Leasehold Home Ownership: Buying your freehold or extending your lease

Replies to Consultation paper

Question 1

We do not believe issued should be treated differently in England and Wales. The Committee believes they should be treated as one territory for this purpose thus avoiding arguments as to whether this is “Housing Policy” (devolved) or “Land Law” reserved to Westminster.

Question 2

2-1 We agree to multiple extensions of the lease.

2-2 Extension for 200 years – putting beyond the reasonable expectation that people now alive could engage in a termination of the lease on expiry. The Committee acknowledged that 999 years would be even better for tenants but that Landlords would not necessarily view things the same way.

2-3 End of the contractual term.

Question 3

3-1 The Committee agrees that leaseholders should have the choice to only extend the lease without changing the ground rent although an argument can be made for lease extensions carrying the right to an extended term at a nominal ground rent in all cases, for the sake of consistency.

3-2 No and this option seems relatively pointless, especially if ground rents are abolished in the future as the Government have intimated.

Question 4

4-1 Yes as this will reduce the opportunity for argument as to the extent of the “curtilage”. However, it may cause issues with the title.

4-2 Yes, but without any compulsion on the claiming leaseholder to agree

4-3 We agree as this would create an intermediate lease with attendant lease drafting complexity.

Question 5

5-1 We agree that a lease extension should automatically be subject to any mortgage that is secured over the existing lease.

5-2 We agree that a lease extension should automatically bind the landlord’s mortgagee.

Question 6

6-1 Agreed.

6-2 Building insurance and reciprocal rights could be included within a prescribed list of non-contentious modernisations.

6-3 Adopt a standard lease with reference to the original lease with wording to adjust the effect of the reduced demise.

Question 7

7-1 Yes as the landlord might offer better financial terms with worse long-term obligations.

7-2 Require the Tribunal to approve any extension outside of the statutory scheme with a duty to ensure that the final terms are not burdensome to the leaseholder

Question 8

8-1 None of the Committee have experience in practice of the statutory provisions under the 1967 and 1993 Acts. Any further questions left blank indicate that we have no experience in practice.

8-2

Question 9

It would likely increase the likelihood of leaseholders seeking lease extensions and it would correct the current mischief of new-build leasehold houses with doubling rents and the builders promising compensation for the increases in freehold costs.

Question 10

10-1 The clarity of the lease extension length and process could make leasehold property more attractive than at present

10-2 Yes if there is a restriction on the landlord’s ability to exercise a break in the lease at a time of its choosing.

Question 11

11-1 We expect this to be a favourite option for those leases without increase or reference to a modern market rent

11-2 This would be an option for new leases with onerous rents but is likely to be irrelevant when ground rents are abolished.

Question 12

12-1 Positively.

12-2 Because of the opportunity for significant variations of the extended lease.

12-3 This is dependent on the landlord’s wishes.

12-4 Substantially as it might not be worth the effort to change from the existing agreement

12-5 It substantially reduces the potential for disputes.

12-6 If the potential terms are benign but expressed in modern language there would be an advantage to all to adopt them, thereby reducing the cause of future disputes.

12-7 Reform would probably lead to more leaseholder seeking their right to a lease extension. At the least it would remove a disincentive and could increase the uptake, especially if properly explained to the leaseholder by a genuinely independent (of the landlord) legal adviser.

Question 13

13-1 The tenant cannot simply acquire the premises contained in the Lease on a freehold basis if there are other matters outside the Lease that need to be incorporated e.g. pipe work, common parts etc which would necessarily serve the freehold acquisition. The tenant could acquire premises not necessarily comprised within the Lease.

13-2 We believe there should be a statutory deadline.

Question 14

14-1 Agreed absolutely.

14-2 We believe the freeholder should discharge the mortgage.

14-3 With regard to a landlord being under a duty to use his or her best endeavours to redeem any rentcharge, we agree that they should use their best endeavours with an indemnity to the leaseholder in the event of failing to redeem the rentcharge.

Question 15

15-1 This should be an option available to the leaseholder as to exclude the rights and obligations in the lease could render the freehold to be acquired of less utility to the leaseholder. In some circumstances the normal / default position of acquiring the freehold as now exists may be fully adequate.

