



**Law
Commission**
Reforming the law

Leasehold home ownership: buying your freehold or extending your lease

Consultation paper



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Consultation Paper No 238

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20 September 2018



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THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Hon Mr Justice Green, *Chairman*, Professor Nicholas Hopkins, Stephen Lewis, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Phillip Golding.

Topic of this consultation: The law of leasehold enfranchisement. This Consultation Paper sets out options for reforming the law of enfranchisement and seeks consultees' views on those options.

Geographical scope: This Consultation Paper applies to the law of England and Wales.

Availability of materials: The Consultation Paper is available on our website at <https://www.lawcom.gov.uk/project/leasehold-enfranchisement/>.

Duration of consultation: We invite responses from 20 September to 20 November 2018.

Comments may be sent:

Using an online response form, which can be found at www.lawcom.gov.uk/project/leasehold-enfranchisement/. Where possible, it would be helpful if this form was used.

Alternatively, comments may be sent:

By email to propertyandtrust@lawcommission.gov.uk

By post to Leasehold Enfranchisement Team, Law Commission, 1st Floor, Tower,
52 Queen Anne's Gate, London, SW1H 9AG.

Tel: 020 3334 3100

(If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically.)

Our website also includes a short survey which we invite individual leaseholders to complete in order to share with us their experiences of the enfranchisement process.

After the consultation: In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: <https://www.gov.uk/government/publications/consultation-principles-guidance>.

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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 8.97 to 8.103.

“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 under which residential use is not permitted (under our proposed regime, on which see paragraphs 8.52 to 8.54).

“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. See paragraph 14.28.

“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 proposed regime). See paragraphs 11.31 to 11.38.*

“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 proposed regime) by multiple leaseholders of residential units in a building or part of a building, or on an estate, to buy the freehold of the building, part of the building or wider estate through a “nominee purchaser”.*

“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”: 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.

“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. See paragraph 14.89.

“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. See paragraph 14.47.

“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. See paragraph 14.26.

“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 proposed enfranchisement regime):

1. claims to a lease extension of a residential unit;
2. individual and collective freehold acquisition claims; and

3. claims to exercise the right to participate.

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

“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 as a dwelling, and either the whole or 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”.

“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. See paragraph 14.67.

“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. See paragraphs 7.32 to 7.50.

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

“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 16 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 16 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”.

“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 proposed 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 “tenant” – 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 proposed regime) is a lease that is granted for a term of 21 years or more.

“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. See paragraph 14.53.

“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. See paragraph 14.88.

“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 proposed 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 proposed 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.

“Original valuation basis”: the basis for valuing the freehold of a house under section 9(1) of the 1967 Act. See paragraph 14.81.

“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 proposed 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. A nominal rent is required because of 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. Whilst 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. See paragraph 14.34.

“Residential unit”: a residential unit is (under our proposals) a unit which has been constructed or adapted for the purposes of a dwelling (even where there might also be some non-residential use). See paragraphs 8.37 to 8.56.

“Response notice”: a document that may be served by a competent landlord in response to a Claim Notice (under our proposed 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 is a proposed new right 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.

“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%. We discuss shared ownership leases in detail in Chapter 9.

“Site value”: under the 1967 Act, the value of the land on which a house is situated, not including the value of that house. Site value is decapitalised to calculate the modern ground rent payable during the additional term of a lease extension. See paragraph 14.88.

“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 16 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 Residential Property Tribunal Wales in Wales.

“Unit”: a unit is (under our proposals) 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 paragraphs 8.41 to 8.45.

“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 in respect of the non-participating leaseholders’ share of that premium.

“Years’ purchase”: years’ purchase is tied to the principle of inflation, and the fact that, in general, money now will buy less in the future than it does now. It is a multiplier which is calculated through the setting of a yield (or other variable) and a number of years (for instance, until the expiry of a lease). See paragraph 14.28.

“Yield rate”: yield rate has the same meaning as “capitalisation rate”.

Part I: Introduction

Chapter 1: Introduction

LEASEHOLD OWNERSHIP

- 1.1 Many people own, or aspire to own, a home.¹ Home ownership has been regarded as having a wide range of advantages over renting.² Further, owning a home is, nowadays, generally the only way to obtain a home for life.³ But 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).
- 1.2 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 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: its value tends to reduce over time, as its length (the “unexpired term”) reduces.
- 1.3 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. As well as a division of control, a landlord may have different interests from the leaseholders. For instance, the landlord may see leasehold 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.
- 1.4 In summary, therefore, leasehold does not provide outright ownership. The experience of leasehold owners was summed up by Cole and Robinson as being that of “owners yet tenants”.⁴ On the one hand, they are home owners, with some of the benefits that ownership brings (such as a financial stake in the home). On the other hand, they have

¹ In the 2010 British Social Attitudes survey, 86% of respondents had 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), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/6362/1936769.pdf.

² A full account is given by R Roland, *The Ideology of Home Ownership* (2008).

³ In the past, security of tenure could be obtained in private and social rented homes, but that is largely no longer the case.

⁴ I Cole and D Robinson, “Owners yet tenants: the position of leaseholders in flats in England and Wales” (2000) 15 *Housing Studies* 595.

a landlord who maintains some control over their use of their home, and who will ultimately take back the home on the expiry of the lease.

- 1.5 Many purchasers do not understand what leasehold ownership involves. Further, even when they do, there is often no choice over the form of ownership. As we explain below, flats are almost invariably owned on a leasehold basis.
- 1.6 As a consequence of these features of leasehold ownership, legislation has been enacted that gives leaseholders “enfranchisement rights”.
 - (1) Leaseholders have a right to extend their lease (“the right to a lease extension”), 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 home, and the value of their asset, is far better protected if they can extend, say, a 40-year lease to 130 years.
 - (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 leaseholders to gain control of their property from an external landlord.
- 1.7 Our enfranchisement project is a wide-ranging examination of leaseholders’ enfranchisement rights.⁵

LEASEHOLD HOME OWNERSHIP IN ENGLAND AND WALES

- 1.8 The number of residential leasehold properties (houses and flats) that are owned on a leasehold basis is the subject of some debate. The latest Government estimates are that there are over 4.2 million leasehold properties in England alone, comprising 18% of all housing stock. Of those, 2.2 million are owner-occupied, 1.8 million are privately owned and let to tenants in the private rented sector, and 0.2 million are owned by social landlords and let in the social rented sector.⁶ Other estimates, however, suggest that there are far more leasehold owners than these statistics suggest – the Leasehold Knowledge Partnership (“LKP”) estimates that there are 6.6 million flats and leasehold houses in England, and 0.2 million flats in Wales.⁷ On any basis, however, it is clear

⁵ Throughout our Consultation Paper, 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 holding long leases of properties (who therefore qualify for such rights), whereas “tenant” is generally used to refer to those 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”.

⁶ Department of Communities and Local Government, Statistical Release, *Estimating the number of leasehold dwellings in England 2015-2016* (21 September 2017), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/646152/Estimating_the_number_of_leasehold_dwellings_in_England__2015-16.pdf.

⁷ See <https://www.leaseholdknowledge.com/> (forthcoming at the time of publication). Not all flats in these figures will be owned on a leasehold basis. In 2013, LKP estimated that there were 5.37 million leasehold properties, that leasehold properties comprised 21.6% of the total housing stock by number of properties,

that leasehold ownership is a matter that directly impacts on the lives of millions of people and families.

- 1.9 Flats are almost universally owned on a leasehold, as opposed to freehold, basis. That is because, for historic reasons, 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.⁸ 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.
- 1.10 While it is possible for flats to be sold on a freehold basis (known as “flying freeholds”),⁹ freehold ownership of flats creates a number of problems in practice. In particular, as flats are structurally interdependent, the failure of certain owners to repair their flats could cause significant damage to other owners’ properties. However, once a freehold flat has been sold for the first time, the subsequent owners will generally not be under an obligation to repair their property. Flats have therefore been sold on a leasehold basis which allows repairing (as well as other) obligations to be transferred to future owners.¹⁰
- 1.11 But leasehold ownership is not limited to flats. Sometimes houses are (and for many years have been) sold on a leasehold basis.¹¹ The first piece of enfranchisement legislation enacted in 1967 – the Leasehold Reform Act 1967 (“the 1967 Act”) – granted enfranchisement rights to leaseholders of houses. More recently, concerns have been raised about the sale of houses on a leasehold basis, and the UK Government has announced its intention to ban the sale of leasehold houses.¹²

and that 3.25 to 3.5 million of those properties were privately owned:

<https://www.leaseholdknowledge.com/number-leasehold-homes-double-figure-government-believes-according-lkp>.

- ⁸ The Law Commission has previously recommended the creation of a new interest in land (“the land obligation”) which can be positive or negative and will bind future owners of the land. However, the needs of freehold flats and other multi-occupancy developments would not be met satisfactorily by this new land obligation: *Making Land Work* (2011) Law Com No 327 paras 1.10, 5.17, 5.18, 5.90 and 5.91.
- ⁹ Freehold ownership through commonhold is discussed at para 1.13 below.
- ¹⁰ Another practical difficulty is that mortgage lenders can be reluctant to lend against the security of a freehold flat.
- ¹¹ Historically, the sale of houses on a leasehold basis became widespread practice in particular areas of the country. More recently, new build houses have been sold on a leasehold basis (at least in part) to allow developers to sell the property subject to an ongoing obligation to pay a ground rent. The right to receive a ground rent (in respect of both houses and flats) is a valuable asset, which can then be sold to an investor. See, for example, http://www.cbre.eu/portal/pls/portal/res_rep.show_report?report_id=2854. The UK Government has announced its intention to ban ground rents in future leases: see fn 12 below.
- ¹² Department for Communities and Local Government (now Ministry of Housing, Communities and Local Government), *Tackling unfair practices in the leasehold market: A consultation paper* (July 2017) available at <https://www.gov.uk/government/consultations/tackling-unfair-practices-in-the-leasehold-market>, and *Tackling unfair practices in the leasehold market: Summary of consultation responses and Government response* (December 2017) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/670204/Tackling_Unfair_Practices_-_gov_response.pdf.

- 1.12 There are therefore good reasons, under the current law, why flats are sold on a leasehold basis. The reasons for selling houses on a leasehold basis are less apparent. 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. The reasons why, for legal purposes, houses may be sold on a long lease do not, however, require the lease to provide income streams to the landlord, beyond those needed to maintain the property or the estate.
- 1.13 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. In England and Wales, commonhold was introduced as an alternative to leasehold in 2002, to enable the freehold ownership of flats. Commonhold allows the residents of a building to own the freehold of their individual units and to manage the shared areas through a company. Commonhold has not, however, taken off – fewer than 20 commonholds have been created since the law came into force.¹³
- 1.14 Alongside our work on enfranchisement, the Law Commission is carrying out a separate project to consider the various legal issues within the current commonhold legislation which affect market confidence and workability. We will recommend reforms that would allow commonhold to be reinvigorated as a workable alternative to leasehold, for both existing and new homes.¹⁴

THE BACKGROUND TO THE PROJECT

- 1.15 In July 2016, we launched a public consultation asking which areas of law should be included in our Thirteenth Programme of Law Reform. We identified residential leasehold law as an area which might benefit from reform and sought views on the problems being faced in practice. We received over 150 responses to our consultation from a wide range of stakeholders which supported a review of one or more aspects of residential leasehold law.¹⁵ This was not the first time that concerns about residential leasehold law had been raised with us; they have been raised in previous Programme consultations. But the calls for reform have become louder and more urgent, and the issues have become of much greater interest to Government.
- 1.16 Following discussions with Government, a project on residential leasehold and commonhold reform was included in our Thirteenth Programme, published in December 2017.¹⁶ The Ministry of Housing, Communities and Local Government (“MHCLG”)

¹³ L Xu, “Commonhold Developments in Practice” in W Barr (ed), *Modern Studies in Property Law: Volume 8* (2015) p 332. The main provisions of the Commonhold and Leasehold Reform Act 2002 came into force on 27 September 2004.

¹⁴ For more information on our project on commonhold, see <https://www.lawcom.gov.uk/project/commonhold/>.

¹⁵ Submissions were received from 24 organisations, two groups of academics and tribunal judges, two politicians, 46 practitioners (lawyers and surveyors) and 15 members of the public.

¹⁶ Thirteenth Programme of Law Reform (2017) Law Com No 377, available at <https://www.lawcom.gov.uk/project/13th-programme-of-law-reform/>.

supported the project as required by our statutory Protocol with Government.¹⁷ As we explain further below, the project is also supported by the Welsh Government in so far as it relates to devolved matters.

- 1.17 In the first instance, our project focusses on reform to enfranchisement and commonhold. Following further discussions with Government, a review of the right to manage – introduced in 2002 – has been added to our project.
- 1.18 As we explain below, we hope that our work on leasehold reform will, in the longer term, extend beyond these topics. We have previously published recommendations concerning event fees in leasehold retirement properties, and we await Government's response to those recommendations.¹⁸ Following on from those recommendations, our Thirteenth Programme also includes a project to consider the application of unfair terms law to leases on assignment, though work on that project has not yet commenced.¹⁹

Overlap with reform of commonhold and the right to manage

- 1.19 Our work on leasehold enfranchisement overlaps with our projects on commonhold and on the right to manage in a number of respects. For example, the right to manage allows leaseholders to take control of the management of their block, without having to acquire (and pay for) the freehold. Leaseholders might therefore choose to exercise the right to manage instead of, or prior to, enfranchisement. Another overlap arises because leaseholders may acquire the freehold of their block through enfranchisement as a stepping stone towards converting the leasehold structure of their block to a commonhold structure. The interrelationship between our projects will be explored further in our forthcoming consultation papers on those topics.

LEASEHOLD REFORM IN THE SPOTLIGHT

- 1.20 Residential leasehold has, for some time, been hitting the headlines and is the subject of an increasingly prominent policy debate.
- 1.21 Concerns have been raised about many aspects of the leasehold market. For example:
- (1) high and escalating 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;
 - (2) leasehold homes being unmortgageable as a result of high and escalating ground rents, making the properties unsaleable and trapping the owners in their homes;

¹⁷ Protocol of 29 March 2010 between the Lord Chancellor (on behalf of the Government) and the Law Commission (2010) Law Com No 321, available at <https://www.lawcom.gov.uk/document/protocol-between-the-lord-chancellor-on-behalf-of-the-government-and-the-law-commission/>.

¹⁸ Event Fees in Retirement Properties (2017) Law Com No 373, available at <https://www.lawcom.gov.uk/project/event-fees-in-retirement-properties/>.

¹⁹ See Thirteenth Programme of Law Reform (above), at p 21.

- (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;²⁰
- (4) the absence of regulation of managing agents either in terms of their qualifications or the quality of their work;
- (5) the charging by landlords of unreasonable permission fees to carry out alterations to a property;²¹ and
- (6) 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.

1.22 Conversely, we would emphasise that, while there have been abusive practices in leasehold, there are other landlords who operate fairly and transparently.

1.23 While abusive practices have been a focus of concern (particularly in media reports), the reform of leasehold law, including of enfranchisement, is not intended simply to remove abuse. Those practices have served to highlight long-standing concerns with leasehold. Our project is therefore not confined simply to removing abuses. Our Terms of Reference (set out below) refer generally to providing "a better deal for leaseholders as consumers". Our proposals for reform of enfranchisement are therefore intended to make the law work better for all leaseholders.

²⁰ As explained above, there is not the same imperative to sell houses on a leasehold basis as there is for flats. Indeed, sometimes the house was originally offered for sale on either a leasehold or – for a higher price – a freehold basis. In the absence of an imperative to sell houses as leasehold, concerns have been raised that leasehold is being used to extract a profit, in particular by collecting ground rent and enfranchisement premiums. See, for example, "The Guardian view on leasehold reform: well overdue" (editorial, 25 July 2017) in *The Guardian*, available at <https://www.theguardian.com/commentisfree/2017/jul/25/the-guardian-view-on-leasehold-reform-well-overdue>; P Collinson, "New figures reveal scale of controversial leasehold homes" (21 September 2017) in *The Guardian*, available at <https://www.theguardian.com/society/2017/sep/21/new-figures-reveal-scale-of-controversial-leasehold-homes>; G Owen, "Feature: The Leasehold Problem" G Owen, (29 September 2017) in *Today's Conveyancer*, available at <https://www.todayconveyancer.co.uk/news/forward-features-problem-leaseholds/>; P Collinson, "Freehold of 'worst leasehold abuse' block sold for £180,000" (22 February 2018) in *The Guardian* at <https://www.theguardian.com/money/2018/feb/22/freehold-worst-leasehold-abuse-block-sold-blyte-court-martin-paine>; Peter Robinson, "Ground rent and leasehold" (15 March 2018) in the *Mortgage Finance Gazette*, available at <https://www.mortgagefinancegazette.com/legal-news/ground-rent-leasehold-15-03-2018>; BBC Radio 4, *Money Box Live: Are leaseholds fit for purpose?* (19 April 2017), available at <https://www.bbc.co.uk/programmes/b08m8z02>; S Brodbeck, "Leasehold scandal: 'Freeholder cost me £100,000 – and there was nothing I could do.'" (28 May 2018) in *The Telegraph*, available at <https://www.telegraph.co.uk/money/consumer-affairs/leasehold-scandal-freeholder-cost-100000-nothing-could-do/>.

²¹ See, for example, "Leasehold homeowners 'hit by permission fees when making improvements'" (14 June 2018) on the Sky News website, available at <https://news.sky.com/story/leasehold-homeowners-hit-by-permission-fees-when-making-improvements-11404039>; A Ellison, "Leaseholders pay £60 for a doorbell" (14 June 2018) in *The Times*, available at <https://www.thetimes.co.uk/article/leaseholders-pay-60-for-a-doorbell-z00wsprhl>; W Kirkam, "Home-seekers routinely misled into buying new-build leasehold houses with extortionate fees and ground fees attached, Which? reveals" (14 June 2018) on the This Is Money website, available at <http://www.thisismoney.co.uk/money/mortgageshome/article-5839377/Homeowners-duped-lawyers-paying-extortionate-ground-rents-leaseholds.html>.

- 1.24 Following the *Tackling unfair practices in the leasehold market* consultation, the Secretary of State for Communities and Local Government – then the Rt Hon Sajid Javid MP – stated that:

It's clear from the overwhelming response from the public that real action is needed to end these feudal practices. That's why the measures this government is now putting in place will help create a system that actually works for consumers.²²

- 1.25 In a written statement in March 2018 the Welsh Minister for Housing and Regeneration, Rebecca Evans AM, noted the “widespread criticism of poor practice in the use of leasehold”. She continued to commit the Welsh government to responding to the practices in question “swiftly and firmly”.²³
- 1.26 An All-Party Parliamentary Group on Leasehold and Commonhold Reform (“the APPG”) has existed since 2016, and has been active in calling for leasehold reform. Its membership has grown from 35 Parliamentarians in September 2016 to 151 in June 2018.²⁴ The APPG’s work has run in parallel with campaigning by LKP for leasehold reform.²⁵ LKP also acts as the APPG’s secretariat. In response to the publicity concerning doubling ground rents, a social media group – the National Leasehold Campaign – has sought to raise awareness of some of the problems being faced by leaseholders, and currently has around 11,000 members.
- 1.27 In November 2017, a Private Members’ Bill – the Leasehold Reform Bill 2017–2019 – was introduced into Parliament under the “10-minute rule” by Justin Madders MP. The Bill is designed to introduce a system for establishing the maximum price for enfranchisement, alongside making certain provisions in respect of tribunal costs and a proposed statutory compensation scheme.²⁶
- 1.28 Improving and facilitating home ownership is a priority for Government, and – as part of that – reform of residential leasehold law has become an increasing priority. The UK Government’s Housing White Paper in February 2017 announced that it would “take action to promote transparency and fairness for the growing number of leaseholders”.²⁷
- 1.29 In December 2017, following a consultation, the UK Government announced various reforms, including proposals to ban the sale of houses on a leasehold basis, and the

²² Ministry of Housing, Communities and Local Government, *Crackdown on unfair leasehold practices* (December 2017), available at <https://www.gov.uk/government/news/crackdown-on-unfair-leasehold-practices--2>.

²³ Written Statement, Leasehold Reform in Wales, Rebecca Evans, Minister for Housing and Regeneration (6 March 2018), available at <https://gov.wales/about/cabinet/cabinetstatements/2018/leaseholdreform/?lang=en>.

²⁴ See <https://www.betterretirementhousing.com/stop-leasehold-rip-offs-joining-appg-fitzpatrick-tells-mps/> and <https://www.leaseholdknowledge.com/appglist>.

²⁵ The APPG, supported by LKP, published its preliminary proposals for leasehold and commonhold reform in June 2017, available at <https://www.leaseholdknowledge.com/wp-content/uploads/2017/04/AllPartyParliamentaryGroupLeaseholdReportApril27.pdf>.

²⁶ Leasehold Reform Bill 2017–2019. *Hansard* (HC) 7 November 2017, vol 630, cols 1383 to 1386. The second reading of the Bill is expected to be held on 26 October 2018.

²⁷ Fixing the Broken Housing Market (February 2017) Cm 9352, p 19.

reservation of ground rents with any financial value when homes (whether houses or flats) are sold on a leasehold basis.²⁸

- 1.30 In April 2018, following a call for evidence, the UK Government announced its plans to regulate managing agents.²⁹ 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.
- 1.31 The UK Government has also published a consultation on the recognition of residents' associations and the possible introduction of regulations under section 130 of the Housing and Planning Act 2016 to require landlords to provide residents' associations with information about leaseholders.³⁰
- 1.32 In March 2018, the Welsh Government announced a series of new requirements that properties would have to meet before they could be supported by the Help-To-Buy-Wales scheme. First, developers would have to present genuine reasons for a house to be marketed as leasehold. In addition, starting ground rents would need to be limited to a maximum of 0.1% of the property's sale value and leasehold agreements would have to have a minimum term of 125 years for flats and 250 years for houses.³¹
- 1.33 Leasehold has been debated on various occasions in Parliament and in the Welsh Assembly.
- 1.34 In a December 2016 debate on leasehold and commonhold reform, the Minister for Housing and Planning at the time, Gavin Barwell MP, acknowledged the "gulf between the letter of the law and our sense of what is right" in leasehold law and practice. He

²⁸ Department for Communities and Local Government, *Tackling unfair practices in the leasehold market: A consultation paper* (July 2017) available at <https://www.gov.uk/government/consultations/tackling-unfair-practices-in-the-leasehold-market>, and *Tackling unfair practices in the leasehold market: Summary of consultation responses and Government response* (December 2017) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/670204/Tackling_Unfair_Practices_-_gov_response.pdf.

²⁹ Department for Communities and Local Government, *Protecting consumers in the letting and managing agent market: call for evidence* (October 2017) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/653170/Property_agents_call_for_evidence.pdf, and Ministry of Housing, Communities and Local Government, *Protecting consumers in the letting and managing agent market: Government response* (April 2018) available at <https://www.gov.uk/government/consultations/protecting-consumers-in-the-letting-and-managing-agent-market-call-for-evidence>.

³⁰ Department for Communities and Local Government, *Recognising residents' associations, and their power to request information about tenants* (July 2017), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/632116/s130_HPAAct_consultation.pdf. Such regulations would 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.

³¹ Written Statement, Leasehold Reform in Wales, Rebecca Evans, Minister for Housing and Regeneration (6 March 2018), available at <https://gov.wales/about/cabinet/cabinetstatements/2018/leaseholdreform/?lang=en>.

acknowledged the existence of “truly appalling behaviour in the sector” and committed to stopping “unfair, unjust and acceptable abuse of the leasehold system”.³² In a subsequent debate in December 2017, the Minister for Housing and Planning, at that time Alok Sharma MP, confirmed Government’s commitment to “stamping out the leasehold abuses that have existed to date”.³³

- 1.35 In the Welsh Assembly in January 2018, Rebecca Evans AM argued that there was no justification for developers to sell houses on a leasehold basis, other than in a small number of particular contexts. She cited university bodies and the National Trust as entities with a special long-term interest in land who might be permitted to sell houses on long leases.³⁴ The Assembly then voted 34 votes to 14 in favour of a motion resolving to abolish the sale of houses on a leasehold basis. The Minister’s comments and the motion preceded the announcements referred to above restricting the sale of houses on a leasehold basis.³⁵ In March 2018, Rebecca Evans AM welcomed the UK Government and the Law Commission’s review of leasehold.³⁶ Her remarks were made in the context of the debate on Hefin David AM’s legislative proposal for a Bill on the regulation of estate management companies.
- 1.36 Alongside this extensive public debate, we have heard from numerous members of the public, both in response to our Thirteenth Programme consultation and following the announcement of our leasehold reform project in December 2017. While our postbag has been full, we have, of course, only heard from a fraction of all leaseholders. Those we have heard from have, however, spoken of the personal difficulties and hardships they have encountered through leasehold ownership. In the light of their experience, they have argued strongly for leasehold reform. We recognise that there will be other leaseholders who are content with their experience of leasehold ownership, whose landlords act fairly and transparently, and so have had no cause to write to us.
- 1.37 In summary, there is considerable impetus for change from the public, from the media, from Parliament and the Welsh Assembly, and from the UK and Welsh Governments. Both Governments have made, and continue to make, announcements about various measures and proposed leasehold reforms that they are pursuing. Our enfranchisement project is undertaken against the backdrop of that wider picture of leasehold reform. The leasehold landscape is changing, and enfranchisement reform is one part of that changing landscape.

CRITICISMS OF THE CURRENT LAW

- 1.38 We have heard numerous, and often detailed and technical, criticisms of the enfranchisement regime. We refer to the criticisms of each aspect of the current law in

³² *Hansard* (HC), 20 December 2016, vol 618, col 1353.

³³ *Hansard* (HC), 21 December 2017, vol 633, col 493.

³⁴ Welsh Assembly, Plenary, Member Debate under Standing Order 11.21(iv): Leasehold residential contracts, 31 January 2018, paras 304 to 305, available at: <http://record.assembly.wales/Plenary/4902?lang=en-GB#A40999>.

³⁵ See para 1.32.

³⁶ Welsh Assembly, Plenary, Debate on a Member’s Legislative Proposal: Estate Management Companies, 14 March 2018, para 229, available at <http://record.assembly.wales/Plenary/4913?lang=en-GB#A42375>.

the relevant chapters of this Consultation Paper. Broadly speaking, the key concerns we have heard fall into five broad categories.

(1) Inherent unfairness of leasehold tenure

- 1.39 Underlying some criticisms of the enfranchisement regime is the view that leasehold ownership is inherently unfair for leaseholders. That perceived underlying unfairness then exhibits itself during the enfranchisement process.
- 1.40 Leaseholders who are bringing an enfranchisement claim are doing so as a result of having previously acquired an interest which is diminishing in value over time. Many leaseholders, when they acquired their lease, will have paid a premium that was not substantially different from the value of a freehold interest in the property. They would say that they had no choice but to acquire a leasehold interest, and consider that they are being asked to pay again for the home they have already bought. And many leaseholders will not have been aware of, or have understood, the diminishing value of their interest, or that the cost of extending their lease or acquiring the freehold would increase substantially over time.
- 1.41 We have also 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. In some cases, buyers of leasehold houses may not even realise when purchasing a leasehold house that they will not become its outright owner. As one stakeholder said to us, people have set their heart on a home and are measuring for curtains and furniture before the lease is explained to them. We discussed the exploitation of consumers’ “behavioural biases” in our project on Event Fees.³⁷ Consumers fail to give adequate weight to future costs in assessing the quality of an offer as a whole. This analysis may also explain consumers’ willingness to purchase long leases (perhaps at a similar price to a freehold interest) despite the further sums that will have to be paid in the future.
- 1.42 Leaseholders often find themselves compelled to make an enfranchisement claim, either (i) because they wish to sell their lease and a purchaser can only be found (or will only be able to obtain a mortgage) if the length of the lease is increased, or (ii) because they know that the cost of doing so in the future will likely be higher than it is at present. They are compelled to make a claim in order to be able to protect the value of their interest from reducing further. And in many cases, that interest is not only an asset but also their home.
- 1.43 The mere fact that leaseholders have to engage with the enfranchisement process – no matter how simple, quick and cheap it is – can, therefore, be a cause of frustration and anger. Leaseholders will often feel that they have been treated unfairly.
- 1.44 By contrast, landlords would argue that they only ever granted – and were only ever paid for – a time-limited interest. Those who purchased such an interest would have known, or ought to have known, that its expiry in the future would entail a process, and

³⁷ Event Fees in Retirement Properties (2017) Law Com No 373, at para 2.5 and following, and Residential Leases: Fees on Transfer of Title, Change of Occupancy and Other Events (2015) Law Commission Consultation Paper No 226, at paras 4.16 to 4.26, both available at <https://www.lawcom.gov.uk/project/event-fees-in-retirement-properties/>.

a sum of money being paid, in order to extend the interest. Landlords, they would argue, are entitled to the assets that they own. To some, the very existence of a compulsory purchase regime that entitles leaseholders to force landlords to hand over their asset is objectionable. To others, such a power of compulsory purchase must be accompanied by an obligation to pay full compensation for the deprivation of the landlord's interest.

- 1.45 So to landlords, any feeling of unfairness amongst leaseholders is caused by a lack of consumer awareness about the nature of leasehold ownership, rather than by a systemic failure of the leasehold regime. Landlords are merely seeking to protect their legitimate property interests.
- 1.46 These competing views are genuinely held and irreconcilable. Decisions about which side to favour, and how to strike the balance between the competing interests, depend to a large extent on political judgement.

(2) An inconsistent, disjointed and unclear regime

- 1.47 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 piecemeal changes over time. Certain terms in the legislation create much uncertainty, and scope for litigation. For example, there is still no clear definition of a "house". And there are different rules for leaseholders of houses and of flats, often with no logical reason for the distinction. The most significant difference concerns the right to a lease extension, the substance of which differs significantly between houses and flats (see Figure 1),³⁸ but there is a catalogue of further, more detailed and technical, inconsistencies between the enfranchisement rights for leaseholders of houses and those of flats.

Figure 1: differences between lease extensions of houses and of flats

Houses	Flats
The 1967 Act prescribes a 50-year extension.	The 1993 Act prescribes a 90-year extension.
Only one extension permitted.	Multiple extensions permitted.
No premium payable.	Premium payable.
Modern ground rent payable, for the duration of the 50-year extended term. The modern ground rent is much higher than a typical ground rent.	No ground rent payable for remaining term of original lease nor for the 90-year extended term.

³⁸ Leaseholders of houses would generally prefer to acquire the freehold, rather than a lease extension, but in some circumstances they are not permitted to do so, and some may prefer a lease extension in order to avoid having to pay a premium up front.

(3) Complexity and uncertainty

- 1.48 Many aspects of the regime are incredibly complex. It can be difficult even to work out whether a leaseholder qualifies for enfranchisement rights. In the case of houses, eligibility may depend on historic rateable values. These values may be difficult, or in some cases impossible, to find. The procedure for exercising enfranchisement rights is not straightforward, and varies depending on the enfranchisement right being claimed. In some circumstances, strict deadlines apply, which can be a trap for the unwary. The valuation process is complicated. There are various different valuation formulae for the purchase of a house, and which of them is applicable again depends on historic rateable values. The valuation process is difficult to understand, and also involves an element of artificiality. That brings with it uncertainty for leaseholders, since valuation is not an exact science, involving a number of known and unknown variable factors.

(4) Costly procedure

- 1.49 The complexity of the process 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 actually exceed the premium payable. These costs are borne by both leaseholders and landlords, though leaseholders are required to pay towards their landlords' costs so will often feel the burden of costs more acutely.

(5) Undesirable incentive structures

- 1.50 Various aspects of the enfranchisement regime create undesirable incentive structures. For example, there is no incentive for leaseholders in a block of flats to encourage all of their neighbours to participate in the collective purchase of the freehold. Instead, one group of leaseholders can – without justification but without negative consequences – deliberately exclude other leaseholders in the block from the process, which is unlikely to foster harmonious relations in the ongoing management of the block.
- 1.51 The regime can encourage an unhelpful tactical “gaming” approach to negotiations, which tends to favour more experienced landlords over leaseholders. The complexity of the regime gives plenty of scope for parties to disagree, or to argue different positions. The threat of litigation about 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 speedily and at minimal cost. The consequence can be an incentive for leaseholders to agree to voluntary lease extensions (that is, outside the statutory regime) which can expose them to significant risks, such as onerous terms in the lease extension.

Summary

- 1.52 The problems with the current enfranchisement regime outlined above cause unnecessary conflict, stress, uncertainty, costs, and delay. Ordinary leaseholders tend to be less able to shoulder the costs and delays than landlords.

OUR TERMS OF REFERENCE

- 1.53 The Law Commission's role is to ensure that the law is fair, modern, simple and cost-effective. Those aims could be achieved by reforming many aspects of the existing enfranchisement regime. Such reforms would involve various policy decisions which, individually, might marginally favour landlords or leaseholders. Many of the proposals

in this Consultation Paper seek to achieve those aims: removing unfairness, bringing the law up-to-date, simplifying the law, and saving people time and money when applying the law. But our examination of the enfranchisement regime goes further. As explained above, leasehold reform has been on Government's agenda for some time, and certain decisions have already been made.³⁹

- 1.54 We are therefore undertaking our project against that backdrop. While we work independently from Government, our project is designed to pursue certain policy objectives, which have been laid down for our work by Government and which are set out in our Terms of Reference (see Appendix 3). The objectives of reform that we have been asked to achieve in relation to enfranchisement reform are set out in Figure 2.

Figure 2: Policy objectives of enfranchisement 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%; and
- to bring forward proposals for leasehold flat owners, and house owners, but prioritising solutions for existing leaseholders of houses.

- 1.55 In summary, our project is designed to provide a comprehensive review of enfranchisement with a view to improving the position of leaseholders as consumers.

- 1.56 In this Consultation Paper, we make proposals to rationalise, streamline and expand the existing enfranchisement rights and to improve the procedure for claiming enfranchisement rights. These reforms would help leaseholders, but in many cases

³⁹ Department for Communities and Local Government, *Tackling unfair practices in the leasehold market: Summary of consultation responses and Government response* (December 2017), paras 72 and 86, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/670204/Tackling_Unfair_Practices_-_gov_response.pdf.

would not do so at the expense of landlords who would also benefit from clarity and efficiency in the system.

- 1.57 In respect of valuation, however, our Terms of Reference are different. It is therefore helpful to explain what valuation is, and what Government has asked us to do in respect of valuation.

VALUATION

- 1.58 When a leaseholder exercises the right to enfranchise, the total cost to the leaseholder is comprised of two distinct components:

- (1) professional costs, namely fees paid to lawyers and valuers; and
- (2) the “premium” – the price the leaseholder needs to pay the landlord for the lease extension or the freehold.

- 1.59 In order to calculate the premium, the value of the interest being obtained from the landlord must be calculated. Valuation therefore refers to calculating the price to be paid, separate from any professional costs incurred. Lower premiums are therefore beneficial to leaseholders, at the expense of the landlord who receives less money for the lease extension or the freehold.

- 1.60 The question whether premiums should be reduced is not solely a question of law: it involves considerations of law, valuation and, ultimately, political judgement.

- 1.61 Our Terms of Reference require us to:

- (1) set out the options for reducing the premium payable by existing and future leaseholders to enfranchise, whilst ensuring sufficient compensation is paid to landlords to reflect their legitimate property interests;
- (2) produce options for a simpler, clearer and consistent valuation methodology; and
- (3) make enfranchisement easier, quicker and more cost effective (by reducing the professional costs), particularly for leaseholders, including by introducing a clear prescribed methodology for calculating the premium.

- 1.62 There is no suggestion that existing leaseholders should be able to obtain a freehold or lease extension without paying the landlord an appropriate price; our task is to propose reforms to improve the enfranchisement process, and to set out the options for reducing premiums that are payable by leaseholders while ensuring sufficient compensation is paid to landlords.

Competing interests

- 1.63 The interests of landlords and leaseholders are diametrically opposed, and establishing consensus between the two interest groups – in relation to valuation but also in relation to many of the other issues we are considering – will be impossible.

- (1) Landlords come in all shapes and sizes: private family estates (for example, the Grosvenor Estate and Cadogan Estate); charities (for example, the National

Trust); developers; pension and other funds; private individuals; investors; and leaseholder-owned companies.⁴⁰ From their point of view, they have investments which are being expropriated from them compulsorily. They are likely to object to any reduction in the premium, and, if anything, are more likely to argue that the current basis for assessing premiums is “unfair” because the resulting premiums are too low.

- (2) Leaseholders are also varied: ordinary home-owners (ranging from those with limited means through to very wealthy owners); non-resident owners (such as buy-to-let landlords, those with a second home, those who have invested in property); and some speculative investors and developers who purchase flats with a view to exercising enfranchisement rights and profiting from selling on an enhanced interest. From their point of view, they have properties which are held on a leasehold basis for one of two reasons. That is, because that is the standard method by which flats can be owned in England and Wales, and because developers are insisting on selling houses on a leasehold basis. They will object to any increase in the premium, and are likely to argue that the current basis for assessing premiums is “unfair” because the resulting premiums are too high.

- 1.64 Government’s desire to reform the enfranchisement regime in order to provide a better deal for leaseholders as consumers is, of course, directed at individual home owners rather than investors.

Human rights

- 1.65 Our Terms of Reference require us to consider valuation options that ensure “sufficient compensation is paid to landlords to reflect their legitimate property interests”. Human rights considerations are a significant part of determining what constitutes sufficient compensation. We will be developing our human rights analysis of the valuation options available to Government over the course of the project. In addition, the human rights implications of reducing premiums cannot be considered in isolation and will depend on other aspects of the reformed regime.⁴¹ Part of the aim of our consultation is to inform our views on what is, and what is not, sufficient compensation in accordance with the Terms of Reference, having regard to human rights considerations.

WELSH DEVOLUTION

- 1.66 The extent to which leasehold enfranchisement is devolved to the Welsh Assembly is unclear. Aspects of enfranchisement have, in the past, been treated as a devolved issue.⁴² “Housing” was expressly devolved to Wales in the Government of Wales Act

⁴⁰ Majority-leaseholder-owned companies are in a slightly different category because, in some circumstances, their interests may more closely align with the interests of the leaseholders. But that will often not be the case, for example, where an enfranchising leaseholder is not a member of the company (because he or she did not participate in the collective enfranchisement that led to the company acquiring the freehold).

⁴¹ Principally the qualification criteria, since the justification for reducing premiums will depend on who benefits from reduced premiums.

⁴² 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 the 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

2006.⁴³ Following the Wales Act 2017, rather than expressly devolving competence in certain areas, competence is devolved unless expressly reserved. The Welsh Assembly 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”.⁴⁴

- 1.67 Under our Protocol with the Welsh Ministers, the Commission will only undertake a project concerning a matter that is devolved to Wales if it has the support of the Welsh Ministers.⁴⁵ 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.
- 1.68 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, after outlining the new scheme that we provisionally propose in this Consultation Paper in Chapter 3, we ask consultees whether any specific considerations call for particular issues to be treated differently in England and in Wales.

IMPACT OF REFORM

- 1.69 The different options for reform that we present will have financial and non-financial implications for landlords and leaseholders, and for the wider property market and economy. Government will undertake impact assessments in relation to any reform options that it pursues. This consultation provides an opportunity to gather evidence and data which can be used in the preparation of impact assessments.
- 1.70 We therefore ask various questions throughout this Consultation Paper about the impact of problems under the current law and about the potential impact of reform. In addition, we have created an online survey which we are inviting individual leaseholders to complete in order to share their experiences of the enfranchisement process.

WIDER RESIDENTIAL LEASEHOLD REFORM

- 1.71 In response to our Thirteenth Programme consultation, consultees raised concerns about various aspects of leasehold law. Enfranchisement, commonhold and right to manage were just three. Other issues are being taken forward by Government (such as the regulation of managing agents).⁴⁶ Other issues included:

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).

⁴³ Government of Wales Act 2006, sch 7, Pt I, para 11.

⁴⁴ Wales Act 2017, s 3 and sch 1 and 2 (and the new sch 7A and 7B).

⁴⁵ Protocol of 10 July 2015 between the Welsh Ministers and the Law Commission, available at <https://www.lawcom.gov.uk/document/protocol-rhwng-gweinidogion-cymru-a-comisiwn-y-gyfraith-protocol-between-the-welsh-ministers-and-the-law-commission/>.

⁴⁶ See para 1.30 above.

- (1) Unfair terms in leases. Stakeholders complained about the lack of protection against unfair terms, such as onerous ground rents and fixed service charges.
- (2) Service charges. These are the sums leaseholders pay towards the landlord's costs of providing services, such as the cost of maintaining shared areas. Stakeholders complained about the complexity of legislation, lack of transparency and ineffective consultation procedures.
- (3) Right of first refusal. This is the right for leaseholders of flats to be offered the freehold of their building before it is sold to a third party. Stakeholders complained that the right is of limited practical importance and that the legislation is poorly drafted. There were suggestions that the right should be abolished or, if retained, improved.
- (4) Lease administration fees (such as the cost of obtaining the landlord's consent to an assignment). Stakeholders complained that these fees are disproportionate and cause delays in the conveyancing process.
- (5) Energy efficiency. There are problems in seeking to improve the energy efficiency of leasehold blocks, because (a) energy efficiency measures will generally be improvements and so the costs cannot be recovered from the leaseholders through the service charge, and (b) landlords do not have any incentive to pay the installation costs since it is leaseholders (and not landlords) who gain the benefits of energy efficient measures from reduced energy bills.
- (6) Consolidation/streamlining. There was general dissatisfaction with the complexity of the leasehold legislation which is partly the result of frequent piecemeal reform.

1.72 We 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.

STRUCTURE OF THIS CONSULTATION PAPER

1.73 Our project is a root and branch review of all aspects of leaseholders' enfranchisement rights, which we have 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?

1.74 This Consultation Paper consists of seven Parts and four Appendices:

(1) *Part I: Introduction.*

Chapter 1 comprises an introduction to our project.

Chapter 2 provides a summary of the current law, the history of the enfranchisement legislation and the policy underpinning that legislation.

Chapter 3 summarises our proposals for a new enfranchisement regime, which are set out in more detail in the remainder of the Consultation Paper.

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

Chapters 4, 5 and 6 explain our proposals for a streamlined set of enfranchisement rights, together with our proposals for a new right to acquire the freehold of an estate collectively, and a new right to participate in a collective freehold acquisition.

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

Chapter 7 explains who can exercise enfranchisement rights under the current law, together with the criticisms of the current law.

Chapter 8 sets out our proposals for reforming the rules governing who can exercise enfranchisement rights.

Chapter 9 covers exemptions from the enfranchisement legislation.

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

Chapter 10 describes the procedures for bringing enfranchisement claims at present and identifies key criticisms of those procedures.

Chapter 11 sets out our proposed single procedure for claiming any of our proposed enfranchisement rights.

Chapter 12 identifies the current processes for dealing with disputes or issues that arise during enfranchisement claims, describes key criticisms of those processes, and sets out our proposals for reform.

Chapter 13 outlines the circumstances in which one party may at present be required to pay either the litigation or non-litigation costs of the other party, identifies key criticisms of both, and describes our proposals for reform.

(5) *Part V: What should it cost to enfranchise?*

Chapter 14 explains the current law on how enfranchisement premiums are set, together with the criticisms of the current law.

