to the Tribunal should be made for permission to amend the notice. If granting the application, the Tribunal should have the power to give other consequential directions (such as the service of an amended Response Notice, where a Claim Notice is being amended).

9.56 Our final scenario is where the defect in the notice means that the notice is invalid. Here, the party whose notice is otherwise invalid should request that the other party treat the notice as valid,[50] and set out the amendments that he or she wishes to make to the notice. If the other party does not agree, the first party would be able to apply to the Tribunal for an order to waive the defect. If the Tribunal makes that order it should also be able to direct the applying party to amend the notice, and to make other consequential directions as described above.[51]

9.57 In each of these examples, we think that a party should be able to apply to the Tribunal either as a stand-alone application, or as part of existing proceedings before the Tribunal. We also think that these rights should be available both to landlords and to leaseholders, in relation to the Response Notice and the Claim Notice (respectively).

The basis for denial of the claim

9.58 We recognise that the approach outlined above differs from our recommendations in the context of the right to manage. In the RTM Report, we recommend that landlords' rights to waive defects in or amend a counter-notice should be restricted.[52] Consultees have told us that landlords may seek to de-rail RTM claims by applying to the Tribunal to dispute the claim notice on procedural grounds, and we are therefore aiming to reduce the opportunities for landlords to delay a claim in this way. In the enfranchisement context, we think our recommended position (which applies both to Claim Notices and Response Notices) is balanced by the role of the Tribunal in assessing the merits of the claim and our other recommendations which seek to reduce the number of arguments which landlords can make in the Tribunal on procedural grounds, such as the limiting grounds on which a Claim Notice can be declared invalid. [53]

9.59 Nevertheless, we think that there should be some further deterrent for landlords who might otherwise seek to serve a Response Notice that either does not set out any grounds on which the enfranchisement claim is opposed, or does not set out all the grounds on which the landlord intends to oppose the claim. Such a landlord would run the risk that his or her application to waive the defects in the Response Notice, or to amend the grounds on which he or she is proposing to rely would not be agreed by the leaseholder or ordered or permitted by the Tribunal. But we also think that the

---

50 We expect that this waiver of the defect by agreement to operate to prevent the parties from challenging the validity of the notice before the Tribunal.

51 The waiver of the relevant defect should have effect from the date of service of the notice. The Tribunal's order should therefore have no effect on the valuation date for the purpose of the enfranchisement claim.

52 RTM Report, para 8.254 to 8.262. This was reflected in our proposals in the RTM CP that the Tribunal's power to waive or amend a defect in the court-notice should be restricted to where the landlord has made a genuine mistake or other exceptional criteria are met: see RTM CP, para 6.97.

53 See paras 9.49 to 9.51 above and paras 9.63 to 9.65 below.

Tribunal should have the power to require the landlord to pay the leaseholder's costs arising from an application to waive any such defect or to amend the Response Notice to add or amend the basis on which the claim is denied. Those costs would include both the costs of dealing with the application itself, the costs of any consequential amendments, and any costs that the leaseholder could show had been wasted as a result of the service of the original notice.

Tribunal discretion

9.60 At paragraphs 9.52 to 9.57 above, we recommended that the Tribunal should be given the power to waive or amend defects in Claim Notices or Response Notices under certain circumstances. In the RTM Consultation Paper, we set out a range of factors that we proposed the Tribunal should have regard to when considering whether to exercise this power. [54] As set out above, we did not propose a power for the Tribunal to amend or waive defects in Claim Notices or Response Notices within the Enfranchisement Consultation Paper; consequently, we did not propose any factors to which the Tribunal might have regard in exercising this power.

9.61 We did not receive any responses from consultees in relation to these proposals in the RTM Consultation Paper. Having considered our position further in the context of enfranchisement, we think that our proposals could usefully be refined. Therefore, we recommend that, when considering whether to waive any defect in a Claim Notice or Response Notice, or to amend a Claim Notice or Response Notice, the Tribunal should have regard to all the circumstances of the claim, including:

(1) the need to ensure that enfranchisement rights can be exercised fairly, at proportionate cost, and without undue delay;

(2) the effect that refusing the application is likely to have on each of the parties;

(3) the effect that granting the application is likely to have on each of the parties;

(4) whether the party making the application has acted promptly; and

(5) (save where the relevant notice is not defective) whether the party opposing the application acted promptly in notifying the party making the application of the defect in the relevant notice.

9.62 We have set out above a power for the Tribunal to make an order for costs against a landlord who wishes to amend or add to his or her grounds for opposing the enfranchisement claim.[55] We do not, however, think that such a power should apply on any other application to waive a defect in a notice, or to amend a notice. The Tribunal would nevertheless retain its existing power to make costs orders on the basis of a party's unreasonable conduct or where costs have been wasted.

---

54 See RTM CP, para 6.94.

55 See para 9.59 above and paras 12.185 and 12.188(4) below.

Recommendation 68.

9.63 We recommend that the validity of Claim Notices and Response Notices should only be capable of being challenged in limited circumstances.

9.64 A Claim Notice should only be invalid if:

(1) the prescribed form is not used;

(2) the Claim Notice does not make clear (to a reasonable recipient):

(a) the enfranchisement right being claimed;

(b) the identity of those bringing the claim; or

(c) the address at which any Response Notice should be served; or

(3) the Claim Notice is not signed (by or on behalf of the minimum number of leaseholders to bring that claim).

9.65 A Response Notice should only be invalid if:

(1) the prescribed form is not used;

(2) the Response Notice fails to make clear (to a reasonable recipient):

(a) whether the claim is admitted or denied;

(b) the basis of the admission or denial; or

(c) the landlord's address for service; or

(3) the Response Notice is not signed (by or on behalf of the competent landlord).

9.66 We recommend that the parties should be entitled to agree:

(1) to waive any defect in a Claim Notice or a Response Notice that would otherwise render the notice invalid; or

(2) amend a valid Claim Notice or Response Notice.

9.67 We recommend that the Tribunal should have a power on application by either party at any time prior to the determination or settlement of the claim to:

(1) waive a defect in a Claim Notice or a Response Notice that would otherwise render the notice invalid;

(2) permit a party to amend a valid Claim Notice or a Response Notice to correct a defect;

(3) permit a party to amend a Claim Notice or a Response Notice that is not defective; and

(4) make any consequential directions.

9.68 We recommend that, in exercising its power to waive a defect or amend the relevant notice, the Tribunal should consider all the circumstances of the case, including:

(1) the need to ensure that enfranchisement rights can be exercised fairly, at proportionate cost, and without undue delay;

(2) the effect that refusing the application is likely to have on each of the parties;

(3) the effect that granting the application is likely to have on each of the parties;

(4) whether the party making the application has acted promptly; and

(5) (save where the relevant notice is not defective) whether the party opposing the application acted promptly in notifying the party making the application of the defect in the relevant notice.

9.69 We recommend that, where a landlord applies to amend a Response Notice to add or amend its grounds of denial, the Tribunal should be entitled to make an order requiring the landlord to pay the leaseholder's costs arising from the application.

RELEVANT TIMINGS

9.70 In the Consultation Paper we set out how long a landlord would have from his or her receipt of a Claim Notice to serve a copy of the Claim Notice on intermediate landlords and third parties (14 days), and to serve his or her Response Notice on the leaseholder(s) bringing the claim (six weeks). We also set out how long either party would have to wait after a Response Notice is served before an application to the Tribunal for a determination of the claim could be made (21 days). We settled on these periods by balancing the need to allow the parties sufficient time to complete the required steps, especially in more complex cases, against the need to ensure that progress in more straightforward claims is made without any undue delay.[56]

Consultees' views and recommendations for reform

9.71 A sizeable majority of consultees supported our provisional proposals. Most of those consultees who commented on the proposals considered that our time limits are sensible and reasonable. Other consultees focussed on the general need to avoid delay and "game playing" by landlords. And one consultee, Pennington Manches LLP, solicitors, noted that our proposal to allow either party to apply to the Tribunal 21 days after the receipt of a Response Notice would "speed up claims/negotiations greatly".

---

[56] See CP, Consultation Question 85, paras 11.144 to 11.146. The timetable for claims under the current law is set out in the CP, at paras 10.109 and 10.162.

9.72 Of those consultees who opposed our provisional proposals, most considered that the time limits were too short. Some consultees expressed support for the time limits under the current law. For example, Irwin Mitchell LLP, wrote that:

> We consider the time frame proposed in the consultation is not practically workable in all matters, even if [these are] the desired timescales. Clearly the proposals require landlords to deal particularly quickly even though in most cases they would have had no warning of the claim. This will affect different landlords differently and we think it is important to remember that leaseholders are seeking to enforce their rights when they decide to do so and even if the landlord is not at fault. We believe it is an unnecessary change to the legislation that will not really assist the leaseholders in any significant manner. The Commission should be aware that many matters do, in practice, complete significantly faster than the legislation provides. It is our understanding that the timescales in the current legislation are there as more of a backstop rather than timings to work to and the current timings have shown themselves to be workable in the majority of cases and yet provide the necessary certainty for the parties.

9.73 Long Harbour and HomeGround, a landlord and an asset manager, considered the likely effects of setting time limits that were too short. They thought that the number of applications made to the Tribunal, and subsequent appeals, would increase, leading to enfranchisement claims lasting longer and costing more than would otherwise be the case. These outcomes, it was argued, would be contrary to our objectives for enfranchisement reform, as set out in our Terms of Reference.

9.74 A few consultees proposed that a landlord should be able to apply to the Tribunal for further time. Other consultees proposed that parties should be able to agree extensions of time between themselves, rather than on application to the Tribunal. For example, Charlie Coombs, a surveyor, wrote that:

> It should be permitted for parties to agree to extend the deadline by which a landlord must respond. It is not unusual to run out of time to meet a counter-notice deadline due to awaiting missing information from the leaseholder's advisors or having not been provided with access to inspect.

But some consultees opposed the idea that any such extensions should be possible.

Time for serving copies of the Claim Notice

9.75 We set out our recommendations for service of the Claim Notice on intermediate landlords and third parties to the leaseholder's lease in Chapter 8.[57] Many consultees who commented on our proposed 14-day time limit for a landlord to serve copies of the Claim Notice on intermediate landlords and third parties objected in principle to the landlord being obliged to do rather than the leaseholder. We have considered that issue in Chapter 8 and do not discuss it further here.

9.76 Several consultees thought that a 14-day period was too short, with consultees proposing between 21 and 28 days to serve copies of Claim Notices on intermediate landlords and third parties. Long Harbour and HomeGround noted that those receiving

[57] See para 8.201 above.

copies of a Claim Notice would also need sufficient time to consider the notice and respond, if appropriate.

9.77 We think that there is a balance to be struck between providing a reasonable period in which to serve copies of the Claim Notice, and allowing recipients sufficient time to decide what action to take. In the case of intermediate landlords, competent landlords will need to identify and locate those holding intermediate interests. And intermediate landlords will need to decide whether they wish to seek to replace the competent landlord. If they wish to try to do so by agreement rather than by application to the Tribunal, that will have to be prior to the date for service of a Response Notice by the competent landlord.[58] As such, any time limit set for serving copies of a Claim Notice on intermediate landlords will have to take account of the time limit set for serving a Response Notice.

9.78 The consequences that flow from a failure to serve copies in time should also be considered. A failure to serve copies of the Claim Notice in time will not directly affect the validity or conduct of the competent landlord's response to the claim. But a competent landlord who has not served copies of the Claim Notice in time is at risk that he or she will be found to be liable for any losses that other landlords may suffer as a result.[59]

9.79 It is difficult to see that 14 days would necessarily be insufficient for a well-organised competent landlord to serve copies of the Claim Notice on intermediate landlords. While more time could be allowed, this might cause prejudice to those intermediate landlords who might seek to take over conduct of the claim from the competent landlord. Further, it should be noted that the consequences for late service on an intermediate landlord are unlikely to be significant in most cases.

9.80 While consultees pointed out the problems that might arise if competent landlords were required to serve third parties to the leaseholder's lease within 14 days, our recommendation that competent landlords should only be required to serve copies of the Claim Notice on third parties where the competent landlord is also the leaseholder's immediate landlord[60] will reduce those difficulties considerably.

9.81 Therefore, for the reasons set out above, we recommend a 14-day time limit for the service of copies of the Claim Notice on intermediate leaseholders and third parties.

Time for serving a Response Notice

9.82 Consultees raised concerns about our proposal for the Response Notice and accompanying documents to be served within six weeks. A number of consultees thought that the existing two-month limit could often prove tight. There might be a delay in the landlord actually receiving the Claim Notice. Further delay might be caused by the need to instruct advisers (for the first time in the case of landlords with smaller portfolios) and to arrange an inspection (particularly where the premises are

---

58 Our recommended power for intermediate landlords to take over conduct of the claim from the competent landlord, whether by agreement or on application to the Tribunal thereafter, is set out at paras 9.105 to 9.106 and 9.108 below.

59 See CP, para 11.105 and paras 8.197 to 8.201.

60 See paras 8.192 and 8.201(2) above.

occupied by sub-tenants, where access will need to be arranged). As Jennifer Ellis put it, "2 months 'works'".

9.83 Many consultees noted that our proposal that the Response Notice be accompanied by draft documents would also have an impact on the time it would take landlords to respond. Long Harbour and HomeGround noted that although some larger landlords might have structures in place that would allow them to respond quickly to a claim, other, smaller landlords would not.

9.84 Several consultees pointed out that time pressure was likely to be most acute in collective claims. For example, Paul Church noted that:

> If there is now to be a requirement that [the Response Notice] now includes the transfer/new lease, a period of 6 weeks is going to be difficult to meet. In practice, landlords are [being] expected to do more in less time…

Those consultees were, however, divided as to whether different time limits should be applied for different types of claim.

9.85 In contrast, a number of consultees believed that six weeks is too long. The periods proposed ranged from two to four weeks. The National Leasehold Campaign noted that:

> The default position should be to make this process as quick as possible without giving unreasonable deadlines. Businesses are incredibly adept at adjusting processes when they have to.

9.86 We think that two factors are likely to make it more difficult for a landlord to comply with any time limit included within our new regime. First, although the leaseholder should specify in the Claim Notice the date by which the landlord should serve his or her Response Notice, the date by which a landlord must respond to a Claim Notice is calculated by reference to the date on which the notice is deemed served, rather than from the date on which it is in fact received.[61] A landlord who is deemed to have been served but receives the notice later might therefore find that he or she has less than the prescribed period in which to respond. Second, our recommendation that landlords should be required to enclose draft documents with the Response Notice means that there will be more to do in the time available.

9.87 The documentation required in some cases will be simpler than in others. For example, in lease extension claims, we have suggested that a lease extension might be granted by way of a short lease referring to the existing lease.[62] In individual freehold acquisition claims, it is likely that most transactions will require a transfer of the whole or part of the freehold title to the leaseholder. While some simple collective

---

61 See para 8.109 above and para 9.95 below. The date set out in the Claim Notice should be not less than two months after the date on which the Claim Notice is deemed to be served on the competent landlord. But the Claim Notice will also contain a saving provision that will allow the competent landlord two months to respond in the event that the date specified by the leaseholder does not allow two months after service is deemed to occur.

62 See our suggestion to Government at para 3.188 above.

freehold acquisitions might be concluded in a comparable way, some of these claims may be complex enough to require a contract that will tie together a series of transfers and grants (such as leasebacks).[63]

9.88 Landlords might decide to apply greater resources to responding to claims if shorter timescales are set. However, it is reasonable to conclude, as many consultees have done, that our proposed six-week time limit may come under strain in more complex collective freehold acquisition claims.

9.89 If it is the case that our proposed period for serving a Response Notice enclosing documents is too short to cover all cases, we might either (1) extend that period for all claims, (2) extend that period for only some categories of claim, or (3) allow landlords to elect to serve the documentation within a prescribed period after the Response Notice has been served, either in some categories of claim, or in all claims.

9.90 While the first option aims to provide sufficient time for even complex claims, it could create delays in simpler claims. The second option could avoid that problem, but it would require reliable identification of those categories of claim that would always require more time for the landlord to respond. It would also create the potential for confusion among both landlords and leaseholders as to which time limit applied to a particular claim. The third option would allow greater flexibility, but would place the discretion in the hands of landlords, who might be tempted to elect to extend the period for producing documents whenever they are entitled to do so. In cases where the extended period is adopted, it would also remove the benefits of providing such information at an early stage.

9.91 Given the difficulties posed by the second and third options, we have concluded that the best way to proceed is to maintain that all specified documents should be enclosed with the Response Notice, and to maintain a single period for responding that would be sufficient to allow more complex documentation to be prepared. With this in mind, we are not taking forward our proposal to reduce the response period from two months to six weeks. While some consultation responses highlighted that the two-month period can create time pressure for more complex claims, we did not receive any suggestions that this period should be extended. We therefore recommend that the existing period of 2 months be allowed for a landlord to serve a Response Notice in respect of all types of enfranchisement claim.

Period before an application to the Tribunal can be made

9.92 Some consultees considered that the proposed 21-day period between service of a Response Notice and the point at which either party could apply to the Tribunal for a determination of any remaining disputes was too short.[64] Most considered that 21 days provided insufficient time for negotiation and settlement, and would lead to premature applications being made to the Tribunal that could put a strain on its resources. For example, Xuxax Limited, a landlord, wrote that:

---

63 Leasebacks are considered in Ch 5 at paras 5.152 to 5.172.

64 Some consultees wrongly interpreted our provisional proposal as the deadline by which any application to the Tribunal should be made. Unsurprisingly, they considered 21 days to be too short for such purposes.

In [our] experience the Tribunal is used as a bargaining chip by both sides and encouraging more use of this will burden the Tribunal with huge amounts of extra workload and costs.

The majority of these consultees supported the existing two-month limit. But a few consultees, including the PBA, considered that the time limit could sensibly be shortened. The specific limits proposed ranged from 28 days to six weeks.

9.93 The time required for negotiations will depend in part upon the number of issues that are likely to be in dispute, and the range of positions than are likely to be adopted in respect of each of those issues. If our provisional proposals succeed in reducing the number of issues that can arise, and narrowing the range of positions than can be adopted, the length of the negotiation process should also be reduced. Much may therefore depend upon the adoption of other provisional proposals as final recommendations, and which options for reducing premiums are selected by Government.

9.94 It is also important to note, however, both that the 21-day period is simply the period that must expire before any party is able (rather than is required) to make an application to the Tribunal, and that we propose that there should be no deadline by which an application should be made.[65] Most parties who remain engaged in meaningful negotiations are therefore unlikely to rush to make an application to the Tribunal. Given that it will not be necessary to make an application to the Tribunal simply within a prescribed period to avoid a claim being deemed to be withdrawn, it seems likely that the Tribunal would not look favourably on a party who has made an application with the intention of placing undue pressure on the other party, rather than because negotiations had broken down, leaving issues in dispute.[66]

Recommendation 69.

9.95 We recommend that:

(1) a landlord should serve a Response Notice no later than two months after the date on which the Claim Notice is deemed to have been served by the leaseholder;

(2) a landlord who is required to serve a copy of the Claim Notice on any intermediate landlords or third parties should do so no later than 14 days after the date on which the Claim Notice is deemed to have been served by the leaseholder; and

(3) if the Response Notice has been served, either party should be entitled to apply to the Tribunal for a determination of the claim 21 days thereafter (but not before).

---

65 We are recommending that landlords should be able to apply to strike out a claim upon written notice to the leaseholder: see para 9.177 below.

66 The point at which this becomes unreasonable conduct is a matter for the Tribunal to consider: see CP, paras 13.111 to 13.114 and paras 12.189 to 12.196 below.

CONDUCT OF THE RESPONSE TO THE CLAIM

9.96 In the Consultation Paper we considered the ways in which an intermediate landlord who has received a copy of a Claim Notice from the competent landlord would be able to participate in the enfranchisement claim.

9.97 First, we said that the intermediate landlord should be entitled to be heard at any hearing of the claim, and to make written submissions. But we also noted that the leaseholder should not bear any additional financial burden as a result of the intermediate landlord's participation.[67]

9.98 Second, we proposed that the intermediate landlord should be entitled to replace the competent landlord as the person responsible for dealing with the leaseholder's claim where his or her interest is likely to be worth more than the competent landlord's interest in the building, or it is otherwise reasonable to do so. We considered that such replacement should be effected by agreement between the intermediate landlord and the competent landlord (provided that the date for serving a Response Notice has not passed) or by obtaining permission from the Tribunal.[68] We also proposed that as such an application would have the effect of staying an enfranchisement claim until it is determined, and that the Tribunal should be able to determine such applications summarily at an early stage.[69]

9.99 Finally, we also proposed that where a leaseholder holds his or her interest under a split freehold or reversion, any landlord who was not initially served with a Claim Notice should similarly be able to replace the landlord who was served.[70]

Consultees' views

9.100 We did not ask a consultation question about these proposals. However, some consultees provided relevant responses. For example, Jennifer Ellis, a surveyor, emphasised the importance of intermediate landlords being represented in the enfranchisement process. Similarly, Irwin Mitchell LLP considered that there were "strong policy and potentially human rights arguments" for intermediate landlords being entitled to be separately represented.

9.101 Other consultees expressed concern about the process by which intermediate landlords would be able to replace a competent landlord, and the effect that could have upon the enfranchisement process. For example, Boodle Hatfield, solicitors, considered that:

> any provision allowing an intermediate landlord to replace a competent landlord must include detailed grounds which the intermediate landlord must satisfy in order to be able to secure such an order. Otherwise, an intermediate landlord could abuse such provisions, and the issue…could itself lead to protracted proceedings in

---

67 See CP, para 11.109

68 See CP, para 11.111.

69 See CP, para 11.113.

70 See CP, para 11.115.

establishing which landlord should take on the role of competent landlord. This in turn will likely add to costs incurred by all parties and delay the passage of the claim.

Discussion and recommendations for reform

9.102 First, we wish to clarify the scope of our proposals in light of the recommendations we are making elsewhere. In particular, we have revised our provisional proposal on service of split reversioners and are now recommending that a leaseholder should serve a Claim Notice on each split reversioner.[71] As split reversioners will together be the competent landlord for the purposes of the claim, our proposal for split reversioners to apply to take on the role of competent landlord is no longer applicable.

9.103 We recommend in Chapter 13 that a competent landlord with conduct of an enfranchisement claim should owe a duty of care to other landlords affected by an enfranchisement claim.[72] However, we note consultees' concerns that an intermediate landlord ought to be able to make representations on his or her own behalf as part of an enfranchisement claim. These concerns would not be addressed if we were to rely solely upon the competent landlord's duty of care. Therefore, we continue to believe that an intermediate landlord should be able to make representations to the Tribunal if he or she wishes to do so.

9.104 As part of our consideration of the intermediate landlord's right to make representations, we want to clarify the position of owners of other land bound by property rights benefiting the leaseholder's lease. These owners should be served with copies of the Claim Notice in accordance with our recommendations in Chapter 8.[73] While such an owner is not capable of becoming the competent landlord, we consider that he or she should have the ability to make representations to the Tribunal if he or she wishes to do so. The owner's property rights will be affected by the claim and therefore we think the extension of the right to make representations is appropriate under these circumstances.

9.105 We also consider that an intermediate landlord should be able to replace the competent landlord as the person with conduct of the response to the leaseholder's enfranchisement claim. As noted in the Consultation Paper, an intermediate landlord might conclude that he or she should take over to ensure that his or her interests are properly protected. This might simply be a matter of the intermediate landlord's share of any premium being significantly larger than that of the competent landlord. Or it might be that the intermediate landlord does not believe that the competent landlord will deal properly with the claim, whether because the competent landlord is entitled to a relatively small share of the premium, or because of any connection between the competent landlord and the leaseholders bringing the claim. However, as we set out in the Consultation Paper, the parties' respective financial interests should not always be a determining factor. Therefore, we think that an intermediate landlord should be able to replace the competent landlord where the competent landlord and intermediate

---

71 See para 8.171. We explain at para 8.164 that, provided one split reversioner has been served with a copy of the Claim Notice, a failure to serve another split reversioner would not invalidate a claim. The Tribunal could then give directions relating to future participation of the split reversioner who had not been served.

72 See para 13.45.

73 See para 8.171.

landlord agree, or where the Tribunal considers it reasonable to do so. When considering whether it is reasonable for the intermediate landlord to take over conduct of the claim, the Tribunal may have regard to the parties' respective financial interests in the claim.

9.106 However, we accept that our provisional proposals were widely drawn, and could allow the intermediate landlord to apply to take over conduct of the claim in a wide range of circumstances. Therefore, we think that a number of restrictions should be in place to ensure that those powers cause as little disruption to the enfranchisement claim as possible. In particular:

(1) An intermediate landlord should only be able to replace the competent landlord by agreement if:

(a) a Response Notice has not already been served by the competent landlord; and

(b) the time for service of the Response Notice[74] has not expired.

(2) Any such agreement should not postpone the date by which a Response Notice should be served. If the intermediate landlord does not have sufficient time to serve a Response Notice once agreement has been reached, he or she will need to apply to the Tribunal for permission to join in the proceedings and serve a fresh Response Notice where it is appropriate to do so.

(3) In considering any application by an intermediate landlord to replace the competent landlord, the Tribunal should take account of:

(a) whether the application was made promptly; and

(b) the effect of granting the application on the enfranchisement claim.

(4) On granting an application for the intermediate landlord to replace the competent landlord, the Tribunal should be able to permit or direct the intermediate landlord to serve a fresh Response Notice where it is appropriate to do so.

[74] See para 9.95.

Recommendation 70.

9.107 We recommend that where an intermediate landlord or an owner of other land bound by property rights benefiting the lease has been served with a copy of a Claim Notice, that person should be entitled to make written and/or oral representations to the Tribunal in respect of the enfranchisement claim.

9.108 We recommend that an intermediate landlord who has been served with a copy of the Claim Notice should be entitled to replace the competent landlord as the person with conduct of the response to the enfranchisement claim either:

(1) with the agreement of the competent landlord (provided that no Response Notice has been served, and the time for doing so has not passed); or

(2) with the permission of the Tribunal.

9.109 We recommend that when considering such an application for permission the Tribunal should take account of whether the application has been made promptly and the effect of granting the application on the enfranchisement claim.

WHAT SHOULD HAPPEN IF A LANDLORD FAILS TO SERVE A RESPONSE NOTICE?

9.110 In the Consultation Paper we proposed that a landlord who had either not received the Claim Notice or who had failed to serve a Response Notice should be able to apply to the Tribunal for an order permitting him or her to participate in the proceedings provided that a determination had not yet been made. We proposed that the Tribunal should have a discretion as to whether to make such an order. But we considered that it would be likely to grant the order if any scheduled hearing would not be unreasonably disrupted or delayed as a result. We also proposed that the Tribunal should have the power to order the landlord to pay the leaseholder's wasted costs.[75]

9.111 Furthermore, we noted that, under the 1993 Act (which applies to collective freehold acquisitions and lease extensions of flats), where a landlord has failed to serve a counter-notice within the prescribed period, the leaseholder may apply to the county court for an order transferring or granting the claimed interest on the terms that had been set out in the notice of claim.[76] We provisionally proposed that a landlord's failure to serve a Response Notice within the prescribed period should not have such an effect under our new regime.[77] Instead, a leaseholder should be able to apply to

---

75 See CP, para 11.129.

76 1993 Act, s 25 and s 49. See also CP, para 10.103 (in respect of lease extension claims) and para 10.154 (in respect of collective enfranchisement claims). The 1967 Act contains no equivalent provisions.

77 See CP, Consultation Question 81, paras 11.96 to 11.101. We proposed that the Tribunal should make its own assessment of the claim based on the evidence produced (and it should not be bound by the terms of the leaseholder's Claim Notice).

the Tribunal for a determination of his or her claim based on the evidence provided and the Tribunal's own expertise.[78]

9.112 We set out the justification for our provisional proposal at paragraphs 11.97 to 11.100 of the Consultation Paper. We considered that the penalty for landlords (or windfall for leaseholders) created by the 1993 Act should not form a part of a fair and reasonable enfranchisement procedure. The size of the penalty or windfall is variable, and bears no relation to the impact of the default on the relevant leaseholders. And the penalty or windfall encourages costly satellite litigation about whether the obligation to serve a counter-notice had arisen or been met.

9.113 We also noted that other provisional proposals support this proposal. First, simplifying the valuation methodology has the potential to reduce the reasonable range of properly arguable prices that might be paid for any interest, thereby reducing the prejudicial effect on landlords of having that price determined by the Tribunal in their absence.[79] Second, the loss of the potential windfall for leaseholders would be balanced by the increased ease and certainty with which leaseholders would be able to start an enfranchisement claim.[80]

Consultees' views

9.114 Just over half of consultees agreed with our provisional proposal about the effect of a landlord's failure to serve a Response Notice. Of those who did, many referred to the unfairness of the current law. One consultee, Morgoed Estates Limited, noted that the 1993 Act created a nasty trap for the unwary landlord and an unjustifiable windfall for leaseholders. Others noted that the current law has led to a significant amount of costly litigation.

9.115 Some consultees placed their support for our provisional proposal in the context of our other provisional proposals designed to make it simpler and easier for leaseholders to bring an enfranchisement claim. One consultee, Christopher Jessel, a solicitor, thought that our provisional proposal in this area would help to achieve an important balance between parties:

> If the technicalities are relaxed for the leaseholders, the same should apply to the landlord. It is important to avoid the games of using technical arguments about forms of notice and strict time limits.

Echoing the relationship between this provisional proposal and our other proposals, the Leasehold Advisory Service ("LEASE") thought that any easing of the current consequences for failure to serve a Response Notice should be conditional upon the introduction of our other proposals to increase the ease and certainty with which leaseholders could start a claim.

9.116 The PBA, as well as Hamlins LLP, solicitors, expressed their support for the proposal that the terms of acquisition would be determined by the Tribunal, but also suggested

---

78 See CP, para 11.125(2).

79 Options to reduce premiums for leaseholders were set out in the Valuation Report.

80 See paras 8.242 to 8.244 above.

that there should be a long-stop date beyond which a landlord who has not served a Response Notice would not be able to intervene.[81]

9.117 A significant minority opposed our provisional proposal.[82] Many expressed support for the position under the 1993 Act. Some did so on the basis that it provides an appropriate sanction for a landlord's failure to comply with the requirement to serve a counter-notice. Others considered that allowing leaseholders to acquire on the terms set out in the notice of claim is fair. For example, Nesbitt and Co, surveyors, wrote that:

> There is no reason for the landlord not to respond to a notice other than to frustrate the [leaseholder's] claim… [I]t is fair and right to allow the [leaseholder(s)] to proceed based on the terms they proposed to avoid further unnecessary costs and delay.

But in contrast, another consultee, Michael Kucharski, a leaseholder, objected to our provisional proposals because it would make enfranchisement fairer for landlords, and argued that such a proposal fell outside our Terms of Reference. Other consultees were concerned that our provisional proposal would allow a landlord to ignore a Claim Notice without apparent sanction, and require leaseholders to incur costs in obtaining a determination from the Tribunal. For example, J Williams, a leaseholder, wrote that:

> I am concerned that this provides landlords with a prime opportunity to frustrate the process and force the leaseholder(s) to put it into the Tribunal. At whose cost (time, money, resource)? There needs to be a consequence for non-response during the given timescales.

9.118 Other consultees proposed alternative sanctions that should apply. The Society of Licensed Conveyancers argued that prescribed terms of acquisition should apply where no Response Notice has been served. And Jonathan and Yvonne Boyd proposed that leaseholders should be able to acquire the landlord's interest at a discounted premium and have their costs paid by the landlord if no Response Notice has been served.[83]

9.119 Some consultees proposed that the position under the 1993 Act should be retained, but that the Claim Notice should contain a warning for landlords about the consequences of failing to serve a Response Notice within time.

9.120 Finally, some consultees responded to our proposal that a landlord should be able to apply to the Tribunal to take part in a claim where it has not served a Response Notice. These consultees thought that there may be certain circumstances in which the landlord may not be able to serve its Response Notice within the prescribed time.

---

81 The power to set aside a determination already made, and the timing of any such application is considered at paras 9.127 to 9.151 below.

82 We note, however, that a sizeable proportion of those consultees misunderstood our provisional proposal as suggesting that a landlord should not be required to transfer the freehold or grant a lease at all if he or she fails to serve a Response Notice.

83 The discount proposed was 25%.

Discussion and recommendations for reform

9.121 Consultees agreed that the current position set out in the 1993 Act can result in leaseholders acquiring their landlord's interest at a lower price that would otherwise be paid. They simply disagreed about whether that outcome is fair. On the whole, landlords and those representing them considered that the current position is unfair, whereas leaseholders and those representing them did not share that view.

9.122 For the reasons set out at paragraph 11.98 of the Consultation Paper and summarised above, we do not consider that the 1993 Act gives rise to a reasonable sanction for default.[84] As such, any savings of costs and time that might result from this sanction cannot be justified. In addition, we believe that although the 1993 Act might save leaseholders the costs and delay required to determine a contested claim, the potential penalty/windfall can lead parties to conduct satellite litigation that is likely in many cases to wipe out any such savings. For this reason, while our provisional proposal would remove an existing source of unfairness to landlords, removing the risk of satellite litigation will also have benefits for leaseholders.

9.123 We also believe that where a landlord has not served a Response Notice within the prescribed time, he or she should be able to apply to the Tribunal for permission to take part in the claim provided that a determination has not already been made.[85] As we set out in the Consultation Paper, the Tribunal should have a discretion as to whether to grant or refuse permission for the landlord to join. But we continue to believe that any disruption or delay likely to be caused by the grant of permission would be important factors in the exercise of that discretion, and that the Tribunal should have a power to order the landlord to pay any wasted costs of the leaseholder as a result.

9.124 At paragraph 11.100 of the Consultation Paper we acknowledged that our provisional proposals, together with other proposals on valuation, could reduce the importance of the landlord responding to a Claim Notice. Some landlords might decide that the likely costs of participating in a claim would exceed the potential benefit of doing so. We also recognise that other landlords might decide not to serve a Response Notice, and rely instead on the power to apply to take part in a claim before a determination is made, and/or to set aside any determination that has been reached. This could have a disruptive impact on enfranchisement claims. We are, however, recommending that such powers should be drawn in a way that we believe will discourage landlords from taking such an approach.[86] For example, a landlord should not be able to set aside a determination if he has received a Claim Notice but chosen not to respond. We are also adopting our proposal for the landlord to pay the leaseholder's wasted costs where the landlord applies successfully to the Tribunal for an order allowing the landlord to serve a Response Notice.[87] For these reasons, we think that it will continue

---

84 See para 9.112 above.

85 If a determination has been made, the landlord may apply to set aside that determination: see para 9.151 below.

86 The scope of these power is considered at paras 9.127 to 9.151 below.

87 See para 12.188 below.

to be in the interests of a landlord to respond to a Claim Notice by serving a Response Notice.

Recommendation 71.

9.125 We recommend that a landlord who has failed to serve a Response Notice within the prescribed period should not be liable to transfer his or her freehold or grant a lease extension on the terms set out in the Claim Notice. Instead, the terms of acquisition should, on application by the leaseholder, be determined by the Tribunal on the evidence provided.

9.126 We recommend that a landlord who has failed to serve a Response Notice within the prescribed period should be able to apply to the Tribunal for permission to take part in the claim provided that no determination of the claim has been made. The Tribunal should have the power to make such an order conditional on the payment by the landlord of any of the leaseholder's wasted costs.

SETTING ASIDE A DETERMINATION

9.127 In the Consultation Paper we invited the views of consultees as to whether a landlord who had failed to serve a Response Notice should be able to apply to the Tribunal for an order setting aside any determination that had been made in the absence of the landlord, and, if so, the grounds on which that should be possible.[88] But we also noted that, if our deemed service regime is to have any substance, it could not simply be enough to show that the Claim Notice was not received: additional criteria would also be needed.[89]

Consultees' views and recommendations for reform

Should there be a power to set aside?

9.128 About half of the consultees who provided responses to this question thought that there should be a power to set aside a determination that was made in the absence of the landlord.[90] Some felt that such a power would be necessary because some of our other proposals would increase the risk that a landlord would not know about a claim or may not be able to respond in time.

9.129 Other consultees focussed on the timing of any such application. Some consultees thought that a power to set aside a determination should be available provided that

---

88 See CP, Consultation Question 83, paras 11.130 to 11.132.

89 See CP, para 11.131. Our recommendations in relation to deemed service are set out at paras 8.242 to 8.244 above.

90 For the most part, consultees understood that our consultation question focussed on applications to set aside made by landlords who did not receive the Claim Notice, or did so but did not respond. A few consultees, however, addressed the question of whether landlords who did respond to a claim should be able to set aside a decision reached in their absence. We believe that the powers of the Tribunal in such cases, and the terms on which it might be exercised, are matters best governed by the Tribunal's own procedure rules.

the relevant transfer or grant has not yet taken place. Others felt that a determination should only be capable of being set aside within a set period after it was made.

9.130 The remainder of the consultees who responded to our consultation question thought that there should not be a power to set aside a determination made in the landlord's absence. Most feared that any such power would be exploited by landlords to their own advantage. For example, Carter Jonas LLP, surveyors, noted that:

> A landlord in such circumstances could simply arrange to absent themselves and devising criteria to satisfy absence would simply be a route map of how to get around it.

9.131 Other consultees considered that landlords should be capable of taking the steps required to avoid having a determination made against them in their absence – for example, by keeping HM Land Registry and Companies House records up to date. And some other consultees expressed little sympathy for those landlords who failed to do so. For example, LEASE considered that:

> Absentee landlords must bear the risk that goes with what, often in our experience, is an unfortunate indifference to the building. There may be reason for their absence, but, in the context of flats being the homes of ordinary people and the lease bringing obligations for the landlord to steward the building containing those homes, we see little justification for a landlord to be absent in this way.

Other consultees noted that the landlord's financial interest would be protected as a result of our provisional proposal that any determination made in the landlord's absence would be made on the basis of evidence and the Tribunal's expertise rather than simply on the terms set out in the leaseholder's Claim Notice.[91]

9.132 We note that while overall consultees were almost evenly split between those in favour of and those against a power to set aside, the answers given by different categories of consultee were less evenly split. Landlords, or those who represented them, were – without exception – in favour of a landlord having a right to set aside a determination that was made in their absence. But a large majority of leaseholders were opposed to such a right.[92]

9.133 Our Terms of Reference require us to aim to make enfranchisement "easier, faster, and most cost effective… particularly for leaseholders". Our recommendations for a more robust service regime go some way to achieving that objective.[93] And in our view, including a power for landlords who do not have an address at which a Claim Notice can be deemed served, or who do not respond to a Claim Notice once served, to set aside a determination made in their absence creates a risk that progress towards that objective will be undone. There would be little point in making it easier for

---

91 See paras 9.110 to 9.125 above.

92 Groups representing professionals were almost all in favour of a power to set aside. But professionals' firms were more divided. Most solicitors' firms favoured such a power, whereas a majority of surveyors' firms were against. Curiously, however, individual surveyors were all in favour of a power, and most individual solicitors were against.

93 See paras 8.202 to 8.238 above.

leaseholders to start an enfranchisement claim if landlords know that they can sit out proceedings and unpick any decision that is reached in their absence at a later stage.

9.134 Determinations made in the absence of one party do, however, carry with them a risk of injustice. The injustice may be that an interest is acquired where there was no right to acquire it, or that the interest is acquired on unjustifiable terms. And while that risk itself could encourage landlords to ensure that leaseholders always know how they can be reached, cases would likely remain where landlords had done so but, through no fault of their own, had still not been made aware of the claim.

9.135 We noted in the Consultation Paper that it is possible that some of our provisional proposals, as well as the options set out in the Valuation Report, could act to limit any prejudice that might be caused to a landlord who had not played a part in the claim. In particular, we flagged our proposal to remove any penalty for landlords who are served with a Claim Notice but fail to serve a Response Notice (which we are now adopting as a recommendation).[94] However, as the price payable is dependent on policy decisions that will be made by Government in response to the Valuation Report, it is not possible to conclude that there would be no risk of injustice to landlords who were not attempting to obstruct or delay the process of enfranchisement. Accordingly, we think that there should be a power to set aside a determination made in the landlord's absence so long as it is directed at avoiding legal errors or other substantive injustices.

What should the criteria be for setting aside a determination?

9.136 Consultees were divided between those who considered that the criteria for setting aside a determination should be based solely on the reason why the landlord failed to respond to the Claim Notice, and those who proposed criteria that extended to the merits of the arguments that the landlord wished to raise.

9.137 In the former group, some consultees proposed simple, factual tests. For example, a few consultees considered that it should be enough for a landlord to show that he or she did not receive the Claim Notice. Other consultees proposed that a landlord should need to show that the Claim Notice was not properly served by the leaseholder.

9.138 In contrast, some other consultees proposed more open-textured criteria. For example, several consultees proposed that a determination should be set aside where a leaseholder had not made reasonable attempts to contact the landlord. Another group of consultees thought that the landlord should have to show that there was a good (or sufficient) reason why he or she did not serve a Response Notice.

9.139 In the latter group, some consultees proposed that the landlord would have to show both that he or she was unable to respond and that the determination was unfair. Long Harbour and HomeGround proposed that the landlord should be required to show that there was evidence that the Tribunal had not seen that would have increased the premium by more than 10% or £5,000 (whichever was the lower). Bruce Maunder-Taylor, a surveyor, proposed that the landlord would have to show that the

---

[94] See CP, paras 11.84 and 11.97, and our recommendation at para 9.125 above.

Tribunal had misdirected itself, or reached a decision which no reasonable Tribunal could reach.

9.140 One consultee, the PBA, proposed that we should look to the Civil Procedure Rules for an appropriate test.[95] In contrast, another consultee argued that the discretion afforded to the Tribunal to set aside a determination would need to be broad to allow for the wide variety of circumstances that might arise.

9.141 In assessing these responses, we believe it makes sense to distinguish between the criteria to be applied where the leaseholders had used the Service Route, and where they had relied on the No Service Route. [96]

Setting aside a determination made under the Service Routes

9.142 We think that if a landlord can show that the Claim Notice was not served on him or her in accordance with our service regime, he or she should be able to set aside any determination made in his or her absence without more. This would include both cases where the leaseholder failed to serve the competent landlord at a Group A or B address and cases where the person served was not, at that time, the competent landlord – for example where a known competent landlord's interest in the property had in fact passed to another (either as a result of death or insolvency).[97] We accept that this approach could lead to further costs being incurred by both sides even in cases where the determination that the landlord seeks to set aside and the final determination reached thereafter are unlikely to be significantly different. But we think that introducing an additional merits-based threshold poses a risk that a leaseholder who knows that the Claim Notice has not been properly served may apply for a determination of his or her claim in the hope that the landlord would not meet the threshold for that determination to be overturned.

9.143 We do not, however, think that a determination made in the landlord's absence should be capable of being set aside simply because the landlord is able to show that – although the Claim Notice was properly served – he or she did not in fact receive it. As we noted in the Consultation Paper, such a low bar would fatally undermine our proposed deemed service regime.[98] The landlord should, therefore, also have to meet an additional test related to the merits of the determination made in his or her absence. However, we think that this test should be narrowly drawn as the circumstances in which a well organised landlord has received a Claim Notice but been unable to serve a Response Notice within the required period would be rare.[99]

---

95 Reference was made to both the power to set aside a default judgment, Civil Procedure Rules, r. 13.3 and an application for relief from sanctions, Civil Procedure Rules, r. 3.9.

96 See paras 8.242 to 8.244 and 8.254 above.

97 See para 8.337 above.

98 CP, para 11.131.

99 Many consultees have raised concerns about the time allowed to serve a Response Notice. The period for doing so is considered at paras 9.82 to 9.91. But we think a landlord who is struggling, for example, to prepare draft documents to accompany the Response Notice in time, would nevertheless be able to serve a Response Notice either within time but without those documents, or with those documents after the deadline

9.144 In deciding upon this threshold, we considered the provisions of the Civil Procedure Rules which require, as part of an application to set aside a default judgment, an applicant to show a real (as opposed to fanciful) prospect of successfully defending the claim. In contrast, an applicant wishing to set aside a judgment entered at a trial heard in his absence must show, as part of the application, that he or she has reasonable prospects of success at trial.[100] Both these tests allow a party to try to set aside a determination if he or she considers that there is a chance that a different order would be made after a full hearing. However, we think that adopting either approach taken by the Civil Procedure Rules would create a real risk that landlords will seek to set aside determinations where the legal costs of the application and of any further proceedings are likely be out of proportion to the sums properly in dispute.

9.145 Instead, we think the power to set aside a determination made in the absence of a landlord who had been properly served with the Claim Notice should be reserved for cases where the Tribunal's determination was wrong. Here, we mean 'wrong' in the sense in which it is used as a ground for granting an appeal under the Civil Procedure Rules.[101] As such, a landlord would have to show that the determination revealed a material error of law, an error of fact, or an error in the exercise of the Tribunal's discretion. For example, the Tribunal could set aside a determination because the leaseholders were not entitled to enfranchise, or because the premium set fell outside the range of values that a reasonable Tribunal was entitled to set. But we also think that, in conducting this assessment, the Tribunal should be able to take account of written evidence on which the landlord would have sought to rely had the determination not taken place in his or her absence. We consider that this threshold will ensure that the Tribunal's powers in setting aside a determination made in the landlord's absence are aimed at avoiding legal errors and other substantive injustices.

Setting aside a determination made under the No Service Route

9.146 Where a landlord has not have been served with the Claim Notice, we have recommended that it should nevertheless be possible for the Tribunal to set aside a determination made under the No Service Route in certain circumstances. In such cases, the criteria for setting aside a determination cannot be the same as those under the Service Routes. Instead, a landlord against whom a determination has been made under the No Service Route should have to show that the test for making an order under that route was not met (either because the Service Routes were in fact available to the leaseholder, or because the leaseholder did not carry out the prescribed checks).[102] If a landlord can show that the relevant test was not met, we do not think it should be necessary for the landlord to be required, in addition, to show that the determination of the claim was wrongly made. To require additional criteria

---

has passed together with an application for permission to join in the claim before any determination is made: see para 9.126.

100 Civil Procedure Rules, r 13.3 and r 39.5 respectively.

101 Civil Procedure Rules, r 52.21(3(a).

102 See para 8.334 above.

would risk encouraging leaseholders to rely on the No Service Route even where they are not reasonably entitled to do so.[103]

9.147 However, even if an order under the No Service Route was properly made, we believe that it should still be possible to set aside that determination on the same grounds as are available where a landlord shows that he did not in fact receive the Claim Notice served under the Service Routes. To set aside such a determination, a landlord should need to show that the Tribunal's decision – taking account of any written evidence on which the landlord seeks to rely – was wrong.[104] We think that threshold sufficiently high to ensure that applications to set aside determinations will not routinely succeed.

Time limit for bringing an application to set aside a determination

9.148 We agree with those consultees who considered that an application to set aside would have to be made before the transaction provided for by the determination has been completed. Unpicking a completed transaction is likely to be far too disruptive a remedy. For example, if a lease extension were to be granted and the residential unit then sold to a third party, any remedy allowing a competent landlord to unpick the initial lease extension would threaten the position of the third-party purchaser. The threat of such action is also likely to undermine the ability of purchasers to secure mortgage finance in respect of any lease extension that was granted without the participation of the competent landlord.

9.149 In light of the responses received from consultees, we have also considered whether any additional time restriction on bringing an application to set aside a determination should be set. For example, the Civil Procedure Rules require the court (when exercising its discretion to set aside a default judgment) to take into account whether the application has been made promptly. But we think that the use of such an open-textured term increases the likelihood of disputes arising on that issue. As a result, we consider that the application to set aside should be made (rather than heard) before any transaction has completed, or within 14 days of the date on which the landlord discovers that an order has been made, whichever is the earlier.

9.150 As we explain above, we think it is necessary for the application to be made prior to completion in order to avoid any complexities associated with unpicking a completed transaction. We understand that, in practice, the enfranchising leaseholder is likely to seek to complete the transaction at the earliest opportunity and so the landlord may not have the full 14-day period to make his or her application prior to completion. However, we think that landlords (and their solicitors) can act swiftly under these circumstances. We should also make clear that if the transaction has not been completed, an application by the landlord to set aside the determination should, once issued, prevent the leaseholder from completing the transaction, until the landlord's application has been heard and finally determined.

---

[103] See para 9.142 above.

[104] See para 9.145 above.

Recommendation 72.

9.151 We make the following recommendations.

(1) A landlord who has not served a Response Notice should be entitled to apply to the Tribunal for an order setting aside a determination of an enfranchisement claim that was made in his or her absence.

(2) An order setting aside a determination that was made in the landlord's absence should only be made if the landlord shows that:

(a) (where the leaseholder's application was made under the Service Route) the Claim Notice was not served in accordance with the provisions of the Service Routes;

(b) (where the leaseholder's application was made under the No Service Route) the test for making an order allowing the claim to proceed under the No Service Route was not met; or

(c) the following criteria apply:

(i) the landlord did not receive the Claim Notice; and

(ii) the determination was wrong, in the sense that it revealed a material error of law, an error of fact, or an error in the exercise of the Tribunal's discretion (taking account of any written evidence on which the landlord seeks to rely).

(3) In either case, an application to set aside should have to be made:

(a) within 14 days of the landlord first discovering that the determination had been made; or

(b) before the transaction provided for in the determination is completed;

whichever is the earlier.

ENSURING THAT A CLAIM IS PROGRESSED

9.152 In the Consultation Paper we provisionally proposed that the deemed withdrawal provisions contained in the 1993 Act should not be replicated in our new regime.[105] We recognised that these provisions create a series of traps for unwary leaseholders, causing a claim to be treated as having been withdrawn, leaving the leaseholder with a liability to pay the landlord's costs, and barring the leaseholder from making a fresh claim for 12 months. We noted that, although these outcomes might be appropriate and fair in a few cases, they are neither necessary nor proportionate in most claims in

[105] See CP, Consultation Question 86, para 11.153.

which a leaseholder misses a procedural deadline. We also noted that, in some instances, a landlord will take deliberate advantage of a leaseholder's ignorance of a deadline and its consequences for the claim.[106]

9.153 We accepted, however, that there would still need to be a mechanism for dealing with stale enfranchisement claims. We therefore proposed introducing a power for a landlord (and, in the case of a collective freehold acquisition, other groups of leaseholders) to apply to strike out a Claim Notice where the leaseholders have failed to take the next procedural step within a prescribed period (which we did not specify in the Consultation Paper).[107] Either applicant would have to give the leaseholder 14 days' notice of their intended application. And in the case of an application brought by a landlord, the Tribunal would be able to order the leaseholder to pay the landlord's non-litigation costs and a fixed sum relating to the application itself.[108]

Consultees' views and recommendations for reform

9.154 A sizeable majority of consultees were in favour of our provisional proposals in respect of deemed withdrawal and the power to strike out claims. Of those consultees who added a comment, most considered that our proposals represented a sensible way of dealing with claims that were not being progressed by leaseholders. For example, Professor James Driscoll, described our proposals as "very important recommendations".

9.155 However, Damian Greenish highlighted an important flaw in our provisional proposal. While we proposed that a strike-out application could be made if a leaseholder missed a procedural deadline, we did not specify in the Consultation Paper the deadlines that would apply. He also asked what was to happen to a Claim Notice that was neither progressed nor subject to a strike out application by the landlord, and asked whether there would be a time limit after which the Claim Notice would expire. We discuss these issues further in the section headed 'Discussion and recommendations for reform' below.

9.156 Many consultees' comments reflected the arguments set out in the Consultation Paper. For example, LEASE wrote that:

> The current provisions are disproportionate when it comes to procedural time limits being missed by the leaseholder. It is also sensible to have a mechanism to deal with any stale claims, both from the perspective of the landlord and to enable other groups of leaseholders to make a claim.

But other consultees focussed on the benefits of our proposals for those advising leaseholders. For example, the Law Society supported our proposal on the basis that "the removal of 'traps' would reduce the number of claims for negligence against hapless advisers". The Law Society also supported our strike out proposal as it would "bring abandoned claims to an end and provide a suitable inducement for leaseholders to continue promptly with their claims". The PBA also supported our

---

106 See CP, paras 11.148 to 11.150.

107 See CP, para 11.151.

108 See CP, paras 11.151 and 11.152.

proposals, but on condition that a landlord should recover his or her costs if a claim does not proceed.

9.157 Philip Rainey QC supported our provisional proposal, but noted that more than 50% of the leaseholders who would be able to participate in a collective freehold acquisition claim should be required to bring a strike out application in respect of an existing collective freehold acquisition claim. He also suggested that leaseholders who did not intend to participate in any collective freehold acquisition claim should still be able to join an application to strike it out as otherwise their lease extension claims would remain suspended by the existing claim.[109]

9.158 Of those consultees who opposed our deemed withdrawal proposal, some did so on the basis that it was up to the party bringing the claim to be sufficiently organised to comply with time limits. Consultees said that landlords should not be prejudiced because of the leaseholder's failings. Others felt that any risks faced by leaseholders could be reduced by taking appropriate legal advice. For example, Paul Church wrote that:

> If the process is to move forward smoothly, both sides need to comply with the procedural timetable. There should be deemed withdrawal if limits are not kept to. In nearly all cases leaseholders will have a solicitor acting for them; there will be no excuse to miss limits.

9.159 Other consultees framed their response in terms of the need to provide certainty for landlords facing enfranchisement claims. For example, Bruce Maunder-Taylor considered that "there must be some degree of certainty", and noted that "with a fixed valuation date, in changing market conditions, [not providing for deemed withdrawal] would be unfair".

9.160 Some consultees opposed our proposals on the basis that our approach placed the burden of dealing with an enfranchisement claim that was not being progressed by leaseholders on the landlord. Wallace Partnership Group Limited, a landlord, thought that this burden was unreasonable given the other simplifications of the enfranchisement process that we have proposed.

9.161 Some consultees accepted the logic of having a power to strike out a Claim Notice if it can no longer be deemed to be withdrawn, but nevertheless thought our proposals cumbersome in practice. Bryan Cave Leighton Paisner LLP, solicitors, thought that allowing other leaseholders to apply to strike out a Claim Notice would lead to conflict between groups of leaseholders.

9.162 In contrast, some consultees opposed our proposed right for a landlord to apply to strike out an enfranchisement claim on the basis that such a right would be open to abuse. Other consultees were concerned that enfranchisement claims might be struck out where there was a legitimate reason why progress had not been made. For example, one leaseholder wrote:

---

[109] Pursuant to s 54 of the 1993 Act, a tenant's notice (in respect of a lease extension) is suspended upon service of a notice of claim in respect of a collective enfranchisement claim.

Why should the already penalised leaseholder be further penalised if there are extenuating circumstances whereby deadlines are missed. Why should the leaseholder be penalised if procedure has been disrupted by circumstances beyond his or her control e.g. bad weather, strikes, postal disruption, lost post etc.

9.163 Other consultees thought that the circumstances in which a Claim Notice might be struck out should be more constrained. John Stephenson, a solicitor, proposed that a landlord should have to show some prejudice has been caused by the delay, and the Tribunal should be able to grant a leaseholder more time to take any step required. Martin Chamberlain, a leaseholder, noted that any time limit applied to leaseholders should be more generous than those applied to landlords, who were more likely to be familiar with enfranchisement processes.

9.164 Some consultees made alternative proposals. The Property Litigation Association suggested that deemed withdrawal provisions should be adopted, but with a power for a leaseholder to apply to the Tribunal for an order reinstating the claim. Another consultee, Bruce Maunder-Taylor, proposed treating a claim as withdrawn if an application is not made to the Tribunal within a six months of the leaseholder failing to comply with the relevant time limit. And a couple of consultees thought that a Claim Notice should only be deemed withdrawn if the leaseholder fails to remedy any default having been given notice to do so by the landlord. Another consultee, Bryan Cave Leighton Paisner LLP, proposed that a landlord should simply be allowed to apply to the Tribunal for an order that the leaseholder pay any costs wasted by any failure to progress the claim.

Revising our provisional proposals

9.165 The first element of our provisional proposals was intended to make it easier and more cost-effective for leaseholders to bring an enfranchisement claim. Leaseholders would no longer run the risk that their claim is treated as withdrawn because a procedural deadline has been missed, leaving them with an obligation to pay their landlord's costs, and preventing them from bringing another claim for a further 12 months.[110]

9.166 Some consultees (both those in favour of and those opposed to our proposals) considered that the change would in fact largely benefit professional advisers, who would no longer face claims for damages for professional negligence from clients whose deadline have been missed. We agree that advisers would be likely to benefit in this way. That does not, however, mean that leaseholders would not also benefit. They would be able to proceed with their intended enfranchisement claim rather than be forced to try to recover losses from their advisers.

9.167 The other elements of our provisional proposals were intended to balance out the removal of deemed withdrawal provisions and deal with claims that are not being progressed (and are therefore "stale"). A landlord (or other leaseholders) should be able to bring a stale claim to an end. We think that our recommendations that a landlord should be able to recover a contribution towards his or her non-litigation

[110] However, we are recommending the introduction of enfranchisement restraint orders where repeated unmeritorious or vexatious claims are made: see para 12.166 to 12.167.

costs, and a fixed sum in respect of the costs of making a successful application to strike out the Claim Notice, can reduce the burden of requiring landlords to take that step.[111] But we also think that the amount of costs that a landlord can recover should be pitched carefully so as not to encourage landlords to make strike-out applications needlessly. Together, we think that our proposals will strike the right balance between avoiding procedural traps for leaseholders, of which some landlords might seek to take advantage, and ensuring that leaseholders progress claims that they have started.

9.168 Some consultees rightly pointed out that further thought needed to be given to the detail of any powers to apply to strike out a Claim Notice. First, as Damian Greenish correctly observed, we framed the power in terms of leaseholders having failed to meet a procedural deadline without specifying the deadline that would apply. We think that the appropriate deadline should be that the leaseholder must make an application to the Tribunal within six months of the service of a Response Notice (or the date by which any such notice should have been served)[112] if no such application has already been made by the landlord. After an application has been made, progress of the claim is likely to be controlled by the Tribunal and its own rules.

9.169 We also consider that a leaseholder should be given 14 days' written notice of an intention to bring a strike-out application, and that it should not be possible for the strike-out application then to be made if the leaseholder makes an application to the Tribunal for a determination of his or her claim within that period. But if the leaseholder's application for determination of the claim is made after the end of that period, the Tribunal should exercise its discretion as to whether to strike out the claim or not. We think that this would give the leaseholder a reasonable opportunity to rectify his or her default. But it would also ensure that leaseholders are not able to ignore a strike-out application in the hope that they can defeat it by applying for a determination of their claim after the strike-out application has been made, or a hearing of the application has been set.

9.170 We also think that applications to strike out should be available to other leaseholders who have a legitimate interest in bringing a stale claim to an end. In the Consultation Paper, we referred to applications made by other groups of leaseholders who might also wish to bring a collective freehold acquisition claim. We see no justification for requiring that the number of leaseholders needed to make an application to strike out a stale claim should be higher than the number required to bring a collective freehold acquisition claim. Any such application to strike out would be necessary in order to allow a collective freehold acquisition claim to be made by an alternative group of leaseholders. But we agree with Philip Rainey QC that an application to strike out a claim should also be available to leaseholders whose own enfranchisement notices have been stayed by a collective claim that has not been progressed as expected.

---

111 See paras 12.128 and 12.129 in respect of non-litigation costs and para 12.188(3) in respect of litigation costs.

112 We discuss our proposal for service of the Response Notice prior to an application for striking out at para 9.174 below.

9.171 Finally, we note consultees' concerns that our provisional proposal would place the burden of dealing with a stale enfranchisement claim on the landlord. We have therefore revised our proposals regarding deemed withdrawal.

9.172 First, we have identified another circumstance in which a claim may not be able to progress. This is where the nominee purchaser company has been struck off, wound up, or become insolvent following service of the Claim Notice. If the leaseholders do not appoint a replacement nominee purchaser, then the claim will not progress and the issues which we discuss above would arise. In particular, if a leaseholder wishes to claim a lease extension, then (on the basis of our conclusions set out above) he or she would need to apply for the collective freehold acquisition claim to be struck out so that the lease extension claim could proceed.[113] The leaseholder would be required to apply for restoration of the nominee purchaser to apply for the order. Therefore, we think that it is appropriate for the claim to be deemed to be withdrawn if the nominee purchaser company is removed from the register. The participating leaseholders should be responsible for ensuring that the nominee purchaser company continues to exist while they pursue the claim, thereby avoiding any inadvertent withdrawal of the claim. Therefore, we also recommend that Claim Notices should be deemed to be withdrawn if the nominee purchaser company is struck off, wound up or becomes insolvent.

9.173 Second, on the basis of our provisional proposals it would be possible for a Claim Notice to remain valid indefinitely. This is because, as Damian Greenish pointed out, our proposal referred to an application to strike out being available where a Response Notice has been served. If no Response Notice has been served, our proposal would not allow the Claim Notice to be struck out.

9.174 It seems that this problem could in part be addressed by allowing an application to strike out to be made whether or not a Response Notice has been served. This would allow other leaseholders to apply to strike out a stale claim regardless of the landlord's response. We also think it unlikely that this would create an incentive for landlords to choose not to serve a Response Notice and hope that the leaseholder fails to make an application to the Tribunal within the six-month period. The landlord would still be required to give the leaseholder notice of the proposed application, providing the leaseholder with an opportunity to apply to the Tribunal for a determination of the claim. If this occurred, the landlord would have to apply for permission to take part in the claim (and to serve a Response Notice) if he or she wishes to avoid a determination being made in his or her absence. Therefore, we think that it should be possible to make an application to strike out a claim if the leaseholder has not made an application to the Tribunal for a determination within six months following (the earlier of) the date of service of the Response Notice, or the date on which the Response Notice should have been served.

9.175 Third, there is a further way in which the Claim Notice may remain in force indefinitely. This is due to our recommendation that a Claim Notice will automatically be binding on the transferee of a landlord's title without the need for prior registration as a land

---

[113] 1993 Act, s 54 provides that a tenant's notice is suspended during the currency of a collective enfranchisement claim relating to premises containing the tenant's flat.

charge or of notice in the register of title.[114] For example, a Claim Notice may be deemed served but neither progressed by the leaseholder nor struck out by the Tribunal on application by the landlord or other leaseholders. The Claim Notice would in remain in force regardless of any change in ownership of the competent landlord's interest. And if the new landlord is not aware of the Claim Notice, it may remain in place for many years, with the original valuation date preserved. We think that allowing a leaseholder (or his or her successors) to rely on a Claim Notice in such circumstances risks injustice and an unmerited windfall for the leaseholder.

9.176 Therefore, while we think that the power for landlords and other leaseholders affected by a Claim Notice to strike out that notice where it has not been progressed will generally be sufficient to deal with stale claims, we recognise that allowing a Claim Notice to remain in force indefinitely could create injustice between leaseholders and landlords. We therefore recommend that a Claim Notice should be deemed to be withdrawn after a period of two years from the date of deemed service if no application has been made to the Tribunal in that time.

Recommendation 73.

9.177 We make the following recommendations:

(1) Subject to paragraph (6) below, a Claim Notice should not be deemed to be withdrawn because a procedural time limit is missed by the leaseholder.

(2) The Tribunal should have a power to strike out a Claim Notice if the leaseholder who gave that notice does not apply to the Tribunal for a determination of his or her claim within six months of the service of a Response Notice or the date on which a Response Notice should have been served (whichever is earlier).

(3) It should be possible for an application under paragraph (2) above to be made:

(a) in any enfranchisement claim by a competent landlord (or another landlord who has responsibility for responding to the claim); and

(b) additionally, in the case of a collective freehold acquisition claim:

(i) by another group of leaseholders within the building who would be entitled to bring a collective freehold acquisition claim; or

(ii) by a leaseholder whose lease extension claim has been stayed as a result of the service of the Claim Notice.

[114] See para 10.81.

(4) No such application should be made unless the leaseholder (and the competent landlord to whom the Claim Notice was addressed) has been given 14 days' written notice of the applicant's intention to do so and that period has expired without the leaseholder making an application for a determination of the claim.

(5) The Tribunal should exercise its discretion as to whether to strike out the Claim Notice if the leaseholder makes an application for a determination of the claim after the expiry of the 14-day period set out in paragraph (4) above.

(6) A Claim Notice should be deemed to be withdrawn if:

(a) no application to the Tribunal is made within a period of two years from the date on which the Claim Notice was deemed to have been served; or

(b) the nominee purchaser company is wound up, struck off or becomes insolvent prior to determination of the claim.

Chapter 10: Completing a claim

INTRODUCTION

10.1 In Chapters 8 and 9 we set out our recommended procedure for making and responding to enfranchisement claims. In the current chapter, we address some issues that arise after a claim has been commenced and as it moves towards completion. We provided a summary of these issues and an outline of our recommendations in Chapter 8.[1]

10.2 The first matter we consider is the effect of serving a Claim Notice. That is a substantive legal issue rather than merely a matter of procedure. We need to consider on what basis a Claim Notice is binding on a landlord. Should it create a statutory contract, as it does under the current law? Or should it have a bespoke statutory effect? Relatedly, what should happen if, after a claim has been made, the leaseholder assigns his or her lease or the landlord sells the freehold to a third party? Should the benefit of the claim transfer automatically with the lease and when should a claim be binding on purchaser of the landlord's title? We address these and other questions.

10.3 In the rest of the chapter, we examine the process by which a leaseholder may bring an enfranchisement claim to a conclusion and the further legal difficulties that may arise at this stage.

(1) We make recommendations in Chapters 4 (also discussed in Chapters 3 and 5) regarding the effect of an enfranchisement claim on a mortgage secured against the lease or against the landlord's title.[2] In this chapter, we consider whether these recommendations need to be supplemented by any procedural requirements on the landlord or the leaseholder to notify their mortgagees of the progress of enfranchisement claims.

(2) We also make recommendations in Chapters 3, 4 and 5 regarding the effect of an enfranchisement claim on contracts to which the landlord is a party that prohibit him or her from transferring the freehold or granting a new lease, or set conditions on the transfer or the grant.[3] In this chapter, we address related questions. What should happen if the relevant contracts are protected by restriction registered against the landlord's title? And what should happen if the landlord is obliged to seek the consent of a mortgagee or a beneficiary under a trust of land to the transfer of the freehold or the grant of a new lease?

---

1 Paras 8.33 to 8.40 above.

2 Recommendations 6, 16 and 22 (at (respectively) paras 3.240, 4.404 and 5.195 above).

3 Recommendations 12 (paras 4.217 to 4.218 above). See also paras 3.335 and 5.173 to 5.182 above.

(3) Finally, we consider whether any special requirements should apply when leaseholders come to register their new leases or the transfer of the freehold on completion of an enfranchisement claim.

10.4 We start by examining the question of whether the service of a Claim Notice should create a statutory contract.

EFFECT OF SERVING A CLAIM NOTICE

10.5 The service of any notice of claim in respect of a house or a notice of claim seeking a lease extension of a flat creates a statutory contract between the parties. The statutory contract is treated as being subject to a series of conditions that are prescribed by separate regulations made in respect of each type of enfranchisement claim. These conditions set out the steps that the parties are expected to take in order to be able to complete the proposed transaction, and a timetable within which those steps should be taken.[4] However, in the case of a notice of claim served in respect of a collective enfranchisement claim, no statutory contract is created. Despite this, regulations still describe the steps that the parties should (in the absence of contrary agreement) take after the notice of claim has been served. In this instance, however, the steps take the parties to exchange of contracts rather than completion.[5]

10.6 In the Consultation Paper we made two separate, but related, provisional proposals.

(1) The service of a Claim Notice should not create a statutory contract between a leaseholder and his or her landlord in any enfranchisement claim.[6]

(2) Detailed conveyancing regulations[7] need not generally be made.[8]

10.7 The first of those provisional proposals was made on the basis that the service of such a notice would give rise to rights and obligations created directly by statute. The fiction of a statutory contract is not required. Having set out this provisional proposal, we nevertheless asked whether consultees thought that, if our provisional proposal were to be adopted, there were any effects of a statutory contract that we would need to provide for in some other way.

10.8 The second of those provisional proposals was made on the basis that outside enfranchisement claims leases and transfers are prepared, negotiated and agreed by the parties without particular difficulty. We argued that regulating how the parties should move towards those stages was unnecessary. We also referred to our separate proposals bringing forward the point at which the terms of any lease or

---

4 See CP at paras 10.22 and 10.40 (in respect of lease extensions of a house), 10.52 and 10.60 (in respect of acquiring the freehold of a house), and 10.84 and 10.104 to 10.105 (in respect of lease extensions of a flat).

5 See CP at paras 10.127 and 10.155.

6 Consultation Question 76: see CP at paras 11.46 and 11.47.

7 Regulations made under the 1967 and 1993 Acts seek to control the process by which the parties negotiate and agree the terms of any lease extension or transfer. See CP at paras 11.39 to 11.42.

8 Consultation Question 84: see CP at para 11.143.

transfer are to be agreed or determined, and that either party would be able to apply to the Tribunal if such documents had not been executed.[9]

Consultees' views and recommendations for reform

Statutory contracts

10.9 A sizeable majority of consultees agreed with our provisional proposal. Some agreed with the reasoning set out in the Consultation Paper.[10] For example, the Leasehold Advisory Service ("LEASE") stated that:

> We do not believe that a statutory contract is necessary. If there is a statutory right then service of the Claim Notice would be enforceable in any event.

Another consultee, Shira Baram, a leaseholder, said that the service of a Claim Notice should simply be seen as the start of an enfranchisement claim:

> The claim notice is not a contract it is merely informing the freeholder/ landlord/ superior landlord that the enfranchisement/ freehold acquisition process has started and that they are legally required to engage with the process…

10.10 A few consultees thought that creating a statutory contract on service of a notice of claim can tie a leaseholder into proceeding with his or her claim in a way that might not be in their interests. For example, the Law Society noted that:

> The creation of a statutory contract can cause problems, particularly if the leaseholder wishes to withdraw the claim within the statutory timeframe after the price has been agreed or determined, as sometimes happens under the 1967 Act statutory contract.

Other consultees, including the Property Litigation Association ("the PLA"), thought that the position currently adopted in respect of collective enfranchisement claims, where a voluntary contract was entered into between the parties, provided greater flexibility and was to be preferred.

10.11 Many of those consultees who thought that a Claim Notice should create a statutory contract believed that serving such a notice should be seen as an important and serious step. A statutory contract imposed clear obligations and set consequences for any breach of those obligations. Some of these consultees believed this would protect landlords from speculative claims, whereas others thought that such contractual obligations could also work in favour of leaseholders. For example, Orme Associates Property Advisers stated that:

> The creation of a statutory contract under the 1967 Act confers advantages on the leaseholder in that it can serve a notice to complete once the price is agreed. This is not possible under the 1993 Act until all the terms are agreed which leaves open the opportunity for advisers to say: "We will agree this price so long as you agree to our

---

9 See CP at paras 11.120 to 11.122.

10 See para 10.7 above.

costs" which is underhand and is not right. I think leaseholders have more power if they have a contract from the outset.

10.12 Many of those consultees who responded to the second part of our consultation question thought it difficult to answer in the absence of more detail about the powers that would be available to the Tribunal when asked to settle or enforce a lease extension or transfer. However, other consultees argued that provision would still need to be made for deposits, the payment of the premium, procedures for withdrawal and timeframes, and for the recovery of costs by a landlord where the claim is invalid or does not proceed. Other consultees were concerned that landlords were not able to obstruct the progress of a claim.