15-2 Yes or as the Tribunal (in default of agreement) considers necessary to give the leaseholder the same rights as are contained in the current lease.

15-3 The types of additional terms that should be included within such a prescribed list: Rights of way, eves droppings, drainage, support, contribution for any services used by the landlord over the newly acquired freehold.

Question 16

16-1 No as these have been abused by landlords and their agents seeking punitive and unreasonable “consent” fees.

16-2 Only the prescribed list as there is no reason why the landlord should retain the benefit of an obligation to approve alterations or give consent to sales, mortgages, change of use or colour of decoration after selling the freehold.

16-3 Rights of way etc and contributions for things used in common.

Question 17

17-1 We agree that any obligation owed to 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.

17-2 No. The unpaid amount should be treated as a contractual debt and recovered through the courts.

Question 18

18-1 Agreed provided that there are no special provisions for the recovery of unpaid amounts.

18-2 Please refer to our responses to Question 15-2 and 15-3.

Question 19

19-1 Yes, it can create problems.

19-2 Make the process of registration at HMLR subject to a requirement that the Tribunal has approved the Transfer, giving the Tribunal the duty to protect the leaseholder from onerous obligations not commensurate with the ownership of an unencumbered freehold.

Question 20

20-1 As per the same unfettered ability to negotiate a lease extension.

20-2 Substantially.

20-3 Very likely when the tone of the negotiations is adversarial.

20-4 Significantly

20-5 As above, 20-4.

20-6 The extent of this depends on the quality of the draftsmanship of the list and the text of the approved clauses.

20-7 Reform would result in a higher proportion of leaseholders seeking to exercise their right of individual freeholder acquisition if it is clear they are not going to be taken advantage of.

Question 21

21-1 Agreed.

21-2 Agreed.

21-3 No.

Question 22

22-1 Agreed.

Question 23

23-1 Yes provided that if the number of units change, the restrictions will apply from the date of creation of the unit fit for habitation.

23-2 The Consultation list plus a requirement to prepare accounts and have them audited.

23-3 The ability to exclude from company meetings and voting a member who has breached the terms of his lease and failed to rectify the default after both a first and final notice separated by at least 3 months.

Question 24

24-1 Agreed, save that if any director of the nominee purchaser company becomes aware of circumstances which might result in the liquidation of the company, an application should be made immediately to the Tribunal for directions for the preservation of the freehold asset.

24-2 Only to another company whose sole object is the management of the freehold reversions expectant upon the leases held by its members.

Question 25

25-1 Yes where the estate is united by external factors such as a locality or joint contribution to a common service charge.

25-2 Prior freehold acquisitions should not be compelled to join in, but should be able to voluntarily (whether houses or buildings)

Question 26

23-1 Yes, we agree.

26-2 Yes. The freehold transfer should include garages, drying areas, parking areas and any other land within the ownership of the landlord which is used in providing services to the building exercising the acquisition i.e. boiler houses, sewerage pumps stations and the site of any electricity sub-station or telecom mast.

Question 27

27-1 The same regime should apply as for an individual freehold acquisition.

27-2 Agreed but the landlord should provide an indemnity for any non-estate rentcharge not redeemed.

Question 28

28-1 Mortgages / Legal Charges should not continue. Rights and other encumbrances affecting the landlord’s freehold should continue.

28-2 Agreed, the same as for individual freehold acquisition.

Question 29

29-1 The terms should be drawn from the prescribed list only and in time this will force landlords to whom this provision may apply in the future to be more careful and fair-minded in drawing the original leases.

29-2 As per Q15-2 and /3 with reciprocal rights and obligations for the retained land not being acquired.

Question 30

30-1 Agreed.

30-2 See answer to Q21/2 with the right for the landlord at its expense to apply to the tribunal for a non-prescribed right should it decide that such is needed in the circumstances

Question 31

31-1 We do not believe leasebacks would be practicable.

Question 32

32-1 Agreed.

32-2 5 years after the end of the calendar year in which the freehold acquisition took place.

Question 33

33-1

33-2 The same requirement as for an individual freehold acquisition, i.e. to require the prior approval from the Tribunal to the Transfer having no more onerous provisions than a transfer under the statutory scheme before the transaction can be registered at HMLR.