Chapter 15 sets out the options for reforming the valuation of enfranchisement premiums.

(6) *Part VI: Intermediate and other leasehold interests*

Chapter 16 addresses particular issues that arise where there are intermediate leases sitting between a leaseholder's lease and the freehold, or leases of common parts.

(7) *Part VII: Summary of proposals and consultation questions*

Chapter 17 sets out a complete list of all of our provisional proposals and consultation questions.

(8) *Appendices 1 and 2: details required to be included in the different notices under the 1967 Act and the 1993 Act*

(9) *Appendix 3: Terms of Reference*

(10) *Appendix 4: Members of advisory group*

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1.75 We have held a number of meetings and discussions with individuals and organisations while we have been preparing this paper, and we are extremely grateful to them all for sharing their time, expertise and views with us so generously. We would like to extend our thanks to the members of our advisory groups who are listed in Appendix 4; Sir Peter Bottomley MP, Jim Fitzpatrick MP and Sir Edward Davey MP (co-chairs of the All-Party Parliamentary Group on leasehold and commonhold reform); the Leasehold Knowledge Partnership; Siobhan McGrath (President of the First-tier Tribunal (Property Chamber)) and Angus Andrew (Legal Member of the First-tier Tribunal (Property Chamber)); the National Leasehold Campaign; the National Trust; the Retirement Housing Group; James Wyatt (Parthenia Valuation); the Leasehold Reform Group (an informal group of ground rent investors); officials from the Ministry of Housing, Communities and Local Government; officials from the Welsh Government; and officials from the Leasehold Advisory Service (LEASE).

PROJECT TEAM

1.76 The following members of the property, family and trust team have contributed to this Consultation Paper: Matthew Jolley (team manager); Daniel Robinson (lead lawyer); Caoimhe McKearney (team lawyer); Kevin Pain (team lawyer); Emily Fitzpatrick (team lawyer); Ellodie Gibbons (team lawyer); Mark Adcock (team lawyer); Frances Joyce (consultant valuer); Jonathan Mellor (research assistant); Thomas Nicholls (research assistant); and Kimberley Ziya (research assistant).

Chapter 2: Current law and legislative history

INTRODUCTION

- 2.1 Enfranchisement has a long history, and the legislation can be described as piecemeal. The main reason for this description is the sheer number of Acts of Parliament that have made changes to the enfranchisement scheme over the past half-century: *Hague on Leasehold Enfranchisement*, a leading practitioner's textbook in the field, cites over 50 Acts which have affected one of the statutes that governs enfranchisement, the Leasehold Reform Act 1967 ("the 1967 Act"), alone.⁴⁷
- 2.2 It is important in examining options for reform of this area of the law to have an understanding of the policy drivers behind it, and how these may have changed over time. In this chapter, we look at the policies behind the major pieces of legislation: the 1967 Act; the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"); and the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). Having set out that background, we then provide a high-level overview of the current law. More detailed explanations of each aspect of the current law are set out in subsequent chapters.

LEGISLATIVE HISTORY

Background

- 2.3 Although it was not until 1967 that a general statutory right for a leaseholder to purchase the freehold of their house was created,⁴⁸ its advent had been much debated in the preceding 90 years.⁴⁹
- 2.4 Views on the possibility of developing an enfranchisement scheme had not, however, been universally positive: a Leasehold Committee in 1950, for example, advised against creating enfranchisement rights, preferring instead the expansion of the Rent Act protections to cover long leaseholders.⁵⁰

The Leasehold Reform Act 1967

- 2.5 Nevertheless, in 1966, Government published its White Paper on Leasehold Reform in England and Wales.⁵¹ Government had become concerned with the perceived

⁴⁷ A Radevsky and D Greenish, *Hague on Leasehold Enfranchisement*, (6th ed 2014) paras 1-24 to 1-34. We refer to *Hague on Leasehold Enfranchisement* throughout this Consultation Paper as "*Hague*".

⁴⁸ Specific and constrained rights did exist: see the Law of Property Act 1925, s 153, and the Places of Worship (Enfranchisement) Act 1920.

⁴⁹ Bills such as the Leaseholders (Facilities of Purchase of Fee Simple) Bill 1884 had been introduced, but were not enacted.

⁵⁰ Final Report of the Leasehold Committee (1950) Cmd 7982, chaired by Jenkins LJ. The Rent Acts provide tenants with security of tenure in their homes, ensuring they can only be evicted in defined circumstances, and provide for the regulation of rents.

⁵¹ White Paper on Leasehold Reform in England and Wales (1966) Cmnd 2916 ("the 1966 White Paper").

unfairness of leasehold as a form of tenure. That worry arose particularly in response to reports of hardship of leasehold house owners in South Wales, the Midlands, the North-West and London, where landowners had reportedly “exploited” housing shortages by offering houses solely on a leasehold basis, at virtually the freehold price.⁵²

- 2.6 Consequently, in the 1966 White Paper Government sought to address this perceived problem by proposing to grant twin rights to certain leaseholders of certain leasehold houses: they could purchase the freehold of their house, or extend their lease by 50 years.⁵³ Government justified this solution by making a somewhat revolutionary proposition.⁵⁴ It was stated that, where a person occupies land as a leaseholder, “the land belongs in equity to the land owner and the house belongs in equity to the occupying leaseholder”.⁵⁵
- 2.7 That proposition caused controversy. Arguments were made over the inexact (and legally incorrect) use of the word “equity”, as well as the illogical nature of limiting the reforms to “occupying leaseholders” of low value houses.⁵⁶ Despite that debate, the White Paper led directly to the enactment of the 1967 Act.
- 2.8 In terms of scope, the 1967 Act applied only to a subset of houses of a certain (low) value (determined by the application of the “low rent test”, and of other financial limits based around the rateable value of the house).⁵⁷ The Act was aimed at providing those leaseholders living in perceived hardship with greater security in their homes. The rights were also restricted to “occupying leaseholders”, as was reflected in the Act’s fairly stringent residence test.⁵⁸

⁵² *Hansard* (HC), 28 February 1966, vol 725, col 906.

⁵³ It was thought that for those persons who could not afford to purchase the freehold, or who did not wish to, the 50-year extension was an attractive alternative in terms of providing security by way of what was then considered to be a long lease. Unlike with a freehold purchase, no premium is payable for a lease extension. HM Land Registry, in Practice Guide 27 (4.4), suggests that this right is very seldom used in practice.

⁵⁴ Revolutionary in how it departed from the traditional understanding that anything attached to land becomes part of it.

⁵⁵ Para 4 of the 1966 White Paper. This concept appears to have stemmed from the widespread use of “building leases”, under which an empty plot was let to a leaseholder in order for him or her to build a house upon it.

⁵⁶ Rather than, as the authors of *Hague* explain at para 1-08, granting rights also to leaseholders who have built or improved a house, and then sub-let it to another. The Standing Committee to which the Bill was committed voted overwhelmingly to remove the rateable value limits on the houses that could qualify for the rights, but Government reinstated them, stating that it was hesitant about intervening in contracts already formed between parties and wanted, therefore, to focus on areas of hardship.

⁵⁷ The low rent test, in broad terms, restricted the right to enfranchise to houses where the ground rent on the lease was less than a certain amount per annum: s 4 of the 1967 Act (there were subsequent amendments and the creation of an alternative low rent test in s 4A). Both the low rent test and the other financial limits applicable to claims under the 1967 Act are discussed further in Ch 7 below.

⁵⁸ The original residence test under the 1967 Act was a requirement that a person seeking to acquire the freehold or to extend their lease had occupied the building in question as their only or main residence for a specified period: s 1(1)(b) of the 1967 Act, as originally enacted.

- 2.9 Flats, however, were not included within the scope of the 1967 Act rights. The White Paper stated that long leases of flats were a much more recent phenomenon, that different considerations applied to them, and that the enfranchisement of flats would entail many more “practical difficulties”.⁵⁹
- 2.10 It was said that the terms on which the twin rights were exercised should be “fair” to both the landlord and the leaseholder. In spite of that, the original valuation provisions in the Act reflected the policy that leaseholders were “morally entitled to the building” and should have to pay only for the land it stands upon. Therefore, in terms of the premium or price payable to enfranchise, the Act leaned in favour of the leaseholder and away from “market value”.⁶⁰

The Housing Act 1974

- 2.11 The Housing Act 1974 (“the 1974 Act”) expanded the right to enfranchise to some degree, but not beyond houses. It raised the financial restrictions on qualification for enfranchisement rights, such as the rateable value limits, and made other related changes. However, it was seen as necessary for the valuation of houses which qualified only because of those changes to “take into account the fact that the tenant had a special interest in buying”.⁶¹ Therefore, a different valuation basis was imposed for those houses, which took into account “marriage value”.⁶² this constituted a move towards market value.⁶³

The Leasehold Reform, Housing and Urban Development Act 1993

- 2.12 As mentioned, flats were not covered by the 1967 Act. However, increasing concerns had since been raised, not least by way of the Nugee report in 1985,⁶⁴ over poor management and excessive service charges in blocks of flats. Some steps were taken towards addressing this issue by allowing leaseholders to challenge unreasonable service charges and granting leaseholders of flats the right of first refusal on sale in the

⁵⁹ Para 8 of the 1966 White Paper.

⁶⁰ Two decisions on the 1967 Act saw the leaseholder being considered a competitor in the hypothetical market: *Custins v Hearts of Oak Benefit Society* (1969) 209 EG 239, and *Haw v Peek* (1969) 210 EG 347. The effect of those decisions was to increase the price, essentially including marriage value (explained at fn 62 below) within the 1967 “original” valuation basis. The Housing Act 1969 reversed these decisions by excluding “the tenant and members of his family residing in the house” from those “buying or seeking to buy”. Marriage value is payable under all other bases of valuation, and is generally considered to reflect proper market value; the 1967 Act and the Housing Act 1969 therefore demonstrate the leaseholder-friendly (and hardship-alleviating) approach of the time.

⁶¹ *Hansard* (HC), 9 February 1993, vol 219, col 873.

⁶² “Marriage value” comprises the additional value an interest in land gains when the landlord’s and the leaseholder’s separate interests are “married” into single ownership. The aggregate value of those two interests held separately is often significantly less than the value of both where both are held by the same person. By way of analogy, a pair of Chinese vases are worth more as a pair than the sum of their individual values if owned separately. The additional value, where they are owned as a pair, is equivalent to marriage value.

⁶³ The different valuation basis is also known as the “special valuation basis”, and is found in s 9(1A) of the 1967 Act.

⁶⁴ Report of the Committee of Enquiry on the Management of Privately Owned Blocks of Flats (1985).

Landlord and Tenant Acts of 1985 and 1987 respectively. Yet it was not until 1993 that Government introduced enfranchisement rights for leaseholders of flats.

- 2.13 The landscape in which those rights were created was a complex one, accentuated by the potential advent of commonhold as an alternative form of tenure for flat ownership.⁶⁵ A 1987 report⁶⁶ and a 1990 Draft Bill⁶⁷ had both anticipated the invention of collective enfranchisement (the right for leaseholders in a block to join together to purchase the freehold) as a route to commonhold, but not as a self-standing, distinct or desirable right.
- 2.14 In 1992, however, a Bill was introduced which took a different approach to enfranchisement in the context of flats, by creating two rights.⁶⁸
- (1) It created collective enfranchisement as a stand-alone right. For the right to be exercised, a number of conditions were imposed, including:
 - (a) a requirement that two-thirds of the flats in the building were held by “qualifying tenants”, namely leaseholders with a lease of over 21 years at a low rent (save for certain exceptions);⁶⁹
 - (b) a requirement that no more than 10% of the floorspace in the building (excluding common parts) was used for non-residential purposes;
 - (c) a requirement that not less than half of the flat-owners in the building, and not less than two-thirds of the qualifying tenants, participated in the claim;⁷⁰ and
 - (d) in relation to the participating leaseholders, a residence test.⁷¹
 - (2) The right to collective enfranchisement was supplemented with the alternative right of a qualifying tenant to have a new lease of his or her individual flat, extended by 90 years. A residence test had to be fulfilled for a leaseholder to qualify for this right.⁷²

⁶⁵ We describe commonhold briefly in Ch 1. For further information see <https://www.lawcom.gov.uk/project/commonhold/>.

⁶⁶ Commonhold: Freehold flats and the freehold ownership of other interdependent buildings (1987) Cm 179.

⁶⁷ Commonhold: A consultation paper (1990) Cm 1345.

⁶⁸ The Housing and Urban Development Bill.

⁶⁹ The low rent test proposed was different from that under the 1967 Act (explained at fn 57 above), being based around the rent payable in the first year of the lease only rather than at any time.

⁷⁰ 1993 Act, s 13(2)(b), as originally enacted.

⁷¹ This residence test (called the “residence condition”) was that half the qualifying tenants had to have occupied their flats as their only or principal home for the last 12 months, or for periods amounting to three years in the last ten years, whether or not they had used it also for other purposes: s 6(2) of the 1993 Act, as originally enacted.

⁷² This residence test (known as the “occupation condition”) was that the leaseholder had to have occupied the flat as his or her only or principal home for the last three years, or for periods amounting to three years in the

- 2.15 That Bill followed a manifesto commitment to give long leaseholders of flats the right to buy the freehold at a fair market price.⁷³ It was further thought that if those in flats (regardless of value) and the majority of those in houses have a right to enfranchise, there was little justification for excluding those in high-value houses. Thus, the Bill also proposed to remove many of the 1967 Act's restrictions on which houses fell within its regime. In particular, it sought to remove the financial limits on eligibility of houses for freehold acquisition claims under the 1967 Act, and to introduce an "alternative" low rent test for 1967 Act claims, replicating the variant of the test proposed by the Bill for flats.⁷⁴
- 2.16 The rationale behind the Bill was thus wider than that of alleviating hardship and unfairness; wider, even, than merely giving security of tenure to leaseholders. Government was concerned with:
- Choice, standards and opportunity: the choice and opportunity to own one's home; the right to decent standards for council tenants; and the opportunity to revitalise our cities.⁷⁵
- 2.17 This rationale reflected a shift away from leasehold as a form of tenure generally. It represented a feeling that the wasting nature of leaseholds, and leaseholders' general lack of control, rendered leasehold unfit for purpose. This policy direction was certainly contributed to by the anticipation of the invention of commonhold as a new form of ownership, but the anti-leasehold feeling ran somewhat more widely than that.⁷⁶
- 2.18 The Bill had a problematic journey through Parliament, however. It was perceived by some as an Act that would cause well-kept estates around the country to be irreversibly broken up; others contended that it would be prohibitively expensive for leaseholders to exercise the new rights.⁷⁷ Nevertheless, the 1993 Act was enacted.
- 2.19 The uptake of collective enfranchisement was not rapid, particularly in large blocks of flats. This lack of uptake was perhaps due to the difficulties in organising and maintaining consensus among a sufficient number of leaseholders throughout the period of a claim, as well as the existence of the residence test.
- 2.20 The fact that the 1993 Act stems from a different underlying policy to the 1967 Act can be particularly clearly seen in its valuation provisions. The widening of the rationale for enfranchisement, from specific concerns of abuse to a shift away from leasehold is reflected in the fact that the 1993 Act aims towards "market value" as the price to be

last ten years, whether or not the leaseholder had used it also for other purposes: s 39(2)(b) of the 1993 Act, as originally enacted.

⁷³ Conservative Party Manifesto, *The Best Future for Britain* (1992).

⁷⁴ See fn 69 above.

⁷⁵ *Hansard* (HC), 3 November 1992, vol 213, col 152.

⁷⁶ Commonhold was not created, in the end, until the passing of the 2002 Act.

⁷⁷ *Hansard* (HC), 3 November 1992, vol 213, col 154 provides an example: "many beautiful squares and streets in this capital city may no longer be maintained as they are".

paid as a general baseline.⁷⁸ It allows the landlord to seek compensation for loss of development potential, and splits any payable marriage value in half between the landlord and leaseholder.

The Housing Act 1996

- 2.21 In relation to enfranchisement, the 1996 Act was initially designed to counteract anomalies in the 1993 Act.⁷⁹ In the event, it had a more significant impact on enfranchisement, both for houses and flats, than had been anticipated.
- 2.22 The Act significantly reduced, for instance, the applicability of the low rent tests as a bar to qualification for freehold acquisition claims under the 1967 Act and for all claims under the 1993 Act. The tests were left relevant only for leases for a term of less than 35 years, and for certain “excluded tenancies”.⁸⁰ This change was aimed at reducing the costs incurred in enfranchising.⁸¹ The test was not completely abolished at this stage, however, as Government contended that it still served a purpose in distinguishing leases from short tenancies – the idea being that a lease is sold at a premium and, as a result, the rent is low, whereas a tenancy is let without a premium and therefore the rent is high.

The Commonhold and Leasehold Reform Act 2002

- 2.23 The roots of the 2002 Act stretch back to the mid-1990s, when the need to expand enfranchisement rights even further was frequently debated. Consultations were published in 1998⁸² and 2000,⁸³ and the result was the 2002 Bill.
- 2.24 As well as introducing commonhold, the 2002 Act made significant alterations to the enfranchisement schemes. For example, the residence test in the 1967 Act was abolished. It was argued by Government that this test unfairly excluded some leaseholders who used their property personally (rather than for investment purposes), and, in support of that, cited examples of:

a leaseholder whose main home is a house in the country but who has a pied-a-terre in town; a leaseholder who is working abroad and who has bought or retained his house with the intention of living in it on his return, and a leaseholder who is living in the house as his main home but has leased it through a company because his landlord has a policy, specifically designed to block the right to a lease extension, of letting only to companies.⁸⁴

⁷⁸ In contrast to the 1967 and 1974 Acts, which aimed towards market value for higher value houses but below market value for lower value houses, as considered above.

⁷⁹ For example, by preventing landlords avoiding collective enfranchisement claims through splitting the freehold interest: s 107 of the 1996 Act.

⁸⁰ See s 106 and sch 9 to the 1996 Act. The definition of an “excluded tenancy” is set out at para 7.26 below.

⁸¹ Costs attributable partially to the complexity involved in determining whether a property fulfilled the low rent test.

⁸² Residential Leasehold Reform in England and Wales – A Consultation Paper (1998).

⁸³ Commonhold and Leasehold Reform (2000) Cm 4843.

⁸⁴ *Hansard* (HL), 5 July 2001, vol 626, col 920.

- 2.25 The 2002 Act replaced this residence test with an ownership requirement.⁸⁵ The ownership requirement was said to serve as a safeguard against speculative investors using the legislation for short term gain. While the residence test was removed, the replacement ownership requirement reflects a consistent concern to prevent the use of enfranchisement legislation for purely investment and business purposes.
- 2.26 The 2002 Act also abolished altogether the residence test for collective enfranchisement claims under the 1993 Act (see paragraph 2.14(1)(d) above), and replaced the residence test for individual lease extension claims with an ownership requirement.⁸⁶ It was thought that the key to determining whether a particular leaseholder should be eligible to enfranchise should be the “extent of their stake” in the property rather than the length of their residence.⁸⁷ Serious difficulties had also been caused by the issue of determining what “residence” is. In abolishing those tests, Government argued that there were sufficient safeguards built in to the 1993 Act to prevent its use by speculative investors, such as the provisions preventing a person holding leases on three or more flats in a block from participating in a collective enfranchisement claim.⁸⁸
- 2.27 A number of further changes brought about by the 2002 Act were aimed at making enfranchisement rights more widely available and more easily exercisable. The low rent test was abolished as a criterion for qualification for either right under the 1993 Act, and for freehold acquisition claims under the 1967 Act save in respect of certain “excluded tenancies”.⁸⁹ For collective enfranchisement claims, the permitted maximum percentage of non-residential use was raised from 10% to 25%,⁹⁰ and the participation requirement was relaxed to not less than half of all flat owners in the building (removing the previous additional requirement that not less than two-thirds of the qualifying tenants must participate in the claim). The Act also attempted the introduction of the Right to Enfranchise company, a corporate vehicle for collective enfranchisement claims (discussed further in Chapter 6 below).
- 2.28 Finally, the 2002 Act also removed marriage value from valuation calculations to which it might have been relevant where the lease has more than 80 years left to run. Although an effect of the removal of marriage value in such cases was to reduce premiums,⁹¹ the change was not designed to provide a windfall to leaseholders. Rather, it was thought that leases with an unexpired term of more than 80 years would have no substantive

⁸⁵ The ownership requirement is that, in broad terms, the claimant has been a leaseholder under a long lease for a period of two years before making the claim: s 1(1)(b) of the 1967 Act. See further below at para 2.37.

⁸⁶ Again, that the claimant has been a leaseholder under a long lease for a period of two years before making the claim: s 39(2) of the 1993 Act. See further below at para 2.44.

⁸⁷ *Hansard* (HL), 22 January 2002, Standing Committee D, cols 113 and 114; *Hansard* (HL) 22 October 2001, vol 627, col 878.

⁸⁸ 1993 Act, s 5(5); *Hansard* (HL), 22 January 2002, Standing Committee D, col 113.

⁸⁹ 1967 Act, s 1AA. The low rent test also remains relevant to the determination of the applicable valuation basis under the 1967 Act. “Excluded tenancies” are discussed at para 7.26 below

⁹⁰ See para 2.14(1)(b) above.

⁹¹ Though the 2002 Act’s effect on the premium did not stray as far as the 1967 Act’s approach to low value houses, still aiming instead to identify the appropriate market value for the interest being acquired.

marriage value payable in any event.⁹² The effect in the market of marriage value being payable where leases have less than 80 years to run, but not where leases have more than 80 years to run, has been dramatic, rendering leases of less than 80 years effectively “short leases”.⁹³

The Housing and Regeneration Act 2008

- 2.29 Further changes were made to the schemes of enfranchisement by the Housing and Regeneration Act 2008. For instance, the low rent test was abolished entirely as a qualification criterion for freehold acquisition claims under the 1967 Act, and in relation to all leases commencing on or after 7 September 2009.⁹⁴ This predominantly stemmed from a desire to remove the “confusion and current disparity” of the low rent test. It was further considered that the situations in which the low rent test was relevant had been reduced by previous Acts to the point that its abolition was desirable.⁹⁵

The Housing and Planning Act 2016

- 2.30 The Housing and Planning Act 2016 made small changes to provisions of both the 1967 and the 1993 Acts concerning the valuation of minor intermediate leasehold interests. The changes were born of necessity, since the valuation formulae in those Acts had become unworkable in 2015.⁹⁶

Summary

- 2.31 The right to acquire the freehold of a leasehold house, or to extend the lease, was introduced approximately 50 years ago. Since then, the appetite for reform has barely lessened, though the drivers behind that reform have shifted.
- 2.32 That initial creation of enfranchisement rights was designed to alleviate hardship by providing security for certain categories of leaseholders in their homes. Twenty-five years later, the desire to extend the rights to more leaseholders, including leaseholders of flats, arose alongside a concern that landlords must be paid a price akin to market value. The mood had decidedly shifted away from merely achieving security of tenure; Government considered that leaseholders deserved choice and opportunity.

⁹² This assumption is no longer universally accepted.

⁹³ In other words, such leases are not generally considered to be adequate security for lenders, and are accordingly more difficult to sell.

⁹⁴ Housing and Regeneration Act 2008 Act, s 300. The low rent test now applies, in respect of freehold acquisition claims under the 1967 Act, only to certain “excluded tenancies” pre-dating 7 September 2009. See further discussion at paras 7.25 to 7.28 below.

⁹⁵ Department of Communities and Local Government, *Shared Ownership and Leasehold Enfranchisement* (July 2007) paras 18 and 20.

⁹⁶ As considered below in Ch 16, one of the components of the original valuation formulae for intermediate leasehold interests in both the 1967 and 1993 Act – 2.5% Consolidated Stock – was fully redeemed in July 2015. The Housing and Planning Act 2016, and the Valuation of Minor Intermediate Leasehold Interest (England) Regulations (SI 2017 No 871), consequently introduced a new formula. Intermediate leasehold interests are discussed in full in Ch 16.

- 2.33 Ten years later, commonhold was created. Exercising rights to enfranchise was made easier, and leaseholders now theoretically had several different routes available to them.

THE CURRENT LAW

- 2.34 In this section, we give an overview of the current law of enfranchisement. This overview is a high-level summary; we provide more detailed explanations of different areas of the current law in the various chapters to which they relate.

Houses: The Leasehold Reform Act 1967

- 2.35 As we explain above, the 1967 Act concerns houses. The 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 on their houses, at a modern ground rent.

- 2.36 In order to qualify for rights under the 1967 Act, first and foremost, a leaseholder's property must be a "house". To be a "house", a building must be "designed or adapted for living in", and must be "reasonably...called" a house.

- 2.37 The leaseholder of a house must satisfy further conditions for enfranchisement rights to arise. These conditions differ as between the right to a lease extension and the right to acquire the freehold. To qualify for the right to acquire the freehold of a house the following requirements must be met:

- (1) the leaseholder must have a "long tenancy", which – broadly speaking – means a lease with a term of longer than 21 years;
- (2) the leaseholder must have held that long lease for two years before making the claim ("the ownership requirement");
- (3) there cannot be a sub-lessee who qualifies for rights under the Act;
- (4) if the leaseholder's lease is an "excluded tenancy", it must meet the low rent test;⁹⁷ and
- (5) if the house contains a flat let to a "qualifying tenant" for 1993 Act purposes, 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.

⁹⁷ The definition of an "excluded tenancy" and the applicability and operation of the low rent test are discussed in Ch 7 below, at paras 7.25 to 7.31.

- 2.38 In order to qualify for the right to a 50-year lease extension, there are certain qualification criteria which must be met in addition to those that apply to freehold acquisition. These conditions are that:
- (1) the house must fall within certain rateable values;
 - (2) certain leases terminable on death or marriage are excluded; and
 - (3) the lease must always meet the low rent test (not just where the lease is an “excluded tenancy”).
- 2.39 If the relevant qualifying criteria are satisfied,⁹⁸ then the leaseholder has rights under the 1967 Act. There is, subsequently, a procedure which must be followed in order to exercise those rights. The leaseholder must, in the first instance, serve his or her landlord with a notice of claim. There is a prescribed form which must be used. This notice may be followed by the service of an (optional) counter-notice by the landlord.
- 2.40 There then usually follows a period of negotiation as to the terms of the transaction – in particular the price to be paid – which is followed by a transfer of the freehold, or by the grant of a lease extension, to the leaseholder. Any disputes between the leaseholder and his or her 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.
- 2.41 Valuation for freehold purchases under the 1967 Act is complicated, as there are several different methods of valuing the premium which must be paid by the leaseholder. Which method is applied depends, generally, on the value of the property being acquired.
- (1) If the house is of low value,⁹⁹ determining the purchase price involves three steps. First, it is necessary to calculate the value of the landlord’s right to receive rent until the end of the original lease (called “the term”). Second, there is an assumption that one 50-year extension at a modern ground rent will be granted (if it has not already been). Calculating the modern ground rent requires establishing the “site value” of the premises, which means the value of the land on which the house is situated, but excluding the value of the house. It is then necessary to calculate the present value of the landlord’s right to the modern ground rent in the future. Third, it is necessary to calculate the value of the landlord’s right to possession at the end of the (hypothetically extended) lease (called “the reversion”). Adding each of those constituent elements together results in the calculation of the premium.
 - (2) If the house is of high value,¹⁰⁰ there is no equivalent assumption of a 50-year lease extension, and thus no need to calculate the “site value”. The purchase

⁹⁸ And subject to certain exclusions, such as in the case of shared ownership leases and land owned by the National Trust: see Ch 9.

⁹⁹ Determining whether a property is “low value” is considered above at fn 57, but, in simple terms, consists of it falling below the original rateable value and rental value limits in the 1967 Act.

¹⁰⁰ In simple terms, a house is of “high value” for these purposes where it does not fall within the original rateable value and rental limits in the 1967 Act, but was included within the scope of the Act as a result of subsequent amendments. This is considered in more detail in Chs 14 and 15 below.

price involves three different steps. The first step is the same as for houses of low value: it is necessary to value the landlord's right to receive rent until the end of the original lease (the term). Second, the value of the landlord's right to possession at the end of the lease is calculated (the reversion). Third, the "marriage value" is calculated and half must be paid by the leaseholder (unless the lease has more than 80 years unexpired). Adding each of those constituent elements together results in the calculation of the premium.

- 2.42 If, on the other hand, the leaseholder is extending the lease, the lease extension is essentially on the same terms as the original lease but subject to a rent review (up to a revised modern ground rent, which, as above, requires calculation of the site value of the premises) when the extension of the term of the original lease commences, and again 25 years later.

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

- 2.43 The 1993 Act concerns flats, and provides two different rights.
- 2.44 First, Chapter II of Part I of the 1993 Act deals with individual lease extensions. Save for certain exceptions, an owner of a long lease of a flat (known as a "qualifying tenant") has the right to obtain a 90-year lease extension¹⁰¹ at a notional rent of a peppercorn.¹⁰² This right arises provided the leaseholder has been a qualifying tenant for two years preceding the claim (the ownership requirement).
- 2.45 The process is commenced by serving a notice of claim on the landlord. There is no prescribed form for making such a claim, but the Act sets out in detail what this notice must contain.
- 2.46 The premium payable is determined similarly to high value houses under the 1967 Act: it is the value of the term and reversion,¹⁰³ and half of the marriage value (unless the lease has more than 80 years unexpired).
- 2.47 Second, Chapter I of Part I of the 1993 Act deals with collective enfranchisement. Collective enfranchisement is the right of long leaseholders of flats, acting together via a "nominee purchaser", to purchase the freehold of their block of flats (or part thereof) along with any intermediate leases. For the right to be available, a number of conditions must be met, including that:

¹⁰¹ 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 (1) the remaining term of the existing lease, and (2) the additional 90 years.

¹⁰² 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. A nominal rent is required because of the English contract law requirement of "consideration" – meaning that an exchange must occur in order for a binding contract to be formed.

¹⁰³ Since the leaseholder acquires a lease extension rather than the freehold, the leaseholder does not pay the full value of the term and reversion. Rather, the leasehold pays the difference between (1) the current value of the term and reversion, and (2) the value of the term and reversion after the grant of the lease extension.

- (1) the building must be a “self-contained building” or a “self-contained... part of a building”;
- (2) 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);
- (3) no more than 25% of the floor space in the building, excluding common parts, must be used for non-residential purposes; and
- (4) two-thirds of all of the flats in the building have to be held by “qualifying tenants”.

2.48 There is no longer a residence test or ownership requirement.

2.49 Even if the building qualifies, the process to acquire the freehold can only be commenced if the qualifying tenants of not less than half of the flats in the building agree to participate in the claim. If this condition is satisfied, then the procedure is commenced by the serving of a notice of claim on the landlord. There is no prescribed form, but the Act sets out the details that any such notice must contain.

2.50 The purchase price is determined similarly to high value houses under the 1967 Act, including how and when marriage value is included. The leaseholders must pay the value of the landlord’s interest in the building, namely the value of the term and reversion, and half of the marriage value in relation to flats where less than 80 years remain on the leases. Complications arise regarding the valuation of flats of any non-participating leaseholders, in respect of which a deferred form of marriage value, known as “hope value”, might be payable. Additional sums, such as development value, or other compensation, may also have to be paid.

2.51 Landlords are required to serve counter-notices in response to notices from leaseholders under both Part I and Part II of the 1993 Act. A failure to serve a counter-notice within the time period entitles the leaseholders (assuming their claim is valid) to acquire the interest claimed on the terms set out in their initial notice.

2.52 As with the 1967 Act, claims under the 1993 Act are usually completed following a period of negotiation between the parties. Any disputes are resolved by the court or the Tribunal.

Chapter 3: Overview of the new regime

INTRODUCTION

- 3.1 We summarised the criticisms of the current enfranchisement regime in Chapter 1 above. It is imperative that the legislation is simplified, and that the exercise of enfranchisement rights is made easier, quicker and cheaper.
- 3.2 As set out in Chapter 1 above, this project is a root-and-branch review of enfranchisement law. It considers the fundamental questions of the availability of enfranchisement rights and the calculation of the premium that must be paid to a landlord in order to avail of them, as well as the technicalities of how those rights can be exercised.
- 3.3 In other words, this project asks four key questions:
- (1) What should the enfranchisement rights be?
 - (2) Who should be entitled to exercise enfranchisement rights?
 - (3) How should enfranchisement rights be exercised?
 - (4) What should it cost to enfranchise?
- 3.4 Each of these questions is addressed in subsequent chapters of this Consultation Paper. However, we do not approach all of these questions in the same way. Our overall task is to devise an improved enfranchisement regime, and so, in most cases, we put forward provisional proposals for, and ask open questions about, a new regime. In relation to the cost of enfranchising, however, our Terms of Reference are different. We have been asked to provide Government with options for reducing the premiums payable by leaseholders when they enfranchise, while ensuring sufficient compensation is paid to landlords. We therefore set out a number of options for reducing premiums, and seek views on these options.
- 3.5 This chapter provides a very brief overview of the contents of the remainder of this Consultation Paper. It sets out the enfranchisement rights which we suggest should be available, and identifies our key proposals as to the leaseholders who ought to be able to enfranchise and the procedure which should apply when they do so. In respect of premiums payable, it summarises the options which we propose to put before Government.

WHAT SHOULD THE ENFRANCHISEMENT RIGHTS BE?

Current law and criticisms

- 3.6 Leaseholders who meet certain qualifying criteria have various enfranchisement rights.

Freehold acquisition

- 3.7 Leaseholders of houses can purchase the freehold of their house. Leaseholders of flats can purchase the freehold of the building containing their premises; they must join together to make the purchase collectively via a nominee purchaser (a process known as “collective enfranchisement”).
- 3.8 The legislation does not cater for the needs of many modern housing estates. For example, when the leaseholder of a house acquires the freehold, services that are provided across a wider estate should continue to be provided, and paid for, for the benefit of that owner and his or her neighbours. But the legislation makes no provision for an ongoing relationship. Similarly, where an estate comprises houses, multiple blocks of flats, or a mixture of houses and blocks of flats, the leaseholders of all of the homes on the estate might wish to join together to acquire the freehold of the entire estate from their landlord.¹⁰⁴ Currently, the legislation only allows a group of leaseholders to purchase a freehold interest in their properties collectively if they are leaseholders within a single block of flats. It does not allow the leaseholders of a wider estate to acquire the freehold of the whole estate.

Lease extension

- 3.9 Leaseholders of houses and of flats who meet certain qualifying criteria have a right to a lease extension, which provides them with longer-term security in their home. Leaseholders of flats are entitled, on payment of a premium, to be granted a 90-year lease extension without an obligation to pay any ground rent. There is no limit to the number of lease extensions that can be obtained. Leaseholders of houses are also entitled to a lease extension, but on very different terms. They are entitled to a single 50-year lease extension. No premium or purchase price is paid for the lease. While that may suggest that a lease extension is attractive, that is not in fact the case. The lease extension is subject to what is known as a modern ground rent, which can be very high. In effect, the modern ground rent means that what would have been paid as a premium is instead paid over time in rent.

Proposals for reform

- 3.10 We provisionally propose, in Chapters 4 to 6 below, a new, coherent and streamlined regime comprising the following enfranchisement rights, which no longer turn on the distinction between houses and flats:
- (1) a universal right to a lease extension which is available to all leaseholders, whether they own a house or flat (“the right to a lease extension”);
 - (2) a right for leaseholders to acquire the freehold of a building individually, or of a building or estate collectively (“individual freehold acquisition” and “collective freehold acquisition” respectively); and
 - (3) a new right for leaseholders who did not participate in a previous collective freehold acquisition to do so at a later date (the “right to participate”).

¹⁰⁴ Doing so can provide the leaseholders with the ability to control the management of their estate, as well as providing them with long-term security in their homes (overcoming the problem of owning a wasting asset).

- 3.11 All of the existing enfranchisement rights are retained under our proposed new regime, though in streamlined form and without some of the existing technical problems. That includes retaining the possibility of a leaseholder of a house extending the lease. While many leaseholders of houses will, of course, want to buy the freehold, a lease extension will be appropriate in some cases. Some leaseholders of houses are unable to acquire the freehold. Others may prefer to have a lease extension. Our proposal therefore ensures that consumer choice is maintained, while providing that the lease extension is on more favourable terms than under the current law.
- 3.12 We make provisional proposals for reform, and consult on other possible changes, that would have the following effect.
- (1) All leaseholders who qualify for a lease extension would have a uniform right to a lease extension, as often as they so wish, at a nominal ground rent. We seek consultees' views (at paragraph 4.41 below) as to the appropriate length of that lease extension – it could, for example, be 125 or 250 years.
 - (2) An extended lease would be on the same terms as the existing lease, except where either party elects to adopt non-contentious modernised terms drawn from a prescribed list. That would remove scope for unfavourable terms to be added to a lease during the enfranchisement process.
 - (3) Where a freehold is acquired in circumstances where the landlord does not retain any surrounding land:
 - (a) In relation to individual freehold acquisitions, we are seeking consultees' views on whether leaseholders should acquire the freehold subject to the rights and obligations that applied to the freehold prior to its acquisition, or on terms that reflect the rights and obligations contained in the existing lease or leases. Additional terms may only be added if the leaseholder decides that they ought to be, and these terms will be drawn from a prescribed list of non-contentious, modernised terms.
 - (b) In relation to collective freehold acquisitions, we propose that the rights and obligations that applied to the freehold prior to the exercise of enfranchisement rights should continue once the freehold has been acquired. We also propose that the landlord and the leaseholders should only be able to add additional covenants to that conveyance from a prescribed list.
 - (4) By contrast, where the landlord does retain surrounding land, there are certain circumstances in which ongoing obligations should continue following the freehold acquisition. However, retaining these obligations may not simply mean replicating the terms of the existing lease.
 - (a) In relation to individual freehold acquisitions we are seeking consultees' views on whether the leaseholder should acquire the freehold on terms replicating those set out in the existing lease (where there is no estate management scheme in place) or whether the terms should be drawn from a prescribed list of appropriate covenants.

- (b) In relation to collective freehold acquisitions, we seek consultees' views as to whether the freehold should be acquired on terms that replicate the terms set out in their existing leases (where there is no estate management scheme in place), but only in so far as those terms relate to the landlord's retained land, or, alternatively, only on terms drawn from a prescribed list.
- (5) In respect of collective freehold acquisition:
- (a) all acquisitions (save in limited circumstances) would be carried out by a nominee purchaser which is a company limited by guarantee;
 - (b) the right would not be limited to leaseholders in a single block of flats. It would also be possible for leaseholders on an estate comprising multiple buildings – whether those buildings are houses or blocks of flats or a combination of the two – to purchase the entire estate collectively (which we refer to as “estate enfranchisement”);
 - (c) participating leaseholders would be able to require the landlord to take a leaseback of any parts of the property being acquired (other than common parts) which are not let to the participating leaseholders. Such parts would include residential units which have not been let on long leases, residential units which are let on long leases but to non-participating leaseholders, and non-residential units.¹⁰⁵ The effect of this proposal would be to reduce the cost of the enfranchisement since the participating leaseholders would not have to obtain finance to cover the costs that are attributable to parts of the premises that are not owned by the participating leaseholders; and
 - (d) the right would be available only where the building or estate in question has not been the subject of a prior collective freehold acquisition within the last five years. While a new collective freehold acquisition will not be possible in that period, leaseholders who did not participate will be able to join the previous collective freehold acquisition through the new right to participate (which we explain at paragraph 3.14 below).

3.13 We say more about the above proposals in Chapters 4 to 6 below.

3.14 Currently, one group of leaseholders can deliberately exclude other leaseholders in the block from the process of collective freehold acquisition. We therefore also propose the creation of a new enfranchisement right, available where a building has already been the subject of a collective freehold acquisition in which all leaseholders did not participate. We suggest that the leaseholders who did not participate at the time of the collective freehold acquisition should be able, subsequently, to purchase a share of the freehold interest held by those who did participate. We call this new right the right to participate. Our reasons for suggesting such a right, and further discussion as to how it might operate, can be found in Chapter 6 below.

¹⁰⁵ As to a “residential unit”, see para 3.19(1) below.

- 3.15 The new regime would have the effect of enhancing and adding to the rights available to leaseholders; they would have a suite of comprehensive rights, which are standardised, practically useful and coherent.

WHO SHOULD BE ENTITLED TO EXERCISE ENFRANCHISEMENT RIGHTS?

- 3.16 In Chapters 7 and 8 below, we consider the criteria that a leaseholder must satisfy in order to qualify for enfranchisement rights. We refer to these as “qualifying criteria”.

Current law and criticisms

- 3.17 The current legislation setting out the various criteria that leaseholders must satisfy in order to qualify for enfranchisement rights is complex. The relevant provisions are scattered across several statutes and subject to many exceptions, provisos and qualifications. The criteria can also be difficult to apply in practice. For example, under the 1967 Act, eligibility for enfranchisement rights and for a particular valuation basis may depend on historic rateable values, which can be difficult to find, and which for some properties do not exist at all. Leaseholders may be required to satisfy the low rent test, which is set out in a number of convoluted, confusing statutory provisions. More fundamentally, certain terms in the legislation create much uncertainty, and scope for litigation. There is still no clear definition of a “house”, despite the issue having been considered by the highest appeal court on five occasions. In the collective enfranchisement regime, what is meant by a “self-contained building” has been the source of frequent dispute. These kinds of difficulties can lead to additional costs and delay for leaseholders seeking to enfranchise, who may need to obtain specialist legal advice, or even in some cases to assert their rights through litigation.
- 3.18 It has also been said that the qualification criteria can be arbitrary or lead to unfair outcomes. For example, in some cases, leaseholders must have owned their leasehold property for two years before they can make an enfranchisement claim. During this waiting period, the price to be paid by the leaseholder to enfranchise might rise. There are also distinctions between the qualification criteria which must be met by leaseholders of houses and those which apply to leaseholders of flats, for which there is not always a good justification.

Proposals for reform

- 3.19 To simplify matters, and to address particular problems, we make the following key provisional proposals.
- (1) The replacement of the current two-track approach to the question of availability of enfranchisement rights (which requires premises to be categorised as a “house” or “flat”) with a single set of criteria (based around the new concept of a “residential unit”, which can be applied to any leasehold premises).¹⁰⁶ This proposal will overcome the difficulties encountered in the current law in determining whether a building is a house.

¹⁰⁶ For the definitions of a “unit” and a “residential unit”, see Ch 8. For present purposes, a residential unit would include a typical house or flat.

- (2) The application of these criteria in two logical stages to identify the enfranchisement rights available to any particular leaseholder:
 - (a) first, to establish whether a lease extension is available to the leaseholder in question; and
 - (b) if so, to establish whether the leaseholder has the additional ability to acquire the freehold, either individually or collectively.
- (3) The abolition of qualifying criteria based on financial limits – both the low rent test and other financial limitations based on historic rateable values. The regime will therefore be simpler, easier to understand, and practically workable.
- (4) The extension of the 25% limit on non-residential use (which currently applies only to collective freehold acquisition claims) to all freehold acquisition claims, to ensure that the new scheme is coherent and standardised.
- (5) The removal of the requirement (currently applicable to all lease extension claims, and claims to acquire the freehold of a house) that the leaseholder must have owned the lease for the last two years. Leaseholders would not, therefore, be required to delay their claim, and watch the premium rise, while they are waiting to satisfy a minimum ownership requirement.
- (6) In collective freehold acquisition claims:
 - (a) the removal of the requirement, where a building contains only two flats, for the leaseholders of both flats to participate in the claim. Instead, a single flat owner could acquire the freehold and the other owner would be entitled to exercise the new right to participate in order to acquire a share of the freehold; and
 - (b) the abolition of the provision that where a leaseholder holds a long lease (or leases) of three or more flats in a building, there shall be taken to be no qualifying long leaseholder of those flats. The requirement is designed to prevent commercial investors participating in a collective enfranchisement claim, but it is ineffective at doing so.