10.13 Some consultees raised concern that the absence of a statutory contract would have other effects that would need to be addressed. One consultee, Heather Keates, a conveyancer, was concerned whether it would remain possible to register a notice against the landlord's title to prevent a purchaser of his or her interest taking free of the enfranchisement claim. Another consultee, Church & Co. Chartered Accountants, was concerned as to whether competing claims might be advanced in the absence of a statutory contract.

Conveyancing regulations

10.14 Well over half of consultees were in favour of our provisional proposal.[11] Many of those who did so expressed their agreement by reference to the reasoning set out in the Consultation Paper. Other consultees, however, supported our proposal on the basis that once the terms of acquisition had been agreed, the parties would usually enter into a contract that would itself set out the further steps required. For example, the Wellcome Trust, a charity landlord, wrote that:

> We agree that detailed conveyancing regulations are not generally needed in relation to enfranchisement claims. On collective enfranchisement claims the parties generally agree a form of contract suitable to the circumstances, which incorporates the Law Society's standard conditions of sale.

10.15 In contrast, some consultees were strongly critical of our provisional proposal. For example, Damian Greenish, a solicitor, considered we had provided "an extraordinarily simplistic summary of the conveyancing process" and that our assessment that voluntary transactions were concluded without statutory control or particular difficulty was "questionable as a generalisation". Such transactions were not "negotiated in a total vacuum" but "go through a process of a contract followed by completion". He did, however, note that there would be no need for conveyancing

---

[11] It should be noted that some consultees who expressed support for our proposal misinterpreted our question. A few consultees thought we were asking whether there is a need for any kind of conveyancing process at all. Most of these consultees considered that any such process was unnecessary, and simply increased costs. Some other consultees thought we were asking whether it should be necessary for lawyers to be engaged to carry out any conveyancing. Most believed the process should be simple enough that this was not necessary. And a few others believed we were asking about the control of the other terms on which a lease might be extended, or a freehold be transferred. Those consultees considered that such control was necessary.

regulations if we were proposing that there should be a contract entered into in all enfranchisement claims.

10.16 Some consultees felt that producing conveyancing regulations would remove any uncertainty or ambiguity about who should do what and when. Other consultees believed that without such regulations there would be no incentive on a party to take the next necessary step to progress an enfranchisement claim.

10.17 A few consultees expressed support for the current regulations. Others considered that any future regulations should be simplified and made easier for leaseholders to understand and follow without legal assistance. Another consultee, the Property Bar Association ("the PBA"), argued that if detailed regulations were not to be made, there remained value in "keeping the framework that is currently in the existing legislation to give a timetable to work to so that claims do not drift".

10.18 Some of the consultees responding to the second part of our consultation question argued that regulations would still be required for particular elements of the conveyancing process. When taken together, most of the matters covered by the existing regulations were argued to need regulation. Other consultees argued that the existing regulations failed to make adequate provision to deal with leaseholders who wished to delay the completion of a transaction after its terms had been agreed.

Ensuring claims are progressed smoothly

10.19 These two consultation questions were asked separately. But both relate to the rights and obligations to which the parties will be subject after the service of a Claim Notice. And while opposing views were expressed about each of these provisional proposals, there does appear to be a commonly accepted broad objective: to ensure that an enfranchisement claim proceeds as smoothly as possible from its commencement (on the service of the Claim Notice) to its completion.

10.20 Pursuit of that objective gives rise to two separate questions. First, what rights and obligations need to be specified in order to ensure that enfranchisement claims can proceed smoothly to completion? And second, what should the source of those rights and obligations be?

10.21 Any enfranchisement regime needs to create a framework within which claims can be started, progressed and completed (or, alternatively, ended). We believe that the recommendations set out in Chapters 8 and 9 establish just such a framework. But we do not think it necessary to go further and prescribe the additional steps that the parties must take in order to reach a stage at which completion of a transaction is possible. In most cases both leaseholders and landlords will want to progress the claim. Most leaseholders who bring a claim intend to complete that claim, and most landlords will recognise that a valid claim has been made, and accept that they will have to take the necessary steps to complete the claim. And where that is not the case, both parties should be aware that either party may apply to the Tribunal for an order requiring the other party to take any steps required to move the claim forward.

10.22 The requirements for parties to complete a transaction forming part of an enfranchisement claim is no different from those for parties entering into such a transaction on a voluntary basis. We recognise, however, that there may be a danger

that some parties are not clear about what is expected of them and when in relation to an enfranchisement claim. This is most likely to be the case where leaseholders are seeking to bring the claim without professional assistance. We also acknowledge that a more dominant party might seek to use the threat of an application to the Tribunal to pressurise a weaker party into taking a particular step. Those two risks can, however, be mitigated by the production of a guide to the steps that should be taken in each case and likely time-scales, and by the way the Tribunal develops the exercise of its discretion.

10.23 Having identified the rights and obligations that need to be prescribed, it is difficult to see what advantage would be conferred by creating such rights and obligations by the fiction of a statutory contract between the parties. Statute (whether primary or secondary) is quite capable of setting such rights and obligations as are required.

10.24 We therefore recommend that the service of a Claim Notice should not give rise to a statutory contract. We also recommend that it will not be necessary to make conveyancing regulations setting out the steps to be taken to progress an enfranchisement claim between service of the Claim Notice and completion. We do, however, recommend that a guide be produced to help parties to understand both the enfranchisement procedure set out in the preceding parts of this chapter and the other steps that are likely to be needed to complete a claim.

10.25 In reaching this conclusion we do note that statutory provision will need to be made in respect of the treatment of intermediate interests, and the inclusion within any transaction of a statement showing that any transaction was the result of a statutory enfranchisement claim.

The role of a contract

10.26 Some consultees were concerned that regulations would be required unless there was a requirement to enter into a contract in every enfranchisement claim. We set out above why we do not think that is the case. But we make clear that we are not proposing to prohibit the use of contracts to create rights and obligations between the parties as part of an enfranchisement claim. Indeed, we recommend that Response Notices enclose a draft contract, lease or transfer (if one is to be used).[12] But in doing so we are not proposing that a contract must be used in all enfranchisement claims, or indeed, all claims of a particular type. We simply intended to refer to the document that would likely be created in respect of a similar voluntary transaction. In cases where an existing interest is registered, there may be little benefit in producing a contract for sale followed by a lease or transfer; but in more complex transactions, perhaps involving a number of related dispositions, a contract may make perfect sense.[13]

---

12 Recommendation 67, para 9.37(1) above.

13 The enforcement of a contract by the parties is considered at paras 11.22 to 11.32 below.

Recommendation 74.

10.27 We recommend that:

(1) the service of a Claim Notice upon a competent landlord should not create a statutory contract between the leaseholder and the landlord;

(2) a contract between the parties should not be required in every enfranchisement claim, but could be used if either party elects, or the Tribunal directs in the absence of agreement between the parties, that such a contract be used; and

(3) the enforcement role of the Tribunal should be limited to giving effect to the transfer or grant of the interest claimed by the leaseholder; if other elements of a contract need to be enforced, it should continue to be possible to make an application to the county court.

10.28 We also recommend that detailed conveyancing regulations should not be made. However, general advisory guidance should be provided as to the statutory enfranchisement procedure and the other steps that the parties are likely to need to take between the service of notices and completion of any transaction.

ASSIGNMENT OF THE BENEFIT OF A CLAIM NOTICE

10.29 The next issue addressed in the Consultation Paper concerned the assignment of notices of claim. Under the current law, a leaseholder must be a qualifying tenant of the relevant property for a period of two years before he or she can make a lease extension or individual freehold acquisition claim. However, a purchaser of a lease can circumvent the two-year ownership requirement if he or she takes an assignment of a notice of claim served by the previous leaseholder. It may thus matter a great deal to the purchaser whether the assignment has been successful.

10.30 In Chapter 6, we recommended the abolition of the two-year ownership requirement.[14] If the recommendation were to be implemented, it would become less significant whether the benefit of a Claim Notice is successfully assigned; the new leaseholder could simply make a new claim. However, there are still reasons why leaseholders may be concerned to ensure that the benefit of a Claim Notice can be easily and successfully assigned. A claim may be quite advanced by the time the leaseholder sells his or her lease. The landlord may have made some useful concessions during the proceedings. It is desirable that a purchaser of the lease can step into the shoes of the previous leaseholder rather than wasting time and money in re-serving the Claim Notice or rearguing issues. It may still matter, therefore, if doubts can arise over whether the benefit of a Claim Notice has been correctly assigned. One danger is that the selling leaseholder forgets that the benefit of the Claim Notice also needs to be expressly assigned alongside the assignment of the lease. Another potential problem

[14] Recommendation 29, para 6.131 above.

is provided by the rule (in both the 1967 and 1993 Acts) that an assignment of the benefit of the Claim Notice must take place at the same time as the assignment of the lease.[15]

10.31 Consequently, we provisionally proposed in the Consultation Paper that the benefit of a Claim Notice should automatically be assigned on the assignment of the corresponding lease, unless the benefit is expressly withheld ("the Assignment Proposal"). We also made an associated proposal intended to protect landlords, particularly if enfranchisement claims can be automatically assigned without their knowledge. We provisionally proposed that a landlord should be able to continue validly serving documents relating to the claim on the original leaseholder until he or she is notified of the assignment of the lease ("the Service Proposal").[16]

Consultees' views and recommendations for reform

10.32 We address the Assignment and Service Proposals separately below. Both proposals were supported by the vast majority of consultees. We do not think that any of the points raised by consultees provide grounds for abandoning either proposal. However, some consultees raised issues which, as we explain, have led us to conclude that the proposals could be improved by some modifications.

10.33 At the outset, we want to clarify the scope of our proposal and, in particular, its application to collective freehold acquisition claims. We note that a collective freehold acquisition claim is not usually assigned to a new leaseholder, as the claim will usually be carried out by the nominee purchaser company. This means that the claim is not deemed withdrawn if it is not assigned in the same way as for an individual freehold acquisition claim or a claim for a lease extension. The incoming leaseholder can become a member of the nominee purchaser company in order to continue the claim insofar as it relates to the flat which is being sold. In addition, the terms of the participation agreement between leaseholders making a collective freehold acquisition claim can be drafted to require a participating leaseholder to ensure that any assignee of the lease of a flat owned by the participant agrees to join in the claim. With this in mind, we do not think that our proposal should apply to collective freehold acquisition claims.

Responses to the Assignment Proposal

10.34 Most consultees who agreed with the Assignment Proposal (including the Leasehold Knowledge Partnership ("LKP") and the PLA) did not provide any reasons for their agreement. But some groups representing large numbers of legal professionals or leaseholders – namely the Law Society and LEASE – wrote to confirm that disputes do often arise over whether the benefit of a Claim Notice has been successfully assigned. Moreover, some leaseholders provided brief comments in support. For example, one leaseholder said that the proposal "makes sense in the same way that planning permission is transferred upon sale of a property".

10.35 Only one consultee offered a substantive reason for disagreeing with the Assignment Proposal. Places for People Group Ltd, a developer, said that the proposal would

---

15 1967 Act, s 5(2); 1993 Act, s 43(3).

16 Consultation Question 87, CP, paras 11.157 to 11.158.

"lead to greater confusion and administrative difficulties than if there is a positive decision to assign". We disagree. We think that the need expressly to assign the benefit of a Claim Notice is more likely to generate confusion than its automatic assignment, particularly given that the underlying statutory right to acquire a new extended lease automatically runs with the ownership of the lease.

10.36 A few consultees suggested modifications of the Assignment Proposal which, for the reasons we give below, we do not think we should adopt.

10.37 One anonymous consultee asked whether it is fair to allow an assignor of a lease to refuse to assign the benefit of a related Claim Notice. This consultee was particularly concerned about cases in which leaseholders are pursuing a collective freehold acquisition claim and one of the participating leaseholders sells their lease but decides not to assign the benefit of the notice of claim. The refusal may "mean that the process has to begin all over again, increasing costs for the other leaseholders". We explain our conclusion that our proposal should not include collective freehold acquisition claims at paragraph 10.33 above. However, we are not convinced that we should go as far as forcing leaseholders to assign the benefit of Claim Notices when they assign their leases in the context of a lease extension or individual freehold acquisition claim. First, a purchaser of the lease will know whether or not he or she is going to get the benefit of an ongoing claim, because the benefit of the Claim Notice will pass unless it is expressly withheld, and the price payable for the lease may be adjusted accordingly. Second, there may be good reasons why the parties do not want the benefit of a Claim Notice to be assigned (particularly if the purchaser of the lease has no interest in pursuing it).

10.38 One leaseholder (Ian Leigh) asked whether assigning leaseholders should have a duty to inform purchasers of the existence of a claim. We do not intend to make a recommendation along these lines. We think the issue is better addressed by standard pre-purchase enquiries and seller's covenants.

10.39 Christopher Jessel, a solicitor, asked about the relationship between our proposal and section 136 of the Law of Property Act 1925. Another consultee, Stephen Desmond, also commented on this potential link. Section 136 enables choses in action (claims) to be assigned at law and not merely in equity if various requirements are met, including that the person against whom the claim may be brought (the landlord) is notified in writing of the assignment. We do not suggest using section 136 to implement our recommendation; we intend for the automatic assignment of the benefit of a leaseholder's Claim Notice to take place under a distinct statutory scheme for enfranchisement.

10.40 However, Christopher Jessel also asked whether our proposal for the automatic assignment of the benefit of a Claim Notice would involve the assignment of the burden of the claim (for example, any liability of the assigning leaseholder to pay some of the landlord's costs). To clarify, we think that liabilities under the claim must be transferred to the new leaseholder.[17] That is what would happen in the case of an express legal assignment of a claim. However, this comment has led us to consider

[17] CP, para 11.155.

further some of the potential consequences of the automatic assignment of the benefit of a Claim Notice.

10.41 We have made a range of recommendations intended to make it cheaper for leaseholders to pursue an enfranchisement claim and to restrict the grounds on which a claim may automatically fail. If these recommendations are implemented, they should reduce the chance that a claim automatically assigned to the purchaser of a lease may carry with it a significant liability for costs. Nevertheless, there is still a risk that a claim which is automatically assigned on the assignment of a lease may carry some liabilities, may be flawed or have been mismanaged, or may be liable to be struck out by the Tribunal (with resulting costs consequences).

10.42 The risk that purchasers of leases may take on significant liabilities by the automatic assignment of an enfranchisement claim is more troubling if the purchaser is unaware of the existence of the claim. Four solicitors' firms[18] mentioned that it may not be clear that an enfranchisement claim has been made by the former owner, particularly where the lease is being sold by auction. We are also mindful of the lack of information that may be available to purchasers where a lease is transferred by a mortgagee under its power of sale or sold by a leaseholder's trustee in bankruptcy.

10.43 We have come to the conclusion that these issues could be resolved if, where the benefit of a Claim Notice is automatically assigned on the transfer of a lease, the new leaseholder is given an opportunity to disclaim the assignment. If the assignment is disclaimed, it would be as if it had never taken place and the former leaseholder had withdrawn the claim. The former leaseholder, not the new leaseholder, would then be liable for any costs due to the landlord. Importantly, it is also the former leaseholder, rather than the new leaseholder, who would have a remedy against their solicitors if the claim had been undermined by negligent legal advice.

10.44 We do not think that we need to specify any particular period within which the disclaimer must take place, but it must take place before the new leaseholder takes any steps to advance the claim. If the claim is not being pursued, the landlord may take steps to have it struck out.

10.45 One consultee (Paul Church) suggested that any statutory deposit paid by the assigning leaseholder should also automatically be assigned to the new leaseholder. But we are recommending that statutory deposits should no longer be payable. Instead, we recommend that a leaseholder should be required to give security for costs in certain circumstances (which we discuss in Chapter 12).[19]

10.46 We need to decide, therefore, whether any security for costs provided should be automatically assigned with the lease to the new leaseholder. We have come to the conclusion that there should not be an automatic assignment of security. We think that the assignment of the enfranchisement claim should transfer both the benefit and potential cost of the claim to the new leaseholder. The default position should not be

---

[18] Irwin Mitchell LLP, who agreed with the Assignment Proposal; Fieldfisher LPP and Shoosmiths LLP, who expressed other views; and Bryan Cave Leighton Paisner LLP, who did not directly answer Consultation Question 87.

[19] See paras 12.130 to 12.146 below.

that the new leaseholder can rely on security provided by the former leaseholder, as this would potentially leave the former leaseholder liable for the landlord's costs. If the security were automatically to be assigned, the new leaseholder would not be taking over the full burden of the claim. There may still be an express assignment of the benefit of the security if the parties choose to arrange their affairs in this way. However, in the absence of an express assignment, we think that the enfranchisement claim should be stayed until alternative security is provided by the new leaseholder.

10.47 Finally, Stephen Desmond asked us at what point the automatic assignment of the benefit of the notice of claim would take effect. We think that the assignment should take effect at the same time that the assignment of the lease takes effect at law; the two assignments should go hand-in-hand. The transfer of a qualifying lease to a new owner should be caught by section 27 of the Land Registration Act 2002 and so will not take effect at law until it is registered. Consequently, the automatic assignment of the associated enfranchisement claim should only take effect when the new owner is registered.

Responses to the Service Proposal

10.48 The responses provided by consultees to the Service Proposal raised far fewer issues than responses to the Assignment Proposal. Again, the vast majority of consultees agreed with the proposal with few providing substantive comments. Some offered brief reasons in support of the proposal. Birmingham Law Society agreed because "the landlord has no direct knowledge of the address for service of the assignee". David Pugh said that the proposal would ensure continuity of the enfranchisement process.

10.49 The Law Society suggested that the proposal reflects the general law regarding the giving of notices to third parties following the assignment of a lease. The proposal does reflect the law regarding express assignments of claim (both in equity and under section 136 of the Law of Property Act 1925). However, if we introduce an automatic statutory assignment of enfranchisement claims, there will be no obligation to give the landlord notice of the assignment unless we expressly provide for one. We have clarified this point in the wording of our recommendation below.

10.50 Only one consultee offered a substantive reason for rejecting our provisional proposal. Tapestart Limited, a landlord, maintained that the landlord should only have to deal with registered proprietors. This suggestion could not apply in relation to unregistered land. In relation to registered leases, the assignment of an enfranchisement claim will only take effect once the assignment of the lease has taken effect law, which will require the registration of the new proprietor.

10.51 Two potential complicating factors were raised by consultees. First, the Wallace Partnership Group Ltd, a landlord, (who agreed with the Service Proposal "in principle") suggested that a landlord should be able to reject the notice of an assignment of a claim if the underlying assignment of the lease had taken place in breach of the terms of the lease. We disagree. An assignment of a lease in breach of a requirement to seek the landlord's consent is still an assignment; legal title to the lease still passes to a purchaser. Any associated enfranchisement claim should also pass. It should not be open to landlords to refuse to deal with the new leaseholder. Whether the breach of the lease renders it liable to forfeiture is a separate matter.

10.52 Second, Christopher Jessel discussed whether a landlord really needs to be given written notice of the assignment of the lease, as we suggested in the Consultation Paper.[20] He asked whether it should not be sufficient for the matter to come to the landlord's attention, or even if it might suffice if the landlord "ought reasonably to have known" of the assignment.

10.53 We think that Christopher Jessel's suggestion has some force. We are not sure that there is any justification for allowing a landlord who knows that a lease together with the associated enfranchisement claim has been assigned to a third party to continue to serve documents on the original leaseholder just because he or she has not received written notice. It would seem to be fairer for our proposal to be expanded also to refer to what the landlord knows. (As a comparable example, the service rules in Part 6 of the Civil Procedure Rules refer to whether a litigant knows the other party's address.[21]) Additionally, we are not sure that we were right to focus on whether the landlord was notified of the assignment of the *lease* (given that the parties might have decided not to assign the benefit of the Claim Notice with the lease). We think that the new test should refer to whether the landlord knows of the assignment of the *claim*.

Recommendation 75.

10.54 We recommend that the benefit of a Claim Notice relating to a lease extension or an individual freehold acquisition should be transferred automatically upon assignment of the leaseholder's lease, except where –

(1) the assignment of the lease expressly states that benefit of the Claim Notice will not be transferred; or

(2) the new leaseholder disclaims the assignment of the benefit of the Claim Notice, provided that the disclaimer takes place before the new leaseholder takes any step to advance the claim.

If the assigning leaseholder has provided security for costs, we recommend that the benefit of that security should not automatically be assigned to the new leaseholder, although it may be expressly assigned. If the security is not expressly assigned, the claim should be stayed until the new leaseholder provides replacement security.

10.55 We recommend that, where the benefit of a Claim Notice is automatically assigned in line with the above recommendation, the landlord should be able to continue validly to serve documents on the assignor until:

(1) he or she is served with notice of the assignment of the benefit of the Claim Notice; or

(2) he or she knows of the assignment of the benefit of the Claim Notice.

---

20 CP, para 11.156.

21 See in particular the Civil Procedure Rules, r 6.9.

PROTECTING CLAIMS ON THE SALE OF THE LANDLORD'S INTEREST IN THE PROPERTY

10.56 The recommendation set out in the previous section addressed cases in which a leaseholder transfers their lease to a third party after serving a Claim Notice. We also need to consider what should happen if the landlord transfers his or her interest in the affected property to a third party after receiving a Claim Notice.

10.57 As we explained in the Consultation Paper,[22] a notice of claim served under either the 1967 Act or the 1993 Act is deemed to constitute an estate contract (a specifically enforceable contract to acquire the relevant property). [23] As such, it can be registered as a land charge under the Land Charges Act 1972 (for unregistered properties) or by registering a notice under the Land Registration Act 2002 (for registered properties). Once registered, a notice of claim will be binding on anyone who acquires the landlord's property. But conversely, the notice of claim would not be binding on a purchase of the landlord's property if it were not registered. The claim would have to be re-made against the new landlord.

10.58 We expressed concern in the Consultation Paper that leaseholders do not always apply to register a land charge or a notice at the same time that they serve a notice of claim. Landlords can be left with a window in which they can transfer their properties, perhaps to an associated company, free of the claim. We suggested that this window presents an opportunity for landlords to try to frustrate enfranchisement claims.

10.59 We consequently proposed that Claim Notices should warn leaseholders about the need to protect their claims by registering a land charge or notice, although we did not ask a specific consultation question about this proposal.[24] We did not propose to prevent landlords disposing of their interests in the relevant properties after the service of Claim Notice. However, we provisionally proposed that a landlord should be liable to pay a leaseholder's wasted costs if he or she disposes of the relevant property after the deemed service of a Claim Notice but before the leaseholder protects that notice by registration. However, this liability for costs would only arise if the leaseholder applied to register the Claim Notice within 14 days of its deemed service on the landlord.[25] We asked consultees if they agreed.[26]

Consultees' views and recommendations for reform

10.60 The vast majority of consultees who responded agreed with our provisional proposal. It received particularly strong support from leaseholders and leaseholder groups, but some landlords (such as Howard de Walden Estates Ltd and Grosvenor) and solicitors' firms (such as Shoosmiths LLP) also agreed with the proposal. However, many commercial freeholders and commercial investors opposed or expressed

---

22 CP, para 11.163.

23 1967 Act, s 5(5); 1993 Act, s 97(1).

24 CP, para 11.167.

25 Consultation Question 88 in the CP mistakenly referred to an application to register a Claim Notice being made "not less than 14 days after" the service of the notice. It should have said "not more than". Nevertheless, consultees appear to have understood what we meant.

26 CP, para 11.169.

reservations about the proposal, as did several law firms, the PBA, the PLA, Damian Greenish, Mark Chick (a solicitor), and Beth Rudolph (a conveyancer).

10.61 As we explain below, we think these consultees have identified some ways in which our proposal could have unfair consequences and also ways in which it could be ineffective. But we think there is a way of modifying our proposal in order to address these concerns while at the same time giving even greater protection to leaseholders than we originally proposed.

Points in favour of our provisional proposal

10.62 Some consultees who agreed with our provisional proposal emphasised that the proposal is fair because, as one leaseholder (Jason Smith) put it, "leaseholders should not be left out of pocket due to the freeholder's actions". Other consultees, such as David Pugh, supported the proposal on the basis that it would provide a disincentive for landlords who try to transfer their properties as a way of avoiding an enfranchisement claim.

10.63 Importantly, several consultees confirmed that they had encountered difficulties where landlords had transferred the affected property after service of a notice of claim, but before it had been protected by registration.[27] Franciszka Mackiewicz-Lawrence, a leaseholder, commented on the ease with which a corporate landlord can transfer ownership of a property around a group of related companies (as did another confidential consultee). Two further consultees (John Stephenson, a solicitor, and Orme Associates Property Advisers) mentioned that it is useful to have more time to register a notice of claim. Orme Associates that they "were caught out recently through non-registration of an estate contract and had to re-serve".

10.64 We continue to think that the need to protect a Claim Notice by registration as soon as it is served presents a trap for the unwary. The responses from consultees support this view and suggest that it would be desirable leaseholders to be given some added protection.

Difficulties with our provisional proposal

10.65 However, the terms of our proposed solution to the problem faced by leaseholders attracted some criticism from consultees. We proposed that a landlord should be potentially liable for a leaseholders' wasted costs if he or she transfers the property after the *deemed* service of the Claim Notice. We recognised in the Consultation Paper that a Claim Notice that has been deemed served may not actually have been received by the landlord.[28] Landlords may then innocently sell their properties in ignorance of any claim and yet be caught by our proposed liability for costs.

10.66 Several consultees (including the PBA, Julian Briant, a surveyor, and Hamlins LLP, solicitors) raised concerns that the proposal is fundamentally unfair where a landlord was unaware of the service of the Claim Notice. Furthermore, consultees suggested

---

[27] One consultee (Hamlins LLP, solicitors), however, said the opposite: in its experience, "there are no incidences of landlords hurriedly selling their property on receiving notices of claim" and so our provisional proposal is addressing a problem that does not exist.

[28] CP, para 11.169.

that the unfairness may be greater where a landlord is obliged to sell his or her property under a contract agreed before the service of the Claim Notice.[29] Indeed, the sale may be going through when the Claim Notice is received.[30]. Xuxax Ltd, a landlord, mentioned the possibility that the sale might be taking place by auction, with a long lead-in time.

10.67 Moreover, the potential unfairness to landlords should also be assessed in the light of the fact that leaseholders can take some steps to protect themselves. The PBA, Stephen Desmond and Tapestart Limited argued that leaseholders should simply file a unilateral notice at HM Land Registry at the same time they serve the Claim Notice. Hamlins LLP and the PBA said that HM Land Registry acts on such applications very quickly. Stephen Desmond pointed out that most property lawyers subscribe to HM Land Registry's portal in any case. The Conveyancing Association suggested that leaseholders should be allowed to undertake a priority search prior to serving their Claim Notices (which would both protect the subsequent claim and serve to notify third parties of its imminent service).

10.68 Finally, one consultee – Bruce Maunder-Taylor, a surveyor – has given us some reason to question whether the remedy provided to leaseholders by our provisional proposal would be particularly useful. If a leaseholder's Claim Notice is not protected by registration and the landlord sells the property, the leaseholder would need to serve a new Claim Notice on the new landlord. In order to recover wasted costs, the leaseholder would have to pursue the original landlord (in addition to continuing his or her enfranchisement claim). Bruce Maunder-Taylor suggested that the original landlord is likely to refuse to pay and the leaseholder "will not wish to spend the resources necessary to obtain payment" by suing. Litigation is long, costly and uncertain.

Revising our provisional proposal

10.69 We think that the responses we have received from consultees indicate that our provisional proposal may not be the best solution to the problem faced by leaseholders of protecting their claims. Four modifications of, or alternatives to, our proposal were suggested by consultees. We do not think we should pursue the first three options suggested, but, as we explain, we have decided to pursue the fourth option.

10.70 First, one leaseholder, Helen Butcher, suggested that landlords should be prohibited from selling their properties after the service of a Claim Notice. We think that an approach of this kind might generate problems. If the Claim Notice is protected by registration, it will be binding on a purchaser of the landlord's property. In these circumstances, there is no need to prohibit the sale. If the Claim Notice is not registered, then a purchaser will not be bound but may not know of the existence of the claim. It would be extremely prejudicial to such a purchaser if the sale turned out to be void because, unbeknownst to him or her, a Claim Form had been served on the seller.

---

29 A point raised by the PBA, the PLA, and Mark Chick.

30 A point raised by David Hinchliffe and Xuxax Ltd, a landlord.

10.71 Second, Irwin Mitchell LLP, solicitors, suggested that liability should only arise where the landlord "purposefully sought to avoid the leaseholder's claim". If our proposal were modified in this way, it would not penalise landlords who sell their properties in ignorance of the service of a Claim Notice. It would, however, require leaseholders to prove actual receipt of the Claim Notice in order to claim for their losses. It may be difficult to provide the relevant evidence of service and it would make our proposal far less useful for leaseholders. (They would also potentially be liable to pay their former landlord's costs if they sued on the basis of a service of a Claim Form that, it turns out, was not in fact received by the landlord.)

10.72 Third, Julian Briant suggested that, if our provisional proposal is adopted, "there should be a right of appeal to Tribunal to include the quantum of costs". We are unsure whether, on this suggestion, a landlord would be able to argue that he or she should not have to pay any costs at all (in other words, that the quantum should be zero). If so, then there is a danger that leaseholders would be left with nothing after pursuing a landlord for their wasted costs. However, aside from this issue, if a leaseholder must bring a fresh claim in order to recover his or her costs from a former landlord, it seems unavoidable that the proceedings may be prolonged and complicated by arguments about quantum. Julian Briant's suggestion again indicates that we should reconsider our proposal.

10.73 The fourth suggestion (put forward by Church & Co Chartered Accountants and Morgoed Estates Ltd, a landlord, and in modified form by another confidential consultee) was that Claim Notices should simply be binding on a purchaser of the landlord's property regardless of registration.[31] We consider the merits of this suggestion below.

Making Claim Notices automatically binding

10.74 We have recommended two changes to the law of enfranchisement that may provide a basis for reconsidering whether Claim Notices should be automatically binding on purchasers. First, we recommended that the service of a Claim Notice should no longer create a statutory contract and so there is no estate contract to protect by registering a land charge or a notice.[32] Second, and more significantly, we have recommended the abolition of the two-year ownership requirement.[33] Even if a purchaser of the landlord's property is not bound by an unregistered Claim Notice, he or she does not take free of the leaseholder's underlying enfranchisement rights. A new claim may be started immediately. It is worth considering, therefore, whether purchasers of the landlord's property should be allowed to take free of an enfranchisement claim.

10.75 If a Claim Notice is automatically binding on a purchaser of the landlord's property, leaseholders' claims will be protected, and not merely within the 14-day window we originally proposed. Moreover, leaseholders will not have to serve a fresh Claim Notice in order to recover their wasted costs from a former landlord and landlords will

---

31 The confidential consultee suggested that landlords, when selling their properties, should be required to disclose that a notice of claim has been served and the purchaser should then be bound by the claim

32 Recommendation 74, para 10.27 above.

33 Recommendation 29, para 6.131 above.

not face a claim for costs in respect of Claim Notices that were deemed served but not actually received. Indeed, as Church & Co Chartered Accountants pointed out, if Claim Notices are automatically binding on purchasers, "there will be no wasted costs".

10.76 We also note that there is precedent for analogous claims automatically to be binding on a purchaser of the landlord's property without a requirement of registration. A claim for an extended business lease under section 26 of the Landlord and Tenant Act 1954 will bind a purchaser of the landlord's estate (although the purchaser will then need to be substituted for the former landlord in any proceedings).[34]

10.77 We need to consider, however, whether making Claim Notices automatically binding could cause any significant prejudice to purchasers. A purchaser of a property subject to a lease attracting enfranchisement rights should be cognisant of the fact that an enfranchisement claim may be made at any point. He or she may hope that an enfranchisement claim will never be made and may be disappointed to discover that a claim has already been commenced. But we do not think that such a hope, where it exists, ought to be protected by requiring claims to be registered, particularly in the context of a new scheme designed to make enfranchisement easier, quicker and more cost-effective particularly for leaseholders.

10.78 There are two other issues that may cause purchasers concern if enfranchisement claims are automatically binding.

(1) First, a purchaser might have a legitimate interest in finding out whether a Claim Notice has already been served if the date of service were significantly to affect the date on which the property is to be valued for the purposes of the claim. We are, however, making recommendations designed to make the enfranchisement process quicker. If claims no longer drag on for years, there is less likely to be a significant difference in the value of the property between the date on which the enfranchisement claim was commenced and the date on which the property is acquired by the purchaser. Furthermore, our recommendation regarding the striking out of stale claims should prevent leaseholders from preserving a beneficial valuation date by quietly sitting on a claim which was made before the current landlord acquired the property.[35]

(2) Second, the original landlord, who dealt initially with the leaseholder's claim, may have made concessions or decisions about how to respond to the claim that may undermine the position of the new landlord following the purchase. We do indeed think that a purchaser must step into the shoes of the original landlord in relation to an ongoing enfranchisement claim, as is the case with claims under the Landlord and Tenant Act 1954. Nevertheless, we have made recommendations to limit the circumstances in which both leaseholders and landlords will be deemed to have admitted an element of the other party's case.

---

34 See *XL Fisheries Ltd v Leeds Corporation* [1955] 2 QB 636, 646. It appears that defences available to the new landlord may be limited by the conduct of or concessions made by the previous landlord: *Piper v Muggleton* [1956] 2 QB 569, 578.

35 Recommendation 73, para 9.177 above.

There will be added flexibility for the Tribunal to allow new issues to be raised or old issues to be reopened.[36] Moreover, we emphasise that, even if a Claim Notice is automatically binding on a new landlord, this does not affect the relevant leaseholder's procedural obligations (for example, to substitute the new landlord for the old landlord as the defendant in ongoing Tribunal proceedings).

10.79 Moreover, even if Claim Notices do not need to be protected by registration in order to be binding, purchasers of the affected properties still have the means to protect themselves. We would expect the existence of an ongoing claim to be revealed by standard pre-contractual enquires and, where relevant, for the seller to be required to offer suitable indemnities to the purchaser.

10.80 We have consequently decided that leaseholders may be more adequately protected if Claim Notices are automatically binding on purchasers of their landlord's properties and that this change to the law would not cause undue prejudice to such purchasers.

Recommendation 76.

10.81 We recommend that a Claim Notice that has been deemed served on the relevant landlord should be binding on a transferee of the landlord's interest in the affected property regardless of whether the Claim Notice has been registered as a land charge or is the subject of a notice on the register of title.

LANDLORD'S INTEREST SUBJECT TO A MORTGAGE

10.82 We recommended in Chapter 3 that lease extensions should also automatically be authorised by the landlord's mortgagee.[37] There is therefore no need for a leaseholder to seek authorisation for the lease extension from the mortgagee. If the current lease is binding on the mortgagee, the new extended lease will also automatically be binding. Our recommendation reflects the current law.

10.83 A lease extension is likely to reduce the value of the landlord's reversionary estate, and thereby reduce the security afforded by a mortgage over that estate. The mortgagee may be entitled to a portion of the premium paid for the extension under the terms of the mortgage. It is desirable for the mortgagee to be informed of the lease extension so that it can take steps to recover any sums due.

10.84 The 1967 and 1993 Acts provide that, if a mortgagee is "entitled to possession of the documents of title" relating to the landlord's estate, then, following a lease extension, the landlord must send a copy of the new lease to the mortgagee "within one month of the execution of the lease".[38] Under both Acts, the obligation to provide a copy of the new lease is deemed to be a term of the landlord's mortgage and so the landlord will

---

36 Recommendation 68, specifically paras 9.66 to 9.69 above.

37 Recommendation 6, paras 3.240(2)(a) above.

38 1967 Act, s 14(5); 1993 Act, s 58(3).

be in breach (and will potentially face enforcement action by the mortgagee) if he or she fails to comply.

10.85 In the Consultation Paper, we provisionally proposed that holders of mortgages over the landlord's estate should have slightly enhanced protection under our new scheme. We proposed that landlords should be under an obligation to notify a mortgagee of a proposed lease extension not less than 21 days prior to the completion of the grant of the new lease and give the leaseholder written confirmation that this notice has been given. We further proposed that, if the required confirmation is not given to the leaseholder or if the mortgagee requests, the leaseholder should be required to pay the premium for the new lease into court.[39] We proposed that landlords should also remain under an obligation to send the new lease to the mortgagee within one month of completion, unless the mortgagee informs the landlord that a copy is not required.[40]

Consultees' views and recommendations for reform

Overview of consultees' views

10.86 A sizeable majority of consultees supported our provisional proposal. Few consultees opposed our proposal outright, but a quarter of the consultees who responded answered "other" to our consultation question.

10.87 Two points of concern were raised in response to our proposal that we can resolve immediately. First, several consultees were under the impression that the proposal would involve leaseholders paying extra sums to extend their leases, possibly because they would have to pay additional fees to the landlord's mortgagee. That is not correct. The proposal does not entail that leaseholders must pay any extra sums to their landlords or their mortgagees.

10.88 Second, several consultees argued that landlords should not be able to mortgage their properties at all.[41] We do not think that this is a feasible proposal. We cannot realistically stop landowners from mortgaging their properties *prior* to the grant of a lease (as this would effectively stop all landowners from mortgaging their properties). Preventing mortgaged properties from being leased would drastically reduce the supply of residential housing. And there is no harm in a landlord mortgaging their property (whether or not it is subject to a lease or is subsequently let) if our policy means that the existence of the mortgage does not inhibit enfranchisement.

10.89 Almost all consultees who expressed agreement with our provisional proposal provided no comments of substance. Some expressed slight reservations about added costs for freeholders and some mentioned issues about negative equity, without expanding on these points in any detail. Others simply indicated agreement with the justification given in the Consultation Paper and some (like Stephen Heslop, a leaseholder) said that our provisional proposal "would stop enfranchisement being

---

39 CP, para 11.173.

40 CP, para 11.171.

41 Some consultees made a similar suggestion in answer to Consultation Questions 5, 14 and 27 (CP, paras 4.54, 5.34 to 5.35, and 6.107 to 6.108).

needlessly slowed down". A few suggested small changes to our proposal, which we return to consider below.

Points of opposition

10.90 Those consultees who opposed our provisional proposal raised concerns about payments into court and suggested our proposal would complicate the conveyancing process. Similar comments were made by consultees who expressed other views or who did not directly answer the consultation question.

(1) Long Harbour and HomeGround, a landlord and an asset manager, and Mark Chick (who expressly disagreed with our proposal) both commented that the Court Funds Office can be slow in processing payments. They suggested that the added administrative burden on the court may not make the enfranchisement process any easier for leaseholders. Damian Greenish said that payment into court is "a tedious business" that should be avoided if at all possible. Similarly, the PLA said that "the requirement for a leaseholder to pay monies into Court is more complex that the current regime and is likely to increase costs for all parties and will delay completion".

(2) Others argued that our provisional proposal would unnecessarily complicate the conveyancing process. Anthony Shamash (a landlord, who expressly disagreed with our proposal) went as far as to say that it would be "unworkable", without providing further explanation. Similarly, Notting Hill Genesis, a housing association, said that, although it did not oppose "the spirit" of our proposal, the actual proposal —

> represents an unnecessary complication where a small mistake such as not sending a confirmation to the lessee could result in disproportionate bureaucracy to remedy for the landlord, lessee, landlord's lender and the courts along with a disproportionate punitive financial remedy.

10.91 We agree that a scheme for lease extensions which relies on payments into court as a standard step in the process would be unsatisfactory. However, we see payments into court as being an exceptional step taken only where landlords are not complying with our scheme. Furthermore, we consider below an option for leaseholders to avoid having to pay money into court even where landlords have failed to provide confirmation that they have notified their mortgagees of the relevant lease extension.

10.92 The effect of our provisional proposal would also bring the law regarding lease extensions into line with the law regarding individual freehold acquisitions under the 1967 Act, which makes provision for payments into court where the freehold is mortgaged.[42] This feature of the law of individual freehold acquisitions is retained in our new scheme (again, as an exceptional step, to be taken only where landlords are not cooperating).[43]

10.93 Moreover, we do not agree that our provisional proposal would have disproportionately punitive consequences for landlords. First, it should become

---

42 See 1967 Act, ss 12(2) and 13.

43 Recommendation 16, para 4.404 above.

standard practice for landlords (or, at least, their conveyancers) to notify their mortgagees of lease extensions and give the proposed confirmation to leaseholders. Second, the notice can be given earlier than 21 days prior to completion and we expect the issue of any mortgage typically to be addressed long before this. Third, our proposal does not affect a landlord's (or mortgagee's) entitlement to receive the premium for a lease extension, merely the process by which it is received. Finally, where landlords do not comply with our proposed scheme, we consider that it is better for leaseholders to have an option of paying money into court rather than having to delay completion, even if this will involve added inconvenience and expense for a landlord who has defaulted on his or her obligations.

Further payment options for leaseholders

10.94 In the Consultation Paper, we envisaged that payments into court would take place in either of two circumstances: where a landlord fails to provide the proposed confirmation to a leaseholder within the proposed timeframe, or where a landlord's mortgagee specifically requests the premium to be paid into court. However, several consultees suggested that current conveyancing practices already provide satisfactory protections to the parties. For example, Gerald Grigsby said the following.

> If the landlord's mortgagee is to receive payment then the landlord's conveyancer will pay direct in return for its consent to the lease. If the lender so requires or there is no landlord's conveyancer, the lender can direct the tenant to pay direct. This would be done by the tenant's conveyancer. The Landlord should provide the tenant with its lenders mortgage details and authority to contact the lender.

10.95 However, it is not right that a landlord's conveyancer will always (or even usually) need to pay the premium to the mortgagee in return for its consent to the lease. If the existing lease is binding on the landlord's mortgagee, a new lease granted as part of a statutory lease extension should also be binding.[44] Leaseholders should only need to obtain their landlords' mortgagees' consent to a new lease if their existing leases were unauthorised. Moreover, there would also be difficulties in providing that the premium should be paid directly to the landlord's mortgagee if the mortgagee requests. First, the extension of a lease does not involve the discharge of a mortgage over the landlord's property. A mortgagee will not always be entitled to recover a portion of the premium. Whether it is so entitled depends on the terms of the mortgage. Second, as Christopher Jessel pointed out, there may be more than one mortgage over the landlord's estate. Which mortgagee is to be paid first may have been agreed between them. These are both matters about which the leaseholder may have no knowledge. If mortgagees have concerns about the premium being paid to the landlord, their solution is to request that it be paid into court.

10.96 Additionally, it should be noted that, having been notified of the lease extension, the landlord's mortgagee may be happy for the premium to be paid to the landlord's solicitors, who will then pay any sum due to the mortgagee. We do not anticipate that mortgagees would routinely require the premium to be paid into court. However, we will explore during the implementation process whether, where the landlord has failed to give the leaseholder the required notice in time, a mechanism can be put in place to

---

[44] Recommendation 6, para 3.240(2)(b) above.

enable payments to be made the landlord's solicitor as stakeholder, rather than into court

10.97 Heather Keates suggested that we should go further and recommend the creation of conveyancing regulations that "the landlord's conveyancer has to notify the landlord's lender and that conveyancer has to pay the relevant money to the lender". Although conveyancing regulations may need to be revised if our new scheme is introduced, we are not sure that there should be a single universal duty on conveyancers regarding the payment of the premium to mortgagees, given that a mortgagee's entitlement to the money may vary.

The length of the time limits

10.98 Two issues were raised about the 21-day time limit put forward in our provisional proposal. First, UK Finance, an association representing mortgage lenders, agreed that there should be a requirement to inform the landlord's mortgagee in advance of completion but was concerned that 21 days might not be sufficient to complete the necessary formalities. However, we are not convinced that 21 days' notice is insufficient. Under the current law, the only requirement is to give notice to the mortgagee within one month *after* completion. Our proposals significantly improve the position of mortgage lenders. Where the leaseholder does not need the mortgagee's consent to the lease extension for it to bind the mortgagee, there should not be any formalities that need to be completed. Where the leaseholder does need to seek consent, he or she will need to ensure the mortgagee has sufficient time to respond, otherwise completion will be delayed or the new lease will be unauthorised.

10.99 Second, two solicitors' firms – Bryan Cave Leighton Paisner LLP and Shoosmiths LLP – noted that we did not specify a period in the Consultation Paper within which the landlord must inform the leaseholder that the mortgagee has been notified of the lease extension. We think that leaseholders should also be notified at least 21 days prior to completion so that they have time to arrange payment into court if necessary.

Concerns about fraud

10.100 Finally, one confidential consultee was supportive of our proposal insofar as it would give mortgagees notice of a lease extension prior to completion, but raised concerns about the following matters.

(1) It would be possible for a landlord fraudulently to inform a leaseholder that notice of a lease extension had been given to the landlord's mortgagee when no notice had in fact been given. The leaseholder might then pay the premium to the landlord and not to the mortgagee directly or into court.

(2) There is insufficient provision for mortgagees to be informed once the grant of a new lease has been completed.

10.101 Regarding the second point, we do not propose to remove the requirement in the current law for landlords to send the new lease to their mortgagees within one month of completion.[45]

10.102 Regarding the first point, if a landlord gives a fraudulent notice and thereby causes loss to his or her mortgagee, the mortgagee will have a personal claim against the landlord (for fraud and presumably also for breach of the terms of the mortgage). Moreover, the mortgage will still be secured against the landlord's reversionary interest in the property. We do not, however, think that we could go further than this and provide for example that, in the case of fraud, the new lease is not binding on the mortgagee. Such a provision would punish the leaseholder for the landlord's actions.

Recommendation

10.103 Given the level of support by consultees, we recommend the implementation of our provisional proposal, clarifying that the landlord will be obliged to send the new lease to the mortgagee within a month of completion.

10.104 We also wish to clarify two further points. First, if a leaseholder is not provided with the relevant notice and so pays the premium for the new lease into court, that payment should count as payment of the premium for the purposes of completion. This point was implicit in our provisional proposal, and we wish to make it explicit in our recommendation to avoid any confusion.

10.105 Second, Christopher Jessel asked whether our provisional proposal was also intended to apply to all charges (as well as second and third mortgages) over a landlord's title. We think that the proposal should apply to all charges. We cannot see a reason for treating, for example, the holder of a registered charging order affecting the landlord's title differently from the holder of a registered mortgage.

[45] CP, para 11.171. A mortgagee would also be notified by HM Land Registry if a leaseholder applies to remove a restriction in favour of the mortgagee registered against the landlord's title.

Recommendation 77.

10.106 We recommend that, in the case of a lease extension claim, where the landlord's interest is held subject to a mortgage or other charge:

(1) the landlord should be under an obligation:

(a) to inform the mortgagee or chargee of the grant of a lease extension not less than 21 days before completion; and

(b) to give his or her leaseholder written confirmation that such notice has been given; and

(2) the leaseholder should be required to pay the purchase money into court if –

(a) the mortgagee or chargee requests the leaseholder to do so (or, where there are multiple mortgages or charges, if any of the mortgagees or chargees make such a request); or

(b) the leaseholder has not received confirmation from the landlord that the landlord has notified his or her mortgagee or chargee of the lease extension within the prescribed time limit.

A payment into court pursuant to this recommendation should qualify as the payment of the premium for the purposes of the completion of the grant of the new lease.

PROVIDING MORTGAGEES WITH A COPY OF A NEW EXTENDED LEASE

10.107 In the Consultation Paper, we posed a consultation question with two proposals, the first concerning leaseholders' mortgages and the second concerning merger. We will address the proposal about merger separately. Our provisional proposal about leaseholders' mortgages was that leaseholders, following a lease extension, should be under a duty to provide the original of the new lease to their mortgagees within one month of registration. We proposed that leaseholders should be liable for any losses caused by a failure to comply with this requirement.[46]

10.108 Our provisional proposal reflects, but also expands on, the current law. Both the 1967 and 1993 Acts impose a requirement on leaseholders to provide the new extended lease to their mortgagees.[47] Under the 1967 Act, the requirement is to provide the lease within one month of its "execution". Under the 1993 Act, the requirement is to provide the lease within one month of its being received following its registration. The latter requirement is now more suitable as all grants of long leases only take effect at law when registered.

---

46 CP, para 11.176.

47 1967 Act, s 14(6); 1993 Act, s 58(5).

10.109 But the requirement to provide a copy of the lease under both Acts only applies where the relevant mortgagee is "entitled to possession of the documents of title relating to the existing lease" under the terms of the mortgage. Where it applies, the requirement to provide the new lease to the mortgagee is deemed to be a term of the mortgage. If the leaseholder fails to comply, they are in breach of the mortgage (and may face enforcement action by the mortgagee). By contrast, under our provisional proposal, the requirement to provide the new lease will apply in all cases regardless of the terms of the mortgage. But a failure to comply with the requirement will not automatically place a leaseholder in breach of the terms of the mortgage.

10.110 We previously recommended that a new lease granted after a statutory lease extension should automatically be subject to any mortgage that was secured over the previous lease.[48] Given that mortgages will automatically transfer, it is useful for mortgagees to be aware of the terms of the new lease against which the mortgage is now secured – hence the need for a copy of the lease to be provided. Furthermore, we did not consider that requiring new leases to be sent to mortgagees would be onerous for leaseholders.

Consultees' views and recommendations for reform

10.111 A sizeable majority of consultees agreed with our provisional proposal. Just under half of the consultees who responded provided substantive comments.

10.112 In support of our proposal, some consultees (including LEASE and David Pugh) highlighted the importance of mortgagees being informed about the new lease. LEASE said our proposal will protect the mortgagee's interest. There was, however, concern raised by Jonathan and Yvonne Boyd that leaseholders should be made sufficiently aware of their duties to provide a copy of the new lease.

10.113 We agree. Mortgagees should also be made aware of the terms of the new lease (against which their loans have become secured) with the minimum time and expense on their part. Sending the new lease to the mortgagee would also serve to inform it that there has been a lease extension, if it has not otherwise been informed.

10.114 A few points of concern were raised by consultees, but we do not think that any of them provides a reason for abandoning our proposal.

10.115 Some consultees (such as Damian Greenish and the PBA) highlighted the fact that mortgagees are less likely than in the past to hold title deeds, and that the terms and conditions of the relevant mortgage are unlikely to require title deeds to be deposited. We think this point justifies a modification of our provisional proposal. Providing a certified copy of the lease – as opposed to the original – should be sufficient for the mortgagee. The requirement in the current law to send the original lease to the mortgagee derives from a time when mortgagees used to keep the documents of title to the property over which the mortgage was held. Now that most land is registered, it is rare for mortgagees to hold documents of title. From a practical perspective, original copies of leases are rarely sent to mortgagees. Instead, a copy is uploaded on to HM Land Registry's portal which is then certified electronically.

---

48 Recommendation 6, at para 3.240(1) above.

10.116 Three consultees who disagreed with our provisional proposal cited the proposed timescale. For example, Jonathan Rolls said the one-month time limit was too prescriptive and should be longer, while James Masterman and a leaseholder who wished to be anonymous said it should be two or three months instead. But the requirement under the current law is to provide the new lease to the mortgagee within one month, and we have not heard that this timescale has caused difficulties in practice.

10.117 Other consultees opposed the substance of our provisional proposal. Julian Briant thought the proposal did not go far enough and said the leaseholder should inform the mortgagee of the (potential) extension at the time that he or she serves the notice of claim. By contrast. David Heard, a leaseholder, pointed to the fact that a lease extension increases the mortgage facilitation and so could see "no reason to force the leaseholder to inform them at all". Similarly, Gerald Grigsby noted that an extension benefits the lender and so "a penalty seems to be inappropriate". Furthermore, he noted that a lease extension will automatically bind the lender (so its consent is not needed) and that, if the lease is registered, it will be available online meaning lenders can obtain a copy themselves.

10.118 However, it is the fact that lenders' mortgages are automatically transferred to the new leases that makes it desirable for mortgagees to be given a copy of the leases against which their loans have become secured. Given that it is the leaseholder, not the mortgagee, who is claiming the lease extension, we think it is fair for the leaseholder to have the responsibility of providing a copy of the lease to the mortgagee. But we do not think that leaseholders should be statutorily required to inform their mortgagees any earlier than they are under the current law. A leaseholder does not need to obtain his or her mortgagee's consent to a lease extension.

10.119 Several consultees also queried what losses a mortgagee could suffer if the leaseholder failed to inform the mortgagee of a lease extension. A mortgagee could conceivably suffer loss if the terms of the new lease are more onerous than those of the old lease so that it provides lesser security (for example, if the new lease contains a clause permitting the landlord to forfeit in the event of the leaseholder's bankruptcy). However, such losses, if they could occur, would be due to the automatic transfer of the mortgage from the old to the new lease, rather than due to any failure of the leaseholder to provide a copy of the new lease to the mortgagee. Furthermore, our new scheme will ensure that the new lease is at a peppercorn rent and will restrict the ability of the landlord and the leaseholder to agree the insertion of new, onerous terms.[49]

10.120 Nevertheless, it is possible for a mortgagee to suffer loss as a result of a failure by a leaseholder to provide a copy of the new lease. For example, the mortgagee may transfer the mortgage to a third party on the basis that it has the lesser security provided by the old lease. In doing so, the mortgagee may agree a price that is less than the mortgage, which is now secured against the new more-valuable lease, is worth.

---

[49] Paras 3.36, 3.177 to 3.179 and 3.209 above.

10.121 Given the broad support for the provisional proposal and the fact it places only a limited duty on leaseholders while serving the legitimate need of mortgagees to see a copy of the new lease, we are confirming our provisional proposal.

Recommendation 78.

10.122 We recommend that, where a leaseholder is granted a new lease following a lease extension claim and a mortgage is automatically transferred from the old lease to the new lease:

(1) the leaseholder should be under an obligation to provide his or her mortgagee with a copy of the new extended lease within one month of its receipt following registration; and

(2) if the leaseholder fails to comply, he or she should be liable for any losses suffered by the mortgagee resulting from the noncompliance.

MERGER AS PART OF A FREEHOLD ACQUISITION

10.123 Immediately after addressing leaseholders' mortgages in Chapter 11 of the Consultation Paper, we considered an issue about merger. We made a provisional proposal about cases in which a leaseholder's lease is subject to a mortgage, the leaseholder makes an individual freehold acquisition claim, and on completion of the claim that leaseholder wishes to merge the freehold and leasehold titles. We provisionally proposed that a deed of substituted security should not be required if written notice of the proposed merger has been given to the leaseholder's mortgagee and no objection has been raised.[50] Instead, the mortgage would automatically transfer from the lease to the freehold.

10.124 There were a number of issues, however, that we did not address in the Consultation Paper.

(1) We did not propose any timescale within which a leaseholder must send the proposed written notice to his or her mortgagee in order to take advantage of our new scheme for merger. The proposal was part of our wider scheme for enfranchisement and so we contemplated that the notice would be sent either during or shortly after the completion of the freehold acquisition. But there was nothing in the wording of our proposal to prevent a leaseholder who acquires the freehold opting to merge the titles years after the acquisition.

(2) Our proposal suggests that a mortgagee might object to the merger. But it does not expressly say what should happen if an objection is received. There is no process for adjudication. The implication is that an objection would prevent merger from taking place (even if the mortgagee's objection is groundless).

[50] CP, para 11.176.

(3) A mortgagee may legitimately object if the merger would significantly reduce the mortgagee's security. In general, an unencumbered freehold should provide better security than a long lease. But our proposal might allow a leaseholder to acquire the freehold, severely reduce its value (for example, burdening it with onerous restrictive covenants) and then seek to merge the leasehold and freehold titles. If the mortgage were to be transferred to the freehold, it would become subject to the onerous covenants. We need to consider whether this outcome would be fair for the mortgagee even if it had failed to respond to a notice of the merger served by the leaseholder.

(4) There is a danger, in any case, that mortgagees who are concerned that their security may be reduced will always give a standard response to the proposed notice objecting to merger. They have nothing to lose by objecting.

(5) The merger of leasehold and freehold titles, and of superior and inferior leasehold titles, is governed by principles of equity. Merger operates effectively to extinguish the inferior title. Pursuant to section 185 of the Law of Property Act 1925, titles will not merge by operation of law if they would not have merged in equity before the 1925 Act came into force. Equity will prevent the merger of titles if the merger would prejudice the interests of third parties that bind the inferior estate. It is not just a mortgage over a lease that may present an obstacle to merger. But our provisional proposal in the Consultation Paper did not suggest what may be done about other proprietary interests affecting a lease.

10.125 As we explain below, our consideration of these issues and the responses we received from consultees has led us to revise our provisional proposal. We think that our proposal could take account not only of mortgages but of all interests that may burden a lease. We think that there is a way of making the proposed merger process simpler and easier for leaseholders. And we think that there is a way of preventing mortgagees and others with interests burdening the lease from being prejudiced by a merger.

Consultees views and recommendations for reform

10.126 Well over half of consultees agreed with our provisional proposal. Those who agreed generally did so on the basis that it would make the process of merger simpler. For example, several solicitors – Bryan Cave Leighton Paisner LLP, Fieldfisher LLP and Shoosmiths LLP – agreed with the proposal, highlighting that it would "avoid undue delay caused by the mortgagee which occurs often with voluntary lease extension matters". However, all three firms also said that there needs to be adequate protection for mortgagees by specifying a sufficient timeframe within which they may respond to the leaseholder with an objection. They did not suggest a particular timeframe.

10.127 Our proposal caused some unease among mortgage lenders, who suggested that we liaise with UK Finance about the policy. No lenders, however, provided concrete examples of how our proposal might cause them prejudice. UK Finance stated that it needed more information about the envisaged process before it could agree to the proposal. It was also unsure whether 21 days would be sufficient time for lenders to decide whether they should object to proposed mergers, particularly as they would likely need advice from their conveyancers.

10.128 The only consultees to give details of a potential substantive difficulty with our proposal were Christopher Jessel, and a confidential consultee. They both mentioned that the terms of a mortgage over a leasehold property may differ in significant ways from the terms of a mortgage over a freehold property, and so transferring a mortgage from a lease to a freehold may disadvantage the lender. Christopher Jessel gave the following example.

> A mortgagee may wish to retain certain rights. For instance, if the lease contains a repairing covenant but the mortgage deed itself does not but does oblige the leaseholder to observe the terms of the lease, the mortgagee may want the mortgage deed to be varied.

10.129 Finally, Pennington Manches LLP, solicitors, raised what we, in retrospect, think is an important question when it asked on what grounds a mortgagee could possibly object to the transfer of its security from a long lease to an unencumbered freehold. The freehold should inevitably provide greater security.

Our general conclusion regarding merger

10.130 Consultees did not provide any evidence or arguments that suggest that it is a bad idea, in principle, to introduce a method by which a leaseholder can easily merge their freehold and leasehold titles on a freehold acquisition. Where consultees did express concerns, the issues they raised centred upon the details of the process for merger we were proposing. While some leaseholders may wish to retain their leasehold titles, others are simply seeking to obtain more secure titles to their homes and greater freedom to use their properties as they wish. Ideally, the enfranchisement process in such cases should end with the former leaseholders in possession of a freehold instead of, rather than in addition to, a lease. We therefore continue to think that leaseholders should be given an opportunity to merge their freehold and leasehold titles with a minimum of effort and expense.

10.131 In line with this rationale for our policy, we think that any new statutory right to merge titles should only be available if it is exercised as part of a freehold acquisition claim. We are trying to help leaseholders who want to substitute their leasehold titles with freehold titles. It should not be open to a leaseholder to retain separate titles to the lease and the freehold and then seek to merge, using our special procedure, years after the freehold acquisition was completed.

10.132 We therefore recommend that a new right to merge titles (which we explain below) should only be available to a leaseholder who requests the merger to take place at the same time as his or her registration as the new proprietor of the freehold. If a leaseholder wishes to merge his or her freehold and leasehold titles at a later date, no special rules will apply; the merger will proceed as it would do under the current law.

Modifying our provisional proposal

10.133 We still need to consider, however, the further issues raised at paragraph 10.124 above, along with the points raised by consultees. These issues have led us to recommend some modifications (and clarifications) of our provisional proposals. Two of the modifications are particularly significant.

10.134 First, if we are to provide leaseholders with an easy route for merger, we will have to make provision not merely for mortgages but for all interests that burden the leasehold title. Any interest burdening the lease for the benefit of a third party may present an obstacle to merger. But leaseholders may also be concerned about what will happen to interests *benefiting* the lease (not wishing them to be lost on merger).

10.135 Second, our new scheme may end up being self-defeating if it gives the beneficiaries of interests burdening the lease (including mortgagees) the right to object to merger. Given that beneficiaries and mortgagees lose nothing by objecting, we may find that they standardly object on the off-chance that merger may cause them even slight prejudice. The solution, we think, is to define the new merger process in such a way that third parties cannot be prejudiced by a leaseholder's decision to merge titles on a freehold acquisition. There would then be no need to set out a scheme for dealing with objections; there could be no objections. Where the leaseholder elects to use it, the merger process could be guaranteed.

10.136 We do not think that the concern raised by a couple of consultees about possible defects in the terms of a mortgage if it is automatically transferred from a lease to a freehold presents a sufficient reason not to pursue our proposal.

(1) First, terms that are specific to leasehold ownership of land (for example, a term requiring the leaseholder to comply with the terms of the lease to ensure that it does not become subject to forfeiture) will simply have no application when the leaseholder is the freeholder.

(2) Second, the terms of a mortgage over a lease may not, for example, require the leaseholder to insure the building if the landlord is required to insure it under the terms of the lease. But a problem could only arise if the terms of the mortgage make no provision for the possibility of merger, if they make no provision for an obligation to insure to arise in alternative circumstances, or if they do not allow the mortgagee to vary the terms and conditions of the mortgage to cater for this situation. We do not think this situation is likely to arise.

10.137 We think we can ensure that merger will not decrease a mortgagee's security and protect any third party with an interest affecting the lease. Our modified proposal is that, on a guaranteed merger, all interests affecting the lease would transfer to the freehold. The transfer would not change their form, duration, or relative priority to other interests (both those affecting the freehold and those affecting the leasehold). We call this a "guaranteed" merger because the owners of interests affecting the lease should not be able to object to or block the merger. They are not prejudiced by it because their interests are preserved (indeed, they now attach to the freehold, which is a more secure form of tenure than a lease). We envisage that, where the conditions for a guaranteed merger are met, HM Land Registry could simply copy the relevant entries registered against the leasehold title across to the freehold title. The following example illustrates how this new rule would work.

How guaranteed merger would operate

A long lease has ten years left to run. The leaseholder grants a right of way over some of the land comprised within the lease to a neighbour. The easement is granted for a fixed period of ten years; if the lease happens to continue for longer than ten years, the easement will nevertheless come to an end. After granting and registering the easement, the leaseholder mortgages the lease to the bank. The easement has priority over the mortgage (so, in the case of default, the bank will take possession of the leased property that is subject to the easement).

Four years after granting the easement, the leaseholder pursues a freehold acquisition claim and wishes to merge the leasehold and freehold titles. When the leasehold title is merged with the freehold, both the mortgage and the easement will transfer to the freehold title. If the leaseholder defaults on the mortgage, the bank will now be entitled to enforce against the freehold. However, the easement will still have priority over the mortgage. But the term of the easement will not be extended in duration. It will last for the rest of the original fixed term (a further six years).

10.138 There are, however, some possible complicating factors which we think we should address.

10.139 First, under our new scheme, a mortgage over the landlord's freehold title will automatically be discharged on an individual freehold acquisition provided that the leaseholder pays (a sufficient portion of) the price directly to the mortgagee or into court.[51] But if the leaseholder does not pay the money to the mortgagee or into court, and the freeholder does not discharge the mortgage, the leaseholder will take the freehold subject to the mortgage. Suppose that there is also a mortgage over the leasehold title and the leaseholder wants to merge and transfer that mortgage to the freehold. A difficult question arises about which mortgage is to take priority over the other. The landlord's mortgagee has a first legal charge over the freehold and would be justifiably upset if this became a second mortgage. The leaseholder's mortgagee has a first legal charge over the lease and would be justifiably upset if this became a second mortgage (albeit over the freehold).[52]

10.140 Second, suppose that a leaseholder has agreed to sell his or her lease or granted an option to purchase it to a third party. The third party has protected this estate contract by registering a notice. The leaseholder then acquires the freehold and wants to merge the titles. If the titles merge, the lease will cease to exist. But the estate contract cannot unproblematically transfer to the freehold. The third party has agreed to purchase the lease, not the freehold. We also think that it would be complicated to provide for the estate contract to take effect as a contract for the grant of a new lease

---

51 Recommendation 16, para 4.404 above.

52 A similar problem could arise if the leaseholder funds the freehold acquisition not by obtaining a further advance from his or her own mortgagee but by obtaining a further mortgage from a third party. A commercial lender is unlikely to lend in these circumstances, but it is not impossible that, for example, a family member or friend might offer funding in exchange for a mortgage over the freehold.

out of the freehold. We would need to consider, among other things, the terms on which the new lease should be granted.

10.141 We have concluded that the simplest and fairest approach is to provide that merger cannot take place in these scenarios. If the freehold and the lease will be encumbered by separate mortgages following completion of a freehold acquisition claim, or if the lease is encumbered by a registered estate contract, the leaseholder will not be able to obtain a guaranteed merger of the two titles.

10.142 The third complicating factor arises where there is a restriction registered against the leaseholder's title which prevents the leaseholder disposing of the lease without complying with particular conditions. We discuss the issue of restrictions in more detail in the following section (paragraph 10.150 and following below). Our focus in that section is upon restrictions on the landlord's title which prevent the freehold from being transferred to the leaseholder or a new extended lease from being granted.

10.143 Restrictions may be entered against a leaseholder's title for a wide variety of reasons. For example, if a leaseholder enters into a contract with a third party that obliges the leaseholder to comply with particular conditions before disposing of his or her property, a restriction may be registered to ensure compliance with the contract. One common case in which this situation may arise is where there is a tripartite lease between a leaseholder, a landlord and a management company. While the leaseholder and the landlord owe obligations to one another enforceable as a matter of landlord and tenant law, their obligations to the management company are contractual. The management company may register a restriction to ensure that any person who purchases the lease in future will enter into equivalent contractual obligations to the company.

10.144 In general, a leaseholder will need to comply with the terms of any restriction registered against the leasehold title before merging it with the freehold title. However, we recommend that there should be two exceptions, both of which we discuss in more detail in the next section on restrictions against the landlord's title (paragraphs 10.171 to 10.183 below).

(1) First, a restriction may be registered to protect a mortgage over the lease, by preventing a disposition of the lease without the mortgagee's consent.

(2) Second, if the lease is held on trust by the leaseholder, then (depending on the terms of the trust) a restriction may be entered preventing a disposition without the beneficiaries' consent (such restrictions are, however, relatively rare).[53]

10.145 Both mortgages and beneficial interests will automatically be transferred to the freehold under our policy if a leaseholder seeks merger on an individual freehold acquisition. We recommend that mortgagees and beneficiaries with interests affecting the lease should be statutorily deemed to consent to merger and the transfer of their interests to the freehold. This consent should meet the requirements of a consent-restriction registered against the lease (as well the underlying requirements in the

[53] See the discussion at para 10.181 below.

mortgage contract or deed of trust). The consent-restriction may then be re-entered by HM Land Registry against the freehold title.

Our recommendation

10.146 We think that the benefits of our modified proposal far outweigh the disadvantages. If (in suitable circumstances, where the exceptions do not apply) the leaseholder has an option to request a guaranteed merger, then the process becomes quicker and cheaper. Leaseholders are given an easier route to substitute their lease for an unencumbered freehold. The process is also relatively simple for HM Land Registry to carry out; entries on the leasehold title can be carried across to the freehold title.

Recommendation 79.

10.147 We recommend that a leaseholder who is pursuing an individual freehold acquisition claim should have the right to request a guaranteed merger of the leasehold and freehold titles, with the titles merging when the acquisition of the freehold is completed by registration. Where the leasehold and freehold titles merge in this way, any interests benefiting or burdening the lease should automatically transfer to the freehold. The transfer should not change their nature or relative priority to other interests that affected the lease or affect the freehold.

10.148 We recommend that the leaseholder should not be entitled to a guaranteed merger of the leasehold and freehold titles in any case in which:

(1) the freehold is subject to a mortgage that is not discharged on the individual freehold acquisition or is made subject to a new mortgage as part of that individual freehold acquisition; or

(2) the lease is subject to a registered estate contract.

10.149 We recommend that a request by the leaseholder for a guaranteed merger should not remove the need for the leaseholder to comply with any relevant restrictions registered against the lease. However, both the leaseholder's mortgagee and (if the lease is held on trust) the beneficiaries under the trust should be deemed to consent to the merger, and this consent should be effective for the purposes of satisfying any consent requirement in the mortgage contract, deed of trust, or consent restriction on the register of title.

THIRD-PARTY CONSENT AND RESTRICTIONS ON THE LANDLORD'S TITLE

10.150 Near to the end of Chapter 11 of the Consultation Paper, we discussed an issue that can arise when a lease extension or an individual or collective freehold acquisition is due to be completed. The issue is that the landlord may be required to seek the consent of a third party before the new lease can be granted or the freehold transferred and that requirement may be protected by a restriction on the register.

10.151 One familiar example is a mortgage with a term that prevents a landlord from disposing of his or her property without the consent of the mortgagee. The mortgagee

may register a restriction preventing a disposition of the property from being registered unless evidence of the mortgagee's consent is provided to HM Land Registry. The current law makes provision for the automatic discharge of mortgages on an individual or collective freehold acquisition and for mortgagees to be deemed to authorise lease extensions. We examine these provisions in more detail below. But we explained in the Consultation Paper that "landlords are able to use the uncertainty as to whether their mortgagee's consent to the grant of a lease extension is required to try and levy fees for obtaining that consent".[54] Moreover, where consent needs to be obtained, it may delay the enfranchisement process.

10.152 However, there are other situations in which a landlord may need to seek a third party's consent. The landlord may, for example, simply agree to a binding contract that (among other things) prevents him or her from disposing of the property without the other party's agreement.

10.153 After discussing mortgages in Chapter 11 of the Consultation Paper, we suggested that a general rule should apply wherever the consent of a third party to a disposal of the landlord's property is required. Our intention was that the rule should apply widely. We provisionally proposed that the grant of a new lease or the transfer of a freehold following an enfranchisement claim should be able to take place even if the consent of a third party (which would have been required for an ordinary transfer or grant) has not been obtained. Rather than seek consent, we provisionally proposed that the landlord must inform the third party about the grant or transfer both 21 days before completion and 12 days after completion. We proposed that the landlord should be liable for any losses suffered by that person as a result of any failure to provide the required notice.[55]

10.154 It may be that some consultees were unclear whether we were referring to interests and restrictions affecting the leaseholder's title or the landlord's title. For example, the Wallace Partnership Group Ltd disagreed with our provisional proposal, saying that the beneficiaries of these interests and restrictions "are more usually associated with the leaseholder or have already been identified by the leaseholder as part of the preparation of the Claim Notice". This observation is probably accurate regarding interests and restrictions affecting the leaseholder's title. But interests and restrictions affecting the landlord's title (such as mortgages or beneficial interests under a trust) are likely to reflect agreements made by the landlord or his or her predecessors in title. We clarify that our provisional proposal is intended to apply only to third-party rights affecting the landlord's title.[56]

10.155 A sizeable majority of consultees supported our provisional proposal. Few opposed it outright, although around a fifth of consultees expressed other views.