Question 34

34-1 Agreed.

34-2 The right should be available retrospectively.

34-3 On completion of the collective claim, details of this should be supplied to all occupiers with the details of the new landlord together with an invitation to participate either immediately or in the future when the leaseholder’s circumstances permit. Any party joining within 12 months should pay the same sum as the original participants to minimise costs and incentivise wider engagement.

The right to participate should be a statutory statement to be added to all service charge demands with new leaseholders (by assignment) being advised as soon as possible. Participation should be an annual event for all those wishing to join within the service charge year to minimise the cost burden of valuation and legal fees.

Question 35

35-1 One benefit would be standard costs known in advance. This would also avoid difficulties over individuals acting as trustees of land and being unwilling to act appropriately.

35-2 Obligations under Company Law are well known, understood and inherently fair.

35-3 Standard format available with certainty and lower costs.

Question 36

36-1 A smooth process depends on goodwill and human nature. Seeking to score points increases delay and thereby legal and other costs.

36-2 The longer a transaction drags on, the greater the potential for disputes.

36-3 The war of attrition over terms may result in unusual terms being reluctantly agreed regardless of future costs. This is likely with a “free for all” approach.

36-4 Substantially

36-5 Substantially

36-6 Substantially

36-7 The benefits would be easier to explain with a standard set of terms and conditions

Question 37

The proposed right might make freehold acquisition but we do not believe leasebacks would be a good idea.

Question 38

38-1 We agree with the new concept of a “residential unit”.

38-2 The above definition of a “residential unit” seems satisfactory.

38-3 It was never intended that leasehold enfranchisement should apply to business premises and this should be maintained. Leases that permit residential use should benefit from enfranchisement. Business leases that require a residential presence for security purposes should be excluded

Question 39

39-1 Agreed.

Question 40

40-1 Yes, to include leases which become united into this position.

40-2 We agree to maintaining the current legal positions that renewals or statutory continuations of long leases are also to be treated as long leases and to treating consecutive long leases as a single long lease.

Question 41

41-1 Yes as the reasons for the different criteria have been consigned to history.

Question 42

42-1 We agree that the two year requirement be abolished as this will make the process quicker and simpler.

Question 43

43-1 Yes with the questions working sequentially.

Question 44

44-1 Yes with a definition of “materially” which allows for terraced or semi-detached houses where part of a room (accessible only from the house) extends over a tunnel entrance or where a wardrobe extends into the next-door property but has their wardrobe intruding into the house. This design was very common in local authority housing in the 20th Century.

44-2 Yes with additional wording to allow for “Eco” houses built into the landscape which are designed not to change the physical character of the land.

Question 45

45-1 Yes, but part of the discretion should refer to the question “can any other person gain access to the part of the building in question without entering the property to be enfranchised?”

Question 46

46-1 For the sake of consistency, yes.

46-2 For the sake of consistency, yes.

46-3 We agree that the limit should be set at 25% of the internal floor space but the definition must be the same for each type of acquisition.

Question 47

47-1 Agreed.

Question 48

48-1 Yes, this is a well understood current requirement.

Question 49

49-1 We agree for the reasons set out in the Consultation.

Question 50

50-1 Accepted, provided that the future right to participate is also included.

Question 51

51-1 With the removal of the residency requirement for enfranchisement, the need for this prohibition is spent

Question 52

52-1 Any size limit is arbitrary so the consistent use of 25% seems appropriate.

Question 53

53-1 The Committee agree that these seem appropriate.

Question 54

54-1 Some members of the Committee agreed that the qualifying criteria for the collective freehold acquisition of an estate ought to correspond to those for the collective freehold acquisition of a single building, however others felt there must be no right for a tenant to acquire the estate owned by the landlord. They felt the tenant should only be entitled to acquire the building in which the flat is situate together with the easements over the estate, as may be necessary. This is important as if the landlord holds an estate he may well want to develop the rest of the estate and should not be bound to have to sell it on a right to buy basis if only easements were granted over the estate to the respective tenants etc.

Question 55

55-1 We do not believe there should be an exception as to allow this would open the doors to a series of complex “work-arounds” for the resident freeholder.

Question 56

56-1 Yes.

56-2 The variations and options are such as would generate copious litigation of fact-specific cases and the Commission would not be acting to simplify the law.