3.20 We also explore whether the ability of commercial investors (as opposed to owner-occupier leaseholders) to benefit from enfranchisement rights ought to be restricted and, if so, how this might be achieved.

Exceptions from the enfranchisement regime

- 3.21 In Chapter 9, we consider those cases in which particular leaseholders who would otherwise appear to qualify for enfranchisement rights in fact have more limited rights, or, in some cases, none at all. We consider the position of shared ownership leaseholders and leaseholders of the National Trust and of the Crown, amongst others.
- 3.22 In relation to shared ownership leases, our Terms of Reference are “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 ask questions to determine how to achieve this policy.

- 3.23 Enfranchisement legislation currently applies to the National Trust only to a limited extent in relation to land that is vested in the Trust inalienably. Leaseholders of houses on inalienable land of the National Trust may acquire a single lease extension, but not obtain the freehold. Leaseholders of flats on inalienable land do not enjoy any enfranchisement rights, although we understand that the National Trust owns very few flats let on long leases. We ask whether the current situation should be maintained.

HOW SHOULD ENFRANCHISEMENT RIGHTS BE EXERCISED?

- 3.24 In Chapters 10 to 13 below, we consider the procedure by which enfranchisement rights are claimed, determined and put into effect under the current law, and set out our proposals for reform.

Current law and criticisms

- 3.25 An enfranchisement claim begins by a leaseholder (or a group of leaseholders in the case of a collective enfranchisement claim) giving a notice to the landlord (a "notice of claim"). The landlord gives a notice in response (a "counter-notice"). The parties then negotiate the terms of the enfranchisement claim (usually through their professional advisers) and the claim will be completed by the grant of a lease extension or by the transfer of the freehold. Leaseholders are required to contribute to certain costs incurred by the landlord. Any dispute about the enfranchisement claim will (depending on the nature of the dispute) be referred to either the county court or to the Tribunal, or to both.
- 3.26 We identify a number of problems with the existing procedures. For example:
- (1) There are distinct procedural regimes for claims involving houses, and for claims involving flats. Inconsistencies between procedures create a risk that parties (or their advisers) will make mistakes by confusing one procedure with another. Those mistakes can lead to additional costs being incurred, or, in some cases, to the failure of a claim.
 - (2) There is too much uncertainty over whether notices of claim are valid, or have been properly served. This problem is made worse in the case of claims concerning flats, because a landlord who does not serve a counter-notice must dispose of his or her interest on the terms set out in the leaseholder's notice of claim.
 - (3) The procedure for dealing with "missing landlords" is complex and almost impossible for leaseholders to follow. In some cases, the cost of trying to locate a landlord, and applying to the county court for a vesting order¹⁰⁷ if he or she cannot be found, can exceed the price to be paid for the interest claimed.
 - (4) The legislation that applies to claims involving flats contains a series of deadlines by which steps in the procedure must be taken; any failure to meet those

¹⁰⁷ An order under which the court completes the transaction in place of the landlord.

deadlines will lead to the claim being treated as having been withdrawn, the leaseholder(s) having to pay their landlord's "non-litigation costs",¹⁰⁸ and a 12-month prohibition on the leaseholder(s) trying to undertake the process again.

- (5) The powers to deal with disputes or issues that arise during an enfranchisement claim are divided between the county court and the Tribunal. This division can be confusing for the parties, and can lead to a number of separate applications having to be made during the course of a claim, causing the parties to incur further unnecessary costs and delays.
- (6) The Tribunal has the power to determine any disputes between the parties as to the terms on which any claimed interest is to be acquired; but once heads of terms have been agreed, any dispute about how those terms are put into effect is dealt with by the county court. This distinction can lead to further costs and delay.
- (7) The powers of the county court and of the Tribunal to make an order that one party should pay the other party's litigation costs are very different. As such, the determination of certain disputes or issues carries a greater risk that such an order will be made than others. The different powers as to costs can make it more difficult for parties to assess in advance the potential costs of bringing an enfranchisement claim.
- (8) There is plenty of scope for parties to disagree, or to argue different positions. The threat of litigation about 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 speedily and at minimal cost. This consequence can be an incentive for leaseholders to agree to voluntary transactions (that is, outside the statutory enfranchisement regime) which can expose them to significant risks, such as (in the case of a lease extension) onerous terms in the new, extended lease.
- (9) Few can operate the procedure without professional assistance, which can be costly. Both legal and valuation costs can be significant, and can be disproportionate to the property value. In some cases, the costs involved actually exceed the premium payable. These costs are borne by both leaseholders and landlords, though leaseholders are required to pay their landlords' reasonable non-litigation costs so will often feel the burden of costs more acutely.
- (10) Many leaseholders object in principle to their obligation to pay their landlords' reasonable non-litigation costs. They also criticise the level of non-litigation costs claimed by some landlords, and the expense of contesting the sums claimed. Leaseholders can find themselves stuck between a rock and a hard place. If leaseholders or their solicitors think that the costs claimed by a landlord are unreasonable, leaseholders must make a claim to the Tribunal, wait for the outcome of that claim (which they may win or lose), and pay their own solicitors'

¹⁰⁸ Bringing an enfranchisement claim will lead both parties to incur legal and other costs even if there is no dispute that needs to be resolved by a court or Tribunal. For example, the parties might incur legal costs when serving notices on the other, and in completing and registering the grant of a new extended lease or the transfer of the freehold to the leaseholder. The parties might also incur professional valuation costs. We refer to these costs as "non-litigation" costs.

costs. It will often be quicker and easier simply to pay the costs claimed by the landlord, even if they are unreasonable.

- (11) In contrast, some landlords have criticised their inability to recover the full costs incurred in dealing with enfranchisement claims, and the lack of any provision to require leaseholders to provide proper security for their costs.
- (12) A leaseholder who wishes to sell his or her premises with the benefit of a notice of claim which has already been served must assign the notice and the lease together. If that is not done successfully, the purchaser will have to serve a fresh notice of claim, but in some cases can only do so after he or she has owned the property for two years. This has been widely criticised.

Proposals for reform

3.27 We provisionally propose introducing a single procedure that would apply regardless of the enfranchisement right being claimed. This proposed procedure would provide for:

- (1) standard forms to be prescribed, which would make claims easier, simpler and cheaper to commence and respond to, and reduce the risk of notices being invalid;
- (2) an enfranchisement claim to be started either by leaseholders serving a notice (a “Claim Notice”) on their landlord or, where that is not possible, by applying to the Tribunal for an order allowing the claim to proceed in the absence of the landlord;
- (3) a Claim Notice to be deemed to have been served on a landlord if posted to an address falling within specified categories of address, making it easier for leaseholders to serve notices. Leaseholders will not have to take time-consuming and costly steps to locate their landlord where they have not been provided with up-to-date contact details. And nor will leaseholders be faced with assertions that landlords have not been properly served;
- (4) a landlord’s notice (a “Response Notice”) to be accompanied by a draft contract (if any) as well as a draft transfer or lease. Later stages of the enfranchisement process would therefore be frontloaded, and areas of potential dispute can be identified at an earlier stage;
- (5) challenges to the validity of notices to be permitted only on a limited number of defined grounds. Arid, costly and time-consuming debates about whether a notice complies with the numerous technical requirements would therefore be avoided;
- (6) leaseholders to be able to apply to the Tribunal for a determination of their claim where:
 - (a) their landlord has given a Response Notice, but issues remain in dispute after a prescribed period;
 - (b) a Claim Notice has been properly served, but no Response Notice has been given within a prescribed period; or

- (c) the Tribunal has granted an order permitted the claim to proceed (as set out at paragraph 3.27(2) above);
 - (7) in each case referred to at paragraph 3.27(6) above, the Tribunal to determine the claim based on the evidence provided, and its own expertise. It will not be required to allow the leaseholders to acquire the interest on the terms proposed in their Claim Notice if the landlord could not be served, or has not responded, so unfair windfall gains for leaseholders would be removed;
 - (8) in each case referred to at paragraph 3.27(6) above, the Tribunal to determine the leaseholders' entitlement to bring a claim, and the terms of acquisition, to include the terms of any contract, transfer or lease extension and a date for completion;
 - (9) either party to be able to apply to the Tribunal for an order giving effect to the transaction if it is not completed by the date agreed or set by the Tribunal;
 - (10) landlords who failed to serve a Response Notice to be entitled to apply to the Tribunal to take part in a claim, and to set aside any determination made, in limited circumstances;
 - (11) leaseholders to be entitled to withdraw their claim at any stage prior to completion of the transaction, with a requirement that they pay some of their landlord's costs if they do so;
 - (12) claims not to be deemed withdrawn, but landlords to be empowered to apply to strike out a claim on notice. Traps for the unwary, which can currently result in claims failing and leaseholders having to pay their landlord's costs, would therefore be removed; and
 - (13) the benefit of a leaseholder's notice to be automatically assigned on any sale of the lease to a third party. Inadvertent errors in properly assigning a notice to a third-party purchaser would no longer result in claims failing and leaseholders having to pay their landlord's costs.
- 3.28 We also propose that all disputes and issues that arise during an enfranchisement claim should be dealt with by the Tribunal. Leaseholders would no longer have to navigate the complex division of responsibility between the court and the Tribunal, and disputes will be resolved more quickly and in one go. We believe that the Tribunal's existing limited powers to make an order that one party pay the other party's costs should apply to all cases. In addition, we propose the introduction of a new dispute resolution procedure for low value claims.
- 3.29 We also invite the views of consultees as to whether leaseholders should be required to contribute to their landlord's non-litigation costs. If that requirement is retained, we set out options for reforming the way in which any contributions are set, and outline a potential fixed-costs regime. A fixed-costs regime would allow leaseholders to know at the outset the amount of costs that the landlord will be entitled to claim, and will prevent leaseholders from feeling compelled to accept having to pay unreasonable costs.

WHAT SHOULD IT COST TO ENFRANCHISE?

- 3.30 In general, leaseholders must make a payment to their landlord in order to exercise their enfranchisement rights. We use the term premium to describe this payment. Calculating the premium is known as “valuation” as it involves putting a financial value on the interest being obtained by the leaseholder(s) from the landlord. We consider valuation in Chapters 14 and 15.
- 3.31 Our Terms of Reference (see paragraph 1.54 above) include specific provisions in respect of premiums. They require us to:
- (1) set out the options for reducing the premium payable by existing and future leaseholders to enfranchise, whilst ensuring sufficient compensation is paid to landlords to reflect their legitimate property interests;
 - (2) produce options for a simpler, clearer and consistent valuation methodology; and
 - (3) make enfranchisement easier, quicker and more cost effective (by reducing the professional costs), particularly for leaseholders, including by introducing a clear prescribed methodology for calculating the premium.
- 3.32 As we explain in Chapter 15 views will invariably differ on what constitutes “sufficient compensation”. In legal terms, however, one aspect of sufficient compensation is the right to peaceful enjoyment of property contained in Article 1 of the First Protocol to the European Convention of Human Rights (“A1P1”), which is incorporated into English law by the Human Rights Act 1998. In *James v United Kingdom*¹⁰⁹ the European Court of Human Rights held that enfranchisement was a deprivation of the landlord’s property and so A1P1 was engaged. However, the rights conferred by A1P1 are qualified, which means that an interference with peaceful enjoyment, including the deprivation, of property can be justified in certain circumstances. It must be shown that the interference complies with the principle of lawfulness and pursues a legitimate aim by means that are reasonably proportionate to the aim sought to be achieved. This final question focusses upon whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. In that regard, the court accepts that a margin of appreciation must be left to the national authorities. The compensation paid to the landlord is a key aspect of determining whether an interference with his or her rights is proportionate. In *James*, the court held that the UK was acting within its margin of appreciation and so the enfranchisement regime was compatible with A1P1.

Current law and criticisms

- 3.33 In Chapter 14 we set out the current law relating to valuation. There is no single method of valuation.
- (1) The 1967 Act deals with valuation in relation to houses. It provides various methods of valuation in relation to acquiring the freehold of a house. Which method applies is dependent on a number of factors. No premium is payable for extending the lease of a house. But the absence of a premium does not mean

¹⁰⁹ *James v United Kingdom* (1986) 8 EHRR 123.

that a lease extension is necessarily an attractive option. The rent payable under the extended lease is what is known as a modern ground rent. As a result, what the leaseholder saves by not paying a premium he or she pays by way of rent over the 50-year extended term of the lease.

- (2) The 1993 Act governs valuation in relation to flats. The Act contains separate provisions on valuation for collective enfranchisement claims and lease extension claims.

3.34 Despite the myriad of provisions, the approach to calculating the premium is broadly the same in all cases, save for those claims to acquire the freehold of a house to which the valuation method laid down by section 9(1) of the 1967 Act applies. The general approach to valuation is designed to ascertain the market value of the landlord's interest in the property. By contrast, the valuation method in section 9(1) of the 1967 Act, which is intended to apply to certain low value houses, is considerably more favourable to leaseholders, though also more complicated and difficult to operate.

3.35 Chapter 14 also sets out four main criticisms of the current approach to valuation:

- (1) An appropriate balance is not necessarily drawn between the competing interests of landlords and leaseholders. The 1967 Act was passed primarily to meet the anxieties of ordinary householders in areas where long leases of houses were widespread, but those who derived most benefit from the Act in financial terms were relatively wealthy leaseholders of houses in expensive areas of London.¹¹⁰ The various amendments to the 1967 Act, and the introduction of the 1993 Act, have shifted the balance between landlord and leaseholder, so that the subsequently introduced bases of valuation seek to compensate the landlord in full at a market value. But leaseholders may argue that the premium is too high and does not reflect the fact that the asset they are buying is their home. The discontent amongst leaseholders has been fuelled by the practice of some developers of selling leasehold properties with rent review clauses leading to very high ground rents. Such rent reviews make the need to enfranchise and buy out the ground rent more imperative, whilst significantly increasing the premium payable to do so.
- (2) Valuation is complicated and expensive. The valuation provisions and methodology are not readily understandable to the lay person and are difficult to apply without specialist advice. Where the capital value of the property is low, the professional fees may be disproportionate to the price payable. One of the reasons for complexity is that there is a wide valuation margin and a lack of standardisation, which gives scope for disputes and a lack of certainty as to the price that will be payable.
- (3) The valuation methodology is both artificial and circular. Both of these criticisms stem from the fact that in calculating the market value various statutory assumptions must be made. In particular, it must be assumed that there are no statutory enfranchisement rights attached to the interest; that is, that the leaseholder has no right to buy the freehold or to a lease extension. But in reality,

¹¹⁰ *Hague*, para 1-08.

nearly all leasehold properties benefit from statutory enfranchisement rights and therefore the “market value” being calculated is, to an extent, artificial. It is circular because the price of a short lease in the market is the value of a long lease/freehold less the cost of extending the lease or acquiring the freehold. As a result, while the market value determines the price payable under the statutory regime, the price payable under the statutory regime determines the market value.

- (4) There are also numerous technical problems with the valuation methodology.

Options for reform

3.36 In Chapter 15 we identify some overarching considerations for reform:

- (1) We consider that the legislation could be simplified by adopting a consistent valuation methodology. We acknowledge, however, that the most favourable method of valuation contained in section 9(1) of the 1967 Act for the freehold acquisition of a house would need to be maintained (or an equivalent provision introduced) to ensure that the premium is not increased for those who currently benefit from it.
- (2) While a consistent regime has the advantage of simplicity, there are difficulties in a “one size fits all” approach. In particular, it means that in some cases the professional costs incurred in enfranchisement may exceed the premium. We therefore consider whether a separate regime should be created for low value claims.
- (3) Currently, the same premium is payable regardless of whether an enfranchisement right is being exercised by (for example) a homeowner in respect of his or her home, or an investor. We note that the identity of the leaseholder exercising the right might be significant in respect of A1P1, as it may be possible to justify a lower premium being paid by a homeowner purchasing his or her home than by an investor. Therefore, we note that differentiating between leaseholders might be considered, if Government wishes to lower the premium payable by homeowners to a level that would not be justified for any other type of purchaser.
- (4) Valuation often involves the use of rates to determine certain aspects of the valuation formula. Identifying these rates can be contentious and can make a significant difference to the premium that will be paid. Any option for reform that continues the need for these rates could be combined with putting in place a procedure for prescribing the rates to be used. To reduce the premium payable, the rates could be prescribed at level that benefits leaseholders. Prescribing rates would also save both landlords and leaseholders professional costs, and would remove uncertainty about how the premium will be calculated.

3.37 We then set out options for reform, which we divide into two categories.

- (1) The adoption of a simple formula. These options move away from attempting to identify a market value. Examining market value inevitably involves variables, and therefore uncertainties, and associated professional fees. These difficulties

are removed by adopting a simple formula. A simple formula (depending on how it is set) would reduce premiums, although there is a risk that the level of the premiums would be arbitrary. We identify two possible formulae:

- (a) a ground rent multiplier, whereby the premium paid is a multiple of the ground rent. This approach has been highlighted in a Private Members' Bill introduced by Justin Madders MP; and
 - (b) a percentage of the capital value of the property.
- (2) Options based on current valuation methodology. These options to reduce premiums involve components of the existing valuation methodology. These different components can be combined in different ways. It will ultimately be a matter for Government to make the political determination of what those components will be as their inclusion or non-inclusion will affect how premiums are calculated. As noted above, they could be combined with prescribing rates in a way that is favourable to leaseholders.

3.38 We include various worked examples to indicate, in simple terms, the effect on enfranchisement premiums of the different options for reform. We ask for consultees' views on the advantages and disadvantages, and practical workability, of these different options for reform.

3.39 Finally, we consider how an online calculator could be used to support valuation. We note that depending on the valuation methodology adopted, an online calculator could limit or even remove the need for expert assistance. In particular, an online calculator could most fully be utilised alongside prescribed rates.

3.40 The human rights implications of each of these options will need to be examined. A simple formula may be difficult to justify under A1P1 in all cases, as the resulting premium may be very low relative to the value of the interest of the landlord being acquired. It may, however, be possible to identify a category of properties in respect of which a simple formula would be appropriate. Moreover, the bounds of acceptability under A1P1 will need to be examined to ensure that a methodology involving prescribed rates is human rights compliant. The body or organisation responsible for setting these rates will be judicially reviewable and the substance of its decisions subject to scrutiny by reference to A1P1. This conclusion will depend not just on the premium payable, but also on who is asked to pay that price, the qualification criteria that apply to the property, the existence of alternative valuation bases and the social policy objectives being pursued.

WELSH DEVOLUTION

3.41 Our project 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, we seek consultees views on whether any specific considerations in England or in Wales call for particular issues to be treated differently in England and in Wales. Consultees are welcome to share their views on this point here, or in response to questions which we ask later in this paper on particular issues.

Consultation Question 1.

- 3.42 We invite the views of consultees as to whether a reformed enfranchisement regime should treat particular issues differently in England and in Wales. Consultees are welcome to share their views on this point here, or in response to questions which we ask later on particular issues.

Part II: What should the enfranchisement rights be?

Any new enfranchisement regime must start by identifying the enfranchisement rights which are available to leaseholders. The nature and extent of enfranchisement rights have a significant bearing on the subsequent questions of who should qualify for those rights, how they may be exercised, and what it should cost a leaseholder to exercise them.

As set out in Chapter 3, our proposed regime envisages the following enfranchisement rights:

- (1) the right to a lease extension;
- (2) the right to acquire the freehold, either individually or collectively with other leaseholders (the rights of “individual freehold acquisition” and “collective freehold acquisition” respectively); and
- (3) the right to participate in an existing collective freehold acquisition.

The right to a lease extension and the right of freehold acquisition already exist under the 1967 and 1993 Acts. We propose to maintain, streamline and enhance those existing enfranchisement rights. The right to participate is a new right – although the underlying concept is one which has been explored before.

This Part sets out our provisional views on what each of these rights should entail. Chapter 4 deals with the right to a lease extension, Chapter 5 considers the right to acquire the freehold individually, and Chapter 6 discusses the right of collective freehold acquisition and the new right to participate.

In the case of the existing rights to a lease extension or to acquire the freehold, we review the current law and consider its shortcomings. We make various provisional proposals to enhance the substance of these rights and ensure they operate more effectively and more fairly for leaseholders. In respect of the right to participate, we explain why we consider the introduction of this right to be desirable and how we envisage it might operate, as well as identifying a number of practical issues which might arise. In both cases, we ask consultees whether they agree with our provisional proposals.

Chapter 4: The right to a lease extension

INTRODUCTION

- 4.1 At present, leaseholders of both houses and flats (who satisfy certain additional criteria) are entitled to be granted a new, extended lease of their house or flat – what we call a “lease extension”. The right to a lease extension complements the rights of individual or collective freehold acquisition discussed in the next two chapters of this Consultation Paper. Although it may be considered a “lesser” right (in that it continues the relationship of landlord and leaseholder), 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.
- 4.2 In this chapter, we consider the nature and substance of the right to a lease extension. We summarise the current law and set out various criticisms which have been made of the present position. We then outline our proposals for reform.

THE CURRENT LAW

- 4.3 The right to a lease extension was first granted to qualifying long leaseholders of houses by the 1967 Act. A parallel right was granted to certain long leaseholders of flats by the 1993 Act. However, the substance of these rights is very different. In this section, we consider how each of these rights operates currently.

The right to a lease extension under the 1967 Act

Key features of the lease extension

- 4.4 Under the 1967 Act, qualifying long leaseholders of houses are entitled 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.¹¹¹
- 4.5 No premium is payable by the leaseholder for the grant of the lease extension.¹¹² Once the end date of the original lease has passed, however, the leaseholder must pay a modern ground rent. A modern ground rent is the full letting value of the site, disregarding the value of any buildings on the site, for the uses to which the house and premises have been put during the course of the original lease.¹¹³ The amount payable is to be determined as at the end date of the original lease, with the possibility of review after twenty-five years, at the landlord’s option.¹¹⁴ In very many cases, this valuation results in the leaseholder being liable for a significant annual ground rent. In effect, what

¹¹¹ 1967 Act, ss 1(1) and 14(1).

¹¹² Leaseholders are, however, required to meet certain of the landlord’s reasonable costs of the process: 1967 Act, s 14(2); see further Ch 13.

¹¹³ 1967 Act, s 15(2)(a).

¹¹⁴ 1967 Act, s 15(2)(b).

is “saved” by not paying a premium is instead paid over the duration of the lease extension through the modern ground rent.

Premises included

4.6 The lease extension will be a lease of “the house and premises”.¹¹⁵ Premises will include “any garage, outhouse, garden, yard and appurtenances” which are let to the leaseholder with the house.¹¹⁶ However, this is subject to two provisos.

- (1) First, there may be premises which were let to the leaseholder with the house, but which are no longer held by the leaseholder – perhaps because those premises have been transferred to a third party.¹¹⁷ It may be inconvenient for a landlord to have to retain those premises separately from “the house and premises” as defined above. The landlord can therefore object to the further severance of those premises from the house and premises.¹¹⁸ If the leaseholder agrees, or if the court is satisfied that it would be unreasonable to require the landlord to retain them without the house and premises, those premises will be treated as included within the house and premises.¹¹⁹
- (2) Second, where it is inconvenient for a part of the house and premises which lies above or below other premises to be included in the house and premises, a landlord is permitted to object to the further severance from those other premises of that part of the house and premises.¹²⁰ In such cases, that part will be treated as not included within the house and premises if the leaseholder agrees, or if the landlord obtains court approval. The court will need to be 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.¹²¹

Limitations on the leaseholder’s rights

4.7 A leaseholder’s rights under a 1967 Act lease extension (and the rights of any sub-lessee or sub-tenant) are expressly limited in several ways.

¹¹⁵ 1967 Act, ss 1(1) and 14(1). The meaning of the term ‘house’ is set out in the 1967 Act at s 2(1) and is considered in Ch 7 at para 7.32.

¹¹⁶ 1967 Act, s 2(3).

¹¹⁷ For example, a leaseholder of a lease of a house and garden might have chosen to assign part of the garden to a third party.

¹¹⁸ The landlord must do so by giving notice of his objection within 2 months of the date of service of the leaseholder’s notice of claim: 1967 Act, s 2(4)(a),

¹¹⁹ 1967 Act, s 2(4). In the example given at fn 117 above, the lease extension would include the whole of the garden. The garden would then be held by the leaseholder subject to any lease of the part of the garden held by the third party.

¹²⁰ The landlord must do so by giving notice of his objection within 2 months of the date of service of the leaseholder’s notice of claim: 1967 Act, s 2(5)(a).

¹²¹ 1967 Act, s 2(5). This power applies both to a lease extension claim and to a claim to acquire the freehold of a house (see Ch 5 at para 5.5). We are not, however, aware of any practical circumstances in which it might be appropriate to make such an order in respect of a lease extension claim.

- (1) The leaseholder is not entitled to any further lease extension under the Act (although he or she may still avail of the right to acquire the freehold of the house and premises).¹²² Where a long sub-lease is granted out of the lease extension, the sub-lessee also has no right as against the leaseholder's landlord to a lease extension.¹²³
- (2) The leaseholder is not entitled to the benefit of various statutory provisions affording potential security of tenure after the expiry of the lease, nor of the provisions of the Rent Act 1977.¹²⁴ However, he or she is entitled to the security of tenure offered by schedule 10 to the Local Government and Housing Act 1989 – namely an assured tenancy.¹²⁵ Similar provisions apply to sub-lessees and sub-tenants after the end date of the lease extension.¹²⁶
- (3) Perhaps most importantly, the landlord retains a right to resume possession of the house and premises, at any time in the last twelve months of the original lease term or thereafter, for the purposes of redevelopment.¹²⁷

Other terms of the lease extension

- 4.8 If the leaseholder's current lease is held subject to a mortgage, his or her lease extension will also be subject to the same mortgage.¹²⁸ In most instances, the lease extension will also be binding on the landlord's mortgagee.¹²⁹
- 4.9 As to the other terms of the lease extension, the parties are free to agree these between themselves.¹³⁰
- 4.10 If no such agreement is reached, however, the lease extension will generally be granted on the same terms as the existing lease.¹³¹ There are a few exceptions to this principle.

¹²² 1967 Act, s 16(1)(b).

¹²³ 1967 Act, s 16(4).

¹²⁴ 1967 Act, ss 16(1)(c) and (1A). "Security of tenure" refers to the right of tenants to remain in occupation of rented property unless particular circumstances or particular processes are followed (usually involving the obtaining of a court order). The Rent Act 1977 provides certain residential tenants with security of tenure in their homes as well as the right to apply for a "fair rent" to be registered for the property (being the maximum rent the landlord can thereafter charge for the property).

¹²⁵ 1967 Act, s 16(1B).

¹²⁶ 1967 Act, s 16(1)(d).

¹²⁷ 1967 Act, s 17. Although a court order is required and compensation is payable to the leaseholder, the court must order possession if satisfied that for the purposes of redevelopment the landlord proposes to demolish or reconstruct the whole or a substantial part of the house and premises.

¹²⁸ Whether this occurs automatically, or requires the leaseholder to take other steps, is a matter of some disagreement. The procedural issues are considered in Ch 10 at paras 10.43 and 10.44.

¹²⁹ A lease extension will not be binding on a mortgagee where the existing lease was granted after 1 January 1968 and was not binding on the mortgagee: 1967 Act, s 14(4). However, the landlord is required to take all necessary steps to ensure that the lease extension is valid: 1967 Act, s 14(7).

¹³⁰ 1967 Act, s 15(7).

¹³¹ 1967 Act, s 15(1).

- (1) The Act identifies several terms which must be included in the lease extension.¹³²
 - (a) Where the lease extension requires the landlord to provide services, or to repair, maintain or insure the property, provision must be made for the leaseholder to pay the landlord for those matters as from the end date of the original lease term.¹³³
 - (b) The landlord's right to resume possession for redevelopment purposes under section 17 of the Act must be expressly reserved.¹³⁴
 - (c) The lease extension must state that no long sub-lease created out of it shall confer on the sub-lessee any right to a lease extension as against the leaseholder's landlord.¹³⁵
- (2) The Act provides that certain terms found in the existing lease must be excluded from the lease extension. For example, any term providing for renewal of the lease, granting an option to purchase, or providing for the early termination of the lease (other than by forfeiture for breach of covenant) must be excluded.¹³⁶
- (3) Appropriate modifications should be made to take account of:
 - (a) the omission from the lease extension of property included in the existing lease;
 - (b) alterations made to the property since the grant of the existing lease; and
 - (c) where the existing lease derives from two or more separate leases, their combined effect and the differences (if any) in their terms.¹³⁷
- (4) Either party may also require any term of the existing lease to be excluded from the lease extension, or modified, where it would be unreasonable in the circumstances to include it unchanged in view of changes occurring since the commencement of the existing lease which affect the suitability of the terms of that lease.¹³⁸

Powers of the court

4.11 A landlord and leaseholder are permitted to agree to a lease extension on terms other than those provided for in the Act – for example, as to rent, or the term of the lease

¹³² It should be noted that the drafting of s 15 of the 1967 Act is such that the second and third of these requirements must be satisfied even in cases where the terms of the lease are agreed between the parties.

¹³³ 1967 Act, s 15(3).

¹³⁴ 1967 Act, s 15(8).

¹³⁵ 1967 Act, s 15(8).

¹³⁶ 1967 Act, s 15(5).

¹³⁷ 1967 Act, s 15(1)(a), (b) and (c).

¹³⁸ 1967 Act, s 15(7).

extension.¹³⁹ The county court has power to approve the grant of such a lease extension in satisfaction of the leaseholder's rights under the Act.¹⁴⁰ With court approval, it is even possible to grant a lease extension which excludes the leaseholder's right to acquire thereafter the freehold of the house and premises.¹⁴¹ However, any such lease extension will still be subject to the limitations set out at paragraph 4.7 above, unless it expressly provides otherwise.¹⁴² The court also has power to set aside or vary any agreement to acquire a lease extension (the terms of which have not been determined by the Tribunal or which has not received prior approval from the court) if it considers that the leaseholder is not adequately recompensed under the agreement for his rights under the 1967 Act.¹⁴³

The right to a lease extension under the 1993 Act

Key features of the lease extension

4.12 The right of leaseholders of flats to a lease extension under the 1993 Act operates in the same way as the right under the 1967 Act: the leaseholder is entitled to a new, longer lease, in substitution for their existing lease.¹⁴⁴ But the substance of this right differs significantly from that under the 1967 Act in several key respects.

- (1) First, the lease extension will be for a term expiring 90 years after the end date of the existing lease – almost twice as long as the extension available under the 1967 Act.¹⁴⁵
- (2) Second, the lease extension will be at a peppercorn rent from the date it is granted – that is, throughout the remainder of the term of the existing lease and for 90 years thereafter.¹⁴⁶ This provision confers an immediate benefit on the many leaseholders who are required to pay a more-than-nominal ground rent under their existing lease.
- (3) Third, the leaseholder must pay a premium for the lease extension, calculated in accordance with a statutory formula.¹⁴⁷
- (4) Fourth, the leaseholder is entitled to unlimited further lease extensions.¹⁴⁸

¹³⁹ 1967 Act, s 23(2)(a).

¹⁴⁰ 1967 Act, s 23(4).

¹⁴¹ 1967 Act, s 23(4) and (5)(a).

¹⁴² 1967 Act, s 23(5)(b).

¹⁴³ 1967 Act, s 23(3). This power, however, must be exercised before the agreement is completed by the grant of the lease extension.

¹⁴⁴ 1993 Act, ss 39(1) and 56(1).

¹⁴⁵ 1993 Act, s 56(1).

¹⁴⁶ 1993 Act, s 56(1).

¹⁴⁷ 1993 Act, s 56(1)(b). As under the 1967 Act, leaseholders must also meet certain of the landlord's reasonable costs of the process: 1993 Act, s 60(1). For discussion of the valuation methodology used to arrive at the premium payable, see Ch 14 below. For a discussion of costs, see Ch 13.

¹⁴⁸ 1993 Act, s 59(1).

- 4.13 These important distinctions aside, the statutory provisions of the 1993 Act governing the premises included in a lease extension, the leaseholder's rights under such a lease and the terms of that lease largely resemble the equivalent provisions under the 1967 Act.

Premises included

- 4.14 Although the Act provides that the leaseholder is entitled to an lease extension of "the flat",¹⁴⁹ this term bears an extended meaning in this context. The lease extension 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".¹⁵⁰

Limitations on the leaseholder's rights

- 4.15 As with a lease extension under the 1967 Act, there are statutory limitations on a leaseholder's rights (and those of their sub-lessees) under a lease extension.
- (1) A sub-lessee under a long sub-lease shall have no right as against the leaseholder's landlord to a lease extension.¹⁵¹
 - (2) It is provided, rather opaquely, that "none of the statutory provisions relating to security of tenure for tenants shall apply to the lease".¹⁵² Sub-lessees and sub-tenants are also excluded from similar statutory protection which might otherwise be applicable.¹⁵³
 - (3) The landlord has a right, during the last 12 months of the original lease or the last five years of the lease extension, to obtain possession of the flat for redevelopment purposes.¹⁵⁴

¹⁴⁹ 1993 Act, ss 39(1) and 56(1). 'Flat' is defined as a separate set of premises (whether or not on the same floor) which forms part of a building, is constructed or adapted for use for the purpose of a dwelling, and where either the whole or a material part of which lies above or below some other part of the building: 1993 Act, s 101(1).

¹⁵⁰ 1993 Act, s 62(2).

¹⁵¹ 1993 Act, s 59(3).

¹⁵² 1993 Act, s 59(2)(a). The authors of *Hague* note, at para 32-21, that it has been suggested the meaning of this provision is not entirely clear. The authors, however, suggest that it is intentionally widely drafted and "plainly covers all those statutes which could conceivably grant security of tenure to a tenant under a lease extension granted pursuant to the 1993 Act." This would include the security of tenure provided by sch 10 to the Local Government and Housing Act 1989, which is available to the owners of leases extended under the 1967 Act: see above at para 4.7(2).

¹⁵³ 1993 Act, s 59(2)(b) and (c).

¹⁵⁴ 1993 Act, s 61. This right is available, with the approval of the court and the payment of compensation to the leaseholder, where the landlord intends to demolish, reconstruct, or carry out substantial works of construction on the whole or a substantial part of any premises in which the flat is contained, and could not reasonably do so without obtaining possession of the flat.

Other terms of the lease extension

- 4.16 If the leaseholder's current lease is held subject to a mortgage, his or her lease extension will automatically be subject to the same mortgage.¹⁵⁵ In most instances, the lease extension will also be binding on the landlord's mortgagee.¹⁵⁶ The lease extension is deemed to have been authorised by the mortgagee.¹⁵⁷
- 4.17 As with lease extensions under the 1967 Act, the parties to a 1993 Act lease extension are free to agree the other terms of the lease extension between them.¹⁵⁸
- 4.18 In the absence of agreement, however, the starting point is that the terms of the lease extension will be the same as those under the existing lease.¹⁵⁹ Again, that principle is subject to a number of provisos (which largely replicate the approach under the 1967 Act).
- (1) The following terms must be included in the lease extension:

- (a) where the lease extension requires the landlord to provide services, or to repair, maintain or insure the property, provision for the leaseholder to pay the landlord for those matters as from the end date of the original lease term;¹⁶⁰
- (b) a term expressly reserving the landlord's right to obtain possession of the property for redevelopment in the last 12 months of the existing term and last 5 years of the extended term;¹⁶¹
- (c) a statement that no long sub-lease granted out of the lease extension shall confer on the sub-lessee any right to a lease extension under the Act;¹⁶² and
- (d) a statement that the lease extension is a lease granted under section 56 of the 1993 Act.¹⁶³

¹⁵⁵ 1993 Act, s 58(4). The issues described in Ch 10 at paras 10.43 and 10.44 in respect of lease extensions under the 1967 Act do not, therefore, arise.

¹⁵⁶ 1993 Act, s 58(1). A lease extension will not be binding on a mortgagee where the existing lease was granted after 1 November 1993 and was not binding on the mortgagee: 1993 Act, s 58(2). This does not affect the landlord's power to grant a lease extension; it may, however, be registered subject to a protective entry in the Register.

¹⁵⁷ The terms of any restriction on the registered title requiring the mortgagee's consent will be therefore be satisfied: Land Registry, *Practice Guide 27*, para 9.3.

¹⁵⁸ 1993 Act, s 57(6).

¹⁵⁹ 1993 Act, s 57(1).

¹⁶⁰ 1993 Act, s 57(2).

¹⁶¹ 1993 Act, s 57(7)(b).

¹⁶² 1993 Act, s 57(7)(a).

¹⁶³ 1993 Act, s 57(11).

- (2) Terms providing for the renewal of the lease, granting an option to purchase or right of pre-emption, or providing for the early termination of the lease (other than by forfeiture for breach of covenant) may not be included in the lease extension.¹⁶⁴
- (3) Suitable modifications must be made to take account of:
 - (a) the omission from the lease extension of property included in the existing lease but not comprised in the flat;
 - (b) alterations made to the property since the grant of the existing lease; and
 - (c) where the existing lease derives from two or more separate leases, their combined effect and the differences (if any) in their terms.¹⁶⁵
- (4) Otherwise, either the landlord or the leaseholder can require that a term of the existing lease be excluded or modified if:
 - (a) it is necessary to do so in order to remedy a defect in the lease;¹⁶⁶ or
 - (b) if it would be unreasonable in the circumstances to include it unchanged in view of changes¹⁶⁷ occurring since the commencement of the existing lease which affect the suitability of the terms of that lease.¹⁶⁸

4.19 As such, while both Acts allow the parties to vary the other terms of a lease extension by agreement, the 1993 Act extended the grounds on which a party, who has failed to persuade the other party to agree, may seek to argue that the lease extension should depart from the terms of the existing lease.

Powers of the court

4.20 Finally, as under the 1967 Act, a landlord and leaseholder may agree to a lease extension on terms other than those provided for in the Act.¹⁶⁹ Again, the county court has power to approve the grant of such a lease extension in satisfaction of the leaseholder's rights under the Act, including one which excludes the leaseholder's right to participate in a collective enfranchisement claim or to acquire a further lease

¹⁶⁴ 1993 Act, s 57(4).

¹⁶⁵ 1993 Act, s 57(1)(a), (b) and (c).

¹⁶⁶ 1993 Act, s 57(6)(a). This power has, however, been construed restrictively. It does not permit a new term to be added, and the term 'defect' has been held to be a shortcoming, fault, flaw or imperfection as viewed objectively by both parties. The term 'necessary' does not mean merely 'convenient'. See *Hague*, at para 32-10.

¹⁶⁷ The authors of *Hague* cite *Waitt v Morris* [1994] 2 EGLR 224, at 226D, to support a construction of "changes" that includes instances such as changes to the property used by the leaseholder, as well as changes to conveyancing practice: *Hague*, para 32-10. The passing of relevant legislation may also constitute a change within this meaning: *Huff v Trustees of the Sloane Stanley Estate (No2)* (1997) Land Valuation Tribunal (unreported).

¹⁶⁸ 1993 Act, s 57(6)(b).

¹⁶⁹ 1993 Act, s 93(2)(a).

extension under the Act.¹⁷⁰ The court may also set aside or vary any agreement to acquire a lease extension which has not yet been completed by the grant of the lease, and the terms of which were not determined by the Tribunal. This power is available if the court considers that the leaseholder is not adequately recompensed under the agreement for his right to a lease extension.¹⁷¹

CRITICISMS OF THE CURRENT LAW

Key features of the lease extension under the 1967 Act

- 4.21 Various criticisms have been made of the lease extension available to leaseholders of houses under the 1967 Act. It has been said that it compares unfavourably to the equivalent right available under the 1993 Act.
- 4.22 First, there has been a gradual increase over time in the length of lease that is perceived to be necessary to create a sufficiently long leasehold interest for leaseholders to have security in their homes. At the time of the 1967 Act, a 50-year lease extension was considered sufficient, but by the time of the 1993 Act, a 90-year extension was considered necessary. Nowadays, there is a general consensus that the 50-year lease extension available under the 1967 Act does not adequately address the problem, inherent to leasehold tenure, that the leaseholder owns a wasting asset.
- 4.23 This problem is compounded by the fact that the right to a lease extension under the 1967 Act can only be exercised once, and by the landlord's ability to determine the lease extension for redevelopment purposes at any time during the extension period.¹⁷² In light of this limited security of tenure, a lease extended under the 1967 Act is unlikely to be attractive security for a mortgagee.¹⁷³
- 4.24 Further criticism has been directed at the modern ground rent payable by leaseholders under a lease extension, once the end date of the original lease has passed. As discussed above, this can be a substantial sum. We have been told that many leaseholders of houses did not fully appreciate the significance of the modern ground rent provisions of the 1967 Act at the time that they purchased or extended their lease.

Key features of the lease extension under the 1993 Act

- 4.25 The lease extension available to leaseholders of flats under the 1993 Act has not escaped criticism either. As the length of lease that is perceived to be necessary to create a sufficiently long leasehold interest has increased over time, it may now be the case that even a 90-year lease extension does not provide leaseholders with sufficient security.
- 4.26 Further, it has been said that the right is too prescriptive. The 1993 Act right both increases the term of the lease, and removes the leaseholder's obligation to pay ground rent (for the remaining term of the existing lease as well as for the duration of the lease extension). It has been suggested to us that some leaseholders are concerned

¹⁷⁰ 1993 Act, s 93(4).

¹⁷¹ 1993 Act, s 93(3).

¹⁷² Discussed in more detail at para 4.7(3) above.

¹⁷³ *Hague*, para 7-02.

principally with their diminishing lease term and would be content to pay a reasonable ground rent during their lease – especially as this will reduce the premium payable upfront. Others wish to be relieved of their obligation to pay a ground rent, but are content with the length of their unexpired term. The 1993 Act does not facilitate choice. Instead, leaseholders are required simultaneously to extend their lease (and therefore pay the landlord for the deferral of the reversion) and to extinguish their ground rent (and therefore pay the landlord the value of the remainder of the original term).¹⁷⁴ It has been suggested that leaseholders should have the flexibility to elect to pursue one or other aspect of a lease extension claim, rather than be required to pursue – and pay for – both.