---

54 CP, para 10.183(2).

55 CP, para 11.179.

56 We discuss what should happen to third-party interests that affect a lease when it is extended at paras 3.291 to 3.296 and 3.303 to 3.312 above. We discuss what should happen to these interests if the leaseholder acquires the freehold and merges the title at paras 10.123 to 10.149 above.

Further legal issues

10.156 However, many consultees, regardless of whether they expressed agreement or disagreement with our provisional proposal, raised difficult legal points that were not fully examined in the Consultation Paper. We have also reflected on some links between our provisional proposal, and the issues discussed in Chapters 3, 4 and 5.[57] In analysing the views of consultees and formulating our recommendations, we will need to delve into two of these legal issues in greater detail.

(1) The range of interests protected by consent restrictions

10.157 The first legal issue we need to consider arises from the fact that our provisional proposal was expressed in general terms. We referred simply to cases in which the landlord needs to obtain the consent of a third party to a grant or transfer. However, as Christopher Jessel pointed out, there are a variety of reasons why the consent of a third party may be required.

10.158 We mentioned that the landlord's mortgagee's consent may be required under the terms of the mortgage for a disposition to take place. Another similar situation is where the landlord holds the property on trust. The terms of the trust may prohibit a disposition without the consent of the beneficiaries.[58]

10.159 In both situations, there is a strong argument for providing that a transfer or grant to a leaseholder following an enfranchisement claim should be able to take place even if consent has not been given. The leaseholder has a statutory right to acquire the freehold or to extend his or her lease. Neither a mortgagee nor a beneficiary should be entitled to block the exercise of this right.

10.160 However, there are other situations in which we are not sure that a requirement that the landlord seek a third party's consent should simply be disapplied. First, unlike restrictive covenants, positive obligations (such as an obligation to maintain a boundary wall or to contribute to the upkeep of roads in a private housing estate) are not proprietary interests. They cannot be protected by a notice on the register and are not binding on a transferee of the property to which they apply. However, a landowner can undertake a positive obligation in favour of a neighbour and undertake that, as a condition of any sale of the land, he or she will require the purchaser to enter into an identical positive obligation. This approach enables positive obligations to be transferred with the ownership of the relevant land. One method for ensuring that purchasers of the affected land do enter into the relevant obligations is to protect the agreement by registering a restriction – a transfer of the land is not to be registered without the consent of the neighbour, whose consent is to be given if the purchaser enters into the obligation.

10.161 Schemes of positive obligations protected by restrictions may play an important role in the management of housing estates. We do not think that there should be a blanket

---

57 See in particular our discussion of contractual obligations on the landlord in relation to individual freehold acquisitions at paras 4.174 to 4.230 above.

58 It is quite rare for restrictions requiring consent to be entered in relation to trusts of land. See para 10.181 below.

rule that these kinds of consent restrictions should be of no effect in relation to an enfranchisement claim.

10.162 Second, in a variety of circumstances, a restriction may prohibit the registration of a disposition without the consent of the court or a third party specified in a court order. One example is a restriction in Form AA, entered as a result of a freezing order. However, the court may tailor an injunction to the idiosyncrasies of a case and require a restriction to be entered in a non-standard form. We do not think that we should be interfering with the effect of court-ordered restrictions, particularly where they have been entered for the purpose of preventing fraud.

(2) Restrictions and requirements to seek consent

10.163 The second legal issue concerns the nature and effect of restrictions on the register of title. Section 41(1) of the Land Registration Act 2002 provides that "where a restriction is entered in the register, no entry in respect of a disposition to which the restriction applies may be made in the register otherwise than in accordance with the terms of the restriction". Section 42(1) and (2) of the 2002 Act specifies when a restriction may be entered, and its effect is that they may be registered in a wide variety of circumstances.

> (1) The registrar may enter a restriction in the register if it appears to him that it is necessary or desirable to do so for the purpose of—
>
> > (a) preventing invalidity or unlawfulness in relation to dispositions of a registered estate or charge,
> >
> > (b) securing that interests which are capable of being overreached on a disposition of a registered estate or charge are overreached, or
> >
> > (c) protecting a right or claim in relation to a registered estate or charge.
>
> (2) No restriction may be entered under subsection (1)(c) for the purpose of protecting the priority of an interest which is, or could be, the subject of a notice.

10.164 A restriction may provide that the transfer of a property, or the grant of an interest in a property, may not be registered unless consent is obtained from a particular person. We proposed in the Consultation Paper that a transfer or grant pursuant to an enfranchisement claim should be able to be registered despite the fact the relevant consent has not been obtained. By this, we meant that restrictions on the register requiring consent to be obtained should not prevent the registration of the transfer or grant. As both Long Harbour and HomeGround and Irwin Mitchell LLP commented in their consultation responses, the registrar's hands are tied by a restriction under the 2002 Act, unless one of the parties applies to modify or disapply it. We discuss below how our proposal might address the obligations placed on the registrar by section 42.

10.165 However, we did not discuss the implications of this proposal for the parties' underlying rights. Suppose that a landlord cannot lawfully transfer the freehold to his or her leaseholder or grant a new extended lease without the consent of a third party. The rights of third party may be protected by a restriction. Merely providing that the restriction shall be ineffective in preventing the registration of a transfer or grant to the leaseholder would not by itself make the transfer or grant lawful. Although it could take

place and be completed by registration, the third party may still argue that the transaction was unlawful in the absence of consent. It could then be argued that, regardless of the restriction, it was a mistake for HM Land Registry to register the transfer. The third party might then apply for rectification of the register to claw the property back from the leaseholder, or otherwise, in some cases, pursue HM Land Registry for its loss.[59]

10.166 The Birmingham Law Society noticed this general point and suggested that a landlord "should be absolved totally from the consequences of not seeking and obtaining prior consent (statutory protection) regardless of the terms of the consent requirement/restriction". We agree that we need to address the substance of third-party rights affecting a landlord's estate in addition to addressing the effectiveness of restrictions.

Initial conclusions

10.167 There are two conclusions that follow from the issues discussed above.

(1) First, while we would like to introduce a general rule along the lines set out in the Consultation Paper that simply removes the need for a landlord to seek a third party's consent in all cases, we now think that this would have undesirable consequences. But given the level of support from consultees for our provisional proposal, we will instead try to introduce more specific rules. These should limit as far as possible the need for landlords to obtain consent from third parties in some commonly arising cases.

(2) Second, our new enfranchisement scheme will need to deal with the underlying rights or interests that give third parties a right to decide whether a landlord should be able to dispose of his or her property. It cannot simply dispense with consent requirements for the purposes of enfranchisement and leave landlords or HM Land Registry to face the consequences.

10.168 We can draw on the conclusions we reached in Chapters 3, 4 and 5 concerning the effect of a lease extension or an individual or collective freehold acquisition on third-party rights and interests affecting the freehold.[60] We think it will be helpful to look first at proprietary interests affecting the freehold, and then to consider contractual rights affecting the freehold (in other words, personal obligations binding the freeholder).

The effect of enfranchisement on third-party proprietary interests

10.169 In Chapters 3 and 4, we recommend a lease extension or individual freehold acquisition should have the following effect on third-party *proprietary* interests burdening the freehold (and we discuss extending these recommendations to collective freehold acquisitions in Chapter 5).

(1) If a lease is binding on a landlord's mortgagee, a lease extension will automatically be binding on the mortgagee.

---

59 Land Registration Act 2002, sch 4 and sch 8.

60 See Recommendations 6, 8, 9, 11, 12 and 22 (paras 3.240, 3.321(2), 3.333, 4.171 to 4.173, 4.217 to 4.218 and 5.195 above) and the additional discussion at paras 3.335 and 5.173 to 5.182 above.

(2) Following a lease extension, the new lease (and interests benefiting or burdening the lease) will have the same priority in relation to interests burdening the landlord's title as the old lease.

(3) There is one exception to the rule in paragraph (2) above: options or estate contracts for the purchase of the landlord's title with vacant possession will be discharged on a lease extension regardless of whether they had priority over the old lease.

(4) Similarly, options or estate contracts for the purchase of the landlord's title will be discharged on an individual or collective freehold acquisition regardless of whether they had priority over the lease(s) of the acquiring leaseholder(s).

(5) A mortgage over the freehold will automatically be discharged on an individual or collective freehold acquisition provided that the leaseholder(s) pay(s) the purchase price (or a sufficient proportion to discharge the mortgage) directly to the mortgagee or into court.

(6) Where a leaseholder or leaseholders acquire a freehold after an individual or collective freehold acquisition claim:

(a) they will take the property free of any proprietary interests that burdened the freehold but were not binding on the lease; and

(b) they will take the property subject to all existing proprietary interests binding both the freehold and the lease.

(7) There is an exception to the rule in (6). Our new scheme will provide that, if the freehold is held on trust or is settled land, and if the purchase price is paid into court, the purchase will overreach any beneficial interests affecting the property and be deemed to satisfy the relevant requirements of the Settled Land Act 1925. The same result will follow if the purchase price is paid directly to a mortgagee (with any residue left over after discharge of the mortgage being paid into court).

10.170 Given these recommendations, we can draw some conclusions about whether certain types of consent requirement or restriction should be effective in relation to enfranchisement transactions. In particular, we can draw conclusions in relation to mortgages, beneficial interests under a trust of land, and estate contracts.

Mortgages

10.171 Suppose that the terms of a mortgage over a landlord's property prohibit the landlord from disposing of the property without the consent of the mortgagee and this requirement is protected by a restriction in the register. We do not think that the mortgagee should be entitled to prevent a leaseholder from acquiring the freehold under our new scheme. Leaseholders have a statutory right to acquire the freehold. Therefore, we recommend that a landlord's mortgagee should be deemed to consent to a transfer of the property pursuant to an individual or collective freehold acquisition claim.

10.172 In Chapters 4 and 5, we made recommendations about the automatic discharge of mortgages on an individual or collective freehold acquisition.[61] Mortgages will automatically be discharged if the leaseholders comply with the payment conditions in Recommendations 16 or 22 (as applicable). If the leaseholders do not comply, and the landlord does not pay off the debt, they will acquire their properties still subject to the mortgages.

10.173 However, this recommendation should not have any bearing on whether mortgagees are deemed to consent to an individual or collective freehold acquisition. In either case, the leaseholders are entitled to acquire the freeholds to their properties. Their entitlement to acquire them is not dependent on them discharging any mortgages burdening the freeholds (although it is obviously in leaseholders' interests for them to be discharged). Mortgagees should not be able to veto or set conditions on the acquisition.

10.174 Matters are slightly more complicated in relation to the grant of a new extended lease. The grant of a new lease counts as a disposition of the landlord's property (although the landlord retains his or her reversionary title). The grant of a new extended lease to a leaseholder may be delayed while the mortgagee's consent is obtained. Moreover, a landlord may seek to recover from the leaseholder the costs of obtaining this consent, or use any difficulties in obtaining consent as a bargaining chip in negotiations with the leaseholder. One mortgage lender has informed us that, although it recognises that it cannot prevent a lease extension from happening without its consent, it nevertheless registers restrictions against the landlord's title requiring its consent to any disposition. The restriction serves to ensure that the mortgage lender is informed of any lease extension.

10.175 The need for mortgage lenders to be informed of lease extensions has already been addressed by Recommendation 77 above. The further notification requirements suggested in our provisional proposal are therefore unnecessary in relation to mortgages.

10.176 The 1967 and 1993 Acts make provision for a lease extension to "be deemed to be authorised" by the landlord's mortgagee and specify the circumstances in which the new extended lease will be "be binding" on the mortgagee.[62] Both Acts provide that the landlord's mortgagee is deemed to authorise a lease extension "despite the fact that the grant of the existing lease was subsequent to the creation of a mortgage on the landlord's interest and not authorised as against the persons interested in the mortgage". In other words, mortgagees are deemed to authorise lease extensions in all cases (regardless of whether the current lease was authorised or granted in breach of the mortgage). However, both Acts then include a caveat. If the current lease did not have priority over the mortgage and is not authorised by the mortgagee, the fact that the grant of the new lease is "authorised" should not be taken to mean that it is "binding" on the mortgagee. If the landlord defaults on the mortgage, the mortgagee may still be able to take vacant possession of the property.

---

61 Paras 4.404 and 5.195 above.

62 1967 Act, s 14(4); 1993 Act, s 58(1).

10.177 We think that our new enfranchisement scheme should make similar provision to the 1967 and 1993 Acts. The landlord's mortgagee should be deemed to consent to a lease extension. The mortgagee should not be able to prevent a leaseholder exercising his or her statutory rights to a lease extension. But the deemed consent should not necessarily mean that the mortgagee agrees to be bound by the new lease. Where the existing lease had priority over the mortgagee or has been authorised by the mortgagee, the mortgagee should automatically be bound by the new extended lease. Where the existing lease does not have priority and is not authorised, the mortgagee should not automatically be bound by the new lease.

10.178 Where a mortgagee has registered a restriction requiring its consent to a disposition, HM Land Registry consider the terms of the restriction to be satisfied by the deemed authorisation granted under the 1967 and 1993 Acts.[63] However, several consultees (including the PBA) urged us to clarify the status of restrictions that purport to prevent a lease extension being granted without the landlord's mortgagee's consent. Several consultees, including the Law Society and the PBA, also raised a concern about cases in which landlords will be in breach of the terms of their mortgage if they convey the burdened property to the leaseholder without the mortgagee's consent.

10.179 We recommend that the legislation should make it clear that the mortgagee's deemed consent to a lease extension is effective for the purposes of satisfying any consent restriction on the register or any term of the mortgage requiring the mortgagee's approval for a disposition. Leaseholders should be able to show that a lease extension complies with the terms of a mortgagee's consent restriction without actually having to obtain consent, and landlords should not be in danger of breaching the terms of their mortgages purely by granting a statutory lease extension.[64]

Beneficial interests under a trust of land

10.180 Similar arguments apply to cases in which a landlord holds the freehold on trust. The interests of beneficiaries under a trust of land are typically protected by the entry of a Form A restriction. A Form A restriction prohibits a disposition under which capital money arises being registered (without the authorisation of the court) unless the money is paid to two or more trustees or to a trust corporation.

10.181 However, the terms of the trust may expressly prohibit the landlord from disposing of his or her property without the consent of the beneficiaries. The beneficiaries may then apply to enter a restriction (in Form N) preventing a disposition of the property without their consent. It is relatively rare for such restrictions to be entered; they are usually only encountered where allowing a disposition of the property without the beneficiaries' consent would defeat the purposes of the trust. The registrar will only enter a Form N restriction if he or she is satisfied that it is "necessary or desirable", bearing in mind "the clear intention of sections 42(1)(b) and 44(1) of the Land

---

63 HM Land Registry, *Practice guide 27: the leasehold reform legislation* (March 2018) para 9.3.

64 The landlord may still be in breach of the mortgage by granting a lease without authorisation in the first place.

Registration Act 2002 and sections 2 and 27 of the Law of Property Act 1925 that overreaching should take place".[65]

10.182 We have made recommendations to ensure that overreaching can occur where, as part of an individual or collective freehold acquisition, the purchase money is paid to a mortgagee or into court.[66] As we noted, in order to put this policy into effect, we will need to ensure that such a payment will satisfy the terms of a Form A restriction (as Form A restrictions are only registered in order to ensure that overreaching occurs).

10.183 However, even if our scheme ensures that overreaching occurs, this would not affect the operation of a consent requirement in a trust or settlement of land or the operation of a restriction protecting such a requirement. A beneficiary should not be entitled to block a leaseholder from exercising his or her enfranchisement rights. We think that, where leaseholders are granted an extended lease or acquire the freehold to their properties under our new statutory scheme, anyone with a beneficial interest in the landlord's property should be deemed to consent to the grant or transfer. Consent requirements in the relevant trusts or settlements, and the terms of any consent restrictions, should then be deemed to be satisfied.

Estate contracts

10.184 We have recommended that a statutory individual or collective freehold acquisition should have the effect of discharging estate contracts affecting the freehold (agreements to purchase the freehold or agreements granting an option or right of pre-emption).[67] We have also recommended that a statutory lease extension should have the effect of discharging any estate contract that provides for the freehold to be transferred to a third party with vacant possession.[68]

10.185 An estate contract, option or right of first refusal may give rise to a proprietary interest in the relevant property that can be protected by registering a notice. Alternatively, some of these agreements may be protected by restrictions. For example, an agreement granting a right of pre-emption to a third party may be protected by a restriction preventing a disposition of property without the consent of that third party.

10.186 There is no easy method by which HM Land Registry could automatically remove or disregard a restriction protecting an estate contract where a leaseholder is pursuing an enfranchisement claim. It would have to be sure, first, that a legitimate statutory freehold acquisition or lease extension is taking place, and, second, that the relevant restriction is protecting an agreement that will be discharged under our scheme. HM Land Registry is not in a position to investigate these matters. The solution, we think, must be for the enfranchising leaseholder to apply for the removal of a relevant restriction on the basis that it protects an agreement that will be discharged on enfranchisement.

---

65 HM Land Registry, *Practice guide 19: notices, restrictions and the protection of third-party interests in the register* (April 2020), para 3.4.4.

66 Recommendation 11 (paras 4.172(3) and 4.173). See also the discussion at paras 5.173 to 5.182 above in relation to collective freehold acquisitions.

67 Recommendation 11, paras 4.172(4). See also the discussion at paras 5.173 to 5.182 above.

68 Recommendation 9, para 3.333 above.

Restrictions protecting contractual rights

10.187 We also discuss personal, contractual obligations on landlords not to dispose of their properties without consent in Chapter 4. The significance of this discussion is that the Land Registration Act 2002 permits restrictions to be registered in order to prevent an unlawful disposition of a property. "Unlawfulness" is a broad concept; it would catch dispositions that occur in breach of contract. A restriction may be entered to prevent a breach of contract even where the contract does not create or give rise to a proprietary interest affecting the relevant property. We discussed the use of restrictions to protect personal contractual rights in our 2018 report Updating the Land Registration Act 2002, where we explained that this use of restrictions is not improper; on the contrary, it was intended.[69]

10.188 We explain in Chapter 4 that our new enfranchisement scheme needs to cater for three ways in which a contract may place limitations on a landlord's powers of disposal.[70] A landlord may be bound by an agreement that effectively prevents him or her from disposing of the freehold at all (perhaps because he or she needs the consent of a third party, who is refusing to provide it). Alternatively, an agreement may make the enfranchisement process longer and more difficult by requiring the landlord to follow an involved process before disposing of the freehold. Finally, an agreement may require the landlord to ensure that, when the leaseholder acquires the freehold, the leaseholder must undertake certain obligations towards a third party (and possibly require the leaseholder to ensure that any successor in title undertakes identical obligations).

10.189 In Chapter 4, we recommend that, if any agreement to which the landlord is a party prevents the landlord from transferring the freehold to the leaseholder or granting an extended lease, the relevant provisions of the agreement should be suspended by the service of a Claim Notice and discharged by the completion of the claim.[71] Our recommendation is based on section 5(7) of the 1967 Act and (in particular) section 19(4) and (5) of the 1993 Act, which concern estate contracts. Our reasoning is that an agreement entered into by the landlord should not be capable of depriving a leaseholder of his or her statutory rights to enfranchise.

10.190 We suggested that the same rule should apply where an agreement that binds the landlord would prevent the landlord from transferring the freehold to the leaseholder or granting an extended lease within the timescale set by the Tribunal. The fact that a landlord has entered into an agreement limiting his or her ability to dispose of the freehold should not make the enfranchisement process significantly slower or more expensive for leaseholders.

10.191 Some consultees who responded to our provisional proposal about consent requirements, did not agree that we should interfere with cases in which a landlord needs to obtain a third party's consent. For example, the Wallace Partnership Group Ltd said that "it is not reasonable to deny third party rights of consent where these are

---

69 (2018) Law Com No 380, Ch 10, especially paras 10.14 to 10.15.

70 Para 4.177 above.

71 Recommendation 12, para 4.217 above.

required". We disagree. It is reasonable to interfere with these rights where their exercise could prevent enfranchisement taking place. Moreover, both the 1967 and 1993 Acts already contain anti-avoidance provisions (in sections 23(1) and 93(1) respectively). We examine these provisions in Chapter 4, consider their limitations and explain why our recommendations are an improvement.[72]

10.192 We also consider in Chapter 4 what should be done about agreements which prevent a landlord from transferring the freehold to a leaseholder unless the leaseholder agrees to enter into specific personal obligations towards a third party.[73] We explain that such agreements could in theory be used to retain onerous requirements in the lease, such as a prohibition on keeping pets without permission and a requirement to pay permission fees.

10.193 But such agreements can also be used to hold in place positive obligations which can play an important role in the management of housing estates. Many consultees raised a concern about stripping away positive covenants. For example, in response to our consultation question about consent restrictions, Clifford Chance LLP, solicitors, pointed out how unsatisfactory it might be if our new scheme for enfranchisement prevented any positive obligations being placed on a leaseholder who acquires the freehold.

> Land Registry restrictions against dealings are often registered in favour of an adjoining landowner in respect of positive obligations (e.g. to pay a service charge for a shared right of way). … These types of conditions are uncontentious and easily satisfied. If the registration is not conditional on compliance, the adjoining owner will, in this example, have to pursue the freeholder for breach of covenant. This will incur legal costs etc. It is not clear on what basis the freeholder (or the adjoining land owner) can force the leaseholder to comply with this obligation after registration.

10.194 Our recommendation in Chapter 4 is that any provisions of an agreement that prevents the landlord transferring the freehold to the leaseholder should be suspended on the service of a Claim Notice in a freehold acquisition claim and discharged on completion of the claim. However, we recommend that there should be an exception to this rule. It will not affect the operation of agreements that require leaseholders to enter into obligations that would meet the test for a valid land obligation or reciprocal payment obligation as set out in our 2011 report Making Land Work: Easements, Covenants and Profits à Prendre.[74] Importantly, in order to meet this test, a payment obligation must be a requirement to pay the reasonable costs of the beneficiary performing works on land which benefit ("touch and concern") the leaseholder's property.

10.195 In Chapter 5, we suggest that the same recommendations may apply relation to collective freehold acquisitions.[75] We explain that the reasoning set out in full in Chapter 4 applies with equal force to collective freehold acquisitions.

---

72 Paras 4.186 to 4.195 above.

73 Paras 4.196 to 4.215.

74 (2011) Law Com No 327.

75 Paras 5.173 to 5.182 above.

10.196 Where an agreement is suspended or discharged in line with the recommendations set out above, the parties to the agreement will no longer be entitled to register a restriction in order to protect it. If they have already registered a restriction, we do not think that HM Land Registry can be required automatically to remove it. As with estate contracts, HM Land Registry has no method of determining whether or not a restriction is protecting a valid contract. However, where a restriction is preventing or delaying enfranchisement, a leaseholder may apply to have the restriction removed on the basis that the contractual provisions it protects have been suspended.

10.197 From the perspective of the landlord, our recommendations should prevent a landlord being forced to breach a contract on the receipt of a Claim Notice by disapplying the provisions of the contract that prevent him or her acceding to the claim.

Court orders and restrictions

10.198 We do not intend to make any recommendation about restrictions entered on the register pursuant to court orders, or those requiring the court's consent to disposition by the landlord. An enfranchising leaseholder will need to apply to court for the restriction to be lifted or for the court's consent to the disposition.

A new notification requirement

10.199 In the first part of consultation question on consent requirements, we proposed that requirements for the landlord to seek third-party consent should be disapplied where there is an enfranchisement claim. We have clarified and modified this proposal in our discussion above. The later parts of our consultation question provisionally proposed that landlords should be under an independent statutory duty to notify third parties of an enfranchisement transaction where a requirement for that party's consent had been disapplied. In our discussion above, we have not considered this part of our proposal.

10.200 Our notification proposal was supported by a clear majority of consultees. Furthermore, some of the minority of consultees who opposed our proposal misunderstood what we were suggesting. They thought we were proposing that landlords should be required to notify third parties with restrictions affecting the *leaseholder's* title. This is not correct. We are only concerned with limitations on the landlord's powers of disposition and so with restrictions registered against the *landlord's* title.

10.201 The principal concern raised by those consultees who opposed our proposal was that we would be placing too onerous a burden on landlords. This was the view of Church & Co Chartered Accountants. Xuxax Limited went so far as to say that our proposal might "detrimentally affect the value of a freehold owned by a company who has a commercial interest that is supported by the residential flats". Daniel Watney LLP, surveyors,[76] wrote that it did not want landlords to be liable for additional costs. CMS Cameron McKenna Nabarro Olswang LLP, solicitors, and the PLA suggested that the landlord should be able to recover the relevant costs from the leaseholder and also

[76] Submitting a response on behalf of Dame Alice Owen's Foundation, the Charity of Richard Cloudesley and the Dulwich Estate (all charity landlords).

raised a concern that our proposal could delay completion. But other consultees argued that the costs should not be passed onto leaseholders.

10.202 We think it may be helpful to clarify the scope of our notification proposal. The effect of our previous discussion is that:

(1) beneficiaries under a trust or settlement of the landlord's estate should be deemed to consent to an enfranchisement transaction;

(2) estate contracts affecting the landlord's estate should be discharged by an individual or collective freehold acquisition, and by a lease extension if the landlord's property was to be acquired by the third party with vacant possession; and

(3) provisions of contracts binding the landlord that prevent enfranchisement taking place or (with some exceptions) that require a transferee of the landlord's estate to undertake personal obligations should be suspended by the service of a Claim Notice and discharged on completion of the claim.

The effect of the second part of our provisional proposal, modified in the light of this discussion, would be that landlords must give notices to beneficiaries under trusts whose consent is no longer required, the beneficiaries of estate contracts that will be discharged, and the other parties to contracts which will be discharged under point (3) above. (Note that we are recommending independent rules regarding the notification of mortgagees.)[77]

10.203 If a landlord is holding a property on trust, he or she should know the identities of the beneficiaries. He or she should also know the identity of third parties with estate contracts binding the property. He or she should know if he or she is party to a contract that inhibits enfranchisement and know the identity of the other parties to that contract. We have been given no reason to think that a requirement for the landlord to notify these parties of an enfranchisement transaction is onerous. It is also not likely to be costly. It could be done by the landlord's conveyancers sending a short standard-form letter. Moreover, for this reason, we do not think there should be any special rule about whether landlords should be able to recover their costs of compliance. The general rules that apply to non-litigation costs (discussed in Chapter 12) should apply to these costs as well.

10.204 We continue to think that it is important for landlords to inform those third parties whose interests or rights in respect of the landlord's property are going to be modified by our recommendations. Beneficiaries of estate contracts, for example, should be told that their contracts are going to be discharged. They might otherwise continue to act to their detriment by arranging their affairs on the basis that they are going to be acquiring the relevant landlords' properties. Beneficiaries under a trust may want to take steps to ensure they can recover some of the purchase price that will be paid by the leaseholder.

10.205 Four consultees agreed but raised concerns about our proposed time limits. Trowers & Hamlins LLP, solicitors, suggested that the time limits should be less strict. By

---

[77] See paras 10.106 and 10.122 above.

contrast, Bryan Cave Leighton Paisner LLP and Shoosmiths LLP said that the timeframes should be tightened from 21 days and 14 days to 14 days and seven days (although they appear mistakenly to have thought that both notices needed to be given before completion). But most consultees were content with the proposed time limits and we continue to think that they are reasonable and practical.

10.206 There was, however, one point that requires a clarification of our proposal. A contract relating to a landlord's estate may require the landlord to notify a third party before disposing of his or her property. During a lease extension or freehold acquisition claim, the landlord may be unable to locate and notify the third party and as a result the contract may be discharged so that the claim can be completed. The landlord would then come under a statutory duty, in line with our proposal, to notify the third party 21 days before completion and 14 days after completion of the transfer of the freehold or grant of the new lease to the leaseholder. But the landlord cannot locate the third party; this is why the contract was discharged. Berkeley Group Holdings PLC, a developer, said that, in these kinds of circumstances, "the landlord should not be penalised for the failure to … inform the beneficiary of the transaction". We agree. We think we should adopt a suggestion made by CMS Cameron McKenna Nabarro Olswang LLP and the PLA that the obligation on the landlord should be to use reasonable endeavours to give the relevant parties the required notice.

10.207 Few consultees expressly addressed the third part of our provisional proposal, which suggested that landlords should be liable for any losses suffered by third parties as a result of their failure to provide the required statutory notice of an enfranchisement transaction. As our proposal involves automatically overriding some rights of third parties in relation to the landlord's property, we continue to think that affected third parties need the protection of our notification requirement. We continue to think that there should be a potential sanction if landlords fail to comply.

10.208 Nevertheless, it will be rare that a failure to give notice, by itself, could give rise to a liability to pay damages. If third parties suffer any losses, these are likely to flow from the automatic discharge of their contracts and be recoverable from the landlords as if the contracts had been frustrated, regardless of whether the landlord complied with the notification requirement. This point also answers a concern raised by the Law Society and Heather Keates (who both expressed agreement with our proposal). They wanted to know what would happen if a mortgagee or other beneficiary is informed of the transfer of the landlord's property and raises an objection. But our proposal, as revised, does not permit third parties to raise objections; it simply discharges their contracts or deems their consent to be given.

Recommendation

10.209 Bringing together the points and decisions made in the preceding discussion, we make the following recommendation. The recommendation does not refer to issues (such as those concerning estate contracts) which are already fully addressed by recommendations in Chapters 3 and 4.

Recommendation 80.

10.210 We recommend that the following rules should apply in relation to third-party rights or interests affecting a landlord's estate that may restrict or set conditions on the landlord's power to grant an extended lease or transfer the freehold to a leaseholder or leaseholders.

(1) The landlord's mortgagee should be deemed to consent to any statutory lease extension. This deemed consent should be effective for the purposes of satisfying any consent requirement in the mortgage contract or consent restriction on the register of title. If the existing lease did not have priority over the mortgage and was not authorised by the mortgagee, however, the mortgagee's deemed consent to the lease extension should not imply that the new extended lease is binding on the mortgagee.

(2) If the landlord's estate is held on trust or is settled land, and a leaseholder or leaseholders make a lease extension or individual or collective freehold acquisition claim, the beneficiaries under the trust or settlement should be deemed to consent to the relevant disposition of the landlord's estate. This consent should be effective for the purposes of satisfying any consent restriction on the register of title.

(3) The service of a Claim Notice seeking a lease extension or individual or collective freehold acquisition should suspend the operation of any provision of an agreement to which the landlord is a party:

(a) that prevents the landlord from transferring the freehold to the leaseholder or nominee purchaser or from granting an extended lease (as applicable), or prevents the landlord doing so by the completion date specified by the Tribunal; or

(b) (subject to (4)) that prevents the transfer or grant unless the leaseholder agrees to enter into personal obligations benefiting a third party (or the landlord).

(4) A provision of an agreement will not be suspended or discharged under paragraph (3)(b) above it falls within the exception set out in Recommendation 12 in Chapter 4, which preserves agreements creating obligations that would be capable of being imposed as a "land obligation" within the meaning of our report Making Land Work.

10.211 We recommend that, where pursuant to our recommendation set out above–

(1) a beneficiary's consent to a disposition by the landlord is deemed to be granted; or

(2) an agreement between the landlord and a third party will be discharged on completion of the leaseholder's claim,

the landlord should be required to make reasonable endeavours to notify the beneficiary or third party of the relevant disposition not less than 21 days before completion, and also within 14 days after completion.

10.212 We recommend that, if the landlord fails to make reasonable endeavours to notify the beneficiary or third party as required above, he or she should be liable for losses suffered by the beneficiary or third party that result from that failure.

FURTHER REGISTRATION REQUIREMENTS

10.213 At the end of Chapter 11 of the Consultation Paper, we provisionally proposed that any lease extension, leaseback, or transfer executed as part of an enfranchisement claim must contain a statement recording that it was executed pursuant to the relevant statutory provisions. We further proposed that HM Land Registry should take on a greater role in noting such interests on the registered titles and, in the case of a collective freehold acquisition, noting any period during which a further claim cannot be made without the permission of the Tribunal.[78] We are recommending that there be a two-year ban on bringing further collective freehold acquisition claims following a successful claim (as opposed to the five-year period we provisionally proposed in the Consultation Paper).[79]

10.214 Our proposal regarding statements in lease extensions, leasebacks and transfers partially reflects the current law. The 1993 Act provides that transfers following a collective freehold acquisition claim and new leases granted following a leasehold acquisition claim must contain a statement that they took place under the relevant provisions of the Act.[80] The 1967 Act does not require such statements to be made, but makes some provision for their effect if they are made. We thought that requiring statements to made in all cases would help focus the parties' minds on whether they are complying with our new statutory scheme.

10.215 We also took the view it would be useful to have information relating to collective freehold acquisitions and any applicable bans on serving a new Claim Notice recorded in the register. It would promote transparency and allow prohibited claims to be identified quickly. Furthermore, we thought that recording in the register that a relevant transaction had occurred pursuant to our enfranchisement scheme would help inform third parties, including potential purchasers, that there had been an enfranchisement claim. For example, a potential purchaser of a freehold who sees that it is subject to a lease granted following a lease extension claim will know to check that the lease extension was granted on statutory terms. If it was not granted on statutory terms,

---

78 CP, para 11.182.

79 We discuss restrictions on future dealings with the freehold title in the CP from paras 6.133 to 6.137. These sections refer to our proposals to introduce a new right to participate, where we have concluded that further work would be needed before we could recommend the introduction of such a right. We explain that conclusion in full in paras 5.222 to 5.246 above.

80 1993 Act, ss 34(10) and 57(11).

there may be consequences for the enforceability of the terms of the lease and the leaseholder may be entitled to the grant of a compliant lease at no extra cost.[81]

Consultees' views and recommendations for reform

10.216 Our provisional proposal was almost universally supported, but there were very few substantive responses. Only two consultees expressly disagreed with our provisional proposals, neither of whom provided reasons for their disagreement. Two others, discussed below, expressed some reservations.

10.217 Support for the provisional proposal was indicated by two confidential consultees. They suggested that it would be useful to have a public record that a collective freehold acquisition claim has been made pursuant to the relevant statutory provisions, as this would make it easier to prove a subsequent claim in breach of the two-year ban is invalid. Similarly, Berkeley Group Holdings PLC added a further suggestion that "there should in addition be a restriction on title … to prevent the nominee purchase company from further disposing of the premises acquired".

10.218 Two consultees were unsure of the benefits of the provisional proposal, however. The Federation of Private Residents' Associations said it is "unclear what the benefit of this is and it opens further opportunity for challenges on the basis of wrongly completed documentation rather than substance". Philip Rainey QC did not agree that a moratorium on making a new claim should be recorded as it would needlessly clutter the title; "tenants should be able to work it out for themselves from the fact that the transfer was a collective".

10.219 We have, however, given further thought to the rationale behind our provisional proposal, partially in response to points raised by HM Land Registry concerning the Consultation Paper. We remain of the view that parties to enfranchisement claims should be required to state in the relevant freehold transfers or grants of new leases that the transfer or grants has taken place pursuant to our statutory scheme.

10.220 But the proposal to record on the register where an enfranchisement claim has taken place faces a difficulty. Those consultees who commented on our proposal were attracted to the idea that the register might contain reliable information about whether and when an enfranchisement transaction had taken place. The proposal makes sense if the information recorded is reliable. We could require application forms to register dispositions with HM Land Registry to contain, for example, a box that must be ticked if the disposition is taking place pursuant to enfranchisement rights. However, HM Land Registry would have no way of knowing whether the applicants had mistakenly failed to tick the box despite being involved in an enfranchisement claim, or whether they had wrongly ticked it despite not being involved in an enfranchisement claim.

10.221 We do not think that we should recommend that information must be entered on the register where its reliability is not guaranteed. Future purchasers of the freehold would still need to investigate whether an enfranchisement claim had (really) previously taken place. Furthermore, there do not appear to be any reasonable steps that we could recommend HM Land Registry take to ascertain whether an enfranchisement

[81] See Ch 14 for further discussion of these issues.

claim has been made. As HM Land Registry's current guidance points out, there are "a large number of applications to register the purchase of reversions and new leases entirely unconnected with the [enfranchisement regime]".[82] It is reliant on parties telling it that a disposition has taken place under the 1967 Act; this fact may not be obvious from the conveyance itself.

10.222 For this reason, we have decided not to recommend implementing our provisional proposal in full as we would not be providing consultees with what they want (a reliable public record showing where an enfranchisement claim has taken place). Purchasers of a property that is subject to a long lease will have to investigate the title they are acquiring and require suitable guarantees from the seller to be sure that the lease was not previously the subject of a lease-extension claim and extended on non-statutory terms.

Recommendation 81.

10.223 We recommend that any lease extension, leaseback or transfer executed as part of an enfranchisement claim must contain a statement recording that it was executed pursuant to the relevant statutory provisions.

82 HM Land Registry, *Practice guide 27: the leasehold reform legislation* (March 2018) para 4.1.

Chapter 11: Dispute resolution

INTRODUCTION

11.1 Disputes that arise during an enfranchisement claim are often settled by agreement between the parties. But where this is not the case, a formal means of resolving those disputes is needed. Even where there is no dispute between the parties, issues may arise during a claim which require an application to a judge for a ruling. Such an application will be necessary, for example, where the landlord is missing, or the parties want to agree a lease extension on non-statutory terms.

11.2 Under the current law, some types of dispute or issue are heard by the county court, while others are heard by the Tribunal[1] and a few by the High Court.[2] This division of responsibility for resolving enfranchisement disputes has been criticised as unnecessarily complex, and as causing confusion and additional costs for the parties.

11.3 In this chapter we set out two key recommendations to make it simpler and quicker to resolve enfranchisement disputes.

(1) Almost all enfranchisement disputes and issues should be heard and resolved by the Tribunal rather than by the county court.

(2) There should be an alternative route for the determination of straightforward valuation disputes that do not merit a full Tribunal hearing.

11.4 In considering our recommendations about dispute resolution in enfranchisement claims, we have sought to simplify the dispute resolution procedure in order to:

(1) make it easier for parties to identify the steps that they need to take;

(2) reduce the need for parties to incur legal costs in order to be able to navigate the procedure successfully;

(3) reduce the costs wasted as a result of making mistakes;

(4) remove the possibility of any party having to make separate applications to the court and tribunal during the course of the claim where possible; and

(5) reduce the instances in which an application to any court or tribunal will be needed.

---

1 The First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

2 The High Court also has residual inherent jurisdiction to hear certain disputes. See para 11.20 below.

PROBLEMS WITH THE CURRENT LAW

11.5 The current law divides the responsibility for resolving disputes and issues that arise during an enfranchisement claim between the county court and the Tribunal. The allocation of disputes and issues between these two bodies is not the same under the 1967 Act as it is under the 1993 Act.[3]

11.6 Many parties to enfranchisement disputes struggle to identify which forum has the power to deal with an issue or dispute. Even once the parties have identified the correct body, they might find that other disputes or issues have to be dealt with before a different body.[4] Parties consequently stand to incur greater costs taking expert legal advice, making separate applications to the court and the Tribunal and, in some circumstances, paying costs incurred by the other party in dealing with mistaken applications.[5] Finally, the powers of the Tribunal and of the county court to order one party to pay the other party's litigation costs are very different; in the county court the unsuccessful party will generally be required to pay the other party's costs, while in the Tribunal, in most circumstances, each party bears their own costs. These problems make it more difficult for a leaseholder to assess whether he or she is likely to be required to pay some of his or her landlord's litigation costs during the claim.[6] This, in turn, creates greater uncertainty for leaseholders as to the potential costs of exercising enfranchisement rights.

A SINGLE VENUE FOR DETERMINING DISPUTES

11.7 In the Consultation Paper, we provisionally proposed that the Tribunal should be given exclusive jurisdiction to determine disputes or issues in an enfranchisement claim.[7] Under this proposal, it would no longer be necessary (or possible) for a party to issue a claim or application in the county court at any stage in the enfranchisement process.

11.8 We also noted that the proposed transfer of jurisdiction to the Tribunal might require the Tribunal to be given additional powers and/or additional facilities.[8] For example, we noted that the Tribunal would need the power to be able to execute a lease extension or transfer when a party had failed to do so.[9] We also noted that the Tribunal did not have powers to punish parties for contempt, or to instruct bailiffs, and was not currently able to use the Court Funds Office in order to accept sums paid into the Tribunal.

Consultees' views

11.9 The overwhelming majority of consultees agreed with our provisional proposal. Several consultees said that our proposal would make determining enfranchisement

---

3 See CP, paras 12.9 to 12.23, for a detailed account of the current law.

4 See CP, para 12.25.

5 See CP, para 12.26.

6 Non-litigation costs are considered in Ch 12.

7 See CP, Consultation Question 94, para 12.60.

8 See CP, paras 12.58 to 12.59.

9 County Courts Act 1984, s 38.

disputes simpler, more efficient and cheaper. The First-tier Tribunal (Property Chamber) remarked that there were "tangible benefits for case management where a single forum is engaged". Others welcomed the consolidation of enfranchisement issues in a forum with specialist leasehold and valuation expertise. Some of those consultees thought that this would mean a greater number of cases would be disposed of correctly. Some consultees noted, however, that the Tribunal would likely require increased resources as a result of an expanded jurisdiction.

11.10 A few consultees believed that the Tribunal should also retain a power to refer a case to the Upper Tribunal if the claim involved matters of valuation principle, or other issues of wider importance. Others believed that the Tribunal should also have the power to refer a case to the High Court if particularly complex issues of law were involved.

11.11 Of those consultees who opposed our provisional proposal, some leaseholders were critical of the current role of the Tribunal, seeing it as being biased towards landlords. Some considered the county court should resolve all disputes. And a few consultees believed that disputes should be resolved by an ombudsman.

Recent developments

11.12 Before considering our recommendations for reform, it is useful to note two ongoing developments.

Housing Court

11.13 On 13 November 2018, Government published a call for evidence on the creation of a new Housing Court.[10] The consultation closed on 22 January 2019 and, to date, Government has not announced the outcome. The call for evidence included options for structural changes to the courts and the Tribunal. One of the suggestions in the call for evidence explored whether there is a case for moving all housing cases under a single, specialist Housing Court or (as one alternative) bringing certain housing cases into the Tribunal. In their responses to the Consultation Paper, a few consultees noted that any recommendation that we make should be consistent with any plans that Government might bring forward for the creation of a Housing Court. As Government has not yet announced the outcome of its consultation, we are unable to align our recommendations in this way. However, we note that our recommendations that all enfranchisement disputes and issues should be determined by the Tribunal would be consistent with the option to move certain disputes into the Tribunal. Whether the proposed specialist Housing Court would be the appropriate forum for all enfranchisement claims would depend on the expertise and constitution of the Housing Court, which has not yet been announced by Government.

Civil Justice Council's deployment project

11.14 The Civil Justice Council's deployment project is designed to allow judges who are able to sit as both Tribunal and county court judges to exercise their powers under

---

[10] We discussed Government's plans to consult on the creation of a new Housing Court in the CP at paras 12.48 to 12.50. The call for evidence is at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755326/Considering_the_case_for_a_housing_court.pdf.

both jurisdictions in a single case at the same venue and on the same day.[11] The aim is to allow cases where issues have arisen in each jurisdiction to be dealt with more efficiently and without the need for separately listed hearings.[12]

11.15 The Civil Justice Council has reported that a pilot of the deployment project has been a success.[13] The working group has since published a proposal and recommendations to amend the Civil Procedure Rules and The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules to implement the recommended changes. These changes would involve the introduction of a new case management track to simplify the deployment of judges to sit concurrently in the tribunal and county court jurisdictions.[14]

Discussion and recommendations for reform

A single jurisdiction

11.16 The division of the power to deal with enfranchisement disputes between the county court and the Tribunal creates complexity, and can cause confusion and additional expense for the parties.

11.17 We agree that the recent flexible deployment project set up by a working group of the Civil Justice Council has gone some way to reduce these problems.[15] But we do not believe that the problems can be sufficiently resolved by the greater deployment of Tribunal judges as county court judges and vice versa. Deployment may avoid the need for two separate hearings, but two separate applications are still required. And we do not believe that a complex work-around is the best means of reducing complexity for leaseholders.

11.18 Instead, we believe that the power to resolve disputes or issues that arise between the parties during an enfranchisement claim should – in so far as is possible – be given to a single body.

11.19 Historically, the Tribunal has been regarded as a specialist body dealing, for the most part, with matters of valuation. But in more recent times, the Tribunal has dealt with a range of legal issues that would previously have been dealt with by the county court or High Court. We think that, in its current form, it has the necessary skills and expertise to deal with all aspects of an enfranchisement dispute. In contrast, while many judges within the county court and High Court have the expertise required to deal with legal issues relating to enfranchisement, few would claim the expertise required to address complex questions of valuation without additional expert assistance.

---

11 The project was discussed by Holgate J and Judge Hodge QC in *Avon Ground Rents Ltd v Child* [2018] UKUT (LC) at [1] to [4].

12 See CP, paras 12.33 to 12.45.

13 Civil Justice Council, *Report on the property chamber deployment project: proposal and recommendation* (October 2018), para 1.

14 Civil Justice Council, *Report on the property chamber deployment project: proposal and recommendation* (October 2018), paras 9 to 10.

15 See CP, paras 12.33 to 12.47.

11.20 We therefore continue to believe that the current division of responsibility between the county court and the Tribunal should be ended.[16] All enfranchisement disputes and issues should be determined by the Tribunal wherever possible. To that end, we recommend that the inherent jurisdiction of the High Court should, so far as possible, be expressly limited to prevent parties from seeking to bring claims in the High Court relating to disputes or issues that the Tribunal has power to determine.[17]

A single jurisdiction in practice

11.21 In Chapters 8 to 10 we set out our recommendations for a reformed procedural regime for enfranchisement claims. Within that process there are a number of points at which a leaseholder and/or landlord would be able to apply to the Tribunal for a determination or order.

(1) Where a leaseholder applies for an order enforcing compliance with an Information Notice to which the landlord on whom it was served has not provided a response within 28 days.[18]

(2) Where a leaseholder applies for an order permitting the claim to proceed under the No Service Route.[19]

(3) Where a leaseholder applies for a determination of the claim in the absence of a Response Notice having been served.[20]

(4) Where a competent landlord applies for permission to serve a Response Notice late.[21]

(5) Where the competent landlord applies for directions from the Tribunal where there are conflicts between the interests of different landlords.[22]

(6) Where another landlord applies for permission to replace the competent landlord.[23]

---

16 We note also that the High Court has a general power under s 41 of the County Courts Act 1984 to order the transfer of any county court proceedings into the High Court if it considers it desirable for those proceedings to be heard in the High Court instead. The High Court also has a limited jurisdiction over certain other matters under the 1967 Act: see paras 12.15 to 12.16 of the CP.

17 This would not, however, prevent the High Court or the Court of Appeal from performing its current supervisory jurisdiction in respect of the decisions reached by the Tribunal or the Upper Tribunal.

18 See para 8.89.

19 See para 8.254.

20 See para 9.125.

21 See para 9.126.

22 See para 13.45.

23 See paras 9.108 to 9.109.

(7) Where a competent landlord applies for an order striking out a Claim Notice (if no application to the Tribunal is made within 6 months).[24]

(8) Where either party applies for a determination of any outstanding dispute or issue (including the terms of any lease extension or transfer).[25]

(9) Where a competent landlord applies for an order setting aside a determination.[26]

(10) Where the landlord applies for the Tribunal's approval of a lease extension or individual freehold transfer that has been agreed by the parties but is not on terms that are consistent with the statutory regime.[27]

(11) Where either party applies to enforce a previous determination of the Tribunal.[28]

(12) Where a community-led housing organisation seeks a declaration that a development is exempt from freehold acquisition claims, on the basis that the development satisfies the definition of community-led housing.[29]

(13) Where a landlord applies for an order preventing a leaseholder or nominee purchaser from serving further enfranchisement Claim Notices (an Enfranchisement Restraint Order),[30] and

(14) Where a leaseholder who is subject to an Enfranchisement Restraint Order applies for permission to serve a further Claim Notice.[31]

Enforcement

11.22 In the Consultation Paper we proposed that either party would be able to apply to the Tribunal for an order "giving effect to" the transaction if it had not been executed by the date agreed or determined.[32] We did not, however, set out in any detail how any such enforcement would work in practice.

11.23 In Chapter 10, we noted that while the service of a Claim Notice would not give rise to a statutory contract, the parties to an enfranchisement claim would be free to enter into a (non-statutory) contract if they considered this was the best means of giving

---

24 See paras 9.177.

25 See paras 9.95 and (in relation to the terms of *Aggio* leases), paras 3.203 and 3.210. This would include any dispute as to whether the leaseholder was entitled to enfranchise, or as to the validity of the claim made. The number of challenges that could be made to the validity of an enfranchisement notice would, however, be much reduced: see paras 9.63 to 9.69.

26 See para 9.151.

27 See paras 14.70 to 14.76 and 14.99 to 14.103.

28 See para 11.25 below.

29 See para 7.210.

30 See para 12.166.

31 See para 12.167.

32 CP, paras 11.09(12) and 11.125.

effect to an enfranchisement transaction. In many straightforward cases the parties would likely decide that a contract would not be necessary as the rights and obligations of the parties could be included within any extended lease or transfer. However, in other cases the parties might agree that a formal contract should be used, either as a means of linking a number of separate transactions within an enfranchisement claim, or as a means of including terms that could not be incorporated in any extended lease or transfer.

11.24 A party seeking to compel another party to give effect to a transfer or the grant of a lease extension will therefore have:

(1) entered into a formal contract for the transfer of the freehold or for the grant of a lease extension in order to give effect to a leaseholder's enfranchisement rights;[33]

(2) entered into an agreement to transfer a freehold or grant a lease extension in order to give effect to a leaseholder's enfranchisement rights, but that agreement is not a formal contract; or

(3) been unable to agree all of the terms of any contract, lease extension or transfer of the freehold and have obtained an order from the Tribunal deciding the outstanding issues (including a requirement that the lease extension or transfer be completed by a specified date).[34]

11.25 In each of these cases, we think that a party should be able to apply to the Tribunal for an order that would help give effect to the transfer or the grant of a lease extension. In particular:

(1) Where an enfranchisement transaction has not been completed solely because one party has failed to sign the lease extension or transfer by the date agreed or set by the Tribunal, the Tribunal should be able to appoint someone to sign the document in the place of the party in default.[35]

(2) Where an enfranchisement transaction has not been completed because the leaseholder has failed to tender the premium or price, the Tribunal should be able to order that:

(a) (where the parties have entered into a formal contract) the contract be discharged unless the premium or price is paid to the landlord by a further date specified in the order; or

(b) (in any other case) any determination of the Tribunal be set aside and the leaseholder's Claim Notice be struck out, unless the premium or price is paid to the landlord by a further date specified in the order.

---

33 We use the term "formal contract" to refer to a contract that meets the formality requirements for a contract for the sale or other disposition of land set out in the Law of Property (Miscellaneous Provisions) Act 1989, s 2.

34 See para 11.21(8).

35 We anticipate that the Tribunal would appoint any member of the Tribunal to sign the document.

11.26 We note that an order made in the terms set out at paragraph 11.25(2) does not compel the leaseholder to pay the price or premium to the landlord. To enable the Tribunal to make such an order, there would need to be a mechanism for enforcing that order if the leaseholder did not comply, including the power to fine or commit a leaseholder to prison for contempt. This could be achieved either by giving the Tribunal the power to punish a leaseholder for contempt, and access to the facilities required by such a power, or by permitting the county court to penalise a leaseholder for failing to comply with the Tribunal's order. We acknowledge that some landlords are concerned about the number of leaseholders who delay payment of an agreed or settled premium. But we think that permitting either the Tribunal to penalise a leaseholder for contempt in the event that the leaseholder failed to pay the premium by the date previously specified by the Tribunal would be disproportionate to the mischief reported by landlords.

11.27 We should note, however, that in the case of a formal contract for a transfer or grant of a lease, either party is currently able to issue a claim in the county court for an order of specific enforcement of the contract.[36] Such an order can compel the party in default to carry out his or her contractual obligations. As such, parties to a formal contract entered into to give effect to a leaseholder's enfranchisement rights – whether following a determination by the Tribunal or otherwise – are currently able to look to the county court to enforce that formal contract. While we have set out above our recommendations about giving the Tribunal powers to enforce a formal contract entered into to give effect to a leaseholder's enfranchisement rights, we do not recommend that the existing powers of the county court to enforce the terms of a formal contract for a transfer or grant of a lease should be changed.

Additional powers and facilities

11.28 We think that if the Tribunal is to be able to make appropriate determinations or orders on each of the applications set out at paragraphs 11.21 and as described at 11.25 above, it will be necessary to give the Tribunal additional powers, and to allow it access to facilities that are currently only available to the county court. First, the Tribunal would need a power to execute a lease extension or transfer in place of a party to that document. Second, where our new procedural regime requires a party to pay money into the Tribunal, it should be possible for the money to be paid into and held by the Court Funds Office. This facility should be available whenever a leaseholder is unable to pay the money to the landlord directly. For example, where a determination had been made following an order under the No Service Route, or following the landlord's failure to serve a Response Notice. It should also be available where our procedural regime requires or permits a leaseholder to pay money into the Tribunal rather than pay the landlord directly.[37]

---

[36] See para 11.32 below. The equitable remedy of specific performance compels a party to perform its positive obligations under a contract. The remedy is only available in relation to valid enforceable contracts, and various features of the contract may be grounds for refusal of an order for specific performance.

[37] For example, at para 4.404 we recommend that, on an individual freehold acquisition, where the landlord's estate is subject to a mortgage then the leaseholder may pay the whole of the statutory price or (if less) the sum outstanding under the mortgage into court.

Recommendation 82.

11.29 We recommend that, save as set out at paragraph 11.32 below, all enfranchisement disputes and issues should be determined by the Tribunal.

11.30 We recommend that the Tribunal be given powers to:

(1) direct that a lease extension or transfer can be executed by a Tribunal judge in place of a party to the transaction;

(2) order that unless the price or premium is paid to the landlord by a specified date any formal contract between the parties will be discharged, or any determination made by the Tribunal will be set aside and the Claim Notice be struck out.

11.31 We recommend that the Tribunal should have access to the Court Funds Office, to enable parties to pay money into the Tribunal in the same way as parties currently pay money into court.

11.32 A party who had entered into a formal contract for a transfer or lease extension would remain able to seek to enforce the terms of that contract in the county court.

AN ALTERNATIVE PROCEDURE FOR VALUATION-ONLY DISPUTES

11.33 In the Consultation Paper, we noted that some of the options we presented for altering the valuation methodology would reduce or eliminate the need for parties to obtain expert valuation evidence. In such circumstances, we suggested that it might be more cost-effective for some disputes to be determined by a single valuation expert rather than at a full hearing.[38]

11.34 We considered that the types of dispute best suited to this alternative procedure might be where:

(1) the value of the premises is low; or

(2) the difference between parties' respective valuations was sufficiently small that it would be disproportionate for the dispute to be dealt with at a full hearing.

11.35 We provisionally proposed that disputes which met either criteria would be dealt with on paper by a valuation member of the Tribunal (sitting on his or her own) unless the Tribunal determined that the dispute should instead proceed to a full hearing.

11.36 We asked consultees:

(1) whether certain valuation disputes should be determined by a single valuation expert rather than at a full hearing; and

[38] See CP, para 12.65.

(2) if they should:

(a) which types of case should be dealt with; and

(b) what rules should govern its operation.[39]

Consultees' views

Whether certain valuation disputes should be dealt with by a single valuation expert

11.37 Almost all consultees who responded agreed that it was desirable, at least in principle, for certain cases to be dealt with by a single valuation expert. Many consultees believed that suitable cases would be disposed of more efficiently and would reduce the parties' costs and the burden on the Tribunal.

Which disputes should be dealt with

11.38 Consultees were divided as to the types of disputes that should be dealt with using this alternative procedure. Some consultees thought the Tribunal should retain a broad discretion to decide whether a valuation dispute should be heard in this way. Other consultees felt that the procedure should only be adopted with the consent of both parties.

11.39 Many consultees agreed with our provisional proposal that this alternative procedure would be best suited to low value claims and/or those in which there was relatively little difference between the parties' respective valuations. These consultees were more divided as to what the criteria should be. There were suggestions that "low value" could be defined by reference to either a set amount or the term remaining on the lease.

11.40 Consultees suggested a number of ways to define claims in which there is relatively little difference between the parties' respective valuations, including by reference to a set figure and proportionately by reference to the value of the claim. There were several other consultees who thought that any such criteria ought also to take into account the number of issues in dispute between the parties.

The nature of this procedure

11.41 We note that the Tribunal already directs that some cases are heard by a valuation member of the Tribunal sitting alone.[40] We were told that Tribunal judges often make such a direction in low value claims or claims against missing landlords where the issues are being considered on the papers.

---

39 CP, Consultation Question 95, paras 12.68.

40 Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013 No 1168), r 6(3)(i) allows the Tribunal to decide the form of any hearing. There is not an equivalent provision in The Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004 (SI 2004 No 681) or The Residential Property Tribunal Procedures and Fees (Wales) Regulations 2016 (SI 2016 No 267).

Discussion and recommendations for reform

Our proposed scheme

11.42 We continue to believe that certain valuation-only disputes should be dealt with by a single valuation expert. This provisional proposal had very broad consultee support and we maintain our view that for certain cases it would be a more cost-effective means of dispute resolution. We think this procedure should involve a determination by a valuer member of the Tribunal on the basis of the parties' written evidence, without an oral hearing.

11.43 We also recommend that the determinations made by the single valuation member of the Tribunal would have the same status as any other decision of the Tribunal at a final hearing. It would be possible to appeal the decision to the Upper Tribunal in the usual way.

Types of disputes to be allocated to the alternative track

11.44 We have decided that we should not seek to prescribe the scope of any "alternative track" by which some disputes are to be determined by a single valuation expert within the Tribunal rather than at a full hearing. We think the Tribunal is best placed to determine which types of case are best suited to this method of dispute resolution. A Tribunal discretion would, it is hoped, prevent parties from attempting to pre-empt any financial criteria for the application of the procedure by altering their estimated valuation premiums. We also believe that the Tribunal is best-placed to settle the rules that would govern that procedure. It could, for example, set guidelines for making this decision via a Practice Direction. And we believe that it would be advantageous if the Tribunal has the flexibility to change the criteria determining which cases would fall within its remit and the rules that would govern the process.

11.45 Nevertheless, we consider that, in the event that our recommendation for an alternative track is adopted, the Tribunal should consider providing that:

(1) the value of the claim,

(2) the difference between the parties' positions, and

(3) the proportionality of conducting a full hearing of the claim,

are each taken into account deciding whether the alternative track should be used in any particular claim.

Power to direct a full hearing

11.46 We accept, however, that a party to a dispute might believe that although the enfranchisement claim meets the criteria for allocation to the alternative track, it should nevertheless be dealt with at a full hearing because the claim raises points of principle or significance that could have a broader impact on the party's property interests. For example, a landlord might believe that the decision in that claim would likely affect the way in which similar claims would be negotiated or determined.

11.47 We think, therefore, that where a claim otherwise meets the criteria for allocation to the alternative track, the Tribunal should retain a power to direct a full hearing of the

claim where a party argues – and the Tribunal accepts – that the determination will have such a broader impact on that party.

11.48 However, we do not think that it would be reasonable in such circumstances to expect the other party to such a claim to have to meet their own additional litigation costs of a full hearing. As such, we think it should be a condition of any such direction that the party who has requested a full hearing should be ordered to meet the other party's reasonable litigation costs of that hearing. We think that this would allow the interests of the party requesting a full hearing to be protected, but not at an expense to the other party.[41]

Recommendation 83.

11.49 We recommend that the Tribunal should be able to order that certain valuation-only disputes be determined on the papers by a single valuer member of the Tribunal rather than at a full hearing. We have termed this the "alternative track".

11.50 We recommend that the Tribunal should have a discretion to determine the sorts of disputes that are best-suited to disposal in this way. However, the Tribunal should include the following as factors in determining the allocation of any claim:

(1) the value of the claim;

(2) the difference between the parties' positions; and

(3) the proportionality of conducting a full hearing of the claim.

11.51 The determinations made by the valuer member of the Tribunal should have the same status as that of a full Tribunal decision, and be capable of being appealed on the same basis.

11.52 We recommend that where a claim would otherwise be allocated to the alternative track the Tribunal should, on the application of any party, be able to direct that the claim will nevertheless proceed on the normal track (in other words, a full hearing) on the grounds that the claim has a broader significance for that party. Any such direction should be subject to a condition that the party making the application is required to meet the other party's reasonable litigation costs of proceeding in that way.

A CONTINUING ROLE FOR ALTERNATIVE DISPUTE RESOLUTION

11.53 In this chapter we have concentrated on reforms to the process by which disputes and issues between the parties are resolved by a formal decision-making process. We have focussed on this process due to the nature of enfranchisement disputes, which tend to be centred on the acquisition of the relevant right (which involves a claim in the Tribunal) rather than the ongoing relationship between the parties. We have

[41] See paras 12.183 to 12.184.

recommended that it should be the Tribunal that, with a few limited exceptions, has the responsibility for resolving all such disputes and issues that arise. And we have also recommended that a cheaper and simpler alternative process should be established within the Tribunal for dealing with certain valuation-only disputes.

11.54 However, in making these recommendations, we do not seek to downplay or diminish the continuing importance of alternative means of resolving disputes outside a formal decision-making process. And we note that the Tribunal Rules already require the Tribunal to draw the attention of the parties to appropriate alternative procedures for resolving disputes in suitable cases, and to facilitate the use of that procedure when the parties so wish.[42] Parties may therefore continue to choose to find alternative ways of resolving their enfranchisement disputes that do not involve a formal determination by the Tribunal.[43]

---

42 The Tribunal Procedure Rules (First-tier Tribunal) (Property Chamber) Rules 2013, r 4. There is not an equivalent provision in The Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004 (SI 2004 No 681) or The Residential Property Tribunal Procedures and Fees (Wales) Regulations 2016 (SI 2016 No 267).

43 We note that enfranchisement disputes tend to centre on the acquisition of the relevant right. In the Commonhold Report we are recommending that the new Housing Complaints Resolution Service could perform a role in settling disputes between unit owners and their commonhold association following conversion to commonhold: see paras 16.63 to 16.64 of the Commonhold Report. Given the nature of enfranchisement disputes, we are not making an equivalent suggestion in this Report.

Chapter 12: Costs

INTRODUCTION

12.1 A leaseholder who exercises a statutory right to a lease extension, or to purchase a freehold, faces costs over and above the payment of the purchase price. First, a leaseholder must pay any costs that he or she incurs in bringing the claim, including sums paid to his or her own legal and other professional advisers. Those costs can be made up of both litigation costs and non-litigation costs. Litigation costs are the costs incurred when there is a dispute between the parties that is resolved by a court or tribunal. Non-litigation costs are the other costs, incurred as a result of the transaction itself, such as valuation and conveyancing costs. Second, a statutory regime will provide for (or otherwise control) the circumstances in which one party will be required (or can be ordered) to pay some or all of the litigation and/or non-litigation costs that have been incurred by the other party during the process.

12.2 At present, a leaseholder is required to pay the landlord's non-litigation costs, so long as those costs fall into prescribed categories, and have been reasonably incurred. The Tribunal has the power to assess those non-litigation costs if there is any dispute.[1] But whether a leaseholder (or indeed a landlord) can be ordered to pay the other party's litigation costs depends in part upon whether the dispute is heard by the county court or the Tribunal. The powers of the county court to make such orders are substantially greater than those of the Tribunal.

12.3 In this chapter we set out our recommendations for reform of the circumstances in which one party to an enfranchisement claim can be required to pay the litigation or non-litigation costs of the other party to the claim. In the context of enfranchisement costs, we have considered whether there is any justification for requiring leaseholders to pay any part of their landlords' non-litigation costs; and if there is, how that contribution should be determined. We have also considered, in respect of litigation costs, whether the judicial body responsible for determining disputes between parties to enfranchisement claims should have powers to make costs orders and, if so, what those powers should be.

12.4 We recommend that whether leaseholders should continue to be required to contribute to their landlord's non-litigation costs should depend on the valuation methodology adopted by Government. If Government adopts a broadly market-value based approach, then we recommend that leaseholders should (in most cases) no longer be required to contribute to their landlord's non-litigation costs. However, if Government adopts a valuation methodology that is not broadly market-value based, we recommend that leaseholders should contribute to their landlord's non-litigation costs, but that the amount paid should be set by a fixed costs regime.

12.5 We also set out our recommendations in respect of security for costs, claims that do not reach completion, and preventing vexatious claims. The approach we take to the

[1] The First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

first two of these policy areas varies depending upon whether leaseholders are generally expected to contribute to their landlord's non-litigation costs.

12.6 We have recommended elsewhere that the Tribunal should have exclusive jurisdiction to deal with almost all enfranchisement disputes and issues.[2] In this chapter, we recommend that the more limited powers of the Tribunal to order one party to pay all or part of the other party's litigation costs should – with a few exceptions – be applied to all the disputes that it hears. As a result, there will be fewer circumstances in which one party to an enfranchisement claim can be ordered to pay the litigation costs of another party.

PROBLEMS WITH THE CURRENT LAW

Non-litigation costs

12.7 A leaseholder is currently required to pay his or her landlord's non-litigation costs provided that they fall within certain prescribed categories and have been reasonably incurred.[3] This is the case whether or not the claim reaches completion.

12.8 A number of criticisms have been made of the requirement on leaseholders to contribute to their landlords' non-litigation costs. Some leaseholders object in principle to any obligation to pay towards their landlord's non-litigation costs. Other leaseholders have criticised both the amount of those costs, and/or the difficulty of predicting at the start of a claim what that amount is likely to be. It is argued that the risk of having to pay a significant sum as a contribution to the landlord's non-litigation costs can lead some leaseholders to accept proposed terms that they might otherwise reject.

12.9 Leaseholders have also criticised the costs of raising any challenge to the landlord's claim for non-litigation costs. The Tribunal has power to determine the amount that is payable by the leaseholder to the landlord. But the leaseholder cannot recover his or her costs of challenging the amount claimed by the landlord even if the leaseholder succeeds in reducing the sum payable. It may therefore be cheaper for a leaseholder to pay the landlord's inflated claim for non-litigation costs, than to incur the costs of disputing that claim.

12.10 Concern has also been expressed about the operation of the deemed withdrawal provisions contained in the 1993 Act. If a leaseholder misses a procedural deadline, then his or her claim will be treated as having been withdrawn, and he or she will be required to pay his or her landlord's non-litigation costs that have been incurred up to that point. This liability, together with the prohibition on bringing a fresh claim within a period of 12 months, can encourage some landlords to take a tactical, game-playing approach to enfranchisement claims. And the liability can discourage leaseholders from bringing a further claim after that time limit has expired.

12.11 Conversely, landlords have criticised the current law for failing to compensate them for all the non-litigation costs that they incur. Complaint is also made about the absence

---

2 See paras 11.29 to 11.31 above.

3 See CP, paras 13.16 to 13.28 for a detailed explanation of the current law on non-litigation costs.

of any provision requiring leaseholders to provide security for the non-litigation costs that landlords are likely to incur as a result of the leaseholder's claim.

Litigation costs

12.12 The jurisdiction to deal with disputes that arise during the course of an enfranchisement claim is currently divided between the county court and the Tribunal.[4] The powers of each to order one party to pay the litigation costs of the other party are different. In the county court, the general rule is that the unsuccessful party will be ordered to pay the litigation costs of the successful party.[5] In contrast, the circumstances in which the Tribunal is able to order one party to pay the litigation costs of the other party are much more limited. The Tribunal is only able to make an order that one party pay the litigation costs of the other party if the former party has wasted costs, or has acted unreasonably.[6] As a result, in most circumstances, each party will be left to pay his or her own litigation costs.

12.13 A number of criticisms have been made of the current rules governing a party's ability to recover its litigation costs from the other side.[7] Some stakeholders are concerned by any power of a court or Tribunal to order one party to pay another party's litigation costs (that is, a "costs-shifting" power). The effect of such a power is to increase the financial impact of pursing an issue or claim unsuccessfully, and to increase the potential financial impact of pursuing an issue or claim at all. And while such an order can just as readily be made in favour of a leaseholder as a landlord, it is often the landlord, as the stronger party in any dispute, who will benefit most from the fact that a costs-shifting power exists.[8] A party may be deterred from pursuing a reasonable point of dispute if he or she is less able than his or her opponent to bear the risk of such a costs order being made. On the other hand, other stakeholders are concerned that any significantly more restricted power to make such costs orders would simply allow a party to pursue weak points unreasonably. And a party that is more able to bear his or her own litigation costs may use the inability of the other side to recover his or her litigation costs, even if successful, to place pressure on the other side to concede.

12.14 Other stakeholders believe it is difficult to justify applying any set of costs rules to some kinds of enfranchisement dispute, but not others. And some stakeholders believe that this differential treatment makes it harder for a party to estimate the likely costs of bringing or opposing an enfranchisement claim in advance. A claim may or may not give rise to issues that need to be determined by the county court. A claim

---

4 A detailed explanation of the current law relating to litigation costs can be found in the CP at paras 13.29 to 13.34.

5 Civil Procedure Rules, r 44(2) The county court does, however, have a broad discretion as to whether costs should be paid by one party to another, and the amount to be paid. In deciding what order to make, the court will have regard to all the circumstances, including the conduct of the parties, whether a party has succeeded on part of its case, and any offer to settle (which is not an offer falling within the terms of Part 36 of the Civil Procedure Rules): Civil Procedure Rules, r44(4).

6 Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013 No 1168), r. 13(1).

7 See the CP at paras 13.40 to 13.43.

8 In our Valuation Report at paras 3.45 to 3.49 we explained the systemic inequality of arms that exists between landlords and leaseholders

therefore may or may not include an increased risk that a party may be ordered to pay the other side's litigation costs if unsuccessful on an issue within the claim. It is the leaseholder, as the weaker party, that will normally find the lack of certainty about the probable costs of the claim most challenging.

SHOULD LEASEHOLDERS CONTRIBUTE TO THEIR LANDLORD'S NON-LITIGATION COSTS?

12.15 In the Consultation Paper we invited consultees to give their views about whether leaseholders should continue to be required to contribute to their landlords' non-litigation costs.[9]

12.16 We noted that the normal practice in residential property sales is that each party pays his or her own costs. Yet, in the case of the transfer of a freehold title or the grant of a lease extension following the exercise of enfranchisement rights, leaseholders must contribute to their landlord's costs. We asked whether either the fact that the leaseholder already holds a lease of the property, or that the landlord is compelled to sell, should alter the usual position that arises on a residential property sale.

12.17 We also referred to arguments that could be made for or against any obligation for leaseholders to continue to contribute towards a landlord's non-litigation costs.[10] We concluded that the arguments raised were finely balanced.

Consultees' views

12.18 This consultation question received a large number of responses. Most groups representing professionals or landlords, freeholders, and individual professionals favoured retaining an obligation for the leaseholder to contribute to a landlord's non-litigation costs. In contrast, the vast majority of leaseholders and groups representing leaseholders were opposed to any contribution being required.