Question 57

57-1 Not really as work-arounds currently exist and can be replicated.

Question 58

58-1 No due to the likelihood of invoking “the Law of Unintended Consequences”.

58-2 No as this would open up a further opportunity for disputes as to the definition of “residence”.

58-3 No as the number would be arbitrary.

Question 59

59-1 Difficulties in obtaining the necessary data to satisfy tests has significantly slowed down the process.

59-2 Common sense for this test has not caused much delay.

59-3 There is not necessarily uncertainty surrounding the definition of a “house” but “self-contained building” is a preliminary question for the retained surveyor.

59-4 This has not caused problems.

59-5 The net effect of all the criteria is that the process is not straightforward and often uncertain in duration and cost.

59-6 By introducing commonality in qualification, the process can be better understood and costed in advance.

59-7 These should be significantly reduced.

Question 60

60-1 This could have the effect of reducing the value of enfranchisement as commercial leaseholders would not be seeking to outbid individuals (or groups of them).

60-2 The commercial leaseholder would need to plan more carefully but would not be deterred from investment.

60-3 Property will always be considered to be suitable industry for careful and strategic investors.

Question 61

61-1 Yes even if the Housing Association / landlord only holds a lease of a lesser term than the extended lease. (Special provisions will be required in these circumstances as between the Housing association and the ultimate freeholder)

61-2 Use the same calculation as per a house lease and reduce the quantum by the amount the staircasing is less than 100%.

61-3 The housing Association holding a lease themselves out of which the shared ownership has been carved should be entitled as of right to an extension of their lease at a cost of 10% of their receipt by way of premium for the shared ownership lease extension plus 1 day for that specific plot / flat. This right should be exercisable as often as required.

Question 62

62-1 Yes as otherwise shared ownership leases could be used as a weapon to frustrate collective enfranchisement.

62-2 Shared ownership leases should be counted as long leases for the purposes of the 2/3rds rule However for the purposes of the 50% participation rule, they should not count as existing at all as they are barred from acquiring the freehold by any means.

Question 63

63-1 Yes as to do otherwise is to perpetuate the historic journey of muddle of the last 50 years in leasehold law.

63-2 Agreed. We suggest that it should be a statutory requirement that the landlord of the shared ownership lease must have an address for service in England or wales and that this be stated in writing to the leasehold owner at least annually.

Question 64

64-1 No.

64-2 No.

64-3 Yes.

64-4 The right to enfranchisement should be excluded but the right to unlimited lease extensions granted with protection against doubling or onerous ground rents with the ability for the National Trust to retain control over development and external decoration colours.

Question 65

65-1 Only one member of the Committee had experience of making lease extension or freehold acquisitions against the Crown, which was a negative one in relation to a house in Regent’s Park where an extension was expected but for reasons not disclosed at the time was refused at a significant loss to the client.

Question 66

66-1 Yes, we agree that there should be a new exemption.

66-2 Community Land Trusts.

66-3 Exclude enfranchisement but allow unlimited lease extensions.

66-4 Retain leasehold obligations to maintain the essential community trust requirements linking the property to the locality.

66-5 Include the Right of First Refusal on sale but at market value with a 2 month decision window and a further 2 month period to completion of the buy-back.

Question 67

67-1 Provisions relating to houses of outstanding interest should mirror our suggestions for the National Trust properties

Provisions for New Towns and their residuary bodies should be repealed as “spent”

Provisions for church properties and Crown Land to be retained. The remainder should be allowed to lapse (or be repealed).

Question 68

Question 69

69-1 We believe that the effect would generally be neutral.

69-2 They could increase marginally in value but it is not expected that there would be a large take-up of new rights to an extended lease (save in the case of the necessity for resale).

Question 70

70-1 We agree that a single procedure should apply to all enfranchisement rights.

Question 71

71-1 Yes and if these are available for completion, whether in response to questions online or as blank forms in a suitable e-format, this would be beneficial.

Question 72

72-1 Yes.

72-2 Yes the minimum number of leaseholders should be sufficient for a valid Claim.

72-3 Yes as this should ensure that the signatory is aware of the legal consequences of signing the Claim.