Extent of premises and rights over other land

- 4.27 Some stakeholders have criticised the provisions within both the 1967 and 1993 Acts that seek to identify the extent of the premises, and the rights over other land, that are to be included in any lease extension.
- 4.28 First, the distinctions drawn between a “house” and “premises” in the 1967 Act, and between the flat as defined in section 101(1), and the extended definition of a flat set out in section 62(2) of the 1993 Act, are difficult for most leaseholders to understand and apply without the benefit of legal advice. As a result, leaseholders are more likely to need to incur the costs of obtaining legal advice before commencing an enfranchisement claim than would otherwise be the case.¹⁷⁵
- 4.29 In addition, the way in which courts have interpreted some of those provisions has made it more difficult for parties to predict whether a piece of land should or should not be included within a lease extension.¹⁷⁶ For example, the courts have held that for land to be considered to be an appurtenance under the 1967 Act (and hence included within the lease extension) that land must fall within the curtilage of the house. Whether it falls within the curtilage of the house depends on whether the house and the land constitute an “integral whole”.¹⁷⁷ The answer to that question is an issue of fact in each case. As a result, disputes between the parties as to whether any particular piece of land should be included within a lease extension continue to arise.
- 4.30 Secondly, the effect of those provisions, as interpreted by the courts, can leave a leaseholder with a lease extension that does not include all of the elements that he or she had enjoyed under his or her existing lease.¹⁷⁸ For example, a leaseholder who had

¹⁷⁴ See Ch 14 where we explain the valuation of the “term” and the “reversion”.

¹⁷⁵ This complexity causes further problems in relation to the validity of notices of claim given by leaseholders. Those issues, and our proposals for reform, are considered in Chs 10 and 11.

¹⁷⁶ For example, in *Methuen-Campbell v Walters* [1979] 1 QB 525, CA and *Cadogan v McGirk* [1996] 4 All ER 643, CA.

¹⁷⁷ See *Methuen-Campbell v Walters* [1979] 1 QB 525, CA at 543 to 544, per Buckley LJ. The term curtilage is defined within the Glossary. We considered the use of the term in another statutory context in Law Commission in Planning Law in Wales (2017) Law Commission Consultation Paper No 233 at paras 18.128 to 18.145. The Paper provisionally proposed the adoption of a statutory definition of the term in respect of planning law in Wales. This provisional proposal will be considered further in the forthcoming final report.

¹⁷⁸ It was noted by Goff LJ in *Methuen-Campbell v Walters* [1979] 1 QB 525, at 538, that the 1967 Act does not necessarily give a leaseholder everything contained within his or her lease.

previously leased a house together with other land may find that part of that land is not considered to fall within the curtilage of the house, and therefore falls outside the terms of the 1967 Act.

- 4.31 Many stakeholders find it difficult to understand why the legislation adopts this restrictive approach rather than simply allowing leaseholders to obtain a lease extension of all the premises included within their existing lease. Many also believe that any benefit that might be gained by landlords from a more restrictive approach is outweighed by the complexity and additional costs that result.
- 4.32 On the other hand, some stakeholders have criticised the existence of the strict two-month time limit within which landlords must give leaseholders written notice of the landlord's wish to include or exclude premises from the land to be contained within a lease extension.¹⁷⁹

Other terms of acquisition

- 4.33 Many stakeholders believe that too many landlords use a lease extension claim as an opportunity either to try to introduce an entirely new, modernised lease, or to depart from the terms of the existing lease in a manner that unduly favours the landlord. For example, stakeholders have referred to cases in which landlords have sought to introduce obligations on leaseholders to pay administration fees to their landlord where no such fees had previously existed.
- 4.34 Such modifications go far beyond what is, in the absence of agreement between the parties, permitted under the 1967 and 1993 Acts (as set out at paragraphs 4.10 and 4.18 above). They depend, in large part, upon one party taking advantage of an imbalance of bargaining power that can often exist between leaseholders and landlords. New terms can be proposed by a landlord in the hope that the leaseholders will agree to their inclusion in order to avoid incurring legal costs, or to secure the lease extension quickly, or at an affordable or acceptable price.
- 4.35 Other stakeholders, however, have argued that the position of leaseholders dealing with variations proposed by their landlord is made more difficult by what they consider to be the unclear and imprecise terms of the existing powers of the Tribunal to depart from the existing terms where there is no agreement. They have also raised concerns about what they consider to be the Tribunal's sometimes inconsistent approach to those powers.
- 4.36 Those problems, it is argued, make it more difficult for the parties to anticipate how the Tribunal might determine any dispute between them. In turn, this uncertainty increases the ability of the better resourced party to seek the other party's agreement to variations which it believes are at, or beyond, the margins of the existing powers, knowing that the other party may lack the resources to contest that variation if the outcome is uncertain.
- 4.37 On the other hand, some leaseholders believe that a lease extension claim should be used as an opportunity to remove onerous terms from existing leases or to lessen the commercial impact of other terms. For example, leaseholders may wish to remove any absolute prohibition on subletting the premises, or to remove or reduce any fees that

¹⁷⁹ 1967 Act, s 2(4) and (5) (as discussed at para 4.6 above).

are payable to the landlord for granting his or her consent to such a subletting, or to alterations. Some leaseholders argue that this use of the statutory lease extension procedure to seek to modify such terms is necessary because of the absence of any other statutory control of onerous terms, and the difficulty and cost of using the current statutory powers to vary existing leases in order to remove those terms.¹⁸⁰

OUR PROPOSED NEW REGIME

One improved right

- 4.38 We see no reason for a leaseholder of a flat to enjoy a more favourable right to a lease extension than a leaseholder of a house. We therefore propose one uniform right to unlimited lease extensions, available on the same terms to all leaseholders.¹⁸¹ We suggest that leaseholders should be entitled, as often as they so wish, to obtain a new, extended lease at a nominal ground rent, at a premium to be calculated under a revised valuation methodology. By a “nominal” ground rent, we have in mind in particular a rent of a peppercorn, as is presently the case with lease extensions under the 1993 Act.
- 4.39 In the light of our concern identified above that even a 90-year lease extension may no longer provide leaseholders with sufficient security, we are considering whether the length of a lease extension should be increased. We have heard suggestions that lease extensions should be for 125 years, 250 years or even 999 years, with appropriate provision for early termination to allow redevelopment. As set out above, a lease extended under either the 1967 or 1993 Act can be terminated for redevelopment purposes, with compensation being paid to the leaseholder. Under a 1967 Act lease extension, the lease can be terminated at any point during the 50-year extended term (a “rolling break clause”). Under the 1993 Act, the lease can be terminated in the 12 months before the expiry of the original lease, and in the last 5 years of the extended term. There is a balance to be struck between allowing redevelopment to take place in appropriate cases (and not significantly delaying redevelopment), and giving leaseholders certainty as to when their lease might be terminated. Our provisional view is that a rolling break clause creates too much uncertainty for leaseholders, but equally that increasing the term of the lease extension should not also prevent redevelopment during that extended term. We seek the views of consultees as to the appropriate length of a lease extension and the points at which the landlord should be entitled to recover the property for the purposes of redevelopment.

¹⁸⁰ These powers are contained in Pt IV of the Landlord and Tenant Act 1987.

¹⁸¹ This approach is also in keeping with our proposal, discussed in full in Ch 8 below, to replace the terminology of “house” and “flat” (which has been problematic) with the new concept of a “residential unit” which can be applied to any leasehold premises.

Consultation Question 2.

- 4.40 We provisionally propose 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 nominal ground rent. Do consultees agree?
- 4.41 We invite the views of consultees as to:
- (1) the appropriate length of such a lease extension; and
 - (2) the points at which the landlord should be entitled to terminate the lease (paying appropriate compensation to the leaseholder) for the purposes of redevelopment.

Choice to extend, to eliminate ground rent, or both

- 4.42 We see the attraction of the suggestion that leaseholders exercising the right to a lease extension should be able to choose to extend their lease, extinguish their ground rent, or both. This choice could be exercised to reduce the premium payable on a lease extension, since leaseholders would have the option of paying only for the deferral of the reversion, or only the value of the remainder of the original term.
- 4.43 However, whilst this might reduce the premium payable at the time of the claim, it could be seen as merely deferring a problem to the future. A second enfranchisement claim – to realise the full benefits of both an extension and a redemption of the ground rent – may be necessary at a later stage (for example, when the lease is sold).
- 4.44 Moreover, giving leaseholders an option to choose a tailored lease extension would inevitably make the statutory right more complicated. There might also be concerns, given the general imbalance of bargaining power, of landlords influencing leaseholders' decisions. Additionally, allowing different types of lease extension could be criticised for introducing inconsistencies and complexities similar to those which arise currently from the existence of different lease extension rights for houses and for flats.
- 4.45 For reasons of consistency and simplicity, therefore, our provisional view is that the right to a lease extension should be a uniform right to a fixed additional term at a nominal ground rent. However, we welcome consultees' views as to whether there is a demand for a more nuanced – and necessarily more complicated – approach.

Consultation Question 3.

4.46 We invite the views of consultees as to whether the right to a lease extension should in all cases be a right to an extended term at a nominal ground rent, or whether leaseholders should also have the choice:

- (1) only to extend the lease (without changing the ground rent); or
- (2) only to extinguish the ground rent (without extending the lease).

Extent of premises and rights over other land

4.47 We think that, in contrast to the current position,¹⁸² 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. If a landlord has let a residential unit to a leaseholder on a long lease – or on two or more long leases that are to be treated as a single lease – all of the land that was included and continues to be held by the leaseholder should be included within any lease extension. The character of the land included under the existing lease should not matter. Nor should it matter, as it does at present,¹⁸³ whether the land included under the existing lease falls within the curtilage of an individual residential unit (or of the building in which that unit is contained).

4.48 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.

4.49 We think that this approach will make it easier for leaseholders to understand what they are entitled to claim, and avoid the costs of obtaining legal advice on this point. We also believe that it will reduce the likelihood of disputes between the parties as to the extent of land, or other rights, to be included within a lease extension of a residential unit.

4.50 We do, however, believe that in a few cases landlords may wish to have included within a lease extension a part of the premises originally granted to the leaseholders, but subsequently assigned to another.¹⁸⁴ We are therefore provisionally of the view that a landlord should continue to be able to request that such a part be included in any lease extension. But while such a request should be set out in a landlord's Response Notice,¹⁸⁵ we do not believe that any statutory deadline or time limit should be set for raising such an issue.¹⁸⁶

¹⁸² See paras 4.6 and 4.14 above.

¹⁸³ See para 4.29 above.

¹⁸⁴ The current power under the 1967 Act to require the leaseholder to take a lease extension of such a part is described in para 4.6 above.

¹⁸⁵ See Ch 11 at para 11.48.

¹⁸⁶ We note, of course, that once an application has been made to the Tribunal (see Ch 11) a party may need to obtain the permission of the Tribunal to raise any issue that had not previously been raised. We also

- 4.51 As explained above, under the 1967 Act a landlord can request the exclusion of part of the “house and premises” on the basis that it lies above or below other premises in which he or she holds an interest.¹⁸⁷ While that might be appropriate when the freehold of a house is being acquired (on which, see Chapter 5 at paragraph 5.5 below), we are doubtful that such a power is necessary where the leaseholder is seeking a lease extension. We therefore propose that no such power should be included in any new regime.

Consultation Question 4.

4.52 We provisionally propose that:

- (1) a leaseholder claiming a lease extension should be entitled to a lease extension of the whole of the premises let under his or her existing lease, whether or not the entirety of the premises falls within the curtilage of the building;
- (2) landlords should be able to propose that other land be included within a lease extension, and that there should be no time limit within which that proposal can be made; and
- (3) there should be no power for landlords to argue that parts of the premises let under a leaseholder’s existing lease should be excluded from a lease extension.

Do consultees agree?

Other terms of lease extensions

- 4.53 We provisionally propose that where a leaseholder’s existing lease is held subject to a mortgage, his or her new lease should automatically be subject to the same mortgage. We also provisionally propose that a new lease will automatically bind the landlord’s mortgagee. As a result, the landlord’s mortgagee’s consent will not be required.

Consultation Question 5.

4.54 We provisionally propose that a lease extension should automatically:

- (1) be subject to any mortgage that is secured over the existing lease, and
- (2) bind the landlord’s mortgagee.

Do consultees agree?

acknowledge the Tribunal’s power to make an order that one party should pay the other party’s costs where costs have been wasted, or that other party has behaved unreasonably (see Ch 13).

¹⁸⁷ 1967 Act, s 2(5) (as discussed at para 4.6 above).

- 4.55 We set out the criticisms that have been made of the current rules governing the terms of a lease extension in paragraphs 4.33 to 4.37 above. In considering a proposed new regime for settling the other terms on which any lease extension can be granted, we have sought to strike an appropriate balance between (1) restricting the parties (in so far as possible) to the terms of the existing lease and (2) allowing the parties to negotiate freely the terms of the lease extension.
- 4.56 In doing so, we have noted that many stakeholders believe that, other than agreeing the price to be paid, agreeing the terms of a lease extension is the most difficult part of the current process. We have also focussed on the objective in our Terms of Reference, set out in Appendix 3, of making enfranchisement easier, quicker, and more cost effective, particularly for leaseholders. In broad terms, we believe that the best way of achieving that aim in this area is to limit the opportunity for the parties to spend time and/or money arguing about the terms of a lease extension whenever it is reasonable to do so.
- 4.57 In most cases where leaseholders are seeking a lease extension of their existing premises, it is possible to use the terms of the existing lease as a starting point for the terms of the lease extension.
- 4.58 A number of questions then follow from this starting point. Should the lease extension simply adopt the terms contained in the existing lease, or should it be possible to make changes to those terms? And if so, should this power be limited to cases in which the existing terms have or might prove to have been unworkable or unreasonable, or should it also extend to the adoption of terms that are merely more desirable or convenient? And if changes are to be made, should this be at the election of one party, or only when agreed by both parties or determined by a court or Tribunal? Alternatively, would it be possible or reasonable to prescribe one or more forms of modern lease that would have to be used, regardless of the existing terms?
- 4.59 There are also some cases in which the terms of the existing lease are unlikely to be an appropriate starting point, or at least would require significant modification. For example, where a leaseholder of premises is permitted to acquire a lease extension of one part of those premises only, a new set of legal relationships will need to be defined between the leaseholder of that part and the landlord of the whole (“an *Aggio*-style lease”).¹⁸⁸ This is likely to justify a more radical departure from existing terms, or even starting from scratch.
- 4.60 In addition, where the common parts of a building containing the leasehold premises are let to, and managed by, a third party, provision will need to be made to address the rights of the parties to the lease once the lease of those common parts expires.

¹⁸⁸ *Aggio*-style leases, and the circumstances in which they can arise, are considered in Ch 7 at para 7.127. The term derives from the name of the leaseholder in the case of *Howard de Walden Estates Limited v Aggio* [2009] 1 AC 39 in which the Court of Appeal held that such leases could be created under the 1993 Act.

Options

4.61 We have identified a number of alternative options that could be adopted. We consider separately cases in which an *Aggio*-style lease is created, and the cases identified in paragraph 4.60 above.

(1) Standardisation of leases through the enfranchisement process using model leases

4.62 It might be possible to adopt one or more standard or model leases that would be used for all or most cases.

4.63 This approach would have the advantage of reducing or even removing arguments about the other terms of lease extensions, thereby reducing the parties' costs significantly. However, we believe that.

- (1) It is likely to be difficult to capture those advantages in practice. In particular, it is difficult to envisage that a single, or even a small range, of model leases would be sufficient to reflect the wide range of circumstances of existing leaseholders. And the advantages of standardisation are likely to be gradually lost as the number of options increase, particularly if it were possible for the parties to disagree as to which model was best suited to their circumstances.
- (2) The standard lease available in any particular case is also likely to fail either to replicate the existing leases of the parties, or – where different – satisfy the interests of both parties.
- (3) The piecemeal adoption of standard or model leases within a building, or across an estate, would create a patchwork of (more recent) model leases and (original) bespoke leases. This would likely create inconsistencies between new and old leases, and increase the risk of disputes between leaseholders and landlords.¹⁸⁹
- (4) In addition, if newer standard leases proved better for one party than his or her existing lease, the price of leasehold interests held on new or old leases could be adversely affected.
- (5) While modernisation might be convenient or sensible, that objective is better achieved for the benefit of all parties within a building or an estate rather than just those who have sought to exercise their enfranchisement rights.

(2) Wider powers to change existing terms

4.64 We have considered whether it would be appropriate to adopt wider powers to depart from the terms of an existing lease when setting the terms of a lease extension than those set out in either the 1967 or 1993 Acts.¹⁹⁰

¹⁸⁹ While we acknowledge that the provisions of the 1967 and 1993 Acts currently allow the terms of lease extensions granted under those Acts to diverge from the terms on which the existing leases were granted, we believe that the degree of divergence that would be created by the adoption of standard or model leases would be greater than arises at present.

¹⁹⁰ See paras 4.10 and 4.18 above.

- 4.65 We acknowledge that many leaseholders who are unhappy with the terms of an existing lease view the statutory power to seek a lease extension as a potential opportunity to remove or modify those terms. These may be terms that are now otiose or obsolete, or terms which leaseholders consider to be unduly onerous.¹⁹¹ Some of those leaseholders have argued that the power to move away from the terms of an existing lease when drawing up the terms of a lease extension should be wide enough to allow them to argue for the removal of objectionable terms. We do not believe, however, that enfranchisement is the best means of addressing the issues that arise in respect of the fairness of terms contained within an existing lease.
- 4.66 In addition, we believe that a broad power to depart from the terms of an existing lease is unlikely to be in the interest of most leaseholders. While some leaseholders might benefit from such a power, in most cases that power is likely to be of greater benefit to landlords. Many landlords have greater financial resources than leaseholders. Some landlords are simply willing to spend more time and/or money arguing about a particular issue as it also affects other interests held by them. We believe that some landlords may try to take advantage of any broader power to depart from the terms of an existing lease to propose changes in the belief that their leaseholders will not have the financial resources to raise or sustain an objection. Alternatively, some landlords might propose changes in the other terms of the lease extension as the basis on which they would be prepared to reach agreement with the leaseholders on the price to be paid for that lease extension. We believe that increasing the parties' ability to argue about the terms of any lease extension is likely to increase the effect of any inequality of bargaining power.
- 4.67 In making that assessment, we have borne in mind that many leaseholders and others believe that the existing statutory powers (outside the enfranchisement regime) to vary the terms of existing leases otherwise than with the agreement of all parties are too narrowly drawn and ineffective.¹⁹² We do not believe, however, that the power to depart from the terms of existing leases when granting a lease extension should be increased simply because the powers to vary the terms of existing leases are considered to be inadequate. In principle, we believe that if changes need to be made to existing leases it is better for that to be achieved by using a distinct statutory power designed for that purpose. Whether existing statutory powers to vary existing leases are sufficient is outside the scope of our review.

(3) Retain existing powers to change terms

- 4.68 We have also considered retaining an equivalent of the existing powers to vary leases within the 1967 and 1993 Acts. As discussed at paragraphs 4.10 and 4.18 above, both the 1967 and 1993 Acts take the terms of the existing lease as the starting point but permit the parties a degree of flexibility to require suitable modifications to take account of changes since the grant of the existing lease. The 1993 Act also permits the parties to require terms to be modified or excluded in order to put right any defects within the existing lease.

¹⁹¹ See para 4.37 above.

¹⁹² These powers are set out in Pt IV of the Landlord and Tenant Act 1987.

4.69 We believe, however, that the lack of precision about the type of changes that can be required under these provisions may create too much room for argument as to whether a party may require any particular proposed change. As set out above,¹⁹³ uncertainty of this kind can lead to some leaseholders agreeing to their landlord's proposed changes in order to avoid incurring further costs, or in order to achieve a price that leaseholders are able to afford.

(4) Narrower powers to change existing terms

4.70 We have also considered narrowing the scope to permit the terms of any lease extension to differ from the terms of the existing lease.

4.71 For example, it might be possible to limit the power to depart from the existing terms where:

- (1) both parties agree; or
- (2) the proposed term is selected by one or other party from a prescribed list of model terms which are considered to reflect modern conveyancing or best practice.

This approach would have the benefit of allowing the parties the freedom to alter the terms of the lease extension where they both wished to do so, but also allow one party to argue for a change where it had been included in a prescribed list of changes.

4.72 This approach would significantly reduce the scope for arguments between the parties that might lead to further litigation costs being incurred. It would not, however, entirely remove the prospect of one party seeking to take advantage of any imbalance of power that might exist between the parties. A party would, in principle, be able to reject any proposed term that he or she did not wish to accept. But a party in a weaker bargaining position may feel under pressure to accept a proposed term as the price of obtaining some other benefit or concession offered by a party in a stronger bargaining position. Alternatively, the weaker party may be under pressure to agree with the proposed term to avoid the costs of an ongoing claim.

4.73 As a result, there might be merit in seeking to limit the power to depart from the terms of the existing lease to the second case only: where the proposed term is selected from a prescribed list of model clauses which are considered to reflect modern conveyancing or best practice.

4.74 Parties would be able to oppose the adoption of such clauses. But we anticipate that the prescribed list would contain relatively non-contentious clauses. Parties acting reasonably are unlikely to spend significant sums opposing the introduction of such terms. Indeed, in many cases, parties may consider such terms to be desirable. In addition, if the inclusion of a more modern term favoured one party rather than the other, this would – where appropriate – be reflected in the price to be paid for the lease extension.

¹⁹³ See paras 4.34 to 4.36 above.

4.75 In the circumstances, this alternative approach would minimise the prospect that one party would propose a change in the belief that the other party would not have the resources to resist that proposal.

(5) Removal of any power to depart from existing terms

4.76 We have also considered removing any right to vary the terms of an existing lease regardless of the nature of any proposed change, or whether the parties would agree to such a change.

4.77 This option would achieve the significant advantage of substantially reducing the costs incurred by parties in seeking to argue about the terms of a lease extension. It would allow the parties to understand the terms on which any lease extension can be offered at the outset. It would also simplify the process of executing the lease extension, allowing it to be granted by means of a short, standard form deed.

4.78 Adopting this approach would mean, however, that an existing opportunity to revise the terms of a lease, perhaps in the interests of both parties, would be lost. Yet, as noted above, it would remain possible for leaseholders to rely upon their existing powers to vary the terms of leases under Part IV of the Landlord and Tenant Act 1987.¹⁹⁴

Other terms of lease extensions: our provisional proposals

4.79 We note the cost advantages of requiring the parties either to adopt the terms of the existing lease when settling the terms of a lease extension (Option (5) above), or to grant a lease extension drawn in a modern standard form (Option (1) above). We do not believe, however, that either approach should be adopted. The latter is unlikely to be able to accommodate the varied circumstances of the parties and others sufficiently without losing much of the costs benefits of standardisation. And the former may leave the parties with terms that are no longer appropriate to their present circumstances.

4.80 We believe that the starting point for the terms on which a lease extension is granted should continue to be the terms of the existing lease. While those terms may not be the ones that the parties would freely negotiate were they starting with a blank sheet of paper, they are the terms which were agreed, or at least accepted, by both parties in the past. And as noted above,¹⁹⁵ we do not believe that a lease extension claim is the best means of dealing with terms within an existing lease that leaseholders consider to be onerous.

4.81 Adopting this starting point might, of itself, lead to lower costs being incurred than if no starting point was set. But we also believe that there should be a limit on the ability of either party to argue that those terms ought to be changed. If there were no such restriction leaseholders would be left exposed to higher costs and/or the impact of any inequality of bargaining power that exists between them and their landlord.

4.82 In setting a limit on the changes that can be argued for by any party, we have considered whether it would be appropriate simply to allow parties to depart from the terms of the

¹⁹⁴ See para 4.67 above.

¹⁹⁵ See para 4.65 above.

existing lease where they agree to do so. On the face of it there might be nothing objectionable about such changes being made. However, as noted above,¹⁹⁶ we believe it will be difficult to permit such changes without also exposing some leaseholders to the additional costs of taking advice either in respect of, or responding to, their landlord's requested changes. In addition, some leaseholders may be placed under pressure to agree if their landlord seeks to link a proposed change to the landlord's position on the price that he or she will accept.

- 4.83 We acknowledge that some of the options that we have set out elsewhere in respect of the simplification of the valuation process would be likely to reduce the chance of landlords being able to apply such pressure to leaseholders. But in so far as that chance remains, we believe that parties should not be able to depart from any of the terms of an existing lease simply on the basis that they had agreed to do so.¹⁹⁷
- 4.84 We have also considered, as an alternative approach, whether it would be possible to limit the type of changes that could be made by agreement between the parties. This could reduce the scope for landlords to try to take advantage of their leaseholders by proposing one-sided alterations to the existing terms. We believe, however, that if types of changes that do not create a risk of unfairness between the parties can be identified, it would be better to prescribe such terms rather than leave the parties to devise their own terms. Choosing between prescribed options is also likely to be cheaper than drafting afresh.
- 4.85 As such, we provisionally propose the adoption of a list of prescribed terms that either party can propose be adopted (whether in substitution for, or in addition to, existing clauses). We believe that the terms appearing on that list should be non-contentious, and reflect, among other things, the best practices expected by mortgage lenders and others. As such, we anticipate that it would not be appropriate to allow the other party to oppose the inclusion of such a term.¹⁹⁸ We believe that one benefit of this proposal would be that landlords would not be able to use a lease extension claim as an opportunity to try to introduce terms that leaseholders would consider onerous. This would, of itself, be a significant benefit to leaseholders.

Figure 3: Examples of prescribed terms

We have identified the following terms which we believe might be included within a prescribed list that could be adopted by the parties to a lease extension.

1. A covenant by the landlord to enforce the covenants within the leases to adjoining flats upon the leaseholder providing him or her with an indemnity in respect of his or her costs of doing so.

¹⁹⁶ See para 4.72 above.

¹⁹⁷ We consider, in paras 4.94 to 4.96 below, the likely impact on our proposals of any power for parties to enter into a lease extension outside the terms of any statutory scheme. We acknowledge that reducing the scope of the parties' liberty to depart from the terms of the existing lease may encourage parties to enter into such voluntary arrangements.

¹⁹⁸ We acknowledge that if the prescribed list was to include terms about which reasonable disputes between the parties might arise, the party objecting to a term's inclusion would have to be entitled to have that dispute determined by the Tribunal in the absence of agreement.

- | |
|---|
| <ol style="list-style-type: none"> 2. A covenant by the landlord to enforce the repairing obligations imposed on a third-party management company by the lease. 3. A covenant by the landlord to carry out the management company's repairing obligation if it fails to do so. 4. A covenant in respect of insurance that complies with the requirements of the Council of Mortgage Lenders. |
|---|

4.86 We also provisionally propose that where such clauses are to be adopted, there should be a further power to make such other changes to the existing terms as are necessary as a result of the adoption of that new term. This should allow for the removal of any inconsistencies between the proposed term and any existing terms.

4.87 Finally, we provisionally propose that the lease extension should not take the form of a full lease drafted to reflect any changes from the existing lease. The costs to both parties of producing a full lease are likely to be out of all proportion to any benefit that might be gained in doing so. Instead, we propose that the document should take the form of a standard template lease that:

- (1) is for an extended term at a peppercorn rent;
- (2) incorporates the terms of the existing lease by reference; and
- (3) sets out any variations to those existing terms within a schedule.¹⁹⁹

We believe that this approach should avoid disputes between the parties as to the form of any lease extension. It would also assist the parties to understand any differences between the terms of the lease extension and the existing lease, and aid any checks that are made by HM Land Registry and any other interested parties²⁰⁰ prior to or following registration.

Aggio-style leases and other problems

4.88 These proposals would not apply where the leaseholder is entitled to a lease extension of only part of the premises.²⁰¹ In such cases, the existing lease is likely to be only a partial guide to rights and obligations that will need to be in place for the lease extension.

4.89 We do, however, seek the views of consultees as to whether it would be appropriate, in such cases, to adopt a standard or model lease, whether as the form of lease that must be used, or as the starting point from which other changes might be ordered.

¹⁹⁹ We anticipate that the template lease would be prescribed by secondary legislation following appropriate consultation.

²⁰⁰ Such as the leaseholder's mortgage lender.

²⁰¹ The entitlement of the leaseholder of a house to claim a lease extension of one part of those premises only under the 1993 Act was established by the Court of Appeal in *Howard de Walden Estates Limited v Aggio* [2009] 1 AC 39. Such leases are referred to at para 4.59 above, and are considered in Ch 7 at para 7.127.

- 4.90 In addition, as set out at paragraph 4.60 above, we acknowledge that in cases where the common parts of a building are owned and managed by a third party, additional terms would have to be included within a lease extension in order to extend the leaseholder's rights beyond the expiry of the existing term of the lease of those common parts.

Consultation Question 6.

- 4.91 We provisionally propose that (except in the case of *Aggio*-style leases and cases where the common parts of a building are owned and managed by a third party) 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 non-contentious modernisations. Do consultees agree?
- 4.92 We invite the views of consultees as to the terms that should be included within such a prescribed list.
- 4.93 Do consultees consider that it would be appropriate to adopt a standard or model lease for *Aggio*-style leases? Alternatively, would it be appropriate to use a standard or model lease as a starting point in such cases?

LEASE EXTENSIONS OUTSIDE THE STATUTORY SCHEME

- 4.94 We have set out in this chapter our proposals as to the terms on which any lease extension could be granted under our proposed statutory enfranchisement regime. We believe that those proposals would, in most instances, reduce the likelihood that the parties will spend time and money disputing those terms. We have also sought, in most cases, to restrict the ability of the parties to include terms simply on the basis that they had both agreed to do so.
- 4.95 We acknowledge, however, that any such statutory scheme could be undermined if the parties were allowed to enter into a lease extension outside that statutory scheme, potentially on terms that would not be permitted by that scheme. We have also been told that leaseholders can be placed under pressure by their landlords to accept the grant of a lease extension outside the provisions of the 1967 or 1993 Acts. For example, such a lease may be offered by a landlord on the basis that it is said to be more favourable to the leaseholders than any lease extension that could be offered in accordance with the statutory scheme, or that it could be granted more quickly than under that scheme.
- 4.96 Statutory control of such voluntary lease extensions is outside the scope of our review of enfranchisement law. However, in light of the potential impact of voluntary lease extensions on our proposed reforms we have sought to identify means by which the potential impact of voluntary lease extensions might be addressed. First, voluntary lease extensions could simply be prohibited. Secondly, voluntary lease extensions might be permitted but only on terms that were less favourable than permitted by the statutory scheme (for example, on the same terms as the existing lease). Thirdly,

voluntary lease extensions might be permitted but only on terms that fell within the statutory scheme. Finally, voluntary lease extensions might be permitted without restriction on their terms, but subject to a requirement that the leaseholders be given a statutory notice warning of the risks of accepting such a lease, and their entitlement under the statutory scheme.

- 4.97 We invite consultees to tell us whether voluntary lease extensions cause a significant problem in practice, and to consider what steps they believe might be taken to control or limit their use or impact.

Consultation Question 7.

- 4.98 Do consultees consider that the ability of parties to enter into a lease extension outside the 1967 and 1993 Acts creates significant problems in practice?
- 4.99 What steps, if any, do consultees consider could be taken to control or limit the use or impact of parties entering into a lease extension outside of a new statutory enfranchisement regime?

CONTRACTING OUT

- 4.100 As set out at paragraphs 4.11 and 4.20 above, it is possible under both the 1967 and 1993 Acts for a landlord and leaseholder, with court approval, to enter into a lease extension under which the leaseholder is precluded from exercising further enfranchisement rights in the future. We invite consultees to tell us about their experiences of the operation of these statutory provisions in practice, and to share their views as to whether similar provision should be made under any new regime.

Consultation Question 8.

- 4.101 We invite consultees to tell us about their experiences in practice of the statutory provisions under the 1967 and 1993 Acts which enable a landlord and leaseholder, with court approval, to enter into a lease extension under which the leaseholder is precluded from exercising further enfranchisement rights in the future.
- 4.102 Do consultees consider that similar provision should be made under any new enfranchisement regime?

THE IMPACT OF REFORM

Consultation Question 9.

4.103 To what extent would our proposed uniform right to a lease extension at a nominal ground rent, for both houses and flats, increase the likelihood of leaseholders seeking lease extensions under (future) enfranchisement legislation?

Consultation Question 10.

4.104 We welcome evidence as to whether, and if so, how, an increase in the length of a statutory lease extension would affect:

- (1) the leasehold market; and
- (2) the mortgageability of leases.

Consultation Question 11.

4.105 We have asked whether leaseholders should have the option of:

- (1) extending their leases without changing the ground rent; or
- (2) extinguishing their ground rent without extending the term of the lease.

We welcome evidence as to the likely uptake of these options by leaseholders.

Consultation Question 12.

4.106 To what extent does the current ability of parties negotiating a lease extension to include such terms as they may agree in the lease extension:

- (1) increase the duration and cost of the enfranchisement process;
- (2) increase the potential for disputes; and
- (3) lead to the imposition of onerous or undesirable terms upon leaseholders under the lease extension, resulting in additional future costs to leaseholders?

4.107 To what extent would restricting parties' ability to introduce new terms into a lease extension to terms which are drawn from a prescribed list:

- (1) reduce the time and cost involved in acquiring a lease extension;
- (2) reduce the potential for disputes; and
- (3) reduce future costs to leaseholders arising from the terms of the lease extension?

4.108 Would this reform lead to a higher proportion of leaseholders seeking to exercise their right to a lease extension?

Chapter 5: The right of individual freehold acquisition

INTRODUCTION

- 5.1 Currently, a leaseholder of a house (who meets certain additional criteria) has the right to acquire the freehold of that house and related premises. A statutory process must be followed, and the leaseholder must pay a premium to the landlord.²⁰²
- 5.2 The right of a leaseholder to acquire the freehold of their house was introduced in 1967, following many years of political debate. As discussed in Chapter 2 above, it was aimed at alleviating hardship reportedly suffered by leaseholders of houses across the country and addressing the perceived unfairness of leasehold as a tenure. It is a valuable right; it enables leaseholders to upgrade their leasehold tenure to a permanent, freehold interest in the property. By doing so, leaseholders no longer have a wasting asset, and, through leaving the relationship with the landlord, leaseholders enjoy considerably greater control of their homes.
- 5.3 In this chapter, we discuss the nature and substance of this right – in other words, what does the enfranchising leaseholder actually get? We consider the extent of the premises and accompanying rights over other land which may be acquired on a claim, and the other terms on which an acquisition will take place. We identify the main shortcomings of the current law in these areas, and make provisional proposals for reform to address these.

THE CURRENT LAW

Extent of premises acquired and rights over other land

- 5.4 The provisions of the 1967 Act that control the extent of the premises to be included in any lease extension of a house also apply to the acquisition of the freehold of a house.²⁰³ The leaseholder is entitled to acquire the freehold to the “house and premises”.²⁰⁴ This will include “any garage, outhouse, garden, yard and appurtenances” which are let to the leaseholder with the house.²⁰⁵
- 5.5 As in the case of a lease extension claim under the 1967 Act, the landlord may require, within two months of the service of the leaseholder’s notice of claim, that other land previously included in the lease, but now no longer held by the leaseholder, be included in any transfer. The landlord may also require, within the same period, that any part of the premises that lies above or below other premises owned by the landlord be excluded

²⁰² There are several different methods by which this premium can be calculated. Valuation is discussed in detail in Ch 14.

²⁰³ See Ch 4 at para 4.6 above.

²⁰⁴ As defined in the 1967 Act, s 2.

²⁰⁵ 1967 Act, s 2(3).

from any transfer.²⁰⁶ While we noted that the power to exclude part of any premises was unlikely to be relevant to a lease extension claim, it is of greater relevance to a claim to acquire the freehold to a house.²⁰⁷ For, example, a landlord may seek to exclude part of the premises from any transfer where its inclusion would create a flying freehold.²⁰⁸

5.6 The 1967 Act provides that the transfer of the freehold:

- (1) must include all rights over other property²⁰⁹ that are necessary for the leaseholder to have the same rights currently available under the lease (in so far as the landlord is able to grant those rights);²¹⁰
- (2) must include such rights of way over other property as the leaseholder requires and as are necessary for the reasonable enjoyment of the house and are currently available under the lease (in so far as the landlord is able to grant those rights);²¹¹ and
- (3) cannot exclude the terms implied under sections 62 and 63 of the Law of Property Act 1925, except with the consent of the leaseholder.²¹² Section 62 can transfer with the freehold of a house, and upgrade into easements, any permission enjoyed by the leaseholder to use other land that had been retained by the landlord.²¹³

Other terms of acquisition

5.7 A landlord is required to transfer the freehold of the house to the leaseholder subject to any lease and to “tenant’s incumbrances”, but otherwise free from incumbrances.²¹⁴ As

²⁰⁶ These powers are considered in more detail in the context of a lease extension claim under the 1967 Act: see Ch 4 at para 4.6.

²⁰⁷ See Ch 4 at para 4.6(2).

²⁰⁸ A flying freehold is the term given to a freehold property which includes premises that are above or below other premises. The existence of a flying freehold can give rise to difficulties in respect of repair and access as positive covenants (such as a covenant to repair) will not automatically bind successors in title.

²⁰⁹ In other words, (1) rights of support for a building or part of a building, (2) rights to the access of light and air, (3) rights to the passage of water, 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 (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.

²¹⁰ 1967 Act, s 10(2).

²¹¹ 1967 Act, s 10(3).

²¹² 1967 Act, s 10(1).

²¹³ *Kent v Kavanagh* [2006] EWCA Civ 162, [2007] Ch 1, at [48]. In that case no express right of way had been included in the transfer when the house and premises were enfranchised.

²¹⁴ 1967 Act, s 8(1). The term “incumbrance” is normally considered to refer to subsisting third party rights, such as leases, mortgages, easements and restrictive covenants, but is extended by s 8(2) of the 1967 Act to include 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”: see *Hague*, para 6-12 and Megarry and Wade, *The Law of Real Property* (8th ed 2002), para 15-082. The definition of tenant’s incumbrances set out in s 8(2) of the 1967 Act (“... 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 to the tenant).”) is considered to include sub-leases, mortgages of the leasehold interest, other

such, any incumbrance affecting the freehold at the date of grant of the lease will normally be binding.²¹⁵ A transfer of the freehold will, therefore, be subject to the leaseholder's own lease,²¹⁶ other leases granted out of that lease, and any mortgage over the landlord's or leaseholder's interest and some rentcharges.²¹⁷

- 5.8 If a leaseholder is to acquire the freehold free from the landlord's existing mortgage, he or she will need to obtain evidence that the mortgage has been discharged. However, the 1967 Act does provide that any mortgage over the freehold title will be discharged where the purchase price is paid either to the mortgagee or into court.²¹⁸ This provides a solution where the purchase price is less than the sums outstanding on the mortgage, or where a discharge cannot otherwise be obtained.²¹⁹
- 5.9 Just as the 1967 Act sets out rights over other land that must be included with the transfer for the benefit of the leaseholder (see paragraph 5.6 above), it also requires equivalent rights to be reserved over the freehold for the benefit of the landlord.²²⁰
- 5.10 In addition, the 1967 Act provides that a transfer must include such provisions (if any) as the landlord may require:
- (1) to secure that the leaseholder is bound by, or to indemnify the landlord against breaches of, restrictive covenants which affect the house;
 - (2) to secure the continuance of restrictions under the lease that either:
 - (a) affect the house, are capable of benefiting other property, and materially enhance the value of that other property; or
 - (b) affect other property, and materially enhance the value of the house; and

incumbrances created by the leaseholder or his or her predecessor, and also any incumbrance affecting the freehold, or any superior lease or interest, which also affects the lease and any interest derived from the lease: see *Hague*, para 6-12.

²¹⁵ In *Kent v Kavanagh* [2006] EWCA Civ 162, [2007] Ch 1, a right of way over part of the premises that had been reserved by the terms of the lease of the premises was held to be a tenant's incumbrance to which the freehold of those premises was held to be subject, even in the absence of any express words in the transfer, by virtue of s 8(1) of the 1967 Act.

²¹⁶ The leaseholder's existing lease and acquired freehold will not automatically merge, but must instead be expressly declared to do so on registration. Where a merger is to take place, the leaseholder's mortgagee may be made a party to the transfer or enter into a deed of substitution replacing the leasehold interest with the freehold as the security provided.

²¹⁷ A transfer of the freehold will be subject to any rentcharge over that title unless (1) the landlord redeems the rentcharge (with the agreement of the owner, or under the Rent Charges Act 1977), or (2) the rentcharge is capable of being overreached (because it arises under a settlement or takes effect in equity only). Where the rentcharge exceeds the amount of rent currently payable under the lease, the leaseholder may require the landlord to discharge the rentcharge to the extent of any excess (1967 Act, s 11(2)). If a rentcharge will not be discharged, this should be reflected in the purchase price.

²¹⁸ 1967 Act, ss 12 and 13.

²¹⁹ The discharge of the mortgage will not discharge the freeholder's liability to pay outstanding sums due under the mortgage.

²²⁰ 1967 Act, s 10(2) and (3).

- (3) to restrict the use of the house in any way which will not interfere with the reasonable enjoyment of the house as they have been enjoyed during the lease, but will materially enhance the value of the landlord's other property.

Estate management schemes

- 5.11 The right to acquire the freehold to a house set out in the 1967 Act created a risk for a landlord of an estate that individual premises which had previously been bound by leasehold covenants owed for the benefit of the estate would be released from such obligations after the freehold had been acquired. The 1967 Act, however, permitted the landlord of an estate to apply to the High Court for an order approving a scheme ("an estate management scheme"). Such a scheme allowed the landlord to retain specified powers of management in respect of a house and/or to have rights against the house in respect of benefits arising from the exercise elsewhere of the landlord's powers of management.²²¹ An order creating an estate management scheme could only be made where a Minister had previously certified that the retention of such powers by the landlord would be in the general interest in order to maintain adequate standards of appearance and amenity and regulate redevelopment in the area in the event of leaseholders exercising their enfranchisement rights under the 1967 Act.²²²
- 5.12 It has not been possible to apply for the grant of such a certificate under the 1967 Act since 31 July 1976.²²³ And while landlords of estates containing houses that had been brought within the 1967 Act by changes made by the 1993 Act and by the Housing Act 1996 were afforded a further period within which to make an application under the equivalent powers set out in the 1993 Act, it is now only possible to apply for the creation of an estate management scheme with the consent of the Secretary of State.²²⁴
- 5.13 Schemes made under the 1967 Act had to include a provision allowing for the variation or termination of the scheme, or exclusion of part of the area included within a scheme, by or with the approval of the High Court.²²⁵ Such a scheme can also be varied by or with the approval of the Tribunal so as to include property within the area of the scheme

²²¹ An application could also be made by two or more landlords of neighbouring estates, or by a leaseholders' representative body capable of representing the leaseholders or such of them as should become entitled to enfranchise under the 1967 Act, s 19(12) and 19(13).

²²² The application to the High Court had to be made within a year of the certificate being granted.

²²³ The 1967 Act originally required any application for a certificate to be made within two years of the commencement of the 1967 Act (ie before 1 January 1970). The extension of enfranchisement rights by the Housing Act 1974 was accompanied by the creation of a further two-year period (ending in July 1976) during which applications for a certificate could be made in respect of areas containing houses within the newly increased financial limits.

²²⁴ Details of those changes are set out in Ch 2 at paras 2.21 and 2.22. Further details of the power to approve an estate management scheme under the 1993 Act are set out in Ch 6 paras 6.27 to 6.32 below. Consent can only be given where the Secretary of State is satisfied that the application could not have been made within the required time, or that both (a) any application made in time would probably have been dismissed, and (b) because of a change in circumstances, the application would probably be granted if consent were now given. In either case, adequate notice of the application for consent must also be given. The authors of *Hague* note that "in practice... few new schemes are now likely to be created." (*Hague*, para 35-01).