12.19 Many of the responses submitted by leaseholders reflected an underlying belief that leasehold ownership placed unfair financial burdens on leaseholders, and that requiring leaseholders to contribute to the landlord's non-litigation costs when a leaseholder seeks to use enfranchisement as a means of alleviating those burdens was in itself unfair. Many consultees also felt that the landlord's non-litigation costs were a cost of ownership that should be factored into a landlord's business model, and would likely be set off against tax. For example, the National Leasehold Campaign wrote that:

---

9 See CP, Consultation Question 98, paras 13.49 to 13.50.

10 See CP at paras 13.52 and 13.53. The arguments cited against a contribution being made can be summarised as: (1) the inherent unfairness of the sales of house and flats on long leasehold interests, (2) the insufficiency of the compulsion on the landlord to grant a lease extension or transfer the freehold as a reason for altering the allocation of costs found in normal residential property sales, and (3) the fact that most landlords will have acquired their interests knowing of the existence of enfranchisement rights. The arguments cited in favour of a contribution being made can be summarised as: (1) the current landlord may not have been responsible for, or benefited from any unfairness, and (2) the current enfranchisement regime does allow landlords to recover some of their non-litigation costs when the leaseholder exercises his or her enfranchisement rights.

Leaseholders should not be required to make any contribution to their landlord's non-litigation costs. Landlords should account for the amount and likelihood of such costs as part of their ongoing financial modelling and forecasting.

12.20 Consultees also put forward a number of other reasons why leaseholders should not be required to make any contribution to a landlord's non-litigation costs.

(1) Both the obligation to pay a landlord's reasonable non-litigation costs and the unpredictability of that sum deters leaseholders from bringing enfranchisement claims. For example, Mark Tomkins, a leaseholder, wrote that:

> The cost of acquiring the Freehold for properties is a significant barrier preventing leaseholders from purchasing the freehold of their properties. The total costs for surveys and other professional fees can be significant and greater in some cases than the value of the freehold itself, for many this would be prohibitive on its own. Furthermore, as the final cost is often unknown, it becomes risky endeavour to commit to enfranchisement in the first place and raises the barrier further, particularly as the Freeholder is in a position to draw out the process at little cost or risk to themselves.

(2) Requiring landlords to pay their own litigation costs, rather than recover them from their leaseholders, would encourage landlords to complete the enfranchisement process as swiftly and efficiently as possible. The National Leasehold Campaign considered that:

> Ensuring that landlords pay for their own non-litigation costs reduces the incentive for them to adopt gamesmanship or prolong the enfranchisement process. It does, in fact, encourage them, to look for ways to make the processes more streamlined and efficient.

(3) If landlords have to bear their own non-litigation costs, the costs of obtaining valuation evidence is likely to fall for both landlords and leaseholders. Where surveyors and landlords know that the landlord client is likely to be able to recover the costs of a valuation report from the leaseholder, this removes any need for the landlord to exert downward pressure on that cost. Any lowering of valuation costs for landlords will likely create downward pressure on the cost of these reports for leaseholders.

(4) Changes to the costs payable by leaseholders under the statutory regime would affect the costs that landlords were able to demand as part of any such transaction carried out on a voluntary basis.

12.21 A few consultees agreed that removing the requirement that leaseholders contribute to their landlords' non-litigation costs would likely increase the volume of enfranchisement claims, but saw any such increase as a problem for landlords. Asset values held by pension funds would be affected, compromising the interests of individuals with pension funds and long-term savers.

12.22 Consultees took different views as to the effect that our proposed procedural changes would have upon the non-litigation costs of the landlord.[11] Some consultees considered these changes were likely to reduce non-litigation costs, thereby making any obligation for leaseholders to contribute to their non-litigation costs less onerous. On the other hand, Damian Greenish, a solicitor, argued that a landlord's non-litigation costs would increase as a result of our provisional proposals on procedure, thereby strengthening the case for requiring the leaseholders to contribute to those costs.

12.23 A number of consultees noted that open market sales of residential property normally proceed on the basis that each party will pay their own non-litigation costs, and that both any valuations obtained and the price ultimately agreed by the parties will reflect that position. The Law Society also noted that valuations carried out under the current statutory enfranchisement regime, which form a key part of any negotiation between the parties, or determination by the Tribunal, do not take into account the fact that the landlord will be able to recover most of his or her non-litigation costs from the leaseholder in addition to the price agreed or determined. As a result, landlords will receive a price that reflects their open market obligation to pay their own non-litigation costs together with a contribution towards those costs. Put another way, as the price does not reflect the fact that landlords will be able to recover most of their non-litigation costs from the leaseholder, requiring the leaseholder to pay those costs provides the landlord with an element of double recovery.

12.24 Some consultees, such as the Leasehold Advisory Service ("LEASE"), considered that the open market position in respect of non-litigation costs should be applied under any statutory regime. However, a significant number of other consultees believed that the fact that the landlord was being compelled to sell his or her asset justified a departure from the open market position.

12.25 Many consultees drew an analogy between enfranchisement claims and compulsory purchase orders, in which the body acquiring the property is required to pay the property owner's transaction costs as part of the compensation paid. However, Bruce Maunder-Taylor, a surveyor, argued that enfranchisement was distinct from compulsory purchase since on enfranchisement the landlord was being paid a share of the profit to be made from selling to the existing leaseholder rather than simply being compensated for the value of that asset.[12] He considered that it is "offensive that the landlord is entitled both to claim his profit margin and also be able to recover his costs".

12.26 Several consultees expressed their concern about instances in which the landlord's non-litigation costs exceeded the premium paid for the interest. In such cases, if the leaseholder were not required to pay a contribution to the landlord's transaction costs, transferring a freehold or granting a lease extension would cost the landlord money. Other consultees were concerned about smaller individual landlords and companies belonging to leaseholders who have previously exercised collective enfranchisement

---

11 See paras 8.53, 8.111 to 8.114 and 9.44.

12 The current valuation methodology allows a landlord of a lease with less than 80 years remaining to be paid 50% of the marriage value in addition to the value of the remaining term and the reversion. The marriage value is the difference between the value of the leasehold interest and the value of the leaseholder's interest once the enfranchisement is complete. It is only realised if the landlord sells his interest to the existing leaseholder rather than to a third party. See the CP, paras 14.53 to 14.66, and paras 2.40 to 2.55 of the Valuation Report.

rights. Such landlords are typically ordinary leaseholders who may be unable to pay the non-litigation costs of an enfranchisement claim where these costs are not offset by the payment of the premium. Concern was also raised by social landlords who would be required to dip into other budgets to cover any non-litigation costs that were not recovered from the leaseholders.

Discussion and recommendations for reform

12.27 Parties to a residential property transaction taking place in the open market normally pay their own legal and other costs of carrying out that transaction. Neither party expects to be able to recover any part of those costs from the other party. The price that the parties agree should be paid for the property reflects the fact that both sides will have to meet their own legal costs but not those of the other party. The sum that the purchaser agrees to pay to the seller is higher than he or she would have agreed to pay if also expected to contribute to the seller's costs.

12.28 The valuation of lease extensions and freehold purchases that take place under the existing statutory enfranchisement regime rely on prices agreed in such open market transactions. Those valuations do not therefore take account of the fact that the leaseholder is also expected to pay the landlord's non-litigation costs as part of that statutory regime. A landlord in an enfranchisement transaction therefore receives both a price for the asset that reflects the open market position (that is, that the purchaser does not have to pay the seller's costs) plus his or her reasonably incurred non-litigation costs. The effect is that the landlord is over-compensated for the non-litigation costs that he or she has to incur in order to transfer the interest to the leaseholder.

12.29 If the leaseholder's statutory contribution to the landlord's non-litigation costs were to be removed, the landlord would continue to receive a degree of compensation for the costs that he or she will incur. It is simply that the landlord's non-litigation costs would have already been – as in the case of an open market transaction – factored into the price to be paid. As such, the issue to be considered is not whether the landlord should receive any contribution towards his or her non-litigation costs incurred as a result of a statutory enfranchisement claim but, rather, whether the landlord should receive any compensation in respect of those costs beyond that already included within the price.

12.30 As noted above, many consultees rely upon the compulsory nature of enfranchisement claims to justify the inclusion of a requirement that the leaseholder contributes to the landlord's non-litigation costs.[13] This argument is not based simply on a desire to compensate the landlord in some way for the statutory removal of their right to deal with their property as they wish. It is also based on the potential financial prejudice that might be suffered if a landlord is required to sell when the property market is weak, or when the sale is otherwise inconvenient for his or her broader business interests. Many consultees also point to compulsory purchase orders – where compulsion and compensation for the property owner's costs are both present – as a suitable analogy for enfranchisement claims.

---

[13] See para 12.25 above.

12.31 However, we do not think the fact that a landlord is forced to sell in an enfranchisement claim is sufficient justification for departing from the position adopted in open market transactions (that is, that each party bears its own non-litigation costs). Significantly, the nature of the asset held by the leaseholder is such that his or her decision to obtain a lease extension or the freehold to his or her property is often not as voluntary as in the case of an open market transaction. First, the leaseholder holds a time-limited property interest. If he or she does not obtain a lease extension or acquire the freehold to the property before the lease expires, the leaseholder will have only a limited right to remain living at the property.[14] Second, as the lease shortens, the price to be paid for acquiring a lease extension or the freehold rises. The longer the leaseholder waits before acting, the more expensive obtaining a lease extension or acquiring the freehold is likely to be. Third, while many of these problems may seem remote to those who are happy to remain in occupation of the premises, those who are required by circumstance to move are likely to have to confront these problems in order to obtain a lease extension or the freehold. If they do not, the remaining term of their lease may be too short for prospective purchasers to obtain mortgage finance to fund any purchase. Even without moving, these problems may be confronted if the leaseholder is re-mortgaging the property for any reason, such as to fund renovations or at the end of a fixed-term interest rate agreement. The price that can be obtained from a market of only those purchasers who are not reliant on mortgage finance to buy is likely to be significantly lower. An enfranchising leaseholder is therefore acting with a degree of compulsion that is inherent in the nature of the leasehold interest that he or she holds. Finally, under the current law, while in general the price increases gradually as the lease shortens, the price can also jump significantly when the remaining length of the lease falls below a specific point. Most notably, as soon as a lease has less than 80 years to run, a leaseholder is required to pay the landlord a 50% share of the marriage value.[15]

12.32 We also do not believe that the fact that a leaseholder chose to acquire his or her lease (whether on initial grant, or on assignment from a previous leaseholder) alters the import of the degree of compulsion felt by leaseholders. First, almost all flats and maisonettes are only available on leasehold tenure. Those who cannot afford to purchase a house will have almost no choice but to acquire a leasehold interest. Second, the early 21st century has seen an historically high proportion of new-build houses being offered for sale on long leases rather than freehold.[16] As a result, the option to purchase a property that is not held on a long lease has been available to fewer people.

12.33 We also think that the element of compulsion present in the exercise of enfranchisement rights by a leaseholder affects the way in which the compulsion experienced by a landlord should be viewed. For the most part, landlords are aware of the compulsion operating on the leaseholder, and know that a leaseholder is able to exercise his or her statutory rights at any stage. Indeed, many landlords purchase

---

14 A leaseholder is entitled to the security of tenure offered by sch 10 to the Local Government and Housing Act 1989: an assured tenancy.

15 One of the options for valuation reform we presented in the Valuation Report would lead to the removal of marriage value from the calculation: see Ch 5 of that Report.

16 Competition and Markets Authority, *Leasehold housing – Update report* (February 2020), para 24.

freeholds and other reversionary assets because of the prospect that a leaseholder will decide to seek a lease extension (and pay a price to the landlord for doing so) sooner rather than later.[17]

12.34 It is also notable that the existence of a statutory enfranchisement regime that requires leaseholders to contribute to the landlord's non-litigation costs leads to the grant of lease extensions or the transfer of freeholds on such terms regardless of whether the statutory regime is used, or the landlord is in fact being compelled to do so. Landlords who acquired a reversionary interest in the hope that a lease extension would be sought will be able to negotiate the payment of their non-litigation costs in addition to the price for the lease extension.

12.35 We recommend, therefore, that if leaseholders are to continue to receive a price for a lease extension or freehold that is calculated by reference to the open market value of the landlord's asset, leaseholders should not also be required to make any contribution to their landlord's non-litigation costs.

12.36 We do not, however, think that the above analysis applies if Government decides that leaseholders should pay a price for a lease extension or freehold that is not calculated by reference to the open market value of the landlord's asset. In such circumstances, we could no longer conclude that allowing a landlord to recover a contribution to his or her non-litigation costs would result in overcompensation of the landlord when compared to an open market transaction. The position of the parties in respect of the payment of the legal and other costs of carrying out a residential property transaction in the open market would no longer be a proper starting point for determining the position on enfranchisement. Therefore, our recommendation that leaseholders should not be required to contribute to their landlords' non-litigation costs applies only if the price paid for enfranchisement is based on market value.

12.37 We have also received advice from Catherine Callaghan QC on the compatibility of these recommendations with Article 1 of the First Protocol ECHR ("A1P1").[18] Counsel's view is that A1P1 would be engaged by the removal or imposition of limits on a landlord's existing ability to recover his or her non-litigation costs. However, Counsel considers that, as the current law in effect allows the landlord to recover more than he or she would in an open market transaction, and given the compulsory nature of the enfranchisement transaction, there is little justification for departing from the position in respect of non-litigation costs adopted in the open market.[19] As such, she concludes that:

> … The UK and Strasbourg Courts are likely to conclude that, in a context where the landlord already receives adequate compensation for his or her interest in a

---

17 The price of a freehold or other reversionary interest sold to someone other than an existing leaseholder will take account to the prospect that the leaseholder will seek to obtain a lease extension in the future (often referred to as hope value). An investor is likely to hope, among other things, to gain by holding an asset that increases in value over time (alongside the remainder of the property market), obtaining an income from ground rent, and making a profit on the hope value paid when a leaseholder decides to obtain a lease extension. See the CP, paras 14.67 to 14.70, and paras 2.51 to 2.53 of the Valuation Report.

18 See paras 1.41 to 1.48 of the Valuation Report.

19 See paras 12.27 to 12.29 above.

property, it would strike a fair balance and be proportionate to remove the landlord's ability to recover his or her non-litigation costs from the leaseholder.[20]

However, she notes that this argument is:

> … Less likely to hold if the Government adopts valuation options that clearly depart from an attempt to capture market value.

12.38 In the Consultation Paper, we set out a number of options for reforming the methodology by which lease extensions and freehold acquisitions are valued.[21] The first set of these options were based on simple formulae: for instance, a ground rent multiplier (Option 1A) or a percentage of the property's freehold value (Option 1B).[22] These options would in many cases constitute a significant reduction in premiums compared to most commonly accepted understandings of market value. A second set of options (Options 2A to 2C) were based on the current valuation methodology.[23] These options would reduce enfranchisement premiums while still making use of the valuation components that are currently employed to calculate the market value of the interest being acquired, including reliance on open market valuations. This second set of Options also envisages the possibility of certain rates – deferment rates, capitalisation rates, and relativities - being prescribed. The prescription of rates would remove the contentious issue of identifying the appropriate rates to use, and could be used to set premiums in a manner that is favourable to leaseholders.

12.39 Applying our analysis to the options set out in the Consultation Paper, we consider that leaseholders should continue to contribute to the landlord's non-litigation costs if:

(1) either Option 1A or 1B were adopted, or

(2) Options 2A to 2C were adopted, and capitalisation and/or deferment rates, and/or relativity were prescribed in a manner designed to reduce the premiums payable by a leaseholder below an open market level.

12.40 In reaching this view, we note that Counsel considered that the likely compatibility of any recommendation for the removal or imposition of limits on a landlord's recovery of non-litigation costs with A1P1 should be assessed by applying a sliding scale:

> … The further away the premium for enfranchisement claims is from the market value of the landlord's asset, the more likely it is that non-litigation costs should be recoverable, in order for the overall package of compensation to be regarded as proportionate and compatible with A1P1.

It will, therefore, be necessary for the compatibility of the recommended removal of a landlord's current right to recover his or her non-litigation costs with A1P1 to be

---

20 Counsel assess the risk of a successful challenge to such a policy as Medium Low.

21 See Ch 15 of the CP.

22 See paras 15.41 to 15.57 of the CP.

23 See paras 15.58 to 15.103 of the CP.

assessed at the point that Government has determined how lease extensions and freehold acquisition are to be valued under any reformed regime.

12.41 We consider the basis on which any such contribution should be made at paragraphs 12.57 to 12.111 below.

Exceptions to the general rule

12.42 We have set our primary recommendation that leaseholders should not be required to contribute to their landlord's non-litigation costs in a statutory enfranchisement claim.[24] We do think, however, that there should be two exceptions to this general rule.

Exception 1: low value claims

12.43 As we noted above, several consultees expressed concern about cases in which a landlord's non-litigation costs would be greater than the price paid by the leaseholder. If leaseholders were no longer required to contribute towards the landlord's non-litigation costs in such circumstances, the grant of the lease extension or transfer of a freehold to the leaseholder would end up costing the landlord money. These situations are problematic, as one of the assumptions we make in the general argument against requiring a contribution towards non-litigation costs is that the price paid for enfranchisement reflects the landlord's transaction costs. Where the premium is lower than these costs, this is not a realistic assumption.

12.44 A landlord who thinks that carrying out an enfranchisement transaction will lead to him or her losing money is more likely to fail to cooperate with the claim. For example, landlords may simply omit to instruct lawyers and valuation professionals. Or a landlord might transfer the low value freehold into the name of a shell company, liquidate the company, allowing the lease to become *bona vacantia* and pass to the Crown.[25] The leaseholder would then have to pay to enfranchise against the Treasury Solicitor. This might cause the leaseholder to incur greater costs than those involved in a regular enfranchisement claim.

12.45 We acknowledge the concerns raised in connection with low value claims and agree that it would be inappropriate for landlords to be left without any contribution to their non-litigation costs if the effect was to require the landlord to spend more in carrying out the transaction than he or she received for the asset.

12.46 We do not, however, think that it would be appropriate to allow a landlord to recover all his or her reasonably incurred non-litigation costs from the leaseholder whenever the price to be paid fell below a particular level. Nor do we consider that a fixed sum contribution should become payable whenever the price to be paid was below a set level. To do either would likely generate substantial argument between leaseholders and landlords (with the associated costs and delay) where the proper price was around the level at which the landlord's costs, or a fixed contribution to those costs, would become payable. Landlords might even argue for a price below any threshold in

---

24 See para 12.35 above.

25 "Bona vacantia" refers to the process by which property that is deemed to be ownerless passes to the Crown. For a fuller explanation, see: https://www.gov.uk/government/organisations/bona-vacantia.

order to obtain a contribution to their costs, knowing that, in many cases, a leaseholder would consider it better to pay that price and contribution rather than spend money arguing the point.[26]

12.47 We therefore think that it would be appropriate to provide that if the premium payable to a landlord in respect of a lease extension or freehold is below a prescribed sum and the landlord's non-litigation costs are higher than the premium payable, the leaseholder will be required to pay to the landlord the lower of the prescribed sum and the landlord's non-litigation costs. The amount by which that sum exceeded the premium payable would be the leaseholder's contribution to the landlord's non-litigation costs. We demonstrate the effect of this approach in the following examples. The examples use a prescribed sum of £1,000 for illustration only; the prescribed sum would be for Government to set.

Examples: leaseholder's payment to landlord in a low-value claim (where there is to be a contribution to landlord's non-litigation costs)

Contribution threshold (prescribed sum): £1,000 (illustrative)

Where landlord's non-litigation costs (C) exceed premium (PR), leaseholder pays landlord lower of (1) the prescribed sum (PS), and (2) the landlord's non-litigation costs (C).

Example (1):

Premium (PR) payable by leaseholder to acquire freehold: £850 (that is, less than PS)

Landlord's reasonably incurred non-litigation costs (C): £750 (that is, less than PR)

Leaseholder pays £850

No contribution to landlord's non-litigation costs required as C not greater than PR.

Example (2):

Premium (PR) payable by leaseholder to acquire freehold: £650 (that is, less than PS)

Landlord's reasonably incurred non-litigation costs (C): £750 (that is, more than PR)

Leaseholder pays £750 (that is, lower of PS and C)

[26] Leaseholders might also argue for a higher premium in order to avoid having to pay any contribution to the landlord's non-litigation costs. But the costs of running that argument might be a disincentive for a weaker party.

Contribution to landlord's non-litigation costs: £100 (that is, total less PR)

Example (3):

Premium (PR) payable by leaseholder to acquire freehold: £150 (that is, less than PS)

Landlord's reasonably incurred non-litigation costs (C): £750 (that is, more than PR)

Leaseholder pays £750 (that is, lower of PS and C)

Contribution to landlord's non-litigation costs: £600 (that is, total less PR)

Example (4):

Premium (PR) payable by leaseholder to acquire freehold: £450 (that is, less than PS)

Landlord's reasonably incurred non-litigation costs (C): £1,250 (that is, more than PR)

Leaseholder pays £1,000 (that is, lower of PS and C)

Contribution to landlord's non-litigation costs: £550 (that is, total less PR)

12.48 We accept that this recommendation creates room for the parties to spend time and money arguing about the proper level of the landlord's reasonably incurred non-litigation costs where the amount in dispute would be recoverable by the landlord under this proposal. Again, the risk is that leaseholders would not be able to afford to challenge a claim by a landlord for the prescribed sum (as a combination of price and non-litigation costs) As a result, the prescribed sum would in effect become the minimum sum payable to enfranchise. For this reason, it will be important for the prescribed sum to be set at a level that acknowledges that landlords can face non-litigation costs that exceed any premium payable in low value claims, but also recognises that leaseholders may find it difficult to challenge a claim to the prescribed sum if made.

Exception 2: additional costs resulting from elections made by leaseholders

12.49 We think that there should be a further exception to the general rule that would apply where a leaseholder makes a choice that, while having the benefit of reducing the price that would otherwise be payable to the landlord, also has the effect of requiring the landlord to incur additional non-litigation costs. In those cases, the leaseholders should be required to contribute to the additional costs incurred by the landlord as a result of the leaseholder's election. For example, we think that where leaseholders making a collective freehold acquisition claim have elected to require the landlord to take leasebacks of some parts of the premises, the leaseholders should be required to contribute to the landlord's non-litigation costs of putting such leasebacks in place. We

believe that if such elements were negotiated as part of a purchase of the freehold, the seller would likely seek to recover these additional costs from the purchaser, or seek to increase the price otherwise payable by the purchaser to reflect these additional costs. The normal expectations of the parties to a transaction in the open market that did not include these elements would not apply. We also think that it is right that the leaseholders should contribute to these additional costs as a matter of principle: by requiring the landlord to take one or more leasebacks, the leaseholder has (often, substantially) reduced the price that they will be required to pay to acquire the freehold, but caused the landlord to meet further expense.

12.50 We do, however, for the reasons set out below, consider that the landlord should be limited to recovering a fixed contribution to his or her non-litigation costs when such an election has been made.[27]

Non-litigation costs arising from right to manage claims

12.51 Our recommendations mean that if leaseholders have to pay a market-value based price for a lease extension or freehold they will not normally also be required to pay anything towards their landlord's non-litigation costs.[28] However, leaseholders would have to make a fixed contribution towards those costs if the price they have to pay for a lease extension or transfer of the freehold is not market-value based. In the RTM Report, we recommend that the RTM company should not be required to contribute to the landlord's non-litigation costs when acquiring the right to manage. We think that this difference of approach between our policy on non-litigation costs for acquisition of the right to manage and enfranchisement is justified for the reasons set out below.

12.52 Our approach in enfranchisement takes account of the price that a landlord receives in return for the lease extension or transfer of the freehold. It recognises that if a market-value based price is to be paid for a lease extension or freehold acquisition, that price will reflect the value of property transactions carried out in the open market. As the parties to open market transactions expect to pay their own non-litigation costs, the price that is agreed is normally higher than would have been the case if the purchaser had also been required to pay the seller's costs as well as their own. Therefore, requiring an enfranchising leaseholder to contribute to the landlord's non-litigation costs as well as pay a market-value based price for the lease extension or freehold would over-compensate the landlord. Such over-compensation would not, however, arise if the price to be paid by the leaseholder were set below the open market level. These arguments do not apply when exercising the right to manage, which is acquired from the landlord without any payment being made to the landlord for the loss of that right.

12.53 While leaseholders are required to pay a premium in order to enfranchise, they acquire a valuable property interest in return – and the leaseholders' property interests are worth more than before enfranchisement took place. Equally, as set out above, the landlord receives a premium in return for transferring its interest in the building or, for a lease extension, delaying the point at which it becomes entitled to the reversion on expiry of the relevant lease and reducing its entitlement to ground rent. We think

---

27 See paras 12.94 to 12.101 below.

28 See para 12.56.

that while the compulsory nature of enfranchisement does not justify a landlord recovering a greater contribution towards its costs than it would in the open market, it remains reasonable for the landlord to recover some contribution to the costs of granting a lease extension or transferring a freehold. That contribution could take the form of a market-value based premium (as discussed above), or a fixed contribution where the premium is not market-value based. In contrast, the transfer of the right to manage a building does not involve the transfer of a valuable asset, but rather the responsibility for managing a building.

12.54 In addition, in many enfranchisement claims, any contribution to be made by the leaseholder to the landlord's non-litigation costs will be substantially outweighed by the value of the asset acquired by the leaseholder. In contrast, any costs that an RTM company is required to pay towards the landlord's non-litigation costs will not be balanced by the value of any asset acquired.

12.55 For human rights purposes, the acquisition of the landlord's interest in a building is considered a deprivation of property under A1P1 whereas the acquisition of the right to manage a building is considered a control of the landlord's use of property only. As a result, a landlord in an enfranchisement claim must receive adequate compensation for the loss of its interest in the building. For this purpose, the premium payable on enfranchisement, together with non-litigation costs, form the compensation 'package' payable to the landlord. In contrast, there is no requirement that a landlord who loses his or her control over the management of a building as a result of a right to manage claim must receive adequate compensation for the loss of that right.

Recommendation 84.

12.56 We recommend that:

(1) if Government adopts a valuation methodology that seeks to reflect open market value for the property being acquired by a leaseholder:

(a) the general rule should be that the leaseholder is not required to make any contribution to his or her landlord's non-litigation costs;

(b) the general rule should not apply where the price payable by the leaseholder is below a prescribed sum; in such a case, the leaseholder should be required to contribute to the landlord's reasonably incurred non-litigation costs so that the total received by the landlord is not less than the landlord's non-litigation costs or the prescribed sum (whichever is the lower);

(c) the general rule should also not apply where a landlord incurs additional non-litigation costs as a result of an election made by the leaseholder that also has the effect of reducing the price payable by the leaseholder to the landlord; in such a case, the leaseholder should be required to make a fixed sum contribution in respect of the landlord's additional costs; and

(2) if Government does not adopt a valuation methodology that seeks to reflect open market value for the property being acquired by a leaseholder, the leaseholder should continue to contribute to the landlord's non-litigation costs.

CALCULATING ANY CONTRIBUTION TO BE MADE

12.57 If Government does not adopt a valuation methodology that seeks to reflect open market value for the property being acquired by the leaseholder, we believe that leaseholders should continue to contribute to their landlord's non-litigation costs. In this section we set out how we think any such contribution should be calculated.

12.58 In the Consultation Paper, we asked consultees for their views as to how any contribution that leaseholders will be required to make to landlords' non-litigation costs should be calculated. We set out a range of possibilities for how this might be done.[29] The options we identified were as follows:

(1) fixed costs;

(2) capped costs;

(3) fixed costs subject to a cap on the total costs payable;

(4) relating the non-litigation costs to the price paid for the interest in land acquired by the leaseholder;

(5) linking the non-litigation costs to the landlord's response to the Claim Notice, and/or whether the landlord succeeds in relation to any points raised in his or her Response Notice;

(6) reducing the categories of recoverable costs from those currently set out in the 1967 and 1993 Acts;

(7) using the same categories of recoverable costs set out in the 1967 and 1993 Acts, but with a reformed assessment procedure; or

(8) expanding the categories of recoverable costs from those currently set out in the 1967 and 1993 Acts.

12.59 We also invited consultees' views on a number of issues relating to the adoption of a fixed costs regime.[30] These were:

(1) whether such a regime should apply to collective freehold acquisition claims as well as individual enfranchisement claims; and

---

29 See CP, Consultation Question 99, paras 13.56 to 13.80.

30 See CP, para 13.90.

(2) if a fixed costs regime were to apply to collective freehold acquisition claims:

(a) what additional features of any such claim might justify the recovery of additional sums; and

(b) whether landlords should be able to recover all of their reasonably incurred costs in respect of those additional features (subject to assessment), or only further fixed sums.

12.60 Finally, we proposed that:

(1) no additional costs should be recoverable in the case of split freeholds or other reversions, or where there are intermediate landlords; and

(2) a small additional sum should be recoverable where a management company seeks advice in relation to an enfranchisement claim.[31]

12.61 We set out below the view of consultees and our recommendations for reform. First, we look at the basis on which any contribution towards the landlord's non-litigation costs should be calculated. Second, we consider how a fixed-cost regime would apply to collective freehold acquisition claims. Finally, we address the issue of split freeholds, intermediate landlords, and third-party management companies.

Consultees' views: the basis for calculating a leaseholder's contribution

12.62 A large number of consultees responded to this consultation question. We set out below the views of consultees as to each of the means of calculating any contribution to a landlord's non-litigation costs as set out above, and as to the application of any fixed costs regime to collective freehold acquisition claims.

Fixed costs

12.63 The vast majority of leaseholders, and groups representing leaseholders, considered that if leaseholders were to be required to contribute towards their landlord's non-litigation costs, then that contribution should be fixed. In contrast, freeholders and professionals, and their respective representative groups, were against the adoption of a fixed costs regime.

12.64 The majority of leaseholders who expressed their support for fixed costs contributions highlighted the problems with the current law that we had identified in the Consultation Paper.[32] Many leaseholders told us that the difficulty in predicting the amount that they were likely to be required to pay towards their landlord's non-litigation costs had deterred them from exercising their enfranchisement rights. Other leaseholders, who had completed enfranchisement claims, felt that the non-litigation costs they had been required to pay were excessive. Some consultees also believed that these factors allow better-resourced landlords to use leaseholders' liability to pay landlords' non-litigation costs as leverage in negotiations about the price to be paid for a lease extension or freehold. Many consultees also considered that the expense of challenging a landlord's claim for non-litigation costs in the Tribunal dissuades many

---

31 See CP, para 13.91.

32 See paras 12.7 to 12.11 above.

leaseholders from doing so. This is said to encourage some landlords to claim higher non-litigation costs that the Tribunal is unlikely to consider reasonable. The adoption of a fixed costs regime was seen by many consultees as helping to address these problems.

12.65 Some consultees expressed an additional concern that any current limitation on the recoverability of non-litigation costs can be circumvented by a landlord offering to settle a claim at a specified price so long as all the landlord's non-litigation costs are paid. Such offers are expressed as being without prejudice, and therefore cannot be relied on by leaseholders seeking to show that the landlord has behaved unreasonably. As a result, a leaseholder can face the choice between accepting an offer that enables the landlord to recover more of his non-litigation costs than the Tribunal would be likely to allow, and rejecting the offer in the knowledge that his or her own irrecoverable legal costs will likely increase thereafter.

12.66 Many of those consultees who objected to fixing leaseholders' contributions to their landlords' non-litigation costs considered that fixed costs would not adequately reflect the diversity of transactions and the varying levels of costs incurred. Wallace LLP, solicitors, made the following comments:

> A fixed costs regime should not be introduced. Enfranchisement is a complex area where each case is case specific and no two cases are the same with complex issues often to investigate and resolve and issues such as breaches of lease to also resolve. Enfranchisement is a hybrid between litigious and non litigious and as such fixed costs would not fairly deal with the wide spectrum of fees incurred from those which are straightforward and uncontested to those which have several issues or complex title problems and are contested.

Mark Chick, a solicitor, described any fixed costs regime as "commercially unrealistic". Other consultees expressed concerns that if they were unable to recover at least their reasonable non-litigation costs, landlords would be forced to settle cases at premiums that were less than was reasonable or fair.

12.67 A number of consultees considered that fixed costs could only be appropriate in straightforward cases. For example, Stewart Gray considered that lease extensions in respect of existing leases with more than 80 years left to run could be suitable cases for the application of fixed costs. And Damian Greenish considered that fixed costs might be appropriate for small, straightforward claims outside London.

12.68 In a similar vein, other consultees considered that a fixed costs regime might be introduced if it were sufficiently flexible to take into account the complexity of the claim. For example, Grosvenor, a commercial freeholder, expressed support for the adoption of a scale of recoverable non-litigation costs, provided the scale reflected the relative complexity of claims. And a number of consultees proposed factors that they considered would need to be reflected in the sums recoverable in any fixed scheme. For example, the Law Society considered that fixed costs would need to vary between different regions of the country, while others considered that the value of the property would be relevant.

Capped costs

12.69 On the whole, the position adopted by consultees in respect of capped costs reflected their position in respect of fixed costs. However, a few consultees who had opposed fixed costs supported capped costs on the basis that it would provide greater certainty for leaseholders, while avoiding the inflexibility of fixed costs.

12.70 Other consultees expressed conditional or partial support for a cap. Two consultees suggested that a cap could be adopted provided that it increased with inflation. And Cadogan, a landlord, considered that a cap might be appropriate for some low value claims, provided the conduct of the leaseholder or their representatives did not lead the landlord to incur higher costs.

12.71 A range of suggestions were made as to how any cap might work. For example, the City of London Corporation considered that the cap should be linked to either the value of the property, or the price to be paid by the leaseholder.[33] And Anthony Shamash, a landlord, considered that a cap should be applied to each of the categories of non-litigation costs recoverable under the 1967 and 1993 Acts.

12.72 Many of those consultees opposed to a cap raised doubts about how any cap would be set, and whether a cap could be set that would be appropriate to the whole range of enfranchisement claims.

Fixed costs subject to a cap

12.73 This option attracted a similar level of support from leaseholders, and opposition from freeholders and professionals, as the option of a fixed costs regime. However, one developer, Berkeley Group Holdings PLC, expressed its support for this option on the basis that it would "allow a degree of variation, reflecting the level of costs that landlords are likely to incur in respect of different types of enfranchisement claims".

Relating the costs to the price paid for the interested acquired

12.74 Linking a leaseholder's contribution to a landlord's non-litigation costs attracted the support of a number of surveyors, and other professionals. Some consultees, however, limited their support to lower value claims, believing that a more sophisticated and generous costs recovery regime would be required for higher value claims.

12.75 However, many consultees, including a number of groups representing professionals, opposed any link between a contribution and the price to be paid by the leaseholder for the asset claimed. For example, the Law Society considered that the proposal would produce unreasonable results in respect of both low and high value claims. Other consultees proposed that this option would only be workable if combined with other factors, such as the location of the property.

---

[33] The City of London Corporation also noted that a minimum sum would need to be allowed to accommodate low value claims. Our proposals in respect of the recovery of a landlord's non-litigation costs in low value claims are set out at para 12.56.

Linking costs to the landlord's response to the claim

12.76 This option attracted limited support. Of those in favour, the Leasehold Forum, a body representing surveyors, noted that preventing leaseholders from incurring costs as a result of landlords pursuing unsuccessful points would "appear to be fair".

12.77 Other consultees were critical about this option. A few consultees considered that, short of unreasonable conduct, a landlord should be entitled to put forward his or her best case without fear of suffering a penalty on costs. And Damian Greenish noted that such a penalty would only be fair if a similar penalty were applied to delays caused, or bad points raised, by leaseholders. A few consultees queried how we proposed to define "success" on a point raised in the Response Notice. Another consultee, Hamlins LLP, solicitors, noted that, as most cases do not actually reach the stage of being heard by the Tribunal, this option would prove to be impracticable in the majority of claims.

Reducing the categories of recoverable costs

12.78 There were relatively few responses that referred to this option, and those which did were uniformly negative. One commercial freeholder, Consensus Business Group, thought this option would further reduce the proportion of a landlord's non-litigation costs that are recoverable from leaseholders. The Law Society warned that reductions in recoverable costs would lead to a greater pressure on the competitiveness of pricing for professional advisers and a subsequent decline in the standards of professional advice. There were no responses from leaseholders indicating support for this option.

Preserving the existing categories of recoverable costs with a reformed assessment process

12.79 Several consultees made suggestions as to how the assessment process might be reformed. A few consultees argued that there should be more detailed guidance provided to help leaseholders distinguish between costs that are likely to be recoverable and those that are not. Another suggested that the reasonableness of claimed costs should be decided by a simpler method, for example, by expert determination, or on the papers.

Expanding the categories of recoverable non-litigation costs

12.80 Several consultees who supported this option argued that the existing categories do not currently allow landlords to recover all of their non-litigation costs. These consultees cited certain categories of costs that ought to be recoverable in addition to the existing heads of recovery.

Recommendation for reform: the basis for calculating any contribution

12.81 Any obligation on a leaseholder to pay all of his or her landlord's reasonably incurred non-litigation costs would leave in place two of the central problems with the current law. Leaseholders would continue to find it difficult to work out how much they are likely to have to pay before deciding to bring a claim. And if the parties were not able to agree the amount of non-litigation costs that should be paid, further time and money would need to be spent on resolving that dispute.

12.82 We have considered whether reforming any right for a landlord to recover his or her reasonably incurred non-litigation costs would resolve or substantially reduce these problems. First, reducing the categories of non-litigation costs that could be recovered would likely lower the amount of those costs that leaseholders would have to pay. But we think it doubtful that any such reduction would have a significant impact on the difficulties of predicting the amount of costs that are likely to have to be paid, or of resolving any disputes that remain.[34] Second, reforming the process for resolving disputes about the amount of the leaseholder's contribution to the landlord's non-litigation costs would likely reduce the costs of any such disputes. But we think such reforms are unlikely to make the level of those assessed costs significantly more predictable. And it seems likely that the leaseholder's costs of resolving the dispute would, in many cases, continue to be disproportionate to the sums in dispute. Leaseholders would continue to be discouraged from raising challenges to sums claimed. And some landlords would continue to feel able to inflate claims for non-litigation costs knowing that a challenge was unlikely. Third, a cap on recoverable costs is, on its own, unlikely to resolve the difficulties identified above. Where costs are incurred (or the leaseholder argues that the costs should only have been incurred) below the level of the cap, arguments about the reasonableness of recovery would continue. Of course, the likelihood of a dispute arising about the level of non-litigation costs claimed by a landlord would depend on the level of any cap. Setting the cap at a lower level would reduce the number of disputes. But the primary purpose of any cap is to define the maximum sum that a leaseholder should be required to contribute to a landlord's non-litigation costs, rather than to minimise the number of disputes. And if the cap is set too low, it would begin to take on the characteristics of a fixed sum rather than a cap.

12.83 We do not think, therefore, that if a leaseholder is required to contribute to his or her landlord's non-litigation costs, that the obligation to do so should extend to all of the landlord's reasonably incurred non-litigation costs. As a result, an entirely new basis for calculating the contribution that a leaseholder would be required to make to their landlord's non-litigation costs is required.

12.84 Requiring a leaseholder to pay a set percentage of the price for the claimed lease extension or freehold as a contribution towards his or her landlord's non-litigation costs would have the benefit of simplicity. And the percentage could be set at a level that many leaseholders would consider worth paying as part of the (overall) "price" of acquiring the interest claimed. But finding a percentage that would also produce a figure that had a sensible relationship with the non-litigation costs in fact incurred by a landlord in any individual case would be much more difficult. We understand from practitioners that in other areas – for example, in probate – costs are no longer calculated by reference to financial benefit of the outcome of the work, but instead with reference to the time taken to carry out the work.

12.85 Linking the recovery of non-litigation costs to the landlord's approach to his or her leaseholder's claim is likely to be problematic. Identifying the points that had been

---

[34] We also accept that the option of widening the categories of non-litigation costs that might be recovered would likely exacerbate the problem for leaseholders. It would also produce results that are likely to be inconsistent with the objectives of reform set out in our Terms of Reference: that is, "reducing or removing the requirements for leaseholders…to pay their landlord's costs of enfranchisement".

unsuccessfully argued by a landlord and which had led to an increase in non-litigation (rather than litigation) costs may be difficult, and give rise to satellite litigation. We also agree that landlords should not be impeded from putting their best case forward when defending their interests.

12.86 In our view, the adoption of a fixed costs regime is by far the best means of calculating the contribution that a leaseholder should make to his or her landlord's non-litigation costs. Fixing the sums to be paid would remove any need for a process for assessing costs, saving the parties both time and money. A fixed costs regime would also allow leaseholders to identify the amount that they would be required to pay towards their landlord's non-litigation costs before embarking on a claim. And a leaseholder's liability for his or her landlord's non-litigation costs would no longer be able to be used by landlords as leverage in negotiations on the price of the lease extension or freehold.

12.87 We acknowledge that in any fixed costs regime there is a balance to be struck between reflecting the different circumstances that can lead to higher or lower non-litigation costs being incurred by landlords and creating a straightforward, predictable system for leaseholders to use. Greater complexity would reduce the risk of under- or over-compensating landlords but would also diminish a leaseholder's ability to predict his or her liability for non-litigation costs. At its extremes, greater complexity might also lead to satellite litigation about whether an element of a more complex system properly applies to a particular case. On the other hand, the simpler the regime the more likely it is that the contribution will fail to reflect the actual level of non-litigation costs incurred by a landlord. Nevertheless, we think that it is possible to devise a fixed costs regime that recognises that the non-litigation costs properly incurred by landlords will not be the same in every enfranchisement claim while at the same time preserving the benefits of predictability and certainty for leaseholders.

12.88 We note that many consultees considered that the amount of fixed costs would need to vary according to the location of the premises and/or the professionals instructed to deal with the claim. We accept that professional charges vary across the country, and can be substantially higher in London, for example, than elsewhere. However, we do not believe that the location of either the premises or the professionals instructed should affect the fixed rates that are recoverable from leaseholders. Landlords with premises in more expensive areas of the country are able to instruct professionals in cheaper areas of the country if they wish to do so. If they choose not to do so, it is difficult to see why the higher costs should be recoverable from leaseholders.

12.89 Finally, we note that Counsel concluded that were a contribution towards a landlord's non-litigation costs to be required in order to be compatible with A1P1, our proposed fixed costs regime would likely be considered to be compatible with A1P1.[35]

[35] Counsel assessed the risk of a successful challenge to such a policy as Medium Low.

Consultees' views: collective freehold acquisitions and fixed costs

12.90 Many consultees believed that any fixed costs regime should also apply to collective freehold acquisitions. While this view was most strongly expressed by leaseholders, it was also shared by a number of legal and valuation professionals.[36]

12.91 There were, however, several consultees who expressed strong opposition to the idea that individual claims and collective claims could be treated in the same way. Most individual claims were relatively straightforward; but collective claims could be significantly more complex. Damian Greenish commented that:

> To compare a collective claim of a block of say 40 (or more) flats in [Prime Central London] with an individual freehold claim is to compare apples with pears; they are completely different. Any costs regime needs to reflect that.

12.92 Some consultees offered examples of the additional elements that can arise in a collective enfranchisement that might lead to additional non-litigation costs being incurred by the landlord. All of the following were suggested: non-qualifying units; leasebacks; additional freehold land; rights over other property; intermediate interests; additional types of unit to be valued; surrounding land to be retained by the landlord; development leases; common parts leases; rentcharges; mortgages; restrictions on title; shared ownership leaseholders; service charge or ground rent arrears; additional leaseholders; management companies; rights to be preserved over land to be retained by the landlord; issues relating to the validity of claims; short leases; and the unreasonable conduct of the leaseholders.

12.93 Several consultees, principally commercial freeholders, but also a few legal and valuation professionals, proposed that where these additional elements are present, a landlord should be able to recover any non-litigation costs reasonably incurred as a result. The Wellcome Trust, a charity landlord, noted that:

> It will be very difficult to identify what a suitable fixed cost level should be in respect of every potential additional feature and any reforms to the existing costs regime should build in flexibility to allow recoverability of reasonable costs for each feature in the claim.

Discussion and recommendation for reform: collective freehold acquisitions and fixed costs

12.94 We have set out above the advantages of a fixed costs regime. We have also acknowledged that any such regime would need to strike a balance between reflecting the level of non-litigation costs likely to be incurred by a landlord in dealing with an enfranchisement claim, and providing the predictability and certainty that leaseholders wish for.[37]

12.95 Although our consultation question asked about additional features present in collective freehold acquisition claims that could lead to an increase in the landlord's

---

[36] For example, the Property Litigation Association, and John Stephenson, a solicitor. Other consultees, who had opposed the principle of fixed costs also believed that, if adopted, it should apply equally to collective freehold acquisitions.

[37] See paras 12.86 to 12.89 above.

non-litigation costs, it is clear from the responses of consultees that some of those additional features can also arise in other types of claim. However, we think that the level of non-litigation costs reasonably incurred in lease extension and individual freehold acquisition claims generally falls within a narrower range than in collective freehold acquisition claims. It is therefore significantly easier for a single fixed sum reasonably to reflect that range in lease extension and individual freehold acquisition claims than it is in collective claims. We also consider that the additional work that can arise in lease extension and individual freehold acquisition claims is unlikely to merit the payment of an additional sum by leaseholders.[38]

12.96 We do not, however, consider that the wider range of likely non-litigation costs in collective freehold acquisition claims would make such claims unsuitable for inclusion within any fixed costs regime. We think that any fixed costs regime should allow for additional sums to be paid by the leaseholders in respect of the landlord's non-litigation costs of such a claim where specified extra work has taken place. However, for the reasons set out below, we do not think that each and every feature of a collective freehold acquisition claim that is likely to increase a landlord's non-litigation costs should be reflected in the costs payable by the leaseholder.[39] While this approach would lead to a more complex fixed costs regime for collective freehold acquisition claims, we believe that any complexity would be outweighed by the benefits of a fixed costs regime.

Features justifying the recovery of additional non-litigation costs

12.97 We do not think that all the elements of a collective freehold acquisition claim that consultees identified as increasing a landlord's non-litigation costs should be reflected within a fixed costs regime. First, the benefits of a fixed costs regime will reduce as the number and effect of any permitted adjustments increase. Second, we do not think that all the elements identified by consultees should lead to an increase in the amount of the landlord's non-litigation costs that a leaseholder will be required to pay.

12.98 We believe that it is possible to distinguish those additional elements that would justify an additional contribution by the leaseholders to their landlord's non-litigation costs. We do not propose to classify at this stage each of the additional elements as either justifying or not justifying additional recovery by the landlord. Instead, we have set out below the principles on which any such classification should be based. In particular:

(1) Additional non-litigation costs incurred by a landlord *should* be reflected in the contribution towards those costs made by the leaseholder where those additional costs are the result of:

(a) an integral element of the leaseholders' enfranchisement claim. For example, where a collective freehold acquisition claim includes more than one type of residential unit, requiring different valuations for each;

(b) an election made by the leaseholders. For example, requiring the landlord to take leasebacks of non-participating or non-qualifying units; or

---

38 See para 12.98(2) below.

39 See para 12.97 below.

(c) a point raised by the leaseholders for their own benefit (whether financial or otherwise). For example, a point relating to rights a leaseholder or leaseholders might be seeking over land retained by the landlord.

(2) Additional non-litigation costs incurred by a landlord *should not* be reflected in the contribution towards those costs made by the leaseholder where those costs are the result of:

(a) any complexities within the building, or the arrangement of superior interests. For example, the existence of intermediate leases, or where development or common parts leases have been granted; or

(b) an election made by the landlord. For example, choosing to take leasebacks of non-qualifying units, or because of a point raised by the landlord for its own benefit (such as the drafting of easements or restrictive covenants which benefit landlord's neighbouring land).

How should any additional costs be calculated?

12.99 A number of consultees thought landlords should be able to recover all their reasonably incurred costs that relate to the additional elements. Those costs would then be added to any fixed sum payable in respect of the claim itself. However, we think that the creation of such a hybrid system would retain many of the disadvantages of the current non-litigation costs regime established by the 1967 and 1993 Acts.[40]

12.100 The alternative would be to allow a further fixed sum to be recovered in respect of each additional element. We accept that this approach does raise the same concerns of over- or under-compensation as arise on fixing a single sum for an entire claim. However, we believe the virtues of simplicity and predictability for enfranchising leaseholders merit the risk of inaccurate compensation in some cases. This conclusion is consistent with the requirement in our Terms of Reference that enfranchisement should be made easier, quicker and more cost effective, including by reducing the legal costs connected to the exercise of enfranchisement rights.

The use of a cap within a fixed costs regime

12.101 We think that, in principle, if a fixed costs regime is to be made up of a base fixed cost together with additional sums in respect of certain additional work, there may be a need to introduce a cap on the total amount of non-litigation costs recoverable in respect of any particular element and/or the total payable. This is to ensure that any fixed costs regime does not produce a total sum that exceeds the reasonable costs likely to be incurred by the landlord in carrying out the work required. In the enfranchisement context, we want to ensure that any fixed costs broadly capture a sum that would be reasonable for the landlord to spend if it were his or her own money. As various consultees identified (and as set out at paragraph 12.92 above, additional fixed sums might be recoverable in respect of a collective freehold acquisition claim – for example, where the landlord elects to take a leaseback of part of the premises. A cap might be needed in this context to ensure that the recovery of a

[40] The disadvantages are highlighted at paras 12.7 to 12.11 above.

number of additional sums does not produce a total sum that is unreasonable. This position can be distinguished from a lease extension claim and an individual freehold acquisition claim, as we believe that the landlord's non-litigation costs can be captured by a base fixed cost.

Consultees' views and recommendations for reform: split reversions, intermediate leases, and management companies

12.102 A number of consultees told us that split reversions can result in complexity in enfranchisement claims, and were therefore in favour of some level of additional costs recovery. The Wallace Partnership Group, a landlord, said split freehold structures that were in place at the point of purchase should have been brought to the attention of the leaseholder. They therefore said that it was reasonable for costs to be recoverable for work resulting from that added complexity. By contrast, the Leasehold Forum said that duplicated work resulting from split freeholds or reversions should not result in the recovery by landlords of additional costs. Christopher Jessel, a solicitor, said that landlords who had deliberately split the reversion to make exercising enfranchisement rights more difficult should be penalised. On the other hand, he suggested that "associated costs should be recoverable" where the split reversion resulted from a "fair and reasonable transaction".

12.103 In respect of intermediate leases, a notable number of consultees asserted that the increased complexity of enfranchisement claims featuring intermediate leases meant that competent landlords should be permitted to recover their additional costs as a result. Consensus Business Group, a landlord, stated that:

> Issues relating to intermediate landlords and management companies can be complex and time consuming to deal with, addressing important issues such as management obligations and other covenants necessary for the ongoing management of complex estates.

12.104 Many of these consultees stated that the value of intermediate leases may often be much higher than the freehold reversion. Without such a contribution, intermediate landlords would be less able to protect their property interests in the course of the enfranchisement process.

12.105 There was widespread support among consultees for landlords to be able to recover a small sum where a management company has had to seek advice in connection with an enfranchisement claim. A few consultees, such as Julian Briant, a surveyor, suggested that the sum capable of recovery should depend on the complexity of issue on which advice was sought. Jo Darbyshire, a leaseholder, expressed concern that the frequent ownership of management companies by landlords would lead to the use of such a costs recovery mechanism to bypass any general rule that sought to limit the recovery of non-litigation costs from leaseholders.

12.106 We set out above our view that additional non-litigation costs incurred as a result of the existence of an intermediate lease would not justify the recovery of additional non-litigation costs from a leaseholder.[41] For the same reasons, we do not believe that a

[41] See paras 12.97 to 12.98 above.

leaseholder should be expected to contribute towards any non-litigation costs incurred by an intermediate landlord during the course of a claim.

12.107 We acknowledge, however, that a competent landlord may incur non-litigation costs dealing with a claim in which the bulk of any premium paid will be due to an intermediate landlord rather than to the competent landlord. And while the intermediate landlord is entitled to seek to take over the defence to the claim, if the intermediate landlord does not wish to do so, the competent landlord will remain under a duty of care to the intermediate landlord in dealing with the claim. In those circumstances, we think that it is right that the competent landlord should be able to recover from the intermediate landlord a contribution towards the non-litigation costs.[42]

12.108 We remain of the view that a management company who is party to the lease should be able to recover a small additional sum from the leaseholders to reflect the costs that it has incurred in dealing with the claim. Such a sum should only be recoverable where the management company had genuinely and reasonably incurred costs in dealing with the claim. It should not be recoverable solely on the basis that the management company is party to the relevant lease. We note that the amount recoverable would need to be set carefully to ensure that leaseholder-controlled management companies, which often have no financial resources of their own, are able to recover costs reasonably incurred.

Recommendation 85.

12.109 We recommend that if leaseholders are required to contribute to their landlord's non-litigation costs the contribution should be a sum determined in accordance with a fixed costs regime.

12.110 We recommend that the fixed costs regime:

(1) should apply to all types of enfranchisement claim;

(2) should allow a landlord to recover:

(a) a prescribed base sum in respect of an enfranchisement claim; and

(b) (in a collective freehold acquisition claim) prescribed further sums in respect of any costs incurred by the landlord in respect of each prescribed additional element that properly features in the claim; and

(3) (in a collective freehold acquisition claim) should be subject to a cap, to be applied in respect of any further sums and/or the total sum to be paid by a leaseholder.

[42] The contribution to be made by an intermediate landlord is such circumstances is considered at paras 13.42 to 13.45 below.

12.111 We recommend that no additional costs should be recoverable in the case of split freeholds or other reversions, or where there are intermediate landlords. However, a small additional sum should be recoverable where a third-party management company seeks advice in relation to an enfranchisement claim.

CLAIMS THAT DO NOT REACH COMPLETION

12.112 Sometimes an enfranchisement claim will fail or will be struck out by the Tribunal. In other cases, a claim will be withdrawn by the leaseholder before it is completed. Under the current law, any of these events will leave the leaseholder having to pay his or her landlord's reasonably incurred non-litigation costs.

12.113 In the Consultation Paper, we proposed that, in each of these three circumstances, leaseholders should be liable to pay a percentage of the fixed non-litigation costs that would have been payable had the claim completed. We then proposed that the percentage of the fixed non-litigation costs that would be payable should vary depending on the stage that the claimed had reached. We asked consultees whether they agreed with these proposals and invited their views on the percentages that ought to apply at particular stages of the claim.[43]

Consultees' views

Should a leaseholder contribute to a landlord's non-litigation costs where the claim does not proceed?

12.114 A little more than a third of consultees who responded to the first part of this consultation question supported our provisional proposal, while just under half of those consultees were opposed to it. However, it is clear from many of the substantive comments left by consultees that a large number of consultees who expressed their opposition used this consultation question as an opportunity to re-state their position that a leaseholder should not at any point be required to make a contribution towards their landlord's non-litigation costs.[44] In this section we consider the responses of those who dealt specifically with the question of whether a leaseholder should be required to pay a percentage of the landlord's non-litigation costs in the event that the claim was not completed.

12.115 Many consultees argued that landlords against whom enfranchisement claims have been made should receive all the non-litigation costs they have incurred in dealing with the claim. They did so on the basis that as the claim has not proceeded to completion, the landlord would not receive a premium that could be used to pay those costs. Other consultees argued that the leaseholder's contribution should be based on the landlord's reasonably incurred costs.

12.116 A further group of consultees argued that a leaseholder's contribution should depend on the reasons why the claim did not proceed, and whether the leaseholder had been

---

43 See CP, Consultation Question 100, paras 13.94 to 13.95.

44 An issue considered in Consultation Question 98: see paras 12.15 to 12.56 above.

at fault. Conversely, some consultees expressed concern about bad conduct on the part of landlords, and argued that landlords should be liable for a leaseholder's wasted costs in the event that the claim had been withdrawn as a result of the landlord's behaviour.

Should the level of contribution depend upon the stage at which the claim has failed?

12.117 Several consultees, whether or not they agreed that a leaseholder should contribute to the landlord's non-litigation costs if the claim did not proceed, proposed percentages that could be applied depending on the stage at which a claim failed. For instance, The Alan Mattey Group, a landlord, suggested that valuation costs should always be paid, but that 60% of the total costs should be payable "up to the service of the counter-notice and a proportion of the remaining 40% after the service of the counter-notice".

12.118 Some consultees opposed our provisional proposal on the basis that the procedural reforms that we had provisionally proposed would require greater expenditure from landlords at the outset of the claim.[45] Allowing a landlord to recover only a percentage of the sum that would be recovered on a completed claim where the claim did not complete might, in such circumstances, lead to landlords not being properly compensated for the sums in fact spent. The Places for People Group Ltd, a developer, commented:

> If the draft contract/lease/transfer becomes required at the Response Notice stage, then the difference in the non-litigation costs in the various withdrawal circumstances that could then exist are not likely in most cases to be so significant to merit differentiation.

These consultees argued, as they did in response in response to the first part of our consultation question, that landlords should be able to recover all of their wasted costs from leaseholders.

Recommendations for reform

12.119 The provisional proposals set out in the Consultation Paper proceeded on the basis that where an enfranchisement claim is completed, a leaseholder will be required to make a fixed contribution to his or her landlord's non-litigation costs. As set out earlier in this chapter, we are recommending that leaseholders will not be required to make any contribution to those costs if Government adopts a market-value based method of calculating the premium to be paid for a lease extension or freehold.[46] We therefore consider below the question of whether a leaseholder whose claim has not been completed should be required to contribute to his or her landlord's non-litigation costs in two policy contexts. First, where a leaseholder would be required to contribute to those costs if the claim had completed; and second, where a leaseholder would not be required to contribute to those costs if the claim had completed.

12.120 Several consultees made variations of the argument that, where a claim is not completed, wasted costs should be reallocated if one of the parties were responsible

---

45 Our proposals are set out in Chs 8 and 9.

46 See para 12.56 above.

for the claim failing to complete. While we recognise that the flexibility of this approach may be attractive, we believe that it should not be pursued. It would not be appropriate for parties to enfranchisement claims to occupy the Tribunal's time – incurring further public and personal costs – to argue about the merits of each party's behaviour in a now-failed claim. It is also not clear whether it would be possible for the parties to contest the allocation of non-litigation costs by reference to leaseholder or landlord fault when this will not be possible in completed claims. In addition, leaseholders would face more uncertainty about the costs they were likely to incur at the outset of the claim. Finally, the relationship between this approach and the Tribunal's power to reallocate litigation costs for unreasonable behaviour might produce confusion. Consequently, we do not recommend fault-based reallocation of non-litigation costs in non-completed claims.

Where leaseholders would be required to contribute were the claim to be completed

12.121 If a leaseholder is required to contribute towards his or her landlord's non-litigation costs upon successful completion of an enfranchisement claim, we think that a leaseholder should also contribute towards those costs if the claim does not proceed to completion. The landlord has incurred costs as a result of the leaseholder starting an enfranchisement claim, but will not receive a premium from the leaseholder that could be used to meet (at least some of) those costs. To decide that landlords should receive no contribution upon the failure of the claim would allow leaseholders to start but not complete a number of claims, each causing the landlord irrecoverable expense. And while the work done might be capable of being re-used in the event of a successful claim – on completion of which the landlord would receive a contribution to his or her non-litigation costs – there is no certainty that a successful claim would ever be made.[47]

12.122 In reaching this conclusion, we note that we have recommended elsewhere that a landlord should be able to apply to the Tribunal for an Enfranchisement Restraint Order against a leaseholder who has repeatedly made unmeritorious claims.[48] This power should allow landlords a measure of protection against being required to incur non-litigation costs in a series of failed claims. But since this power could only restrict future claims after a number of failed claims had been made, we do not think that power by itself is sufficient protection for landlords who are forced to incur non-litigation costs in dealing with enfranchisement claims that do not proceed.

12.123 We do not think, however, that a landlord should be able to recover all of the non-litigation costs that he or she has incurred up to the point at which the claim fails. Such an approach would create undesirable incentives for landlords to incur costs unreasonably and/or to take steps to try to frustrate enfranchisement claims, knowing that those costs would be recovered if the claim failed. Nor do we think that a landlord should be able to recover all of his or her non-litigation costs in so far as those costs

---

47 We have also made a recommendation that landlords should be able to apply for an Enfranchisement Restraint Order where a leaseholder makes a series of enfranchisement claims relating to the same premises that are without merit. We do not, however, consider such a power would give landlords sufficient protection from vexatious claims to allow us to recommend that leaseholders should make no contribution to the landlord's non-litigation costs when a claim completes.

48 See paras 12.165 to 12.167 below.

were reasonably incurred. First, allowing reasonably incurred costs to be recovered would re-introduce many of the problems identified with the recovery of such costs under the current law.[49] Second, we think that any contribution made if the claim does not proceed to completion should be calculated by reference to the sums that would have been paid if the claim had completed. Third, we also think it important to avoid requiring a more generous contribution for an incomplete claim than for a completed claim. To do otherwise would be to risk creating an incentive for landlords to try to defeat enfranchisement claims with a view to recovering a more generous sum in non-litigation costs than had the claim proceeded. As we have recommended that any contribution to be made by a leaseholder to his or her landlord's non-litigation costs on successful completion of a claim should be by way of fixed costs, we think that the contribution made by a leaseholder on failure of the claim should be a proportion of those fixed costs.[50]

12.124 We do not think that it would be appropriate for us to determine the exact proportion of fixed costs that would be recoverable in the event that a claim failed after a particular procedural point had been reached. We accept, however, that by seeking to advance the stage at which the detailed terms of any lease extension or transfer of freehold are considered, a landlord may well incur non-litigation costs at an earlier stage than under the current procedure. This would need to be taken into account when setting any proportions. On the other hand, we also think, for the reasons set out above, that it is important that the costs recoverable on a failed claim should not be more generous – when taking account of the work likely to have been done to any particular point – than would have been the case in a completed claim.

Where leaseholders would not be required to contribute were the claim to be completed

12.125 If a leaseholder would not be required to contribute towards his or her landlord's non-litigation costs upon successful completion of an enfranchisement claim, it might at first appear to follow that no contribution should be required if the claim does not complete. After all, in a residential transaction in the open market – with which we have drawn a parallel – a seller would not recover any transaction costs he or she had incurred in the event that the purchase did not complete.

12.126 We think, however, that there are reasons why leaseholders should be expected to contribute their landlord's non-litigation costs when a claim does not complete even though no such contribution would be required if the claim had completed. First, as the landlord has not received a premium, the landlord will not have received the sum that we believe takes into account non-litigation costs. Second, a seller in the open market would be able to refuse to deal with a purchaser who had led him or her to incur costs but then failed to complete the transaction. Alternatively, the seller might demand that those costs be taken into account in any fresh agreement to purchase the property. But a landlord in an enfranchisement claim has no such option – he or she has to incur costs in dealing with the new claim.

12.127 However, for the reasons set out above, we do not think that leaseholders should be responsible for all of the landlord's non-litigation costs if a claim does not proceed. Nor

---

49 See paras 12.07 to 12.11 above.

50 See paras 12.109 to 12.111 above.

do we think that the leaseholders' position would be protected by providing that a landlord could only recover costs that were reasonably incurred and reasonable in amount. Instead, the contribution should be a fixed sum. But we think that the sum set should be lower than the sums that would be set if leaseholders were required to contribute to their landlords' non-litigation costs in the event of a successful claim. We accept that the non-litigation costs incurred by landlords would likely be the same whether or not a contribution were to be paid if the claim were successful. And we also acknowledge that there will be uncertainty about whether the work done might be capable of being re-used in the event of a successful claim in future in both cases. But we think that where leaseholders are not required to contribute to their landlords' non-litigation costs in the event of a successful claim, the possibility of recovering a significant part of those costs if the claim fails may create an incentive for some landlords to try to push a claim towards failure in order to recover some of their non-litigation costs. Conversely, the sum would need to be substantial enough to discourage the pursuit of weak claims by leaseholders who will be responsible for paying the landlord's costs if the claim fails. We do not, however, consider that striking the correct balance requires different sums to be payable depending on the stage at which the claim fails.

Recommendation 86.

12.128 We recommend that if leaseholders are required, as a general rule, to make a fixed costs contribution to their landlord's non-litigation costs on successful completion of a claim, leaseholders should be liable to pay a percentage of those fixed costs to the landlord if the claim is withdrawn, is struck out, or otherwise fails. The percentage to be paid should depend on the stage in the enfranchisement process that has been reached when the claim fails.

12.129 We recommend that if leaseholders are not, as a general rule, required to make any contribution to their landlord's non-litigation costs on successful completion of a claim, leaseholders should be liable to pay a small fixed sum to the landlord if the claim is withdrawn, is struck out, or otherwise fails. The sum should not vary depending on the stage in the enfranchisement process that has been reached when the claim fails.

A LANDLORD'S SECURITY FOR NON-LITIGATION COSTS

12.130 In the Consultation Paper, we noted the inconsistency between different enfranchisement rights and the respective requirements for leaseholders to pay a deposit towards the anticipated purchase price.[51]

12.131 We proposed replacing these existing rules with a right for landlords to seek security for their non-litigation costs from leaseholders at an early stage in the

[51] See the CP, paras 13.25 to 13.28.

enfranchisement process.[52] If a fixed costs regime were established, security would be given for the fixed sum identified at the start of the claim.[53] We also proposed that, if the security were not provided within a specified period, the Claim Notice would be stayed.[54]

Consultees' views

12.132 The majority of consultees, many of whom were leaseholders, opposed our provisional proposal. Most of these consultees objected in principle to a leaseholder being required to pay any of the landlord's costs. Several consultees also expressed a concern that the requirement would discourage leaseholders from bringing claims as they would need to raise funds at an early stage in the claim.

12.133 About a third of consultees who responded to this consultation question supported our provisional proposal. This group included commercial freeholders, law firms and professional representative bodies. Of these consultees, many felt that security for costs could constitute a serviceable replacement for the current requirements to pay a deposit in certain enfranchisement transactions. Other consultees were also broadly supportive of security for costs in respect of a potential fixed costs regime.

12.134 Several consultees expressed support for the existing requirement under the current law for a deposit to be paid, which they thought acted as a substitute for a requirement to provide security for costs. Conversely, other consultees criticised the use of deposits as a form of security for costs, as the deposits currently paid can vary significantly, depending on the value of the interest acquired. Deposits can vastly exceed the likely costs payable. Concern was also raised by a few consultees that such high deposits can make it more difficult to persuade leaseholders to join a collective claim.

Recommendations for reform

12.135 Security for costs is normally provided by one party in respect of the costs of another party. A sum of money, or another asset, is set aside by one party and made available for the other party to use to pay the costs in the future. Security may be provided by one party in respect of costs that will be incurred by the other party and that the first party will be required to pay in the future, or in respect of costs that the first party may be required to pay in future.

12.136 The provisional proposal set out in the Consultation Paper proceeded on the basis that where an enfranchisement claim is completed, a leaseholder would be required to contribute to his or her landlord's non-litigation costs. As set out earlier in this chapter, we are recommending that – with a couple of exceptions – leaseholders will not be required to make any contribution to those costs if Government adopts a market-value based method of calculating the premium to be paid for a lease extension or freehold.[55] We therefore consider below the question of whether a landlord should be able to claim security for his or her non-litigation costs in two policy contexts. First,

---

52 See CP, Consultation Question 101, para 13.98.

53 See the CP, para 13.96.

54 See the CP, paras 13.96 to 13.97.

55 See para 12.56 above.

where a leaseholder would not generally be required to contribute to those costs where a claim is completed; and second, where a leaseholder would not be required to contribute to those costs where a claim is completed.

If leaseholders are not generally required to contribute to their landlord's non-litigation costs

12.137 If a leaseholder will not be required to contribute to the landlord's non-litigation costs at the conclusion of a successful claim, there can be no question of the leaseholder being required to provide the landlord with security for his or her non-litigation costs at the start of a claim.

12.138 There would, however, remain circumstances in which a leaseholder would be required to contribute to the landlord's non-litigation costs.

(1) Where the premium for the interest to be acquired is below a prescribed sum, the leaseholder will be required to contribute to the landlord's reasonably incurred non-litigation costs; however, the total (of premium and non-litigation costs) payable to the landlord will not exceed the landlord's non-litigation costs or (if lower) the prescribed sum.[56]

(2) (In a collective freehold acquisition) where non-litigation costs are incurred by landlords as a result of an election made by the leaseholders exercising enfranchisement rights.[57]

(3) Where an enfranchisement claim has been withdrawn, struck out, or has otherwise failed.[58]

12.139 In the first of these cases,[59] we do not think it would be appropriate for a leaseholder to be required to provide any security for their landlord's non-litigation costs. We accept that this exception could lead to a leaseholder paying the whole of the prescribed sum to the landlord in circumstances where the bulk of that sum is made up of a contribution to the landlord's non-litigation costs. But the extent of that contribution would depend upon the premium to be paid. The higher the premium, the lower the contribution towards the landlord's non-litigation costs would be. It would therefore be hard to say at the start of a claim whether, and if so, in what sum, any contribution towards the landlord's non-litigation costs would be required at the end of the claim. As such, it would be difficult to treat any security provided at the start of such a claim as being provided in respect of the landlord's non-litigation costs rather than the payment of premium and non-litigation costs (up to the prescribed sum). We also think that requiring security to be provided in all cases up to the prescribed sum would likely deter some leaseholders from exercising their enfranchisement rights. Indeed, many consultees expressed their concern that any significant upfront costs

---

56 See paras 12.43 to 12.48 above.

57 See paras 12.49 to 12.50 above.

58 See paras 12.128 to 12.129 above.

59 See para 12.138(1) above.

would make the exercise of enfranchisement rights highly unattractive to many leaseholders.

12.140 In the second of these cases,[60] however, we consider that it would be appropriate for the landlord to be able to require the leaseholder to provide security for the fixed sum that would be payable by the leaseholder in respect of these costs. First, in contrast to the exception in respect of low value claims, the leaseholder's liability in respect of the landlord's non-litigation costs would be fixed in amount. Further, the fact that such a liability is present in any claim will become clear the moment that the leaseholder makes the election that requires the landlord to incur additional costs. We also think that as the election is voluntary, and has been made with a view to reducing the amount of premium that the leaseholder is required to pay, the obligation to provide security in respect of these additional costs should not present a significant financial barrier to those wishing to enfranchise.

12.141 In the last of these cases,[61] a requirement to provide a landlord with security for his or her recoverable non-litigation costs would not be appropriate. The leaseholder's liability arises only at the point that the claim is withdrawn, is struck out, or otherwise fails. Prior to that point, we do not think it would be reasonable to expect all leaseholders to provide security for costs that would only be payable if one of these events occurs. And once one of these events has occurred, the leaseholder is liable to pay the fixed sum, and there would be no purpose in providing security for that sum.

If leaseholders are required to contribute to their landlord's non-litigation costs

12.142 If a leaseholder is required to contribute to his or her landlord's non-litigation costs, we think that a landlord should be able to obtain security from the leaseholder in respect of the non-litigation costs that the landlord will be able to recover from the leaseholder at the conclusion of the claim. This would provide a level of assurance that money that the landlord is required to spend as a result of the enfranchisement claim, and is entitled to recover from the leaseholders, will in fact be paid.

12.143 We think that a system of security for costs is significantly better than the existing obligation on the leaseholder to pay a deposit under the current law. As noted in the Consultation Paper, that obligation is not consistent across enfranchisement rights. Consultees confirmed that while the deposit paid is often treated by the landlord as if it had been paid in respect of future non-litigation costs, the sum advanced can often far exceed the landlord's likely non-litigation costs.

12.144 In place of any obligation to pay a deposit, we therefore propose that a leaseholder would have to provide security for the fixed costs contribution to the landlord's non-litigation costs that he or she was liable to pay at the end of a successful claim.