Question 73

73-1 Yes with a clear statement addressed to the recipient that a failure to reply promptly could expose the recipient to additional costs

Question 74

74-1 Agreed.

74-2 A single form with “if [this] complete sections x, y and z. If [that] complete sections a,b and c.

Question 75

75-1 No, in the interests of natural justice all other tenants must be entitled to participate and at least receive notice of their entitlement to participate.

Question 76

76-1 There would be no advantage

76-2 Absent a statutory contract, the service of the Claim should be registerable either at HMLR or as a C (iv) land charge

Question 77

77-1 Yes but it should be made clear that if the Landlord is not the leaseholder’s immediate landlord, the title of all intermediate landlords should also be deduced.

Question 78

78-1 No. If an Information Notice has been served and returned the Leaseholder may have the correct data to serve the competent landlord. However service on the landlord collecting the ground rent from them should be considered equally good service and in the Response Notice the recipient of the Claim should state whether they are the competent landlord or if they have served a copy of the Claim on a third party (giving the name, address, date and method of service).

78-2 In these circumstances, yes.

Question 79

79-1 Agreed save that for a corporate body, their registered office or principal place of business as stated in their Annual Accounts as published should be added to the Group A list.

79-2 Agreed with such conditions and requirements as the Tribunal considers appropriate including advertising.

Question 80

80-1 We agree and the form of Claim should contain a checklist for completion so that the Statement of Truth makes reference to the checklist either as being necessary (or not) and to have been completed.

Question 81.

81-1 Yes.

Question 82

82-1 This is a fair balancing out of the penalty for failure to reply and equates nicely with the extension of the deemed service proposals.

Question 83

83-1 Not if the deemed service provisions are in play

83-2 If the missing landlord or No Service route has been followed, the landlord should be entitled to apply to the Tribunal and there should be a reputable presumption that the Landlord will bear the wasted costs of the leaseholder and the costs of defending the present application.

Question 84

84-1 Agreed.

84-2 Yes; payment of a deposit as stakeholder on account of the costs of enfranchisement and completion date being 4 weeks after the agreement to all the terms of the new lease or transfer unless the Tribunal should order otherwise

Question 85

85-1 Yes to all points.

Question 86

86-1 The Committee agrees that these appear to be reasonable time frames.

Question 87

87-1 Agreed and if the lease is registered at HMLR, the Land Registry should insert a note in the Section A Register of the title if the non-Assignment of the Claim Notice (if this be the case).

87-2 Agreed as the landlord has no direct knowledge of the address for service of the Assignee.

Question 88

88-1 Agreed.

Question 89

Yes presuming that reference to “court” means the Tribunal in this context.

The landlord’s obligation to forward the counterpart lease extension of a certified copy of the transfer should be modified to within 14 day of registration of the transaction at HMLR.

Question 90

90-1 As to handing over the lease extension, we agree but if the mortgagee indicates in writing that this is not required, then there should be no liability as proposed.

90-2 Agreed

Question 91

91-1 We partially agree. If the landlord gives appropriate notices both before and afterwards, (s)he 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.

The Land Registry should not be entitled to refuse to register the transaction without the consent and this provision should protect both the landlord and the leaseholder.

With regard to registration at Land Registry, some members of the Committee felt that the third party should be given 14 days to object and then a further 14 days to lodge proceedings in support of that objection. If no proceedings or other procedures are followed by the landlord then the tenant must be entitled to register his interest in the property free from an unknown restriction or a restriction where the third party simply refuses to consent.

Question 92

92-1 We agree.

Question 93

93-1 The need to engage lawyers with detailed knowledge and expertise of dealing with the confusing and other irrational differences between lease extension, freehold enfranchisement and collective enfranchisement means that this type of work will be undertaken by more senior lawyers at a higher charge rate.

Presumably historically there was a reason for two sets of rules – I agree that these should be consolidated into one form.

93-2 Unfortunately it is commonly the case that the rules on missing and uncooperative landlords are not known to many practitioners. Knowledge of the rules and suitable orders for costs against landlords which could be, for example, a reduction in the premium to be paid would concentrate the mind of landlords and the uncooperative ones would become less uncooperative.

93-3 This is a purely administration and uncomplicated task.