²²⁵ 1967 Act, s 19(6). The jurisdiction of the High Court is now exercised by the Tribunal: 1993 Act, s 75(1).

that can be enfranchised as a result of changes introduced by the 1993 Act and Housing Act 1996.²²⁶

- 5.14 Schemes made under the 1993 Act also had to include a provision allowing for the termination or variation of the scheme, or for the exclusion of any part of the area, by or with the approval of the Tribunal. Whether a change of circumstances must be shown in each case remains unclear.²²⁷

CRITICISMS OF THE CURRENT LAW

- 5.15 As set out in the introduction to this chapter, the right of individual freehold acquisition is an important right. It gives the enfranchising leaseholder the best tenure available under English and Welsh property law. In this section, we focus on specific criticisms which have been made in respect of the effectiveness of the right.

Extent of the premises and rights acquired

- 5.16 As noted above, the provisions of the 1967 Act relating to the extent of any premises that are to be included within a freehold acquired are the same as those that apply to a lease extension under that Act. The criticisms made in this area are set out Chapter 4 at paragraphs 4.27 to 4.32.
- 5.17 Some stakeholders have also criticised the distinct treatment of rights of way under the 1967 Act, and query whether it is necessary to require such rights to be expressly granted and reserved, rather than being implied in any transfer.

Other terms of acquisition

- 5.18 Many stakeholders, particularly landlords, have raised concerns about the ability of landlords, in the absence of an estate management scheme, to recover the costs incurred by them in providing services across an estate of leasehold houses once the freehold has been acquired under the 1967 Act. It is possible for the parties to agree that the leaseholder will continue to contribute to such costs in the same sums as he or she had previously been required to contribute by way of service charges as a leaseholder. However, landlords have no entitlement under the 1967 Act to require that such obligations be created.²²⁸
- 5.19 As a result, where no estate management scheme has been created, the transfer of freehold houses under the 1967 Act can lead, over time, to the landlord of a wider estate being unable to recover the full amount of the sums that he or she is obliged to spend. This shortfall often acts as a disincentive to the landlord continuing to carry out his or

²²⁶ 1993 Act, s 75(2). While this provision applies only to houses, it has been held that blocks of flats may be brought within a scheme under s 19(9) of the 1967 Act: see *Re Estate Trustees of the Dulwich Estate's Appeal*, (1998) (unreported); cited in *Hague*, para 35-42.

²²⁷ The editors of the third edition of *Hague* considered that a change of circumstances was a precondition to obtaining a variation, termination or exclusion. However, in the sixth edition, the editors refer (at para 35-42) to the decision of the Tribunal in *Re Wellcome Trust Limited and the Trustees of Smith's Charity Application*, (1998) (unreported) wherein it was assumed that a change of circumstances was not a precondition to an application for a variation.

²²⁸ Even where leaseholders agree to such obligations voluntarily, there are practical legal difficulties when seeking to create positive obligations that will also bind successors in title: see *Making Land Work* (2011) Law Com No 327, pts 5 and 6.

her obligations (such as maintaining common parts). In other cases, that shortfall may be sought from others on a voluntary basis. As a result, those who have bought the freehold through enfranchisement are ultimately either disadvantaged by the landlord's non-compliance with his or her obligations, or have what may be seen as a windfall in continuing to enjoy the maintenance of the estate without having to contribute to it.

- 5.20 One stakeholder has proposed that this problem could be addressed in respect of new estates by introducing a flexible statutory estate management scheme to be approved by the Tribunal. While modelled on the provisions of the 1993 Act, it was suggested that the powers in the scheme should only be exercised by a body representing the leaseholders within the estate rather than by the landlord.
- 5.21 In contrast to these concerns about landlords being unable to insist on the creation of legitimate ongoing obligations following freehold acquisition, many leaseholders have expressed concerns about landlords using the enfranchisement process as an opportunity to convert onerous leasehold terms into freehold obligations. For example, an obligation in a lease requiring a leaseholder to obtain the landlord's consent before making any alterations to the property can enable landlords to seek to extract significant permission fees for, say, the construction of a conservatory: see Chapter 4 at paragraph 4.37. On enfranchisement, some landlords seek to replicate those obligations in the transfer of the freehold.²²⁹
- 5.22 Whilst leaseholders are not required, by the statutory scheme, to accept such terms, the potential imbalance of power between landlords and leaseholders (discussed in Chapter 4 above) can lead to leaseholders accepting such terms rather than suffering the cost, delay and uncertainty that can arise if disputing such terms. Many leaseholders strongly believe that, as a result, they continue to be bound by onerous obligations that are inconsistent with their newly acquired status as freehold owners.

OUR PROPOSED NEW REGIME

- 5.23 In the light of the criticisms outlined in the previous section, we make the following provisional proposals to increase the effectiveness of the current right of individual freehold acquisition.

Extent of premises acquired and rights over other land

- 5.24 We believe that leaseholders making an individual freehold acquisition claim should be entitled to acquire the freehold to the whole of the premises included within their lease. As we have argued in respect of lease extension claims,²³⁰ a landlord who has let a residential unit to leaseholders on a long lease – or on two or more long leases that are treated as a single lease – should be required to include within any transfer all of the land that was included within the lease and continues to be held by the leaseholders.

²²⁹ When such obligations are negative – but not where they are positive – they will automatically bind the property (and successors in title) provided the landlord retains benefited land. But regardless of whether the landlord retains benefited land, mechanisms are available to allow both positive and negative obligations to bind successors in title.

²³⁰ See Ch 4 at para 4.47 above.

Neither the character of the land nor whether the land included within the lease falls within the curtilage of a building should matter.²³¹

- 5.25 However, we also believe that leaseholders who qualify for an individual freehold acquisition claim should be entitled to acquire the freehold to the whole of the building within which their leasehold premises are situated even if the existing lease is of less than the whole of that building. We believe that leaseholders should be able to acquire any other leases granted in respect of other parts of the building, including but not limited to intermediate leases. Such leases would also typically include, for example, leases of roof and air spaces.
- 5.26 As in the case of lease extension claims, we also believe that all of the rights granted by an existing lease over land that is not granted to the leaseholder by that lease should be continued by the terms of the transfer whenever possible to do so.
- 5.27 As we noted in respect of lease extension claims, we think that this approach will make it easier for leaseholders to understand what they are entitled to claim. We also believe that this approach will reduce the need for the cost of legal advice to be incurred on this point. We also believe that it will reduce the likelihood of disputes between the parties as to the extent of land, or other rights, to be included within a transfer of the freehold.
- 5.28 We do, however, believe that in a few cases landlords may wish to have included within any transfer a part of the premises originally leased to the leaseholders, but since assigned to another person. We also believe that it may also be reasonable in some cases for a landlord to wish to exclude from any transfer a part of the premises that lies above or below other premises in which he or she has an interest. We therefore propose that a landlord should continue to be able to request that such premises be included or excluded as appropriate.
- 5.29 But while such a request should be set out in a landlord's Response Notice,²³² we do not believe that any statutory deadline or time limit should be set for raising such an issue.²³³

²³¹ See Ch 4 at para 4.47 above.

²³² See Ch 11 at para 11.48 below.

²³³ We note, of course, that once an application has been made to the Tribunal (see Ch 11) a party may need to obtain the permission of the Tribunal to raise any new issue. We also acknowledge the Tribunal's power to make an order that one party should pay the other party's costs where costs have been wasted, or that other party has behaved unreasonably (see Ch 13).

Consultation Question 13.

5.30 We provisionally propose that, where an individual freehold acquisition claim is made:

- (1) the leaseholder should be entitled to a transfer of:
 - (a) the whole of the building in which his or her residential unit is situated, even if parts of that building are not included within his or her existing lease; and
 - (b) the whole of his or her premises let under the existing lease, whether or not the entirety of those premises falls within the curtilage of the building; and
- (2) there should be no statutory deadline or time limit for landlords to propose that other land originally let to the leaseholder, but now assigned to another, should also be included in the transfer, or that parts of the premises that are above or below other premises in which he has an interest should be excluded from the transfer.

Do consultees agree?

Other terms of acquisition

5.31 We provisionally propose that a transfer will overreach any incumbrances that would normally be overreached on an arms-length sale. We also propose that any mortgage secured against the freehold should be discharged automatically upon execution of the transfer. We think that adopting this approach would prevent a landlord from seeking to charge leaseholders for obtaining the landlord's mortgagee's consent.

5.32 The leaseholder who acquires the freehold would, however, be under a duty to:

- (1) pay the whole of the sum outstanding under the mortgage to the mortgagee,
- (2) (where the sum outstanding on the mortgage exceeds the price to be paid) pay the whole of the price to the mortgagee, or
- (3) (where neither (1) nor (2) can be carried out) pay the equivalent sums into court.

In each case, any sums paid to the mortgagee or into court will reduce the sums payable to the landlord accordingly.

5.33 We also provisionally propose that a landlord should be under a duty to use his or her best endeavours to redeem a rentcharge.²³⁴ This would not apply, however, in the case of an estate rentcharge imposed to ensure the enforceability of positive covenants.

²³⁴ Whether by agreement, reliance on the Rent Charges Act 1977, by substituting the burdened land with other property, or by apportionment.

Consultation Question 14.

5.34 We provisionally propose that, where an individual freehold acquisition claim is made:

- (1) any mortgage secured against the freehold title should automatically be discharged upon execution of the transfer; but
- (2) the leaseholder should be under a duty to pay:
 - (a) the whole of the price; or
 - (b) (if less) the sum outstanding under the mortgage;to the mortgagee or, alternatively, into court; and
- (3) any sums due from the leaseholder to the landlord should be reduced by any sums paid under (2) above.

Do consultees agree?

5.35 We also provisionally propose that where an individual freehold acquisition claim is made – save in the case of estate rentcharges imposed to secure positive covenants – a landlord should be under a duty to use his or her best endeavours to redeem any rentcharge.

Do consultees agree?

5.36 Where a leaseholder making an individual freehold acquisition claim is seeking to acquire the whole of the landlord's existing freehold interest, the terms of any transfer should be straightforward.²³⁵ The relationship between the freehold premises and the leasehold premises has already been set by the terms of any existing lease. Similarly, the relationship between the freehold premises and third-party owners of adjoining property, has also been set by the terms of any previous transfer of the freehold.

5.37 The terms of those relationships could, in such cases, simply be retained. In any event, while it might be possible to refine or improve those terms where the terms related to the ongoing legal relationships of parties to the transfer, it would not be possible to alter the rights or obligations of third parties as part of the exercise of an enfranchisement right.

5.38 The position is more complicated where leaseholders are to acquire only part of the land currently owned by a landlord; that is, where the landlord's freehold title includes land that does not form part of the individual freehold acquisition claim. This situation can arise either where the land leased currently forms part of a larger area of freehold

²³⁵ In cases of unregistered land, this would apply where the leaseholders are claiming all of the land owned by the landlord. In cases of registered land, this would apply where the leaseholders are claiming all of the land within a registered title, and the landlord does not also own adjoining land (whether or not also registered).

land owned by the landlord (whether held under one or more registered titles), such as an estate,²³⁶ or where some part of the land leased is to be excluded from the land acquired on enfranchisement.²³⁷

- 5.39 In such cases, the terms of the relationship between the freehold land to be acquired and the retained land will not already have been set by the terms of any existing lease or transfer. Accordingly, the terms of any transfer of the part to be acquired will need to allow for the creation of rights and/or obligations that will govern the future legal relationship between that part and the retained land.
- 5.40 As a result, when considering reforms to the basis on which the terms of a transfer of any freehold acquired under an individual freehold acquisition claim are set, we have sought to distinguish between cases in which the whole of the landlord's freehold interest is being acquired, and where it is not.

Acquiring the whole of the landlord's freehold interest

- 5.41 For the reasons set out at paragraphs 5.36 and 5.37 above, the transfer of the whole of the landlord's freehold interest to a leaseholder bringing an individual freehold acquisition claim need not require any changes to the existing rights and obligations attaching to the freehold.²³⁸ We believe that any undischarged rights and obligations could be continued automatically upon acquisition of the freehold, without the need for express provisions within a transfer detailing those rights.
- 5.42 We note, however, that the 1967 Act does not provide for the transfer of the freehold subject to the rights and obligations on which it is currently held. Instead, the 1967 Act provides, for the most part, for the transfer of the freehold to be subject to those rights and obligations affecting the leasehold land as at the date of the claim. In that sense, the leaseholder does not acquire what the landlord has but rather, for the most part, obtains the freehold equivalent of his or her existing lease.
- 5.43 Problems can arise where the existing lease grants rights over other land that is not owned, or is no longer owned (whether because of a voluntary disposal or enfranchisement) by the landlord, and he or she has not reserved equivalent rights over that other land in favour of the freehold.²³⁹ In such cases, the landlord is not able to grant rights over the other land in favour of the freehold land. In those circumstances, it is not currently possible for the leaseholder to be granted freehold rights that are as extensive as his or her current leasehold rights. Equally, if the leaseholder were to simply acquire the freehold, he or she would not be granted any rights over other land that were not presently enjoyed by the freehold. It may be important, therefore, in either

²³⁶ In some cases, leaseholders may have existing rights over the landlord's other land. In other cases, that land may not be subject to any such rights.

²³⁷ For example, see Ch 4 at para 4.30 above. As a result of our provisional proposals, such exclusions may be less common than at present.

²³⁸ The exception would be that those obligations which would, in the case of a transfer of land outside the terms of any enfranchisement statute, ordinarily be discharged upon payment of the purchase price for that land would be discharged. This would include the discharge of a mortgage over the freehold.

²³⁹ The courts have, however, found ways in which such freehold rights can be identified as having been created upon severance of the freehold: for example, *Kent v Kavanagh* [2006] EWCA Civ 162, [2007] Ch 1.

case, that the leaseholder does not merge the freehold interest with the existing leasehold interest.

- 5.44 We therefore seek the views of consultees as to whether leaseholders acquiring the whole of their landlord's freehold interest should acquire the freehold subject to all of the rights and obligations on which the freehold is currently held, or on terms reflecting the rights and obligations set out in their current lease, where different. We also seek the views of consultees as to the best statutory means for giving effect to the acquisition of those rights and obligations.
- 5.45 We also acknowledge that, in some cases, leaseholders might wish to introduce restrictions on the way in which the freehold of the premises can be used after it is acquired. For example, leaseholders might wish to introduce a covenant preventing development, or non-residential use of the freehold premises, with a view to limiting the price that might otherwise be payable to acquire the freehold. As such, there might be circumstances in which it would be appropriate to allow new terms to be added.
- 5.46 We do not believe, however, for the reasons set out in Chapter 4,²⁴⁰ that the benefit of any broad power to introduce new terms is likely to be shared equally by leaseholders and landlords. We therefore propose that additional terms may only be added where the leaseholder elects to include a term chosen from a prescribed list of terms.
- 5.47 We seek the views of consultees as to the types of covenant that should be included within the prescribed list.

Consultation Question 15.

- 5.48 We invite the views of consultees as to whether a leaseholder making an individual freehold acquisition claim should acquire the freehold 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.
- 5.49 We provisionally propose that, on an individual freehold acquisition claim, additional terms may only be added to the transfer where the leaseholder elects to include a term drawn from a prescribed list of terms.
- Do consultees agree?
- 5.50 We invite the views of consultees as to the types of additional terms that should be included within such a prescribed list.

²⁴⁰ See para 4.66.

Acquiring less than the landlord's whole interest

- 5.51 Any transfer of only part of the landlord's freehold interest would – in addition to transferring that freehold on terms relating to that part²⁴¹ – need to define the legal relationship between that part and the landlord's retained land.

Where the lease already sets out terms governing the relationship with the landlord's retained land

- 5.52 In some cases, rights and obligations relating to the retained land will be contained in the leaseholder's lease. For example, where the leasehold premises formed part of a wider estate within the ownership of the landlord, that lease may have set out rights and obligations in respect of the wider estate (such as the landlord's obligation to maintain common parts and his or her power to collect service charges from the leaseholders in respect of those costs).
- 5.53 In principle, the leaseholders' freehold title to the part acquired could be made subject to rights and obligations that reflect those set out in the lease. This approach would not, however, allow leaseholders to use enfranchisement as means to free themselves from obligations within their existing leases that they believe to be onerous. Instead, such terms would be carried across as freehold obligations.²⁴² However, as noted in Chapter 4 in respect of lease extension claims,²⁴³ we do not believe that enfranchisement is the best means of addressing the issues that arise in respect of the fairness of such terms. We also note that the Law Commission's Thirteenth Programme includes a project on unfair terms within residential leases.²⁴⁴ That work has the potential to provide a solution to unfair terms in leases irrespective of whether the leaseholder is exercising a right to enfranchise. We note, however, that not all terms that leaseholders consider to be onerous will also satisfy the legal test of unfairness.
- 5.54 In some estates, many of those rights and obligations will have been translated into an estate management scheme that will bind the owner of an enfranchised house into the future. Where this has taken place, we believe that the rights and obligations set out in that scheme should continue to operate.²⁴⁵ We do not believe that there would be any additional benefit from requiring other terms that do not appear within the existing estate management scheme to bind leaseholders who are making an individual freehold acquisition. Indeed, we think that there is likely to be greater benefit from creating consistency between the terms on which such an acquisition is made, and the terms governing freeholds acquired under the 1967 Act.
- 5.55 In other estates, there will be no existing estate management scheme. In such cases, we think that two options are available.

- (1) The freehold should be made subject to such rights and obligations in respect of the retained land as reflect the obligations appearing in the existing lease. This

²⁴¹ As set out in paras 5.41 to 5.44.

²⁴² See para 5.44 above.

²⁴³ See Ch 4 at para 4.65.

²⁴⁴ Thirteenth Programme of Law Reform (2017) Law Com No 377, paras 2.45 to 2.47.

²⁴⁵ The existing power to apply to the Tribunal to vary the terms of an estate management scheme would also be retained.

option would have the effect of translating the obligations currently owed as leaseholder into obligations owed as freeholder. While this would have the benefit of preserving the balance of obligations across an estate, it would not address the concerns of those leaseholders who consider their existing leasehold obligations to be onerous, and/or those who consider that freeholds should not be burdened by such terms. We note, however, that not all such burdens will be onerous or even unreasonable, and that it is common for freehold titles to be subject to some restrictions for the benefit of other land.

- (2) The freehold acquired should only be made subject to such rights and obligations as appear within a prescribed list of appropriate covenants. This option would restrict the obligations that could be imposed on enfranchising freeholders in respect of other land. It would, therefore, go some way to addressing the concerns of those who consider that onerous terms too often affect freehold titles acquired by leaseholders. It would, however, remain necessary to decide the type or content of terms that would appear on the prescribed list.

Consultation Question 16.

5.56 We invite the views of consultees as to whether, where a leaseholder's existing lease contains rights and obligations in respect of land that is to be retained by the landlord, the leaseholder should (where there is no current estate management scheme in place) acquire the freehold subject to terms in respect of the retained land that:

- (1) reflect the rights and obligations set out in the leaseholder's existing lease; or
- (2) appear within a prescribed list of appropriate covenants.

5.57 We invite the view of consultees as to the types of terms that should be included within such a prescribed list.

5.58 We accept, however, that, as set out above,²⁴⁶ there remain practical legal difficulties when seeking to create positive obligations in respect of freehold land that will bind successors in title. As a matter of policy, we believe that both positive and negative obligations should bind successors in title, and that our enfranchisement regime should allow the landlord to insist on the continuation of those rights. The parties could adopt existing legal mechanisms to achieve this – such as an estate rent charge, or a chain of covenants – or, when introduced, the land obligation set out in our report, *Making Land Work*.²⁴⁷ Alternatively, a new statutory positive obligation could be introduced specifically for enfranchisement cases.

5.59 We also provisionally propose that the landlord of the estate should be able to enforce the obligations created regardless of whether he or she retains land which benefits from any restriction on the enfranchising owner.

²⁴⁶ See para 5.18.

²⁴⁷ *Making Land Work* (2011) Law Com No 327, pt 6.

5.60 We consider that the right of a landlord to an estate management scheme to charge unpaid sums against the freehold property, and to enforce the same as if he or she were a mortgagee of that property, has the potential to create injustice in respect of relatively small sums.²⁴⁸ We nevertheless invite the views of consultees as to whether such a power should be included and, if not, what other mechanism might be adopted to enforce such debts.

5.61 We have provisionally proposed to allow leaseholders to join together with others to acquire the freehold to an entire estate rather than of their own individual residential unit or the building in which their residential unit is situated.²⁴⁹ Where such a right is exercised, the leaseholders will be acquiring the whole of their landlord's freehold interest, and the rights between landlord and leaseholders will have already been set by the terms of the existing leases.

Consultation Question 17.

5.62 We provisionally propose that any obligation 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.

Do consultees agree?

5.63 We invite the views of consultees as to whether unpaid sums due from a leaseholder who has acquired the freehold of their premises 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.

Where the lease does not set out terms governing the relationship with the landlord's retained land

5.64 In other cases, there will be no existing agreement that seeks to govern the relationship between the land that is to be acquired and the retained land. It may, therefore, be necessary for the parties to fill in any gaps.

5.65 As in the case of lease extension claims, we believe the ability of the parties to negotiate the other terms on which they are to dispose of or acquire a freehold interest should generally be restricted in so far as it is reasonable to do so.²⁵⁰ We therefore propose that a list of covenants that may be added where only part of the landlord's freehold interest is acquired should be prescribed. We also propose that terms should only be included within this list where their inclusion might be required by the retention of part of the landlord's freehold interest. The retention of that part should not be used as a means of obtaining other, wider changes. We believe that this restriction on the terms that can be introduced in such circumstances will prevent landlords from seeking to

²⁴⁸ This power is contained in s 69(3) of the 1993 Act.

²⁴⁹ See Ch 6 at paras 6.93 to 6.95.

²⁵⁰ See Ch 4 at para 4.56.

introduce new onerous terms as part of any transfer of the freehold of premises that takes place under the statutory scheme.

Consultation Question 18.

- 5.66 We provisionally propose that where a leaseholder's existing lease does not contain rights and obligations in respect of land that is to be retained by the landlord, the leaseholder should (where there is no current estate management scheme in place) acquire the freehold subject to terms in respect of the retained land that appear within a prescribed list of appropriate covenants.

Do consultees agree?

- 5.67 We invite the views of consultees as to the types of terms that should be included within any prescribed list.

TRANSFERS OUTSIDE THE STATUTORY SCHEME

- 5.68 In Chapter 4 we described the risk posed to any statutory lease extension scheme by allowing parties to agree to enter into a transaction outside of that scheme.²⁵¹ We also outlined ways in which this problem might be addressed.²⁵²

- 5.69 We think that the same risks are posed in respect of any statutory scheme for the individual acquisition of a freehold. We therefore invite consultees to tell us whether such voluntary transfers cause a significant problem in practice, and to consider what steps they believe might be taken to control or limit their use or impact.

Consultation Question 19.

- 5.70 Do consultees believe that the ability of parties to enter into a transfer of the freehold of a house outside the 1967 Act creates significant problems in practice?
- 5.71 What steps, if any, do consultees believe could be taken to control or limit the use or impact of parties entering into a freehold transfer to an individual leaseholder outside of a new statutory enfranchisement regime?

²⁵¹ See Ch 4 at paras 4.94 to 4.95.

²⁵² See Ch 4 at para 4.96.

THE IMPACT OF REFORM

Consultation Question 20.

- 5.72 To what extent does the current ability of parties negotiating the terms of a claim to acquire the freehold of a house to agree the terms of the freehold transfer without restriction:
- (1) increase the duration and cost of the enfranchisement process;
 - (2) increase the potential for disputes; and
 - (3) lead to the inclusion of unusual terms within the freehold transfer, resulting in additional future costs to former leaseholders?
- 5.73 To what extent would limitations on the ability of parties to include new rights and obligations in a freehold transfer to an individual leaseholder:
- (1) reduce the time and cost involved in acquiring the freehold individually;
 - (2) reduce the potential for disputes; and
 - (3) reduce future costs to former leaseholders arising from the terms of the freehold transfer?
- 5.74 Would this reform result in a higher proportion of leaseholders seeking to exercise their right of individual freehold acquisition?

Chapter 6: The right of collective freehold acquisition

INTRODUCTION

- 6.1 The existing “right to collective enfranchisement” is a creation of the 1993 Act. In simple terms, it is designed to enable leaseholders in blocks of flats to join together to acquire the freehold of their building and, possibly, associated parts of their wider surroundings. The aim is two-fold: to enable leaseholders to own their own homes (albeit jointly with others), and to give them control of the management of their buildings.
- 6.2 The 1993 Act contains provisions identifying the leaseholders who may exercise the right to collective enfranchisement (known as “qualifying tenants”) and the premises which may be the subject of the right. These provisions are discussed in detail in Chapter 7 below. For now, they can briefly be summarised.
- (1) A “qualifying tenant” is a leaseholder under a long lease of a flat. This definition is subject to several exceptions, the most important of which being where the lease is a business lease.²⁵³
 - (2) Premises may be the subject of a collective enfranchisement claim where they consist of a self-contained building or part of a building, and contain a specified minimum number and proportion of flats held by qualifying tenants. This criterion is also subject to several exceptions, the most important being premises where more than 25% of the internal floor area (excluding common parts) is neither occupied nor intended to be occupied for residential purposes.²⁵⁴
- 6.3 Not all leaseholders in any given premises need to participate in a collective enfranchisement claim. A claim can be brought by the qualifying tenants of at least one half of the total number of flats in the relevant premises. This rule is subject to an exception in the case of premises containing just two flats, where both flats must be let to qualifying tenants and both must participate in the claim.
- 6.4 The leaseholders exercising the right to collective enfranchisement must compensate the landlord for the loss of his or her interest in the premises and other property, with that price being determined according to a valuation methodology laid down by the 1993 Act.²⁵⁵ They must also meet various costs incurred by the landlord in relation to the enfranchisement, in so far as those costs are reasonable.²⁵⁶ We say more about each of these matters in Chapters 14 and 13 respectively.

²⁵³ 1993 Act, s 5.

²⁵⁴ 1993 Act, ss 3 and 4.

²⁵⁵ 1993 Act, s 32 and sch 6.

²⁵⁶ 1993 Act, s 33.

- 6.5 In this chapter, we focus on the nature and substance of the right to collective enfranchisement itself. We first set out the current law on this topic and identify a number of criticisms which have been made of the right in its present form. We propose various ways in which the right, which we recast as the “right of collective freehold acquisition”, could be made more effective, and seek consultees’ views on these proposals. Finally, we set out our proposal for a new right to participate in an existing collective freehold acquisition.

CURRENT LAW

- 6.6 In this section, we set out the current law concerning various aspects of a collective enfranchisement claim. We consider:

- (1) the nature of the “nominee purchaser” who acquires the premises on behalf of the participating leaseholders;
- (2) the extent of the premises which can be acquired on such a claim, as well as rights over other land;
- (3) the other terms on which such premises are acquired;
- (4) the availability of “leasebacks” to the landlord of certain parts of the premises being acquired; and
- (5) the operation of estate management schemes.

The nominee purchaser

- 6.7 The right to collective enfranchisement is the right of certain leaseholders of flats to have the freehold of a self-contained building or part of a building acquired on their behalf by a person or persons appointed by them for that purpose.²⁵⁷ That person or persons also conducts the collective enfranchisement proceedings on behalf of the participating leaseholders, and is known as the “nominee purchaser”.²⁵⁸
- 6.8 There are no restrictions within the 1993 Act as to the person or persons who may act as a nominee purchaser. Some groups of leaseholders name an individual or (more commonly) individuals, most likely drawn from amongst themselves. Others opt to set up a limited company for the purpose, with the participating leaseholders becoming members of the company. In all cases, however, the eventual conveyance will be subject to the usual rule that a maximum of four persons can hold the legal title to property.²⁵⁹ Appointing individuals as the nominee purchaser is therefore much more common in relation to the collective enfranchisement of smaller blocks, where it is more likely to be possible for all of the participating leaseholders to be named as legal owners of the freehold interest being acquired.

²⁵⁷ 1993 Act, s 1(1).

²⁵⁸ 1993 Act, s 15(1).

²⁵⁹ Law of Property Act 1925, s 34(2).

Extent of premises acquired and rights over other land

- 6.9 As set out above, only a self-contained building or part of a building may be the subject of a collective enfranchisement claim. Definitions of a self-contained building and a self-contained part of a building are set out in statute,²⁶⁰ and are discussed further in Chapter 7 at paragraphs 7.70 to 7.73. They are far from straightforward concepts, but for present purposes it suffices to say that their effect is to limit any collective enfranchisement claim to leaseholders in a single building (or, sometimes, one part of a single 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.
- 6.10 Leaseholders who participate in a collective enfranchisement claim are not, however, limited to acquiring solely the freehold to the building or part of the building when they exercise the right. They may also acquire:
- (1) “appurtenant property” which is included with the lease of a qualifying tenant – meaning “any garage, outhouse, garden, yard and appurtenances belonging to, or usually enjoyed with, the flat”;²⁶¹ and/or
 - (2) property which any such leaseholder is entitled under the terms of the lease of his or her flat to use in common with the occupiers of other premises.²⁶²
- 6.11 Alternatively, in the latter case, the landlord may instead of transferring the freehold of that property choose:
- (1) to grant permanent rights over that property to ensure that subsequent occupiers of the flat have the same (or nearly the same) rights as those currently enjoyed by the qualifying tenant under his or her lease;²⁶³ or
 - (2) to convey the freehold of alternative property over which such permanent rights may be granted.²⁶⁴
- 6.12 The 1993 Act also makes provision for the grant and reservation of rights of way and other rights.²⁶⁵ Unless the parties agree otherwise any such conveyance must:

²⁶⁰ 1993 Act, s 3(2).

²⁶¹ 1993 Act, s 1(2)(a), (3)(a) and (7).

²⁶² 1993 Act, s 1(2)(a) and (3)(b).

²⁶³ 1993 Act, s 1(4)(a). In *Corp of Trinity House of Deptford Strond v 4-6 Trinity Church Square Freehold Limited* [2018] EWCA Civ 764, [2018] HLR 27, the Court of Appeal held that a nominee purchaser was entitled under s 1(4) of the 1993 Act to the grant of permanent rights over an adjacent garden even though the rights currently enjoyed by the leaseholders over the garden were granted by way of revocable licence. The court considered that it was not surprising that permanent rights could replace revocable rights since the starting point was that the nominee purchaser was entitled to the freehold of the garden. It also noted that if only revocable rights were granted, the freeholder would be able to revoke the licence immediately after transfer.

²⁶⁴ 1993 Act, s 1(4)(b).

²⁶⁵ The specified easements and rights are: (1) rights of support for a building or part of a building; (2) rights to the access of light and air; (3) rights to the passage of water, 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

- (1) include rights of way over other property that are necessary for the reasonable enjoyment of the premises (so far as the landlord is capable of granting them);²⁶⁶
- (2) reserve rights of way over the property that are necessary for the reasonable enjoyment of the landlord's other property;²⁶⁷
- (3) include rights as are necessary to secure (as nearly as possible) the same rights as currently exist for the benefit of the premises, and any further such rights as are necessary for the reasonable enjoyment of the premises (in so far as the landlord is capable of granting them);²⁶⁸
- (4) be subject to all rights for the benefit of other property to which the premises are currently subject; and
- (5) reserve rights as are necessary for the reasonable enjoyment of the landlord's other property.²⁶⁹

Other terms of acquisition

6.13 Parties can in large part negotiate their own terms. But the 1993 Act does provide that certain terms must be included. Any transfer must include such provisions as the landlord may require:

- (1) to secure that the nominee purchaser is bound by, or indemnifies the landlord against breaches of, restrictive covenants;²⁷⁰
- (2) to secure the continuance of restrictions under any lease that either:
 - (a) affects the premises, is capable of benefiting other property, and materially enhances the value of that other property; or
 - (b) affects other property, and materially enhances the value of the premises;²⁷¹ and
- (3) to restrict the use of the premises in a way which will not interfere with the reasonable enjoyment of those premises as they have been enjoyed under the lease, but will materially enhance the value of the landlord's other property.²⁷²

such passage, drainage or disposal; (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: 1993 Act, sch 7, para 3(1).

²⁶⁶ 1993 Act, s 34(9) and sch 7, para 4(a).

²⁶⁷ 1993 Act, s 34(9) and sch 7, para 4(b).

²⁶⁸ 1993 Act, s 34(9) and sch 7, para 3(2)(a).

²⁶⁹ 1993 Act, s 34(9) and sch 7, para 3(2)(b).

²⁷⁰ 1993 Act, s 34(9) and sch 7, para 5(1)(b).

²⁷¹ 1993 Act, s 34(9) and sch 7, para 5(1)(b).

²⁷² 1993 Act, s 34(9) and sch 7, para 5(1)(c).

- 6.14 The 1993 Act prohibits the transfer from excluding or restricting the operation of sections 62 and 63 of the Law of Property Act 1925, unless this is with the consent of the nominee purchaser or in other limited circumstances, such as preserving or recognising any existing right or interest of any other person.²⁷³
- 6.15 Any transfer of the freehold under the 1993 Act will discharge any mortgage over the freehold provided that the nominee purchaser pays over any purchase monies to the mortgagee.²⁷⁴ If the purchase monies paid over by the nominee purchaser are less than the sum owed to the mortgagee, the mortgage will still be discharged, but the landlord will remain liable to pay the outstanding sum to the mortgagee. Rentcharges are also normally discharged upon transfer.

Leasebacks

- 6.16 The landlord of premises which are the subject of a collective enfranchisement claim may be entitled to be granted leases of certain parts of the premises by the nominee purchaser.²⁷⁵ These leases, which must take effect immediately after the acquisition by the nominee purchaser of the freehold interest in the premises,²⁷⁶ are generally referred to as “leasebacks”. Leasebacks may be available in respect of either flats or other units within the premises.²⁷⁷
- 6.17 The value of the freeholder’s interest in any flat or unit which is to be the subject of a leaseback will be the difference between the value of his or her freehold interest in it and the value of his or her interest in it under the leaseback.²⁷⁸ Since the leaseback will almost always be for a term of 999 years at a peppercorn rent (as discussed further at paragraph 6.23 below), this difference will generally be minimal. Leasebacks therefore typically result in a significant reduction in the premium which would otherwise be payable by the nominee purchaser to acquire the premises.
- 6.18 Leasebacks can be divided into mandatory leasebacks (which the nominee purchaser is obliged to grant, and the freeholder is obliged to accept) and optional leasebacks (which the nominee purchaser is obliged to grant if the freeholder by notice requires him or her to do so).

Mandatory leasebacks

- 6.19 Mandatory leasebacks are required in two situations.

²⁷³ 1993 Act, sch 7, para 2.

²⁷⁴ The parties may, however, agree that the mortgage should remain in place. Any mortgage over the leaseholder’s leasehold interests are unaffected by the transfer.

²⁷⁵ 1993 Act, s 36 and sch 9.

²⁷⁶ 1993 Act, s 36(2).

²⁷⁷ The definition of a “flat” (1993 Act, s 101(1)) is discussed further at para 7.56. “Unit” is defined in s 38(1) of the 1993 Act as a flat, any other separate set of premises constructed or adapted for use for the purposes of a dwelling, or a separate set of premises let, or intended for letting, on a business lease (ie on a lease to which Pt II of the Landlord and Tenant Act 1954 applies: 1993 Act, s 101(1)).

²⁷⁸ 1993 Act, sch 6, para 3(4). Both of those values shall be determined in like manner as the value of the freeholder’s interest in the whole of the premises to be acquired is determined under the Act.

- (1) The first is where a flat is let under a secure tenancy or introductory tenancy,²⁷⁹ and either:
 - (a) the freeholder is the tenant's immediate landlord; or
 - (b) the freeholder is a public-sector landlord, and every intermediate landlord of the flat (as well as the immediate landlord under the secure or introductory tenancy) is also a public-sector landlord.²⁸⁰
- (2) The second is where a flat is let by a housing association on a tenancy other than on a secure tenancy, the housing association is the freeholder, and the tenant is not a qualifying tenant of the flat.²⁸¹

6.20 The nominee purchaser is obliged to stipulate in the notice of claim which flats or units the participating leaseholders consider to be eligible for a mandatory leaseback.²⁸²

Optional leasebacks

6.21 There are two situations in which an optional leaseback is available, at the freeholder's election.

- (1) The first is where a unit is not let to a qualifying tenant.²⁸³ Typical examples include a flat let by the freeholder on a short tenancy, or a commercial unit.
- (2) The second is where the freeholder occupies a flat or other unit in the specified premises, and is also a qualifying tenant of that flat or other unit.²⁸⁴ This requires the freeholder to hold a long lease of the flat or unit which he or she occupies. In most cases, a freeholder occupying a flat or unit will have merged the freehold and leasehold interests in the flat or unit, or will simply never have granted a lease of the flat or unit. This situation is therefore only likely to arise infrequently.²⁸⁵

6.22 The nominee purchaser need not draw the freeholder's attention to any possible optional leasebacks in the notice of claim. The freeholder is required to give the nominee purchaser notice in the counter-notice that he or she is seeking a leaseback of the unit or units in question.²⁸⁶

²⁷⁹ "Secure tenancy" is defined in s 79 of the Housing Act 1985. An "introductory tenancy" amounts to a secure tenancy for a trial period: Housing Act 1996, ss 124 and 125.

²⁸⁰ 1993 Act, sch 9, para 2(1) and (3).

²⁸¹ 1993 Act, sch 9, para 3(1) and (2).

²⁸² 1993 Act, s 13(3)(c)(ii).

²⁸³ 1993 Act, sch 9, para 5(1) and (2).

²⁸⁴ 1993 Act, sch 9, para 6(1) and (2). Para 6(3) of sch 9 to the 1993 Act provides that ss 5, 7 and 8 shall apply for the purpose of determining whether the freeholder is a qualifying tenant of a unit other than a flat as they apply for the purpose of determining whether a person is a qualifying tenant of a flat.

²⁸⁵ *Hague*, para 28-21.

²⁸⁶ 1993 Act, s 21(3)(a)(ii) and (7).

The terms of a leaseback

6.23 The 1993 Act lays down certain requirements which leasebacks must generally meet.²⁸⁷ As mentioned above, one of those requirements is that the lease must be for a term of 999 years at a peppercorn rent.²⁸⁸ Other requirements relate to the rights and obligations of the nominee purchaser (now landlord) and freeholder (now leaseholder) under the leaseback. Several examples are set out in Figure 4 below.

Figure 4: example requirements of a leaseback under the 1993 Act

1. The lease must make certain provision for the premises both to benefit from and be subject to appropriate rights of way and other easements.
2. The lease must contain certain covenants by the landlord (the nominee purchaser) in relation to the repair of the structure and exterior of the premises and building, the provision of services, and the insurance of the premises.
3. The lease must contain a covenant by the leaseholder (the previous freeholder) to keep the interior of the premises in repair, and may require the leaseholder to pay a service charge as a reasonable contribution to the landlord's costs of repair and insurance.
4. The lease must not prohibit or restrict the assignment or sub-letting of the premises, unless they include a unit let (or intended to be let) on a business lease. In those cases, there must be a prohibition against the assignment or sub-letting of the premises, or altering their use, without the prior consent of the landlord, which must not be unreasonably withheld.
5. The lease must not include any provision for termination, other than by forfeiture for breach of lease. This precludes any provision for a break notice, or for forfeiture on the ground of insolvency.

6.24 Mandatory leasebacks may only depart from these requirements where this is agreed between the nominee purchaser and the freeholder and has the approval of the Tribunal.²⁸⁹ The Tribunal will only give such approval where the departure from standard terms appears reasonable in the circumstances, having particular regard to the interest of the tenant under the secure, introductory or housing association tenancy.²⁹⁰

6.25 Optional leasebacks may depart from the standard terms where the departure is agreed between the nominee purchaser and the freeholder, or where directed by the Tribunal on an application made by either of those persons.²⁹¹ Again, the Tribunal will only give such a direction if satisfied that the departure appears reasonable in the circumstances, having particular regard to the interests of any person who will be the tenant of the flat

²⁸⁷ See 1993 Act, sch 9, Pt IV.

²⁸⁸ 1993 Act, sch 9, para 8.

²⁸⁹ 1993 Act, sch 9, para 4(1).

²⁹⁰ 1993 Act, sch 9, para 4(2) and (3).

²⁹¹ 1993 Act, sch 9, para 7(1).

or other unit in question under a lease inferior to the leaseback to be granted to the freeholder.²⁹²

- 6.26 Finally, it should be noted that the above summary of the current law does not give a complete picture of all the leaseback arrangements which a nominee purchaser and a freeholder might enter into. Although not provided for by the 1993 Act, it is not unheard of for a freeholder to agree to take leasebacks of the flats of qualifying tenants who are not participating in a collective enfranchisement claim. These leasebacks operate outside the provisions of the 1993 Act and need not therefore satisfy the prescribed requirements set out above.

Estate management schemes

- 6.27 We noted in respect of the right to acquire the freehold of a house under the 1967 Act that the exercise of that right created a risk for a landlord of an estate that individual premises which had previously been bound by leasehold covenants owed for the benefit of the estate would be released from such obligations after the freehold had been acquired.²⁹³ The creation of a right of collective enfranchisement posed a similar risk. The 1993 Act therefore permitted a landlord²⁹⁴ of an estate to apply to the Tribunal for an order approving the terms of a scheme (“an estate management scheme”) that allowed the landlord to retain powers of management in respect of collectively enfranchised premises, and to have rights against those premises in respect of the benefits arising from the exercise elsewhere of his or her power of management.²⁹⁵ Once made, an estate management scheme applies to future freehold acquisitions that take place pursuant to the exercise of enfranchisement rights. The criteria for the approval of such a scheme under the 1993 Act were the same as applied to the grant of a certificate by the Minister under the 1967 Act.²⁹⁶ In essence, a scheme could only be approved where it was required to maintain standards of appearance and amenity and to regulate development in an area in which existing powers of management could be lost as the result of the enfranchisement.
- 6.28 As had been the case under the 1967 Act, an application for the approval of an estate management scheme under the 1993 Act originally had to be made within two years of the introduction of the 1993 Act.²⁹⁷ And again, a further two-year period to bring an application was established to accompany changes to eligibility for collective enfranchisement introduced by the Housing Act 1996.²⁹⁸ After the expiry of those two-

²⁹² 1993 Act, sch 9, para 7(2) and (3).

²⁹³ See Ch 5 at para 5.11 above.

²⁹⁴ An application could also be made by two or more landlords of neighbouring areas, a suitable body of persons representing persons occupying or interested in the area (or such of them who are or many become entitled to enfranchise), or by certain public bodies (where the area was within a conservation area): 1993 Act, ss 71 and 73.

²⁹⁵ As noted in Ch 5 at para 5.12 above, the provisions of Ch IV of Pt I of the 1993 Act also applied to areas containing leasehold houses that became liable to enfranchisement as a result of changes introduced by the 1993 Act and, subsequently, by the Housing Act 1996.

²⁹⁶ See Ch 5 para 5.11 above.

²⁹⁷ 1993 Act, s 70(1), as originally enacted.