---

60 See para 12.138(2) above.

61 See para 12.138(3) above.

Recommendation 87.

12.145 We recommend that if leaseholders are not, as a general rule, required to make any contribution to their landlord's non-litigation costs on successful completion of a claim, a landlord should not generally be able to seek security for his or her non-litigation costs from the leaseholder. However, a landlord should be able to seek such security where a leaseholder has made an election at the start of or during a claim that has the effect of allowing the landlord to recover a fixed sum from the leaseholder in respect of the landlord's non-litigation costs arising from that election.

12.146 We recommend that if leaseholders are required, as a general rule, to make a fixed costs contribution to their landlord's non-litigation costs on successful completion of a claim, a landlord should be able to seek security for his or her non-litigation costs from the leaseholder. However, a leaseholder should not be required to pay a deposit in respect of the premium to be paid to the landlord at the conclusion of the claim.

PREVENTING VEXATIOUS CLAIMS: ENFRANCHISEMENT RESTRAINT ORDERS

12.147 The current law prevents a leaseholder serving a fresh notice of claim within 12 months of a notice of claim being withdrawn. In the Consultation Paper we proposed that this prohibition should be removed and replaced with a right for landlords to apply to the Tribunal for an order prohibiting named leaseholders from serving a further Claim Notice in respect of the premises without first obtaining the permission of the Tribunal to do so.[62]

Consultees' views

12.148 Over a third of consultees who responded to our consultation question supported our provisional proposal, but about half of consultees were opposed to it. Most freeholders and professionals were in favour; but a large majority of leaseholders were against.

12.149 Many consultees agreed that there was a need for a means of preventing vexatious claims. Several consultees felt that such a measure was important given the procedural and other reforms we are recommending, including the abolition of the existing rule that a leaseholder whose claim has been withdrawn must wait 12 months before bringing a fresh claim.

12.150 Some consultees set out the basis on which an order restraining further enfranchisement claims should be made. Fieldfisher LLP, solicitors, believed that care would need to be taken to ensure that "the rights of leaseholders are not unfairly prejudiced". Midland Valuations Limited, surveyors, thought that the Tribunal would be able to determine whether "the landlord was being fair and reasonable in making such an application".

---

62 See CP, Consultation Question 102, paras 13.99 to 13.100.

12.151 Some consultees, however, expressed concern at the potential for landlords to use the existence of such a power as a means to persuade leaseholders to accept unfavourable terms in negotiations or to undermine legitimate enfranchisement claims. A few consultees expressed scepticism as to whether the risk of leaseholders making repeated vexatious applications was even a problem in need of regulation.

12.152 Others opposed our proposal on the basis that the existing 12-month prohibition on serving a new application functions well and should be retained. One consultee objected to the additional expense of a landlord having to applying for such an order as compared with the current 12-month prohibition on a leaseholder bringing a fresh claim.

Recommendation for reform

Enfranchisement Restraint Orders

12.153 We do not think that a rule that prohibits leaseholders from bringing an enfranchisement claim within 12 months of the failure of an earlier claim is the best means of protecting landlords from having to deal with repeated unmeritorious or vexatious claims. The fact that an enfranchisement claim has failed does not mean that a further claim brought by the same leaseholders in respect of the same property would also lack merit. Any blanket prohibition would bar strong and weak further claims alike. As a result, such a ban appears to be as much about punishing a leaseholder for having brought a failed claim as about protecting a landlord from having to deal with a fresh claim.

12.154 We recognise, however, that landlords have a legitimate interest in avoiding being faced with a series of unsuccessful enfranchisement claims.[63] We also acknowledge that by limiting a leaseholder's liability to contribute towards his or her landlord's non-litigation costs in the event of a failed claim, there is a risk that repeated claims would leave landlords bearing an unreasonable financial burden. But we think the most focussed protection from repeated claims is provided by a landlord having the power to ask the Tribunal to prohibit a leaseholder from bringing a further claim in respect of the same premises without its permission. We refer to such an order as an Enfranchisement Restraint Order (an "ERO").

Criteria for making an Enfranchisement Restraint Order

12.155 We did not set out in the Consultation Paper what the criteria for making an Enfranchisement Restraint Order should be. Many consultees assumed that a landlord would need to prove more than simply that an enfranchisement claim had been withdrawn, struck out, or had otherwise failed.

12.156 We anticipate that the rules relating to EROs are likely to draw on the rules adopted by the Civil Procedure Rules Committee in respect of civil restraint orders.[64] In particular, we note that the High Court and county courts are able to make a range of

---

63 We also recognise that a series of successful freehold acquisition claims may raise issues for both landlords and leaseholders. We discuss our proposed restriction on successive collective freehold acquisition claims at paras 5.206 to 5.221.

64 Civil Procedure Rules, r. 3.11 and Practice Direction 3C

civil restraint orders designed to offer differing degrees of control over future claims and applications.[65] The power to make those orders arises where a party has made applications and/or claims that are determined to have been totally without merit. As currently interpreted, a claim or application will be totally without merit where it is "bound to fail", in the sense that there is no rational argument that could be made in its support.[66]

12.157 However, we also think it important to provide some protection for landlords who face a number of enfranchisement claims from the same leaseholder in respect of the same premises that are not in themselves without merit, but nevertheless do not result in a completed transaction. A measure of protection is afforded by our recommendation that leaseholders who bring a claim that does not complete should contribute to their landlord's non-litigation costs.[67] But we also recognise that the contribution made may not cover all of the landlord's reasonable non-litigation costs, and that repeated claims that do not complete give rise to a risk that the landlord's unrecovered non-litigation costs will begin to mount unreasonably.

12.158 We have therefore concluded that the grounds for making an ERO should extend to repeated claims by the same leaseholder that are in themselves (or when taken in combination with other claims made in respect of the same premises) vexatious, frivolous, or otherwise an abuse of process (within the terms of the existing Tribunal Rules).[68]

12.159 There would also be some other important differences between civil restraint orders and EROs. The building block of civil restraint orders is an order of the court striking out a claim or application that goes on to record that the claim or application was totally without merit. Such an order can be made following an application made by the other party to the claim or application, or by the court of its own motion. If such an order is made, the court is required to go on to consider whether a civil restraint order should also be made.[69] But a claim or application that is totally without merit, but has not been the subject of such an order – perhaps because it was discontinued or withdrawn before any such order could be made – cannot be relied upon when the court is considering making a civil restraint order. The risk to the other party of facing a series of flawed but aborted claims or applications that cannot thereafter be relied on to obtain a civil restraint order is minimised by the party's ability to apply to the court for an order striking out the claim or application as soon as it is made. And the

---

65 Civil Procedure Rules, Practice Direction 3C, paras 2 to 4. A limited civil restraint order prevents a party from making further applications within existing proceedings without first obtaining permission (para 2). An extended civil restraint order prevents a party from bringing a claim or making an application concerning any matter relating to existing proceedings without first obtaining permission (para 3). A general civil restraint order prevents a party from bringing any claim or making any application without first obtaining permission (para 4).

66 *R (Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1091, [2014] 1 WLR 342, as considered in *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82, [2016] WLR 2793.

67 See paras 12.128 to 12.129.

68 Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013 No 1168), r 9.

69 Civil Procedure Rules, r 3.4(6) and 23.12.

other party is also able to rely on the court's power to award the other party its legal costs on the discontinuance of a claim or withdrawal of an application.

12.160 An enfranchisement claim differs on both these points. First, the claim is started (in most cases) by a leaseholder (or group of leaseholders) serving a Claim Notice on the landlord - and it is only after the landlord has served a Response Notice, and a period of 21 days has expired, that any application to the Tribunal can be made. This means there is likely to be a significantly longer period in an enfranchisement claim between the start of the claim and the point at which the Tribunal could declare the claim to be totally without merit than is the case in a county court claim. Second, given that we have proposed reforms that would front-load some of the landlord's non-litigation costs of dealing with a claim, it is likely that a landlord will have incurred much of those costs before any order striking out the claim could be made. But the landlord is likely to recover a smaller proportion of those costs than would be the case if a county court claim had been discontinued or withdrawn.

12.161 We do not, however, think that the landlord should be able to apply to the Tribunal at an earlier stage, with a view to striking out the Claim Notice and inviting the Tribunal to make an ERO. To do so would risk encouraging landlords to make, or threaten to make, such applications as a means of persuading leaseholders to abandon a claim, or to settle on less favourable terms. Instead, we think that when applying to the Tribunal for an ERO against a leaseholder, a landlord should be entitled to rely upon:

(1) any previous orders of the Tribunal striking out an enfranchisement claim made by the leaseholder in respect of the same premises that also declared the claim to have been either totally without merit, or frivolous, vexatious, or otherwise an abuse of process;

(2) any previous enfranchisement claims made by the leaseholder in respect of the same premises that had been withdrawn that were either totally without merit or were (either alone or in combination with other claims) frivolous, vexatious, or otherwise an abuse of process.

This contrasts with the position for civil restraint orders discussed above, where the court can rely only on an order striking out a claim or application that goes on to record that the claim or application was totally without merit.

12.162 If a landlord establishes that a prescribed number of such enfranchisement claims have been made by the same leaseholder (whether individually or with others as part of a collective freehold acquisition claim) in respect of the same premises, the Tribunal would have the power to make an ERO against that leaseholder.

The scope and effect of an Enfranchisement Restraint Order

12.163 We believe that the Tribunal should have a discretion as to the scope of any prohibition. In particular, the Tribunal would be able to decide whether the ERO against a leaseholder should:

(1) be limited to further claims for the exercise of the same enfranchisement rights as had previously been claimed in respect of particular premises,

(2) extend to any enfranchisement claim brought in respect of the same premises as before, or

(3) extend to any enfranchisement claim brought in respect of other leasehold interests held by the same landlord.

In contrast to the position in respect of civil restraint orders, we do not believe that a higher threshold would need to be crossed before more a restrictive ERO could be made. Once the threshold for making an ERO has been met, the Tribunal would be able to determine the appropriate scope of the ERO.

12.164 We also think that the Tribunal should be able to permit a leaseholder against whom an ERO had been made from bringing a further enfranchisement claim, and to do so with or without conditions. For example, the Tribunal might decide to permit a claim to be made only on a particular basis, or in the form produced as part of the application for permission.

Recommendation 88.

12.165 We recommend that there should be no bar on a leaseholder starting a fresh enfranchisement claim when an earlier claim in respect of the same premises has been withdrawn, struck out, or has otherwise failed.

12.166 We recommend that:

(1) a landlord should be able to apply to the Tribunal for an order prohibiting a leaseholder from bringing a further claim without the permission of the Tribunal (an Enfranchisement Restraint Order ("ERO"));

(2) the Tribunal should be able to make such an order where a leaseholder has made a prescribed number of enfranchisement claims in respect of the same premises that were either totally without merit, or were (either of themselves or when considered together) frivolous, vexatious or otherwise an abuse of process; and

(3) a landlord who applies for an ERO should be able to rely on previous determinations made by the Tribunal in respect of an enfranchisement claim and/or invite the Tribunal to make such findings in respect of other enfranchisement claims.

12.167 We recommend that the Tribunal should be able to grant permission to bring a further enfranchisement claim to a leaseholder who is subject to an ERO either with or without conditions.

LITIGATION COSTS: COSTS-SHIFTING POWERS

12.168 The powers of the county court and the Tribunal to order one party to a claim to pay the litigation costs of another party to that claim are very different.[70] The powers of the county court to make such an order are significantly wider than the powers of the Tribunal. As a result, whereas such orders are routine in the county court, they are only rarely made in the Tribunal.

12.169 We have recommended elsewhere that all enfranchisement disputes should be heard by the Tribunal. Some disputes that are currently dealt with by the county court would therefore in future be decided by the Tribunal.[71] This transfer of some issues from the county court to the Tribunal led us to consider whether the more limited powers of the Tribunal to make an order requiring one party to pay the litigation costs incurred by another party should apply to hearings to determine the issues that would previously have been dealt with by the county court.

12.170 In the Consultation Paper we provisionally proposed that the Tribunal's existing limited powers to make orders requiring one party to pay the other party's litigation costs should, with a few exceptions, be applied to all matters it is to decide.[72] As a result, in most cases, each party would have to pay their own litigation costs.

12.171 The exceptions to the general rule that we identified in the Consultation Paper were:

(1) where a leaseholder has obtained an order from the Tribunal under the No Service Route that allows him or her to proceed with the claim. The Tribunal would be able to order that the landlord pay the leaseholder's costs;

(2) where a landlord who had failed to serve a Response Notice, or against whom an order had been made under the No Service Route, has applied successfully to the Tribunal for an order allowing the landlord to serve a Response Notice and participate in the claim, or to set aside an earlier determination of the claim. The Tribunal would be able to order the landlord to pay any of the leaseholder's costs wasted as a result; and

(3) where a landlord has obtained an order from the Tribunal striking out a leaseholder's Claim Notice. The Tribunal would be able to require the leaseholder to pay a fixed sum to the landlord relating to the costs of that application.

12.172 We invited consultees to tell us whether or not they agreed with these provisional proposals. We also asked them, in the event that they disagreed, to tell us:

---

70 These powers are sometimes referred to as "costs-shifting powers" since the order shifts the burden of paying litigation costs from the party who has incurred those costs, to the party who is made the subject of the order.

71 See paras 11.29 to 11.32.

72 See CP, paras 13.105 to 13.109.

(1) the types of disputes and/or issues that should be excluded from the ordinary litigation costs restrictions that apply in the Tribunal;

(2) the powers to make orders in respect of litigation costs that should apply in such excluded cases; and

(3) whether parties should be permitted to agree that costs shifting will apply to all or part of a claim.[73]

Consultees' views

12.173 When asked whether they agreed with our provisional proposal, just under half of the consultees who responded to our consultation question agreed, with a little less than a quarter disagreeing.[74] It is clear from many of the substantive responses that some consultees misinterpreted our consultation question. We intended consultees to consider whether the Tribunal's existing powers should be applied to cases that are currently dealt with by the county court, or what exceptions to such a general rule should apply. But several consultees considered instead what powers the Tribunal should have to make orders in respect of costs more generally.

12.174 Most consultees agreed that the Tribunal's existing powers in respect of costs should be applied to cases that would previously have been heard by the county court. For example, the Leasehold Forum considered that:

> The existing limited powers of the Tribunal to order litigation costs should apply to all disputes… If all matters concerning enfranchisement are to be transferred to the Tribunal's jurisdiction the consequence must be that its limited powers to order costs be retained.

12.175 In contrast, some consultees believed that the existing powers of the county court to make orders requiring one party to pay the litigation costs of another party should be applied by the Tribunal when dealing with issues that are heard in the county court under the current law. For example, Irwin Mitchell LLP, solicitors, stated that:

> One of the benefits of the county court proceedings is that costs can be awarded where a party loses their claim. This can be a benefit to both leaseholders and landlords and even if the powers move to the tribunal, we believe these costs orders should still be possible to be made in the same way as they are currently.

12.176 Other consultees thought that the county court's powers in respect of costs should be applied to all cases, and not simply to those that would be heard by the county court under the current law. The Property Bar Association considered that one set of rules (whether those of the county court or of the Tribunal) should apply to all types of dispute.

12.177 The First-tier Tribunal (Property Chamber) agreed that the Tribunal's existing limited powers to make costs orders should apply to all disputes and issues that it would decide in enfranchisement claims. But it was resistant to the no-costs principle being

---

73 See CP, Consultation Question 103, para 13.110.

74 Just under a third of consultees chose to neither agree nor disagree with the proposal.

undermined. It moreover expressed a preference for statutory costs, that are automatically payable in certain circumstances, rather than the Tribunal being given a discretion to make costs orders where appropriate.

Recommendations

The general rule

12.178 We do not think that the county court's powers to order one party to pay the litigation costs of another party should be applied by the Tribunal when it deals with disputes and issues that, under the current law, are dealt with by the county court. First, as we set out in the Consultation Paper, while the introduction of costs-shifting powers has the potential to benefit leaseholders and landlords alike, we think that in most instances, the risk of being ordered to pay their landlord's litigation costs would likely increase the pressure on leaseholders to abandon or settle their claim on less favourable terms.[75] Second, we think that introducing a distinct set of rules that would apply to some disputes but not others would perpetuate some of the existing difficulties that arise from the separate jurisdictions under the current law.

Exceptions to the general rule

12.179 In the Consultation Paper we provisionally proposed some exceptions to the general rule.[76] In doing so, we had sought to identify circumstances in which it would be reasonable to expect one party to pay costs that had been incurred by the other party. In each of these circumstances, the party against whom such an order would be made has conducted him or herself in a way that has led the other party to incur costs or expense.

12.180 We considered that in each of these exceptions, the Tribunal should have a discretion as to whether, and if so, in what amount, an order in respect of litigation costs should be made. This would provide the Tribunal with the ability to decline to make an order for costs in cases where such an order would be unreasonable. We note, however, that the First-tier Tribunal (Property Chamber) proposed in its response to the relevant questions in the Consultation Paper that each of our exceptions should give rise to an entitlement to an order for costs against the party in default.

12.181 Removing any discretion as to whether an order for costs should be made would prevent the parties spending further time and money arguing about that issue. This benefit would, however, come at the cost of injustice in a limited number of cases where no order as to costs would be the just outcome. But as the exception itself identifies a circumstance in which the conduct of one party has led to the other party incurring costs, we think the benefits of removing any argument about whether an order for costs should be made is likely to substantially outweigh the disadvantages of doing so.

12.182 We also think that where an order is made against a landlord, the leaseholder should be able to recover all of his or her reasonably incurred litigation costs or (in the case of an order made on the landlord's application to be allowed to join in proceedings, or set

---

75 See the CP, para 13.106.

76 See the CP, para 13.109 to 13.110.

aside a determination) wasted costs. First, further costs will not be wasted in dealing with an application for costs under the No Service Route as the landlord will not be in attendance. Second, we think that the costs likely to have been wasted where a landlord has successfully made an application to participate in a claim, or set aside an existing determination, are likely to be too varied to permit a fixed sum to be set without causing injustice in a significant number of cases. In contrast, we think that it would be possible to prescribe a fixed amount that should be payable by a leaseholder if an application to strike out was made successfully. This fixed sum should be payable whether the application to strike out was made by the landlord or by another leaseholder.[77]

Additional exceptions

12.183 As part of our recommendations elsewhere in this Report, we have concluded that there should be some additional circumstances in which the Tribunal should be able to order one party to pay the other party's costs.

12.184 First, in Chapter 11, we set out our recommendation for an alternative track within the Tribunal for dealing with disputes where the only issue was the valuation of the interest claimed, and the value claimed by the landlord fell below a prescribed limit. These cases would be dealt with on paper by a valuation member of the Tribunal sitting alone rather than by the Tribunal at a full hearing.[78] We also recommended that where a claim falls within the scope of this alternative track, one party would still be able to argue that the claim should follow the standard track because the claim involved a point of law or principle of significance for that party beyond that individual case. But we also recommended that, if acceding to such a request, the Tribunal should have a power to order the party who wanted the claim to follow the standard track to pay the litigation costs that would incurred by the other party as a result. This would help to avoid one party using the threat of a hearing on the standard track (with associated costs) to force the other party to settle the claim.

12.185 Second, in Chapter 9, we set out our recommendation that, if the landlord denies the leaseholder's enfranchisement claim, the Response Notice must include the basis for the landlord's denial in order to be valid. We also set out the Tribunal's power to waive and/or amend defects in Claim Notices and Response Notices on application of the relevant party. However, where a landlord applies to the Tribunal to add or amend the grounds of denial in its Response Notice, we recommended that the Tribunal should be entitled to make an order requiring the landlord to pay the leaseholder's costs arising from the application.[79]

12.186 We think that the Tribunal should have a discretion as to whether an order is made in the scenarios set out at paragraphs 12.190 and 12.191 above. But we also think that there should be a presumption in favour of making such a costs order if the Tribunal agrees that the claim should not proceed on the alternative track, or grants the landlord's application to amend its Response Notice. The amount of costs recoverable

---

77 Our recommendation in respect of the power to strike out a Claim Notice is set out at para 9.177.

78 See paras 11.49 to 11.52 above.

79 See paras 9.59 and 9.62 above.

by the party with the benefit of such a costs order would be assessed at the point that all hearings before the Tribunal had finished. We also think that those litigation costs should be assessed by the Tribunal on an indemnity basis[80] since the relevant order (either allowing the claim to proceed otherwise than on the alternative track, or to amend the Response Notice) will have been made for the benefit of the party seeking that order.

Recommendation 89.

12.187 We recommend that, as a general rule, the limited powers of the Tribunal to order one party to pay the litigation costs of another party in an enfranchisement claim should apply to all disputes and issues that it is to decide.

12.188 We recommend that there should be the following exceptions to the general rule.

(1) Where a leaseholder has obtained an order from the Tribunal under the No Service Route that allows him or her to proceed with the claim, the Tribunal should order that the landlord pay the leaseholder's reasonably incurred litigation costs.

(2) Where a landlord who had failed to serve a Response Notice, or against whom an order had been made under the No Service Route, applies successfully to the Tribunal for an order allowing the landlord to serve a Response Notice and participate in the claim, or to set aside an earlier determination of the claim, the Tribunal should order the landlord to pay the leaseholder's wasted costs.

(3) Where a landlord obtains an order from the Tribunal striking out a leaseholder's Claim Notice, the Tribunal should require the leaseholder to pay a fixed sum contribution to the litigation costs incurred by the landlord in making that application.

(4) Where a landlord applies successfully to the Tribunal for an order to waive and/or amend a defect in its Response Notice in order to add to or amend its grounds of opposition, the Tribunal should be entitled to make an order requiring the landlord to pay the leaseholder's costs arising from the application.

(5) In a case that the Tribunal considers is appropriate for disposal in the alternative track but should nonetheless proceed to a full Tribunal hearing so that an important issue may be heard in the interests of one party, the Tribunal should be able to make a prospective costs order requiring that party to pay the litigation costs of the other party on an indemnity basis.

[80] Where costs are assessed on an indemnity basis, the court (in this case, the Tribunal) will resolve any doubt about whether the costs were reasonably incurred or reasonable in amount in favour of the party with the benefit of the costs order, and there is no requirement for the costs sought to be proportionate.

LITIGATION COSTS: UNREASONABLE CONDUCT

12.189 In the Consultation Paper we acknowledged that the absence of costs-shifting powers can encourage some parties to pursue weak cases or arguments in the hope that the prospect of having to incur further litigation costs to deal with these points will encourage the other party to abandon a claim, or to settle on less favourable terms. We therefore considered whether the existing scope of the Tribunal's general power to make an order for costs against a party on the basis of that party's unreasonable conduct should be changed.[81]

12.190 We concluded that expanding the scope of what would constitute unreasonable conduct would likely encourage satellite litigation, and – as in the case of costs-shifting powers generally – is more likely to benefit parties with greater resources. We therefore provisionally proposed that the existing power to award costs against a party on the basis of their unreasonable conduct should remain, and that its scope, as currently interpreted, should not be changed.[82]

Consultees' views

12.191 A clear majority of consultees agreed with our provisional proposal. For example, Irwin Mitchell LLP thought that: "The current position probably has the balance about right on the costs orders that can be made". And Church & Co Chartered Accountants noted that:

> The current limits on awards of costs at the Tribunal allow it to be a low-cost route to justice in a contested claim. To widen the areas of the award of costs will make the process of a disputed claim much riskier to all parties.

12.192 Many of the consultees who opposed our provisional proposal did so on the basis that the Tribunal should have much wider powers to deal with costs, rather than focussing specifically on the proper scope of any power to deal with unreasonable conduct. Most of these consultees believed that the wider powers of the county court should be introduced into the Tribunal when dealing with enfranchisement claims. For example, the Property Bar Association stated that:

> If the Tribunal is going to have comprehensive powers to deal with all disputes it needs to have comprehensive powers to order costs. Otherwise, this will lead to the parties using litigation frivolously which will have the opposite effect to that intended which is to increase costs and delay.

And the British Property Federation considered that:

> In our view the ability to make orders on costs, concentrates the minds of parties to litigation and would reduce the element of 'gaming' that can currently take place where there is no effective cost sanction. We consider that the risk of a costs liability would act as a deterrent to both landlords and leaseholders in pursuing poor arguments or bad claims before the Tribunal.

---

81 See the CP, para 13.111 to 13.113.

82 See CP, Consultation Question 104, para 13.114.

12.193 Some consultees focussed on the types of conduct that could lead to a costs order being made. For example, Jonathan West, a leaseholder, wrote that:

> I support the proposals on litigation costs but would like to see the definition of 'unreasonable conduct' extended to claims for costs or valuations that the responsible party should reasonably know to be wildly outside those that may reasonably be expected.

And Stephen Barney thought that a costs order should be made "if the Tribunal finds that the landlord has behaved unreasonably or has caused the Tribunal hearing".

Recommendation

12.194 As presently interpreted by the Upper Tribunal, the Tribunal's power to order one party to pay the litigation costs of the other party on the basis of the former party's unreasonable conduct is limited.[83]

12.195 We continue to believe that the scope of the Tribunal's existing power to deal with unreasonable conduct – as presently interpreted by the Upper Tribunal – strikes an appropriate balance between limiting and controlling unacceptable behaviour of the parties, and avoiding the problems that can be caused by the existence of costs-shifting powers.

Recommendation 90.

12.196 We recommend that the scope of the Tribunal's existing power to order one party to pay any of the litigation costs of another party on the basis of the former party's unreasonable behaviour should be preserved (subject to our recommendation at paragraphs 12.187 to 12.188 above).

A LANDLORD'S CONTRACTUAL ENTITLEMENT TO COSTS

12.197 In this chapter, we have set out the circumstances in which one party would (or could) be required to pay the litigation or non-litigation costs of another party. We think that the recommendations we have made set the appropriate balance between leaseholder and landlord when an enfranchisement claim is made.

12.198 We acknowledge that the effect of our recommendations is that a landlord is likely to receive less of his or her non-litigation and litigation costs than under the existing law. We think that this change might create an incentive for landlords to seek to try to recover those costs in a different way. In particular, there is a risk that landlords would begin to include within newly granted leases a term that requires a leaseholder to pay the landlord's litigation and/or non-litigation costs arising out of any enfranchisement

---

83 In *Willow Court Management v Ratna Alexander* [2016] UKUT 290 (LC) the Upper Tribunal held that in considering the exercise of this power a Tribunal should ask whether (1) there is a reasonable explanation for the conduct complained of, and (2) a reasonable person in that party's position would have conducted themselves as the party did. See also the CP, para 13.33.

claim. Such terms could have the effect of undermining the balance between leaseholder and landlord that our recommendations are designed to strike.

12.199 We note that statute already permits a court or tribunal to make an order preventing a landlord from recovering his or her litigation costs under the terms of a lease. In particular, section 20C of the Landlord and Tenant Act 1985 allows a court or tribunal to make an order that prevents a landlord recovering such costs via a service charge provision within a lease. And paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 allows a court or tribunal to make an order preventing such sums being recovered via an individual covenant in a lease.

12.200 For the most part, such orders have been made in respect of the litigation costs of the landlord in service charge disputes. They have not been sought in respect of litigation costs of enfranchisement disputes. However, the explanation for this is that the terms of existing leases which allow a landlord to recover his or her legal costs are normally focussed on the recovery of the landlord's costs of managing the premises, and enforcing the leaseholder's obligations under the lease. The legal costs of enfranchisement would fall outside the scope of such a term. But, for the reasons set out above, this might change.

12.201 We note that in the RTM Consultation Paper, we recommended that the current law should be amended so that there would be a presumption that the costs relating to an RTM claim would not be recoverable by a landlord under the terms of any lease unless an order was made allowing such sums to be recovered in that way.

12.202 We think, however, that the position in respect of the recovery of the costs of an enfranchisement claim should be different from that adopted in respect of RTM claims. Existing leases do contain terms allowing a landlord to recover his or her right to manage costs under the lease. Leaseholders are required to seek an order from the court or Tribunal if they wish to prevent the landlord from recovering his or her right to manage litigation costs pursuant to such terms. In contrast, as noted above, existing leases do not contain terms seeking to allow landlords to recover enfranchisement costs under the lease. Leaseholders are not required to seek an order from the court or Tribunal to prevent the landlord from recovering his or her enfranchisement litigation costs pursuant to those terms. As such, we do not think that relying on a statutory power to prevent landlords from relying upon a contractual term that might begin to appear in new leases would be consistent with our Terms of Reference. To allow enfranchisement costs to be recovered in this way would also, in time, risk undermining our proposed statutory control of such costs. And while some parties might be sophisticated and informed enough to be aware of the effect of agreeing to such a term, we think that this is unlikely to be the case for most leaseholders seeking to purchase a home.

12.203 We therefore propose that any term of a lease that requires a party to pay another party's litigation or non-litigation costs of an enfranchisement claim should be unenforceable. The only non-litigation or litigation costs that will be payable by another party will be those required to be paid under our statutory enfranchisement regime.

Recommendation 91.

12.204 We recommend that any term of a lease or collateral agreement that purports to allow a landlord to recover his or her litigation or non-litigation costs arising out of an enfranchisement claim should be unenforceable.

Part V: Intermediate leases and other leasehold interests

Chapter 13: Intermediate leases and other leasehold interests

INTRODUCTION

13.1 In the simplest enfranchisement claim there are only two owners of the premises: the leaseholder, and the freeholder. The leaseholder's interest in the premises will have been created by a lease granted by the freeholder who, thereafter, holds the freehold subject to the rights and obligations set out in the lease.

13.2 But while there can only be one freehold interest in any premises, there can be more than one leasehold interest.[1] First, a freehold owner may have decided to grant separate leases of different parts of his or her premises. This would be the case, for example, in a block of flats. Second, additional leasehold interests can be created in respect of any part of the premises. This can happen as a result of the freeholder deciding to grant a further lease of the premises that will end after, and be subject to, an existing leasehold interest. And it can also happen as a result of the existing leaseholder granting a further lease of the premises that will end before his or her own lease which, thereafter, will be subject to this additional lease.

13.3 In this chapter, we consider the issue of "intermediate leases" and other leasehold interests in enfranchisement claims.[2] We asked various consultation questions on these points, as set out in Chapter 16 of the Consultation Paper. There were relatively few self-identified leaseholders who provided substantive responses to the consultation questions posed in that chapter. The issues we raised in Chapter 16 were technical in nature and we appreciate that they may have proved difficult to engage with for consultees without prior knowledge of the area.

13.4 We have nonetheless made every effort to present the views of consultees in a balanced manner that reflects the range of submissions made in response to the consultation questions. And in considering the treatment of intermediate leases and other leasehold interests we have sought to simplify statutory provisions where possible, and to ensure that the presence of intermediate leases or other leasehold interests does not present an unreasonable financial or practical impediment to leaseholders wishing to bring an enfranchisement claim.

13.5 We initially consider the position of an intermediate landlord who does not have conduct of an enfranchisement claim in accordance with our recommendations in Chapter 8 and Chapter 9 of this Report. In this chapter, we make a number of recommendations to ensure that the interests of that intermediate landlord are protected.

---

1 It is, of course, possible for a building to have been divided between separate freehold owners, or for the freehold of any premises to be held jointly by more than one person. But there cannot be more than one freehold interest in respect of any part of a building.

2 See paras 13.9 to 13.11 and 13.16 to 13.18 below.

13.6 Under the current law, inconsistencies between the rules governing intermediate leases in different types of claim create unnecessary complexity and additional costs for leaseholders. We therefore make a number of recommendations in relation to the treatment of intermediate leases in enfranchisement claims. In particular, we recommend that the leaseholders bringing the claim should be able to choose whether to acquire an intermediate lease in the building, with certain exceptions. We also make recommendations as to the enfranchisement rights of a sub-leaseholder where his or her lease was granted by an intermediate leaseholder whose own lease has been extended.

13.7 We also consider the acquisition of two forms of leasehold interest as part of a collective freehold acquisition claim.

(1) Some leases in the building may contain common parts in addition to, for example, a residential unit. In the Consultation Paper, we described how the provisions of the 1993 Act which govern the acquisition of leases that contain common parts can have unsatisfactory consequences.[3] We therefore recommend a power for the Tribunal[4] to order that the lease is acquired by the nominee purchaser insofar as it relates to common parts.

(2) Landlords may grant leases of common parts to third parties for development purposes, leading to a potential conflict between the acquisition of such leases by the nominee purchaser and the need to preserve development rights. We recommend that the nominee purchaser should be able to elect whether to acquire the whole of that lease, or the part relating to common parts, or not to acquire that lease at all.

13.8 Finally, we discuss the valuation of the interests of intermediate leasehold, and set out one option for reform as well as other recommendations.

INTERMEDIATE LEASES AND OTHER LEASEHOLD INTERESTS

Intermediate leases

Terminology

13.9 At any point in time the different interests in any premises can be visualised as a chain of interests. At the top of this chain is the freehold. Below, the leasehold interests are placed in descending order of the time left before each of those interests expires. We refer to a lease that is above another lease in such a chain as being “superior” to that other lease. And we refer to a lease that is below another lease in such a chain of leases as being “inferior” to that other lease.

---

3 CP, para 16.113.

4 The First-tier Tribunal (Property Chamber) in England, and the Leasehold Valuation Tribunal in Wales.

Figure 9: A chain of interests in premises

A	A is the freeholder. A is the landlord under Lease 1.
↓ **Lease 1**	Lease 1 is an intermediate lease. It is also a head lease.
B	B is both a leaseholder (under Lease 1), and a landlord (under Lease 2).
↓ **Lease 2**	Lease 2 is an intermediate lease. It is also a sublease.
C	C is both a leaseholder (under Lease 2), and a landlord (under Lease 3).
↓ **Lease 3**	Lease 3 is a sub-lease.
D	D is the leaseholder under Lease 3.

13.10 A leasehold interest that is superior to any other lease is also described as an "intermediate lease", as it has an interest both above it in the chain (either the freehold, or another lease) and below it in the chain. Where an intermediate lease has no other leasehold interest above it in a chain, it is also referred to as a "head lease" (as it is at the head of the chain of leasehold interests). Any leasehold interest that is granted out of another lease is referred to as a "sub-lease" (or under lease).

13.11 An intermediate lease will have been granted by a landlord to a leaseholder. Where that intermediate lease is not a head lease, the landlord will also be a leaseholder under the lease that is superior to that intermediate lease. A leaseholder under an intermediate lease will also be a landlord of the lease that is inferior to that intermediate lease. As such, one individual can be both a leaseholder under the superior lease and a landlord under the inferior lease. Where we discuss the rights and obligations owed by a person as a leaseholder under an intermediate lease, we refer to that person as an "intermediate leaseholder". Where we discuss the rights and obligations owed by a person as a landlord under an intermediate lease, we refer to that person as an "intermediate landlord".

Intermediate leases in enfranchisement claims

13.12 At the conclusion of an enfranchisement claim, the interest claimed by the leaseholder will be created (or transferred) by the person who has a sufficient interest in the premises to be able to do so. If the freehold is claimed, it will necessarily be the freeholder who must transfer the freehold to the leaseholder. If a lease extension is claimed, it will be the freeholder who must grant the extended lease unless an intermediate leaseholder of the premises has a sufficiently long leasehold interest in the building to be able to grant the lease extension. If there is more than one such intermediate leaseholder, it will be the leaseholder whose interest is closest to the leaseholder's lease in the chain of interests who must grant the lease extension. The person who grants the leaseholder the interest that he or she claims is referred to as the "competent landlord".

13.13 It may be that the person who grants the leaseholder a lease extension is an intermediate leaseholder in the sense we have described at paragraphs 13.9 to 13.11 above. But the rules we consider in this chapter are those that apply to any intermediate leases that are found between the interest held by the competent landlord and the enfranchising leaseholder. Each of those intermediate leases will be affected by the enfranchisement claim and the transfer of the freehold or the grant of a lease extension.

Do intermediate leaseholders have enfranchisement rights?

13.14 At present there is only ever one leaseholder who is able to exercise enfranchisement rights in respect of any premises. In general, this will be the leaseholder nearest to the bottom of the chain of interests who meets all of the relevant qualifying criteria for enfranchisement rights. It is this leaseholder to whom the enfranchisement regime seeks to provide rights.

13.15 There are a few points to note in relation to this general rule. First, under the current law, where a leaseholder holds a sub-lease of a house or flat that was granted by an intermediate landlord who had previously obtained a lease extension under either the 1967 or 1993 Acts, the leaseholder who has the sub-lease will not have any enfranchisement rights. This is therefore an exception to the general rule we set out at paragraph 13.14 above. We consider whether that position should change under our proposed new regime at paragraphs 13.108 to 13.117 below. Second, under the current law, a leaseholder who holds a head lease of premises will have enfranchisement rights in respect of any house or flat where there is no inferior lease with enfranchisement rights.[5] We do not propose to change that position, but we do consider what should happen to such a head lease when a collective freehold acquisition claim is made at paragraphs 13.70 to 13.82 below. Finally, we considered the possibility of introducing an additional enfranchisement right for certain intermediate landlords in Chapter 7 above.[6]

Other leasehold interests in a building

13.16 In many cases, an intermediate lease will include the same property as the leaseholder's lease and it will simply expire after the leaseholder's lease expires.[7] But in other cases, the intermediate lease will include more, or less, property than is included in the leaseholder's lease. For example, in a block of flats, an intermediate lease will often include both the residential units and the common parts of the building (such as entrance halls, staircases, store rooms), and there will be no inferior lease of those common parts. In this chapter, we refer to these leases as "common parts leases".

13.17 In other cases, parts of the building will have been let out on separate leases rather than included within a lease of a residential unit or an intermediate lease that includes those units. For example, the common parts of a building may have been let to a

---

5 A flat may, for example, be occupied by tenants under the terms of an assured or other short-term tenancy that does not qualify for enfranchisement rights.

6 See paras 7.39 to 7.47 above.

7 However, if the freeholder grants an overriding lease for a term less than any existing sub-lease, then the superior lease will in fact expire before the sub-lease.

management company, or the roof space within a block of flats may have been let to a third-party, sometimes with a view to its future development. In this chapter, we refer to these leases as "development leases".

13.18 In an enfranchisement claim to acquire the freehold of a building, rules need to be made as to the treatment of these additional leasehold interests in a building. First, it is necessary to decide whether the holder of an intermediate lease has any enfranchisement rights in respect of the building. Second, rules must be made to govern what should happen to an intermediate lease when an enfranchisement claim is made by an inferior leaseholder. And finally, if an intermediate lease is to be acquired by a leaseholder bringing an enfranchisement claim, a means of valuing the intermediate lease needs to be established.

PROBLEMS WITH THE CURRENT LAW

13.19 A comprehensive account of the current law concerning intermediate leases in enfranchisement claims is set out at paragraphs 16.14 to 16.105 of the Consultation Paper. That section covers the following topics:

(1) the provisions in the 1967 and 1993 Act that determine which leaseholder of a house or flat is entitled to exercise enfranchisement rights;

(2) the entitlements of enfranchising leaseholders to acquire intermediate leasehold interests in their unit or building and the procedures by which those leases are acquired; and,

(3) how intermediate interests acquired under the current law are valued.

13.20 We also set out in the Consultation Paper the key criticisms that are made of the current law.[8] These criticisms can be summarised as follows:

(1) problems with the current procedures for dealing with intermediate leasehold interests;[9]

(2) problems caused by the requirement that leaseholders bringing a collective enfranchisement claim must buy out all intermediate leasehold interests, even where those interests are held by leaseholders who have acquired intermediate interests in respect of their own flats or by third-party investors who have financially assisted an earlier collective enfranchisement claim;[10]

(3) the methodology by which Minor Intermediate Leasehold Interests (as defined at paragraph 13.147 below) are valued;[11] and

---

8 CP, paras 16.106 to 16.114.

9 CP, para 16.107.

10 CP, paras 16.108 to 16.110.

11 CP, para 16.111 and *Hague*, para 1-50(3)(d)(iii).

(4) potential injustices that may result from the power given to leaseholders under the 1993 Act to acquire any lease within a building that contains common parts.[12]

PROTECTING AN INTERMEDIATE LANDLORD IN AN ENFRANCHISEMENT CLAIM

13.21 Our recommendations about the procedure for making an enfranchisement claim are set out in Chapter 8. In most cases, an enfranchisement claim would be started by the leaseholder serving a Claim Notice on his or her competent landlord. We recommended that a competent landlord should be responsible for serving copies of the Claim Notice on any intermediate landlords.[13] In Chapter 9, we have set out our recommendations for responding to a claim. We recommended that the competent landlord would remain in charge of dealing with the leaseholder's claim unless he or she agreed that the intermediate landlord could take over, or the Tribunal granted permission for the intermediate landlord to do so. An intermediate landlord who had been served with a copy of a Claim Notice but did not wish to take over conduct of the claim would still be able to make representations to the Tribunal.[14] We believe these recommendations are necessary in order to prevent an increase in the costs and delay of bringing – and concluding – an enfranchisement claim.

13.22 However, in making these recommendations we accepted that there was a risk that an intermediate landlord would suffer a loss if a competent landlord failed to serve him or her with a copy of the Claim Notice. We therefore recommended that a competent landlord who failed, without reasonable excuse, to serve a copy of the Claim Notice on an intermediate landlord would be responsible for any losses caused to that intermediate landlord as a result.[15]

13.23 An intermediate landlord may choose not to apply to replace the competent landlord. Under these circumstances, the intermediate landlord could be adversely affected by the way in which the competent landlord conducts the claim. For example, the competent landlord could reach a settlement of the claim which would be binding on other landlords without their consent.[16] The Consultation Paper contained a proposal which was designed to mitigate this risk. We proposed that a statutory duty of reasonable care and skill and to act in good faith in respect of the interests of all other landlords should be imposed on the landlord who has conduct of an enfranchisement claim involving multiple landlords. We also proposed that any landlord whose interests are adversely affected by the negligent or dishonest actions of the landlord dealing with the claim would be able to recover damages from that landlord.[17]

13.24 In this chapter, we have referred to the landlord responsible for dealing with the claim as the competent landlord, and the other landlord affected by the claim as the intermediate landlord, as that is the starting point under our recommended procedural

---

12 1993 Act, s 2(3) and (4).

13 See para 8.201(1)(a) above.

14 See para 9.107 above.

15 See para 8.201(1)(b) above.

16 See CP, para 16.84.

17 See CP, Consultation Question 126, para 16.118.

regime. If the intermediate landlord does replace the competent landlord, the roles of the competent and intermediate landlords (as described in this part of the chapter) will be reversed.

Consultees' views

13.25 The vast majority of consultees agreed with our proposal. For example, Mark Chick, a solicitor, supported our provisional proposal on the basis that since the competent landlord could bind the intermediate landlord, he or she should be under a duty of good faith. Other consultees thought that, although our proposal echoed the current law, the current position would benefit from being clarified.

13.26 A few consultees who expressed their support for our provisional proposal nevertheless suggested modifications. For example, Damian Greenish, a solicitor, thought that our proposal should be coupled with a duty on intermediate landlords to provide relevant information to, and assist, the competent landlord in dealing with the enfranchisement claim. He also considered that intermediate leaseholders should be required to contribute to the costs incurred by the competent landlord in dealing with the claim, save in so far as those costs were recovered from the leaseholder.

13.27 Other consultees expressed reservations about the precise limits of a competent landlord's liability under our provisional proposal. For example, Christopher Jessel, a solicitor, suggested that the standard of conduct required of a competent landlord should fall short of that required of a trustee. Another consultee, Berkeley Group Holdings PLC, a developer, thought that the requirements of a duty of good faith were "still evolving and not well understood". A couple of consultees believed that it should be a defence to any claim for breach of statutory duty for the competent landlord to show that he or she had acted in accordance with professional advice.

13.28 A number of consultees opposed our provisional proposal. The Property Litigation Association thought our proposed was duty too onerous and likely to be used by some landlords to frustrate the enfranchisement process. A few consultees considered that the interests of competent landlords and intermediate landlords were often in conflict, and they should be separately represented where that was the case. Some of those consultees felt that any duty on the competent landlord should only apply where an intermediate landlord had chosen not to be separately represented.

Discussion and recommendations for reform

The need for a duty

13.29 Our recommended procedural regime would allow a competent landlord who is dealing with a claim both to conduct any litigation without the involvement of any intermediate landlord, and to settle that claim without first obtaining the agreement of the intermediate landlord. We accept that these recommendations create a risk that the competent landlord would use his or her powers to obtain a determination of, or settle, a claim on terms that significantly undervalued the interest of any intermediate landlord. To mitigate that risk, we proposed that a duty should be imposed on the competent landlord to protect the interests of the intermediate landlord. The competent landlord would still be entitled to take into account his or her own interests when dealing with the claim; our proposed duty was not fiduciary in nature. However,

such a duty would provide a remedy for the intermediate landlord where he or she had suffered a loss as a result of the competent landlord's conduct of the claim.

13.30 The creation of such a duty does give rise to the potential for litigation between landlords following the determination of an enfranchisement claim. But we think the prospect of such a claim being made by an intermediate landlord would deter most competent landlords from seeking to take advantage of the intermediate landlord. In addition, we believe that in the absence of any such duty, intermediate landlords would be more likely to apply to replace the competent landlord, or to seek to participate in the determination of a claim. Further, it would also be necessary to provide that any settlement of an enfranchisement claim would need the consent of all intermediate landlords. This means that, in the absence of such a duty, costs and delays for leaseholders would likely increase.

13.31 We have also considered whether an alternative model which seeks to encourage co-operation between competent and intermediate landlords could be introduced. However, we think that such a model is unrealistic and is likely to cause significant delay in the completion of enfranchisement claims. In doing so, it would place the competing interests of the landlords ahead of the interests of leaseholders, who are likely to care little about how the premium they must pay should be divided.

What should the standard be?

13.32 As we discussed in the Consultation Paper, the 1967 Act and the 1993 Act require competent landlords to act "in good faith and with reasonable care and diligence" when dealing with an enfranchisement claim.[18] In the Consultation Paper we proposed that any duty imposed on competent landlords under our new regime should be to "act with reasonable care and skill, and to act in good faith" in respect of the interests of other landlords.[19] We did not consider that this represented a departure from the standard contained in the 1967 Act and the 1993 Act. However, we note that the 1967 Act and the 1993 Act do not create a statutory duty; instead, they set out the circumstances in which a competent landlord will not be liable for any loss or damage caused by his or her acts or omissions in dealing with the claim.[20]

13.33 We think there needs to be further control over the extent to which the competent landlord is entitled to advance his or her own interests in a manner that will affect the interests of the intermediate landlord. We accept that the interests of the competent landlord and the intermediate landlord will often be aligned, as the competent landlord and any intermediate landlord will each have a financial interest in the outcome of the claim and may have a joint interest in maximising the amount of money to be paid by the leaseholder.[21] However, the proper division of the sum payable by the leaseholder

---

18 CP at paras 16.32 and 16.84. See also 1967 Act, sch 1, para 4(4), and 1993 Act, sch 11, para 6(4)

19 CP, Consultation Question 126, para 16.118.

20 The authors of *Hague* consider that any statutory duty under the 1967 and 1993 Acts is implied: see *Hague*, para 23-12. In *Kateb v Howard de Walden Estates Ltd, Accordway Ltd* [2016] EWCA Civ 1176, [2017] 1 WLR 1761, the Court of Appeal proceeded on the basis that the provisions of the 1993 Act created a statutory duty.

21 This may not be the case where there is a relationship between the competent landlord and the leaseholder. For example, the competent landlord may be a leaseholder-owned company, or a company associated with one or more leaseholders.

can place the competent landlord and intermediate landlord's interests in conflict. For example, the competent landlord may argue for receiving a greater share, and the intermediate landlord receiving a lesser share. In doing so, he or she will be advancing his or her own interests in preference to those of the intermediate landlord.

13.34 We think that an appropriate control on the competent landlord's ability to advance his own interests would be established by requiring the competent landlord to act in good faith. This would prevent the competent landlord from pursuing his or her interests in a manner that unfairly prejudices, or wilfully or recklessly sacrifices, the interests of the intermediate landlord.

13.35 We also think that the competent landlord should be expected to act with reasonable skill and care in his or her conduct of the claim. This would capture acts or omissions that were not designed unduly to favour the competent landlord over the intermediate landlord, but represented a failure to deal with the claim to the standard of a competent and reasonable landlord. We believe that this combined duty will provide sufficient protection for intermediate landlords.

13.36 We do not believe that it is possible or sensible to try to prescribe all the factors that a court should take into account when considering whether a competent landlord has acted in breach of this statutory duty. However, we consider that our statutory regime should make clear that although acting on legal or other professional advice would be a factor to be considered by the court, it would not of itself constitute a defence to a claim. Similarly, we think that where the competent landlord is uncertain as to how he or she should proceed, these difficulties should be resolved by appropriate communication between the competent landlord and other landlords. Both landlords would also know that any such communications would be taken into account in any future claim for damages by the intermediate landlord.

Aiding compliance with the duty

13.37 At present, intermediate landlords are required to provide the competent landlord with such information and assistance as the latter may reasonably require. If the competent landlord suffers loss from a breach of this duty, an intermediate landlord must indemnify the competent landlord.[22] We recommend that these duties should also be included in our new enfranchisement regime. We think that this will help to ensure that the competent landlord is able to obtain the information required to make appropriate decisions about the conduct of a claim, and the extent of his or her own duty to the intermediate landlord. We consider that the extent to which intermediate landlords share information and provide assistance to the competent landlord should also be relevant to the Tribunal's assessment of whether the duties of good faith and of reasonable care and skill have been fulfilled.

13.38 However, we also think that both the competent landlord and any intermediate landlord should be able to apply to the Tribunal for directions as to the conduct of the claim. A competent landlord might decide to do so where he or she remains uncertain as to whether an intended course of action would place him or her in breach of the duty to the intermediate landlord. An intermediate landlord would be able to make such an application if he or she considered that there was a risk that the competent

---

22 1967 Act, sch 1, para 5(5) and 1993 Act, sch 11, para 8(1).

landlord would act in breach of the duty, and the intermediate landlord could not be adequately protected by applying to replace the competent landlord, or by making representations at any hearing.[23]

13.39 We accept that in allowing any landlord to apply for directions, there is a risk that enfranchisement claims could be delayed by disputes that have arisen between landlords. We anticipate, however, that such applications should only be made where the landlords have been unable to resolve any conflict of interest between them in another way. Certainly, we think parties would, in almost all cases, have been required to discuss any conflict or dispute, and the best means of resolving that issue, prior to any application for directions being made.

Determination and settlement of claims

13.40 As we have set out above, any determination of the claim or settlement agreement reached between the leaseholder and competent landlord would be binding on any intermediate landlord. The consent of those other landlords to a settlement would not be required. However, the competent landlord might settle the claim on terms that were unfavourable to an intermediate landlord. The same risk would be faced by a competent landlord who was replaced by an intermediate landlord as the landlord responsible for dealing with the claim.

13.41 We have concluded that the competent landlord should be under a duty to act in good faith and with reasonable care and skill in its conduct of the claim, and that any other landlord should be under a duty to provide all information and assistance as the landlord who is responsible for bringing the claim reasonably requires. These measures provide some protection to an intermediate landlord who does not apply to take over the claim. With this in mind, we think that any determination or settlement agreement should continue to be binding on any intermediate landlord under our recommended regime.

Costs between landlords

13.42 In Chapter 12, we have made recommendations about who should pay the non-litigation costs of the parties to an enfranchisement claim.[24] If the leaseholder is required to pay a premium that broadly reflects market value, we recommend that each party should bear its own non-litigation costs. This recommendation reflects the fact that the premium set would be based on open market valuations where each party expects to pay their own costs. The price agreed by the seller already takes account of the fact that he or she will have to meet his or her own non-litigation costs. If premiums are set at a level that does not broadly reflect market value, we recommend that leaseholders should contribute to their landlord's non-litigation costs, but that contribution should be calculated in accordance with a fixed costs regime. We have also recommended that where a leaseholder is required to contribute to the competent landlord's non-litigation costs, a leaseholder should not be required to pay

---

[23] See paras 9.107 to 9.108 above.

[24] See para 12.56.

any greater sum as a result of the presence of an intermediate lease within the building.[25]

13.43 We recognise, however, that allowing a competent landlord to deal with a claim on behalf of all landlords creates a risk that the non-litigation costs will be incurred by the competent landlord, but the premium payable will be split between the competent landlord and one or more intermediate landlords. As a result, the competent landlord may not be fully compensated for his or her non-litigation costs, and the intermediate landlord will receive a share of the premium without meeting any of the non-litigation costs of giving effect to the transaction. We also recognise that an intermediate landlord who is due to receive a substantial proportion of the premium payable by a leaseholder may be content to leave the competent landlord to deal with the claim, knowing that the competent landlord is under a statutory duty to act in good faith and with reasonable skill and care.

13.44 As a result, we think there is a need to allow a competent landlord to recover some of his or her non-litigation costs from an intermediate landlord where a significant proportion of the premium payable by the leaseholder goes to the intermediate landlord rather than the competent landlord. We think an intermediate landlord should pay a percentage of a fixed sum[26] to the competent landlord in respect of the latter's non-litigation costs. The percentage payable should be the same as the percentage of the premium payable to the intermediate landlord. The sum should, however, be capped at the premium received by the intermediate landlord.

Figure 10: An intermediate landlord's contribution to the competent landlord's non-litigation costs

Fixed sum: (say) £1,000

Example 1:

Premium payable by leaseholder: £15,000
Proportion of premium payable to intermediate leaseholder: 35%
Premium payable to intermediate leaseholder: £5,250
Intermediate landlord's contribution to competent landlord's non-litigation costs: £350 (being 35% of £1,000)

Example 2:

Premium payable by leaseholder: £850
Proportion of premium payable to intermediate leaseholder: 35%
Premium payable to intermediate leaseholder: £297.50
Intermediate landlord's contribution to competent landlord's non-litigation costs: capped at £297.50 (as 35% of £1,000 – being £350 – would exceed the premium payable to the intermediate landlord)

25 See para 12.111.

26 The fixed sum would be determined in accordance with our recommendations in Chapter 12.

Recommendation 92.

13.45 We make the following recommendations.

(1) A determination of an enfranchisement claim by the Tribunal should bind the parties to that claim, and any other landlord affected by that claim. Any settlement of a claim made between a leaseholder and a landlord who is responsible for dealing with the claim should also bind any other landlord affected by that claim.

(2) The landlord who is responsible for dealing with a leaseholder's claim should owe a duty to other landlords to deal with the claim in good faith and with reasonable skill and care. Any landlord who suffers a loss as a result of a breach of that duty should be able to bring a claim in the county court for damages against the landlord who acted in breach of that duty.

(3) Any landlord who is not responsible for dealing with the leaseholder's claim should be under a duty to provide all information and assistance as the landlord who is responsible for dealing with the claim reasonably requires. Any landlord in breach of that duty should indemnify the landlord who is responsible for dealing with the claim against any losses arising from any such breach.

(4) Any landlord (whether responsible for dealing with the leaseholder's claim or not) should be able to apply to the Tribunal for directions as to the conduct of the response to the claim.

(5) A landlord who is entitled to receive any part of the premium on an enfranchisement claim, but who is not responsible for dealing with the claim, should contribute to the non-litigation costs incurred by the landlord who has been responsible for dealing with the claim. The sum payable should be a percentage of a fixed sum. The percentage should be equal to the percentage of the premium receivable by the landlord who is not responsible for dealing with the claim, subject to a cap equal to the total of that premium.

WHAT SHOULD HAPPEN TO AN INTERMEDIATE LEASE ON ENFRANCHISEMENT?

13.46 The current law on the acquisition of intermediate interests differs between freehold acquisitions and lease extensions. In freehold acquisitions of houses, the 1967 Act requires that all intermediate interests must be acquired by the enfranchising leaseholder.[27] The 1993 Act similarly prescribes a default rule that, in a collective enfranchisement claim, all intermediate interests should be acquired by the nominee purchaser.[28] In lease extension claims, on the other hand, intermediate interests remain, but are deemed to be surrendered and regranted subject to the leaseholder's

[27] 1967 Act, sch 1, para 1(1)(a).

[28] 1993 Act, s 2.

newly extended term, with the diminution in value of that interest paid by leaseholders to intermediate landlords who own those interests.[29]

13.47 In the Consultation Paper we did not propose any changes to the current law on the acquisition of intermediate leasehold interests by leaseholders bringing an enfranchisement claim. We did not, at that stage, anticipate any broader changes being required. We did however make a provisional proposal in respect of the acquisition of intermediate leases of the whole building where not all the flats within the building are let on long sub-leases (such that the intermediate leaseholder would be treated as a "qualifying tenant" of some of the flats).[30]

13.48 However, we now think that we need to consider further the general position of intermediate leasehold interests in a collective freehold acquisition claim. This is due to our recommendation in Chapter 5 that leaseholders making a collective freehold acquisition claim should be able to elect to require the landlord to take a leaseback of certain units in a building.[31] We explain that leasebacks have the effect of reducing the premium which the leaseholders would otherwise pay to acquire the freehold of the premises. However, one consultee pointed out that our proposal (which is now our recommendation) regarding leasebacks would not assist in reducing the premium payable by leaseholders where that unit is subject to a very long lease which needs to be bought out as part of the claim.[32] In other words, the current law governing acquisition of intermediate leases on a collective enfranchisement would mean that there is no substantial reduction in the premium payable by leaseholders where the landlord takes a leaseback of certain parts of the premises.

13.49 We think that the existing position for lease extensions and individual freehold acquisitions should remain. However, we are recommending a different approach to collective freehold acquisitions in light of our recommendations relating to leasebacks in Chapter 5. We think that the default position in our new enfranchisement regime should be that leaseholders bringing a collective freehold acquisition claim should be able to choose whether or not intermediate interests are acquired by the nominee purchaser.[33] This means that, where the freehold title is the reversionary title to the intermediate lease and the leaseholders do not elect to acquire the lease, the nominee purchaser would become the landlord of that intermediate lease. If there is more than one intermediate lease and the leaseholders do not elect to acquire these interests, then the nominee purchaser would become the superior landlord and the other intermediate leases would not be affected.

13.50 We believe that this change would help groups of leaseholders afford to bring a collective freehold acquisition claim, as they would be able to choose not to buy out expensive intermediate interests with a high reversionary value. This approach is consistent with our objectives of ensuring that intermediate interests do not pose

---

29 1967 Act, sch 1, para 10(2) and 1993 Act, sch 11, para 10(1).

30 CP, para 16.125.

31 See para 5.172 above.

32 By Philip Rainey QC, see para 5.160 above.

33 We are recommending out limited exceptions and refinements to this default position in certain circumstances as set out in the remainder of this chapter.

unreasonable impediments to leaseholders seeking to exercise enfranchisement rights. It also ensures that leaseholders can reduce the premium payable on enfranchisement by requiring the former landlord to take a leaseback of certain units, and choosing not to acquire any intermediate leases of those units.

Recommendation 93.

13.51 We recommend that in a collective freehold acquisition claim, the normal rule should be that the leaseholders bringing the claim can choose whether to acquire any (or any part of an) intermediate lease in the building.

ACQUIRING INTERMEDIATE LEASES CREATED IN A PREVIOUS COLLECTIVE FREEHOLD ACQUISITION

13.52 As we set out in the Consultation Paper, the current rule that intermediate leases created in the course of one collective enfranchisement claim (such as a leaseback to the former landlord or investor) can be acquired in a subsequent collective claim has been the subject of criticism.[34] In the Consultation Paper we considered whether such intermediate leases should be immune from being acquired in that way. We noted that such an immunity would be inconsistent with our proposed right to participate, and that we had also proposed a restriction on subsequent collective claims. And we also noted that those who took leasebacks as investors in a collective claim could protect their investment in other ways, and that a landlord who is required to take a leaseback by enfranchising leaseholders remained able to dispose of that leaseback to another if they wished.[35] We nevertheless invited consultees' views as to whether intermediate leases created as part of previous collective freehold acquisitions should be capable of being acquired by the nominee purchaser in subsequent claims.[36]

Consultees' views

13.53 A majority of consultees thought that intermediate leases created as part of one collective freehold acquisition claim should be capable of being acquired in a subsequent collective freehold acquisition claim. Those who expressed that view included professional representative bodies, leaseholder representative bodies, commercial freeholders, solicitors and surveyors.

13.54 However, a number of consultees believed that the valuation of intermediate leases to be acquired on a subsequent collective freehold acquisition should be carried out on a basis that gave a measure of protection to the intermediate landlord. For example, Southlands College Estate Wimbledon Limited thought that the premium paid to the intermediate landlord should be the higher of (a) the sum payable under any new valuation regime, and (b) a minimum sum calculated by reference to the price which the intermediate landlord had paid to acquire that intermediate lease.

---

34 CP, para 16.108.

35 CP, para 16.119 to 16.120

36 CP, Consultation Question 127, para 16.121.

13.55 A number of consultees, however, thought that intermediate leases created as part of an earlier collective freehold acquisition claim should be immune from being acquired in a subsequent collective freehold acquisition claim. Some consultees were opposed in principle. For example, Cadogan, a landlord, wrote that:

> It seems an odd proposition to suggest that a freeholder can be obliged to take a leaseback by one group of leaseholders and then for that leaseback to be acquired compulsorily by another group of leaseholders. If the freeholder does not like that, it is suggested that he could simply sell his asset. However, there may be any number of reasons why a sale at a particular time in particular circumstances may not be advantageous. What is the justification for allowing the nominee purchaser to acquire the intermediate leasehold interest in these circumstances?

Other consultees warned of the complexity of this issue, and the difficulty of finding a general solution that would work in all cases. A few consultees noted that the introduction of a right to participate and a moratorium on subsequent collective claims would make the requirement to acquire such intermediate leases unnecessary due to a reduced chance of "ping-pong" claims.[37]

Discussion and recommendations for reform

13.56 Two of our recommendations in Chapter 5 are relevant to this issue. First, we have recommended that there should be a defence to a collective freehold acquisition claim where the premises have been the subject of a successful collective freehold acquisition claim within the preceding two years (save where the further claim is intended to facilitate the conversion of the building to commonhold).[38] Second, we are not currently able to recommend the immediate introduction of a right to participate.[39] As such, in reaching a conclusion about whether leaseholders bringing a collective freehold acquisition claim should be required to acquire intermediate leases created as part of a previous claim, we have taken account of our recommended defence to successive collective acquisition claims, but not the existence of a right to participate.

13.57 We do not consider that there is a sufficiently strong case for making this type of intermediate lease immune from acquisition on a subsequent collective claim, when we are not recommending an immunity for other comparable intermediate leases. The risk that an investor who had taken an intermediate lease as part of a collective freehold acquisition claim may have that interest acquired by the nominee purchaser in a subsequent collective freehold acquisition should be taken into account by that investor when deciding whether or not to invest.

13.58 In addition, we are recommending that leaseholders should be able to reduce the premium payable on a collective freehold acquisition claim by requiring the landlord to take leasebacks of certain parts of a building. We think those intermediate leases should be capable of being acquired if the leaseholders making a subsequent collective freehold acquisition claim consider that the parts previously excluded from acquisition (by virtue of the grant of leasebacks) should now be included. And as an

---

37 See para 5.4(4), where we discuss the issues caused by "ping-pong" claims.

38 See para 5.221 above.

39 See paras 5.222 to 5.246 above.

intermediate lease created during one collective freehold acquisition claim would be valued in the same way as any other intermediate lease on the subsequent collective freehold acquisition claim, we do not believe the investor or the freeholder who is required to take a leaseback would lose out. Collective freehold acquisition is a right which is exercisable at a time of the leaseholders' choosing and thus it is always open for leaseholders to choose a time which is most beneficial to them in terms of valuation.

13.59 We believe that where an intermediate lease has been created as part of a collective freehold acquisition claim, that lease should not be immune from being acquired. In other words, leaseholders bringing a subsequent collective freehold acquisition claim should be able to choose (as they can under the current law) whether or not they wish to acquire that intermediate lease in the same way we have recommended that leaseholders can choose whether or not to acquire any other intermediate lease. We also think that if the intermediate lease is to be acquired by the leaseholders, it should be valued in the same way as any other intermediate lease.

Recommendation 94.

13.60 We recommend that:

(1) intermediate leases created as part of a previous collective freehold acquisition should not be immune from acquisition, so that leaseholders may elect to acquire such leases in a subsequent collective freehold acquisition; and

(2) if any such intermediate lease is to be acquired, it should be valued on the same basis as any other intermediate lease.

WHERE THE INTERMEDIATE LANDLORD IS ALSO THE LEASEHOLDER OF THE RESIDENTIAL UNIT

13.61 In the Consultation Paper, we referred to a criticism of the current law made by Philip Rainey QC: leaseholders who have acquired an intermediate lease that is superior to their own lease are liable to have that intermediate lease acquired by a nominee purchaser upon a subsequent collective enfranchisement.[40] This might happen where the leaseholder has chosen to take an intermediate lease between his or her own lease and any superior interest instead of extending his or her own lease, and the titles to the two leases have not been merged.[41] We provisionally proposed that

[40] CP, para 16.109.

[41] Where a leaseholder holds more than one lease of the same property, he or she may make an application to HM Land Registry merge the leasehold titles so that the sub-lease comes to an end. This means that the leaseholder could make an application to merge his or her original lease and the intermediate lease, so that the leaseholder holds only the intermediate lease.

leaseholders who have acquired an intermediate lease in this way should not have that lease acquired on a subsequent collective freehold acquisition.[42]

Consultees' views

13.62 A majority of consultees who responded to this consultation question supported our provisional proposal. Many consultees did so on the basis that there was no justification for a nominee purchaser acquiring an intermediate lease to an individual residential unit in such cases. Others noted that the current law can cause problems in practice, with a leaseholder who also holds an intermediate lease of his or her flat being faced with the prospect of having to use the money paid to him or her by the nominee purchaser to acquire the intermediate lease to bring a fresh statutory claim for a lease extension.

13.63 Very few consultees opposed our provisional proposal. Of those who did so, John Stephenson, a solicitor, warned that complications might result, for example, where a third party held a lease between the leaseholder's two leases. Caxtons Commercial Limited, surveyors, considered that a leaseholder's intermediate lease should not be acquired in a subsequent collective freehold acquisition, but that if the intermediate lease included commercial property, the intermediate lease should be severed and the leaseholder left with a lease of the commercial property.

Discussion and recommendations for reform

13.64 We believe that we should take forward our provisional proposal, subject to some refinements.

13.65 As a starting point, we think that where a leaseholder holds both an intermediate lease and an under lease of a particular residential unit (as described at paragraph 13.61 above), the leaseholder should be able to decide whether the intermediate lease should be acquired by the nominee purchaser as part of a collective freehold acquisition claim. Putting such a power in the hands of the leaseholder would allow the leaseholder to avoid having to make a further enfranchisement claim to extend his or her lease as a means of effectively replacing the interest that had been acquired.

13.66 That starting point would, however, be subject to the following qualifications. First, the power to prevent such an intermediate lease being acquired would lie only in the hands of a leaseholder who would be entitled to participate[43] in a collective freehold acquisition claim. Those leaseholders would avoid loss of their intermediate lease (which will be granted for a longer term than the sub-lease) in the process of the collective freehold acquisition, and avoid the need to re-grant that interest following completion of the acquisition. In all other circumstances, we believe the nominee purchaser should able to elect whether or not to acquire intermediate or other leasehold interests to ensure that there is a choice between minimising the premium and maximising post-acquisition management control. Second, the power would not be available where there was a further intermediate lease between the leaseholder's lease and his or her intermediate lease of the same premises. Instead, the nominee

---

42 CP, Consultation Question 128, para 16.123.

43 That is, leaseholders who qualify for enfranchisement rights (whether or not they are in fact participating in the claim).

purchaser would be able to decide whether or not it wished to acquire those intermediate leases.

Recommendation 95.

13.67 We recommend that, when a collective freehold acquisition claim is made, an intermediate lease of a residential unit that is held by the leaseholder of that residential unit should not be acquired by the nominee purchaser if the leaseholder of that residential unit decides that it should not be acquired.

13.68 We recommend that this power should:

(1) only be available to leaseholders who are eligible to participate in a collective freehold acquisition; and

(2) only apply to an intermediate lease that sits directly above the leaseholder's lease.

13.69 We recommend that where there is an intermediate lease between the leaseholder's lease and his or her intermediate lease of the same premises, the nominee purchaser should be able to choose whether to acquire those intermediate leases as part of a collective freehold acquisition claim.

HEAD LESSEES WHO ARE ALSO QUALIFYING LEASEHOLDERS

13.70 In the Consultation Paper we described the position under the current law where a head lease of an entire building includes a residential unit that is not the subject of its own long lease (in other words, it is not subject to a sub-lease of that residential unit).[44] We noted that, as a result of the decision of the House of Lords in *Howard de Walden Estates Ltd v Aggio*, the leaseholder of the head lease is a qualifying tenant of that residential unit.[45] He or she would therefore be entitled to a lease extension of the residential unit, and to participate in a collective enfranchisement claim. But the current law also requires that when a collective enfranchisement claim is made, all intermediate leases should be acquired by the nominee purchaser.[46] This means that the holder of such a head lease will have that intermediate lease acquired by the nominee purchaser despite his or her own enfranchisement rights.

13.71 In the Consultation Paper we proposed two alternative solutions to this problem. On a collective freehold acquisition, either:

(1) the whole of the head lease would not be acquired (Option 1); or

---

44 CP, para 16.18. As noted at para 13.10 above, a head lease is an intermediate lease where the superior interest is held by the freeholder. A head lease is at the top of a chain of leasehold interests in a building.

45 See CP, para 7.127 for our discussion of *Aggio* leases and the circumstances in which they can arise.

46 1993 Act, s 2.

(2) the whole of the head lease would be acquired, but there would be a leaseback to the leaseholder of the head lease of units of which he or she would be the qualifying leaseholder (Option 2).[47]

Consultees' views

13.72 It is clear that some of the responses to this consultation question misinterpreted Option 1. This option was intended to propose that the head lease be severed, and that only the part that did not include the relevant residential unit would be acquired on collective freehold acquisition. The part containing the residential unit would be retained by the leaseholder of the head lease. We did not intend to propose that no part of the head lease should be acquired by the nominee purchaser (that is, that the head lease should be left in place). Some of those consultees who misinterpreted our consultation question in this way supported Option 1, while others opposed it.

13.73 The vast majority of consultees who answered this consultation question supported Option 2. Most did so on the basis that Option 2 would make the subsequent management of the building easier, as the nominee purchaser would manage the whole building, rather than having part of the building under the control of the leaseholder of the head lease. In contrast, Philip Rainey QC focussed on the complexity of severing a head lease which is "never straightforward and usually not that satisfactory".

13.74 Some consultees were concerned as to how either option would fit with our provisional proposal that leaseholders making a collective freehold acquisition claim should be able to require a freeholder to take a leaseback of any residential units that had not been let on long leases. Others were concerned that if the leaseholder of the head lease took a leaseback, that lease would be inferior to the leases that the nominee purchaser was likely to grant to the participating leaseholders once the collective claim was complete. Another consultee proposed that the intermediate leaseholder should be granted a 999-year lease of the residential unit in respect of which he or she held enfranchisement rights.

Discussion and recommendations for reform

13.75 If a leaseholder of a head lease has enfranchisement rights in respect of part of a building, we think it would be wrong in principle to have the whole of the head lease acquired by a nominee purchaser as part of a collective freehold acquisition. The exercise of enfranchisement rights by one leaseholder (or a group of leaseholders) should not extinguish the enfranchisement rights of another leaseholder. Both the options set out above would leave the enfranchisement rights of the leaseholder of the head lease in place.