93-4 This is not an onerous task provided that knowledge and experience is held by the person performing the task.

93-5 This is draconian and totally unjustified. The rules that apply in this regard should only be applied once the same has been considered by at the very least a first tier tribunal adjudicator.

93-6 These consequences are once again draconian and should only apply after consideration and an appropriate order by a first tier tribunal adjudicator.

93-7 Deemed withdrawal is a major issue for solicitors if they don’t get the lease completed within 4 months of it being agreed. Landlords and their solicitors can use this as a tactic which is unreasonable as the leaseholder’s solicitor has to apply to court to get an extension of time.

93-8 There was some disagreement on this as some believed the duration and cost would be reduced substantially once the new processes are fully understood and have been used whilst others felt that it might not as be as substantial as forms still have to be completed with expert knowledge and historically proposed improvements in procedures, flatter to deceive.

93-9 Only time will tell, but a guestimate would be a reduction of 50%.

93-10 We would imagine it would assist but to what extent is difficult to tell until the matter has been tried and tested.

Question 94

94.1 We agree that all such matters should be determined by the Tribunal.

Question 95

95-1 Yes, it is desirable. Types of case – Low value or differences between rival valuation =< 20% of the higher figure

95-3 Calculation showing the calculation methodology, any special or extraordinary features and any other comparable evidence – all in writing only.

Question 96

96-1 Whilst the Committee have no experience, this could be due to the fact that the applicant tenant tends to be under such pressure due to costs that have little or no choice but to make a business decision and agree. Once again appropriate costs sanctions and/or reduction in premium to Landlords may lead to an improvement.

96-2

96-3

96-4

96-5 Substantially as there would be no need to liaise with a different hearing diary schedule or explain to a different judge what has been litigated and decided in the other location

Question 97

97-1 The Committee do not have experience but we do believe that dealing with cases on this alternative track is likely to save time and money.

Question 98

98-1 We suggest that the landlord’s valuation costs (including junior counsel’s fees for advising on the basis of valuation) and the legal costs of deducing title (including evidence of a mortgage or restriction on that title) should be borne by the leaseholder. This is because the landlord has been forced into this expenditure solely as a result of the service of the Notice of Claim. The landlord should bear all other non-litigation costs howsoever arising.

Question 99

99-1 Fixed costs subject to a cap seems the most equitable.

99-2 Yes

99-3 Fixed costs with an increment as suggested for additional participants for > 30 participants.

99-4 Yes but a fixed advice fee without increase where there is more than one occupied building involved.

Question 100

100-1 No. The leaseholder should pay 100% of the fixed fee up to the last completed stage that the landlord has reached with the day of the failure being included in the fees recoverable as completed, whether or not the information has been communicated to the Tribunal or the leaseholder.

100-2 The Fixed Fee schedule should state the fee for each stage so that it is question of fact whether the stage has been completed or not.

Question 101

101-1 Yes, but landlord security for cost must be limited. Otherwise there may be a situation where a landlord demands far too much money for security for costs unless this is regulated in some way.

Question 102

102-1 Yes. This should be expandable to include Family and Associates (as defined in Company Law) to restrict the opportunities for the Tribunal’s orders to be circumvented

Question 103

103-1 Yes

103-2 In relation to the Excepted Orders, the full powers available in the County Court should apply

103-3 Costs shifting should not apply to any part of the Claim save as mentioned above

Question 104

104-1 Yes save where in the opinion of the Tribunal (on its own motion) one party has pursued an unmeritorious claim / application after the Tribunal has warned that party that to continue a repeated unmeritorious claim or application risks a costs order against that party

Question 105

105-1 Costs are always an issue and Landlord (or their solicitors) will always try and charge as much as they can. Surveyors often have the opinion that costs charged by the landlord are “probably too high but not worth the time and expense of challenging them”. There ought to be some sort of scale fees.

105-2 Generally the costs for landlords appear to be much higher than the norm. Practitioners for the tenant see the costs due to the fact that on virtually every case the tenant is responsible for the Landlords legal and surveyors which are normally fixed at the outset. This is surely an unfair burden on the tenant.

105-3 Neutral.

105-4 Definitely.

105-5 A likely desire to deal with the process more quickly.

Question 106

106-1 This would tend to concentrate the mind.