²⁹⁸ 1993 Act, s 70(1), as amended by the Housing Act 1996.

year windows in which to apply to the Tribunal for an estate management scheme, it is now only possible to apply to the Tribunal for the creation of an estate management scheme with the consent of the Secretary of State.²⁹⁹

- 6.29 In deciding whether or not to approve a scheme under the 1993 Act, the Tribunal must have regard primarily to the benefit to the area as a whole (including to enfranchised premises) likely to result from the scheme. It must also consider the extent to which it is reasonable to impose obligations on enfranchising leaseholders for the benefit of that area. It must also have regard to:

The past development and present character of the area and to architectural and historical considerations, to neighbouring areas and to circumstances generally.³⁰⁰

A scheme can only be approved if it does not give the landlord a degree of control that is out of proportion to that previously exercised by him or her, or to that required for the purposes of the scheme.³⁰¹

- 6.30 The matters that can be included within a scheme are fairly wide.³⁰² However, it is common for a scheme to seek to regulate external alterations or additions, and the development and use of the property acquired by enfranchisement. Often the owner will be required to obtain the consent of the landlord (not to be unreasonably withheld) to any such changes. In addition, obligations can be imposed on the occupants of enfranchised properties to carry out certain structural repairs, maintain boundary walls or maintain a garden. Similarly, owners of enfranchised properties can be required to repair parts of the area covered by the scheme that are used in common with others, or to contribute to the landlord's costs of doing so. Most schemes also require an enfranchised owner to insure the full replacement value of the owner's buildings. These obligations are considered binding on successors in title.
- 6.31 A scheme may also provide for sums due to the landlord to be charged on the owner's property, and for that charge to be enforceable as if he or she were a mortgagee. Provision is also normally made for the postponement of any such charge behind any first charge over the property.
- 6.32 Schemes made under the 1993 Act are required to include a provision allowing for the termination or variation of the scheme, or for the exclusion of any part of the area

²⁹⁹ Consent can only be given where the Secretary of State is satisfied that the application could not have made within the required time, or that both (a) any application made in time would probably have been dismissed, and (b) because of a change in circumstances, the application would probably be granted if consent were given. In either case, adequate notice of the application for consent must also be given. The authors of *Hague* note that "in practice... few new schemes are now likely to be created" (*Hague*, para 35-01).

³⁰⁰ 1993 Act, s 70(3). These terms are similar to the terms contained in s 19(3) of the 1993 Act.

³⁰¹ 1993 Act, s 70(7)(b)(ii). The editors of *Hague* consider that these provisions mean that the terms of the scheme must be broadly based on the existing leases, but that additional powers can be included if they are not disproportionate to those previously exercised. In *Re Dulwich College's Application* (1972) 224 EG 1039 (a case concerning s 19(3) of the 1967 Act) it was considered that the scheme had to be "fair and practicable".

³⁰² See *Hague*, para 35-24 and following.

included within a scheme, by or with the approval of the Tribunal. Whether a change of circumstances must be shown in each case remains unclear.³⁰³

CRITICISMS OF THE CURRENT LAW

- 6.33 The current right of collective enfranchisement has not been very widely taken up. On one view, this may be seen as inevitable. By its very nature, collective enfranchisement requires cooperation between leaseholders and a level of organisation beyond that necessary for exercising enfranchisement rights as an individual. Cooperation and organisation can be especially difficult in the case of large buildings, where a considerable number of leaseholders may be required to act together to make a successful claim. In some cases, where leaseholders do not live in their properties, it can be difficult for their neighbours even to make contact with them.³⁰⁴
- 6.34 Leaseholders will also be conscious that the story does not end at the point of acquisition of the freehold. Ongoing involvement in management of the building is thereafter required, which may not appeal to all. We have been told that in some sectors in particular – such as the retirement housing sector – some leaseholders have purchased their leases partly in order to reduce their property-management responsibilities. A high proportion of ordinary leaseholders in blocks of flats will be workers living in urban areas with many existing demands on their time. Quite simply, collective enfranchisement will only take place where there is a sufficiently motivated group of participating leaseholders, which will not be the case in many blocks. Conversely, however, it has been suggested that the current regime for collective enfranchisement operates to dissuade leaseholders from exercising the right. The right might be most likely to be exercised when there is already discontent with the management of the block, meaning that the leaseholders inherit an already difficult situation.
- 6.35 In any event, the cost of collective enfranchisement can be substantial. It is not just the purchase of the landlord's interest in their own flats which participating leaseholders will have to fund. They will also be required to purchase the landlord's interest in the flats of any qualifying but non-participating leaseholders and in any units within the premises which are not let to qualifying tenants (subject to any leasebacks which may be granted to the freeholder).³⁰⁵ It is possible for leaseholders to secure funding for collective

³⁰³ The editors of the third edition of *Hague* considered that a change of circumstances was a precondition to obtaining a variation, termination or exclusion. However, in the sixth edition, the editors refer (at para 35-42) to the decision of the Tribunal in *Re Wellcome Trust Limited and the Trustees of Smith's Charity Application* (1998) (unreported) wherein it was assumed that a change of circumstances was not a precondition to an application for a variation.

³⁰⁴ This issue has come to prominence recently in the context of leaseholders' right to form a "recognised tenants' association". In 2017, Government carried out a public consultation on proposals which would require landlords to request consent from all leaseholders to provide their names and contact details to a secretary of a tenants' association, and then to provide the secretary with the contact details of all leaseholders who so consent: Department for Communities and Local Government (now Ministry of Housing, Communities and Local Government), *Consultation on recognising residents' associations, and their power to request information about tenants* (July 2017) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/632116/s130_HPAAct_consultation.pdf. A response to that consultation from Government is forthcoming.

³⁰⁵ For discussion of leasebacks, see paras 6.16 to 6.26 above.

enfranchisement via a “white knight” investor,³⁰⁶ but this will not be available in all cases and does not take away from the fact that funding remains a significant hurdle for many groups of leaseholders. We have also been told that bank funding has become less readily available to fund collective enfranchisement claims.

- 6.36 These considerations go some way towards explaining why collective enfranchisement has not been more popular. However, there are also a number of more specific criticisms which have been made of the current right. Those are considered in this section.

Difficulties where the nominee purchaser consists of individuals

- 6.37 As set out above, leaseholders exercising the right to collective enfranchisement are free to choose the nature and identity of the nominee purchaser who will acquire the premises on their behalf. Various difficulties can arise where leaseholders choose to act via named individuals rather than through a company.

Lack of clarity surrounding beneficial ownership of the freehold

- 6.38 Wherever land is owned by more than one person, a “trust of land” will arise. Those who are named as holding the legal title of the land hold it “on trust” for all those who have a beneficial interest in the land. The legal owners and beneficial owners may or may not be the same people.
- 6.39 In cases where fewer than four leaseholders participate in a collective enfranchisement, it will be possible for all of them to be named as legal owners of the freehold interest acquired. However, it will not be clear from legal ownership alone how they intend the beneficial interest in the freehold to be held.³⁰⁷
- 6.40 Problems can be amplified where there are more than four participating leaseholders (whether because leaseholders from more than four flats are participating, or because one or more of the leases are themselves held in more than one name). In these cases, because only four persons can hold the legal title to land, the leaseholders named on the freehold title will hold it beneficially for others whose names do not appear anywhere on the legal title. Those individuals may not therefore be sufficiently protected if the legal owners were to seek to deal with the land without their agreement.
- 6.41 All of these difficulties can be avoided by having a proper declaration of trust drawn up at the time of the acquisition of the freehold. However, this will require careful drafting, usually by a specialist lawyer, and will usually have to be re-drawn each time a flat is sold. The process can be costly, and so it is not always done.

Problems with day-to-day decision-making and dispute resolution

- 6.42 A related problem is that, where the freehold interest is acquired in the name of individuals, there will often be no formally agreed basis on which day-to-day decision-

³⁰⁶ 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.

³⁰⁷ There are two ways in which co-owners can share the beneficial interest in property: as joint tenants, or tenants in common. The legal implications of each are different, and not always appreciated by property owners without the benefit of legal advice.

making is to be carried out, such as would be the case within a company structure. The individuals involved are simply left to decide between them how they will carry out their obligations as a freeholder. This provides an obvious source of potential disagreement.

- 6.43 Where disputes do arise between the leaseholders which cannot be resolved between them, they must be dealt with by way of an application to court pursuant to the Trusts of Land and Appointment of Trustees Act 1996.³⁰⁸ Such disputes can be expensive and time-consuming, and the court has a wide discretion on such applications so outcomes are unpredictable.

Potential for conveyancing difficulties

- 6.44 Where an individual leaseholder who has participated in a collective enfranchisement later seeks to sell his or her flat, it is generally expected that he or she will also sell with the flat his or her interest in the freehold.³⁰⁹ This typically increases conveyancing costs, whether the freehold interest is held in the names of individuals or by a company of which the leaseholder is a member. However, particular difficulties can arise in the former case.
- 6.45 First, it will be necessary to execute a separate conveyance of the freehold title (as well as the conveyance of the leasehold interest in the flat being sold) in order to replace the selling leaseholder's name with that of the buyer.³¹⁰ Difficulties can arise where the signature of one of the legal owners of the freehold title cannot be obtained (whether because they are deceased, missing or for some reason refuse to sign the transfer).
- 6.46 Alternatively, problems can arise where a lease of a flat is sold without a transfer of the corresponding share of the freehold interest.³¹¹ This will typically be the result of an oversight during the conveyancing process, but might also be the result of parties choosing to proceed in that way where one freehold owner's signature cannot be obtained (perhaps without appreciating the potential downsides of doing so). In these cases, new leaseholders may find themselves with a landlord who has little to no interest in meeting his or her obligations as landlord, or who may even be unaware that he or she continues to own the freehold of the premises in question.

Restriction of the right to single buildings consisting of flats

- 6.47 As set out above, the current right of collective enfranchisement may be exercised only by leaseholders of flats, and only in relation to one self-contained building or part of a building, and its associated premises. 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

³⁰⁸ As set out above, the leaseholders named on the freehold title as the legal owners hold the interest on trust for all participating leaseholders, and are therefore trustees.

³⁰⁹ Indeed, this will often be required where a trust deed is used, or by a covenant in a well-drafted voluntary lease extension granted after the collective enfranchisement.

³¹⁰ This assumes that the selling leaseholder is named as one of the legal owners of the freehold title. If this is not the case (ie if it is in fact held on trust for him or her by other leaseholders), then the proper approach would be to have those leaseholders execute a new declaration of trust to take account of the change of beneficial ownership.

³¹¹ A restriction entered on the leasehold title at HM Land Registry, providing that it should not be sold without the corresponding share of the freehold interest, will go some way to avoiding this issue, but these are not always utilised.

and managed together. We have identified several ways in which this restriction is unhelpful.

- (1) It is not possible for leaseholders in multiple buildings together comprising an estate to purchase collectively the freehold of the entire estate, even though it will often make good sense – in terms of effective and efficient management – for the whole to be owned and managed together. An example of such an estate might be one consisting of a block of flats and several houses, all of which share the same access road and car park.
- (2) Leaseholders of houses on estates (of which there are many) may be able to purchase the freehold of their house, but have no means by which to become involved in the management of the wider estate on which they live. The management of the estate can be an important aspect of their enjoyment of their homes. In this respect, such leaseholders are at a disadvantage compared to leaseholders of flats.
- (3) Where leaseholders on an estate of houses each exercise their right to acquire the freehold of their house, the common parts of the estate – such as an access road or grounds – will be left in the hands of a landlord who may thereafter have little interest in properly maintaining those parts. We have been told of cases where such landlords (usually a developer or special purpose vehicle company) have effectively abandoned the common parts altogether, perhaps becoming insolvent, leaving the land to fall into disrepair. Whilst it is open to the owners of the houses to seek to purchase the common parts from a disinterested landlord, they have no entitlement to do so.

6.48 In reality, the first of these issues will not always be a problem in practice. Where leaseholders across an estate consisting of multiple blocks of flats are sufficiently motivated and organised, it is possible for them to acquire the freehold of the entire estate. All that is required is for each block to enfranchise collectively, with each naming the same nominee purchaser and each claiming different areas of the common parts (which together make up the entirety of those parts). When all the transactions have completed, the entire estate will be within the ownership of one entity.

6.49 This work-around, however, is far from a complete solution to the issues identified above. Aside from its artificiality, in many cases there may be good reason for an estate to be owned by a number of the leaseholders and managed as a whole even if each block would not itself meet the criteria (whether in terms of the premises themselves or the necessary number of qualifying or interested leaseholders) for a collective enfranchisement of that block. Further, it is of no assistance to the owners of leasehold houses on estates. Additionally, the ability to acquire a whole estate is always subject to the landlord's right to grant the leaseholders permanent rights over the common parts instead of transferring the property of those parts.³¹²

Extent of premises acquired and rights over other land

6.50 As in the case of lease extension claims (discussed in Chapter 4), some stakeholders have criticised the provisions within the 1993 Act that seek to identify the extent of the

³¹² This right is discussed at para 6.11 above.

premises, and the rights over other land, that can be included in any transfer pursuant to a collective enfranchisement claim.

- 6.51 Many stakeholders consider that the distinctions in the 1993 Act between the different statutory bases on which property can be acquired by the nominee purchaser are difficult for most leaseholders to understand and apply without the benefit of legal advice.³¹³ As a result, leaseholders are more likely to need to incur the costs of obtaining legal advice before commencing a collective enfranchisement claim than would otherwise be the case.³¹⁴
- 6.52 The interpretation placed on these provisions by the courts has also made predicting whether a piece of land should be included in any transfer more difficult to predict.³¹⁵ For example, the courts have held that for land to be considered to be appurtenant under the 1993 Act (and hence included within any transfer), that land must fall within the curtilage of the building in which the flats are situated. The answer to that question is an issue of fact in each case. As a result, disputes between the parties as to whether any particular piece of land should be included within a transfer continue to arise.³¹⁶ The effect of those provisions, as interpreted by the courts, can leave leaseholders acquiring the freehold of less property than is included in their individual leases.
- 6.53 Many stakeholders find it difficult to understand why the legislation adopts this restrictive approach rather than allowing the leaseholders to obtain the freehold to all of the premises included within their existing leases. Many also believe that even if there is some advantage to be gained by landlords from the current position, the benefit is outweighed by the additional costs that can be incurred in resolving any disputes.
- 6.54 Other stakeholders have criticised the treatment of property that falls outside the building, that has not been let to any qualifying tenant under a lease, but that is used by such a tenant in common with others. Some stakeholders have criticised the leaseholders' power to acquire the freehold of land over which they currently only exercise rights. Others criticise the landlord's right to elect not to transfer the freehold but instead to (1) grant equivalent permanent rights over that land, or (2) convey the freehold to other land over which such permanent rights are granted.³¹⁷

Other terms of acquisition

- 6.55 As in the case of claims to acquire the freehold of a house under the 1967 Act,³¹⁸ some landlords have criticised the effect of the transfer under the 1993 Act of a block located within a wider freehold estate on their ability to recover in full the costs of works or services that they provide across that estate.

³¹³ See paras 6.10 to 6.11 above.

³¹⁴ This complexity causes further problems in relation to the validity of notices of claim given by leaseholders. Those issues, and our related proposals for reform, are considered in Ch 11.

³¹⁵ For example, in *Methuen-Campbell v Walters* [1979] 1 QB 525 and *Cadogan v McGirk* [1996] 4 All ER 643.

³¹⁶ See *Hague*, at para 20-04.

³¹⁷ See para 6.11 above.

³¹⁸ See Ch 5 at para 5.18 above.

- 6.56 As observed in Chapter 5,³¹⁹ over time, in the absence of an estate management scheme, the landlord of a wider estate may become unable to recover the full amount of the sums that he or she is obliged to spend. This shortfall often acts as a disincentive to the landlord continuing to carry out his or her obligations (such as the repair of common parts). In some cases, a landlord may seek to recover that shortfall from others on a voluntary basis. But in other instances, the problem can cause a deterioration in the condition and maintenance of the estate as a whole.
- 6.57 We noted above that one stakeholder proposed that this problem could be addressed in respect of new estates by the introduction of a flexible statutory estate management scheme to be approved by the Tribunal.³²⁰ Although modelled on estate management schemes under the 1993 Act, the powers in the proposed scheme could only be exercised by a body representing the leaseholders within the estate.
- 6.58 Leaseholders have, in contrast, raised concerns that some landlords try to use an enfranchisement claim as an opportunity to convert existing onerous leasehold terms into freehold obligations. For example, a lease may contain an obligation to obtain the landlord's consent before making any alterations to the property. This can lead to some landlords seeking to extract significant permission fees in order to give permission for (say) the leaseholder to construct a conservatory: see Chapter 4 at paragraph 4.37. On enfranchisement, landlords might seek to replicate those obligations in the transfer of the freehold.³²¹ Although leaseholders are not required, by the statutory scheme, to accept such terms, the imbalance of power between some leaseholders and landlords can lead to cases where leaseholders will accept such terms rather than dispute them in order to avoid the cost, delay and uncertainty of opposing the landlord's position.³²²

The “ping-pong” problem

- 6.59 Finally, we have been told of a practical problem which can arise where there are two competing “factions” of leaseholders within a building, who are both interested in having control of the building. It may be possible, in this scenario, for one such faction to exercise the right to collective enfranchisement and acquire the freehold of the premises, only for the other faction to immediately thereafter do the same and take the freehold interest from the first faction.³²³ In theory, this back-and-forth transfer of the freehold interest in the premises between two groups of leaseholders could carry on indefinitely, with the result that it has been colloquially referred to as the “ping-pong” problem. Although the premium payable on successive collective enfranchisements is

³¹⁹ See Ch 5 at para 5.19 above.

³²⁰ See Ch 5 at para 5.20 above.

³²¹ When such obligations are negative – but not where they are positive – they can bind the property (and successors in title) provided the landlord retains benefited land. But regardless of whether the landlord retains benefited land, mechanisms are available to allow both positive and negative obligations to bind successors in title.

³²² See Ch 5 at para 5.22.

³²³ This is a possibility because the notice of claim for a collective enfranchisement claim can be served by the qualifying tenants of only 50% of the total number of flats in the building (see para 7.81 below), and because there is no bar on a further collective enfranchisement claim being made against a freeholder who acquired the freehold by means of a prior collective enfranchisement.

likely to decrease over time,³²⁴ each transfer will give rise to conveyancing costs, and it is clearly far from ideal to have the freehold – and therefore management – of the premises changing hands regularly in this way.

OUR PROPOSED NEW REGIME

6.60 The right to collective enfranchisement is an important and useful right. We provisionally propose to retain it within our new scheme of enfranchisement rights, recast as the right of “collective freehold acquisition”. In this section, we set out our proposals for various ways in which the existing right can be improved upon, so as to make it more effective for leaseholders and more workable for all parties involved.

A company nominee purchaser

General requirement for a company nominee purchaser

6.61 We have set out above the problems which can arise when a freehold interest acquired by collective enfranchisement is held in the names of individuals. Setting up a company to act as the nominee purchaser goes some way to ameliorating these issues.

- (1) The lack of clarity surrounding the beneficial ownership of the freehold which can result from a trust structure is avoided. The company will be the owner of the freehold, with the participating leaseholders forming the membership of the company. Whilst there will inevitably be some cost involved in setting up a company, doing so at least ensures that the leaseholders’ intentions as to ownership will generally be discussed and agreed upon. It is unlikely that the freehold will be acquired without the leaseholders having made appropriate provision in this regard (for example, by the allocation of differing economic and voting interests in the company to reflect participating leaseholders’ respective contributions to the purchase price).
- (2) Setting up a company enables decision-making by the company directors, by consensus or by majority vote. This not only aids the efficient day-to-day management of the acquired premises, but is also likely to minimise disputes in this regard. This is particularly useful for larger blocks of flats. Further, under a company structure, many disputes between participating leaseholders which do arise will be internal disputes between company members rather than trustee disputes.
- (3) The conveyancing difficulties discussed at paragraphs 6.44 to 6.46 above are avoided. There is no need for a separate conveyance of the freehold title – all that needs to be dealt with on the sale of an individual leaseholder’s flat is his or her membership of the nominee purchaser company. This process is not difficult, and in the event it is somehow unsuccessful, it is possible for a director of the company to take steps to rectify the position (provided the company’s articles so

³²⁴ Because the enfranchising leaseholders are likely to grant themselves 999-year leases at a peppercorn rent, thus diminishing the value of the freehold interest in the premises.

permit).³²⁵ The possibility of a lease of a flat being sold without a transfer of the corresponding share of the freehold interest is thereby substantially reduced.

- 6.62 Requiring a nominee purchaser to be a company also has the additional benefit of facilitating our proposed new right to participate, discussed in the final section of this chapter. What we envisage is that leaseholders who did not participate in a collective freehold acquisition should be able, subsequently, to join in by purchasing a share of the freehold interest held by those who did participate. It seems to us that this would not be easy to operate where the freehold is held in the names of individuals. A conveyance of the freehold or a change of beneficial ownership (or both) would be required each time a leaseholder chose to exercise the right to participate. Where a company is the nominee purchaser, however, all that is required is for the leaseholder choosing to participate to become a member of the company on appropriate terms. The company's articles of association could make provision for this process.
- 6.63 On the other hand, we recognise that to require all collective freehold acquisition claims to be made through a company nominee purchaser may not be welcomed by all leaseholders. They would have no choice but to incur the costs of setting up and running a limited company, and would have to comply with a range of company law obligations. This may be perceived as particularly onerous for leaseholders in small blocks (of, say, 2, 3 or 4 flats) who may currently choose to hold the freehold title in their individual names after a collective enfranchisement specifically to avoid these impositions.³²⁶ Indeed, we acknowledge that there are many small blocks where leaseholders hold the freehold in their individual names and work together harmoniously to manage the building, without experiencing any of the difficulties described above.
- 6.64 On balance, we think that in most cases the benefits of using a company nominee purchaser outweigh the burden this may place on enfranchising leaseholders. We therefore provisionally propose a general requirement that a collective freehold acquisition claim must be carried out by a nominee purchaser which is a company. We do, however, consider that there is a strong case to permit an exception to this requirement in the case of claims concerning a small building – but only where the risk of making the right to participate considerably more difficult can be excluded. We therefore propose an exception to the requirement for a company nominee purchaser where:
- (1) the premises to be acquired contain four residential units or fewer;
 - (2) all residential units are held on long leases;
 - (3) the leaseholders of all residential units are participating in the claim; and

³²⁵ In the case of a company limited by shares, a director may transfer shares belonging to an outgoing leaseholder in default of that leaseholder doing so (pursuant to a power of attorney given by the company articles). In the case of a company limited by guarantee, the articles of association can provide for the automatic removal of a member if his or her lease is sold.

³²⁶ Given that legal title to the freehold can be held in a maximum of four names, as explained at para 6.8 above, blocks of more than four flats usually proceed by means of a company vehicle at present in any event.

(4) all those leaseholders agree.

6.65 These criteria ensure that at least one owner of each residential unit can be named on the legal title to the freehold,³²⁷ and that there are no remaining leaseholders (or potential leaseholders) who might later seek to exercise the right to participate.

6.66 We have also considered whether some of the requirements imposed on all companies by company law might be inappropriate or onerous for a nominee purchaser company, and whether these could be relaxed – for example, the requirement to file annual accounts (even if the company is dormant) or to file an annual confirmation statement. We seek the views of consultees on this point.

Consultation Question 21.

6.67 We provisionally propose:

- (1) a general requirement that a collective freehold acquisition claim must be carried out by a nominee purchaser which is a company; and
- (2) an exception to the above requirement where:
 - (a) the premises to be acquired contain four residential units or fewer;
 - (b) all residential units are held on long leases;
 - (c) the leaseholders of all residential units are participating in the claim; and
 - (d) all those leaseholders agree.

Do consultees agree?

6.68 Do consultees consider that some of the requirements of company law are inappropriate or onerous for a nominee purchaser company and should be relaxed? If so, please tell us which.

Nature of the company

6.69 If the nominee purchaser on any collective freehold acquisition is to be a company, it is necessary to consider the form that company should take. First, we have considered whether the liability of the company should be limited or unlimited.

Limited or unlimited liability?

6.70 Members of a limited company are not responsible for the debts and liabilities of the company. If the company fails, their liability is limited to any unpaid part of the nominal value of their shares (for a company limited by shares) or the amount of their guarantee (for a company limited by guarantee). In an unlimited company, however, in the event of insolvency, members of the company (in this case, the leaseholders) bear joint and

³²⁷ As set out above, up to four persons can hold the legal title to property: Law of Property Act 1925, s 34(2).

several liability for the company's debts, without limit. Creditors can lay claim to the personal assets of members, who may face personal bankruptcy if these are still insufficient.

- 6.71 Whilst it is to be hoped that the insolvency of a nominee purchaser company is a rare event, it remains a possibility. It seems to us inappropriate to require leaseholders participating in a collective freehold acquisition to take on this risk. Leaseholders do not get to choose who their neighbours are, in the way that those entering into an unlimited liability business partnership can carefully select the person with whom they do so. In practice, creditors of the company would pursue enforcement action against the more affluent leaseholders or those most easily persuaded to pay (which may also be the most vulnerable). At best, those leaseholders would be required to seek contributions from their non-paying neighbours. At worst, they would end up subsidising them. Indeed, we consider that the threat of unlimited liability would be likely to discourage many leaseholders from participating in a collective freehold acquisition.
- 6.72 It is sometimes suggested that an unlimited company has the benefit of being more attractive to creditors – both because they have recourse to the personal assets of members in the event of insolvency, but also because members who have put so much at risk are likely to scrutinise the company's operations very closely, thereby ensuring good management. And it is true that it can be difficult for leaseholder-owned companies to secure borrowing or credit, given that in almost all cases their only means of raising funds is through the collection of service charges. However, we do not consider that this potential benefit outweighs our concerns outlined above.
- 6.73 We therefore propose that the nominee purchaser company should be a company registered under the Companies Act 2006 with limited liability.

Limited by shares or by guarantee?

- 6.74 A private limited liability company can take two forms – limited by shares, or limited by guarantee. In a company limited by shares, members hold “shares” in the ownership of the company. As set out above, their liability for the company's debts is typically limited to any unpaid part of the nominal value of those shares.³²⁸ Members' voting rights depend on their shareholdings, and profits will generally be paid out to shareholders as dividends. In a company limited by guarantee, there are no shares. Members (or guarantors) guarantee to pay a fixed sum towards the company's debts in the event of its failure – again, often a nominal sum. Surplus income is usually reinvested in the company rather than being distributed amongst members (although this is not prohibited). We have considered which of these company forms is more appropriate for a nominee purchaser company.
- 6.75 It is often thought that the unequal allocation of voting rights between members and the distribution of income to members can be more easily accommodated in a company limited by shares. Differential voting rights may be particularly important where a collective freehold acquisition has been funded unequally by participating leaseholders – for example, where one of the participating leaseholders or a white knight funds the

³²⁸ Partly-paid shares are, however, unusual, and the nominal value of the shares is often as little as £1 in any event.

purchase of non-participating leaseholders' flats. In a company limited by shares, this contribution can easily be reflected by the allocation of extra shares in the company (because, generally speaking, each share carries with it one vote),³²⁹ or a different class of share. The default position in a company limited by guarantee, on the other hand, is that each member is entitled to one vote.

- 6.76 These concerns, however, are not insurmountable. Both the allocation of differential voting rights and the distribution of income can be accommodated by express provision within the articles of a company limited by guarantee. There are other ways too of protecting the interest of an external investor, such as a charge against the freehold title, or overriding leases. In any event, the need for external funding is likely to be substantially reduced if, as we propose at paragraph 6.131 below, the freeholder can be required to take leasebacks of all parts of the premises which are not let to participating leaseholders.
- 6.77 Further, a company limited by guarantee is likely to be administratively more convenient for its directors to operate than a company limited by shares. In particular, since there is no need to deal with share certificates, the company limited by guarantee can provide more easily for the admission and removal of members where the lease of a participating residential unit is sold. The articles can provide that, where a person ceases to own a unit, the directors can simply remove his or her name from the register of members and accept an application for membership from the new owner of that unit. This will avoid the difficulties which can arise where a selling leaseholder fails to properly transfer his or her share(s) in a nominee purchaser company to the buyer of his or her property, or where a mortgagee in possession sells the lease of the defaulting leaseholder's property but has no power to deal with the share in the company.
- 6.78 We consider that the ease of administration of the nominee purchaser company is of substantial importance if the right of collective freehold acquisition is to operate effectively. For that reason, we propose that the nominee purchaser company should be a company limited by guarantee.

Consultation Question 22.

- 6.79 We provisionally propose that the nominee purchaser company used for a collective freehold acquisition claim must be a company limited by guarantee.

Do consultees agree?

Prescription of articles

- 6.80 We have considered whether it is desirable for the articles of association of the nominee purchaser company to be prescribed to some extent. We think that it is. A template set of articles will reduce the number of decisions which need to be made by leaseholders

³²⁹ We note, however, the unusual decision in *Sugarman v CJS Investments LLP* [2014] EWCA Civ 1239, [2014] 3 EGLR 127, in which the Court of Appeal interpreted the articles of a company limited by shares as meaning that each member had only one vote, regardless of how many flats (and therefore shares) were owned.

when setting up their company, as well the drafting required in each particular case. This is likely to make it easier, quicker and cheaper to exercise the right of collective freehold acquisition. There will also be benefits when a leaseholder who has participated in a collective freehold acquisition later comes to sell their property. The work of conveyancing professionals is likely to be reduced if they need only consider those parts of the articles of association which are unique to the particular nominee purchaser company in question, thus making conveyancing faster and cheaper.

- 6.81 We also think that some prescription of articles is necessary to facilitate our new right to participate, discussed below at paragraph 6.144 onwards. The articles of association represent the terms on which a leaseholder exercising the right to participate in a prior collective freehold acquisition is to acquire membership of the nominee purchaser company (and, thus, a share of the freehold interest in the premises acquired). As such, not only must the articles be fair to such leaseholders (for example, the right to participate would be rendered illusory if the original participants could set up a company with articles providing that anyone seeking to join the company subsequently must pay a membership fee of £1,000,000), but provision must be made to ensure that they cannot be changed by the original participating leaseholders once the collective freehold acquisition has been completed but before anyone has exercised the right to participate.
- 6.82 For those reasons, we provisionally propose that the articles of association of any nominee purchaser company exercising the right of collective freehold acquisition must contain certain prescribed articles. We also propose that those prescribed articles may not be departed from for so long as there are non-participating leaseholders (or potential future leaseholders) who may seek to exercise the right to participate in the future. In other words, it would only be permissible for those prescribed articles to be departed from where all the residential units within the premises are held on long leases, and the leaseholders of all those units are already members of the nominee purchaser company.
- 6.83 We consider that it may be desirable for articles dealing with the following matters to be prescribed:
- (1) the objects of the company;
 - (2) the appointment, termination, powers and responsibilities of directors and their decision-making procedures;
 - (3) the admission and expulsion of members and their decision-making procedures (including voting rights);
 - (4) the provision of relevant insurances, such as directors' and officers' liability insurance, and employers' liability insurance where appropriate; and
 - (5) administrative matters and the production of accounts.
- 6.84 We also think that it may be necessary for prescribed articles to lay down a suitable mechanism by which the total premium payable on the collective freehold acquisition can be attributed to each of the units within the acquired premises (even though, in many cases, it will not actually be funded according to this division). Depending on the

valuation methodology that is adopted by Government following our review, this may be needed to ensure that leaseholders participating in the collective freehold acquisition claim do not attribute an unfair proportion of the total premium payable to non-participants' units, with the intention of making it more expensive than it might otherwise have been for non-participants to join in later.

6.85 Finally, we think that there are further matters for which leaseholders setting up a nominee purchaser company should be obliged to provide in the articles, but with some freedom as how exactly they do so. These matters might include:

- (1) the limitation of liability of company members;
- (2) the collection of subscription fees or cash calls on members;
- (3) the use or distribution of future company income from the grant of lease extensions or the exercise of the right to participate by non-participating leaseholders; and
- (4) the terms upon which a company member's lease may be extended and/or varied.³³⁰

³³⁰ It would be necessary to provide that any articles dealing with the terms of a lease extension or variation may not be changed whilst there remain non-participating leaseholders (or potential future leaseholders) who may seek to exercise the right to participate in the future. Otherwise, the initial participants in the collective freehold acquisition would be able to grant themselves lease extensions on favourable terms, and then change the articles of association so as to deprive leaseholders participating subsequently from availing of the same terms.

Consultation Question 23.

6.86 We provisionally propose that the articles of association of any nominee purchaser company exercising the right of collective freehold acquisition must contain certain prescribed articles. We also propose that those prescribed articles may only be departed from where:

- (1) all the residential units within the premises are held on long leases; and
- (2) the leaseholders of all residential units are members of the nominee purchaser company.

Do consultees agree?

6.87 We invite the views of consultees as to:

- (1) the matters in respect of which it would be desirable for articles to be prescribed; and
- (2) any matters in respect of which it would be desirable to require provision in the articles of association, albeit with some freedom as to that provision.

Restrictions on future dealings with the freehold title

6.88 It occurs to us that there is little point requiring leaseholders to use a company as the nominee purchaser for a collective freehold acquisition if they can immediately thereafter simply transfer the freehold title into the names of one or more individuals. For example, a group of leaseholders might do so in order to prevent other, non-participating leaseholders from exercising the new right to participate (discussed at paragraph 6.144 onwards), or to avoid the ongoing obligations associated with running a company. However, we do not consider that an outright ban on future dealings with the freehold title would be appropriate. There might be cases where there is good reason for a subsequent transfer. For example, all leaseholders may wish to sell the property to a developer for profit, or the nominee purchaser company may be unable to continue to meet its obligations by reason of financial difficulty.

6.89 We therefore propose a restriction preventing a nominee purchaser company, after a completed collective freehold acquisition, from disposing of the acquired premises save where:

- (1) all the residential units within the premises are held on long leases;
- (2) the leaseholders of all residential units are members of the nominee purchaser company; and
- (3) all members of the company agree with the proposed disposition;

OR

- (4) the Tribunal makes an order permitting the proposed disposition.

- 6.90 A restriction framed in these terms ensures that the acquired premises cannot be transferred out of the name of the nominee purchaser company without the permission of the Tribunal whilst there are remaining leaseholders (or potential leaseholders) who might wish to exercise the right to participate. The Tribunal's discretion to grant such permission could be limited to cases where the nominee purchaser can demonstrate a good reason for such a transfer – for example, its own inability to continue managing the premises properly, or its insolvency. We seek the views of consultees as to the circumstances which might amount to such a good reason.

Consultation Question 24.

- 6.91 We provisionally propose that a nominee purchaser company, having carried out a collective freehold acquisition, be restricted from disposing of the premises acquired, save where:

- (1) all the residential units within the premises are held on long leases;
- (2) the leaseholders of all residential units are members of the nominee purchaser company; and
- (3) all members of the company agree with the proposed disposition;

OR

- (4) the Tribunal makes an order permitting the proposed disposition.

Do consultees agree?

- 6.92 We invite the views of consultees as to the grounds on which the Tribunal should be empowered to permit a disposition of the premises acquired collectively by a nominee purchaser company.

Collective freehold acquisition of estates

- 6.93 At paragraphs 6.47 to 6.49 above, we identified the restriction of the current right to collective enfranchisement to the acquisition of single buildings consisting of flats as a significant limitation posed by the current law, particularly for the owners of leasehold houses living on estates. We therefore consider that there is an advantage in expanding the right of collective freehold acquisition to permit the long leaseholders of residential units on an estate comprising multiple buildings to acquire the freehold of the whole estate – to participate in an “estate enfranchisement”. This would apply whether the buildings on the estate are houses or blocks of flats, or any combination of the two.
- 6.94 Of course, proposing such a right raises many further questions. How should an “estate” be defined? What criteria must be satisfied for an estate enfranchisement to proceed? What happens if some houses or buildings on the estate have already exercised other freehold acquisition rights? Can leaseholders “carve out” an individual freehold acquisition or a collective freehold acquisition of an individual building on the estate after the whole estate has been acquired collectively?

6.95 We consider the criteria that must be satisfied for an estate enfranchisement to proceed as part of our general consideration of qualifying criteria in Chapter 8 below. Otherwise, we consider that the above issues could be resolved in the following ways.

- (1) An estate enfranchisement will be available where the residential units let on long leases within multiple buildings all contribute to a common service charge (whether or not there are also other separate service charges for each distinct building or for smaller groups of buildings).
- (2) Where an estate enfranchisement is proposed, but there has already been some prior enfranchisement of houses or buildings on the estate:
 - (a) A building or part of a building which has already carried out a collective freehold acquisition may be included in the estate enfranchisement only if:
 - (i) it still meets the criteria to be eligible for collective freehold acquisition of that building or part alone; and
 - (ii) the minimum number of leaseholders who would be required to participate in a collective freehold acquisition of that building or part agree to being included in the estate enfranchisement.
 - (b) A unit which has already been the subject of an individual freehold acquisition (a typical house) may be included in an estate enfranchisement only with the agreement of the freehold owner.³³¹
 - (c) If the consents described above are not forthcoming then it will not be possible to acquire the relevant house, building or part of a building as part of the estate enfranchisement.
- (3) After an estate enfranchisement has taken place, it will remain possible for individual freehold acquisitions or collective freehold acquisitions of individual buildings to take place. Our proposals in Chapter 5 at paragraphs 5.54, 5.55 and 5.65 (in respect of individual freehold acquisitions) and at paragraphs 6.121 to 6.123 and 6.126 below (in respect of collective freehold acquisitions) will help to alleviate the current problem relating to the continuation of estate service charges where part only of an estate is the subject of a freehold acquisition claim.

³³¹ In many cases, a former leaseholder who has acquired the freehold of his or her unit individually will no longer have a lease of that unit, as the long leasehold and freehold interests will have been merged. In these circumstances, he or she would need to take a lease extension of the property in order to retain a right of possession upon the acquisition of his or her freehold interest as part of an estate enfranchisement.

Consultation Question 25.

- 6.96 We provisionally propose that the right of collective freehold acquisition should extend to the acquisition of the freehold of an entire estate consisting of multiple buildings.

Do consultees agree?

- 6.97 We invite the views of consultees as to how such a right might operate. Do consultees consider that there are any problems with the approach we have suggested at paragraph 6.95, or any other issues for which we would need to provide?

Extent of premises acquired and rights over other land

- 6.98 We think that leaseholders making a collective freehold acquisition claim should, as at present, be entitled – through their nominee purchaser – to acquire the freehold to the building or buildings in which their flats are situated, including to the common parts of those buildings that do not form a part of any premises granted to any leaseholder by their lease. As such, the nominee purchaser would acquire both the freehold to the parts of the building held under individual leases – such as the flats and storage areas – and the freehold to hallways and staircases over which leaseholders exercise rights in common.
- 6.99 But we also believe, in contrast to the current position,³³² that the nominee purchaser should also be able to acquire the freehold to any other land let with the flats within the building or buildings, regardless of the character of that land, or whether it falls within the curtilage of the building. For example, the nominee purchaser should also acquire the freehold to garages or parking spaces that have been let to leaseholders.
- 6.100 In common with our proposals in respect of other enfranchisement rights,³³³ we consider that, in most instances, all rights granted by any existing lease of a flat within the building or buildings over land that is not let by that lease should be continued by the terms of the transfer in so far as is possible. For example, the transfer of the freehold should also include such rights of way over other land as are currently enjoyed by leaseholders under the terms of their existing leases.
- 6.101 However, in contrast to other enfranchisement rights,³³⁴ we consider that in some cases leaseholders making a collective freehold acquisition claim should instead be entitled to acquire – through their nominee purchaser – the freehold of other land over which such rights in common have been granted by their existing leases. In particular, where the right to make use of that land is shared only with other occupiers of the buildings which are to be acquired as part of the enfranchisement, the nominee purchaser should be able to acquire the freehold to that land. For example, where a right of way over other land is enjoyed only by occupiers of the buildings that were to be acquired, the nominee purchaser would be entitled to acquire the freehold to that land rather than

³³² See para 6.52 above.

³³³ See Ch 4 at para 4.48 and Ch 5 at para 5.26.

³³⁴ See Chs 4 and 5.

simply retain rights over it. We think that the acquisition of the freehold in place of granted rights can be justified in such circumstances, and should aid the better management of an estate.

- 6.102 We think that this approach will make it easier for leaseholders to understand what they are entitled to claim, and reduce the need for the cost of legal advice to be incurred on this point. We also believe that it will reduce the likelihood of disputes between the parties as to the extent of land, or other rights, to be included within a transfer of the freehold, and remove arguments based on the current alternatives that can be offered by landlords.

Consultation Question 26.

- 6.103 We provisionally propose that a nominee purchaser carrying out a collective freehold acquisition should acquire:

- (1) the freehold to the building or buildings in which the flats are situated, including any common parts; and
- (2) any other land let with the flats within the building.

Do consultees agree?

- 6.104 We provisionally propose that a nominee purchaser carrying out a collective freehold acquisition should be entitled to acquire the freehold of other land over which the leaseholders exercise rights in common, provided that the right is shared only with other occupiers within the building(s) being acquired.

Do consultees agree?

Other terms of acquisition

- 6.105 As in the case of an individual freehold acquisition, we propose that a transfer should overreach any incumbrances that would normally be overreached by an arm's-length sale. We also propose that a mortgage secured against the freehold title should be discharged automatically upon execution of a transfer pursuant to a collective freehold acquisition claim. However, the duties that would apply to leaseholders in respect of an individual freehold claim would apply equally to the nominee purchaser in a collective freehold acquisition claim.³³⁵

- 6.106 As in the case of an individual freehold acquisition claim, we provisionally propose that a landlord should use his or her best endeavours to redeem a rentcharge, save in the case of an estate rentcharge imposed to secure the enforcement of positive covenants.³³⁶

³³⁵ See Ch 5 at para 5.32.

³³⁶ See Ch 5 at para 5.33.

Consultation Question 27.

6.107 We provisionally propose that, on a collective freehold acquisition:

- (1) any mortgage secured against the freehold title should automatically be discharged upon execution of the transfer; but
- (2) the nominee purchaser should be under a duty to pay:
 - (a) the whole of the price, or
 - (b) (if less) the sum outstanding under the mortgage,to the mortgagee or, alternatively, into court; and
- (3) any sums due from the nominee purchaser to the landlord should be reduced by any sums paid under (2) above.

Do consultees agree?

6.108 We also provisionally propose that on a collective freehold acquisition – save in the case of estate rentcharges imposed to secure positive covenants – a landlord should be under a duty to use his or her best endeavours to redeem any rentcharge.

Do consultees agree?

6.109 In Chapter 5 above,³³⁷ we set out a distinction between individual freehold acquisitions of the whole of the landlord's freehold interest and the individual freehold acquisition of less than that whole.

6.110 We believe that distinction holds in respect of collective freehold acquisition claims. Where the whole of the landlord's freehold interest is to be acquired by a nominee purchaser, the relationship between the freehold premises and those holding leasehold interests within those premises will have already been defined by the terms of the existing leases. And the relationship between the freehold premises and any third-party owners of adjoining land will have already been set by the terms of the existing transfer. Where the nominee purchaser is not to acquire the whole of the landlord's freehold interest, those rights and obligations will not have been set to date, and any transfer of the freehold will need make provision for them.