13.76 We have recommended in Chapter 5 that leaseholders bringing a collective freehold acquisition claim should be able to require a freeholder to take a leaseback of parts of the building.[48] This would include commercial areas, residential units held by non-participating leaseholders, and residential units where no long sub-leases have been granted. The advantage in allowing leaseholders to make such a choice is that the

---

47 CP, Consultation Question 129, para 16.125.

48 See para 5.172 above.

premium payable to acquire the freehold would be reduced as a result (as the freeholder will retain a leasehold interest in that part of the building).

13.77 But we noted at paragraph 13.48 above that much of the benefit in allowing leaseholders to make such a choice would be lost if they were required to buy out a long intermediate lease held over that part of the building. The cost of buying out that intermediate interest could be almost equivalent to acquiring the freehold to that part without granting a leaseback to the existing freeholder. We recommended, therefore, that leaseholders should be able to choose to leave the intermediate interest in place[49], and therefore any leaseback of that part of the building could be granted without the need to buy out an intermediate interest.

13.78 These recommendations are relevant to our provisional proposal in relation to *Aggio* head leases.[50] This is because an *Aggio* head lease may include parts of the building which will be leased back to the freeholder, as well as the residential units in relation to which the head leaseholder has enfranchisement rights. Under these circumstances, Option 1 would allow the head lease to be severed so that its demise includes only those parts of the premises in respect of which the head leaseholder also has enfranchisement rights. Under Option 2, the leaseholders would acquire the whole of the head lease and grant a leaseback to the head leaseholder over the relevant parts of the premises in its place.

13.79 Our recommendations on leasebacks in general and the solution to the specific problem addressed in this section should adopt a consistent approach. And in Chapter 5, we explain that leasebacks have the effect of reducing the premium which the leaseholders would otherwise pay to acquire the freehold of the premises, but that this effect would not be felt where leaseholders are required to buy out a head lease of the building. This is because most of the value in the building would be held by the head leaseholder and not the landlord. Option 2 would require the enfranchising leaseholders to buy out the whole of the *Aggio* head lease. Therefore, we are recommending that Option 1 be adopted.

13.80 This means the intermediate lease in question will be severed, such that one portion of it is acquired by the nominee purchaser and the other is retained by the head leaseholder. The head leaseholder does not stand to lose the whole of his or her lease, but instead is able to retain a severed portion of the lease over units of which they are the most inferior leaseholder. And the nominee purchaser could grant leasebacks of those units to the freeholder (if the head leaseholder is not participating in the claim in relation to those units), without the need to acquire the whole of the intermediate lease. This means that the nominee purchaser would not be required to pay for any of the reversionary value in these units. The retained portion of the head lease may need to be varied in order to ensure that it is fit for purpose in relation to the residential unit(s) which remain within its demise, and we think that the Tribunal should have the power to order that the lease is so varied as part of the terms of the acquisition.

---

49 See para 13.51 above.

50 See para 13.82 above.

13.81 We acknowledge that, in adopting Option 1, we have taken a different view from the majority of substantive responses to this Consultation Question. And while the need for consistency with our recommendations on leasebacks in general is a key reason for this approach, we think there are other compelling arguments against the adoption of Option 2. First, in cases where there are multiple intermediate leases, acquisition and leaseback (Option 2) becomes extremely complicated. The nominee purchaser would need to grant a leaseback to the first intermediate leaseholder, who would then need to grant a leaseback to the next intermediate leaseholder, and so on. Second, any severance of an intermediate lease can be recorded in the transfer of the freehold from the landlord to the nominee purchaser, provided the intermediate leaseholder is a party to the transfer. This avoids the additional documentation (and associated costs) which would be required to implement a leaseback under Option 2. Finally, this approach ensures that leaseholders exercising their rights to a collective freehold acquisition do not need to pay significant additional sums for head leases they may not want to acquire, and allows the head leaseholder to retain its head lease in relation to those residential units where it has enfranchisement rights.

Recommendation 96.

13.82 We recommend that where:

(1) a collective freehold acquisition claim is made; and

(2) there is a head lease which includes residential units over which the leaseholder under the head lease has enfranchisement rights (because there is no inferior long lease of those parts),

the head lease should be severed, with the part containing the residential units over which the intermediate leaseholder has enfranchisement rights being retained by the intermediate leaseholder, and the remainder being acquired by the nominee purchaser.

LEASES OF COMMON PARTS

13.83 Section 2(3) of the 1993 Act contains a power for the nominee purchaser to elect to acquire any lease within a building that contains common parts where "the acquisition of that interest is reasonably necessary for the proper management or maintenance of those common parts". We were told in the pre-consultation period that this provision can result in the acquisition of leases containing both a residential flat and common parts, although that outcome was considered more likely to be the result of undue pressure being applied to leaseholders whose premises included common parts rather than the proper application of section 2(3) of the 1993 Act.

13.84 In the Consultation Paper we proposed that, in a collective freehold acquisition claim:

(1) the nominee purchaser would be able to acquire leases that contained both common parts and other property where that was reasonably necessary for the proper management and/or maintenance of the common parts;

(2) the Tribunal would, however, have a power to determine that such a lease should instead either:

(a) be severed, leaving only the part containing the common parts to be acquired by the nominee purchaser, or

(b) be retained by the leaseholder of that lease, but with the introduction of new or varied easements to ensure proper management and/or maintenance of the common parts.[51]

We considered that this proposal would clarify the existing power under the 1993 Act in a way that is likely to be significantly less disruptive for the leaseholder of a lease of a residential unit that also contains common parts.

13.85 However, we also noted the potential for conflict between the acquisition of common parts leases to ensure the proper management of the building and the preservation of development rights when those leases were granted by landlords to third parties over parts of the building for development purposes.[52]

13.86 We therefore provisionally proposed that, on a collective freehold acquisition claim, leases of common parts granted for development purposes should not be acquired unless the severance of any part of that lease, and/or the introduction of new (or the variation of existing) easements, would permit the proper management of any common parts, while also preserving the intended development.[53]. Whether a common parts lease had been granted for development purposes would be a matter for the Tribunal to determine, on the basis of substance rather than form.

Consultees' views

Leases of common parts

13.87 A sizeable majority of the consultees agreed with our provisional proposal. While a few consultees warned that our proposed solution might involve complex drafting to ensure that its practical operation was workable, it was felt that the desired result was worthwhile. The Property Litigation Association noted that this proposal would be particularly helpful in respect of mixed-use developments.

13.88 Not many of the consultees who opposed our provisional proposal made substantive comments. Church & Co Chartered Accountants strongly opposed the continuation of the current power to acquire such leases, citing an example of the difficulties arising from a lease of a private road being acquired by groups of leaseholders of different buildings in successive collective enfranchisements. Long Harbour and HomeGround, a landlord and an asset manager, commented that our provisional proposal might result in a former landlord being left with a useless part of a lease.

---

51 See CP, Consultation Question 130, para 16.129.

52 See CP, para 16.114.

53 See CP, Consultation Question 131, para 16.133.

Development leases

13.89 The majority of consultees who responded to our question concerning common parts leases granted for development agreed with our provisional proposal. While very few actively opposed the proposal, a sizeable minority of consultees provided substantive responses setting out the issues raised by our proposal.

13.90 Consultees who favoured our proposal stressed that enfranchisement claims should not be capable of frustrating development opportunities. For instance, Church & Co Chartered Accountants argued forcefully in favour of our provisional proposals, asserting that "it is vital to the ongoing redevelopment of our town and city-scape that we do not let enfranchisement be used as an engine to stop both incremental development or redevelopment".

13.91 The small minority of consultees who made substantive comments opposing our provisional proposal were particularly vocal in their dissent. A common view was that collective enfranchisement claims are often aimed precisely at preventing development work by freeholders. For example, Philip Rainey QC believed that "being able to control development is central to the concept of enfranchisement". And Bruce Maunder-Taylor, a surveyor, expressed strong opposition to our provisional proposal on the basis that it would shift the balance in favour of disruptive developments and against the interests of leaseholders:

> [Developments] almost invariably involve major disruption [to the leaseholders] … and for these developments to proceed under present law and regulations, the developer has to do deals with the [leaseholders] so that there is a balance between the developer's right to develop, and the lessee's right to peaceful enjoyment etc. If you change the law so that the developer can have his development rights preserved, without having to do such deals and without having to balance his rights against the rights of the [leaseholders] there will be huge problems…. What you appear to be suggesting is that if the developer (who has deep pockets and tax deductible business expenses) could show that the proper management of any common parts is not frustrated, then those [leaseholders] who wish to oppose him (who have by comparison little money and are paying out of net income after tax) have a very much weakened position.

13.92 Mark Chick, a solicitor, thought that in principle such leases should be acquired on a collective freehold acquisition claim, but that leaseholders should be able to choose not to do so. He considered that such a right would "allow arguments about development value to be 'parked' if the [leaseholders] so wished".

Discussion and recommendations for reform

Leases of common parts

13.93 The legitimate purpose of the existing power for a nominee purchaser to acquire a lease where that lease contains common parts is to ensure that a nominee purchaser is able to maintain or manage the common parts properly once the freehold of the building is acquired. Restricting this legitimate purpose would mean that leaseholders would be deterred from bring a collective freehold acquisition claim if they thought that the nominee purchaser would not be able properly to manage or maintain the

common parts of the building. Indeed, landlords could then grant common parts leases to deter enfranchisement claims.

13.94 The statutory test for the exercise of the Tribunal's existing power provides a measure of protection for leaseholders whose premises include common parts. A nominee purchaser is only permitted to acquire a lease where that is "reasonably necessary for the proper management or maintenance of those common parts".[54] We agree, however, that the existence of the power can create an opportunity for those bringing a collective enfranchisement claim to place undue pressure on other leaseholders to give up their leases to a nominee purchaser rather than face a costly dispute.

13.95 We also think that the existing power is too inflexible a tool. If the proper management or maintenance of the common parts can be provided for without the whole of the lease being acquired by the nominee purchaser, allowing the nominee purchaser to do so would be a disproportionate interference with the property interests of the leaseholder of that lease. We continue to believe, therefore, that the Tribunal should be able to direct that only part of the premises contained in the lease (such as the common parts) be acquired or that the lease be retained by the leaseholder, but with the addition or variation of such easements as are required to facilitate proper management or maintenance of the common parts.

13.96 We do, however, accept that the application of this flexible power creates a risk that the leaseholder of a lease that contains common parts might be left with a lease (or a part of a lease) that is of no economic value. Equally, we believe that providing that the Tribunal's more limited powers could only be exercised at the election of the leaseholder would risk requiring the nominee purchaser to buy out the lease when it did not need to do so for the purposes of maintaining or managing the common parts. We consider that it would be reasonable for the leaseholder to retain the lease as altered by the exercise of these powers.

13.97 In the Consultation Paper we provisionally proposed that a nominee purchaser would be able to acquire the whole of a lease containing common parts and other property, but that the Tribunal would have a power to order one of the two alternatives set out at paragraph 13.84 above. This would provide the leaseholder of the common parts lease with an opportunity to argue that the whole of the lease need not be acquired. It would not, however, allow the leaseholders bringing the collective freehold acquisition claim a similar opportunity: if the leaseholder of the lease did not raise the point, the whole of the lease would have to be acquired by the nominee purchaser. Equally, if the leaseholders bringing the collective freehold acquisition claim were able to argue that the whole of the leaseholder's lease need not be acquired, we think that the leaseholder of the lease should be permitted to argue that the whole of the lease should be acquired.

13.98 Therefore, we consider that where some common parts of a building are contained within a lease that also relates to other property, the Tribunal should be able to make

---

[54] 1993 Act, s 2(3).

a range of orders in relation to that lease.[55] Further, we consider that either the nominee purchaser or the leaseholder may raise the issue of the treatment of that lease before the Tribunal. The Tribunal's powers would only be exercisable where it was satisfied that an order was reasonably necessary for the management or maintenance of the common parts. In deciding the nature of the order, the Tribunal would also be required to consider the effect of any such order on the leaseholder's retained interest.

Development leases

13.99 In the Consultation Paper we also noted that a collective enfranchisement claim could hinder the development of a building by allowing leaseholders to acquire a lease of common parts even if the lease had been granted for the purposes of allowing such development to take place.[56] Our proposals sought to balance the competing interests of leaseholders and the third-party owners of development leases which include common parts.

13.100 We acknowledge that our provisional proposal in respect of development leases gave insufficient weight to the wish of many leaseholders to use enfranchisement as an opportunity to control development within their building. Allowing landlords to grant leases of common parts in a way that would place future development beyond the control of leaseholders who subsequently obtain the freehold of the building via enfranchisement would ignore those wishes. Indeed, landlords may be encouraged to grant development leases that included common parts in order to deter enfranchisement claims being made, in the same way as they might grant common parts leases to deter claims where the acquisition of those leases is complicated or prohibited by enfranchisement legislation. We accept that there is a wider societal importance in ensuring the proper development of existing buildings. But we do not think that protecting common parts leases granted by a landlord to a third-party for development purposes from being acquired by leaseholders making an enfranchisement claim is a necessary part achieving that wider objective.

13.101 We have concluded, therefore, that the fact that a common parts lease has been granted for development purposes should not prevent that lease from being acquired by leaseholders bringing a collective freehold acquisition claim. However, we also accept that not all leaseholders would wish to acquire that lease as part of their claim. For example, some leaseholders may not be concerned about the development opportunity contained within such a lease, while others may simply be unable to afford to buy out the lease.

13.102 Accordingly, we recommend that leaseholders bringing a collective freehold acquisition claim should be able to choose whether or not to acquire a lease of common parts where that lease had been granted for development purposes. In other words, the acquisition (or not as the case may be) should be at the election of the

---

55 The Tribunal's order may include more than one of the options we set out in our proposal – for example, the Tribunal may order that the lease is severed and then varied so that it is fit for purpose in relation to its altered demise.

56 CP, para 16.114.

nominee purchaser.[57] In the event that only part of the premises let by the lease of common parts has development potential, the leaseholders can elect to sever the lease of common parts and acquire just the parts of the premises which are without development potential. We think this approach will reduce the appeal to landlords of granting common parts leases as a deterrent to enfranchisement claims. In addition, the leaseholders will be able to elect to acquire those parts of a common parts lease which do have development potential and either pay any development value assessed to be payable as part of the premium, or elect to take a restriction on future development, if Government takes forward that option for reform in our Valuation Report.[58]

13.103 We also think that the Tribunal should be able to give effect to the election of the nominee purchaser in respect of any lease of common parts that had been granted for development purposes. In particular, the Tribunal should be able to determine the terms of any severance of the existing lease, and/or vary the lease as necessary to give effect to the election of the nominee purchaser.

Recommendation 97.

13.104 We recommend that where, in a collective freehold acquisition claim, a lease includes residential unit(s) and common parts then (save where that lease is granted for the purposes of development) the Tribunal should have the power to order that:

(1) the lease be acquired by the nominee purchaser,

(2) the lease be severed in order to separate the common parts from the remainder, with the former being acquired by the nominee purchaser, and/or

(3) the lease be varied by the addition or alteration of easements relating to the common parts.

13.105 We recommend that:

(1) before any of these powers can be exercised, the Tribunal should be satisfied that an order is reasonably necessary for the proper management or maintenance of the common parts; and

(2) in deciding which of these orders to make, the Tribunal should take into account:

(a) the proper management and/or maintenance of the common parts, and

(b) the effect of any such order on the leaseholder's retained interest.

---

57 The Tribunal may determine any dispute relating to the acquisition of such leases (for example, valuation disputes and variations to the lease) in accordance with our recommendations in Chapter 11.

58 Valuation Report, paras 6.155 to 6.179. In the Valuation Report we refer to this option as "Sub-option 3". This option would also be available to leaseholders as part of the valuation of the freehold interest of premises which have development potential.

13.106 We recommend that, on a collective freehold acquisition claim, the nominee purchaser will be able to choose whether or not to acquire any lease of common parts that had been granted for development purposes, or to acquire only the part of that lease that contains the common parts.

13.107 We also recommend that, in relation to a lease of common parts that had been granted for development purposes, the Tribunal should (in the absence of agreement between the parties) be able to determine the terms of any severance of the existing lease and/or vary the lease as necessary to give effect to the election of the nominee purchaser.

SUB-LEASES GRANTED OUT OF EXTENDED LEASES

13.108 As noted above, a leaseholder's long lease of a residential unit may have been granted by a landlord who held only a lease of those premises. The lease held by that leaseholder is described as a sub-lease. Where the landlord who granted that sub-lease held a lease that had itself been extended, whether under the 1967 Act or the 1993 Act, the enfranchisement rights of the sub-leaseholder are limited. Such a sub-leaseholder may exercise a right to acquire the freehold to the premises. But he or she can only exercise a right to extend their sub-lease against their immediate landlord (that is, the landlord whose lease was extended). Any other rights to a lease extension are held by the sub-leaseholder's landlord and not by the sub-leaseholder.[59]

13.109 In the Consultation Paper we provisionally proposed removing this restriction on the enfranchisement rights of such a sub-leaseholder.[60] We argued that such an approach was necessary to facilitate our proposed right to participate and because of our provisional proposal that there should be no restriction on the number of lease extensions that a leaseholder could obtain.[61] We also proposed that this change would apply to sub-leases that had been granted before as well as after any new regime was introduced.

Consultees' views

13.110 A large majority of the consultees who answered this question agreed with our provisional proposal. That support came from a broad range of consultees, including leaseholders, landlords, and professionals. Carter Jonas LLP, surveyors, noted that our proposal seemed "fair and equitable".

13.111 A few consultees opposed our provisional proposal. For example, Boodle Hatfield LLP, solicitors, said that giving sub-leaseholders lease extension rights would result in a "proliferation of sub-leases". They continued by stating that this:

---

59 Under the 1967 Act, a leaseholder of a house whose lease had been extended under that Act has no further right to a lease extension. But under the 1993 Act, the leaseholder whose lease has already been extended would have a right to a further lease extension.

60 See CP, Consultation Question 132, para 16.137.

61 See CP, para 16.136.

> … introduces more intermediate leases on a future collective enfranchisement. That will be particularly unfair if a claimant does not have to meet costs incurred by an intermediate landlord.

13.112 Another consultee, Damian Greenish, considered that any extension of our proposal to holders of existing sub-leases was problematic. He thought that, in doing so, we would be taking away rights (and value) from one leaseholder, and giving those rights (and value) to another leaseholder.

Discussion and recommendations for reform

13.113 We do not consider that the existing rule that limits the enfranchisement rights of a leaseholder who has a sub-lease granted by a landlord who had already extended his or her own lease under the 1967 Act or 1993 Act should be retained in any new regime.

13.114 We understand that the existing rule was included within the 1967 Act in order to prevent the rule that leaseholders of houses were only entitled to a single 50-year extension from being circumvented.[62] We can see no sensible explanation for its inclusion within the 1993 Act, where any number of 90-year extensions of leases of flats were permitted. We have recommended in Chapter 3 of this Report that leaseholders of residential units (incorporating houses and flats) should be entitled to any number of lease extensions. Therefore, we can see no justification for the inclusion of the existing rule within our new regime.

13.115 In the Consultation Paper, we identified that our proposal would transfer enfranchisement rights from an intermediate leaseholder to a sub-leaseholder, and would therefore facilitate our proposed right to participate (which, we proposed, would be available to the sub-leaseholder). As set out in Chapter 5 of this Report, we are not recommending that the right to participate is taken forward at this time. However, we do not think that our position on the right to participate changes our analysis in relation to our provisional proposal. We remain of the view that the sub-leaseholder should benefit from the full suite of enfranchisement rights, and that this position would assist if any right to participate is introduced in future.

13.116 We accept that our provisional proposal will transfer some enfranchisement rights from a leaseholder who has previously extended his or her lease pursuant to the legislation to the leaseholder to whom they had subsequently granted a sub-lease (that is, the sub-leaseholder). We also accept that the value of the leaseholder's lease may be reduced by the transfer of those rights. However, we believe that any such loss of value has been overstated. First, the sub-leaseholder has an existing right to obtain a lease extension as against his or her immediate landlord, provided that the immediate landlord holds a sufficient interest in the property to grant such an extension. If the sub-leaseholder exercises a right to extend their lease, the intermediate leaseholder will usually be entitled to receive part or all of the premium. This mitigates any loss of value to the leaseholder's lease as a result of the grant of the sub-lease. Second, as the leaseholder's lease is an intermediate lease, it is liable

---

62 If the rule were not in place, a leaseholder who had extended a lease of a house would be able to obtain a further extension by granting a sub-lease to a connected party, who would then exercise a right to a lease extension for a further 50 years.

to be acquired by leaseholders bringing a collective enfranchisement claim. In this case the intermediate leaseholder's interest will be valued in the usual way, on the basis that it does not have any enfranchisement rights. There would, therefore, be no difference in value between the sum the intermediate leaseholders could expect to obtain if their lease is acquired in a collective freehold acquisition under the present law and the value of the intermediate leaseholder's interest in light of our provisional proposal.

Recommendation 98.

13.117 We recommend that the enfranchisement rights of a leaseholder should not be limited by virtue of the fact that his or her lease was granted by the landlord out of a lease that had itself been extended in reliance upon statutory enfranchisement rights. This should apply whether the landlord's lease was extended under the existing or new enfranchisement regimes.

VALUATION

13.118 As set out at paragraph 13.18 above, if an intermediate lease is to be acquired by a leaseholder bringing an enfranchisement claim, a means of valuing the intermediate lease needs to be established.

13.119 As set out at paragraph 13.46 above, the position at present is that intermediate leases are not acquired by the leaseholder in a lease extension claim. Rather there is a deemed surrender and regrant of any intermediate lease. Consequently, while the interest continues until its contractual expiry, the intermediate landlord is compensated for the reduction in the value of his or her interest. As set out at paragraph 13.49 above, we think that the existing position for lease extensions should remain. In other words, that there should continue to be a deemed surrender and regrant of any intermediate lease.

13.120 Where a freehold is being acquired under either the 1967 Act or the 1993 Act, each individual leasehold interest being acquired is at present given its own separate price. The separate price which is determined for each intermediate leasehold interest is ascertained on the same basis as the freehold interest, with appropriate modifications. Under the current law, therefore, each landlord's interest (whether freehold or leasehold) is valued based on what the landlord loses. This is usually rent receivable and a reversion, but can also include the value of the potential to develop or to receive premiums, for example.[63] Where the intermediate interest is a "minor superior tenancy" (in the case of a house) or a "Minor Intermediate Leasehold Interest" (known as a "MILI") (in the case of a block of flats), there are special arrangements. These are considered below.

---

63 One option for reform set out in our Valuation Report would allow leaseholders, when acquiring the freehold, to impose a restriction on development, which would remove the requirement for them to pay any development value: Valuation Report, para 6.155 to 6.179.

13.121 Broadly speaking, and absent any reversion of value of which the intermediate lease may benefit,[64] an intermediate lease may have:

(1) a positive value, because the ground rent received under the sub-leases exceeds the rent that has to be paid to the head landlord – so the intermediate landlord makes a profit; or

(2) a negative value, because the ground rent received under the sub-leases is less than the rent that has to be paid to the head landlord – so the intermediate landlord makes a loss.

13.122 Where an intermediate lease includes a reversion of value, but otherwise has a negative rental income, the value of the reversion may exceed the value of the negative rental income, such that the intermediate lease when taken as a whole has a positive value.

13.123 Under the current valuation methodology, the way in which a rental stream is capitalised so as to determine the premium that the leaseholder must pay differs depending on the existence of intermediate leases and whether those leases have a positive or negative value.

13.124 The rent received by a freeholder or by an intermediate landlord with a reversion is valued using a single capitalisation rate, known as a remunerative rate. However, in a lease extension claim, the freeholder's loss is generally only that its reversion is deferred by 90 years. This is because the rent paid by the intermediate landlord is not affected or reduced by the claim.

13.125 Where an intermediate landlord has a positive rental stream but no reversion, it is assumed, for the purposes of capitalising that rental stream, that the landlord will set part of the rent received aside, creating a sinking fund, to replace its original investment (if the landlord has a reversion or a negative rent flow there is no need for a sinking fund). Consequently, two capitalisation rates are used: a remunerative rate and a sinking fund rate. This technique is called using a dual rate and it results in a lower capitalised value than if a single capitalisation rate is used.

13.126 Where an intermediate landlord has a negative rent stream, the question is not what it is worth, but what will the intermediate landlord have to pay someone to take the obligation to pay rent to its landlord off its hands. This involves finding out what sum must be invested to produce interest sufficient to pay the shortfall. That is calculated using a single rate. However, Tribunals have directed that the investment must be a very safe one such as a Government bond, the rate of return on which is low, and the lower the capitalisation rate the higher the capitalised sum.

---

[64] An intermediate lease will have a reversion that is valuable where it includes the right to possession of the property for a lengthy period of time. For example, if the freehold is subject to an intermediate lease with an unexpired term of 90 years, which in turn is subject to a sub-lease with an unexpired term of 40 years, then the intermediate lease has a valuable reversion, namely the right to possession of the property starting in 40 years and ending in 90 years.

13.127 The effect of the above is that:

(1) where there is an intermediate lease with a positive rental stream and there is no reversion, the value of the lost rent, and therefore the enfranchisement premium, will be lower than if there were no intermediate lease; and

(2) where the intermediate lease has a negative value, the value of the lost rent, and therefore the enfranchisement premium, will be higher than if there were no intermediate lease.

13.128 In our Valuation Report we put forward various options for the reform of the current valuation provisions in the 1967 and 1993 Acts. If the present approach to valuation where there is more than one landlord is maintained, in other words, if each landlord is to be compensated by the enfranchising leaseholder in respect of his or her loss, then the options put forward in our Report could be applied equally to the valuation of intermediate leasehold interests. However, the responses to the questions concerning valuation in the Consultation Paper identified that the existence of intermediate leases may be an impediment to simplifying the valuation methodology. For example, in response to the question on whether the deferment rate should be prescribed, Prosper Marr-Johnson, a surveyor, said that:

> In complex cases there are situations where it is appropriate to deviate from the *Sportelli* rate, particularly if there is an intermediate interest with a set reversionary term. Therefore a certain amount of flexibility is necessary.

And in response to the suggestion of an online calculator, Fanshawe White, surveyors, said that:

> An online calculator cannot determine an intermediate leaseholder's ground rent capitalisation rate as it would not know the head leaseholder's position (negative or positive). Consequently, an online calculator could not possibly determine an intermediate leaseholder's split.

This would also be an argument against the prescription of capitalisation rates and certainly against the prescription of a single capitalisation rate.

13.129 Our Terms of Reference include not only seeking to simplify enfranchisement legislation, but also to promote fairness and to examine the options to reduce the premium (price) payable by leaseholders to enfranchise. Having reflected further on the valuation methodology where there is more than one landlord, we feel that it is not fair that two different leaseholders of flats or houses of the same value, with leases of the same remaining length and at the same ground rent, may have to pay different amounts to extend their lease or acquire the freehold of their house or block of flats because of the existence or otherwise of one or more intermediate leases. Further, the existence of an intermediate lease can not only affect the premium payable upon enfranchisement, it makes ascertaining the premium more complicated and thereby increases the professional costs of the leaseholder.

13.130 As set out at paragraph 13.4 above, in considering the treatment of intermediate leases and other leasehold interests we have sought to simplify statutory provisions where possible, and to ensure that the presence of intermediate leases or other

leaseholder interests does not present an unreasonable financial or practical impediment to leaseholders wishing to bring an enfranchisement claim. Bearing all of the above in mind, we believe that our Terms of Reference, as a whole, may be best met if the need for the leaseholder to pay a premium in respect of each landlord's interest is removed.

13.131 Removing the need for the leaseholder to pay a premium in respect of each landlord's interest would be a move away from assessing premiums based on what sum would compensate a landlord for his or her actual loss, towards assessing what the leaseholder should pay in respect of the enhanced asset that they receive. The premium the leaseholder has to pay on this basis would be calculated disregarding the existence of any intermediate lease. Put another way, the premium would be calculated on the assumption that any intermediate leases are merged into the freehold. Since the value of a property can logically never exceed 100% of the freehold, there is a cogent reason for valuing the property as if it were held freehold, and then splitting the premium between landlords where there is more than one. The most equitable way of dividing the premium is likely to be on the basis of the value of the landlords' respective interests. This division could be prescribed or left flexible, if this option is taken forward.

13.132 The valuation on an enfranchisement claim where there are intermediate leases would, on the above basis, become a two-stage process. The leaseholder would only be involved at the first stage, namely the determination of the price payable for the term and reversion of his or her lease. The costs of the second stage, namely the apportionment of that premium between the landlords, would be borne by those landlords. This would include the costs of resolving any dispute between them, which could still be determined by a tribunal or by private dispute resolution such as arbitration or mediation. The apportionment and any dispute resolution could even take place after the enfranchisement has completed, saving the leaseholder time as well as money. We believe that disregarding the existence of any intermediate lease is likely (on its own) to have the effect of increasing the overall premium payable by leaseholders in many lease extension cases, namely those where the intermediate leaseholder is making a profit and has no reversion. However, (1) we do not believe that this increase would be significant, (2) we think that any increase would be offset by a saving in professional costs of not having to obtain a valuation for, negotiate about, or litigate over, each landlord's interest, and (3) in any event, premiums can be reduced overall if Government implements the options for reducing premiums set out in our Valuation Report.

13.133 We also believe that in a lease extension claim where the intermediate interest currently has a nil, negative, or nominal profit rent, the overall premium payable by the leaseholder would reduce, and possibly reduce significantly. However, that also means that the compensation received by the landlords in those cases is necessarily reduced.

13.134 We set out below two examples to demonstrate the potential effect of disregarding the existence of an intermediate lease. In Example 1, the flat has a freehold vacant possession value of £250,000 and a fixed ground rent of £250 per annum. In the example we set out the likely lease extension premiums at 100, 75, 50 and 25 years unexpired, depending upon whether there is no intermediate lease (IL), an

intermediate lease with a positive value (IL Positive), or an intermediate lease with a negative value (IL Negative). Example 2 shows the same calculations but for a flat which has a freehold vacant possession value of £1,250,000 and a fixed ground rent of £1,250 per annum.[65]

Example 1

Freehold Vacant Possession Value £250,000
Ground Rent £250pa fixed

Unexpired Term (Years)	A No IL	B IL Positive	C IL Negative	Increase B to A	As a %age	Decrease C to A	As a %age
100	£6,032	£5,863	£17,635	£169	2.9%	£11,603	65.8%
75	£16,486	£16,345	£21,002	£141	0.9%	£4,516	21.5%
50	£43,986	£43,776	£46,915	£210	0.5%	£2,929	6.2%
25	£98,679	£98,466	£99,834	£213	0.2%	£1,155	1.2%

Example 2

Freehold Vacant Possession Value £1,250,000
Ground Rent £1,250pa fixed

Unexpired Term (Years)	A No IL	B IL Positive	C IL Negative	Increase B to A	As a %age	Decrease C to A	As a %age
100	£30,160	£29,316	£88,174	£844	2.9%	£58,014	65.8%
75	£82,430	£81,727	£105,012	£703	0.9%	£22,582	21.5%
50	£219,928	£218,878	£234,575	£1,051	0.5%	£14,646	6.2%
25	£493,393	£492,329	£499,168	£1,063	0.2%	£5,775	1.2%

[65] In both examples, a single capitalisation rate of 6% has been used where there is no intermediate lease. A dual capitalisation rate of 6% and 2.25% has been used where the intermediate lease has a positive value and a single capitalisation rate of 1% has been used where the intermediate lease has a negative value.

13.135 As can be seen in the examples, the premiums where there is no intermediate lease are higher than where there is an intermediate lease with a positive value. Consequently, disregarding the existence of an intermediate lease with a positive value would increase the premium. However, in the examples the greatest monetary increase (like Example 2 with an unexpired term of 25 years) is under £1,100, which is likely to be offset significantly by the saving in professional costs. Further, the *increases* that would result from disregarding intermediate leases with positive values are less in monetary and percentage terms than the *decreases* that result from ignoring intermediate leases with negative values.

13.136 We believe that the effect of disregarding intermediate leases in a freehold acquisition ought to be similar to those set out above in relation to lease extension claims. However, in freehold acquisition claims the difference between there being an intermediate lease with a positive value and no intermediate lease should be less and, therefore, any increase in the premium as a result of disregarding the intermediate lease should be less. This is because in a lease extension claim the intermediate landlord has to be compensated for the loss of the whole of the rent that was payable under the existing under lease by the leaseholder, whereas in a freehold acquisition claim the intermediate landlord is only compensated for the loss of so much of that rent which represents a profit. The balance of the rent payable by the leaseholder (in other words, that which is paid to the intermediate landlord, but which the intermediate landlord pays to its landlord) is already valued as a loss by the superior landlord, usually the freeholder.

13.137 In a claim to acquire the freehold where the intermediate lease has a negative value, at present this negative value is deducted from the freehold value in calculating the overall premium. This can lead to a windfall for the intermediate landlord at the expense of the freeholder. In the Consultation Paper we provisionally proposed that, on any individual lease extension claim, the rent payable by an intermediate landlord should be commuted on a pro rata basis. This approach was proposed primarily so as to avoid creating a negative value in an intermediate lease, which could then be used to gain a windfall on a subsequent freehold acquisition claim. We discuss the responses received from consultees and our recommendations in this regard at paragraphs 13.153 to 13.158 below. However, the Consultation Paper did not address the problem caused by intermediate leases which currently have a negative value.

13.138 The current unfairness arises as follows.

(1) Individual leaseholders extend their leases and in doing so they pay for 90 years of the reversion and to buy out their ground rent. Their ground rent and therefore the rent received by the intermediate landlord is reduced to a peppercorn. However, the rent the intermediate landlord has to pay to its landlord remains, which pushes the intermediate lease into negative value (although it may take several lease extensions before this happens). The intermediate landlord is compensated by way of a capital sum paid by each leaseholder which can be used to meet the intermediate landlord's rental liabilities going forward. The freeholder does not receive a payment in respect of capitalised rent because the freeholder continues to receive rent from the intermediate landlord.

(2) The leaseholders then make a collective enfranchisement claim to acquire the freehold. The negative value of the intermediate lease gets deducted from the value of the freehold. The leaseholders have effectively already paid for this reduction in value when they extended their leases. However, the freeholder loses out because he or she receives nothing in respect of its lost rental stream while the intermediate leaseholder gains a windfall because the intermediate leaseholder keeps the capital sums paid on each lease extension, but no longer has to pay any rent. That windfall was, in fact, a windfall to the leaseholders in *Alice Ellen Cooper-Dean Charitable Foundation Trustees v Greensleeves Owners Limited*[66] (and would have been in *Nailrile Ltd v Cadogan*[67] had the scheme worked) because the leaseholders owned the intermediate lease.

13.139 If, in the above scenario, the leaseholders had to compensate the freeholder for its loss of rent at stage 2, the leaseholders would be paying twice. Whereas, if, as we suggest above, there is a move away from assessing premiums based on what sum would compensate a landlord for his or her actual loss, towards assessing what the leaseholder should pay in respect of the enhanced asset that they receive, leaseholders would only have to pay the capitalised value of their ground rents, which would be nil, and for a nominal reversion. On this basis the premium ought not to increase significantly from what it would be at present. However, this approach, without more, does nothing to address the current unfairness, as it leaves the freeholder out of pocket and the intermediate leaseholder with a windfall. That unfairness could be addressed by requiring an intermediate leaseholder who has received a capital sum with which to pay future ground rent, paying what remains of that sum over to his or her landlord on any future collective freehold acquisition (that is, at the point at which its rental liability is extinguished).

13.140 The leaseholders would in theory acquire the obligation to pay rent upon acquiring the intermediate lease. However, as they would be both landlord and leaseholder under the intermediate lease, they can extinguish the ground rent liability at no cost. The intermediate leasehold and freehold interests will, in effect, merge upon acquisition by the leaseholders. This supports a valuation approach based upon what the leaseholders acquire, which assumes that any intermediate leases are merged into the freehold and are thereby disregarded.

13.141 Our Recommendation 93 at paragraph 13.51 above is that, in a collective freehold acquisition claim, the normal rule should be that the leaseholders bringing the claim would be able to choose whether or not to acquire any (or any part of an) intermediate lease in the building. If the leaseholders chose not to acquire an intermediate lease, they would, as freeholder, acquire the rental stream. On the basis that the leaseholders ought to pay for the asset they receive, they ought to pay for any such right to receive rent. Consequently, the existence of the intermediate lease should not be disregarded for the purposes calculating the premium. This is consistent with the fact that where the leaseholders are not acquiring any intermediate lease, it does not, upon the acquisition of the freehold, merge with any other interest.

---

66 [2015] UKUT 320 (LC).

67 [2009] 2 EGLR 151.

13.142 As our Terms of Reference in relation to the premium paid on enfranchisement are to examine the options to reduce it, it is arguable that we should consider only ignoring the existence of an intermediate lease where ignoring it has the effect of reducing the premium. However, that does not achieve the benefits of simplicity and a reduction in professional costs which ignoring *any* intermediate lease would: it creates a two-tier valuation methodology where there is an intermediate lease and a leaseholder would have to take valuation advice as to which valuation methodology applied. Further, in order for an online calculator to work where there was an intermediate lease, the leaseholder would have to know what the intermediate landlord's profit rent was, which was one of the criticisms made of the use of an online calculator: see paragraph 13.128.

13.143 In those claims where disregarding the existence of an intermediate lease would reduce the premium payable, the total compensation received by any intermediate landlord and the freeholder would necessarily be less than it would at present. Further, we recommend above, in Recommendation 94, that leaseholders bringing a collective freehold acquisition claim should be able to choose whether, as part of that claim, the nominee purchaser should also acquire any intermediate lease that had been created as part of an earlier collective freehold acquisition claim. As a result, any reduction in the premium payable to intermediate landlords may lead to landlords who have been forced to take leasebacks of non-participators' flats or investors (often other leaseholders themselves) who have helped to fund an earlier collective freehold acquisition claim, losing out.

13.144 Our Terms of Reference in relation to the premium paid on enfranchisement are "to examine the options to reduce the premium payable by existing and future leaseholders whilst ensuring sufficient compensation is paid to landlords to reflect their legitimate property interests". We do not, therefore, make a recommendation about the approach to calculating enfranchisement premiums where there are intermediate leases, but instead set out an option that Government could pursue. In putting forward options to reduce the price payable in our Valuation Report, we had the benefit of advice from Catherine Callaghan QC on the compatibility with Article 1 of Protocol 1 of the European Convention of Human Rights on the options that we put forward. We have not asked Counsel to advise on the human rights implications of disregarding the existence of an intermediate lease in order to calculate the premium. That would have to be considered further as part of Government's consideration as to whether to pursue this option.

Valuation Option for Reform

13.145 In determining the premium that the leaseholder has to pay, the existence of any intermediate lease could be disregarded, save in collective freehold acquisition claims where that intermediate lease is not being acquired.

13.146 If the above option is not taken forward, or if it is, but provision is made as to the basis on which the landlords are to split the premium, then the questions we asked in the Consultation Paper remain relevant and our discussion of them is set out below.

"MINOR SUPERIOR TENANCIES" AND "MINOR INTERMEDIATE LEASEHOLD INTERESTS"

13.147 A "Minor Superior Tenancy" or a "Minor Intermediate Leasehold Interest" is a superior lease having an expectation of possession of not more than one month (after the expiry of the inferior lease) and in respect of which the "profit rent"[68] is not more than £5 per year. Further, the profit rent cannot be a negative (or nil) amount. The premium payable for such interests is currently calculated using a formula. Those formulae and the criticisms of them are set out at paragraph 16.111 of the Consultation Paper.

13.148 In the Consultation Paper we proposed that the separate designations of "Minor Superior Tenancy" and "Minor Intermediate Leasehold Interest" and the formulae relating to them should be removed. Those interests which currently fall within the existing definitions would then be valued on the same basis as all other intermediate leases. Alternatively, we proposed that the thresholds in the formulae that apply to a Minor Superior Tenancy and/or a Minor Intermediate Leasehold Interest ought to be increased.

13.149 The majority of those that responded to this question were in favour of removing the current formulae. These included bodies representing professionals, leaseholders and landlords, freeholders/investors themselves, law firms, and a significant number of firms of valuers and individual leaseholders. The reason given for removing the formulae by valuers, solicitors, and a freeholder was that they have little practical use. They explained that "Minor Superior Tenancies" and "Minor Intermediate Leasehold Interests" rarely arise and the complexity of the current law and confusion over when the formulae may or may not apply causes delays and argument.

13.150 There was some concern, albeit not from leaseholders, that valuing these minor interests on the same basis as more valuable interests would have adverse costs consequences for leaseholders. However, if the valuation provisions as a whole are to be simplified and/or our option set out above is taken forward, this should not be the case. Those that expressed concern supported increasing the thresholds in the formulae.

---

[68] The definition of "profit rent" in the context of minor superior tenancies is set out in the 1967 Act, sch 1, para 7A(3): "an amount equal to that of the rent payable under the tenancy on which the minor superior tenancy is in immediate reversion, less that of the rent payable under the minor superior tenancy". This is a circular definition, and does not cater for future increases or decreases in rent; it has, however, been stated that this should be calculated by weighted average over the period "n" (*Nailrile Ltd v Cadogan* [2009] 2 EGLR 151), though the authors of *Hague* disagree and argue that the profit rent would be determined solely "on the basis of the rents payable at the valuation date": para 11-17.

Recommendation 99.

13.151 We recommend that the separate designations of "Minor Superior Tenancy" and "Minor Intermediate Leasehold Interest" and the formulae relating to them should be removed. Those interests which currently fall within the existing definitions would then be valued on the same basis as all other intermediate leases.

COMMUTING THE HEAD RENT

13.152 In the Consultation Paper we provisionally proposed that, on any individual lease extension claim, the rent payable by an intermediate landlord should be commuted on a pro rata basis. Primarily this approach would avoid creating a negative value in an intermediate lease, which the leaseholders could use to their advantage in the way that was done in the case of *Alice Ellen Cooper-Dean Charitable Foundation Trustees v Greensleeves Owners Limited*,[69] and as explained at paragraphs 16.99 to 16.101 of the Consultation Paper.

Consultees' views

13.153 The majority of those that responded to this question were in favour of commuting the head rent. These included bodies representing professionals, leaseholders and landlords, freeholders/investors themselves, law firms, and a significant number of firms of valuers and individual leaseholders. There was a very small minority opposed to the idea. Of those, one consultee's response suggested they were talking about collective enfranchisements as opposed to lease extensions and John Stephenson felt that the intermediate landlord should have a choice as to whether to take the premium or commute the rent. However, forceful arguments were made by those in favour of our proposal.

13.154 Charlie Coombs, a surveyor, gave an example of a recent case his firm had dealt with in which the intermediate landlord insisted on taking its share of the premium as opposed to a reduction of the head rent. Having been left with a large head rent to pay, no ground rent income, but a large capital sum in the bank, the intermediate landlord then threatened to collapse the intermediate interest and cease managing the building unless a head rent reduction was agreed to. This experience was shared by Cadogan, which said that where the head rent has not been commuted and intermediate lessees have a negative cash flow, they are going into voluntary liquidation causing hardship and expense for all concerned, including leaseholders.

Discussion and recommendations for reform

13.155 We discuss at paragraph 13.138 the potential windfall gain to intermediate landlords on a freehold acquisition claim where an intermediate lease has a negative value. As we set out at paragraphs 16.99 to 16.101 of the Consultation Paper, this windfall can be engineered by the leaseholders if they own the intermediate landlord and the head rent is not commuted on a lease extension claim. Any windfall as a result of the existence of an intermediate lease with a negative value would be avoided altogther, if

[69] See para 13.138(2) above.

the option set out above is pursued. However, if the option is not pursued, then commuting the head rent would remove the ability of the leaseholders to engineer such a windfall.

13.156 Whether or not the option set out above is pursued, commuting the head rent would make no difference to the premium payable on a lease extension claim, but would have the benefit of avoiding the sort of scenario outlined by Charlie Coombs and Cadogan. Indeed the responses of these consultees provide a good reason why intermediate landlords should not be given a choice as to whether to take the premium or commute the rent, the only real argument in opposition to the provisional proposal being that there should be such a choice.

13.157 It may not be simple to assess the amount of the commutation in a particular case because there are rent reviews or because of the position created by lease extension claims made to date. For example, the intermediate landlord may already have a negative rental stream as a result of having lost much of the rent originally payable under the under leases. A form of dispute resolution is, therefore, likely to be needed in the event that the landlords cannot reach an agreement between themselves.

Recommendation 100.

13.158 We recommend that on any individual lease extension claim, the rent payable by an intermediate landlord should be commuted on a pro rata basis.

Part VI: Voluntary transactions and contracting out

Chapter 14: Voluntary transactions and contracting out

INTRODUCTION

14.1 In this Report we have set out our recommendations for the creation of a new statutory regime for enfranchisement that will apply to leaseholders of both houses and flats. The regime will allow leaseholders to obtain a lease extension or the freehold of their building whether or not the landlord agrees.

14.2 We have also described the terms on which any such lease extension can be granted, and on which the freehold can be transferred. While there is no prescribed form of lease extension or transfer, our statutory regime does set limits on what can and cannot be included.[1]

14.3 Our Terms of Reference ask us to promote transparency and fairness in the residential leasehold sector, to provide a better deal for leaseholders as consumers, and to consider the case for improving access to enfranchisement. In the Consultation Paper we noted that control of "voluntary transactions"[2] falls outside our Terms of Reference. Our project is concerned with reforming the statutory scheme for exercising enfranchisement rights, and not with the ability of parties to enter into lease extensions or freehold transfers outside of that scheme. However, we also noted that any statutory enfranchisement scheme could be undermined if leaseholders and landlords could agree to a lease extension or transfer that is on terms that are not consistent with the statutory scheme.

14.4 As these voluntary agreements could have a significant impact on our recommended reforms, we sought the views of consultees on the steps that might be taken to control or limit their use. In the Consultation Paper we asked consultees whether the ability of the parties to enter into lease extensions outside the current statutory scheme caused significant problems in practice. We also asked what steps, if any, could be taken to control or limit their use or impact. The same two questions were also asked in respect of transfers of the freehold of a house, and transfers of the freehold of a block of flats.[3] In each case, we sought to identify ways in which controls on voluntary transactions might be put in place. The options we identified were:

(1) prohibiting voluntary transactions;

---

1 See paras 3.148 to 3.210, 4.113 to 4.173 and 5.173 to 5.182 above. We also suggest that Government consider publishing guidance on the form of lease extension (see para 3.188 above).

2 Where the terms of a lease extension or transfer are outside the current statutory enfranchisement regime, we referred to these transactions in the CP as "voluntary transactions" or "outside the statutory scheme". See paras 14.9 to 14.12 below for an explanation of the terminology used in this chapter.

3 CP, Consultation Question 7 (paras 4.98 and 4.99), Consultation Question 19 (paras 5.70 and 5.71) and Consultation Question 33 (paras 6.142 and 6.143).

(2) permitting voluntary transactions on terms which were more restrictive than our proposed statutory regime;

(3) permitting voluntary transactions on terms that were identical to our proposed statutory regime; or

(4) permitting voluntary transactions provided the leaseholder had been given a statutory notice warning them of the risks of accepting such a transaction, and his or her entitlement under the statutory regime.

14.5 However, the ability of parties to agree to the grant of a new lease or lease extension on terms that exclude or restrict the leaseholder from exercising enfranchisement rights in the future is within our Terms of Reference because it is specifically provided for in the current statutory scheme. In the Consultation Paper, we asked about consultees' experiences of the power of the court to approve a lease extension that excluded the leaseholder's ability to exercise any enfranchisement rights in the future (known as "contracting out"). We also asked whether similar provision should be made in any new statutory regime.[4]

14.6 In considering the responses of consultees, and the conclusions that we should reach in respect of both voluntary transactions and contracting out, we have sought to:

(1) balance the benefits of allowing parties to enter into transactions on their own agreed terms against the need to protect leaseholders from abusive behaviour and/or bad bargains; and

(2) protect the integrity of our new statutory regime.

14.7 We recommend that Government should consider taking steps to regulate the ability of leaseholders and landlords to enter into lease extensions or individual transfers that are "not on statutory terms" – in other words, on terms that are not consistent with our statutory regime.[5] We accept that such regulation would interfere with the parties' freedom to agree their own terms. However, we think that these steps are necessary to prevent leaseholders from being persuaded to agree lease extensions or "individual transfers" that have been drafted on unreasonable terms. In contrast, we conclude that it is not necessary or practical for Government to take similar steps to regulate "collective transfers" on terms that are not consistent with our statutory regime.[6]

14.8 Finally, we recommend that any term of a lease or a lease extension, or any other agreement, that purports to exclude or restrict the ability of a leaseholder to exercise any enfranchisement rights contained in our proposed new regime should be void (that is, of no effect). We think that is necessary to ensure that enfranchisement rights remain available to help protect present and future leaseholders from some of the inherent weaknesses of leasehold tenure.

---

4 CP, Consultation Question 8, paras 4.101 and 4.102.

5 See paras 14.9 to 14.13 below for an explanation of the terminology we have adopted in setting out our conclusions, including the terms "individual transfer" and "collective transfer".

6 We note that Government will consider our conclusions in the context of its proposed ban on ground rents in leases of flats.

A note on terminology

14.9 In this chapter, we refer to transfers effecting collective claims and those which effect individual claims. We use three different expressions when describing these transfers, both as part of our discussion of the proposals in the Consultation Paper and our recommendations for reform.

(1) In the Consultation Paper, we referred to the "transfer of the freehold of a house outside the 1967 Act" to describe transfers that are outside the existing statutory scheme.[7] In this chapter, we use the expression "individual transfer" to refer to these transfers, as well as transfers effecting individual freehold acquisitions under our recommended enfranchisement regime. An individual transfer may be on statutory terms or not on statutory terms (see paragraph 14.12 below).

(2) In the Consultation Paper, we referred to the "transfer of the freehold of a block of flats outside the 1993 Act" to describe transfers that are outside the existing statutory scheme.[8] In this chapter, we use the expression "collective transfer" to refer to these transfers, as well as any transfers which effect collective freehold acquisitions. A collective transfer may be on statutory terms or not on statutory terms.

(3) We use the term 'freehold transfers' to refer to individual and collective transfers.

14.10 More fundamentally, we have reconsidered our terminology in relation to voluntary transactions. In the Consultation Paper we referred to lease extensions or freehold transfers that were "outside the statutory scheme" or "voluntary". And our Consultation Questions referred to lease extensions or freehold transfers that were "outside the 1967 and 1993 Acts". In setting out below the response of consultees to each of our Consultation Questions, we have adopted these descriptions as reflecting the language used in our questions and by consultees in their responses.

14.11 We do not think, however, that the description of a transaction as being "outside the statutory scheme" or the terms "voluntary lease extension" or "voluntary transfer" are clear. In particular, these descriptions could relate to the nature of the process that led to the transaction being executed (in other words, whether agreement was reached without an enfranchisement claim being made by the leaseholder), or to the terms of that transaction (in other words, whether the terms of the transaction were within the statutory regime). We think that a more useful distinction is between lease extensions or transfers that are on terms that are consistent with the statutory regime and those that are not.[9]

---

7 CP, para 5.70.

8 CP, para 6.142.

9 We considered whether transactions that are consistent with the statutory regime could simply be referred to as "statutory transactions". But as it is possible to enter into a transaction that is consistent with a statutory regime without having started an enfranchisement claim, or to enter into a transaction that is inconsistent with that regime having done so, we think this again risks confusing process with substance.

14.12 As a result, when setting out our conclusions below, we refer to lease extensions and freehold transfers as being either on terms that are consistent with our statutory regime (referred to as being "on statutory terms") or on terms that are not consistent with our statutory regime (referred to as being "not on statutory terms"). In doing so we make clear that a transaction can be either on, or not on, statutory terms regardless of whether an enfranchisement claim was made, or if the transaction was agreed before or after an enfranchisement claim had been started by the service of a Claim Notice (or if no such claim is started). And we are also seeking to capture transactions which are "not on statutory terms" because a required term (which may create a property right, such as a right of way) has been omitted from the relevant document, as well as cases where the terms which are included are not consistent with our statutory regime.

14.13 We should add that when we refer to a transaction being on statutory terms, we refer to terms on which the relevant property is to be acquired. We do not seek to regulate the extent of the property so included. As such, a lease extension or transfer that includes more (or less) land than would be permitted under our statutory scheme would not be outside our statutory scheme for that reason alone. But if the lease extension or freehold transfer is not on terms prescribed by our statutory scheme in relation to the portion of land that the leaseholder is entitled to acquire (and has acquired) under our scheme, the transfer or grant is not on statutory terms and requires approval by the Tribunal.

THE CURRENT LAW

Voluntary lease extensions and freehold transfers

14.14 The 1967 and 1993 Acts seek to define the terms on which any lease extension or transfer can be granted or made. In some instances, those terms are set by the legislation. For example, a lease extension of a flat must be for a term of an additional 90 years, and at a peppercorn rent. In other cases, the boundaries of the other terms that can be included within a lease extension or transfer are set out in legislation, but the parties are permitted to agree different terms.[10]

14.15 As a result, the parties have a degree of latitude within the current law as to the terms on which a lease is extended, or a freehold is transferred. Importantly, however, whenever the Tribunal is asked to determine the price to be paid for a lease extension or transfer of the freehold, the price will be set on the basis of the terms that have been determined or agreed. As such, if a leaseholder has agreed a term that is less favourable to him or her than a term to which he or she is entitled under the legislation, this should be reflected in the price that he or she will be required to pay.

14.16 Parties are, nevertheless, free to agree a lease extension or transfer that is wholly inconsistent with the 1967 or 1993 Acts. For example, a leaseholder of a flat can agree to take a lease extension for a term that is longer or shorter than the 1993 Act

[10] For example, the 1993 Act provides that the starting point for the terms of any lease extension will be the terms of the existing lease, and specifies a number of ways in which changes to those terms can be introduced. But those constraints are subject to the ability of the parties to agree other terms. This allows the parties to agree to a lease extension on terms that are radically different from the existing terms of the lease.

requires. Or a leaseholder could agree to include an ongoing obligation to pay ground rent in exchange for a reduction in the price to be paid on a lease extension.

Contracting out

14.17 Any term of a new lease (as opposed to a lease extension) that purports to prevent or restrict the leaseholder from exercising any of the enfranchisement rights set out in the 1967 or 1993 Acts will be void (that is, of no effect). It is therefore not possible under the current law for the parties to agree that the leaseholder of a newly granted lease will not be able to claim a statutory lease extension, or to acquire the freehold.[11]

14.18 As we explained in the Consultation Paper, it is possible for the parties to an existing lease to enter into a lease extension under which the leaseholder is precluded from exercising any enfranchisement rights in the future.[12] But such a term can only be included with the prior approval of the court.

PROBLEMS WITH THE CURRENT LAW

Voluntary lease extensions and freehold transfers

14.19 In the Consultation Paper we acknowledged the potential for any proposed statutory regime to be undermined if parties could enter into a lease extension or freehold transfer outside of that statutory regime. We had been told that leaseholders can be put under pressure by their landlords to accept the grant of a lease extension or freehold transfer on such terms, whether on the basis that those terms are said to be better than would be available under the statutory scheme, or because the transaction could be completed more quickly, or at a reduced cost.

14.20 As we explained in the Consultation Paper, the current power under the 1967 and 1993 Acts for the parties to include other terms within a lease extension or transfer simply on the basis that they have agreed to do so has caused issues.[13] In summary, the power creates a risk that one party may be persuaded to adopt a term to which he or she would not otherwise agree, and that would not be included on a determination by the Tribunal, in order to obtain some other perceived advantage, or to avoid incurring the costs of continuing to oppose the inclusion of that term. The broad liberty of the parties to agree a voluntary transaction allows that risk to play out over a much broader canvas.

Contracting out

14.21 In the Consultation Paper we referred to the power of the court to approve a lease extension that excluded the leaseholder from exercising any enfranchisement rights in the future. We did not raise any existing criticisms of that provision, but sought consultees' views as to their experiences in practice of its operation, and whether such a power should be included in any new enfranchisement regime.[14]

---

11 1967 Act, s 23(1) and 1993 Act, s 93.

12 CP, paras 4.11 and 4.20.

13 CP, paras 4.95, 5.68 and 6.140.

14 CP, Consultation Question 8, paras 4.100 to 4.102.

LEASE EXTENSIONS OUTSIDE THE STATUTORY SCHEME

Consultees' views

Do voluntary lease extensions cause problems in practice?

14.22 The majority of consultees considered that the ability of the parties to enter into a lease extension outside the 1967 or 1993 Acts has created significant problems in practice. Many of these consultees noted that, while voluntary lease extensions were often presented to leaseholders by landlords as being both quicker and simpler than obtaining a lease extension under the 1967 or 1993 Acts, voluntary arrangements often carried significant risks for leaseholders.

14.23 Most consultees who believed voluntary lease extensions created problems in practice were concerned that such transactions allow landlords an opportunity to continue the leaseholder's obligation to pay ground rent throughout the term of the lease extension. Other consultees noted that leaseholders of flats were sometimes offered lease extensions for a shorter term than the additional 90-year term provided for by the 1993 Act. Some consultees were concerned about a wide range of other terms that could be included by a landlord as a means of maintaining a future income stream for the landlord. And some consultees felt that, as a result, leaseholders who accepted a voluntary lease extension could be left with a lease on terms that were unattractive when compared to other leases within the same building.

14.24 A number of consultees were concerned that leaseholders were often presented with lease extension terms in circumstances where they had little opportunity to consider them. Other consultees believed that leaseholders were often unable to assess properly the long-term impact of such terms on the value of their leases, and the effect that the inclusion of such terms ought to have on the premium being demanded by the landlord. Some leaseholders were also concerned that such offers were made in a manner that required leaseholders to incur costs at an early stage, leaving them more likely to accept the terms offered by the landlord rather than feel that those costs had been wasted

14.25 A number of consultees agreed with our assessment that voluntary transactions have the potential to undermine any statutory regime. And Martin Beesley, a leaseholder, thought that the continued availability of voluntary transactions might lead to landlords seeking to make the statutory route as difficult as possible as a means of pushing leaseholders towards a less fair voluntary transaction.

14.26 Many consultees considered that the problems identified above arose as the result of the imbalance of power that often exists between landlords and leaseholders. Some consultees also argued that the effects of this imbalance of power are often made worse by the costs and delay that can be experienced by leaseholders pursuing the statutory route to enfranchisement. However, other consultees believed that leaseholders who wished to extend their lease in order to be able to sell their property are particularly vulnerable to pressure from their landlord to agree to a voluntary lease extension.

14.27 Some consultees considered that problems can also arise from weaknesses in the process of negotiating a voluntary lease extension. Heather Keates, a conveyancer,

referred to problems caused where “the landlord is not very engaged with the process and their solicitors tend not to be proactive” and:

> Tenants are unsure about the level of premium, the conveyancer is not able to advise on matters of value as this is a specialist area and the tenant is reluctant to pay for professional guidance from a suitably qualified surveyor.

However, other consultees believed that problems only arose where landlords sought to take advantage of the leaseholder, or the leaseholder was poorly advised or needed to proceed with the transaction quickly.

14.28 There was little agreement between consultees as to how common such problems were in practice. Overall, individual consultees, including leaseholders, tended to consider that such problems were commonplace. This view was echoed by the National Leasehold Campaign:

> NLC has many case studies from leaseholders who have naively taken informal offers from freeholders and now find themselves in a much worse position than they were originally. We also have members who have bought leasehold properties where informal lease extensions were taken by previous owners and now find themselves trapped with onerous lease conditions that were not properly explained when they purchased the property.

In contrast, professionals and their representative groups tended to think that such problems occurred less frequently. The consultation response from the Chartered Institute of Legal Executives included the results of its own survey of members on the prevalence of problems with voluntary lease extensions:

> 59.26% of survey respondents agreed or strongly agreed that voluntary enfranchisement agreements are problematic in practice.

But it also noted “anecdotal evidence obtained from some members” that suggested that problems were now less common than before. Other consultees argued that problems arose in a very small proportion of cases. A few consultees argued that the problems did not arise in more sophisticated markets, such as Prime Central London. And some consultees rejected the idea that voluntary lease extensions could cause significant problems. For example, the Property Bar Association argued that: “No evidence of any particular problems arising from [voluntary transactions] have been identified”.

14.29 Some landlords relied on the prevalence of voluntary transactions as evidence of both the absence of problems, and the popularity of such arrangements with leaseholders. For example, Morgoed Estates Limited, a landlord, said that the vast majority of its lease extensions were settled outside the 1967 Act or the 1993 Act. Long Harbour and HomeGround, a landlord and an asset manager, stated that approximately half of their lease extensions were agreed on a voluntary basis.

14.30 A few consultees noted that some of the lease extensions that are considered to be voluntary transactions are in fact offered on substantially similar terms to those under the 1967 Act or the 1993 Act. Such leases are simply a less formal means of providing a lease extension on broadly statutory terms. But many consultees acknowledged that

in most cases the voluntary lease extension would be different from that offered under the statutory scheme.[15]

14.31 Many of these consultees went on to describe what they saw as the benefits of voluntary transactions. For some, it was simply a matter of freedom of contract and preserving consumer choice. Others thought that the flexibility afforded by voluntary transactions would stimulate innovative practices in the sector. Most of these consultees argued that voluntary lease extensions could have important benefits for the parties. First, by allowing the landlord to continue to receive income from the lease into the future, a landlord could retain some value in his or her reversion, and the leaseholder could obtain the lease extension at a lower price than would otherwise be possible. In particular, Consensus Business Group, a landlord, argued that the retention of ground rent enabled landlords to serve their borrowings, and that institutional lenders would be able to rely on continued rental income to support long-term lending, to the benefit of pensioners and others. Second, a voluntary lease extension could avoid the complexities associated with the statutory regime, thereby reducing costs and delay. As Bruce Maunder-Taylor, a surveyor, argued, our proposed reforms of the current law are itself evidence that the 1967 and 1993 Acts are "not fit for purpose", and that a voluntary lease extension would often be "agreeable" to both parties. Daniel Watney LLP, surveyors,[16] argued that voluntary lease extensions could help the parties to avoid "unfortunate results of statutory provisions".

14.32 Some consultees argued that, if leaseholders consider that the voluntary lease extension offered to them was unsuitable, they could always fall back on the statutory scheme. And while some had considered leaseholders might not be best placed to make that assessment, other consultees thought the opposite. As Irwin Mitchell LLP, solicitors, put it: "the onus should be on leaseholders to research/take advice on whether they are being offered a good deal, as with any deal entered into. We do not consider this puts leaseholders at a disadvantage, as they can take professional advice".

Methods of controlling voluntary lease extensions

14.33 A large number of the consultees who thought the availability of voluntary lease extensions creates significant problems in practice believed that such transactions should be banned entirely. The proposed means for doing so ranged from making any voluntary lease extension invalid, or incapable of being registered at HM Land Registry, to the use of fines and the automatic substitution of any terms within such a lease extension that fell outside the statutory scheme.

14.34 Some consultees, however, raised doubts about whether any such restrictions would be enforceable in practice. Christopher Jessel, a solicitor, considered that any restrictions would be difficult to enforce "short of making an extra-statutory lease an

---

[15] As noted at para 14.12 above, the term "voluntary lease extension" does not distinguish between those agreements which are on terms that are consistent with the statutory regime and those that are not. A voluntary lease extension, which is granted without an enfranchisement claim having been made, may still be on terms that are consistent with the statutory regime.

[16] On behalf of Dame Alice Owen's Foundation, the Charity of Richard Cloudesley and the Dulwich Estate (landlords).

offence, or declaring it void". He also thought that the "only means of enforcement would be to throw the burden on [HM Land Registry]" and raised concern about the treatment of any such leases that were not discovered until many years later.

14.35 A number of consultees considered that voluntary lease extensions should only be available if the terms on which they could be granted were prescribed. Other consultees suggested more limited controls on the terms of any voluntary lease extension. These ranged from prohibiting onerous ground rent clauses or capping the level of ground rent payable, to prohibiting any ground rent clauses entirely and prescribing the length of the term.

14.36 Some consultees believed that the fairness of voluntary lease extensions should be determined by an external body. A few consultees thought this should be HM Land Registry; others believed that an Ombudsman, or independent leasehold specialist should have the power to review any transaction. The Birmingham Law Society proposed that the Tribunal should be required to approve any voluntary lease extension. And Damian Greenish, a solicitor, proposed that:

> … it would be possible to extend the "contracting out" provisions in both the 1967 Act and the 1993 Act (simplified by giving jurisdiction to the Tribunal rather than the court) to any lease not granted under the statutory regime. That would generally discourage unjustified voluntary lease extensions whilst providing a route to allow those leaseholders who genuinely want a lease outside the statutory regime to have that choice.

14.37 Other consultees thought that voluntary lease extensions could be sufficiently controlled by providing warnings to leaseholders in advance of any transaction. For example, Irwin Mitchell LLP believed that landlords should be required to advise leaseholders of their statutory rights, and of the need to take independent legal and valuation advice; and it also proposed that leaseholders would be able to challenge any unreasonable terms before a court if those warnings had not been given. Other consultees proposed that any differences between a proposed voluntary lease extension and the position under the statutory regime should be drawn to the leaseholder's attention. Another consultee, Ann Middleton, a leaseholder, also proposed that both parties should sign a "waiver" of their statutory rights. Another consultee drew an analogy with the notice often signed by a wife whose husband wishes to use the jointly owned matrimonial home as security for his business's borrowings.

14.38 Some consultees considered that obtaining independent legal advice was key to avoiding problems. For example, Wallace Partnership Group Limited, a landlord, argued that the only control required was "to ensure leaseholders take their own professional advice when making these decisions".

14.39 Several consultees considered that reforming the statutory regime itself would be the best way of reducing the prevalence of voluntary transactions. For example, the British Property Federation wrote that:

> If, as seems likely, the new regime encourages the use of the proposed legislative framework and makes it simpler and easier, then the desire to enter into agreements outside this framework may well diminish…

14.40 Some consultees considered that if our final recommendations include an option for leaseholders to extend the term of their leases but retain the existing ground rent, the need for voluntary lease extensions would be significantly reduced. And Nesbitt & Co, surveyors, noted that "removing the two-year ownership rule should assist as will the implementing of legislation which prohibits ground rent in new leases".

Discussion

The existence of a problem

14.41 Under the current law, a leaseholder may enter into a lease extension with their landlord without starting an enfranchisement claim. Even after a claim has been started, leaseholders are free to agree the terms of a lease extension in settlement of that claim without seeking a determination from the Tribunal. In either case, the lease extension may be on statutory terms or not on statutory terms.[17]

14.42 The ability to enter into a lease extension that is on statutory terms, whether before or after the start of an enfranchisement claim, does not cause a problem. However, the ability of parties to agree lease extensions that are not on statutory terms, whether before making, or in settlement of, an enfranchisement claim, does pose a potential threat to the integrity of our regime and, in turn, to the protections for leaseholders that regime is intended to offer. The significance of that threat depends on the proportion of leaseholders who are likely to agree to such a lease extension, and the scale of the risks that they might face in doing so.

14.43 Most consultees who argue that parties should be free to agree to a lease extension that is not on statutory terms do so on the basis that such transactions can have advantages for both parties. The advantages claimed are said to arise from avoiding the complexity, cost and delay that can exist within the current statutory regime.[18] Those benefits can also reflect the limited range of options available to parties under the 1967 and 1993 Acts and the fact that, under the current law, leaseholders must have owned their lease for two years before enfranchising.[19] However, many consultees believe that these potential benefits often prove illusory in practice. Leaseholders can be left with a lease extension on onerous terms for which they may in fact have overpaid.

14.44 In a market place consisting of well-informed participants of equal bargaining power, transactions should only be agreed if (in some way) beneficial to both parties. However, as we have explained in our Valuation Report, a systemic inequality of arms exists in the enfranchisement process between leaseholders (as a group) and landlords (as a group).[20] Enfranchisement is not, therefore, a market place involving participants of equal bargaining power. This inequality of arms can lead to leaseholders agreeing unfavourable terms, particularly where leaseholders are under time pressure because they are hoping to sell their lease, or to avoid the expiry of a

---

17 See paras 14.9 to 14.13 above. In this section, we refer to lease extensions that are "not on statutory terms" rather than to "voluntary lease extensions" or to lease extensions that are "outside the statutory regime".

18 These benefits could also be present in the case of a lease extension that was on statutory terms, but had been entered into without the leaseholder making an enfranchisement claim

19 This requirement does not apply to a collective enfranchisement claim: see CP, para 7.76.

20 Valuation Report, paras 1.71 and 3.45.

fixed term, increasing the apparent attraction of being able to conclude a lease extension more quickly than one obtained pursuant to statute. Other explanations for leaseholders agreeing problematic lease extensions are put forward by critics and supporters alike. Both sides cite the unscrupulous behaviour of some landlords and the inadequacy of legal advice offered to leaseholders.

14.45 Therefore, we conclude both that lease extensions not on statutory terms have the potential to be a more attractive option for some leaseholders, and that the availability of such lease extensions creates space within which some landlords operate to the disadvantage of leaseholders.

Making statutory lease extensions more attractive to leaseholders

14.46 As noted above, several consultees considered that leaseholders were often tempted to take up an offer of a lease extension that was not on statutory terms because of perceived weaknesses within the existing statutory regime. Those consultees believed that addressing those weaknesses would reduce the likelihood that leaseholders would want to step outside the statutory regime.

14.47 Some of the recommendations we make in this Report would likely remove or reduce some of the incentives that currently exist for leaseholders to accept a lease extension that is not on statutory terms. We have recommended a simplification of the process for making an enfranchisement claim that we anticipate will reduce the costs and delay in the current statutory regime.[21] We have also recommended that the two-year ownership requirement should be removed.[22] We have recommended that (depending on the option for treatment of ground rent which Government chooses in response to our Valuation Report) it should be possible for a leaseholder with an onerous ground rent to extend the term of his or her lease but retain the obligation to pay the ground rent for the duration of the unexpired term of the original lease.[23] We have also recommended that, where the remaining term of the lease is very long, the leaseholder may buy out the ground rent but not extend the term.[24] And we have also made recommendations which limit the other changes which can be made to a leaseholder's existing lease when it is extended, therefore reducing delay and cost in agreeing the terms of the lease extension.[25] Finally, we have made recommendations to remove or reduce the requirement for leaseholders to contribute to their landlord's non-litigation costs (depending on whether premiums are at market or below market level).[26]

14.48 In addition, in our Valuation Report we have also put forward a number of options for reforming the valuation of lease extensions. Each of these options would reduce, or would be capable of reducing, the price currently paid by leaseholders for a lease extension on statutory terms. The adoption of any one of these options by

---

21 Our recommendations in relation to our new statutory process are set out in Ch 8 and Ch 9.

22 See para 6.131 above.

23 See para 3.112(1) above.

24 See para 3.112(2) above.

25 See para 3.209 above.

26 See para 12.56 above.

Government might also reduce the price difference between lease extensions that are on statutory terms and those that are not, thereby reducing the incentive for leaseholders to enter into a lease extension that was not on statutory terms. In addition, some of the options presented would (or could) make it cheaper for leaseholders to buy out their ground rent, thereby reducing any financial incentive for leaseholders to agree to a lease extension that retained any obligation to pay ground rent.

14.49 And some of the final recommendations contained in this Report, such as our recommendations to remove or reduce the requirement for leaseholders to contribute to their landlord's non-litigation costs, are likely to make it more difficult for landlords to offer lease extensions to leaseholders at a lower overall cost (to make such a transaction attractive enough to leaseholders) but with a higher premium (to make the transaction attractive to landlords) than would be the case with a lease extension under the statutory regime. Put another way, any argument by landlords that leaseholders' overall costs will be reduced by entering into a transaction outside the statutory regime will be less persuasive.

14.50 However, it is likely that some leaseholders will still wish to extend their lease on terms that are not consistent with our reformed statutory regime. And it will always be possible for landlords to try to undercut the statutory process by contending that the lease extension they are offering remains cheaper or quicker than a lease extension obtained under the statutory regime.

The objective behind any regulation of lease extensions that are not on statutory terms

14.51 We think that the central objective of any regulation of lease extensions that are not on statutory terms should be to remove the prospect that a leaseholder will agree to a lease extension that he or she does not understand, or which is not reasonable or which is unfairly priced. We think this interference with the freedom of the parties to enter into a contract of their choosing is justified as any lease extension will regulate the basis on which a leaseholder occupies the residential unit for the long term, and any unreasonable terms may have a significant impact on the value of the leaseholder's asset.

14.52 We think that there are two alternative ways in which Government might seek to achieve that objective:

(1) by prohibiting lease extensions that are not on statutory terms, or

(2) by preventing parties from entering into lease extensions that are not on statutory terms unless they have been understood, are on reasonable terms, and have been fairly priced.

14.53 Which of these two approaches should be adopted will depend on two factors. First, the extent to which leaseholders could benefit from entering into a lease extension that is not on statutory terms. If such transactions can nevertheless be reasonable and fairly priced, preventing parties from entering into any lease extension that is not on statutory terms under all circumstances would likely be disproportionate. Second, the effectiveness of any controls that could be put in place to regulate such transactions. If a prohibition was unlikely to be effective in preventing parties entering into

unreasonable or unfair transactions, there would be little merit in seeking to introduce it. This could mean that a stricter regulation is justified, or conversely, that no such regulation is possible.

Prohibiting all lease extensions that are not on statutory terms

14.54 It is not possible to prevent parties from agreeing and entering into a lease extension which is not on statutory terms. The means of ensuring that existing leases cannot be so extended must, therefore, focus on the legal effect of entering into a transaction which is not on statutory terms.

14.55 It would be possible to provide that any lease extension that is not on statutory terms is void and of no effect. At first glance, this would appear to be a straightforward means of banning the use of such transactions. But this approach runs the risk that the parties will enter into such a transaction and continue to act in accordance with its terms for many years before its invalidity is discovered. Under such circumstances, the leaseholder would not be left with a lease extension that was on statutory terms, but rather with his or her original lease and term, having paid for the lease extension. In most cases a leaseholder would then be able to claim or agree a lease extension that was on statutory terms; but in a few cases, the original lease may have expired by the time that the invalidity of the lease extension is noticed. And even if the original lease has not expired, the valuation date for the new lease extension would be later in time and therefore the cost to the leaseholder may have increased. In addition, the parties would be faced with the problem of recovering any payments that had been made in respect of the void lease extension. In principle, these could include the payment of any premium for the void lease extension, and any other payments made by a leaseholder to the landlord under the void lease extension that would not have been made under the existing lease. But the passage of time, and any transfer of the reversion by the landlord to a third party, would create sizeable difficulties with either task.

14.56 The existing requirement that a lease extension will only be effective at law if it is registered at HM Land Registry could, however, present an opportunity for lease extensions that were not on statutory terms to be spotted at a relatively early stage, thereby reducing the risks that would otherwise be created by delayed discovery. In Chapter 10, we are recommending that any statutory lease extension must contain a statement recording that it was executed pursuant to the relevant statutory provisions. But as there is no way to guarantee the reliability of this information, we concluded that this information should not then be included on register of title.[27] Therefore, it is difficult for HM Land Registry to identify at the outset whether a lease was entered into as part of an enfranchisement claim. And a lease which has not been entered into pursuant to an enfranchisement claim, but ought to be on statutory terms, would not include the statement which we recommend in Chapter 10.

14.57 Even if HM Land Registry could reliably identify all such leases, it would then be necessary for HM Land Registry to find terms which are not compatible with (or which ought to have been included under) the statutory regime. We have suggested that Government consider publishing guidance as to the form of lease extension which

---

[27] See paras 10.220 to 10.223 above.

parties would be expected to use, being a short document that incorporates the existing lease subject to any changes that are permitted by that regime.[28] We think that a lease extension in this format would make it easier for HM Land Registry to identify any terms that were incompatible with the statutory regime, compared to a lease extension which is an entirely new document that does not incorporate the terms of the previous lease. But any other form of lease extension would be difficult to identify. And even if HM Land Registry were able to identify and prevent the registration of all lease extensions that were not on statutory terms, it would still be possible for a leaseholder to have paid for a lease extension that proves to be invalid. Control at the point of registration would not therefore remove the risk that the landlord will have dissipated some or all of the monies paid before the invalidity of the lease extension is discovered, and an order for repayment can be made, nor would it remove the possibility that a second later attempt by the leaseholder to obtain their lease extension may be more expensive.

14.58 In addition, while we think it would be relatively straightforward for HM Land Registry to identify a term or at a ground rent that was not consistent with our statutory regime, we think that it would significantly more difficult and resource intensive for other deviations from that regime to be identified successfully. As such, while a lease extension for a term, or at a ground rent, that was not consistent with the statutory regime might (depending on its form) be identified at registration, a lease extension that includes other terms that fall outside of our statutory regime, or which omits terms which ought to have been included under our statutory regime, might not be identified.

14.59 An alternative approach would be to provide that a lease extension that is not consistent with the terms permitted by the statutory regime should simply be read as being consistent with that regime. For example, a lease extension for an additional term of 50 years would be treated as having been for the term provided for in our statutory regime. Or the ground rent payable would be treated as having been no more than permitted by our statutory regime. But reading a lease extension as being consistent with the statutory regime is likely to be more difficult if there is more than one way in which the lease could have complied with the statutory regime. For example, the leaseholder may have elected to buy out the ground rent for the remainder of the term of the lease (provided that term is of a sufficient length). Some means of determining which statutory option should be applied would be needed.

14.60 In addition, requiring lease extensions to be read consistently with the statutory regime would still create a risk that leaseholders and landlords will continue to act on the basis of the rights and obligations set out in a lease which is not on statutory terms for many years. Some of the problems with treating a lease extension as void would not arise – in particular, the leaseholder would be able to rely upon a corrected version of the lease extension, rather than having to rely upon the terms of any existing lease. However, it may be difficult to put either party back in the position they would have been in had the inconsistency with the statutory regime been corrected at the start. This may not simply be a matter of repaying any overpayment made by a leaseholder to the landlord under any onerous terms that had been included within the lease extension. Landlords may also seek to argue that had the lease extension been consistent with the statutory regime, the premium paid by the leaseholder would have

[28] See para 3.188 above.

been higher, and that if the lease is to be read consistently with the statutory regime, he or she should be able to recover the difference from the leaseholder. And it may also be the case that leaseholders would not always welcome the impact of such a wholesale correction of the position as they understood it to be.

Prohibiting lease extensions that are not on statutory terms only if unreasonable or unfair

14.61 A requirement for the approval of an independent party or body would provide a means to ensure that a lease extension that is not on statutory terms can only be validly entered into if it is on reasonable terms and fairly priced.

14.62 We have considered whether a lease extension that departs from the statutory scheme should be valid so long as the lease is accompanied by a certificate provided by the leaseholder recording that he or she had received independent legal advice before signing it. However, we do not think that approach would be sufficient to ensure that leaseholders did not enter into lease extensions on unreasonable or unfair terms. First, it could be difficult to be confident that the advice provider had the necessary expertise in the specialist area of enfranchisement law. Second, legal advice normally seeks to explain the legal effect and possible consequences of a proposed transaction. It does not normally seek independently to approve the transaction as reasonable. It simply better informs the leaseholder before he or she decides whether to proceed with the transaction.

14.63 Therefore, given its expertise and existing role in this area, we believe that the Tribunal would be best placed to determine whether any lease extension that is not on statutory terms should be approved. Under these circumstances, parties would be able to enter into a valid lease extension that was inconsistent with the terms of the statutory regime, but only if the Tribunal was satisfied that the terms of the lease extension were reasonable and that any premium was fair.

14.64 As we noted above, a lease extension that is not on statutory terms could be concluded either prior to the exercise of any enfranchisement rights by the leaseholder, or in settlement of a claim made pursuant to those rights.[29] As a result, it would need to be possible for parties to seek approval of the Tribunal either as part of a free-standing application (whether made prior to or after the service of a Claim Notice), or on an application made in the course of an existing application to the Tribunal for a determination of the leaseholder's enfranchisement claim.[30] Any application for approval could be made easier and quicker by including a schedule setting out any terms that were not consistent with the statutory regime (including any terms which have been omitted), and an explanation as to why those terms (and the lease as a whole) were considered to be reasonable and the premium considered to be fair.

14.65 Such an application would doubtlessly carry some cost (including the payment of a fee to the Tribunal). We think that any such application for approval should be made, and paid for, by the landlord. If a landlord is proposing to grant a lease extension on terms

---

29 See para 14.41 above.

30 We acknowledge that, in the latter case, the Tribunal could be asked both to exercise its power to determine a dispute between the parties as to a term that (on either party's case) falls within the statutory regime, and to thereafter approve the terms the lease as a whole as a lease that was not on statutory terms.

that are not consistent with the limits (and protections) of our new statutory regime, we think that the costs of making that application should be borne by the landlord.

14.66 Since the approval of the lease extension would be sought on the basis that it has been agreed between the parties and was drafted on reasonable terms, with a fair price, the Tribunal would need to be sure that the leaseholder understood the proposed terms, and agreed that those terms were reasonable. To this end we think that the landlord's application – if made otherwise than during the course of a hearing – should also include a certificate provided by an independent legal adviser confirming that the differences between the proposed lease extension and a lease extension on statutory terms had been explained to the leaseholder by the lawyer and that the leaseholder (rather than the lawyer) believed the terms to be reasonable and the price to be fair.[31] The Tribunal would then be able to reach its own judgment as to the reasonableness and fairness of the transaction.

14.67 We acknowledge that there are costs associated with requiring a leaseholder to obtain a certificate from an independent legal adviser. However, we believe that the independence of the legal advice obtained could be at risk if the advice were funded by the landlord. We also think that the cost incurred by the leaseholder is balanced by the fact that the burden of paying for the application is on the landlord and not the leaseholder.

14.68 Any scheme which requires the approval of lease extensions which are not on statutory terms must make provision for the treatment of lease extensions which are not so approved.[32] We consider this issue as part of our conclusions below.

Steps short of prohibition

14.69 Consultees made a variety of proposals that they believed would help reduce the chances of a leaseholder agreeing a lease extension that was unfavourable to them. But we think that while improved information for leaseholders, or warning notices, may lead some leaseholders to review whether a proposed transaction was reasonable or fair, it is unlikely to have a significant impact on the number of leaseholders who enter into unreasonable or unfair transactions. Such information may be either too detailed, or too generic to have much of an impact. And more specific information about the merits of a particular lease extension may well arrive too late in the process to change a leaseholder's mind. In addition, for the reasons set out at paragraph 14.62 above, we think that it would be unrealistic to think that a requirement to take independent legal advice on its own would sufficiently address the problems presented by lease extensions that are not on statutory terms.

Conclusion

14.70 While we are making final recommendations about the shape of our statutory regime, the control of lease extensions that are not on statutory terms is outside of our Terms of Reference.[33] Therefore, we are unable to make specific recommendations about

---

31 If the application were made during the course of a hearing before the Tribunal it would be able to satisfy itself about the leaseholder's understanding and approval at that stage.

32 See paras 14.54 to 14.62 above.

33 See para 14.3 above.

the treatment of lease extensions that are not on statutory terms in the same way as we are able to do with matters falling within our Terms of Reference. However, we do believe that it is necessary to take steps to control the use of lease extensions that are not on statutory terms. While such transactions can provide benefits to leaseholders, they carry risks both for leaseholders and for the integrity of our statutory regime. Therefore, we are recommending that Government consider this issue further. In the following paragraphs we have set out our conclusions as to the steps that we think Government should take, should Government decide to regulate lease extensions which are not on statutory terms.

14.71 We do not think that an outright prohibition on lease extensions that are not on statutory terms would be a proportionate policy. It would prevent parties entering into such a lease extension even when its terms were reasonable and fair. We also do not consider that statutory notices or other warnings required to be given to leaseholders before a lease extension is entered into are likely to be sufficient to protect leaseholders from agreeing to unreasonable or unfair terms.

14.72 We therefore suggest that parties are only able to enter into a lease extension that is not on statutory terms where those terms have been approved as being objectively reasonable and the price approved as fair. We think this approval should be obtained from the Tribunal.

14.73 We think that the best means of enforcing this regulation of lease extensions that are not on statutory terms is to provide that unless the approval of the Tribunal has been obtained:

(1) a leaseholder who has been granted a lease extension that is for a term that is shorter than provided for in our statutory regime should be treated as having a lease extension of 990 years recommended for in our statutory regime;

(2) a leaseholder who has been granted a lease extension that contains a ground rent provision that is not consistent with our statutory regime should be treated as being under an obligation to pay a ground rent that is consistent with our statutory regime;[34] and

(3) a leaseholder who has been granted a lease extension that contains any other terms that are not consistent with our statutory regime would be able to choose not to be bound by that term; [35] and

---

[34] In most cases, a peppercorn ground rent will be the only ground rent that is consistent with our statutory regime. However, we have also recommended that, if Government decides not to cap the treatment of ground rent in calculating enfranchisement premiums, leaseholders with an onerous ground rent may elect to maintain the ground rent for the unexpired term of the original lease: see para 3.112 above. A leaseholder who – without obtaining Tribunal approval – entered into a lease extension that was consistent with neither statutory option should be treated as having a peppercorn ground rent, or (where applicable) a ground rent at the level set out in the original lease, depending on which of these options most closely reflected the level of premium paid by the leaseholder for the lease extension.

[35] In more technical language, the inconsistent term would be "voidable at the election of the leaseholder". For our recommendations on the terms of lease extensions under our new regime (including in relation to *Aggio* leases), see para 3.148 and 3.210 above.

(4) a leaseholder who has been granted a lease extension that does not include a term that should have been included under our statutory scheme would have a right to require the landlord to ensure that the lease is varied to include the missing term (at no additional cost to the leaseholder). If the landlord does not ensure that the lease is so varied, he or she would be liable for any losses suffered by the leaseholder that occur as a result of the missing term.

14.74 We note that an appropriate legal mechanism will need to be chosen to best give effect to the policy set out at paragraph 14.73(1) above. However, as we consider that a similar issue also arises in respect of the enforcement of Government's proposed ban on the sale of leasehold houses, we think that the choice of the appropriate legal mechanism in enfranchisement will need to reflect the enforcement mechanism adopted in respect of this ban.

14.75 We accept that our approach could produce results that some landlords would oppose. For example, a landlord might agree to accept a lower premium for a shorter lease extension only to find that – in the absence of Tribunal approval – the lease extension was treated as having been granted a much longer term, and that he or she was unable to recover the premium payable in respect of the difference between those two terms. The leaseholder might therefore obtain a windfall. We have, however, selected this approach as we believe it protects leaseholders from the risks created by lease extensions that are not on statutory terms. It also places the onus on landlords to protect any such lease extension by first obtaining the approval of the Tribunal.[36] We think that placing the responsibility on landlords in this way is justified by the systemic inequality of arms that exists between leaseholders and landlords in the leasehold system.

14.76 These rules would apply only to any lease extension granted to a leaseholder who had been eligible to obtain a lease extension under our proposed statutory regime. It will therefore be important for any subsequent third-party purchaser of the landlord's reversion to consider whether the leaseholder's lease is one to which these rules would have applied.

INDIVIDUAL TRANSFERS OUTSIDE THE STATUTORY SCHEME

14.77 We set out the consultation questions raised in respect of voluntary individual transfers at paragraph 14.4 above.[37] In summary, we asked whether individual transfers outside the statutory scheme caused significant problems in practice, and invited consultees to propose means by which such arrangements might be controlled.

14.78 We also explain above that although we refer in the Consultation Paper and in our consultation questions to "voluntary transfers" and "transfers outside the statutory scheme", and adopt those terms in setting out consultation responses, we refer to

---

[36] We also think that the fact that solicitors acting for any proposed purchaser of the landlord's retained reversionary interest will seek confirmation of Tribunal approval for any such lease extension will also encourage landlords to obtain such approval.

[37] See also CP, Consultation Question 19, paras 5.70 and 5.71.

transfers that are, or are not, on statutory terms. when setting out our conclusions.[38] However, as we set out at paragraph 14.9 above, we use the term 'individual transfers' when discussing the proposals in the Consultation Paper as well as our recommendations for reform.

Consultees' views

14.79 Many of the consultation responses raised in respect of individual transfers outside the statutory scheme echoed the responses received in respect of lease extensions that are outside the statutory scheme.[39] Below we set out where the same arguments were raised, and set out in more detail any additional points or issues highlighted by consultees in respect of individual transfers that were not raised in respect of lease extensions.

Do voluntary individual transfers create significant problems in practice?

14.80 Just under half of consultees considered that the ability of parties to enter into voluntary individual transfers has created significant problems in practice. Consultees identified different problems from those said to arise from the ability of the parties to choose a voluntary lease extension. For a start, negotiations around the lease term and ground rent do not apply in relation to individual transfers. But many consultees felt strongly that the ability of the parties to agree to enter into voluntary individual transfers often led to the inclusion of terms within the transfer that many felt were onerous. Sometimes these terms reflected existing provisions in the lease, but on other occasions new terms were added.

14.81 Consultees raised complaints about permission fees (that is, an obligation for the leaseholder to pay sums to the landlord in respect of the grant of his or her permission to do something in respect of the property that he or she would not otherwise be permitted to do) and other charges levied against the new freeholder by his or her former landlord in voluntary individual transfers. Leaseholders saw such terms as being designed simply to continue or establish a future income stream for the former landlord, rather than as a legitimate means of managing a wider estate. Many leaseholder consultees who had entered into such transactions felt that they had acquired something that contained obligations that were inconsistent with freehold ownership. Freeholds that were burdened in this way were often described as "fleecehold" – an issue which we discuss further in Chapter 4 of this Report.

14.82 Some leaseholder consultees felt that they had not understood how the inclusion of onerous terms might affect the value of their new freehold, and their ability to transfer it on the open market at a proper price. Other consultees were concerned about the wider effects that voluntary individual transfers could have upon the consistency of terms across an estate.

14.83 Some consultees set out the factors that they believed drove leaseholders towards voluntary individual transfers and away from reliance upon the statutory regime. As in the case of voluntary lease extensions, many cited the perceived costs and delays of

---

38 See paras 14.9 to 14.12 above.

39 The consultation responses received in respect of lease extensions that are outside the statutory scheme are set out at paras 14.22 to 14.32 above.

pursuing the statutory route. An offer from a landlord of a voluntary individual transfer would often appear an easier option. But, as in the case of voluntary lease extensions, many consultees felt that leaseholders entered into transactions containing onerous terms because landlords were able to take advantage of their superior knowledge and understanding of legal documents, and their (often) significantly stronger bargaining position.

14.84 Some consultees believed that it was very difficult for leaseholders to assess whether the price offered by the landlord for the purchase of the freehold was fair. For example, the National Leasehold Campaign wrote that the majority of leaseholders "have no idea whether the price offered is reasonable or not". Bryan Wildman, a leaseholder, believed that freeholders often inflate the price of the freehold "to nearly match what the freehold plus legal fees would cost under [the statutory scheme] or more". Other consultees were concerned that some landlords sought to put pressure on leaseholders by making time-limited offers, or by only producing the terms of transfer (including onerous clauses) at a late stage in the process.

14.85 In contrast, several professional consultees contended that, in their experience, voluntary individual transfers rarely caused problems. Other consultees supported similar views by reference to the number or proportion of transactions that they or those they represented undertook which fell outside the 1967 Act.

14.86 Many of the same consultees went on to set out what they saw as the benefits of voluntary individual transfers. As in the case of voluntary lease extensions, many consultees considered that voluntary individual transfers should be available simply as a matter of freedom of contract. But most considered that voluntary individual transfers offered advantages over the statutory regime. As in the case of voluntary lease extensions, many consultees considered that a voluntary individual transfer was usually simpler, quicker and cheaper than a statutory equivalent.

14.87 Some consultees believed that the terms of a voluntary individual transfer were usually offered to leaseholders as a means of reducing the price that would otherwise be payable. One consultee, in a confidential response, provided three illustrative examples of where the total sum paid by a leaseholder for a voluntary individual transfer was less than the total sum that would likely have been paid under the statutory regime. These leaseholders were said to have saved between 10% and 30% by following the voluntary rather than the statutory route.[40]

14.88 Other consultees described the wider benefits for leaseholders of entering into a voluntary transaction. For example, Hampstead Garden Suburb Trust wrote that:

> We offer modernised versions of the lease covenants as transfer covenants or carrying over the exact lease covenants. We also offer fixed conveyancing and

---

[40] In each case the sale price of the freehold on a voluntary basis was higher than would have been payable under statute (by between 5% and just over 20%). The savings were claimed on the basis that valuation evidence would not be obtained by either side, and that both parties' legal costs would be reduced, in the case of a voluntary transaction. However, the landlord offers to share the benefit of these avoided costs with the leaseholder. As such, while the leaseholder pays less overall, the landlord normally also receives more for his or her asset than would be the case if a statutory claim had been made and pursued. Of course, this saving can be achieved even if the individual transfer that is agreed is on statutory terms.

valuers' costs to outside the Act sales. This offers certainty to both parties and ensures that covenants are reasonably uniform across the estate. Those purchasing a leasehold house on the estate are able to ask for those terms in advance of purchase (which we will provide to prospective purchasers/agents/advisers) and so there should be no surprises to an incoming owner.

14.89 Other consultees believed that voluntary individual transfers are not problematic because the statutory regime acted as a safety net for leaseholders.

Methods of controlling voluntary individual transfers

14.90 Consultees identified the same options for controlling voluntary individual transfers as had been put forward in respect of voluntary lease extensions. However, the responses also revealed a greater focus by consultees on the potential unfairness of the terms included within a voluntary individual transfer. Many consultees made proposals as to how such terms could be regulated. For example, consultees variously proposed that:

(1) restrictive covenants and permission fees should not be capable of inclusion in an individual transfer;

(2) where prohibited terms had been included, there should be a process for amending the transfer, the costs of which would be borne by the former freeholder, who would also be liable to compensate the former leaseholder for any losses arising;

(3) individual transfers should not be capable of enforcement if unfair terms were included in the transfer outside of the statutory enfranchisement regime; and

(4) Tribunal approval should be required to, as Birmingham Law Society stated, "protect the leaseholder from onerous obligations not commensurate with the ownership of an unencumbered freehold". Other consultees proposed regulation by an ombudsman, or leasehold regulator.

Discussion

The existence of a problem

14.91 As in the case of lease extensions, leaseholders are able to agree to a transfer of the freehold without starting an enfranchisement claim, or, once such a claim has begun, without seeking a determination of the Tribunal. In either case, the document agreed may be on statutory terms or not. But as we noted earlier in this chapter, it is only those transactions that are not on statutory terms that pose a potential threat to the integrity of our proposed statutory regime.

14.92 It is clear from consultation responses received in respect of individual transfers that the claimed benefits for leaseholders of an individual transfer that is not on statutory terms fall within a narrower range than is seen in the case of lease extensions. As the freehold is being acquired on an individual transfer, there is no term or ground rent provision that can be manipulated with the stated aim of reducing the price that would otherwise be payable by the leaseholder. But such a transaction could still include a term that could not be included under the statutory regime or not include a term that would otherwise be included under the statutory regime.

14.93 Many consultees also argue that individual transfers negotiated before significant sums have been spent pursuing a statutory claim are normally cheaper for leaseholders. Any such saving is normally achieved by the leaseholder avoiding the valuation and non-litigation costs incurred in bringing an enfranchisement claim. In other cases, however, the price to be paid for the transfer itself may have been reduced to reflect the more onerous terms on offer.

14.94 As in the case of lease extensions that are not on statutory terms, the danger for leaseholders is that an individual transfer does not have the advantages that have been claimed for it, or that any benefits are outweighed by disadvantages that have gone unnoticed, or that the transaction as a whole has been unfairly priced.

Making statutory individual transfers more attractive to leaseholders

14.95 As we noted for lease extensions, some of our recommendations are likely to reduce the incentive for leaseholders to opt for an individual transfer that is not on statutory terms. Our recommendations on the terms of individual freehold acquisitions in Chapter 4 of this Report seek to limit the obligations which may be imposed on leaseholders on an individual transfer. In addition, and as we noted for lease extensions, the options we have put forward in the Valuation Report for reforming the valuation of individual transfers would reduce, or would be capable of reducing, the price currently paid by leaseholders for an individual transfer on statutory terms. The potential for a reduction in the price difference between individual transfers that are on statutory terms and those which are not would reduce the incentive for leaseholders to enter into a transfer that was not on statutory terms.

14.96 Nevertheless, it is likely that the opportunity to enter into an individual transfer on non-statutory terms will remain attractive to some landlords and leaseholders. As consultees have told us, one of the main reasons why the parties may agree an individual transfer that is not on statutory terms is to save the costs associated with bringing an enfranchisement claim. Although the costs of making an enfranchisement claim under our new regime are likely to be lower than under the existing regime, any remaining cost saving may continue to be a good reason for parties to want to step outside the statutory regime. Some landlords will likely welcome the opportunity to introduce additional or alternative terms, particularly where these terms provide for the leaseholder to continue to make payments to the landlord. And some leaseholders will be attracted by the prospect of obtaining the freehold without some of the obligations which should be included under the statutory regime.

Controlling individual transfers that are not on statutory terms

14.97 We think that our analysis as to the objective of any regulation of lease extensions that are not on statutory terms, and of the approaches that might be taken to achieve that objective, applies equally to individual transfers that are not on statutory terms.[41]

14.98 However, there are a few points which are specific to the terms of individual transfers and which we have taken into account in reaching our conclusion below. In Chapter 4, we recommended that, as a general rule, the leaseholder should acquire the freehold

---

41 See paras 14.70 to 14.76 above.

subject to and with the benefit of all existing property rights, but he or she should not have to take over personal obligations that were binding on the landlord.[42] There are exceptions, however, where we recommended that property rights burdening the freehold should drop away or where the leaseholder should step into the shoes of the landlord and take over the performance of personal obligations. We also recommended rules setting out when new property rights may be created and for when the leaseholder may be required to undertake new personal obligations. Generally, the leaseholder should not have to take on new personal obligations and new property rights should only be created to replicate rights in the lease.[43] Moreover, many elements of our recommended scheme are prescriptive: in many cases, it lays down what rights and obligations *must* be created on an individual freehold acquisition. In considering the control of individual transfers that are not on statutory terms, we have taken into account the varying ways in which our recommended scheme deals with different categories of rights and obligations.

Conclusion

14.99 We think it less likely that an individual transfer that is not on statutory terms would be objectively reasonable than would be the case with a lease extension. There may, therefore, be relatively few instances in which parties wish to enter into an individual transfer that is not on statutory terms where the terms are nevertheless reasonable. However, it does not seem that the number of such cases would be so low as to justify the introduction of a blanket ban on individual transfers that were not on statutory terms.

14.100 We recommend, therefore, that Government also consider the regulation of individual transfers that are not on statutory terms. While we are not able to make a recommendation as to the form which this regulation should take, we have reached a conclusion as to the best way of regulating individual transfers that are not on statutory terms. We have set out that conclusion in the following paragraphs.

14.101 As we discuss at paragraph 14.56 above, it will be difficult for HM Land Registry to identify whether a lease extension has been entered into as part of an enfranchisement claim, or otherwise ought to be on statutory terms. For similar reasons, we do not think it will be possible for HM Land Registry to identify all applications for the registration of individual transfers that are not consistent with our statutory regime. In particular, we think that the format of individual transfers means that it will be more difficult to identify transfers which are not on statutory terms than, for example, in relation to a lease extension which is granted by reference to the leaseholder's existing lease.

14.102 We therefore think that individual transfers which are not on statutory terms should remain valid and registrable at HM Land Registry, but that unless the approval of the Tribunal has been obtained:

---

42 See paras 4.171 to 4.173 and 4.217 to 4.218 above.

43 See paras 4.337 and 4.351 and 4.369 to 4.370 above.

(1) any personal obligation that the landlord requires the leaseholder to undertake towards the landlord that is not consistent with the statutory regime would be unenforceable at the election of the leaseholder;

(2) the landlord must ensure the release of any personal obligation that the landlord requires the leaseholder to undertake towards third parties and that is not consistent with our statutory scheme and, if the obligation is not released, the landlord will be liable for any losses suffered by the leaseholder as a result;

(3) the landlord must ensure the release of any property obligation imposed on the leaseholder that is not consistent with the statutory scheme (whether such obligation benefits the landlord or a third party) and, if the landlord does not do so, he or she should be liable for any losses suffered by the leaseholder as a result;

(4) the landlord must ensure the grant of any property right that should have been granted to the leaseholder (whether by the landlord or a third party) in order for the transfer to be on statutory terms and, if the landlord does not do so, he or she should be liable for any losses suffered by the leaseholder as a result.

14.103 As in the case of lease extensions, we suggest that the above restrictions on the enforceability of the terms of individual transfers that were not on statutory terms would not apply where the terms of the transaction had been approved by the Tribunal as objectively reasonable and the price approved as fair.[44]

COLLECTIVE TRANSFERS OUTSIDE THE STATUTORY SCHEME

14.104 We set out the consultation questions raised in respect of voluntary collective transfers at paragraph 14.4 above.[45] In summary, we asked whether collective transfers outside the statutory scheme caused significant problems in practice, and invited consultees to propose means by which such arrangements might be controlled. As we set out at paragraphs 14.9 to 14.12 above, we refer to transfers that are, or are not, on statutory terms when setting out our conclusions. We use the term 'collective transfers' when discussing the proposals in the Consultation Paper as well as our recommendations for reform.

Consultees' views

14.105 Many of the consultation responses given in respect of collective transfers outside the statutory scheme echoed the responses received in respect of lease extensions that are outside the statutory scheme.[46] Below we refer to the similarities in the arguments raised in relation to lease extensions, and set out in more detail any additional points or issues highlighted by consultees in respect of collective transfers.

---

44 Details of the proposed application for approval would be as set out in respect of lease extensions at paras 14.63 to 14.68 above. As we set out at para 14.13 above, we would not seek to regulate the extent of the property which is being transferred.

45 See also CP, Consultation Question 33, paras 6.142 and 6.143.

46 The consultation responses received in respect of lease extensions that are outside the statutory scheme are set out at paras 14.22 to 14.32 above.

Do voluntary collective transfers create significant problems in practice?

14.106 Fewer than half of consultees considered that the ability of parties to enter into a transfer of a block of flats outside of the 1993 Act creates a significant problem in practice. A large majority of those consultees were leaseholders. Many of these consultees referred to abuse and injustices that they felt could arise from voluntary transactions. Some referred to terms being proposed by a landlord for his or her own financial advantage and to the detriment of the leaseholders. Others referred to the inequality of bargain power between leaseholders and landlords and the risks for leaseholders arising from that imbalance. But few of these consultees provided specific details of such problems.

14.107 Some consultees pointed to the need for collective transfers to be consistent with the statutory regime in order to support our other proposals in the Consultation Paper. For example, Christopher Balogh noted that allowing a group of leaseholders to purchase the freehold to their building other than on terms that were consistent with our proposed right to participate would threaten the ability of other leaseholders to gain a share of the ownership and control of the building at a later stage. Unless those other leaseholders could form a group large enough to bring their own collective freehold acquisition claim, they would be locked out of ownership and control for ever.

14.108 Other consultees drew attention to what they considered were the potential advantages of the ability of parties to enter into a voluntary collective transfer. Some consultees felt that a voluntary collective transfer could provide greater choice for leaseholders. For example, Maddox Capital Partners Limited, a landlord, noted that such transactions could be "less rigid", while Paul Church noted that such transactions could "include conditions outside of the Act, such as allowing deferred terms, options and longer completion times". Other consultees focussed on the costs and time that could be saved if a transaction was entered into without following the statutory process.[47]

14.109 Some of those consultees who did not believe voluntary transactions created significant problems in practice nevertheless noted the potential for difficulties to arise. For example, the Law Society noted that voluntary transactions are "situations where imbalance of negotiating strengths of landlords and leaseholders can give rise to unfairly weighted transactions". A few consultees noted that problems did not arise so long as the leaseholder is properly represented. And Julian Briant, a surveyor, noted that "the legislation is still there to fall back on if all else fails".

Methods of controlling voluntary collective transfers

14.110 A number of consultees thought that the use of voluntary collective transfers should be banned. The means of achieving such a ban echoed those proposed in respect of voluntary lease extensions and individual transfers.[48] Other consultees proposed a range of controls on voluntary collective transfers that, again, reflected the means proposed in respect of other voluntary transactions.

---

47 As we noted at para 14.06 above, these costs savings would be available whether or not the terms of the transaction were consistent with the statutory regime.

48 See paras 14.33 and 14.90 above.

Discussion

The existence of a problem

14.111 As in the case of lease extensions and individual transfers, leaseholders are able to agree to a collective transfer of the freehold without starting an enfranchisement claim or, once such a claim has begun, without seeking a determination of the Tribunal. In either case, the terms agreed may be on statutory terms or not. But as we noted above, it is only those transactions that are not on statutory terms that pose a potential threat to the integrity of our proposed statutory regime.

14.112 The responses received in respect of collective transfers highlighted that the advantages of collective transfers that are not on statutory terms are similar to those for lease extensions and individual transfers. Some consultees noted that transaction times are quicker and transaction costs lower than where the statutory process is followed.[49] However, other consultees considered that the greater flexibility offered by collective transfers that are not on statutory terms is more important than in the case of lease extensions and individual transfers because of the complexities that can arise in a collective claim.

14.113 We note that consultees who raised concerns about the impact of collective transfers that are not on statutory terms often did so in general terms, rather than providing specific instances of disadvantage that can result from acting outside the 1993 Act. These generic disadvantages were, broadly put, the inclusion of unfair or financially burdensome terms in the conveyance and poorly drafted agreements that can lead to problems later.

14.114 We also note the responses which flagged the possible interrelationship between our proposed right to participate and collective freehold acquisitions that are on statutory terms. As we explain in Chapter 5, we are not recommending that a new right to participate is taken forward at this time. We acknowledge that one of the questions associated with the right to participate is how to prevent attempts by the participants in a collective freehold acquisition claim to block or frustrate the future exercise of that right.[50] It may be that entering into a collective transfer that is not on statutory terms could be a way to achieve that aim. The relationship between the right to participate and the statutory terms for collective freehold acquisitions will need to be considered as part of any future project on the right to participate.

Making statutory collective transfers more attractive to leaseholders

14.115 On the strength of these responses, we think that collective transfers that are not on statutory terms are more likely to be of benefit to leaseholders and are less likely to create problems than is the case with lease extensions or individual transfers that are not on statutory terms. We think that one of the reasons for the reduced incidence of problems is that it is inherently more difficult for a landlord to take advantage of a group of leaseholders than it is to take advantage of an individual.

---

49 Such savings are not, however, related to whether or not the transfer is on statutory terms.

50 See para 5.243 above.

Controlling collective transfers that are not on statutory terms

14.116 We believe that imposing controls on the power of the parties to enter into a collective transfer that is not on statutory terms poses challenges that are either not present, or not as significant, in the context of lease extensions or individual transfers.

14.117 In order to be able to impose controls over any grant or transfer that is not on statutory terms, the first step is being able to identify such transactions reliably. In the case of a transfer of the freehold to a block of flats, it is unlikely to be obvious that the proposed transferee is acting on behalf of a group of leaseholders who could otherwise have made a collective freehold acquisition claim.

14.118 A further complication is created by the provisions of Part I of the Landlord and Tenant Act 1987 ("the 1987 Act") (the "right of first refusal"). Broadly speaking, leaseholders immediate landlord may not make a disposal of their interest in the building without first giving the leaseholders a right to acquire that interest. And if a disposal to a third party takes place without the landlord offering the same terms (or better terms) to the leaseholders, the leaseholders are entitled to acquire the landlord's interest on the terms of the disposal to the third party.

14.119 These provisions were intended to give leaseholders of a building a chance to acquire the freehold of the building on the same terms as the landlord might otherwise dispose of it to a third party. However, the right conferred on leaseholders by the 1987 Act could be used to shield an agreement between the landlord and a group of leaseholders to acquire the freehold of the building which is not on statutory terms. Once such terms are agreed, the landlord could simply give written notice to the leaseholders in the building offering to sell the freehold, allowing a group of leaseholders to acquire the freehold on those terms. The transfer would take place as an exercise of the statutory right of first refusal and be free of any regulation that we might propose in respect of collective freehold transfers that were not on statutory terms.

14.120 We note that Part I of the 1987 Act has been the subject of much criticism and calls for reform.[51] While such reform falls outside the scope of our current work, a future review could address the difficulty that is identified at paragraph 14.119. Nevertheless, the difficulty identified at paragraph 14.117 above in relation to the control of collective transfers more generally would remain.

Conclusion

14.121 In the circumstances, we do not believe that Government should consider introducing controls on the ability of the parties to enter into collective transfers which are not on statutory terms.

---

[51] See para 1.63(9) above.

Recommendation 101.

14.122 We recommend that Government consider regulating transactions for lease extensions and individual freehold acquisitions that are not on statutory terms.

CONTRACTING OUT

Consultees' views

14.123 Few consultees had relevant experience of the parties' ability to agree, subject to court approval, to a lease extension that excludes or restricts the ability of the leaseholder to exercise his or her statutory enfranchisement rights in the future. Those who did tended to refer to experience in respect of the areas sometimes described as the "great estates" of London, or professional advisers who have acted on their behalf. Most of those consultees suggested that the power is relied on in a very small number of cases where the landlord had a particular wish to safeguard its freehold interest in the premises, or the leaseholder offered to give up his or her rights in return for a discounted premium. Other consultees noted that the power could be useful for elderly leaseholders with limited resources.

14.124 Consultees who were in favour of preserving the contracting-out provisions in any new enfranchisement regime advanced arguments that reflected their views of the operation of the existing regime in practice. Some referred to how the provisions can be beneficial for landlords, or for development generally. Others focussed on what they considered were the potential benefit for leaseholders – for example, where a leaseholder will only require one lease extension, contracting out can be a way of lowering the premium payable.[52] This may be particularly relevant to elderly leaseholders who do not have extensive funds available. But a number of consultees simply argued that the existing power was a form of consumer choice that should be retained, while others also noted the protection for parties afforded by the need to obtain court approval. For example, Philip Rainey QC considered that "there is little abuse of the present contracting out, because it is known that the court will not approve schemes where one party is unsophisticated".

14.125 Other consultees thought that the ability to opt out of enfranchisement rights should be extended to include the grant of a new lease to a leaseholder (as opposed to the grant of a lease extension to an existing leaseholder, as per the current law). These consultees thought that the extension of the exclusion would encourage the redevelopment of commercial premises to residential use by removing the risk (for landlords) of collective freehold acquisition claims. These consultees also thought that specialist housing sectors (such as retirement and purpose-built student housing) would benefit from contracting-out provisions.

14.126 The majority of those opposed to the inclusion of contracting-out provisions in a new enfranchisement regime were leaseholders and individuals. Some opposition was based on the broad view that enfranchisement rights should not be restricted at any

[52] These benefits were not, however, reported to us by leaseholders.

time. Other consultees were concerned that such a power would work to the detriment of leaseholders and the advantage of landlords, while a couple of consultees were not convinced that even the need to obtain court approval would adequately protect leaseholders. Several consultees also expressed concern about the possible impact on subsequent purchasers of the extended lease.

14.127 A number of consultees thought that the ability to opt out would be contrary to the spirit of enfranchisement legislation, or to the objectives of our reform project. And one consultee noted that contracting out might become more attractive to landlords in the event that reforms otherwise strengthened the position of leaseholders.

Discussion and recommendations for reform

14.128 The ability for a leaseholder to obtain a lease extension or purchase the freehold to his or her premises is an important statutory right that helps to protect leaseholders against some of the inherent weaknesses of their leasehold tenure. Our Terms of Reference ask us to "consider the case to improve access to enfranchisement". We must, therefore, carefully consider the merits of any existing provision that has the effect of restricting access to enfranchisement and assess whether such a provision has any place in any new enfranchisement regime.

14.129 On the evidence submitted by consultees, it seems that the existing power for parties to agree, subject to court approval, to contract out of future enfranchisement rights on the grant of lease extension is not in significant use in practice. From that perspective, it might seem that carrying over such a power into our new regime would have limited practical impact.

14.130 But while some consultees have given examples of the bespoke circumstances in which it has been used, one consultee noted that they have used the power more widely with the purpose of preserving the landlord's freehold interest into the future. Indeed, some consultees believe that the flexibility presented by this power is a useful tool that can help finance future developments, and should be extended.

14.131 We think that allowing a landlord's interest in premises to be preserved for the duration of a lease extension is fundamentally at odds with the aim and benefits of our proposed enfranchisement regime. While it is perhaps used at the margins of the existing statutory scheme, we are concerned that the impact of our recommendations for enfranchisement reform, coupled with Government's other proposed residential leasehold reforms, would lead to renewed interest in a mechanism that could allow landlords to avoid the application of the enfranchisement regime in the future.

14.132 While we note that the existing regime is subject to approval by the court, we do not think that this would provide adequate protection for leaseholders in circumstances where the pressure for landlords to avoid a reformed statutory enfranchisement regime may increase. We are also concerned that an ability for the parties to opt out of future enfranchisement rights would become simply another form of transaction that was not on statutory terms and therefore require Tribunal approval, if Government takes forward our suggestions on that point. In contrast, we think that forbidding the future use of enfranchisement rights is a departure from the statutory regime of more fundamental kind than allowing a transaction to take place on terms that are inconsistent with our statutory regime. Such an application, if granted, would turn back

the clock on the rights of the residential leaseholder to escape some of the difficulties of leaseholder tenure, now and into a lengthy future. Any circumstances in which such an opt-out would be properly merited are few.

14.133 We wish to draw a clear line in favour of enfranchisement rights for leaseholders. We therefore also see no merit in seeking to allow parties to a new lease to opt out of enfranchisement rights. A leaseholder in such circumstances may be no less vulnerable than a leaseholder seeking a lease extension.

Recommendation 102.

14.134 We recommend that any term of a new lease or a lease extension, or any other agreement, that purports to exclude or restrict the ability of a leaseholder to exercise any enfranchisement rights contained in our proposed new regime should be void (that is, of no effect).

Part VII: Summary of our recommendations

Chapter 15: Recommendations

CHAPTER 3: THE RIGHT TO A LEASE EXTENSION

Recommendation 1.

15.1 We recommend that leaseholders of both houses and flats should be entitled, as often as they so wish (and on payment of a premium), to obtain a new, extended lease at a peppercorn ground rent.

[Paragraph 3.36]

Recommendation 2.

15.2 We recommend that:

(1) on a lease extension claim, an additional period of 990 years should be added to the remaining term of the existing lease; and

(2) where a lease has been extended, the landlord should be entitled, during the last 12 months of the term of the original lease or the last five years of each period of 90 years after the commencement of the extended term, to obtain possession of the property for redevelopment purposes.

[Paragraph 3.62]

Recommendation 3.

15.3 We recommend that, in addition to the right to obtain a new, extended lease at a peppercorn ground rent:

(1) (if the treatment of ground rent in calculating enfranchisement premiums is not subject to a cap) leaseholders who have a lease with an "onerous" ground rent (that is, an annual ground rent which exceeds 0.1% of the freehold value of the property) should be entitled to extend the term of their lease (on payment of a premium), but maintain the current ground rent provisions within the extended lease for the duration of the unexpired term of the original lease; and

(2) leaseholders who have a lease with a very long remaining term (we suggest 250 years, but the threshold could be set lower if Government wished to do so) should be entitled to extinguish the ground rent payable under the lease (on payment of a premium) without extending the term of the lease.

[Paragraph 3.112]

Recommendation 4.

15.4 We recommend that:

(1) a lease extension of a residential unit or residential units should include other associated premises (any garage, outhouse, garden, yard and appurtenance let

to the leaseholder with the residential unit or residential units, and within the curtilage of the building containing the residential unit or residential units); and

(2) a lease extension of a building or self-contained part of a building should include other associated premises (any garage, outhouse, garden, yard and appurtenance let to the leaseholder with the building or self-contained part of the building, and within its curtilage).

15.5 We recommend that:

(1) a landlord should be able to propose that other land originally let to but no longer held by a leaseholder be included in a lease extension;

(2) there should be no strict time limit within which that proposal can be made; and

(3) that other land should be included if:

(a) the leaseholder agrees; or

(b) the Tribunal is satisfied that it would be unreasonable to require the landlord to retain it separately from the premises included in the lease extension.

15.6 We recommend that there should be no power for a landlord to argue that parts of the premises let under a leaseholder's existing lease and which lie above or below other premises in which the landlord has an interest should be excluded from a lease extension.

[Paragraphs 3.145 to 3.147]

Recommendation 5.

15.7 We recommend that, on a lease extension (other than an *Aggio* lease extension), the starting point should be that the new lease will be on the same terms as the existing lease (with the exception of the ground rent and the length of the lease). However, either party should be permitted to require suitable variations to the terms of the existing lease (whether by excluding or modifying existing terms, or adding new ones) wherever this is necessary:

(1) to take account of the omission from the new lease of property included in the existing lease;

(2) to take account of alterations made to the property demised since the grant of the existing lease;

(3) in a case where the existing lease derives from two or more separate leases, to take account of their combined effect and of the differences (if any) in their terms;

(4) to insert "such provision as may be just" to require service charge payments by the leaseholder from the end of the term of the existing lease, where the existing lease does not include such provision;

(5) to remedy a "defect" in the existing lease, or take account of a "change" occurring since the date of commencement of the existing lease, provided such defect or change falls within one of the categories prescribed by regulations;

(6) to reflect the fact that a special-purpose property right granted or reserved in the lease is not being regranted or extended in duration; or

(7) to take account of the fact that the leaseholder's rights in respect of common parts may need to be extended beyond the expiry of a third party's existing lease of those common parts.

15.8 We recommend that the terms of *Aggio* lease extensions should be left to the parties to agree, with the exception of the ground rent and the length of the lease.

[Paragraphs 3.209 to 3.210]

Recommendation 6.

15.9 We recommend that, where a lease extension is granted:

(1) any mortgage or other charge secured against the existing lease should automatically be transferred to the new lease; and

(2) if the landlord's estate is subject to a mortgage or other charge:

(a) the mortgagee or chargee should automatically be deemed to consent to the lease extension; and

(b) the lease extension should automatically be binding on the mortgagee or chargee, but only if the existing lease had priority over the mortgage or charge or was authorised by the mortgagee or chargee.

[Paragraph 3.240]

Recommendation 7.

15.10 We make the following recommendations regarding property rights granted in the lease for the benefit of the lease.

(1) A lease extension should include an extension of all property rights granted in the lease itself for the benefit of the leasehold title so that their duration matches the term of the new lease (regardless of whether the rights affect the land belonging to the landlord or the demised premises or land belonging to a third party).

(2) Accordingly—

(a) the leaseholder must claim and the landlord (or, where relevant, the third party to the lease) must grant an extension of the rights described in paragraph (1); and

(b) if the parties agree that a relevant property right will not be extended, the lease extension is not on statutory terms.

However, our recommendation does not apply to “special-purpose rights”. The Tribunal may determine disputes about whether a right is a special-purpose right.

15.11 We make the following recommendations regarding property rights granted separately from the lease.

(1) A leaseholder should be entitled to claim, at his or her election, an extension of any property rights (so that their duration shall match the term of the new lease) that were granted separately from the lease and that were granted:

(a) for the benefit of the leasehold title; or

(b) for the benefit of the freehold or an intermediate leasehold title and which the leaseholder is entitled to use under the terms of the existing lease.

(2) The leaseholder’s entitlement to claim an extension of property rights should apply regardless of their nature or duration, regardless of whether they were granted at the same time as the lease or on a later occasion, and regardless of whether the land which they affect belongs to the landlord or a third party.

(3) A standard form Claim Notice should automatically include a claim for an extension of all such property rights that the recipient is able to grant unless the leaseholder expressly indicates otherwise.

(4) Landlords and third parties should be entitled to object to the extension of property rights that were granted separately from the lease, with disputes to be determined by the Tribunal. The Tribunal should have a discretion to allow the right not to be extended or for it to be varied on the extension.

(5) The Secretary of State should have the power to specify factors in regulations that the Tribunal must take into account in exercising its discretion, but the starting point should be that all property rights benefiting the lease are extended.

Our recommendation does not apply to “special-purpose rights”.

15.12 We further recommend that, on the completion of a lease extension by the surrender of the existing lease and the grant of a new lease, there should be an automatic statutory transfer of all property rights benefiting the existing lease to the new lease. The same automatic transfer should apply to rights benefiting intermediate leases that are surrendered and regranted on a lease extension.

[Paragraphs 3.298 to 3.300]

Recommendation 8.

15.13 We recommend that the following provisions should apply on the completion of a lease extension by the surrender of the existing lease and the grant of a new lease.

(1) There should be an automatic statutory transfer of all property rights burdening the existing lease to the new lease. The same automatic transfer would apply to

property rights burdening intermediate leases that are surrendered and regranted on a lease extension.

(2) The new extended lease should have the same priority in relation to property rights affecting the freehold or a superior lease as the existing lease. This rule does not apply, however, in relation to mortgages, estate contracts and options (on which, see below). It also does not apply to property rights affecting the freehold where the lease is also affected by a materially identical corresponding property right.

15.14 We recommend that property rights which burden the lease and which were granted or reserved in the lease should automatically be extended on a lease extension.

[Paragraphs 3.321 to 3.322]

Recommendation 9.

15.15 We recommend that an estate contract or option to purchase the landlord's title with vacant possession should be suspended by the service of a Claim Notice seeking a lease extension and discharged on completion of the claim.

15.16 We recommend that an estate contract or option to purchase the leaseholder's title or to acquire a property right burdening that title should not automatically transfer to the new lease following a lease extension claim. The leaseholder would have to comply with any restriction protecting such a contract or option, and it would prevent the successful surrender of the existing lease unless the leaseholder agrees with the beneficiary of the estate contract or option—

(1) for the purchase of the existing lease or the grant of the property right to take place before the completion of the claim;

(2) for the estate contract or option to be discharged; or

(3) for a new estate contract or option to be agreed in relation to the new lease.

[Paragraphs 3.333 to 3.334]

CHAPTER 4: THE RIGHT OF INDIVIDUAL FREEHOLD ACQUISITION

Recommendation 10.

15.17 We recommend that an individual freehold acquisition of a building or self-contained part of a building should include other associated premises (any garage, outhouse, garden, yard and appurtenance let to the leaseholder with the building or self-contained part of the building, and within its curtilage).

15.18 We recommend that where:

(1) a leaseholder qualifies for an individual freehold acquisition in respect of a building or self-contained part of a building; but

(2) parts of the building or self-contained part of the building are not included within his or her existing lease,

he or she should nevertheless be entitled to acquire the freehold of the whole of that building or self-contained part of the building (as well as to acquire the reversion to any leases granted in respect of those other parts).

15.19 We recommend that:

(1) a landlord should be able to propose that other land originally let to but no longer held by a leaseholder be included in an individual freehold acquisition;

(2) there should be no strict time limit within which that proposal can be made; and

(3) that other land should be included if:

(a) the leaseholder agrees; or

(b) the Tribunal is satisfied that it would be unreasonable to require the landlord to retain it separately from the premises included in the individual freehold acquisition.

15.20 We recommend that:

(1) a landlord should be able to propose that parts of the premises let under a leaseholder's existing lease and which lie above or below other premises in which the landlord has an interest should be excluded from an individual freehold acquisition; and

(2) the land should be excluded if:

(a) the leaseholder agrees; or

(b) the Tribunal is satisfied that any hardship or inconvenience likely to result to the leaseholder from the exclusion of that part is outweighed by the difficulties that will be caused for the landlord by the further severance of it from the other premises and any resulting hardship or inconvenience.

[Paragraphs 4.34 to 4.37]

Recommendation 11.

15.21 We recommend that, subject to the exceptions set out below, a leaseholder who brings an individual freehold acquisition claim should be treated in the same way as a third-party purchaser. Consequently, if the relevant requirements of registered or unregistered conveyancing are met, the leaseholder should acquire the freehold subject to and with benefit of all existing property rights.

15.22 We recommend that special rules should apply in the following situations.

(1) The freehold acquired by the leaseholder should not be bound by any property rights that, at the time that the individual freehold acquisition claim is completed, bind the freehold but do not bind the lease. However, this rule should not apply if the lease is bound by a separate but equivalent right.

(2) The rule in paragraph (1) above should not apply to mortgages (which we recommend should be subject to separate rules).

(3) If the freehold is held on trust or is settled land, the interests of the beneficiaries under the trust or settlement should be deemed to be overreached:

(a) by the payment of the purchase price into court; or

(b) if the leaseholder is required to pay (a portion of) the purchase price directly to the landlord's mortgagee, by the payment of the price to the mortgagee, provided that any remainder is paid into court; and

as if (in relation to settled land) the freehold were transferred pursuant to the powers conferred by the Settled Land Act 1925.

(4) An estate contract or option to purchase the freehold should be suspended by the service of a Claim Notice seeking an individual freehold acquisition and discharged on completion of the claim.

15.23 A leaseholder who has paid the statutory price for an individual freehold acquisition, as determined by whichever new valuation scheme is selected by Government, should be deemed to have acquired the freehold for "valuable consideration" and "money or money's worth".

[Paragraphs 4.171 to 4.173]

Recommendation 12.

15.24 We recommend that the service of a Claim Notice seeking an individual freehold acquisition should suspend the operation of any provision of an agreement to which the landlord is a party that:

(1) prevents the landlord from transferring the freehold to the leaseholder;

(2) prevents the transfer from happening by the date for completion specified by the Tribunal; or

(3) subject to the exception set out below, prevents the transfer happening unless the leaseholder agrees to enter into specified personal obligations benefiting a third party (or the landlord).

The provisions of agreements suspended on the service of a Claim Notice should be discharged on the completion of the claim.

15.25 The exception mentioned in paragraph (3) above is that some agreements binding the landlord will not be suspended or discharged under our scheme. The landlord should be entitled to insist on the leaseholder undertaking personal obligations towards the relevant third party as a condition of the transfer of the freehold to the extent that those obligations meet the following conditions.

(1) The agreement imposes an obligation on the landlord which is of type that would be capable of being imposed by means of a "land obligation" within the

meaning of our report Making Land Work. The obligation must be owed to a third-party landowner and must be:

(a) a negative obligation to refrain from performing a particular activity on the landlord's land which touches and concerns the third party's land;

(b) a positive obligation to carry out a particular activity on the landlord's land which touches and concerns the third party's land; or

(c) a reciprocal payment obligation to pay the third party (a portion of) their costs of carrying out an activity on their land which (i) touches and concerns the landlord's land, and (ii) is carried out pursuant to an obligation owed to the landlord.

(2) The landlord is obliged by the agreement to ensure that transferees of the freehold will undertake an identical personal obligation owed to the third party (in return, where applicable, for the third party entering into the relevant obligation in favour of the transferee).

(3) At the time of the individual freehold acquisition claim, the leaseholder is under an obligation under the terms of the lease:

(a) (in cases where the landlord is under a negative obligation) not to perform the relevant activity;

(b) (in cases where the landlord is under a positive obligation) to perform the relevant activity instead of or in conjunction with the landlord or to pay (a portion of) the landlord's costs of performing the activity; or

(c) (in cases where the landlord is under a reciprocal payment obligation) to pay (a portion of) the landlord's costs of making the relevant payment.

[Paragraphs 4.217 to 4.218]

Recommendation 13.

15.26 We recommend that, on an individual freehold acquisition claim:

(1) the leaseholder should acquire the freehold subject to appurtenant property rights that will replicate existing rights and obligations under the terms of the lease owed to the landlord or to a third party (and benefiting their land); and

(2) the leaseholder should acquire the freehold with the benefit of appurtenant property rights that will replicate existing rights and obligations under the terms of the lease owed to the leaseholder and benefiting the leaseholder's land.

The appurtenant property rights that may be created on an individual freehold acquisition should include land obligations, introduced through implementation of our recommendations in Making Land Work. Our recommendations do not apply to "special-purpose rights".

[Paragraph 4.337]

Recommendation 14.

15.27 We make the following recommendations about what new property rights may be claimed on an individual freehold acquisition for the benefit of the freehold, where those rights will replicate existing property rights that were granted *separately* from the lease.

(1) A leaseholder should be entitled to claim (at his or her election) the grant of a permanent property right for the benefit of the freehold title where that right will replicate an existing property right that was granted:

(a) for the benefit of the leasehold title; or

(b) for the benefit of the freehold or an intermediate leasehold title and which the leaseholder is entitled to use under the terms of the existing lease.

(2) The leaseholder's entitlement to claim the grant of a property right for the benefit of the freehold title to replicate an existing property right enjoyed in relation to the lease should apply regardless of when the existing right was granted, its duration and whether it affects land belonging to the landlord or a third party.

(3) A standard form Claim Notice should automatically include a claim for the grant of all applicable property rights for the benefit of the freehold that the recipient is able to grant, unless the leaseholder expressly indicates otherwise.

(4) Landlords and third parties should be entitled to object to the grant of the relevant property rights, with disputes to be determined by the Tribunal. The Tribunal should have a discretion to allow the new right not to be granted or for it to be granted in a different form.

(5) The Secretary of State should have the power to specify factors in regulations that the Tribunal must take into account in exercising its discretion, but the starting point should be that all relevant property rights claimed by the leaseholder for the benefit of the freehold are granted.

Our recommendations do not apply to "special-purpose rights".

[Paragraph 4.351]

Recommendation 15.

15.28 We recommend that as a general rule it should not be possible to create new personal obligations during the freehold acquisition process, whether such obligations bind the leaseholder, the landlord or a third party.

15.29 It should only be possible to create new personal obligations during the freehold acquisition process where they are necessary and are taken from a list prescribed by the Secretary of State.

[Paragraphs 4.370 to 4.371]

Recommendation 16.

15.30 We recommend that, where an individual freehold acquisition is made and the landlord's estate, or a superior leasehold estate that will also be acquired through the claim, is subject to a mortgage:

(1) the leaseholder should be under a duty to pay:

(a) the whole of the statutory price; or

(b) (if less) the sum outstanding under the mortgage;

to the mortgagee or, alternatively, into court;

(2) if the leaseholder complies with the duty in (1) above, any mortgage secured against the freehold title, or against a superior leasehold title also acquired though the claim, should automatically be discharged;

(3) if the leaseholder does not comply with the duty in (1) and the mortgage is not otherwise discharged, it will remain on the freehold title after acquisition by the leaseholder but will only secure the mortgage debt up to the value of such part of the statutory purchase price as was not paid in accordance with the duty in (1); and

(4) any sums due from the leaseholder to the landlord should be reduced by any sums paid under (1) above.

[Paragraph 4.404]

CHAPTER 5: THE RIGHT OF COLLECTIVE FREEHOLD ACQUISITION

Recommendation 17.

15.31 We recommend that leaseholders making a collective freehold acquisition claim should be required to use a corporate body with limited liability as the nominee purchaser, without exception.

[Paragraph 5.59]

Recommendation 18.

15.32 We recommend that an optional model constitutional document should be produced for each type of corporate body which might be used as the nominee purchaser on a collective freehold acquisition claim.

[Paragraph 5.68]

Recommendation 19.

15.33 We recommend that leaseholders should be permitted to bring a collective freehold acquisition claim to acquire any two or more buildings (or self-contained parts of buildings) together, using one claim notice and one nominee purchaser. However, each building (or part of a building) must satisfy all of the usual qualifying criteria and

participation requirements for a collective freehold acquisition (or, as the case may be, the criteria for an individual freehold acquisition).

[Paragraph 5.102]

Recommendation 20.

15.34 We recommend that leaseholders making a collective freehold acquisition claim:

(1) should acquire the building in respect of which their claim is made, including the common parts of that building;

(2) should be entitled (but not obliged) to acquire associated premises let with the residential units in the building which is the subject of the claim, provided there is no other building or structure above or below the land (to avoid creating flying freeholds);

(3) should be entitled (but not obliged) to acquire any land which is used exclusively by the owners or occupiers of the residential units in the building (or by those persons exclusively save for use pursuant to a public right of way), provided there is no other building or structure above or below the land (to avoid creating flying freeholds); and

(4) should be entitled to request to acquire other land over which the owners or occupiers of the residential units in the relevant building have rights, but which is not used by them exclusively (for example, land which is shared with another building). If the landlord does not agree to this request, the leaseholders should be able to refer the matter to the Tribunal for a decision as to whether or not they should acquire the land.

15.35 We recommend that, where a matter is referred to the Tribunal in accordance with paragraph (4) of the above recommendation, there should be a rebuttable presumption that the leaseholders should acquire the land in question. The presumption should be rebuttable if the Tribunal should determine that it is not just and convenient in all the circumstances for the leaseholders to acquire the land, taking into account in particular:

(1) whether the land is also used by the occupants of other buildings and, if the land is acquired, whether there would be disruption to the service charge liabilities of tenants or leaseholders in those buildings;

(2) whether other interests in favour of third parties and the landlord are or can be sufficiently protected; and

(3) the proportion of those persons having rights over the land which are participating in the claim.

15.36 We recommend that a landlord against whom a collective freehold acquisition claim is made should be able:

(1) to require leaseholders to acquire land which is of no useful benefit to the landlord if it is severed from the building and other land being acquired; and

(2) to reserve easements and other property rights over the land acquired by the leaseholders, for the benefit of land retained by the landlord.

[Paragraphs 5.149 to 5.151]

Recommendation 21.

15.37 We recommend that (in addition to the provisions of the current law concerning the grant of leasebacks to the landlord) leaseholders making a collective freehold acquisition claim should be able to require the landlord to take a leaseback of any units (other than common parts) which are not let to leaseholders participating in the claim.

[Paragraph 5.172]

Recommendation 22.

15.38 We recommend that, where a collective freehold acquisition is made and the landlord's estate (or a superior leasehold estate or common parts lease that will also be acquired through the claim) is subject to a mortgage:

(1) the nominee purchaser should be under a duty to pay:

(a) the whole of the statutory price; or

(b) (if less) the sum outstanding under the mortgage;

to the mortgagee or, alternatively, into court;

(2) if the nominee purchaser complies with the duty in (1) above, any mortgage secured against the freehold title or against a superior leasehold title also acquired, should automatically be discharged, with the discharge taking effect at law on the registration of the transfer;

(3) if the nominee purchaser does not comply with the duty in (1) and the mortgage is not otherwise discharged, it will remain on the freehold title after acquisition by the nominee purchaser, but will only secure the mortgage debt up to the value of such part of the statutory purchase price as was not paid in accordance with the duty in (1); and

(4) any sums due from the nominee purchaser to the landlord should be reduced by any sums paid under (1) above.

[Paragraph 5.195]

Recommendation 23.

15.39 We recommend that there should be a defence to a collective freehold acquisition claim, available to the nominee purchaser under a prior successful collective freehold acquisition claim of the premises, where that prior claim completed within the preceding two years. This defence should not be available, however, where the purpose of the intended claim is to facilitate the conversion of the building to commonhold.

[Paragraph 5.221]

CHAPTER 6: QUALIFYING CRITERIA

Recommendation 24.

15.40 We recommend that the qualifying criteria for enfranchisement rights should be based on the unified concept of a "residential unit", which will replace the language of "houses" and "flats".

[Paragraph 6.45]

Recommendation 25.

15.41 We recommend that a leaseholder should not qualify for enfranchisement rights if, at the time the claim is made:

(1) the terms of his or her lease do not permit the premises to be used for residential purposes; or

(2) the lease permits both residential and non-residential use, and the leaseholder is occupying the premises solely for non-residential purposes.

15.42 Conversely, where a leaseholder has a lease which only permits the premises to be used residentially, he or she should not fall within the business lease exclusion, irrespective of the current use of the premises.

[Paragraphs 6.67 to 6.68]

Recommendation 26.

15.43 We recommend that, in order to qualify for enfranchisement rights, a leaseholder should have a lease that was granted for more than 21 years.

[Paragraph 6.82]

Recommendation 27.

15.44 We recommend preserving the current law in respect of renewals or statutory continuations.

15.45 We also recommend preserving the current position in respect of concurrent long leases, but whilst relaxing the "same landlord" condition so that a leaseholder of separate long leases of:

(1) two or more parts of a residential unit; or

(2) part of a residential unit and the premises associated with it,

should be able to treat those separate long leases as a single long lease for the purposes of enfranchisement.

[Paragraphs 6.100 to 6.101]

Recommendation 28.

15.46 We recommend that all qualifying criteria for enfranchisement rights based on financial limits (both the low rent test and rateable values) be removed, except where expressly preserved for a specific purpose (such as, for example, potentially in relation to retaining section 9(1) of the 1967 Act as a basis of valuation).

[Paragraph 6.115]

Recommendation 29.

15.47 We recommend that the requirement to have owned premises for two years prior to exercising enfranchisement rights be abolished.

[Paragraph 6.131]

Recommendation 30.

15.48 We recommend that a leaseholder who qualifies for an individual freehold acquisition of a building (or self-contained part of a building) should also be entitled to an additional lease extension option, which covers the whole of that building (or that self-contained part of the building).

[Paragraph 6.138]

Recommendation 31.

15.49 We recommend that the right of individual freehold acquisition should be available where:

(1) a leaseholder has a long lease over premises which include at least one residential unit which is not sublet to another person on a long lease;

(2) there are no units in the building save for the unit(s) let to the leaseholder under his or her long lease; and

(3) the premises let to the leaseholder comprise either:

(a) one unit; or

(b) more than one unit, but:

(i) none of those units are residential units that are sublet to another person under a long lease; and

(ii) the floor space of any non-residential unit does not exceed 50% of the floor space of all the units combined.

[Paragraph 6.171]

Recommendation 32.

15.50 We recommend that two-unit buildings (and, so, flats above shops) should not be treated any differently to other buildings in terms of the scheme of qualifying for individual freehold acquisition rights.

[Paragraph 6.186]

Recommendation 33.

15.51 We recommend that the meaning of "building" should, in line with current case law, be a built structure with a significant degree of permanence which can be said to change the physical character of the land.

15.52 We also recommend that the premises which may be the subject of a freehold acquisition claim (whether individual or collective) should be identified in line with the 1993 Act's definition of "self-contained building" and "self-contained part of a building", with a relaxation of the currently strict approach to the 1993 Act's vertical division condition.

[Paragraphs 6.214 to 6.215]

Recommendation 34.

15.53 We recommend maintaining an equivalent of the current requirement that, for a collective enfranchisement to be possible, at least two-thirds of the flats in the premises to be acquired must be held by qualifying tenants.

[Paragraph 6.251]

Recommendation 35.

15.54 We recommend maintaining an equivalent of the current requirement that, for a collective enfranchisement to be possible, there must be a minimum of two or more flats held by qualifying tenants in the premises to be acquired.

[Paragraph 6.264]

Recommendation 36.

15.55 We recommend that the leaseholders of at least half of the total number of residential units in the premises to be acquired must participate in a collective freehold acquisition.

[Paragraph 6.281]

Recommendation 37.

15.56 We recommend maintaining the requirement that, in the case of a building containing only two leaseholders who qualify for enfranchisement rights, both leaseholders must participate in a collective freehold acquisition claim.

[Paragraph 6.296]

Recommendation 38.

15.57 We recommend that the percentage limit on non-residential use in collective freehold acquisitions be increased from 25% to 50%.

[Paragraph 6.338]

Recommendation 39.

15.58 We recommend that the exception from collective enfranchisement rights in respect of premises containing operational railway tracks should be carried forward into our new scheme.

[Paragraph 6.349]

Recommendation 40.

15.59 We recommend that the resident landlord exclusion be abolished.

[Paragraph 6.355]

Recommendation 41.

We recommend that the current prohibition on leaseholders of three or more flats in a building being qualifying tenants for the purposes of a collective enfranchisement claim should be abolished.

[Paragraph 6.371]

CHAPTER 7: QUALIFYING CRITERIA: EXCEPTIONS TO THE USUAL RULES

Recommendation 42.

15.60 We recommend that:

(1) shared ownership leaseholders should be entitled to a lease extension which is of the same length as that available to all other leaseholders;

(2) the “share” in the property held by the leaseholder should remain unchanged after the lease extension; and

(3) the terms of the lease extension should replicate any terms of the existing lease which relate to its shared ownership nature.

[Paragraph 7.19]

Recommendation 43.

15.61 We recommend that the premium payable on the extension of a shared ownership lease should consist of:

(1) the usual cost of buying out any ground rent payable under the lease, but not any rent payable in respect of the unacquired share of the property; and

(2) a proportion of the usual cost of deferring the landlord's reversionary interest in the property, corresponding to the share which the leaseholder holds in the property.

[Paragraph 7.38]

Recommendation 44.

15.62 We recommend that the qualifying criteria for collective freehold acquisition claims should not be relaxed where a building contains units let on shared ownership leases. Specifically:

(1) residential units which are let on shared ownership leases should be counted when determining the number of units in a building;

(2) shared ownership leases should not be counted as long leases for the purposes of satisfying the two-thirds rule; and

(3) there should be no relaxation of the requirement that leaseholders of at least half of the total number of residential units in a building must participate in a collective freehold acquisition claim (even where that total number includes units let to shared ownership leaseholders who are not entitled to participate in such a claim).

[Paragraph 7.61]

Recommendation 45.

15.63 We recommend that, for the purposes of the exclusion of shared ownership leases from freehold acquisition rights, a shared ownership lease should be defined as a lease of a residential unit

(1) granted on payment of a premium calculated by reference to a percentage of the value of the residential unit or of the cost of providing it; or

(2) under which the leaseholder will or may be entitled to a sum calculated by reference, directly or indirectly, to the value of the residential unit.

15.64 In addition, we recommend that for the exclusion to apply, the lease should:

(1) entitle the leaseholder to acquire additional shares in the property at any time, up to a maximum of 100% (save in the case of properties in designated protected areas, in respect of "leases for the elderly", and in other circumstances where Government determines that there are good policy reasons to restrict leaseholders to acquiring a lower maximum share in the

property), and the minimum share which a leaseholder may purchase must be no greater than 25%;

(2) provide that the price payable for such shares shall be proportionate to the market value of the property at the time of acquisition of the shares, and provide for a corresponding reduction in rent payable by the leaseholder;

(3) in the case of properties that could otherwise be the subject of an individual freehold acquisition claim against the provider of the shared ownership lease, entitle the leaseholder to require the landlord's interest to be transferred to him or her, free of charge, at any time after the leaseholder's share in the property has reached 100%; and

(4) in the case of all other properties, provide that the terms of the lease which relate to its shared ownership nature will no longer apply after the leaseholder's share in the property has reached 100%.