6.111 We also note that our proposed expansion of the right of collective freehold acquisition to allow the whole of an estate to be acquired by a nominee purchaser has the potential to increase the number of claims where the whole of the landlord's freehold interest is being acquired.³³⁸ Blocks within, or individual residential units across, an estate, which

³³⁷ See Ch 5 at paras 5.36 to 5.40 above.

³³⁸ See para 6.93 above.

would previously have been required to enfranchise separately, might now more easily join to acquire the whole of the landlord's freehold interest. There will, however, remain cases in which this is either not desired or not possible.³³⁹

Acquiring the whole of the landlord's freehold interest

6.112 The transfer of the whole of the landlord's freehold interest to a nominee purchaser in a collective freehold acquisition claim need not require any changes to the existing rights and obligations attaching to the freehold. The exception is where those obligations would, in the case of an ordinary transfer of land outside the terms of the Acts, be discharged upon the payment of the purchase price for that land.³⁴⁰

6.113 We believe that, as in the case of individual freehold acquisition claims, those undischarged rights and obligations could be continued automatically upon acquisition of the freehold, without the need for express provisions within a transfer detailing those rights. As in the case of individual claims, we invite the views of consultees as to the best statutory or other means by which that can be achieved.

6.114 Leaseholders seeking to acquire the freehold to their premises are usually reluctant to agree to any additional restrictions on their use of the land once acquired. However, we acknowledge that in some instances leaseholders might elect to introduce such restrictions. Leaseholders might, for example, seek to agree to a covenant preventing development, or non-residential use, with the aim of reducing the price that might otherwise be payable to acquire the freehold.

6.115 However, for the reasons set out above,³⁴¹ we do not think that leaseholders are likely to benefit as much as landlords from any broad power to introduce additional terms. We therefore provisionally propose, as in the case of individual freehold acquisition claims, to allow only the adoption of one or more additional covenants that appear on a prescribed list of such covenants, provided that the leaseholders have elected to include them.

6.116 We again seek the views of consultees as to the types of covenant that should be included within the prescribed list.

³³⁹ For example, where a building on an estate has already been the subject of a collective freehold acquisition, and either it no longer meets the criteria for collective freehold acquisition or there is not sufficient agreement from leaseholders within that building.

³⁴⁰ Such as the discharge of a mortgage over the freehold.

³⁴¹ See Ch 4 at para 4.66.

Consultation Question 28.

6.117 We provisionally propose that, where a nominee purchaser making a collective freehold acquisition claim is to acquire the whole of the landlord's freehold interest, any rights and obligations that are not ordinarily discharged upon payment of the purchase price should be continued automatically.

Do consultees agree? What do consultees consider would be the best statutory means by which this could be achieved?

6.118 We provisionally propose that, where a nominee purchaser making a collective freehold acquisition claim is to acquire the whole of the landlord's freehold interest, the parties should only be able to adopt additional covenants if those covenants are drawn from a list of prescribed covenants.

Do consultees agree? Which covenants do consultees consider should be included within such a prescribed list?

Acquiring less than the landlord's whole interest

6.119 Any transfer of part only of the landlord's freehold interest would – in addition to transferring the freehold on terms relating to that part – need to define the legal relationship between that part and the landlord's retained land.

Where the leases already set out terms governing the relationship with the landlord's retained land

6.120 In some collective freehold acquisition claims, the rights and obligations relating to the retained land will be contained in the leases contained within the premises to be acquired. For example, where the leasehold premises formed part of a wider estate within the ownership of the landlord, those leases are likely to have set out rights and obligations in respect of the wider estate.

6.121 As in the case of individual claims, where there is no existing estate management scheme, the nominee purchaser's freehold title to the part acquired could in principle also contain rights and obligations that reflect those set out in such leases. But as noted in Chapter 5,³⁴² this approach would prevent leaseholders from using enfranchisement as a way of freeing themselves from obligations within their existing leases that they consider to be onerous. However, as also noted in Chapter 5, we do not believe that enfranchisement is the best means of addressing the issues that arise in respect of the fairness of such terms. It is an indirect means of addressing the issue and one which only benefits those who are enfranchising. We also note that the Law Commission's Thirteenth Programme includes a project on unfair terms within residential leases.³⁴³ That work has the potential to provide a solution to unfair terms in leases irrespective of whether the leaseholder is exercising a right to enfranchise. It should be noted,

³⁴² See Ch 5 at para 5.53.

³⁴³ Thirteenth Programme of Law Reform (2017) Law Com No 377, paras 2.45 to 2.47.

however, that not all terms that leaseholders consider to be onerous will satisfy the legal test of unfairness.

6.122 As in the case of individual freehold acquisition,³⁴⁴ we think that two options are available. First, that the freehold acquired by the nominee purchaser should be made subject to such rights and obligations in respect of the retained land as reflect those set out in the existing leases. Secondly, that the freehold acquired by the nominee purchaser should only be made subject to such rights and obligations as appear within a prescribed list of appropriate covenants. We believe that the considerations set out in Chapter 5 at paragraph 5.55 in respect of these two options would apply equally to a collective freehold acquisition claim.

6.123 As set out in Chapter 5, there remain practical legal difficulties in creating positive obligations that bind successors in title to freehold land.³⁴⁵ But we believe it would be possible to create a statutory positive obligation to do so that would arise upon the transfer of a freehold pursuant to enfranchisement rights.

Consultation Question 29.

6.124 We invite the views of consultees as to whether, on a collective freehold acquisition claim where the leaseholders' existing leases contain rights and obligations in respect of land that is to be retained by the landlord, the nominee purchaser should (where there is no current estate management scheme in place) acquire the freehold subject to terms in respect of the retained land that:

- (1) reflect the rights and obligations set out in the leaseholders' existing leases; or
- (2) appear within a prescribed list of appropriate covenants.

6.125 We invite the views of consultees as to the types of term that should be included within such a prescribed list.

Where the leases do not set out terms governing the relationship with the landlord's retained land

6.126 In other cases, there will be no existing agreement that seeks to govern the relationship between the land that is to be acquired by the nominee purchaser and the land retained by the landlord. It may, therefore, be necessary for the parties to fill in any gaps. As in the case of individual claims,³⁴⁶ we believe that the ability of the parties to negotiate these other terms should be restricted. We therefore propose that such additional covenants should only be permitted where they are drawn from a prescribed list of such covenants. That list should be limited to covenants that can arise upon retention of part of the landlord's land. Wider changes should not be included. We believe that this restriction on the terms that can be introduced will prevent landlords from seeking to

³⁴⁴ See Ch 5 at para 5.55.

³⁴⁵ See Making Land Work (2011) Law Com No 327, Pt 6.

³⁴⁶ See Ch 5 at para 5.65.

introduce new onerous terms as part of any transfer of the freehold of premises to a nominee purchaser under the statutory scheme.

Consultation Question 30.

6.127 We provisionally propose that, on a collective freehold acquisition claim where the leaseholders' existing leases do not contain rights and obligations in respect of land that is to be retained by the landlord, the nominee purchaser should (where there is no current estate management scheme in place) acquire the freehold subject to terms in respect of the retained land that appear within a prescribed list of appropriate covenants.

Do consultees agree?

6.128 We invite the views of consultees as to the types of terms that should be included within such a prescribed list.

New ability for leaseholders to require the freeholder to take leasebacks

6.129 As set out above, the current law enables freeholders responding to a collective enfranchisement claim to elect to take leasebacks of any units within the premises being acquired:

- (1) which are not let to qualifying tenants (in other words, flats which the freeholder retains, or commercial units); or
- (2) which the freeholder occupies, and of which he or she is also a qualifying tenant.

Aside from mandatory leasebacks of any flats let on secure, introductory or housing association tenancies, there is no ability under the current law for leaseholders to require the freeholder to take a leaseback of any part of the premises. We have considered whether these provisions strike the right balance between the interests of the freeholder and those of the leaseholders seeking to enfranchise.

6.130 A freeholder usually has a considerably greater interest in units which are not let on long leases than in those which are so let. The freeholder may derive a substantial income from such units, particularly in the case of commercial units. In respect of units where the freeholder is also a leaseholder under a long lease and the occupant, the freeholder has a personal interest in addition to a commercial one, by reason of his or her occupation. For these reasons, we think the ability of the freeholder to elect to take leasebacks of these parts of the premises being acquired is one which should remain under our new scheme of collective freehold acquisition.

6.131 Our Terms of Reference also require us both to consider the case to improve access to enfranchisement and to examine the options for reducing the premium payable by leaseholders to enfranchise. As mentioned above, the need to fund the purchase of the freeholder's interest in the flats of any qualifying but non-participating leaseholders and in any units within the premises which are not let to qualifying leaseholders can affect the ability of some groups of leaseholders to enfranchise. To alleviate this difficulty, we

provisionally propose that leaseholders exercising the right of collective freehold acquisition should be able, if they so choose, to require the freeholder to take a leaseback (or leasebacks) of any or all parts of the premises (other than common parts) which are not let to participating leaseholders. This would include the flats of qualifying but non-participating leaseholders, flats which are not let on long leases, and commercial units. Whilst we acknowledge that granting leasebacks to the freeholder is unlikely to be attractive to some groups of enfranchising leaseholders (who are acquiring the freehold with the specific aim of getting rid of their freeholder), for others this proposal has the potential to result in a significant reduction in the premium payable. Further, we do not consider that this change would cause significant disadvantage to the freeholder. If he or she does not wish to retain a leaseback interest in any particular unit then he or she is free to sell it on.

Consultation Question 31.

6.132 We provisionally propose to introduce a new power for leaseholders exercising the right of collective freehold acquisition to insist, if they so choose, that the freeholder take a leaseback or leasebacks of all parts of the premises (other than common parts) which are not let to participating leaseholders.

Do consultees agree?

Limitation on successive collective freehold acquisitions

6.133 Finally, we have considered how the “ping-pong” problem identified at paragraph 6.59 above might be addressed under our new regime.

6.134 To some extent, this problem might be lessened by the introduction of our proposed new right to participate, discussed in the final section of this chapter. If leaseholders who did not participate in a collective freehold acquisition claim are able, effectively, to join in that claim at a later date, they may be less inclined to attempt their own such claim. This will be particularly so given that the leaseholders who participated in the original collective freehold acquisition claim will enjoy the same right to participate in any subsequent acquisition. Nevertheless, we appreciate that the right to participate is not a complete solution to this problem. The ping-pong problem is most likely to arise where two factions of leaseholders hold very divergent views on how the premises in question should be run. In such cases, they may not be particularly keen to share its control and management with one another. Further, the proposed right to participate presents its own challenges, as discussed at paragraph 6.156 below. For these reasons, we have considered other means by which successive collective freehold acquisition claims might be limited.

6.135 One option would be to prohibit altogether a collective freehold acquisition claim where the intended subject premises have already been the subject of a prior such claim. We think, however, that a total prohibition would be very difficult to justify. There are likely to be cases where it is entirely appropriate for a second collective freehold acquisition claim to take place. After all, we are talking about properties which are likely to continue to exist for a very long time into the future. As mentioned above, a collective freehold

acquisition brings with it responsibility for the running of the premises acquired. An initial group of highly-motivated participating leaseholders might well, over time, be replaced by leaseholders who are not so willing to play an active part in management. In such a case, it is difficult to see why a different group of leaseholders should not be permitted to make a collective freehold acquisition claim.

6.136 Another option would be to require that leaseholders seeking to bring a further collective freehold acquisition claim obtain the permission of the Tribunal to do so. The Tribunal could be empowered to give permission only where there is a good reason for a further acquisition – such as, for example, poor management by the existing freehold owners. However, we think that this option may place an unfair burden on leaseholders who do have a good reason for carrying out a second acquisition, whilst requiring the Tribunal in borderline cases to make difficult assessments as to the relative merits of management by competing groups of leaseholders. We are also concerned that the Tribunal may be faced with spurious applications for permission in cases where there are bad relations between two competing groups of leaseholders. We do not wish to increase the workload of the Tribunal without proper justification.

6.137 We therefore consider that the best way of addressing the ping-pong problem would be by the introduction of a time-limited prohibition on further collective freehold acquisition claims where premises have already been acquired collectively. A period during which no further claims can be made will give participating leaseholders a fair opportunity to establish that they can manage the premises satisfactorily,³⁴⁷ without unduly restricting the enfranchisement rights of non-participating leaseholders (who will also enjoy the right to participate, discussed below, during that period). We suggest that a period of five years would be an appropriate duration for such a prohibition. That period ought to be long enough for the success or otherwise of the initial collective freehold acquisition to be assessed, but not so long that the proper and efficient management of buildings is stymied.

Consultation Question 32.

6.138 We provisionally propose that, where premises have been the subject of a collective freehold acquisition claim, the leaseholders in those premises should be prohibited from making a further collective freehold acquisition claim in respect of the same premises for a set period.

Do consultees agree?

6.139 We provisionally propose that five years would be an appropriate duration for such a prohibition.

Do consultees agree?

³⁴⁷ If this can be done, the right to participate (discussed at paras 6.144 to 6.156 below) may prove sufficient for other leaseholders who wish to play a part in ownership and management so that future collective freehold acquisition claims can be avoided altogether.

TRANSFERS OUTSIDE THE STATUTORY SCHEME

6.140 In Chapter 4 we described the risk posed to any statutory lease extension scheme by allowing parties to agree to enter into a transaction outside of that scheme.³⁴⁸ We also outlined ways in which this problem might be addressed.³⁴⁹

6.141 We think that the same risks are posed in respect of any statutory scheme for collective freehold acquisition. We therefore invite consultees to tell us whether such voluntary transfers cause a significant problem in practice, and to consider what steps they believe might be taken to control or limit their use or impact.

Consultation Question 33.

6.142 Do consultees believe that the ability of parties to enter into a transfer of the freehold of a block of flats outside the 1993 Act creates significant problems in practice?

6.143 What steps, if any, do consultees believe could be taken to control or limit the use or impact of parties entering into a freehold transfer to a group of leaseholders outside of a new statutory enfranchisement regime?

THE NEW RIGHT TO PARTICIPATE

The problem of participation

6.144 As explained at the beginning of this chapter, a collective enfranchisement claim can generally proceed even if not all of the units in the subject premises are let to qualifying tenants, and even if not all of the qualifying tenants support the claim. The qualifying criteria for a collective enfranchisement claim are discussed in detail in Chapter 7 below. To summarise briefly, the general rule is that two-thirds of the flats in the premises must be let to qualifying tenants, and a notice of claim must be served by the qualifying tenants of at least one half of the total number of flats.³⁵⁰

6.145 There are good reasons why the participation of all qualifying tenants is not required for a collective enfranchisement claim to proceed.³⁵¹

- (1) Many premises which could be the subject of a claim will have at least one leaseholder who has no desire to participate, or perhaps is unable to afford the cost of doing so. It would seem unfair to rule out a widely-supported collective enfranchisement because a small minority of leaseholders do not want to or cannot, for some reason, participate.

³⁴⁸ See Ch 4 at paras 4.94 to 4.95.

³⁴⁹ See Ch 4 at para 4.96.

³⁵⁰ Exceptions include premises containing just two flats (where both flats must be let to qualifying tenants and both must participate in the claim), and premises of which more than 25% of the internal floor area is neither occupied nor intended to be occupied for residential use (which are not eligible for collective enfranchisement).

³⁵¹ As will be seen in Ch 8 below, we do not propose to change this position.

- (2) It would become extremely difficult, if not impossible, to carry out a collective enfranchisement of a large block if all leaseholders were required to participate. Further, landlords would be able to veto any proposed claim simply by retaining control of just one flat within the given premises. In short, the “right” to collective enfranchisement would be rendered illusory in many cases.

6.146 What is harder to justify, however, is the fact that leaseholders who would be eligible to participate in a proposed collective enfranchisement claim will not necessarily know that one has been proposed. There is no requirement that all qualifying tenants be invited to join the participating leaseholders in making the claim, or even informed that a claim is about to be made or is in progress. Some participating leaseholders choose, quite deliberately, to exclude one or more leaseholders. In other cases, they may simply have no means of making contact with certain non-resident leaseholders. It is entirely possible, therefore, that the first a non-participating leaseholder will know of a collective enfranchisement claim is when they are informed, after the transaction has completed, that they have a new landlord.

6.147 This state of affairs is unsatisfactory for two main reasons.

- (1) First, relations between neighbouring leaseholders are unlikely to be well served if it is felt by non-participants that they have been unfairly kept in the dark by those who participated in the collective enfranchisement – and who have now become the landlord of the non-participants.
- (2) Perhaps more importantly, participation in a collective enfranchisement is, generally, a “one-off” opportunity. A non-participating leaseholder will only be able to acquire a share in the freehold subsequently by 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. The former method may result in the non-participating leaseholder purchasing a share of the freehold on terms which are considerably less favourable than those enjoyed by the participants in the collective enfranchisement, and the latter is not conducive to effective management and good leaseholder relations. In any event, neither is guaranteed to succeed.

6.148 Of course, the one-off nature of collective enfranchisement also has implications for leaseholders beyond those who were unaware, for whatever reason, that a collective enfranchisement claim was being pursued. As mentioned above, there may be leaseholders who would have liked to participate in the claim, but were unable to finance their share of the purchase price, or others who chose not to participate for some other reason. Others may have acquired their lease since the collective enfranchisement took place.³⁵²

Previous attempts to increase participation

6.149 Attempts have been made before to address the problems outlined in the previous section. The Commonhold and Leasehold Reform Act 2002 contains a number of

³⁵² This could be the case where a lease extension has been granted of a residential unit which was not previously let on a long lease, or where a non-participating leaseholder has assigned his or her lease.

provisions – known as the “right to enfranchise” or “RTE” provisions – intended to amend the 1993 Act so as to ensure that all qualifying tenants would be notified of an intended collective enfranchisement claim and given the opportunity to participate in that claim.³⁵³

6.150 Those provisions would make it compulsory for leaseholders exercising the right of collective enfranchisement to use a prescribed form of company – “the RTE company” – as the nominee purchaser. Once the RTE company had been incorporated, it would be mandatory for the initial participating leaseholders to serve an “invitation notice” on any qualifying tenant who was not already a member of the company, at least 14 days before serving the notice of claim on the landlord. The invitation notice would make the recipient aware that a collective enfranchisement claim was to be made, provide certain information about the proposed claim and invite the recipient to become a participating member of the RTE company. Any qualifying tenant would be able to become a member of the RTE company simply by serving a “participation notice” within a prescribed “participation period”.

6.151 However, the RTE provisions have never been brought into force, and the secondary legislation needed to lay out the detail of RTE companies has not been produced. There has been widespread criticism of the complexity of the proposed RTE procedure and its potential to give rise to further disputes between leaseholders and landlords, and amongst leaseholders themselves. Accordingly, whilst the RTE provisions have not yet been formally repealed, it now appears to be accepted that they are unworkable and will never be brought into force.

A possible solution

6.152 We have considered how our new enfranchisement regime might best ensure that all leaseholders who qualify for the right of collective freehold acquisition are given every opportunity to participate whenever that right is exercised by their fellow leaseholders. In doing so, we have considered participation not only at the time of the collective freehold acquisition in question, but also subsequently.

6.153 We do not consider that requiring leaseholders who wish to carry out a collective freehold acquisition to serve mandatory invitation notices on all other qualifying leaseholders is a workable solution. To begin with, it is obvious that such a requirement is likely to be an onerous one in the case of large blocks. As noted at paragraph 6.33 above, leaseholders will not infrequently have difficulties even locating contact details for their neighbouring leaseholders. A requirement to invite all other eligible leaseholders is therefore likely to delay the making of the claim, which could result in the price to be paid increasing during the period of delay. Further, we understand that in the context of the current right to manage legislation (which does require invitation notices to be served), invitation notices have proved a fruitful source of dispute between leaseholders and landlords.³⁵⁴ Members of our advisory group have told us that

³⁵³ Commonhold and Leasehold Reform Act 2002, ss 121 to 124.

³⁵⁴ Disputes have arisen in relation to issues as varied as a failure to include the prescribed notes in the invitation notices (*Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC), [2016] L&TR 23), a failure to include on the invitation notices a Saturday or Sunday as an available date for the inspection of the articles of association of the RTM company (*Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ

landlords may object to the validity of invitation notices even at a late stage in the process, when considerable costs have already been incurred, resulting in time-consuming Tribunal proceedings with the attendant further delay and cost.³⁵⁵ In addition, leaseholders would have to invite other leaseholders who are associated with the landlord to participate, with the risk that the landlord would gain an important insight into the legal and valuation advice that the leaseholders had received.

6.154 Accordingly, we consider that it is preferable to focus, in our reforms, on incentivising maximum initial participation in a collective freehold acquisition, whilst also enabling leaseholders to participate subsequently. To that end, we propose the creation of a new enfranchisement right, available where a building, part of a building or an estate has already been the subject of a collective freehold acquisition. We suggest that leaseholders who did not participate at the time of that claim, as well as those who have only since come to qualify for the right, should be able, subsequently, to purchase a share of the freehold interest held by those who did participate. We call this the right to participate. It becomes possible, in respect of collective freehold acquisitions under our new scheme, because of our proposal at paragraph 6.64 above that all such acquisitions must be carried out in the name of a company nominee purchaser.³⁵⁶ The leaseholder participating later can acquire an interest in the freehold equivalent to that of the original participants by acquiring membership of the company. As mentioned above, it would be much more difficult to facilitate the right to participate where the freehold title is held in the names of individuals following the collective freehold acquisition.

6.155 We consider that the introduction of the right to participate would offer several significant benefits to leaseholders.

- (1) First, this right will be of obvious benefit to those leaseholders who were not aware of a collective freehold acquisition claim at the time it was made, or were unable for one reason or another to participate at that time.
- (2) Second, we think that its introduction may also reduce instances of leaseholders being excluded from proposed collective freehold acquisition claims in the future. There is little to be gained from excluding a leaseholder who will have a statutory right to share in the acquisition subsequently. Inclusion could perhaps be further incentivised if it were apparent that the leaseholders who participated in the original claim would incur further cost each time a leaseholder who had not participated sought to exercise the right to participate.
- (3) Finally, as explained at paragraph 6.134 above, this proposal may go some way to reducing the ping-pong problem which exists under the current law.

89, [2018] QB 571) and a failure to serve an invitation notice on a deceased leaseholder's personal representative (*Assethold Ltd v 7 Sunny Gardens Road RTM Co Ltd* [2013] UKUT 509 (LC)).

³⁵⁵ The Law Commission is currently considering the operation of the right to manage process under a separate project. See <https://www.lawcom.gov.uk/project/right-to-manage/>.

³⁵⁶ As set out at para 6.64 above, the only exception to this requirement will be where the leaseholders of all residential units within the subject premises are participating in the collective freehold acquisition claim, such that there are no remaining leaseholders (or potential leaseholders) who might later seek to exercise the right to participate.

6.156 That said, it is apparent to us that the proposed right to participate raises a number of significant issues which will have to be addressed if the right is to operate successfully.

- (1) It will be necessary to consider the precise circumstances in which the right is available. Two situations raise particular difficulties. First, it is questionable whether the right should be available in respect of collective enfranchisements which have taken place under the existing enfranchisement legislation, which will not necessarily have been undertaken by a company nominee purchaser. Second, there are likely to be differing views as to whether a landlord who has taken a leaseback of part of the premises on the collective freehold acquisition (so as to become a leaseholder under a long lease himself or herself) should then be permitted to re-acquire a share of the freehold interest by exercising the right to participate.³⁵⁷
- (2) Thought will have to be given to the terms on which a leaseholder exercising the right to participate will be able to acquire membership of the nominee purchaser company. In the interests of fairness, we think that this should be on terms which are as close as possible – if not identical – to the terms on which the participating leaseholders became members. This might require some prescription of the articles of association of the nominee purchaser company, and perhaps also a mechanism by which these can be embedded so as not to prejudice the interests of leaseholders exercising the right to participate at a later date.
- (3) A leaseholder exercising the right to participate will necessarily have to pay a premium to do so. This could be calculated in the same way as the original participating leaseholders' contributions to the premium were calculated. However, in doing so, account would need to be taken of the particular terms on which the leaseholder is acquiring membership of the nominee purchaser company and any changes in the value of the freehold interest post-acquisition.
- (4) A procedure for the exercise of the right to participate will need to be devised. Ideally, this should be as consistent as possible with the proposed new procedure for a collective freehold acquisition claim, set out in Chapter 11 below.
- (5) The question of costs will also need to be considered. We think that it might be possible to create a costs-sharing regime which would both incentivise leaseholders exercising the right of collective freehold acquisition to invite all other leaseholders to participate in the claim and incentivise such invitees to join in, if they are able to do so, rather than waiting to exercise the right to participate later. Some examples may illustrate our thinking.
 - (a) As mentioned above, the initial participating leaseholders might be encouraged to invite their neighbours to join in the claim by provision to the effect that they would not be able to recover all of their costs where another leaseholder, who was not invited to join, subsequently exercises the right to participate.

³⁵⁷ For discussion of leasebacks, see para 6.129 onwards.

- (b) Conversely, leaseholders should be discouraged from choosing not to participate at the time of the collective freehold acquisition (perhaps in the hope that he or she may be able to do so more cheaply at a later date). This might be achieved by a provision to the effect that the costs payable for the exercise of the right to participate by a leaseholder who was invited to join the initial claim will exceed what he or she would have had to pay had he or she participated at that time.
- (6) Finally, it will be necessary to consider whether there are means by which leaseholders who were not invited to participate in a collective freehold acquisition, or who have only acquired their lease since then, could be made aware that there has been such an acquisition in respect of which they can exercise the right to participate.

Consultation Question 34.

6.157 We provisionally propose a new right to participate: the right for leaseholders who did not participate in a prior collective freehold acquisition claim, or who did not qualify for the right at the time of the prior claim, subsequently to purchase a share of the freehold interest held by those who did participate.

Do consultees agree?

6.158 Do consultees consider that the right to participate should be available only in respect of collective freehold acquisition claims completed in the future, or also in respect of collective enfranchisement claims that completed before commencement of the new regime?

6.159 We have identified at paragraph 6.156 a number of issues which will need to be addressed in order for the right to participate to operate successfully. We invite consultees to share with us their views on how these issues might be resolved, and to tell us of any further difficulties they foresee with the operation of the proposed right.

THE IMPACT OF REFORM

Consultation Question 35.

6.160 We welcome evidence as to the costs and benefits of requiring leaseholders pursuing a collective freehold acquisition claim to:

- (1) use a company limited by guarantee as the nominee purchaser;
- (2) comply with the applicable rules of company law; and
- (3) use a set of partly-prescribed articles of association for the company limited by guarantee.

Consultation Question 36.

6.161 To what extent does the current ability of parties negotiating the terms of a collective enfranchisement to agree the terms of the freehold transfer without restriction:

- (1) increase the duration and cost of the enfranchisement process;
- (2) increase the potential for disputes; and
- (3) lead to future difficulties (financial or otherwise) resulting from the inclusion of unusual terms within the freehold transfer?

6.162 To what extent would limitations on the ability of parties to include new rights and obligations in a freehold transfer to a nominee purchaser:

- (1) reduce the time and cost involved in acquiring the freehold collectively;
- (2) reduce the potential for disputes; and
- (3) reduce future difficulties (financial or otherwise) resulting from the inclusion of unusual terms within the freehold transfer?

6.163 Would this reform result in a higher proportion of leaseholders seeking to exercise the right of collective freehold acquisition?

Consultation Question 37.

6.164 To what extent would our proposed new ability for leaseholders exercising the right of collective freehold acquisition to require the freeholder to take leasebacks of all parts of the premises (other than common parts) which are not let to participating leaseholders make collective freehold acquisition more affordable? Would this reform result in a higher proportion of leaseholders seeking to exercise the right of collective freehold acquisition?

Part III: Who should be entitled to exercise enfranchisement rights?

In the preceding Part of this Consultation Paper, we made provisional proposals as to the enfranchisement rights which should be available to leaseholders. We proposed a scheme of three rights: the right to a lease extension, the right to acquire the freehold, and the (new) right to participate in an existing collective freehold acquisition. In this Part, we consider the criteria which leaseholders must meet in order to qualify for each of those rights. We refer to these as “qualifying criteria”.³⁵⁸

At present, the qualifying criteria for leaseholders of houses are set out in the 1967 Act. Those for leaseholders of flats are set out in the 1993 Act. The criteria differ in places as between leaseholders of houses and of flats, and as between those seeking to extend their leases and those seeking to acquire the freehold of their premises.

One of our key objectives in reforming this area is to address the inconsistencies between the treatment of leaseholders of houses and that of leaseholders of flats. We also want to reduce the overall complexity of determining whether a person qualifies for enfranchisement rights. Beyond this, however, we have sought to answer a more fundamental question: who *should* be entitled to enfranchisement rights?

This Part consists of three chapters. In Chapter 7, we summarise the qualifying criteria for leaseholders of houses and flats under the current law and outline the criticisms that have been levelled at this regime. Chapter 8 explains our general policy approach to the reform of qualifying criteria, before setting out our provisional proposals for a new scheme. Chapter 9 deals with those cases which constitute “exceptions” to our proposed scheme.

³⁵⁸ It is worth noting that certain of the criteria discussed (for example, the low rent test) are also used to determine the valuation basis that a leaseholder will be subject to, and therefore the price that he or she will have to pay to exercise his or her rights. Where this is the case, it is discussed further in Chs 14 and 15.

Chapter 7: Qualifying criteria: current law and criticisms

INTRODUCTION

- 7.1 In this chapter, we set out the criteria that leaseholders of houses and flats must meet in order to qualify for enfranchisement rights under the current law. We then outline the criticisms that have been made of these criteria.
- 7.2 We have explained that in this Consultation Paper we use the language of “leases” and “leaseholders” in preference to that of “tenancies” and “tenants”. In general, we do so even where the current legislation refers to “tenancies” and “tenants”. However, the concept of a “qualifying tenant” is central to the scheme of qualifying criteria under the 1993 Act. In this Part, therefore, that term is also used where appropriate.

THE CURRENT LAW

- 7.3 At present, there are separate frameworks of qualifying criteria for leaseholders of houses and of flats. Each is considered separately below. There are also different qualifying criteria for lease extensions and freehold acquisition. Those differences are highlighted where they arise. In addition, we identify one instance in which the legal position in Wales diverges from that in England.
- 7.4 These distinctions aside, the qualifying criteria for enfranchisement rights generally take into account:
- (1) the nature of the premises in respect of which the leaseholder in question wishes to exercise the rights;
 - (2) the nature of the leaseholder’s lease;
 - (3) the leaseholder’s use of the premises; and
 - (4) certain additional characteristics of the particular leaseholder (for example, how long he or she has held the lease, or whether he or she holds leases of other premises in the same block).
- 7.5 However, there is significant overlap between these factors. For example, the way in which a particular property is used by a leaseholder may affect whether or not it can be categorised as the kind of premises which are subject to enfranchisement rights. Similarly, the nature of a leaseholder’s lease may mean that additional requirements relating to his or her occupation of the premises must be satisfied before enfranchisement rights become available.

Qualifying criteria for leaseholders of houses: the 1967 Act

- 7.6 Section 1 of the 1967 Act identifies those leaseholders who may obtain a lease extension or acquire their freehold under the Act. The provision itself is lengthy, complex

and supplemented by numerous other provisions in the Act. In essence, to be entitled to enfranchisement rights, the leaseholder must be a long leaseholder of a house.

- 7.7 While this criterion may appear simple enough, there are many exclusions and additional requirements set out in section 1 and subsequent provisions of the Act which make the position far less straightforward. It is not necessary to detail every nuance of the current regime (its immense complexity being one of the major drivers for reform), but what follows is an overview of the key legal requirements.
- 7.8 We will consider first what it means to be a long leaseholder before looking at the meaning of a house.

(A) Long leaseholder

- 7.9 To qualify for enfranchisement rights under the 1967 Act, a person must be the leaseholder of a whole house under a long lease and have been so for a period of two years at the time that he or she makes a claim.³⁵⁹ In certain circumstances the lease will also need to be at a low rent. This section considers the following aspects of qualifying as a long leaseholder:

- (1) identifying the relevant leaseholder;
- (2) the two-year ownership requirement;
- (3) the definition of a long lease;
- (4) leases which cannot qualify;
- (5) business leases; and
- (6) the low rent test.

Identifying the relevant leaseholder

- 7.10 In a straightforward scenario the relevant leaseholder will simply be the leaseholder of the whole of the house in respect of which he or she is seeking to exercise enfranchisement rights. For example, where A (a landlord) sells a house to B on a long lease, B will be the leaseholder. If B assigns the lease to C, C will be the leaseholder.
- 7.11 But what if B has sub-let the whole or any part of the house to C? This is where matters become slightly more complicated.
- 7.12 Let us imagine that B has sub-let the whole house to C on a long lease. In theory, both B and C are entitled to rights under the Act. However, the legislation provides that, where a house is let on two or more leases which meet the relevant criteria, only the most inferior lease will qualify for enfranchisement rights and those superior to it will be excluded.³⁶⁰ In this example, C (as the sub-lessee) would have enfranchisement rights and B (as the superior leaseholder) would not.

³⁵⁹ 1967 Act, s 1(1)(a) and (b).

³⁶⁰ 1967 Act, s 1(1ZA).

- 7.13 Alternatively, consider the scenario where the house is divided into flats and B has sub-let one of those flats to C in such a way that C qualifies for enfranchisement rights in respect of the flat under the 1993 Act (explained below). In this case, B will need to satisfy an additional residence test (which does not otherwise apply) if he or she is to be eligible for enfranchisement rights in respect of the house.³⁶¹

Two-year ownership requirement

- 7.14 At the date of giving a notice of claim,³⁶² the person claiming enfranchisement rights must have been the leaseholder of the house under a long lease for the last two years.³⁶³ Generally, the leaseholder will need to have been the registered proprietor of the lease for that two-year period.³⁶⁴
- 7.15 Whether this requirement is met will usually be fairly straightforward to establish, but several special cases merit brief mention.
- (1) Where the long leaseholder dies, a family member living in the house with them who succeeds to the lease can count the deceased leaseholder's period of ownership as his or her own.³⁶⁵
 - (2) Where a leaseholder was previously entitled or permitted to occupy the house as a beneficiary under a trust, he or she can count that period of time as though he or she were the leaseholder at that time. Similar provision is made for a sole tenant for life of a lease which was settled land under the Settled Land Act 1935.³⁶⁶
 - (3) The personal representatives of a deceased leaseholder who had a right to acquire the freehold or to a lease extension immediately prior to his or her death are able to exercise that right while the lease is vested in them.³⁶⁷ They must do so within two years from the grant of probate or letters of administration.³⁶⁸

³⁶¹ 1967 Act, s 1(1ZB). The test is that the leaseholder (here, B) has occupied the house or part of it as his or her only main residence for the past two years or for periods amounting to two years in the past 10 years.

³⁶² Notices are discussed in Ch 10 below.

³⁶³ 1967 Act, s 1(1)(b). This requirement was introduced by the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), in place of the previous residence requirement discussed at para 2.8 above.

³⁶⁴ The authors of *Hague* note, at para 4-01, that a leaseholder may be able to rely on a period of time prior to the grant of his or her lease to meet the two-year ownership requirement, where he or she had the benefit of a specifically enforceable agreement for a lease during that period. This is because the definition of a tenancy within the 1967 Act includes a tenancy in equity: s 37(1)(f). For the same reason, the time between the grant of and first registration of the lease might count towards the two years, since during that time the lease takes effect as an agreement for lease.

³⁶⁵ 1967 Act, s 7(1). For the definition of "family member", see s 7(7).

³⁶⁶ 1967 Act, s 6(1).

³⁶⁷ 1967 Act, s 6A(1).

³⁶⁸ 1967 Act, s 6A(2). That is not to say, however, that personal representatives will be unable to make an enfranchisement claim after the expiry of two years from the grant of probate or letters of administration. The provision makes clear that the two-year restriction applies to claims based on the deceased leaseholder's period of ownership. A deceased's real property vests in his or her personal representatives on death:

- 7.16 A trustee in bankruptcy, however, cannot rely on the bankrupt's period of ownership in order to bring a claim under the 1967 Act and will need to satisfy the two-year requirement in his or her own right.³⁶⁹

Definition of a long lease

- 7.17 Section 3 of the 1967 Act defines a long lease as a lease granted for a term of more than 21 years. The term of a lease is taken as beginning on the commencement date or the date of grant of the lease (whichever is later) and ending on the date specified in the lease.³⁷⁰
- 7.18 It does not matter that the lease may be brought to an end before the 21-year term has expired – for example, by use of a break clause. However, the leaseholder cannot rely on a culmination of consecutive leases with terms of less than 21 years. The leaseholder must be able to say that he or she is, or has at some point been, entitled to remain the leaseholder of the premises for 21 years.³⁷¹
- 7.19 Section 3 also specifies certain leases that will be deemed to be long leases despite having a term of less than 21 years. For example, a lease that has been granted by way of renewal of a previous long lease at a “low rent” (explained below) will be deemed to be a long lease regardless of its stated length.³⁷²
- 7.20 Generally speaking, the lease must be of the whole house which the leaseholder is seeking to enfranchise. However, the 1967 Act provides for the situation where there are separate leases (between the same landlord and leaseholder) for different parts of the same house, or for the house and land or other premises occupied with it.³⁷³ Where those leases are all long leases the Act will apply as if there were a single long lease for the entirety of the premises comprised in the long leases.

Administration of Estates Act 1925, s 1(1). Once the lease has been vested in the personal representatives for two years, they will satisfy the two-year ownership requirement in s 1(1)(b) in their own right. Further, it is irrelevant when the personal representatives are registered as proprietors of the lease (if at all): Land Registration Act 2002, s 27(5)(a) provides an exception, in the case of transfers taking effect by operation of law on death or bankruptcy, to the general requirement that a disposition of land must be completed by registration. See also the discussion of the equivalent (but not identical) provisions of the 1993 Act at para 7.67 below.

³⁶⁹ A bankrupt's estate vests in the trustee in bankruptcy immediately and automatically on the trustee's appointment: s 306(1) of the Insolvency Act 1986. Further, as in the case of personal representatives, the effect of s 27(5)(a) of the Land Registration Act 2002 is that this disposition does not need to be registered to operate at law. Therefore, the trustee in bankruptcy will satisfy this requirement two years after his or her appointment, even if the bankrupt remains the registered proprietor. See *Helman v Keepers and Governors of the Possessions, Revenues and Goods of the Free Grammar School of John Lyon* [2014] EWCA Civ 17, [2014] 1 WLR 2451.

³⁷⁰ Where a grant is in equity the term commences on the date when the agreement first becomes specifically enforceable.

³⁷¹ *Hague*, para 3-03; *Roberts v Church Commissioners for England* [1972] 1 QB 278 CA.

³⁷² 1967 Act, s 3(2). Other examples include leases with a covenant or obligation for perpetual renewal (s 3(4)) and a long lease which has been continued under Parts I or II of the Landlord and Tenant Act 1954 or sch 10 of the Local Government and Housing Act 1989 (s 3(5)).

³⁷³ 1967 Act, s 3(6).

Leases which cannot qualify

7.21 Certain types of lease which would otherwise satisfy the above definition of a long lease are specifically excluded from the operation of the 1967 Act.

- (1) Leases that are terminable after a death, marriage or civil partnership were originally excluded altogether from the definition of a long lease under the Act, even if they were granted for a term of more than 21 years.³⁷⁴ The impact of this exclusion has since been reduced by various amendments to the Act,³⁷⁵ although the provisions as amended are extremely complicated and their effect is not entirely clear.³⁷⁶ It appears that these kinds of leases will now be treated as long leases save where they meet particular criteria.³⁷⁷ But even where the criteria are not met, if the lease was granted before 18 April 1980 the leaseholder will be eligible for a freehold acquisition claim only.³⁷⁸
- (2) 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.³⁷⁹
- (3) Similarly, the leaseholder of a house which is “ancillary to” other premises let under the same lease is excluded.³⁸⁰ For example, in a case involving a cottage which originally formed the stables and servants’ quarters of a larger house, and which was let under the same lease as the larger building, it was held that the leaseholder could not exercise enfranchisement rights in respect only of the smaller building.³⁸¹

7.22 There are also a number of other exceptions to the usual rules governing the availability of enfranchisement rights under the 1967 Act, arising out of the nature of the property concerned or the identity of the particular landlord. For example, there is an exception for certain leases of houses granted by charitable housing trusts, and another for certain owners of shared ownership leases. These exceptions are discussed in full in Chapter 9.

³⁷⁴ 1967 Act, s 3(1) (as originally enacted).

³⁷⁵ By the Housing Act 1980, s 141 and the 1993 Act, s 64(1) and (2).

³⁷⁶ See *Hague*, paras 3-05 to 3-07.

³⁷⁷ The criteria are contained in a proviso to s 3(1) of the 1967 Act, which provides that a lease terminable by notice after death, marriage or the formation of a civil partnership is not to be treated as a long lease if the notice is capable of being given at any time after the relevant event, the length of the notice is not more than three months and the terms of the lease preclude both its assignment or the sub-letting of the whole of the premises comprised in it.

³⁷⁸ 1967 Act, s 1B.

³⁷⁹ 1967 Act, s 1(3)(b).

³⁸⁰ 1967 Act, s 1(3)(a).

³⁸¹ *Brightbest Ltd v Meyrick* (26 March 2014) Winchester County Court (unreported).

Business leases

7.23 Additional requirements are imposed if the lease, which would otherwise qualify for rights under the Act, is one to which Part 2 of the Landlord and Tenant Act 1954 applies.³⁸² Part 2 of the 1954 Act applies to:

any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes.³⁸³

7.24 The owner of such a lease will only qualify for enfranchisement rights if the lease falls within one of several categories specified in section 1(1ZC) of the 1967 Act – for example, if it is granted for a term exceeding 35 years rather than 21 years. In addition, the leaseholder will need to have occupied the house, or part of it, as his or her only or main residence for the last two years, or for periods amounting to two years in the last ten years.³⁸⁴

The low rent test

(1) When does the low rent test apply?

7.25 The low rent test remains applicable to all lease extension claims under the 1967 Act.³⁸⁵ But in most cases, in England, satisfying the test is no longer a qualifying criterion for acquiring the freehold of a house.³⁸⁶

(1) First, it has been abolished for these purposes, in respect of leases commencing on or after 7 September 2009,³⁸⁷ by section 300 of the Housing and Regeneration Act 2008.

(2) Second, in respect of leases commencing before that date, section 1AA of the 1967 Act continues to apply.³⁸⁸ Section 1AA dramatically reduced the applicability of the low rent test by providing that leaseholders of houses, other than those who own certain leases of houses in designated “rural areas”, could acquire the freehold (but not a lease extension) if they could do so but for the low rent test.

7.26 Accordingly, the low rent test applies to claims to acquire the freehold of a house located in England only in very limited circumstances: where the leaseholder’s house is in a “rural area” as designated by the Secretary of State, the lease pre-dates 7 September

³⁸² 1967 Act, s 1(1ZC) and (1B).

³⁸³ Landlord and Tenant Act 1954, s 23.

³⁸⁴ 1967 Act, s 1(1B).

³⁸⁵ 1967 Act, s 1(1)(aa).

³⁸⁶ *Hague*, para 3-19.

³⁸⁷ The Housing and Regeneration Act 2008 (Commencement No.6 and Transitional and Savings Provisions) Order 2009 (SI 2009 No 2096), arts 2(1) and 3(1).