[Paragraphs 7.92 to 7.93]

Recommendation 46.

15.65 We recommend that:

(1) in respect of certain, specified leases of inalienable National Trust land (being leases of visitor attraction properties and "donor" leases), the National Trust should enjoy a complete exemption from all enfranchisement claims under our new regime. Where these leases would currently benefit from the lease extension right under the 1967 Act, that right should remain available;

(2) all other leases of inalienable National Trust land should be excluded from freehold acquisition rights, but should benefit from the same lease extension right as all other long residential leases; and

(3) where a leaseholder of inalienable National Trust land has extended his or her lease under our new regime, the lease should thereafter be subject to a right of first refusal in favour of the National Trust. The Trust should be entitled to "buy back" the lease (at market value) whenever the leaseholder seeks to dispose of it.

[Paragraph 7.145]

Recommendation 47.

15.66 We recommend that the Crown should remain exempt from statutory enfranchisement rights, on the basis that the Crown bodies will give an undertaking to act by analogy with the new enfranchisement regime save in certain special cases.

15.67 We recommend that the restriction imposed by section 3(2) of the Crown Estate Act 1961 on the term for which a lease may be granted by the Crown Estate Commissioners should not apply where the lease in question is to be granted by way of renewal of an existing long lease and, but for the Crown's exemption from statutory

enfranchisement rights, there would be a statutory right for the leaseholder of the existing lease to acquire a new lease.

[Paragraphs 7.182 to 7.183]

Recommendation 48.

15.68 We recommend that a new exemption from freehold acquisition claims should be available in respect of community-led housing. The exemption should apply to a development where the community-led housing organisation has obtained a declaration from the Tribunal to that effect, on the basis that the development satisfies or will satisfy the definition of community-led housing. The development will cease to benefit from the exemption if at any time it no longer satisfies the definition of community-led housing.

[Paragraph 7.210]

Recommendation 49.

15.69 We recommend that properties which have been designated under section 31 of the Inheritance Tax Act 1984, for the purposes of a conditional exemption from inheritance tax, should be exempt from individual and collective freehold acquisition claims under our new enfranchisement regime.

[Paragraph 7.242]

Recommendation 50.

15.70 We recommend that specific provisions relating to land held by various public bodies, contained in sections 28 to 30 of the 1967 Act, should not be replicated in our new enfranchisement regime.

[Paragraph 7.246]

Recommendation 51.

15.71 We recommend that charitable housing trusts should no longer enjoy any exemption from any enfranchisement rights. Long leaseholders of charitable housing trusts should be entitled to bring both lease extension and freehold acquisition claims.

[Paragraph 7.259]

CHAPTER 8: PROCEDURE – MAKING A CLAIM

Recommendation 52.

15.72 We recommend that a single procedure should be adopted for all enfranchisement claims.

[Paragraph 8.49]

Recommendation 53.

15.73 We recommend that a single set of forms (namely an Information Notice, a Claim Notice and a Response Notice) should be prescribed for use in all types of enfranchisement claim.

15.74 If the relevant prescribed form is not used, the notice should not be valid. Any challenge to the validity of an enfranchisement notice on this basis may only be raised in writing and:

(1) (in relation to an Information Notice) at the same time as any reply to that notice by the landlord or (if earlier) within the time limit for such reply;

(2) (in relation to a Claim Notice) at the same time as service of the Response Notice by the landlord or (if earlier) within the time limit for service of the Response Notice; or

(3) (in relation to a Response Notice) within 14 days following receipt of the Response Notice by the leaseholder.

[Paragraphs 8.73 to 8.74]

Recommendation 54.

15.75 We recommend that:

(1) leaseholders should be permitted to serve an Information Notice on their immediate landlord and/or another superior landlord;

(2) a landlord who has received an Information Notice should respond within 28 days by providing the names and addresses of his or her immediate landlord and/or any superior landlord, so long as this information is either within his or her own knowledge, or can be obtained by checking his or her own records; and

(3) where a landlord has received but failed to respond to an Information Notice within time, the leaseholder who gave that notice may either:

(a) apply to the Tribunal for enforcement (including an order that the landlord pay the leaseholder's costs of the application) having taken the steps required by a pre-application protocol; or

(b) proceed to start an enfranchisement claim in reliance upon the liability of the landlord for any costs of the leaseholder that were wasted because of that failure.

[Paragraph 8.89]

Recommendation 55.

15.76 We recommend that leaseholders intending to bring a collective freehold acquisition claim should not be required to give other leaseholders notice of the proposed claim.

[Paragraph 8.108]

Recommendation 56.

15.77 We recommend that Claim Notices should include full details about the leaseholder's claim and proof of the leaseholder's title.

[Paragraph 8.117]

Recommendation 57.

15.78 We make the following recommendations.

(1) Enfranchisement notices should be signed by the party who is giving the notice, or by anyone authorised to sign the notice on his or her behalf. Signatures applied electronically should be valid.

(2) A Claim Notice in a collective freehold acquisition claim should not be invalidated simply because it has not been signed by or on behalf of all the leaseholders recorded as bringing the claim. A Claim Notice should remain valid so long as it has been signed by or on behalf of the minimum number of leaseholders required to bring that claim.

(3) In circumstances where the Tribunal requires assurance that specified checks have been carried out and/or the result of such checks, a statement of truth as to the carrying out of the specified checks should form part of any application to the Tribunal under the No Service Route. The Claim Notice should not need to contain a statement of truth that such checks have been completed, but it should contain guidance for leaseholders as to the carrying out of such checks.

[Paragraph 8.145]

Recommendation 58.

15.79 We make the following recommendations.

(1) Leaseholders making an enfranchisement claim should serve the Claim Notice on their competent landlord (that is, the first superior landlord who holds a sufficient interest in the premises to be able to grant the interest claimed).

(2) In the case of joint landlords of a single premises, leaseholders should only be required to serve the Claim Notice on one such landlord. It should be for the landlord who has been served by the leaseholder to serve copies of the Claim Notice on the other joint landlords. If the landlord served with a Claim Notice is unable to serve copies on the other joint landlords, the landlord should be able to apply to the Tribunal for an order dispensing with service, or giving directions for service.

(3) In the case of split reversions, a leaseholder should be required to serve the Claim Notice on each split reversioner. However, provided one split reversioner has been served, a failure to serve the other split reversioners should not invalidate the claim.

(4) In the case of owners of other land bound by property rights benefiting the lease:

(a) if the right is granted within the lease, a leaseholder should be required to serve the Claim Notice on the owner of that other land, but failure to serve the owner of other land should not invalidate the claim.

(b) if the right is not granted within the lease, a leaseholder should be required to serve the Claim Notice on the owner of that other land in order to claim the relevant right.

In the case of (3) and (4)(a) above, the Tribunal should have power to give directions relating to late service of the Claim Notice, and future participation of the unserved split reversioner or owner of other land (as the case may be) in the claim.

[Paragraph 8.171]

Recommendation 59.

15.80 We make the following recommendations.

(1) Where a copy of the Claim Notice should be served on intermediate landlords:

(a) a competent landlord should be responsible for serving copies of the Claim Notice; and

(b) where the competent landlord fails to serve a copy of a Claim Notice on an intermediate landlord, the intermediate landlord should be able to bring a claim for damages in the county court against the competent landlord for any losses arising.

(2) Where a copy of the Claim Notice should be served on third parties to the relevant lease (including guarantors and management companies):

(a) a competent landlord who is also the leaseholder's immediate landlord should be responsible for serving copies of the Claim Notice;

(b) if the competent landlord is not also the leaseholder's immediate landlord, the leaseholder should be responsible for serving copies of the Claim Notice; and

(c) no party should be required to serve a copy of a Claim Notice on a third party who has died or (in the case of a company) no longer exists or (in the case of a guarantor) has no continuing liability.

[Paragraph 8.201]

Recommendation 60.

15.81 We recommend that:

(1) claim Notices delivered by post or hand, or sent by email to competent landlords at prescribed categories of address, should be deemed served;

(2) where a Claim Notice is served by post, service should be deemed to have been effected at the time at which a letter would be delivered in the ordinary course of post; and

(3) the prescribed categories of address should be divided into two groups, Group A and Group B. A leaseholder should only send or deliver the Claim Notice to addresses falling within Group B if an address within Group A cannot be identified.

15.82 We further recommend that:

(1) Group A should consist of:

(a) the competent landlord's current address; and

(b) the latest address (including an email address) that has been provided by the competent landlord:

(i) to the leaseholder as an address at which an enfranchisement notice can be served;

(ii) for the purposes of sections 47 and 48 of the Landlord and Tenant Act 1987; or

(iii) for the purposes of serving notices generally (including notices in proceedings),

but, in each case, only where the address has been provided within the 12 months preceding the service of the Claim Notice.

(2) Group B should consist of:

(a) the competent landlord's last known address; and

(b) the latest address (including an email address) that has been provided by the competent landlord:

(i) to the leaseholder as an address at which an enfranchisement notice can be served;

(ii) for the purposes of sections 47 and 48 of the Landlord and Tenant Act 1987; or

(iii) for the purposes of serving notices generally (including notices in proceedings),

but, in each case, only where the address has been provided more than 12 months preceding the service of the Claim Notice;

(3) where a Claim Notice is served on a Group B address the leaseholder should (in the case of registered land) also serve the Claim Notice on each of the addresses given for the competent landlord as registered proprietor at HM Land Registry.

15.83 We further recommend that a landlord who has served a Response Notice in relation to an enfranchisement claim should not be permitted to argue that the Claim Notice was not properly served.

[Paragraphs 8.242 to 8.244]

Recommendation 61.

15.84 We recommend that:

(1) where it is not possible to serve a Claim Notice using the Service Routes, leaseholders should be able to apply to the Tribunal for an order allowing the enfranchisement claim to proceed ("the No Service Route"); and

(2) an application under the No Service Route will require leaseholders to complete a statement of truth setting out that specified checks have been carried out and their results.

[Paragraph 8.254]

Recommendation 62.

15.85 We recommend that:

(1) where a Claim Notice is:

(a) deemed to be served on a landlord; and

(b) the leaseholder has received no Response Notice from the landlord within the specified time frame;

the leaseholder should be entitled to apply to the Tribunal for an order determining the claim in the landlord's absence;

(2) before making an order determining the claim, the Tribunal should be satisfied that the Claim Notice was served on the correct landlord at a Group A address or Group B address(es); and

(3) the Tribunal should be provided with the results of the specified checks, or be assured that the results of the specified checks would not have affected the leaseholder's decision to serve the Claim Notice on the landlord set out in the Claim Notice, or the address(es) to which the Claim Notice was sent.

[Paragraph 8.332]

Recommendation 63.

15.86 We recommend that:

(1) where a leaseholder is unable to take advantage of the Service Routes because:

(a) he or she is unaware of the identity of the landlord, or

(b) he or she is aware of the identity of the landlord but does not have an address for the landlord within Group A or Group B,

the leaseholder should be entitled to apply to the Tribunal under the No Service Route for an order allowing him or her to proceed with the claim;

(2) before making an order allowing the leaseholder to proceed with the claim, the Tribunal should be satisfied that the identity of the landlord is unknown, or that there is no address within Group A or Group B available for the landlord; and

(3) the Tribunal should be provided with the results of the specified checks, or be assured that they do not reveal information that would enable the identity of the landlord to be identified and/or a Group A or Group B address for the landlord to be identified.

[Paragraph 8.333]

Recommendation 64.

15.87 We recommend that:

(1) before applying to the Tribunal for an order under the No Service Route, a leaseholder should be required to place an advertisement in the London Gazette inviting owners of the premises to contact the leaseholder within 28 days;

(2) where a leaseholder knows the identity of the landlord, but does not have an address for the landlord falling within Group A or Group B, the leaseholder should be required to carry out specified checks, before placing an advertisement in the London Gazette in the manner described above; and

(3) if the specified checks or the advertisement do not reveal an address for service, the leaseholder should be able to make an application to the Tribunal under the No Service Route.

[Paragraph 8.334]

Recommendation 65.

15.88 We recommend that:

(1) the Secretary of State should be given the power to make regulations setting out the specified checks that should be undertaken by a leaseholder prior to

making an application to the Tribunal for an order under either the Service Routes or the No Service Route; and

(2) the power of the Secretary of State to make regulations should:

(a) enable different specified checks to be set in different circumstances; and

(b) enable the weight that should be given to the results of the specified checks by the Tribunal to be set.

15.89 We further recommend that the specified checks should include:

(1) a check of the records held at HM Land Registry (which may assist in establishing or confirming both the identity of the landlord and a Group A or a Group B address);

(2) (where the landlord is understood to be a corporate body whose details are registered at Companies House) a check of the records at Companies House; and

(3) (where Service Route B is being used to serve a Claim Notice, and the landlord is understood to be an individual who is likely to be resident in England and Wales):

(a) a search of probate records; and

(a) a search of the Individual Insolvency Register.

[Paragraphs 8.335 to 8.336]

Recommendation 66.

15.90 We recommend that, in certain circumstances (which the specified checks are designed, in part, to identify), the Group A address for service should be as set out below.

(1) If an individual landlord is dead, the Group A address for service should be the address of any personal representatives at the address given in any grant of probate or letters of administration or, where no such grant has been issued, the Public Trustee.

(2) If an individual landlord is insolvent, the Group A address for service should be the address for his or her trustee in bankruptcy as shown on the Insolvency Service website.

(3) If a corporate body is insolvent, the Group A address for service should be both:

(a) the corporate body's registered office address; and

(b) the address for its administrator, liquidator, or receiver as listed at Companies House; if no such person has been appointed, the Official Receiver should be served.

(4) If a corporate body has been dissolved, the Group A address for service should be the Treasury Solicitor.

[Paragraph 8.337]

CHAPTER 9: PROCEDURE – RESPONDING TO A CLAIM

Recommendation 67.

15.91 We recommend that a Response Notice should:

(1) state whether the leaseholder's claimed right to enfranchise is admitted or denied, and the basis of the admission or denial (including any intention to oppose the claim on the grounds of an intention to redevelop);

(2) state whether the landlord accepts or rejects the leaseholder's proposals, and set out the landlord's own proposed terms (even if the claim is denied);

(3) state whether the landlord wishes 'other land' to be included;

(4) state whether the landlord wishes to take a leaseback of any part of the premises and (if relevant) include the landlord's response to any request by leaseholders that the landlord take a leaseback;

(5) state, in respect of a freehold acquisition claim, whether:

(a) the property is subject to an existing Estate Management Scheme; and

(b) the property, or parts of it, are subject to any other Claim Notices;

(6) state whether the landlord is seeking any security in respect of his or her non-litigation costs;

(7) provide an address within England and Wales at which the landlord can be served;

(8) (if land is registered) provide the title numbers for:

(a) the competent landlord's interest, and

(b) the interests of any intermediate landlords;

(9) record the names and addresses of any intermediate leaseholder to whom a copy of the Claim Notice has been given.

15.92 We also recommend that competent landlords should be required to attach:

(1) a draft transfer, lease and/or contract (if one is to be used);

(2) (save where the relevant registered title numbers have been provided within the Response Notice itself (see paragraph (7) above) proof of:

(a) the competent landlord's title, and

(b) the title of any intermediate landlords;

(3) registered title numbers (or, in the case of unregistered land, proof of title) for the interests of any intermediate landlords.

15.93 We also recommend that from the date of receipt of the Claim Notice, any landlord (whether competent or intermediate) should be required to inform the leaseholders bringing the claim of any disposal of the whole or part of his or her title.

[Paragraphs 9.36 to 9.38]

Recommendation 68.

15.94 We recommend that the validity of Claim Notices and Response Notices should only be capable of being challenged in limited circumstances.

15.95 A Claim Notice should only be invalid if:

(1) the prescribed form is not used;

(2) the Claim Notice does not make clear (to a reasonable recipient):

(a) the enfranchisement right being claimed;

(b) the identity of those bringing the claim; or

(c) the address at which any Response Notice should be served; or

(3) the Claim Notice is not signed (by or on behalf of the minimum number of leaseholders to bring that claim).

15.96 A Response Notice should only be invalid if:

(1) the prescribed form is not used;

(2) the Response Notice fails to make clear (to a reasonable recipient):

(a) whether the claim is admitted or denied;

(b) the basis of the admission or denial; or

(c) the landlord's address for service; or

(3) the Response Notice is not signed (by or on behalf of the competent landlord).

15.97 We recommend that the parties should be entitled to agree:

(1) to waive any defect in a Claim Notice or a Response Notice that would otherwise render the notice invalid; or

(2) amend a valid Claim Notice or Response Notice.

15.98 We recommend that the Tribunal should have a power on application by either party at any time prior to the determination or settlement of the claim to:

(1) waive a defect in a Claim Notice or a Response Notice that would otherwise render the notice invalid;

(2) permit a party to amend a valid Claim Notice or a Response Notice to correct a defect;

(3) permit a party to amend a Claim Notice or a Response Notice that is not defective; and

(4) make any consequential directions.

15.99 We recommend that, in exercising its power to waive a defect or amend the relevant notice, the Tribunal should consider all the circumstances of the case, including:

(1) the need to ensure that enfranchisement rights can be exercised fairly, at proportionate cost, and without undue delay;

(2) the effect that refusing the application is likely to have on each of the parties;

(3) the effect that granting the application is likely to have on each of the parties;

(4) whether the party making the application has acted promptly; and

(5) (save where the relevant notice is not defective) whether the party opposing the application acted promptly in notifying the party making the application of the defect in the relevant notice.

15.100 We recommend that, where a landlord applies to amend a Response Notice to add or amend its grounds of denial, the Tribunal should be entitled to make an order requiring the landlord to pay the leaseholder's costs arising from the application.

[Paragraphs 9.63 to 9.69]

Recommendation 69.

15.101 We recommend that:

(1) a landlord should serve a Response Notice no later than two months after the date on which the Claim Notice is deemed to have been served by the leaseholder;

(2) a landlord who is required to serve a copy of the Claim Notice on any intermediate landlords or third parties should do so no later than 14 days after the date on which the Claim Notice is deemed to have been served by the leaseholder; and

(3) if the Response Notice has been served, either party should be entitled to apply to the Tribunal for a determination of the claim 21 days thereafter (but not before).

[Paragraph 9.95]

Recommendation 70.

15.102 We recommend that where an intermediate landlord or an owner of other land bound by property rights benefiting the lease has been served with a copy of a Claim Notice, that person should be entitled to make written and/or oral representations to the Tribunal in respect of the enfranchisement claim.

15.103 We recommend that an intermediate landlord who has been served with a copy of the Claim Notice should be entitled to replace the competent landlord as the person with conduct of the response to the enfranchisement claim either:

(1) with the agreement of the competent landlord (provided that no Response Notice has been served, and the time for doing so has not passed); or

(2) with the permission of the Tribunal.

15.104 We recommend that when considering such an application for permission the Tribunal should take account of whether the application has been made promptly and the effect of granting the application on the enfranchisement claim.

[Paragraphs 9.107 to 9.109]

Recommendation 71.

15.105 We recommend that a landlord who has failed to serve a Response Notice within the prescribed period should not be liable to transfer his or her freehold or grant a lease extension on the terms set out in the Claim Notice. Instead, the terms of acquisition should, on application by the leaseholder, be determined by the Tribunal on the evidence provided.

15.106 We recommend that a landlord who has failed to serve a Response Notice within the prescribed period should be able to apply to the Tribunal for permission to take part in the claim provided that no determination of the claim has been made. The Tribunal should have the power to make such an order conditional on the payment by the landlord of any of the leaseholder's wasted costs.

[Paragraphs 9.125 to 9.126]

Recommendation 72.

15.107 We make the following recommendations.

(1) A landlord who has not served a Response Notice should be entitled to apply to the Tribunal for an order setting aside a determination of an enfranchisement claim that was made in his or her absence.

(2) An order setting aside a determination that was made in the landlord's absence should only be made if the landlord shows that:

(a) (where the leaseholder's application was made under the Service Route) the Claim Notice was not served in accordance with the provisions of the Service Routes;

(b) (where the leaseholder's application was made under the No Service Route) the test for making an order allowing the claim to proceed under the No Service Route was not met; or

(c) the following criteria apply:

(i) the landlord did not receive the Claim Notice; and

(ii) the determination was wrong, in the sense that it revealed a material error of law, an error of fact, or an error in the exercise of the Tribunal's discretion (taking account of any written evidence on which the landlord seeks to rely).

(3) In either case, an application to set aside should have to be made:

(a) within 14 days of the landlord first discovering that the determination had been made; or

(b) before the transaction provided for in the determination is completed;

whichever is the earlier.

[Paragraph 9.151]

Recommendation 73.

15.108 We make the following recommendations:

(1) Subject to paragraph (6) below, a Claim Notice should not be deemed to be withdrawn because a procedural time limit is missed by the leaseholder.

(2) The Tribunal should have a power to strike out a Claim Notice if the leaseholder who gave that notice does not apply to the Tribunal for a determination of his or her claim within six months of the service of a Response Notice or the date on which a Response Notice should have been served (whichever is earlier).

(3) It should be possible for an application under paragraph (2) above to be made:

(a) in any enfranchisement claim by a competent landlord (or another landlord who has responsibility for responding to the claim); and

(b) additionally, in the case of a collective freehold acquisition claim:

(i) by another group of leaseholders within the building who would be entitled to bring a collective freehold acquisition claim; or

(ii) by a leaseholder whose lease extension claim has been stayed as a result of the service of the Claim Notice.

(4) No such application should be made unless the leaseholder (and the competent landlord to whom the Claim Notice was addressed) has been given 14 days' written notice of the applicant's intention to do so and that period has expired without the leaseholder making an application for a determination of the claim.

(5) The Tribunal should exercise its discretion as to whether to strike out the Claim Notice if the leaseholder makes an application for a determination of the claim after the expiry of the 14-day period set out in paragraph (4) above.

(6) A Claim Notice should be deemed to be withdrawn if:

(a) no application to the Tribunal is made within a period of two years from the date on which the Claim Notice was deemed to have been served; or

(b) the nominee purchaser company is wound up, struck off or becomes insolvent prior to determination of the claim.

[Paragraph 9.177]

CHAPTER 10: COMPLETING A CLAIM

Recommendation 74.

15.109 We recommend that:

(1) the service of a Claim Notice upon a competent landlord should not create a statutory contract between the leaseholder and the landlord;

(2) a contract between the parties should not be required in every enfranchisement claim, but could be used if either party elects, or the Tribunal directs in the absence of agreement between the parties, that such a contract be used; and

(3) the enforcement role of the Tribunal should be limited to giving effect to the transfer or grant of the interest claimed by the leaseholder; if other elements of a contract need to be enforced, it should continue to be possible to make an application to the county court.

15.110 We also recommend that detailed conveyancing regulations should not be made. However, general advisory guidance should be provided as to the statutory enfranchisement procedure and the other steps that the parties are likely to need to take between the service of notices and completion of any transaction.

[Paragraphs 10.27 to 10.28]

Recommendation 75.

15.111 We recommend that the benefit of a Claim Notice relating to a lease extension or an individual freehold acquisition should be transferred automatically upon assignment of the leaseholder's lease, except where –

(1) the assignment of the lease expressly states that benefit of the Claim Notice will not be transferred; or

(2) the new leaseholder disclaims the assignment of the benefit of the Claim Notice, provided that the disclaimer takes place before the new leaseholder takes any step to advance the claim.

If the assigning leaseholder has provided security for costs, we recommend that the benefit of that security should not automatically be assigned to the new leaseholder, although it may be expressly assigned. If the security is not expressly assigned, the claim should be stayed until the new leaseholder provides replacement security.

15.112 We recommend that, where the benefit of a Claim Notice is automatically assigned in line with the above recommendation, the landlord should be able to continue validly to serve documents on the assignor until:

(1) he or she is served with notice of the assignment of the benefit of the Claim Notice; or

(2) he or she knows of the assignment of the benefit of the Claim Notice.

[Paragraphs 10.54 to 10.55]

Recommendation 76.

15.113 We recommend that a Claim Notice that has been deemed served on the relevant landlord should be binding on a transferee of the landlord's interest in the affected property regardless of whether the Claim Notice has been registered as a land charge or is the subject of a notice on the register of title.

[Paragraph 10.81]

Recommendation 77.

15.114 We recommend that, in the case of a lease extension claim, where the landlord's interest is held subject to a mortgage or other charge:

(1) the landlord should be under an obligation:

(a) to inform the mortgagee or chargee of the grant of a lease extension not less than 21 days before completion; and

(b) to give his or her leaseholder written confirmation that such notice has been given; and

(2) the leaseholder should be required to pay the purchase money into court if –

(a) the mortgagee or chargee requests the leaseholder to do so (or, where there are multiple mortgages or charges, if any of the mortgagees or chargees make such a request); or

(b) the leaseholder has not received confirmation from the landlord that the landlord has notified his or her mortgagee or chargee of the lease extension within the prescribed time limit.

A payment into court pursuant to this recommendation should qualify as the payment of the premium for the purposes of the completion of the grant of the new lease.

[Paragraph 10.106]

Recommendation 78.

15.115 We recommend that, where a leaseholder is granted a new lease following a lease extension claim and a mortgage is automatically transferred from the old lease to the new lease:

(1) the leaseholder should be under an obligation to provide his or her mortgagee with a copy of the new extended lease within one month of its receipt following registration; and

(2) if the leaseholder fails to comply, he or she should be liable for any losses suffered by the mortgagee resulting from the noncompliance.

[Paragraph 10.122]

Recommendation 79.

15.116 We recommend that a leaseholder who is pursuing an individual freehold acquisition claim should have the right to request a guaranteed merger of the leasehold and freehold titles, with the titles merging when the acquisition of the freehold is completed by registration. Where the leasehold and freehold titles merge in this way, any interests benefiting or burdening the lease should automatically transfer to the freehold. The transfer should not change their nature or relative priority to other interests that affected the lease or affect the freehold.

15.117 We recommend that the leaseholder should not be entitled to a guaranteed merger of the leasehold and freehold titles in any case in which:

(1) the freehold is subject to a mortgage that is not discharged on the individual freehold acquisition or is made subject to a new mortgage as part of that individual freehold acquisition; or

(2) the lease is subject to a registered estate contract.

15.118 We recommend that a request by the leaseholder for a guaranteed merger should not remove the need for the leaseholder to comply with any relevant restrictions registered against the lease. However, both the leaseholder's mortgagee and (if the lease is held on trust) the beneficiaries under the trust should be deemed to consent to the merger, and this consent should be effective for the purposes of satisfying any consent requirement in the mortgage contract, deed of trust, or consent restriction on the register of title.

[Paragraphs 10.147 to 10.149]

Recommendation 80.

15.119 We recommend that the following rules should apply in relation to third-party rights or interests affecting a landlord's estate that may restrict or set conditions on the

landlord's power to grant an extended lease or transfer the freehold to a leaseholder or leaseholders.

(1) The landlord's mortgagee should be deemed to consent to any statutory lease extension. This deemed consent should be effective for the purposes of satisfying any consent requirement in the mortgage contract or consent restriction on the register of title. If the existing lease did not have priority over the mortgage and was not authorised by the mortgagee, however, the mortgagee's deemed consent to the lease extension should not imply that the new extended lease is binding on the mortgagee.

(2) If the landlord's estate is held on trust or is settled land, and a leaseholder or leaseholders make a lease extension or individual or collective freehold acquisition claim, the beneficiaries under the trust or settlement should be deemed to consent to the relevant disposition of the landlord's estate. This consent should be effective for the purposes of satisfying any consent restriction on the register of title.

(3) The service of a Claim Notice seeking a lease extension or individual or collective freehold acquisition should suspend the operation of any provision of an agreement to which the landlord is a party:

(a) that prevents the landlord from transferring the freehold to the leaseholder or nominee purchaser or from granting an extended lease (as applicable), or prevents the landlord doing so by the completion date specified by the Tribunal; or

(b) (subject to (4)) that prevents the transfer or grant unless the leaseholder agrees to enter into personal obligations benefiting a third party (or the landlord).

(4) A provision of an agreement will not be suspended or discharged under paragraph (3)(b) above it falls within the exception set out in Recommendation 12 in Chapter 4, which preserves agreements creating obligations that would be capable of being imposed as a "land obligation" within the meaning of our report Making Land Work.

15.120 We recommend that, where pursuant to our recommendation set out above–

(1) a beneficiary's consent to a disposition by the landlord is deemed to be granted; or

(2) an agreement between the landlord and a third party will be discharged on completion of the leaseholder's claim,

the landlord should be required to make reasonable endeavours to notify the beneficiary or third party of the relevant disposition not less than 21 days before completion, and also within 14 days after completion.

15.121 We recommend that, if the landlord fails to make reasonable endeavours to notify the beneficiary or third party as required above, he or she should be liable for losses suffered by the beneficiary or third party that result from that failure.

[Paragraphs 10.210 to 10.212]

Recommendation 81.

15.122 We recommend that any lease extension, leaseback or transfer executed as part of an enfranchisement claim must contain a statement recording that it was executed pursuant to the relevant statutory provisions.

[Paragraph 10.223]

CHAPTER 11: DISPUTE RESOLUTION

Recommendation 82.

15.123 We recommend that, save as set out at paragraph 11.32 below, all enfranchisement disputes and issues should be determined by the Tribunal.

15.124 We recommend that the Tribunal be given powers to:

(1) direct that a lease extension or transfer can be executed by a Tribunal judge in place of a party to the transaction;

(2) order that unless the price or premium is paid to the landlord by a specified date any formal contract between the parties will be discharged, or any determination made by the Tribunal will be set aside and the Claim Notice be struck out.

15.125 We recommend that the Tribunal should have access to the Court Funds Office, to enable parties to pay money into the Tribunal in the same way as parties currently pay money into court.

15.126 A party who had entered into a formal contract for a transfer or lease extension would remain able to seek to enforce the terms of that contract in the county court.

[Paragraphs 11.29 to 11.32]

Recommendation 83.

15.127 We recommend that the Tribunal should be able to order that certain valuation-only disputes be determined on the papers by a single valuer member of the Tribunal rather than at a full hearing. We have termed this the “alternative track”.

15.128 We recommend that the Tribunal should have a discretion to determine the sorts of disputes that are best-suited to disposal in this way. However, the Tribunal should include the following as factors in determining the allocation of any claim:

(1) the value of the claim;

(2) the difference between the parties’ positions; and

(3) the proportionality of conducting a full hearing of the claim.

15.129 The determinations made by the valuer member of the Tribunal should have the same status as that of a full Tribunal decision, and be capable of being appealed on the same basis.

15.130 We recommend that where a claim would otherwise be allocated to the alternative track the Tribunal should, on the application of any party, be able to direct that the claim will nevertheless proceed on the normal track (in other words, a full hearing) on the grounds that the claim has a broader significance for that party. Any such direction should be subject to a condition that the party making the application is required to meet the other party's reasonable litigation costs of proceeding in that way.

[Paragraphs 11.49 to 11.52]

CHAPTER 12: COSTS

Recommendation 84.

15.131 We recommend that:

(1) if Government adopts a valuation methodology that seeks to reflect open market value for the property being acquired by a leaseholder:

(a) the general rule should be that the leaseholder is not required to make any contribution to his or her landlord's non-litigation costs;

(b) the general rule should not apply where the price payable by the leaseholder is below a prescribed sum; in such a case, the leaseholder should be required to contribute to the landlord's reasonably incurred non-litigation costs so that the total received by the landlord is not less than the landlord's non-litigation costs or the prescribed sum (whichever is the lower);

(c) the general rule should also not apply where a landlord incurs additional non-litigation costs as a result of an election made by the leaseholder that also has the effect of reducing the price payable by the leaseholder to the landlord; in such a case, the leaseholder should be required to make a fixed sum contribution in respect of the landlord's additional costs; and

(2) if Government does not adopt a valuation methodology that seeks to reflect open market value for the property being acquired by a leaseholder, the leaseholder should continue to contribute to the landlord's non-litigation costs.

[Paragraph 12.56]

Recommendation 85.

15.132 We recommend that if leaseholders are required to contribute to their landlord's non-litigation costs the contribution should be a sum determined in accordance with a fixed costs regime.

15.133 We recommend that the fixed costs regime:

(1) should apply to all types of enfranchisement claim;

(2) should allow a landlord to recover:

(a) a prescribed base sum in respect of an enfranchisement claim; and

(b) (in a collective freehold acquisition claim) prescribed further sums in respect of any costs incurred by the landlord in respect of each prescribed additional element that properly features in the claim; and

(3) (in a collective freehold acquisition claim) should be subject to a cap, to be applied in respect of any further sums and/or the total sum to be paid by a leaseholder.

15.134 We recommend that no additional costs should be recoverable in the case of split freeholds or other reversions, or where there are intermediate landlords. However, a small additional sum should be recoverable where a third-party management company seeks advice in relation to an enfranchisement claim.

[Paragraphs 12.109 to 12.111]

Recommendation 86.

15.135 We recommend that if leaseholders are required, as a general rule, to make a fixed costs contribution to their landlord's non-litigation costs on successful completion of a claim, leaseholders should be liable to pay a percentage of those fixed costs to the landlord if the claim is withdrawn, is struck out, or otherwise fails. The percentage to be paid should depend on the stage in the enfranchisement process that has been reached when the claim fails.

15.136 We recommend that if leaseholders are not, as a general rule, required to make any contribution to their landlord's non-litigation costs on successful completion of a claim, leaseholders should be liable to pay a small fixed sum to the landlord if the claim is withdrawn, is struck out, or otherwise fails. The sum should not vary depending on the stage in the enfranchisement process that has been reached when the claim fails.

[Paragraphs 12.128 to 12.129]

Recommendation 87.

15.137 We recommend that if leaseholders are not, as a general rule, required to make any contribution to their landlord's non-litigation costs on successful completion of a claim, a landlord should not generally be able to seek security for his or her non-litigation costs from the leaseholder. However, a landlord should be able to seek such security where a leaseholder has made an election at the start of or during a claim that has the effect of allowing the landlord to recover a fixed sum from the leaseholder in respect of the landlord's non-litigation costs arising from that election.

15.138 We recommend that if leaseholders are required, as a general rule, to make a fixed costs contribution to their landlord's non-litigation costs on successful completion of a claim, a landlord should be able to seek security for his or her non-litigation costs from

the leaseholder. However, a leaseholder should not be required to pay a deposit in respect of the premium to be paid to the landlord at the conclusion of the claim.

[Paragraphs 12.145 to 12.146]

Recommendation 88.

15.139 We recommend that there should be no bar on a leaseholder starting a fresh enfranchisement claim when an earlier claim in respect of the same premises has been withdrawn, struck out, or has otherwise failed.

15.140 We recommend that:

(1) a landlord should be able to apply to the Tribunal for an order prohibiting a leaseholder from bringing a further claim without the permission of the Tribunal (an Enfranchisement Restraint Order ("ERO"));

(2) the Tribunal should be able to make such an order where a leaseholder has made a prescribed number of enfranchisement claims in respect of the same premises that were either totally without merit, or were (either of themselves or when considered together) frivolous, vexatious or otherwise an abuse of process; and

(3) a landlord who applies for an ERO should be able to rely on previous determinations made by the Tribunal in respect of an enfranchisement claim and/or invite the Tribunal to make such findings in respect of other enfranchisement claims.

15.141 We recommend that the Tribunal should be able to grant permission to bring a further enfranchisement claim to a leaseholder who is subject to an ERO either with or without conditions.

[Paragraphs 12.165 to 12.167]

Recommendation 89.

15.142 We recommend that, as a general rule, the limited powers of the Tribunal to order one party to pay the litigation costs of another party in an enfranchisement claim should apply to all disputes and issues that it is to decide.

15.143 We recommend that there should be the following exceptions to the general rule.

(1) Where a leaseholder has obtained an order from the Tribunal under the No Service Route that allows him or her to proceed with the claim, the Tribunal should order that the landlord pay the leaseholder's reasonably incurred litigation costs.

(2) Where a landlord who had failed to serve a Response Notice, or against whom an order had been made under the No Service Route, applies successfully to the Tribunal for an order allowing the landlord to serve a Response Notice and participate in the claim, or to set aside an earlier determination of the claim, the Tribunal should order the landlord to pay the leaseholder's wasted costs.

(3) Where a landlord obtains an order from the Tribunal striking out a leaseholder's Claim Notice, the Tribunal should require the leaseholder to pay a fixed sum contribution to the litigation costs incurred by the landlord in making that application.

(4) Where a landlord applies successfully to the Tribunal for an order to waive and/or amend a defect in its Response Notice in order to add to or amend its grounds of opposition, the Tribunal should be entitled to make an order requiring the landlord to pay the leaseholder's costs arising from the application.

(5) In a case that the Tribunal considers is appropriate for disposal in the alternative track but should nonetheless proceed to a full Tribunal hearing so that an important issue may be heard in the interests of one party, the Tribunal should be able to make a prospective costs order requiring that party to pay the litigation costs of the other party on an indemnity basis.

[Paragraphs 12.187 to 12.188]

Recommendation 90.

15.144 We recommend that the scope of the Tribunal's existing power to order one party to pay any of the litigation costs of another party on the basis of the former party's unreasonable behaviour should be preserved (subject to our recommendation at paragraphs 12.187 to 12.188 above).

[Paragraph 12.196]

Recommendation 91.

15.145 We recommend that any term of a lease or collateral agreement that purports to allow a landlord to recover his or her litigation or non-litigation costs arising out of an enfranchisement claim should be unenforceable.

[Paragraph 12.204]

CHAPTER 13: INTERMEDIATE LEASES AND OTHER LEASEHOLD INTERESTS

Recommendation 92.

15.146 We make the following recommendations.

(1) A determination of an enfranchisement claim by the Tribunal should bind the parties to that claim, and any other landlord affected by that claim. Any settlement of a claim made between a leaseholder and a landlord who is responsible for dealing with the claim should also bind any other landlord affected by that claim.

(2) The landlord who is responsible for dealing with a leaseholder's claim should owe a duty to other landlords to deal with the claim in good faith and with reasonable skill and care. Any landlord who suffers a loss as a result of a breach of that duty should be able to bring a claim in the county court for damages against the landlord who acted in breach of that duty.

(3) Any landlord who is not responsible for dealing with the leaseholder's claim should be under a duty to provide all information and assistance as the landlord who is responsible for dealing with the claim reasonably requires. Any landlord in breach of that duty should indemnify the landlord who is responsible for dealing with the claim against any losses arising from any such breach.

(4) Any landlord (whether responsible for dealing with the leaseholder's claim or not) should be able to apply to the Tribunal for directions as to the conduct of the response to the claim.

(5) A landlord who is entitled to receive any part of the premium on an enfranchisement claim, but who is not responsible for dealing with the claim, should contribute to the non-litigation costs incurred by the landlord who has been responsible for dealing with the claim. The sum payable should be a percentage of a fixed sum. The percentage should be equal to the percentage of the premium receivable by the landlord who is not responsible for dealing with the claim, subject to a cap equal to the total of that premium.

[Paragraph 13.45]

Recommendation 93.

15.147 We recommend that in a collective freehold acquisition claim, the normal rule should be that the leaseholders bringing the claim can choose whether to acquire any (or any part of an) intermediate lease in the building.

[Paragraph 13.51]

Recommendation 94.

15.148 We recommend that:

(1) intermediate leases created as part of a previous collective freehold acquisition should not be immune from acquisition, so that leaseholders may elect to acquire such leases in a subsequent collective freehold acquisition; and

(2) if any such intermediate lease is to be acquired, it should be valued on the same basis as any other intermediate lease.

[Paragraph 13.60]

Recommendation 95.

15.149 We recommend that, when a collective freehold acquisition claim is made, an intermediate lease of a residential unit that is held by the leaseholder of that residential unit should not be acquired by the nominee purchaser if the leaseholder of that residential unit decides that it should not be acquired.

15.150 We recommend that this power should:

(1) only be available to leaseholders who are eligible to participate in a collective freehold acquisition; and

(2) only apply to an intermediate lease that sits directly above the leaseholder's lease.

15.151 We recommend that where there is an intermediate lease between the leaseholder's lease and his or her intermediate lease of the same premises, the nominee purchaser should be able to choose whether to acquire those intermediate leases as part of a collective freehold acquisition claim.

[Paragraphs 13.67 to 13.69]

Recommendation 96.

15.152 We recommend that where:

(1) a collective freehold acquisition claim is made; and

(2) there is a head lease which includes residential units over which the leaseholder under the head lease has enfranchisement rights (because there is no inferior long lease of those parts),

the head lease should be severed, with the part containing the residential units over which the intermediate leaseholder has enfranchisement rights being retained by the intermediate leaseholder, and the remainder being acquired by the nominee purchaser.

[Paragraph 13.82]

Recommendation 97.

15.153 We recommend that where, in a collective freehold acquisition claim, a lease includes residential unit(s) and common parts then (save where that lease is granted for the purposes of development) the Tribunal should have the power to order that:

(1) the lease be acquired by the nominee purchaser,

(2) the lease be severed in order to separate the common parts from the remainder, with the former being acquired by the nominee purchaser, and/or

(3) the lease be varied by the addition or alteration of easements relating to the common parts.

15.154 We recommend that:

(1) before any of these powers can be exercised, the Tribunal should be satisfied that an order is reasonably necessary for the proper management or maintenance of the common parts; and

(2) in deciding which of these orders to make, the Tribunal should take into account:

(a) the proper management and/or maintenance of the common parts, and

(b) the effect of any such order on the leaseholder's retained interest.

15.155 We recommend that, on a collective freehold acquisition claim, the nominee purchaser will be able to choose whether or not to acquire any lease of common parts that had been granted for development purposes, or to acquire only the part of that lease that contains the common parts.

15.156 We also recommend that, in relation to a lease of common parts that had been granted for development purposes, the Tribunal should (in the absence of agreement between the parties) be able to determine the terms of any severance of the existing lease and/or vary the lease as necessary to give effect to the election of the nominee purchaser.

[Paragraphs 13.104 to 13.107]

Recommendation 98.

15.157 We recommend that the enfranchisement rights of a leaseholder should not be limited by virtue of the fact that his or her lease was granted by the landlord out of a lease that had itself been extended in reliance upon statutory enfranchisement rights. This should apply whether the landlord's lease was extended under the existing or new enfranchisement regimes.

[Paragraph 13.117]

Valuation Option for Reform

15.158 In determining the premium that the leaseholder has to pay, the existence of any intermediate lease could be disregarded, save in collective freehold acquisition claims where that intermediate lease is not being acquired.

[Paragraph 13.145]

Recommendation 99.

15.159 We recommend that the separate designations of "Minor Superior Tenancy" and "Minor Intermediate Leasehold Interest" and the formulae relating to them should be removed. Those interests which currently fall within the existing definitions would then be valued on the same basis as all other intermediate leases.

[Paragraph 13.151]

Recommendation 100.

15.160 We recommend that on any individual lease extension claim, the rent payable by an intermediate landlord should be commuted on a pro rata basis.

[Paragraph 13.158]

CHAPTER 14: VOLUNTARY TRANSACTIONS AND CONTRACTING OUT

Recommendation 101.

15.161 We recommend that Government consider regulating transactions for lease extensions and individual freehold acquisitions that are not on statutory terms.

[Paragraph 14.122]

Recommendation 102.

15.162 We recommend that any term of a new lease or a lease extension, or any other agreement, that purports to exclude or restrict the ability of a leaseholder to exercise any enfranchisement rights contained in our proposed new regime should be void (that is, of no effect).

[Paragraph 14.134]

(signed) Sir Nicholas Green, Chairman
Professor Sarah Green
Professor Nick Hopkins
Professor Penney Lewis
Nicholas Paines QC

Phil Golding, Chief Executive

26 June 2020

Appendix 1: Terms of Reference

THE LAW COMMISSION: RESIDENTIAL LEASEHOLD LAW REFORM

TERMS OF REFERENCE

The project was announced in the Law Commission's *Thirteenth Programme of Law Reform* and in Government's response to its consultation *Tackling unfair practices in the leasehold market*.

The project will be a wide-ranging review of residential leasehold law, focussing in the first instance on reform to:

1. enfranchisement;

2. commonhold; and

3. the right to manage.

The Commission and Government are discussing other areas of residential leasehold reform that could be included in the project.

The Government has identified the following policy objectives for the Law Commission's recommended reforms:

Generally

- to promote transparency and fairness in the residential leasehold sector;

- to provide a better deal for leaseholders as consumers;

Enfranchisement

- to simplify enfranchisement legislation;

- to consider the case to improve access to enfranchisement and, where this is not possible, reforms that may be needed to better protect leaseholders, including the ability for leaseholders of houses to enfranchise on similar terms to leaseholders of flats;

- to examine the options to reduce the premium (price) payable by existing and future leaseholders to enfranchise, whilst ensuring sufficient compensation is paid to landlords to reflect their legitimate property interests;

- to make enfranchisement easier, quicker and more cost effective (by reducing the legal and other associated costs), particularly for leaseholders, including by introducing a clear prescribed methodology for calculating the premium (price), and by reducing or removing the requirements for leaseholders (i) to have owned their lease for two years before enfranchising, and (ii) to pay their landlord’s costs of enfranchisement;

- to ensure that shared ownership leaseholders have the right to extend the lease of their house or flat, but not the right to acquire the freehold of their house or participate in a collective enfranchisement of their block of flats prior to having "staircased" their lease to 100%; and

- to bring forward proposals for leasehold flat owners, and house owners, but prioritising solutions for existing leaseholders of houses;

Commonhold

- to re-invigorate commonhold as a workable alternative to leasehold, for both existing and new homes.

Right to manage

- to facilitate and streamline the exercise of the right to manage.

(1) ENFRANCHISEMENT

Enfranchisement covers the statutory right of leaseholders to:

- purchase the freehold of their house;

- participate, with other leaseholders, in the collective purchase of the freehold of a group of flats; and

- extend the lease of their house or flat.

The project will consider the following issues:

1. *Qualifying criteria.* The Commission will review the qualifying criteria that must be satisfied to exercise the right to enfranchise, namely:

    a. the premises that qualify for enfranchisement;

    b. the leaseholders who can exercise the rights, including the two-year ownership requirement, and the proportion of tenants required to participate in a collective enfranchisement claim;

    c. the landlords to whom the enfranchisement legislation applies; and

    d. the leases to which the enfranchisement legislation applies.

2. *Valuation.* The Commission will seek to produce options for a simpler, clearer and consistent valuation methodology. The review will include consideration of:

    a. the existing valuation assumptions;

    b. the extent to which the ground rent (including any rent review clause) should feature in the valuation;

    c. the role of yield and deferment rates and whether they could be standardised;

d. the role of marriage value, hope value, and relativity, and the extent to which they should feature in the valuation;

e. whether to retain different valuation bases (as currently exist for enfranchisement of houses, depending on historic rateable values);

f. the valuation of the interest of any intermediate leaseholders.

3. *Procedure.* The Commission will consider reforms to make it easier, quicker and more cost effective to enfranchise. The review will include consideration of:

    a. introducing a simplified enfranchisement procedure which is, so far as possible, consistent across all enfranchisement claims;

    b. the form, content, effect, service, and assignment of notices by leaseholders and landlords in the enfranchisement process;

    c. how to reduce or remove the requirement for leaseholders to be responsible for landlords' costs of responding to enfranchisement claims;

    d. the nature and role of the nominee purchaser in collective enfranchisement claims;

    e. giving effect to the right to enfranchise, including the conveyancing procedure, the terms of the transfer of the freehold or extended lease, leasebacks to the landlord, and the role of third party funders (in a collective enfranchisement claim);

    f. the forum for, and facilitation of, the resolution of disputes and enforcement of the statutory rights;

    g. problems that arise where there are missing, incapacitated, recalcitrant, or insolvent landlords; and

    h. the termination or suspension of an enfranchisement claim, and its effect.

(2) COMMONHOLD

Commonhold is a form of ownership of land which is designed to enable the freehold ownership of flats. There are various legal issues within the current commonhold legislation which affect market confidence and workability. The Commission will review those issues to enable commonhold to succeed.

The following legal issues will be considered:

1. *Creation of commonhold (including conversion).* The Commission will consider whether the procedure for creating and registering commonhold could be simplified and how it could be made easier for leaseholders to convert. In particular, the Commission will review whether, and if so how, it might be possible to convert to commonhold without the consent of:

    a. the freeholder; and

b. all of the leaseholders.

2. *Improving flexibility.* The Commission will consider reforms to make the commonhold model more sophisticated and flexible to meet the needs of communities and developers, including:

    a. the creation of "layered" or "sub-commonholds" to deal with different parts of a commonhold scheme, especially in mixed-use developments; and

    b. allowing different costs to be shared between unit-holders in ways that will better reflect actual use of amenities and services.

3. *Corporate structure*. The Commission will consider whether the commonhold association, which owns and manages the common parts of the commonhold, should remain a company limited by guarantee or whether there might be a more appropriate corporate structure.

4. *Shared ownership.* The Commission will consider ways of incorporating shared ownership within commonhold.

5. *Developer rights and consumer protection.* Ensuring developers have sufficient power to complete the development whilst affording protection to unit-holders.

6. *Commonhold Community Statement.* The Commission will review the model CCS which sets out the rights and obligations of unit-holders and the commonhold association. In particular, the Commission will seek to ensure the CCS is flexible enough to meet the local needs of a scheme, and consider the circumstances in which it can be varied.

7. *Dispute resolution.* The Commission will consider ways of facilitating the resolution of disputes within commonhold.

8. *Enforcement powers.* The Commission will consider whether the enforcement powers of the commonhold association, for instance to enforce the payment of commonhold costs, are sufficient or whether these powers should be enhanced. The Commission will also consider whether there are sufficient safeguards in place to protect unit-holders from unreasonable demands for costs.

9. *Insolvency.* The Commission will consider whether any mechanisms could usefully be put in place to prevent a commonhold association from becoming insolvent, for instance whether it might be appropriate for an administrator to be appointed. The Commission will also consider the effect of insolvency on a commonhold association and review whether homeowners and lenders are adequately protected.

10. *Voluntary termination.* The Commission will review the procedure for the termination of a commonhold association by unit-holders and consider whether lenders' security is adequately protected.

The project will commence with the publication of a call for evidence. Other legal problems that emerge from that call for evidence will be included in the project by agreement with Government.

The Commission's review will complement Government's own work to remove incentives to use leasehold, and Government's work to address non-legal issues to re-invigorate

commonhold such as education, publicity and supporting developers, lenders and conveyancers. As part of its call for evidence, the Commission will invite consultees' views on (i) whether, and if so how, commonhold should be incentivised or compelled, and (ii) the non-legal issues that must be addressed to re-invigorate commonhold, and report on the outcome of that consultation, without making recommendations.

(3) RIGHT TO MANAGE

The right to manage was introduced by the Commonhold and Leasehold Reform Act 2002. It is a right granted to leaseholders to take over the landlord's management functions through a company set up by the leaseholders for this purpose.

The Law Commission is asked to conduct a broad review of the existing right to manage legislation with a view to improving it. In particular, the Law Commission will:

1. consider the use currently made of the right to manage legislation and how far it meets the needs of users;

2. consider the case to improve access to the right to manage, including by modifying or abolishing existing qualification criteria; and

3. make recommendations to render the right to manage procedure simpler, quicker and more flexible, particularly for leaseholders.

Appendix 2: List of consultees

1 West India Quay Residents' Association

A L Knowles

Aaron [no other name given]

Adam Stamboulid

Adi [no other name given]

Adlington Property Limited

Adrian Page

Afzal Memon

Agnes Kory

Aiton Marr

Alan Davies

Alan Davis

Alan Henry Brook

Alan Riggs

ALEP (Association of Leasehold Enfranchisement Practitioners)

Alexia Dempsey

Alexis Kakoullis

Alice Brown

Alison Rowe

Alison Rowlands

Altaf Sumra

Alun Gruffydd Phillips

Alun Phillips

Amanda Khan

Amanda Murphy

Amanda Whitenstall

Amar Kansal

Amarjit [no other name given]

AML Surveys and Valuation Ltd

Amy Pegnam

AnchorHanover

Andrea Carr

Andrea Leech

Andrea Manzini

Andrea McKie

Andrea Millward

Andrew Athey

Andrew Baker

Andrew Boorman

Andrew Brophy

Andrew Callan

Andrew Childs

Andrew Dunn

Andrew Henderson

Andrew Pridell Associates Ltd

Andrew Richard Perrin

Andrew Strain

Andrew Yelland

Angela Capper

Angela Doran

Angela Whitehead

Anita [no other name given]

Ann Middleton

Ann Redshaw

Anna Jones

Anna Symonowicz

Anna Williams

Annabella Louise Scoffin

Anne Hunter

Anne Juliff

Annmarie O'Brien

Anthony and Lynn Cotterill

Anthony Baker

Anthony Brunt

Anthony Cummisky

Anthony Hurndall

Anthony Kent

Anthony Shamash

Anthony Shilson

Anthony Wood

Anton Schwarzin

Antonio De Gouveia

Apex Housing Group

ARCO (Associated Retirement Community Operators)

Asela Kuruwita Arachchilage

Ashley Hill

Association of British Insurers

Avril Pino

Barbara Warburton

Barry Carpenter

Barry Evans

Barry McNorton

Barry Stock

Bearwood Court (Maintenance) Limited

Beata Baryla

Belgravia Residents Association

Belmont Park Close, Belmont Park and Brandram Road, Lewisham, London SE13 Leaseholders

Benjamin Newton

Berkeley Group Holdings PLC

Bert Lourenco

Beth Leahy

Beth Rudolf

Beverley Woodward

Bi-Borough Legal Services for Westminster and Kensington and Chelsea

Bikrish Amatya

Birmingham Law Society

Bob Ford

Boodle Hatfield

Boris Vucicevic

Brenda McMahon

Bretton Green Ltd

Brian Turnbull

Bridget Murphy

British Insurance Brokers' Association (BIBA)

British Property Federation

Brockenhurst Parish Council

Bruce Maunder-Taylor

BRW Sparrow

Bryan Cave Leighton Paisner LLP

Bryan Wildman

Buckingham Court Residents Association

Building Societies Association

Cadogan

Candy Green

Cannock Mill Cohousing Colchester Limited

Carol Barber

Carol Giles

Carol Greenwood

Carol Johnson

Carol Seymour

Carol Walsh

Caroline Marks

Carrie Rollinson

Carter Jonas LLP

Cassie Ilett

Catherine Gale

Catherine Kane

Catherine Loader

Catherine Williams

Caxtons Commercial Ltd

Celina Jowett

Cellina Momodu

Cerian Jones

Charities Property Association

Charles Oliver

Charles Tellerman

Charlie Coombs

Charlotte [no other name given]

Charlotte Newton

Charlotte Thomas

Cherry Denison

Chin Li

Chris Alexander

Chris and Lynn Scully

Chris Austin

Chris Burns

Chris Lawrenson

Chris Longley

Chris Martin

Chris Mitchell

Chris Pearce

Chris Smith

Chris Uden

Christina Goddard

Christina Mary Edmunds

Christina Varnakidou

Christine Rigby

Christopher Balogh

Christopher Cubbin

Christopher Denny

Christopher Elliott

Christopher J.D. Roberts

Christopher Jessel

Christopher Mark Hepple

Christopher Myers

Church & Co Chartered Accountants

Church Commissioners for England

CILEx

Ciro Ahmad

City of London Corporation

Clare Butchart

Clare Ellis

Clare Huntingford

Clare Schofield

Cliff Hawkins

Clifford Chance LLP

Cluttons

CMS Cameron McKenna Nabarro Olswang LLP (CMS)

Colin Greenbank

Colin Joseph Gavan

Conrad Lea

Consensus Business Group

Cora Beeharry

Corrina Davies

Cottons

Council for Licensed Conveyancers

Country Land and Business Association

Craig Alexander

Craig Hamer

Craig Moodie

Craig Stamper

Cyntra Properties Limited

D Taylor

Dale Robertson

Dame Alice Owen's Foundation

Damian Greenish

Damien Coyle

Dan Smith

Daniel Allum

Daniel Hooley

Daniel Jones

Daniel Latto

Dave and Sue Parker

Dave Chapman

Dave Smith
David Allen
David Britch
David Clapp
David Cobb
David Deaville
David Dixon
David Evans
David Hatch
David Heard
David Hinchliffe
David Johnson
David Johnston
David Lester
David Lewis
David Masterman
David Mawer
David McArthur
David Michael Pugh
David Murphy
David Newton
David Pearce
David Robson
David Sainsbury
David Sheppard
David Silvermam
David Stewart
David Thorogood
David Whitworth
Dawn Barnes
Debbie Peaford
Debbie Winfield
Deborah Holmes
Debra Harvey
Declan O'Byrne
Deepak Gupta
Della Bramley
Denise Clark
Derek AR Gomez
Derek Sparrow
Derek Walker
Des Kinsella
Dhar [no other name given]
Doreen Keane
Douglas Whyte
Dr Anthony Shaw
Dr Bernard Johnston
Dulwich Estate
E Pugh
Each Side Leasehold
Ebrahim Esat
Ed Meyer
Eileen O'Brien
Eileen Walsh
Elizabeth Bull OBE
Elizabeth Pearce
Ellen Booth
Elliot Sweeney
Emily Harris
Emily Harrison
Emma Hynes
Emma Latham
Emma McDonald
Emma Sutton
Emma Thomas
Emma Thorncroft
Erik Magnusson
Estates Business Group
Estelle Hargraves
Eunice Keane
Fanshawe White
Federation of Private Residents' Associations (FPRA)
Fee Simple Investments Limited
Fieldfisher LLP Solicitors
Fiona Biglin
First-tier Tribunal (Property Chamber)
Five Rivers Cohousing
Francesco [no other name given]
Francesco Guariglia
Francine Jones
Franciszka Mackiewicz-Lawrence
Gabriel Netser
Gabriel Schembri
Gareth Helsby
Gary Humphries
Gary Nolan
Gary Okell
Gavin Allen
Gemma James
Geoff Fear
Geoffrey Brewis-Levie
Geoffrey Holmes
George Donath
Geraint Evans
Gerald Eve LLP
Gerald Grigsby
Gerald Hyam
Giles Rowlinson
Gilles Costerousse
Gillian Miller
Glen Armstrong
Glyn Jenkins
Gordon Clifton
Gordon Peters
Graeme Foster
Graham Dixon
Graham Hollingworth
Graham McGouran
Graham Webb
Greg Davies
Greg Passeri
Grosvenor
Guy Charrison
Hamlins LLP
Hampstead Garden Suburb Trust

Hannah Kopel
Hannah Yates
Hatal Raninga
Hayes Point Collective Freehold Limited
Heather Keates
Hele Meehan
Helen Atack
Helen Butcher
Helen Leighton
Helen Merrifield
Helen Short
Hilary McDonagh
Hitesh Sangtani
Howard de Walden Estates Limited
Hugh Donaldson
Huw Thomas
Iain Glennon
Ian Ashmore
Ian Daniels
Ian Grant
Ian Holland
Ian Humphreys
Ian Jefferson
Ian Kirby
Ian Leigh
Ian Morgan
Ian Murphy
Ian Nicholson
Ian Teacher
Ian Thomson
Ian Young
Institute and Faculty of Actuaries (IFoA)
Irwin Mitchell LLP
J Walsh
J Williams
Jacob Fraser
Jacqueline Coals
Jacqueline Perkins
Jad Adams
Jahangir Hussain
James Driscoll
James Matthews
James Mills
James Moyse
James Pickering
James Souter
James Strong
James T Palmer
Jamie Farrell
Jamie John Atkins
Janaka Prasad Vithanage
Janan Shan
Jaqueline Gay Meeks
Jasmin Akhtar
Jason Smith
Jay Beeharry
Jayne Field
Jean Lemon
Jeanette [no other name given]
Jeanette Allen
Jeanette Rodgers
Jean-Sebastien Tourtel
Jeffrey Ellis
Jennifer Ellis
Jennifer McMaster
Jenny Harley
Jeremy Gibbs
Jeremy Goldberg
Jeremy Shall (on behalf of Denise Saccone)
Jerry and Tamzin Mannion
JLL
Jo Darbyshire
Jo Morgan
Joan Bingham
Joanne Walker
Jocelyn [no other name given]
John Bound
John Byers
John Davidson
John Fosyer
John Fryer
John Hall
John Hammerbeck
John Lyon's Charity
John Paul Hardesty
John Rogers
John Shorrock
John Smyth
John Stephenson
John W Bunting
Jonathan Adams
Jonathan and Yvonne Boyd
Jonathan Clark
Jonathan Grisenthwaite
Jonathan King
Jonathan Poulter
Jonathan Pringle
Jonathan Rolls
Jonathan West
Joseph McGuigan
Josephine Rostron
Joy Dickinson
Judith Read
Julian E C Briant
Julian Parsons
Julian Wilkins & Co Chartered Surveyors
Jupiter Investments Ltd
Kalpesh Patel
Kapil Purohit
Karen Burrell
Karen Conneely
Karen Deakin
Karen Knowles
Karen Mills
Karen Wilson

Karim Walji
Karl Briggs
Karl Layland
Kate Jones
Kath Jones
Kathleen Fellows
Kathryn Cavanagh
Kathryn McGouran
Katie Johnson
Katie Kendrick
Keith Hince
Keith Richardson
Kelly Casey
Ken Moore
Kerry Knowles
Kerry Maisey
Kevin Joyce
Kevin Sephton
Kevin Tranter
Kirsty Marsden
KPMG
Kris Bradshaw
Kristian Littlewood
Kristine and Geoff Taylor Bryher
Kyle Hollingworth
Laura Ferrie
Laura Woodward
Laurence Griffiths
Laurence Prax
LEASE
Leasehold Forum
Leasehold Knowledge Partnership
Leasehold Solutions
Lee Baker
Lee Broadbent
Lee Dickinson
Lee Livett
Leonard Samson
Leonardo Monzon
Leshane Perry
Lesley Johnson
Lesley Rentell
Leslie Smee
Lewis Cowey
Liam Goodwin
Lilac Mutual Home Ownership Society
Linda Berriman
Linda Diane Parsons
Linda Friend
Linda Macdonald
Linda Skelton
Linda Sloane
Lindsey Smith
Linz Darlington
Lisa [no other name given]
London Borough of Camden
London Borough of Islington
London Borough of Tower Hamlets
London Diocesan Fund
Long Harbour and HomeGround
Lord Berkeley
Lord Carnwath of Notting Hill
Lord Truscott
Lorena Vacca
Lorraine Black
Lorraine Jimenez
Louisa Tunney
Louise Glover
Louise Hudspith
Louise Jones
Louise O’Riordan
Louise Whitnall
Lucia O'Brien
Lucy Carmichael
Lucy Lenton
Lucy Watt
Luke Boyden
Lune Valley Community Land Trust Ltd
Lynn Myers
Lynne Briggs
Lynne Butler
Lynne Martin
Lynne O'Brien
Lynsey Foster
M Naseef Owasil
M Y Ecker
Maddox Capital Partners Limited
Madeleine Brierley
Malgorzata Zymla
Man Fai Lo
Marbeth Gordon
Margaret Benton
Margaret Moore
Maria Jouce
Maria Manalo Nwachuku
Marian Berkeley
Marie Joyce-Reidy
Marie McLaughlin
Marilyn Campbell
Mark Attenborough
Mark Baynton-Glen
Mark Chick
Mark Emeny
Mark Hanson
Mark Hawkins
Mark Hood
Mark Sullivan
Mark Tomkins
Mark Wall
Marsha Oza
Marshel Weerakone
Martha Commandeur
Martin and Fiona Nicolle

Martin Beesley

Martin Chamberlain

Martin Cottam

Martin Dawson

Martin Geoghegan

Martin William D T Ward

Martine Colby

Martyn Eynon Jones Not applicable

Mary Stiff

Matthew Alton

Matthew Hewstone

Matthew McKay

Matthew Olley

Maureen Gillooly

Maureen Whitlock

Mavis Chakwenya

Mavis Paterson

Max Beckett

Mayoor Agarwal

Mayor of London

McCarthy & Stone

Megan Bowyer

Mehboob Neky

Melanie West

Melissa Goodwin

Melissa Johnson

Michael Hollands

Michael Huang

Michael Kelly

Michael Kucharski

Michael Marshall

Michael Moran

Michalis Kapsos

Michelle Merrilees

Midland Valuations Limited

Mike [no other name given]

Mike Searle

Millbrooke Court Residents Association

Miss J Boyce and Mr Mark Mitchell

Mitchell [no other name given]

Morgoed Estates Limited

myleasehold ltd

Nagappan Selvan

Nancy Hopkins

Nasir Zaman

Natalia Bremner

Natalie Suggitt

Natasha Forster

Natasha Sampson

National CLT Network and the UK Cohousing Network

National Housing Federation

National Leasehold Campaign

National Trust

Neil Gear

Nesbitt and Co

Neville Brian Gallacher

Nicholas Roberts

Nick Raymond

Nick Steel

Nick Trainer

Nicola Beswick

Nicola Bowden

Nicola Callaghan

Nicola Jenkinson

Nicola Jones

Nicola Reid

Nicola Smith

Nicola Tann

Nicola Tomlinson

Nicola Warburton

Nigel Carnie

Nigel Edwards

Nigel Keen

Nina Rautio

Nina Salsotto Cassina

North View Fold Resident Group

Notting Hill Genesis

Oakfield Court Residents' Association

Octavia Housing

Oliver Stancombe

Onward Homes

Orme Associates Property Advisers

Ormond P Simpson

Owen O'Neill

Pamela Cunliffe

Pamela Rose

Parthenia

Patricia Kennedy

Paul and Sally Coulthard

Paul Church

Paul Glover

Paul Goodlad

Paul Gothard

Paul Hamilton

Paul Hird

Paul Osborne

Paul Potts

Paul Roberts

Paul Rowntree

Paul Tayler Limited

Paul Thomas

Paul Thurston

Paul Willmott

Paul Worley

Paula Hill

Paula Shaw

Pauline Mawer

PBM Property Management

Pearn Ltd

Penelope Brook

Pennington Manches LLP

Penny Atkinson

Penny Gell

Persimmon PLC

Pete Liggins

Peter and Christine Davis

Peter Barker

Peter Beckett

Peter Cunningham

Peter Finneran

Peter Jones and Gabrielle Maxwell-Jones

Peter Muir

Peter Weeks

Peter Wright

Philip Ashley

Philip Bullivant

Philip Cross

Philip Culley

Philip Kelly

Philip Rainey QC

Phyllis Helen Buchanan

Piers Haben

Polly Durey

Pollyanna Williams

Professor Grey Giddins

Property Bar Association

Prosper Marr-Johnson

Rachael Ball

Rachael Newman

Rachel Florey

Rachel Lewin

Rachel Rose Dring

Radamanthos Tsotsos

Rakesh Tiwari

Rama Vorray

Ramilla Shah

Randy Silver

Ravelle Josephs

Ray Chapple

Renate Thompson

Residential Landlords Association

Residents' Association of Canary Riverside

Rhett Ewer

Richard Baron

Richard Bass

Richard Chester

Richard Glass

Richard Hards

Richard Hartigan

Richard McCarthy

Richard Porter

Richard Stacey

Richard Warwick

Richard William Morris

Rishi Mital

Rita Simmonds

Robert Bater

Robert Brooks

Robert Guerrini

Robert James

Robert Nix

Robert Owen

Robert Parr

Robert Warren

Robert Wood

Robin Benjamin

Roger Dunn

Roger Parkin

Rolfe Klement

Ron Harris

Rory & Elizabeth Cunningham

Rory Cunningham

Rosemary Hadfield

Rosie Bahr

Rothesay Life

Royal Institution of Chartered Surveyors (RICS)

Rupert Barnes

Rupert Houltby

Russell Hughes

Russell Thomson

S M Rendell

Salah Banna

Sally Jane Jenkins

Sally Mills

Sandeep Dulai

Sandra Smith

Sanja Williams

Sara Cornthwaite

Sarah Brachtvogel

Sarah Chan

Sarah Cooper

Sarah Elise Robertson

Sarah Foster

Sarah Hilton

Sarah Johnston

Sarah Majid

Sarah Webb

Sarfraz Rajwadkar

Sarum St Michael Management Company Ltd

Saul Gerrard

Sayyam Sahni

Scrivener Tibbatts Ltd

Sharon Johnson

Shaun Porter

Sheila Jalving

Sheila Neville

Sheila White

Shelagh Fitzpatrick

Shelley King

Shepard Way Residents Association

Shira Baram

Shirley Mcdonagh

Shoosmiths LLP

Simon Davies

Simon Davies

Simon Elliott

Simon Wones

Sinnathamby Senthitselvan

Sir John Cass's Foundation

Sladana Tanaskovic

Sophie Wolf

South East Leasehold

Southlands College Estate Wimbledon Limited

St Thomas's Leaseholders

Stefania Maulucci

Stella Roberts

Stephanie Holm

Stephanie Livesey

Stephanie Russell

Stephanie Stockton

Stephen Barney

Stephen Desmond

Stephen Heslop

Stephen Hogg

Stephen Nottridge

Stephen Wharton

Steve Fiddler

Steve Lydiate

Steven Harding

Steven Robert Jones

Steven Short

Stewart Gray

Stone King LLP

Stuart Cox

Sue Murray

Sumita Harris

Suraiya Akter

Susan Airey

Susan Clarke

Susan Heywood

Susan Kirby

Susan Lydiate

Susan Pearmain

Susan Routledge

Sutton Leaseholders Association

T Smethurst

TANT (Tenants Association of the National Trust) – Killerton Group

Tapestart Limited

Tenants Association National Trust

Tenants Association of the National Trust

Terence Perkind

Terence Robert Ballard

Thackray Williams LLP (Solicitors)

The Alan Mattey Group

The Chalfont Dene Lease Owners Association, and Mr Derrick Fuller-Webster, in a response endorsed and supported by Mrs Margaret Rutherford QC, Mr John Edwards, and about 40 leaseholders of the Audley Inglewood Retirement Village

The Charity of Richard Cloudesley

The Conveyancing Association

The Crown Estate

The Land Trust

The Landmark Trust

The Law Society

The Portman Estate

The Property Litigation Association (PLA)

The Royal Commission for the Exhibition of 1851

The Society of Licensed Conveyancers

The Wellcome Trust

Therese Leignel

Thomas Beech

Thomas JD Travers

Tim Reeves

Tom Ellis

Tom Muir

Tommy Reeves

Tony Boys

Tony Burke

Tony Smetham

Tracey Cummings

Tracey Horton

Transport for London

Trevor Leigh

Trowers and Hamlins LLP

UK Finance

Valerie Gibson

Valerie Johnson

Vanessa Austin Badoor

Veer Shah

Verina Glaessner

Verity McMahon

Vicky Johnson

Victor and Freda Margaret Crew

Victor Levy

Victoria Bradbury

Victoria Davies

Victoria Holden

Wales Co-operative Centre

Wallace LLP

Wallace Partnership Group Ltd

Wayne Rowlatt

Wedlake Bell LLP

Wendy Parga

Wendy Seddon

Wesley Kinsella

William Bullin

William Coney

William Doran

William Stansfield

Wing Man Kan

Wojciech Zymla

Womble Bond Dickinson (UK) LLP

Wrigleys LLP

Xuxax Limited	Yvonne Tolliday	Zhaokai Ma

The list of consultees set out in this Appendix excludes those who wished to remain anonymous or whose response to our consultation was intended to be confidential.

CCS0620752350
978-1-5286-2061-1