³⁸⁸ The Housing and Regeneration Act 2008 (Commencement No.6 and Transitional and Savings Provisions) Order 2009 (SI 2009 No 2096), art 3(2). In other cases, s 1AA is also repealed by s 300 of the Housing and Regeneration Act 2008, subject to saving provisions.

2009, and the house and lease meet certain additional requirements.³⁸⁹ Indeed, on the face of the 1967 Act (following the amendments made by the Housing and Regeneration Act 2008), the test appears to apply solely in respect of lease extensions.³⁹⁰

7.27 The position is different in Wales. Section 300 of the 2008 Act has not yet been brought into force in Wales. As a result, the low rent provisions continue to apply in full to all enfranchisement claims in respect of Welsh houses.

7.28 For the sake of completeness, it should be noted that the low rent test also continues to serve two additional purposes within the current enfranchisement regime.

- (1) It applies where a leaseholder seeks to establish that he or she has a long lease by virtue of the renewal of a long lease at a low rent (despite the renewed lease being granted for less than 21 years).³⁹¹
- (2) It is used to determine whether a leaseholder can exercise his or her enfranchisement rights on the more favourable valuation basis provided by section 9(1) of the 1967 Act.³⁹²

(2) What is the test?

7.29 The “original” low rent test is set out in section 4 of the 1967 Act. If a lease fails to satisfy this test, and the leaseholder wishes to acquire the freehold, he or she may rely instead on the alternative test under section 4A of the 1967 Act.³⁹³ A leaseholder seeking a lease extension must satisfy the “original” section 4 test.³⁹⁴

7.30 The tests themselves are complex and vary depending on the date on which the lease was entered into.

- (1) In essence, the “original” test is whether the yearly rent is less than:
 - (a) (for a pre-1990 lease)³⁹⁵ two-thirds of the rateable value³⁹⁶ of the property on the “appropriate day” (or, if later, the first day of the term); or
 - (b) (for a post-1990 lease) £1,000 in Greater London or £250 elsewhere.

³⁸⁹ 1967 Act, s 1AA. These are known as “excluded tenancies”.

³⁹⁰ 1967 Act, s 1(1)(aa).

³⁹¹ 1967 Act, s 3(2), discussed under “Definition of a long lease” at para 7.17 onwards.

³⁹² The different valuation bases are discussed in more detail in Ch 14 below.

³⁹³ 1967 Act, s 1A(2).

³⁹⁴ The original test also continues to apply wherever a leaseholder is seeking to establish that he or she has a long lease by virtue of the renewal of a long lease at a low rent, or that he or she is entitled to rely on the s 9(1) valuation basis.

³⁹⁵ This includes leases entered into post-1990 but pursuant to contracts entered into pre-1990.

³⁹⁶ Rateable values were based on the notional value ascribed to all properties for local taxation purposes, taking into account their location, size and other factors. 1967 Act, s 37(6) provides that rateable values shall be ascertained in accordance with s 25(1)(a) of the Rent Act 1977. Domestic rateable values were abolished on 31 March 1990.

The legislation defines the terms “appropriate day” and “rent”³⁹⁷ and there is a special proviso for leases granted between the end of August 1939 and the beginning of April 1963.³⁹⁸

- (2) The alternative test is satisfied where either (a) no rent was payable in respect of the property during the initial year of the lease; or (b) the aggregate rent payable during that year did not exceed a certain threshold. The applicable threshold depends on when the lease was entered into, being:
- (a) for a pre-1963 lease, two-thirds of the letting value of the property on the date of commencement of the lease;
 - (b) for a post-1963 but pre-1990 lease, two-thirds of the rateable value of the property on the date of commencement of the lease; or
 - (c) for any other lease, £1,000 in Greater London or £250 elsewhere.

Again, the key terms are defined by the legislation.³⁹⁹

7.31 The key difference between the original section 4 test and the alternative section 4A test is that the latter’s focus is on the original rent payable as opposed to the current rent. Also, unlike the section 4 test, the section 4A test needs only to be satisfied during the initial year of the lease, not throughout the duration of the two-year ownership period.⁴⁰⁰

(B) House

What is a house?

7.32 In order to qualify for enfranchisement rights, the leaseholder must be a long leaseholder (satisfying the tests set out above) of a qualifying “house”. Whilst in the majority of cases it will be easy to identify whether a particular building is or is not a house, there are some scenarios which are less obvious. There has been significant litigation on this point, including five cases which have reached the highest appellate court.

7.33 The definition of a house is contained in section 2 of the 1967 Act. There are three key elements:

³⁹⁷ 1967 Act, s 4(1)(a) to (c). The “appropriate day” is defined as being 23 March 1965, or “such later day as by virtue of s 25(3) of the Rent Act 1977 would be the appropriate day for purposes of that Act in relation to a dwelling house consisting of the house in question”. The Rent Act 1977 s 25(3) sets out that the “appropriate day in relation to any dwelling-house which, on 23rd March 1965, was or formed part of a hereditament for which a rateable value was shown in the valuation list then in force, or consisted or formed part of more than one such hereditament, means that date, and in relation to any other dwelling-house, means the date on which such a value is or was first shown in the valuation list”.

³⁹⁸ 1967 Act, s 4(1).

³⁹⁹ 1967 Act, s 4A(2).

⁴⁰⁰ *Hague*, para 3-52.

- (1) a building;
- (2) designed or adapted for living in;
- (3) which is a house reasonably so called.⁴⁰¹

7.34 There are caveats in relation to houses divided vertically or horizontally⁴⁰² and houses of which a material part lies above or below a part of the structure not comprised in the house.⁴⁰³ These are discussed in more detail below.

(1) A building

7.35 For something to be a “building” there must be a built structure or erection⁴⁰⁴ which can be “said to form part of the realty and to change the physical character of the land”⁴⁰⁵ taking into account its “degree of permanence...size and composition by components”.⁴⁰⁶

7.36 This has been described as a test of “commonsense” or “objective judgment”,⁴⁰⁷ so that “a cave, movable caravan, houseboat or boathouse would not be included” but “a well-equipped beach-hut probably is”.⁴⁰⁸

7.37 For the purposes of the Act the same structure may be a single building or several buildings. The authors of *Hague* give the example of a terrace of houses, the entirety of which may constitute a single building despite each individual house in the terrace also being a building.⁴⁰⁹ However, “building”, for these purposes, does not include the plural, so two separate buildings are not within the definition.⁴¹⁰

(2) Designed or adapted for living in

7.38 Initially, it was a requirement that, to qualify for enfranchisement rights, a leaseholder had occupied the building in question as their only or main residence for a specified period. This residence requirement was later abolished⁴¹¹ and replaced with the two-year ownership requirement discussed above.⁴¹² The removal of the residence

⁴⁰¹ 1967 Act, s 2(1).

⁴⁰² 1967 Act, s 2(1)(a) and (b).

⁴⁰³ 1967 Act, s 2(2).

⁴⁰⁴ *Malekshad v Howard de Walden Estates Ltd* [2002] UKHL 49, [2003] 1 AC 1013; Town and Country Planning Act 1990, s 119(1).

⁴⁰⁵ *Hague*, para 2-03, referring to *Cheshire County Council v Woodward* [1962] 1 All ER 517 (CA) which discusses the definition of “building” in the context of s 336, Town and Country Planning Act 1990.

⁴⁰⁶ *R v Swansea City Council, Ex parte Elitestone Ltd* (1993) 66 P and CR 422, 429.

⁴⁰⁷ *R v Swansea City Council, Ex parte Elitestone Ltd* (1993) 66 P and CR 422, 430.

⁴⁰⁸ *Hague*, para 2-03.

⁴⁰⁹ *Hague*, para 2-03; referring to *Malekshad v Howard de Walden Estates Ltd* [2003] 1 AC 1013.

⁴¹⁰ *Hague*, para 2-03; referring to *Dugan-Chapman v Grosvenor Estates* [1997] 1 EGLR 96.

⁴¹¹ 2002 Act, s 138.

⁴¹² 1967 Act, s 1(1)(b).

requirement has placed some strain on the “designed or adapted for living in” element of the definition, as it must now be applied to premises that are not in fact lived in.⁴¹³

- 7.39 This element of the definition was considered by the Court of Appeal in *Hosebay Ltd v Day*.⁴¹⁴ Lord Neuberger MR (as he then was) recognised in this case that a building originally designed as a house but later adapted for another use may cease to satisfy the test.⁴¹⁵ This view was approved by the Supreme Court on appeal.⁴¹⁶
- 7.40 The current use of a building will therefore be an important (although not always determinative) consideration in deciding whether it is designed or adapted for living in. “Active and settled use” of a building for a particular purpose will usually be conclusive evidence that it has been adapted for that purpose.⁴¹⁷ Generally, where a building is empty, its last use is likely to determine the purpose for which it is designed or adapted.⁴¹⁸
- 7.41 Additionally, a building need not have been designed or adapted solely for residential use. For example, a purpose-built interconnected shop and residence has been held to qualify.⁴¹⁹ The extent of the non-residential use will, however, be a relevant factor.
- 7.42 The Supreme Court in *Hosebay* held that it was necessary to refer to the identity or function of the building based on its physical characteristics.⁴²⁰ Therefore, for a building to be designed or adapted for living in, the building itself – rather than its contents – must have been made suitable for living in. To put it another way, “a mere change of furniture is not enough” to change the adapted use.⁴²¹

(3) *A house reasonably so called*

- 7.43 This third limb of the definition of a house can be used to exclude buildings which, while designed or adapted for living in, cannot reasonably be called a house – for example, a purpose-built block of flats or a hotel. The general approach to applying this limb has been to ask the following question: does the building look like a house?
- 7.44 This test can, however, be difficult to apply to buildings which look like houses, and are to some extent adapted for living in, but are nonetheless used in a way that is

⁴¹³ As the authors of *Woodfall: Landlord and Tenant* (looseleaf ed) write: “The abolition of the residence requirement by the 2002 Act has focussed greater attention on the meaning of the word ‘house’” (para 26.008).

⁴¹⁴ *Hosebay Ltd v Day* [2010] EWCA 748, [2010] 1 WLR 2317 (CA).

⁴¹⁵ This was a step back from his more literalist approach in *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2008] UKHL 5, [2008] 2 All ER 759, which was that “designed for living in” and “adapted for living in” were essentially alternatives and that if a house satisfied the former it would qualify regardless of it subsequently being adapted for another use.

⁴¹⁶ *Hosebay v Day* [2012] UKSC 41, [2012] 4 All ER 1347 (“*Hosebay*”).

⁴¹⁷ *Hague*, para 2-04; *Hosebay* at [35].

⁴¹⁸ *Hague*, para 2-04.

⁴¹⁹ *Tandon v Trustees of Spurgeons Homes* [1982] AC 755.

⁴²⁰ *Hosebay*, at [35].

⁴²¹ *Hosebay*, at [35].

inconsistent with calling them houses. An example of such might be a house with a doctor's surgery downstairs and a separate flat upstairs.

- 7.45 This difficulty has led the Court of Appeal to state that the structure and appearance of a building alone is not enough to determine whether it is a house "reasonably so called".⁴²² The Court held that it is necessary to take account of several relevant circumstances including the terms of the lease in question, the actual use of the building and the relevant proportions of different kinds of use. The Supreme Court in *Hosebay* agreed that the use of the building, rather than its physical appearance, was the principal factor.

(4) Buildings that are sub-divided

- 7.46 Where a building is divided horizontally – into flats or maisonettes – the whole may still qualify as a house so long as it falls within the above definition. On the other hand, if it is divided vertically – say, into terraced or semi-detached houses – the individual units can each be a house (providing they satisfy the above criteria) but the building as a whole cannot.⁴²³
- 7.47 The Act also provides for cases where a building is divided partly horizontally and partly vertically, creating what is known as "overhang" and "underhang". A "house" which is not structurally detached from another building and of which a "material part" lies above or beneath part of that other building, is excluded from enfranchisement rights.⁴²⁴ For example, a house with a basement that extends significantly under another building, will be excluded. However, in *Malekshad v Howard de Walden Estates Ltd*,⁴²⁵ which concerned a large house with a basement which extended in part under a separate mews house, the House of Lords held that the portion of the basement extending under the mews house was not "material".
- 7.48 The question of what constitutes a "material" part of the house was held in *Malekshad* to be a physical question, but the precise meaning of the term remains unclear. The authors of *Hague* conclude that in each case it will be a question of fact and degree.⁴²⁶

Financial limits

- 7.49 In addition to establishing that their premises are indeed a "house", leaseholders seeking a lease extension will also need to show that the value of that house falls within certain financial limits. This is another example of where the qualifying criteria for freehold acquisitions and those for lease extensions differ.⁴²⁷

⁴²² *Prospect Estates Ltd v Grosvenor Estates Ltd* [2008] EWCA Civ 1281, [2009] 1 WLR 1313.

⁴²³ 1967 Act, s 2(1)(a) and (b) respectively.

⁴²⁴ 1967 Act, s 2(2).

⁴²⁵ *Malekshad v Howard de Walden Estates Ltd* [2002] UKHL 49, [2003] 1 AC 1013.

⁴²⁶ *Hague*, para 2-10.

⁴²⁷ This is because s 1A of the 1967 Act affords an additional right to acquire the freehold – but not a right to a lease extension – where enfranchisement rights are otherwise unavailable because the financial limits in s 1 are exceeded.

7.50 There are two tests, set out at section 1(1)(a) of the 1967 Act. Which is used depends on whether the lease was granted before or after domestic rateable values were abolished (on 1 April 1990).⁴²⁸

- (1) As with the low rent test discussed above, the test for properties where the lease was granted before 1 April 1990 turns on whether the rateable value on the “appropriate day”⁴²⁹ was below a certain limit:
 - (a) where the appropriate day is before 1 April 1973, the limits are £400 in Greater London or £200 outside;
 - (b) where the appropriate day is on or after 1 April 1973, but the lease was created on or before 18 February 1966, the limits are £1,500 in Greater London or £750 outside; or
 - (c) where the appropriate day is on or after 1 April 1973, and the lease was created after 18 February 1966, the limits are £1,000 in Greater London or £500 outside.
- (2) For leases granted on or after 1 April 1990 the test relies on a formula set out at section 1(1)(a)(ii) of the 1967 Act, where the outcome (“R”) cannot exceed £25,000 on the date that the lease was entered into, or contracted for.⁴³⁰ The purpose of the formula is to show whether, if the premium payable upon the grant of a lease were instead paid as an annual rent, that rent would be less than £25,000 per annum.⁴³¹

⁴²⁸ Again, leases entered into pre-1990 includes those entered post-1990 but pursuant to contracts entered into pre-1990.

⁴²⁹ The “appropriate day”, for these purposes, is defined in s 1(4) of the 1967 Act. The definition is identical to that found in s 4(1)(a) of the Act (and set out at fn 397 above, where it appears in relation to the low rent test).

⁴³⁰ The formula in s 1(1)(a)(ii) is as follows:

$$R = \frac{P \times I}{1 - (1 + I)^{-T}}$$

where —

“P” is the premium payable as a condition of the grant of the lease (and includes a payment of money’s worth) or, where no premium is so payable, zero,

“I” is 0.06, and

“T” is the term, expressed in years, granted by the lease (disregarding any right to terminate the lease before the end of the term or to extend the lease).

⁴³¹ £25,000 was, at the time, the upper rent limit for a tenancy to qualify as an assured tenancy under the Housing Act 1988 and therefore benefit from the protection of that Act. In Ch 14 below, we discuss the capitalisation of an annual rent to produce a capital sum of equivalent value. Conversely, to calculate an annual rent which is the equivalent of a capital sum (the premium), it is necessary to “decapitalise” that capital sum. For this purpose, the de-capitalisation rate is set at 6%. The test therefore requires that, if the premium is decapitalised at a rate of 6% to produce an annual rent, that annual rent must not exceed £25,000.

Qualifying criteria for leaseholders of flats: the 1993 Act

- 7.51 As explained in Chapter 2 above, the 1993 Act introduced enfranchisement rights for leaseholders of flats.
- 7.52 To be eligible for the right to an individual lease extension in respect of a flat (under Chapter II of the 1993 Act), a leaseholder must have been a “qualifying tenant” of the flat within the meaning of the Act for at least two years. If there are multiple “qualifying tenants” within a block, and the block itself satisfies certain criteria, then there may be a right for those leaseholders to group together to acquire collectively the freehold of the block (under Chapter I of the 1993 Act).
- 7.53 This section will first consider the meaning of a “qualifying tenant” – which is relevant to both lease extension and collective enfranchisement claims – before considering the premises which are eligible for collective enfranchisement and certain additional requirements which must be met before a collective enfranchisement claim may be brought.

(A) Qualifying tenants

- 7.54 The 1993 Act provides that “a person is a qualifying tenant of a flat... if he is tenant of the flat under a long lease”.⁴³²
- 7.55 We will consider several elements of this definition in turn.
- (1) What is a flat?
 - (2) What is a long lease?
 - (3) Who is the relevant tenant?

What is a flat?

- 7.56 The meaning of “flat” is set out at section 101(1) of the 1993 Act:

“*flat*” means a separate⁴³³ set of premises (whether or not on the same floor)⁴³⁴ —

- (a) which forms part of a building, and
- (b) which is constructed or adapted for use for the purposes of a dwelling, and

⁴³² The definition of a qualifying tenant of a flat, for the purposes of collective enfranchisement, is in s 5(1) of the 1993 Act. By s 39(3)(a) of the Act, the same definition is adopted for the purposes of lease extension claims.

⁴³³ “The word “separate” suggests both “physically separate” or “set apart” and “single” or “regarded as a unit”. The definition is concerned with the physical configuration of the premises”: *Cadogan v McGirk* [1997] 29 HLR 294, at 299, by Millett LJ (as he then was).

⁴³⁴ “The words in parenthesis make it clear that maisonettes are included, but they may have a wider effect than this”: *Cadogan v McGirk* (above).

(c) either the whole or a material part of which lies above or below some other part of the building.

7.57 We have already considered, in relation to the definition of a house under the 1967 Act, what is meant by a building. The requirement that the premises be constructed or adapted for use as a dwelling also bears a considerable similarity to the requirement that in order to qualify as a house a building be designed or adapted for living in.⁴³⁵

7.58 The third element of this definition demonstrates the interaction between the definitions of a flat and a house in the 1967 and 1993 Acts. Section 2(2) of the 1967 Act states that

references in this Part of this Act to a house do not apply to a house which is not structurally detached and of which a material part lies above or below a part of the structure not comprised in the house.

It has been held that

it was clearly the intention of Parliament to bring about a state of affairs in which a dwelling which formed part of a building would either be a "house" under section 2(1) and (2) of the 1967 Act or, if it was not, would be a "flat" as defined in section 101(1) of the 1993 Act.⁴³⁶

What is a long lease?

7.59 The definition of a "long lease" is found in section 7 of the 1993 Act.⁴³⁷ In many respects, it corresponds closely to the definition of a long tenancy under the 1967 Act. It includes a lease granted for a term exceeding 21 years, as well as certain other specified leases that may or may not have a term in excess of 21 years. Examples include a lease granted pursuant to the right to buy, or by way of renewal of a previous long lease.⁴³⁸ As with the 1967 Act, certain leases terminable after death or marriage are not to be treated as long leases,⁴³⁹ and concurrent leases of different parts of the same flat are treated as if there were a single lease of the whole.⁴⁴⁰

7.60 There are, however, a couple of key differences between the 1967 and 1993 Act definitions of a long lease.

⁴³⁵ In *Smith v Jafton Properties Ltd* [2013] 2 EGLR 104, it was held that characteristics such as a centralised booking system, the lack of tenancy agreements, and the general pattern of occupancy tended more towards a hotel setup. Therefore, four short-term serviced apartments fell outside the definition of "flat", despite their physical appearance resembling flats. It was held, further, that the occupation of the premises was not "residential" and thus s 4(1) of the 1993 Act would engage to prevent collective enfranchisement.

⁴³⁶ *Malekshad v Howard de Walden Estates Ltd* [2002] UKHL 49, [2003] 1 AC 1013, at [101], by Lord Scott.

⁴³⁷ The definition in s 7 applies, on the face of it, only to collective enfranchisement claims. However, the same definition is adopted for the purposes of lease extension claims by s 39(3)(b) of the Act.

⁴³⁸ 1993 Act, s 7(1)(b) to (e), (3), (4) and (5).

⁴³⁹ 1993 Act, s 7(2). This provision is substantially less complicated than the corresponding provisions under the 1967 Act, discussed above at para 7.21(1).

⁴⁴⁰ 1993 Act, s 7(6).

- (1) Where the leaseholder of a property under a long lease which comes to an end is granted a further lease of the same property or part of it, he or she is deemed under both Acts to have a long lease.⁴⁴¹ This is the case regardless of the actual term of the second lease. However, whereas a leaseholder in this situation under the 1967 Act is deemed to have a single lease running from the start of the original long lease, this is not the case under the 1993 Act.⁴⁴² The difference becomes significant when it comes to valuation. Under the 1967 Act, improvements made by the leaseholder under the previous long lease will be disregarded. Under the 1993 Act, they will not.
- (2) Certain statutory continuation periods of long leases are included by both Acts as being within the definition of a long lease.⁴⁴³ In relation to long leases continued under Part II of the Landlord and Tenant Act 1954,⁴⁴⁴ however, the statutory continuation period is considered a long lease under the 1967 Act but not under the 1993 Act. Accordingly, the leaseholder under a business lease of a house statutorily continued under Part II of the 1954 Act may be eligible for enfranchisement rights,⁴⁴⁵ but the leaseholder under such a lease of a *flat* will not be. This reflects the complete exclusion from 1993 Act rights of business leases within the meaning of Part II of the 1954 Act.⁴⁴⁶

7.61 There is some uncertainty over whether a shared ownership lease under which the leaseholder has not yet acquired all of the shares in the flat is a long lease within the meaning of the 1993 Act. This issue is discussed in full in Chapter 9.

Who is the relevant tenant?

7.62 Generally, as with houses, the relevant tenant will simply be the person who owns the long lease. However, certain cases need to be considered in the light of the 1993 Act's provision that "no flat shall have more than one qualifying tenant at any one time".⁴⁴⁷ In consequence:

- (1) where a flat is let on a head lease and one or more sub-leases which qualify as long leases, it is the leaseholder under the most inferior of those leases who is the qualifying tenant;⁴⁴⁸ and

⁴⁴¹ 1967 Act, s 3(2) and 1993 Act s 7(3).

⁴⁴² 1967 Act, s 3(3); 1993 Act, s 7(3).

⁴⁴³ 1967 Act, s 3(5); 1993 Act, s 7(5).

⁴⁴⁴ Landlord and Tenant Act 1954, s 24(1) provides for the statutory continuation of leases which include premises occupied by the leaseholder for the purposes of a business carried on by him or her or for those and other purposes.

⁴⁴⁵ If they meet the additional requirements for leaseholders of business leases discussed above.

⁴⁴⁶ See further at paras 7.64 to 7.65 below.

⁴⁴⁷ 1993 Act, s 5(3).

⁴⁴⁸ Since "any tenant under any of those leases which is superior to that held by any other such tenant shall not be a qualifying tenant of the flat for the purposes of this Chapter" (1993 Act, s 5(4)(a)).

- (2) where a lease is held by multiple persons, they are regarded as *jointly* constituting the qualifying tenant.⁴⁴⁹

7.63 A leaseholder can be a qualifying tenant of more than one flat in a building,⁴⁵⁰ although there is a two-flat limit in the case of collective enfranchisements (discussed further below).⁴⁵¹

Exceptions

7.64 Section 5(2) of the 1993 Act sets out three cases where a leaseholder who meets the criteria above will nevertheless be deemed not to be a qualifying tenant (and will not, therefore, be entitled to a lease extension or to participate in a collective enfranchisement). These cases are:

- (1) where the lease is a business lease within the meaning of Part II of the Landlord and Tenant Act 1954;
- (2) where the landlord is a charitable housing trust and the flat forms part of the housing accommodation provided by it in pursuit of its charitable purposes;⁴⁵² and
- (3) where the lease is a sub-lease granted out of a superior lease which is not a long lease, in breach of the terms of the superior lease, and there has been no waiver of the breach by the superior landlord.

7.65 It will be seen that the first two of these cases bear a close resemblance to cases where a leaseholder of a house is excluded from enfranchisement rights under the 1967 Act. However, under the 1993 Act, the effect is achieved by deeming the leaseholder in these scenarios not to be a qualifying tenant rather than by excluding the lease from the section 7 definition of a long lease. It can also be seen that the approach to business leases differs under the two Acts; under the 1967 Act, the leaseholder under a 1954 Act business lease may enjoy enfranchisement rights if certain additional requirements are met (as discussed above), but under the 1993 Act a blanket exclusion applies.

Two-year ownership requirement in lease extension claims

7.66 As mentioned above, there is a requirement in lease extension (but not collective enfranchisement) claims that the leaseholder must have been a qualifying tenant of the relevant flat for the period of two years prior to giving a notice of claim.⁴⁵³ This requirement is similar to the ownership requirement in the 1967 Act discussed at paragraphs 7.14 to 7.16 above. As with the requirement under the 1967 Act, the

⁴⁴⁹ 1993 Act, s 5(4)(b) and, crucially, s 101(4).

⁴⁵⁰ 1993 Act, s 39(4).

⁴⁵¹ 1993 Act, s 5(5).

⁴⁵² Again, this is discussed in full in Ch 9.

⁴⁵³ 1993 Act, s 39(2). This requirement was introduced by the 2002 Act, in place of the previous residence requirement discussed at para 2.14 above.

leaseholder will generally need to have been the registered proprietor of the lease for the relevant two-year period.⁴⁵⁴

- 7.67 There are no provisions in the 1993 Act equivalent to those under the 1967 Act enabling a family member succeeding to a lease or trust beneficiaries to rely on previous periods of ownership by others.⁴⁵⁵ Similar provision to that under the 1967 Act is, however, made with regard to personal representatives. Where a person who has been a qualifying tenant of a flat for two years dies, his or her personal representatives can exercise the right to a lease extension.⁴⁵⁶ Again, they must do so within two years of the grant of probate or letters of administration.⁴⁵⁷ The position of a trustee in bankruptcy is also the same as under the 1967 Act: the trustee cannot rely on the bankrupt leaseholder's previous ownership period to bring a claim.⁴⁵⁸

(B) Collective enfranchisement

- 7.68 Having established what is meant by a qualifying tenant (and therefore who has a right to a lease extension), it is necessary to consider when several such leaseholders can join together to acquire their freehold collectively. In short, this is possible where the premises in which the qualifying tenants' flats are located meet certain criteria, and where a sufficient number of qualifying tenants within the premises are prepared to participate in the claim.

Premises which qualify for collective enfranchisement

- 7.69 With a small number of exceptions (discussed below), premises will be eligible for collective enfranchisement if they satisfy three requirements:

- (1) they consist of a self-contained building or part of a building;
- (2) they contain two or more flats held by qualifying tenants; and
- (3) the total number of flats held by qualifying tenants is not less than two-thirds of the total number of flats contained in the premises.⁴⁵⁹

⁴⁵⁴ Again, the leaseholder may be able to rely on a period of time during which he or she had the benefit of a specifically enforceable agreement for a lease, since "lease" in the 1993 Act is defined as including "an agreement for a lease": s 101(2)(b).

⁴⁵⁵ Discussed at para 7.15 above.

⁴⁵⁶ 1993 Act, s 39(3A).

⁴⁵⁷ 1993 Act, s 42(4A). A recent High Court decision has confirmed that this provision should be interpreted in the same way as s 6A(2) of the 1967 Act (discussed at fn 368 above), despite having slightly different wording. In other words, once a long lease of a flat has been vested in personal representatives for a period of two years, they may seek a lease extension based on their ownership of the lease, regardless of how long has passed since the grant of probate: *Villarosa v Ryan* [2018] EWHC 1914 (Ch), [2018] PLSCS 137. Again, it is irrelevant whether the personal representatives have been registered as the proprietors of the lease for that period: Land Registration Act 2002, s 27(5)(a).

⁴⁵⁸ See further discussion above at para 7.16 and fn 369.

⁴⁵⁹ 1993 Act, s 3(1).

(1) *Self-contained building or part of a building*

7.70 The meaning of “building” aligns with that under the 1967 Act, requiring a degree of permanence and size. There appears to be consensus that a building must be a *singular* building.⁴⁶⁰

7.71 A self-contained building is one which is “structurally detached”.⁴⁶¹ There is no definition of “structurally detached” in the 1993 Act, but case law demonstrates that what may appear externally to be two or more buildings may in fact be a single building for the purposes of the Act – for example, two blocks of flats linked by an underground car park which is integral to the structure of both blocks.⁴⁶²

7.72 A self-contained *part* of a building is one which meets the conditions set out at section 3(3) of the 1993 Act:

- (1) the part must constitute a vertical division of the building;⁴⁶³
- (2) the structure of the building must be such that the part in question could be redeveloped independently of the remainder of the building;⁴⁶⁴ and
- (3) the relevant services⁴⁶⁵ provided for those occupying the part in question must be provided independently of the services provided for the rest of the building, or

⁴⁶⁰ The authors of *Hague* cite *Garden Court NW8 Property Co Ltd v Becker Properties Ltd* (7 September 1995) Central London County Court (unreported) to support that proposition; though note that in the context of the Landlord and Tenant Act 1987 it has been controversially held that more than one building could be the subject of a notice (*Long Acre Securities Ltd v Karet* [2004] EWHC 442 (Ch), [2005] Ch 61). Recently, in the context of the right to manage, an Upper Tribunal decision was overturned by the Court of Appeal, and it was held that a right to manage company could only acquire the management of one set of premises: *Triplerose Ltd v Ninety Bloomfield Road RTM Co Ltd* [2015] EWCA Civ 282, [2016] 1 WLR 275. Gloster LJ, at [60], approved the analogy with the 1993 Act drawn in *Hague*.

⁴⁶¹ 1993 Act, s 3(2).

⁴⁶² In the context of the 2002 Act, in *No.1 Deansgate (Residential) Ltd v No.1 Deansgate RTM Co Ltd* [2013] UKUT 580 (LC), it was held that an attachment to the building would need to be an “attachment of a structural nature” in order to take the building outside the ambit of “structurally detached” (see para [35]). An example of such a structural attachment would be an underground car park linking the building in question with another building; the building in question would not be “structurally detached” (*Albion Residential Ltd v Albion Riverside Residents RTM Co Ltd* [2014] UKUT 6 (LC)). At [33] of that decision, the Tribunal concluded that “in circumstances where continuous concrete structures... are major and integral components both of the Building and of the car park, the piazza and Building 1, it is not possible in our judgment to regard the Building as structurally detached”.

⁴⁶³ There must be clear vertical division (subject to a *de minimis* deviation exception). 2% of the floor area underlying a neighbouring part of the building would fail to satisfy this requirement: see *Re Holding and Management (Solitaire) Ltd* [2008] 1 EGLR 107, at [8] to [10]. Furthermore, it was held in that case that the *Malekshad* interpretation of the word “material” in the 1967 Act was not relevant to 1993 Act cases.

⁴⁶⁴ The independent redevelopment requirement is not elaborated upon further. The authors of *Hague* suggest that “an appropriate test is that it must be capable of being demolished and/or rebuilt without causing damage to the structure of the neighbouring part”: *Hague*, para 21-03.

⁴⁶⁵ “Relevant services” means services provided by means of pipes, cables or other fixed installations: 1993 Act, s 3(2)(b).

must be capable of being so provided without requiring works likely to result in a significant interruption in the provision of those services.⁴⁶⁶

- 7.73 A part of a building can be a “self-contained part” even though it could be subdivided into smaller self-contained parts.⁴⁶⁷

(2) Two or more flats held by qualifying tenants

- 7.74 The definitions of a “flat” and a “qualifying tenant” have been discussed above. The collective enfranchisement of a self-contained building or part of a building will only be possible where that building or part contains two or more flats held by qualifying tenants.

- 7.75 However, there is an important caveat to this general position. Where a person is the qualifying tenant of three or more flats in “any particular premises consisting of the whole or part of a building”, there is deemed to be no qualifying tenant of any of those flats.⁴⁶⁸ Take the example of a building consisting of four flats: numbers 1 to 4. If A owns flat 1 and B owns flats 2 to 4⁴⁶⁹ there will be deemed to be only one flat held by a qualifying tenant as B’s three flats will be disregarded. The building will not be eligible for collective enfranchisement.

- 7.76 It should also be noted that there is no requirement, for collective enfranchisement claims, that the qualifying tenants have been qualifying tenants for any particular length of time. The two-year ownership requirement which applies to lease extension claims does not apply. All that is required is that the requisite number of qualifying tenants exists at the time the notice of claim is served.

- 7.77 It was originally a requirement for a successful collective enfranchisement claim that at least half of the qualifying tenants by whom the initial notice of claim was given had occupied their flat as their only or principal home for the last twelve months, or for period amounting to three years in the last ten years.⁴⁷⁰ This condition was removed by the 2002 Act.⁴⁷¹

(3) Not less than two-thirds held by qualifying tenants

- 7.78 In addition to the requirement that two or more flats must be held by qualifying tenants, it is also necessary that at least two-thirds of the total number of flats in the relevant building or part of a building are so held. Together, these two requirements dictate that

⁴⁶⁶ See *St Stephens Mansions RTM Co Ltd v Fairhold NW Ltd* [2014] UKUT 541 (LC), which was in the similar context of the right to manage. It was held in that case that “entitlement to carry out the necessary work” should be disregarded; the question was which premises the Act applies to, and “it is appropriate to consider that question on a purely practical level, focussing on the construction and configuration of the premises, rather than on the rights of their occupiers” (at [88]).

⁴⁶⁷ *41-60 Albert Palace Mansions (Freehold) Ltd v Crafrule Ltd* [2010] EWHC 1230 (Ch), [2010] 1 WLR 2046.

⁴⁶⁸ 1993 Act, s 5(5). We discuss this provision further at paras 7.124 to 7.126 below.

⁴⁶⁹ Whether on a single long lease or three individual ones.

⁴⁷⁰ See 1993 Act, s 6(2) as originally enacted.

⁴⁷¹ 2002 Act, s 120.

where there are only two flats in the premises to be acquired, both must be held by qualifying tenants.

- 7.79 Again, where a person is a leaseholder of three or more flats within a building there is deemed to be no qualifying tenant of those flats. Consider, for example, 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.

(4) Excluded premises

- 7.80 There are three types of premises that are excluded from collective enfranchisement claims even if they meet the three criteria above. These are:

- (1) premises where more than 25% of the internal floor area (excluding any “common parts”⁴⁷²) is occupied or intended to be occupied for non-residential use;⁴⁷³
- (2) premises made up of four units or fewer which have a “resident landlord”;⁴⁷⁴ and
- (3) premises which include the track of an “operational railway”.⁴⁷⁵

Participation requirements

- 7.81 Finally, the Act requires that the notice of claim for a collective enfranchisement claim must be served by the qualifying tenants of at least one half of the total number of flats contained in the relevant premises.⁴⁷⁶ If premises contain only two qualifying tenants, both must give the notice of claim.⁴⁷⁷ So, while two-thirds of the flats in a building or part of a building must be owned by qualifying tenants in order for that building (or that part) to be eligible for collective enfranchisement, not all of those qualifying tenants are necessarily required to serve the notice of claim. However, these provisions ensure that a notice of claim must be given not simply by a majority of qualifying tenants, but by a

⁴⁷² The “common parts” include “the structure and exterior of that building or part and any common facilities within it”: 1993 Act, s 101(1). It has been held, for example, that the flat of a caretaker who services the building constitutes a “common part” (regardless of whether the caretaker is required to be resident): *Earl Cadogan v Panagopoulos* [2010] EWCA Civ 1259, [2011] Ch 177.

⁴⁷³ 1993 Act, s 4(1).

⁴⁷⁴ 1993 Act, s 4(4). “Unit” is defined in s 38(1) as “(a) a flat; (b) any other separate set of premises which is constructed or adapted for use for the purposes of a dwelling; or (c) a separate set of premises let, or intended for letting, on a business lease”. 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 principle home for the preceding 12 months: 1993 Act, s 10.

⁴⁷⁵ 1993 Act, s 4(5).

⁴⁷⁶ 1993 Act, s 13(2)(b). Note that, if the landlord is missing, the notice of claim must be served by the qualifying tenants of two-thirds of the flats in the premises: see Ch 10 on notices. The 1993 Act originally included a further requirement that at least two-thirds of the qualifying tenants must give the notice of claim. That requirement was removed by the 2002 Act (see para 2.27 above).

⁴⁷⁷ The Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) Order 2002 (SI 2002 No 1912), sch 2, para 2.

majority of the “owners” of all the flats in the building (that is, both flats with qualifying tenants and flats without).

CRITICISMS OF THE CURRENT LAW

7.82 Having set out the current law on qualification for enfranchisement rights, we turn now to the criticisms that have been levelled at it. Apart from specific criticisms directed at the qualifying criteria under the 1967 and 1993 Acts, three general criticisms can be made of the regime as a whole:

- (1) the legislation is complex and inaccessible;
- (2) there are inconsistencies between the treatment of leaseholders of houses and of flats; and
- (3) the expansion of enfranchisement rights has inappropriately benefited non-owner-occupiers.⁴⁷⁸

7.83 This section will consider these three general concerns, before setting out a number of criticisms which have been directed at the qualifying criteria under the 1967 and 1993 Acts specifically.

Complexity and inaccessibility of the legislation

7.84 As noted above, the question of whether a leaseholder qualifies for enfranchisement rights – and if so, which ones – is often not easy to answer. There are many pages of relevant provisions spread throughout the 1967 and 1993 Acts, with seemingly endless qualifications and provisos, and with reference sometimes having to be made to the transitional provisions of other amending legislation to understand the true legal position. Beyond that, the tests themselves can be extremely complex – the low rent test, as explained in paragraphs 7.25 to 7.31 above being a particularly good example.

7.85 Complexity in the law does not automatically call for criticism. It often stems from a need to provide for a wide variety of factual scenarios. This point is certainly true of enfranchisement legislation, given the many different types of leases, leaseholders and premises for which the legislation must cater. However, much of the complexity in the current law stems not from a need to provide a comprehensive regime, but rather from the numerous, piecemeal amendments made by one statute after another over many years. The complexity seems to us to be unnecessary. While enfranchisement legislation may never be simple, it could certainly be made simpler, and thereby more accessible to the ordinary leaseholders whom it is designed to benefit.

Inconsistencies in the treatment of house and flat owners

7.86 The 1993 Act was designed to extend the existing rights afforded to leasehold owners of houses under the 1967 Act to owners of flats. However, the drafting and subsequent amendment of the two Acts has led to a number of inconsistencies between the

⁴⁷⁸ By this we mean that it is not apparent that the extension of enfranchisement rights to non-owner-occupiers is consistent with the policy underlying the enfranchisement legislation, as set out in Ch 2.

qualifying criteria for leaseholders of flats and those which apply to leaseholders of houses.

Definition of a lease

7.87 The definition of a lease – or, to use the language of the Acts, a “tenancy” – is not the same in the 1967 Act as in the 1993 Act. The 1967 Act provides that:

“tenancy” means a tenancy at law or in equity, but does not include a tenancy at will nor any interest created by way of security and liable to termination by the exercise of any right of redemption or otherwise, nor any interest created by way of trust under a settlement, and “demise” shall be construed accordingly.⁴⁷⁹

The 1993 Act provides that:

“lease” and “tenancy” have the same meaning, and both expressions include (where the context so permits):

- (a) a sub-lease or sub-tenancy; and
 - (b) an agreement for a lease or tenancy (or for a sub-lease or sub-tenancy),
- but do not include a tenancy at will or at sufferance.⁴⁸⁰

7.88 The authors of *Hague* contend that there is “no logical reason for this [divergence], and that it causes particular difficulties where sections have been added to the 1967 Act by the 1993 Act”.⁴⁸¹ Furthermore, despite the fact that scenarios such as statutory continuation of long leases, concurrent leases and renewal leases are treated in similar fashion in both Acts, consecutive long leases can only be joined under the 1967 Act.

Additional qualifying criteria under the 1967 Act

7.89 The qualifying criteria which a leaseholder of a house must satisfy under the 1967 Act are more extensive than those which a leaseholder of a flat must meet under the 1993 Act. First, there is no equivalent under the 1993 Act of the financial limits in the 1967 Act (discussed at 7.49 to 7.50 above), nor of the low rent test (in so far as it still applies). Given that flats nowadays can be just as valuable as houses, it is difficult to identify a reason for this distinction. Secondly, a leaseholder claiming either the right to acquire the freehold or a lease extension under the 1967 Act must have owned the lease for two years at the date of giving notice of his or her claim. Under the 1993 Act, only a claim to a lease extension carries an equivalent requirement. The two-year ownership requirement is discussed further at paragraphs 7.118 to 7.121 below.

Business use restrictions

7.90 Business use restrictions apply to both lease extensions and freehold acquisitions under the 1967 and 1993 Acts. However, the 1967 Act is generally more permissive of business use than the 1993 Act.

⁴⁷⁹ 1967 Act, s 37(1)(f).

⁴⁸⁰ 1993 Act, s 101(2).

⁴⁸¹ *Hague*, para 1-53 and, more fully, para 1-59.

- 7.91 First, the 1993 Act excludes outright a leaseholder with a “business lease” from being a qualifying tenant.⁴⁸² By contrast, the 1967 Act permits the owners of such leases to qualify for rights so long as they satisfy certain additional requirements.⁴⁸³ One potential justification for this distinction is the fact that it may be easier to occupy part of a house for business purposes while continuing to occupy the rest as a residence than it is to do the same for a flat. It would also complicate the 25% limit on non-residential use (discussed below) in collective enfranchisement claims if individual flats could be classed as being in both residential and business use.
- 7.92 Second, the 1993 Act restricts collective enfranchisement to premises which do not exceed an upper limit of 25% non-residential use. There is no such threshold under the 1967 Act, with the test simply being whether the non-residential use is such as to render the house no longer “designed or adapted for living in” or “a house reasonably so called”. In practice this absence of a threshold has resulted in the courts allowing premises with significant business use – sometimes upwards of 50% – to qualify as houses (and thereby for enfranchisement rights) under the 1967 Act.

Expansion of enfranchisement rights to non-owner-occupiers

- 7.93 When the 1967 Act was enacted, its primary objective was to remedy perceived injustices suffered by leaseholders occupying their premises as their home.⁴⁸⁴ The availability of enfranchisement rights has clearly moved on significantly from this position, most noticeably following the removal in 2002 of the residence requirements from the 1967 and 1993 Acts. Enfranchisement rights are now available in respect of certain premises in some sort of commercial use and properties owned purely as an investment.
- 7.94 Government’s stated objective in abolishing the residence test in 2002 was to make enfranchisement rights available to those who had bought their properties primarily for personal rather than investment reasons, but were nonetheless unable to satisfy the residence test. The examples given were leaseholders with a main home in the country but a “pied-a-terre” in London, or a leaseholder forced to lease through a company due to their landlord having a policy of letting only to companies.⁴⁸⁵ It is clear, however, that enfranchisement rights are now available to persons who buy property primarily for investment (rather than personal) reasons, so extending enfranchisement rights beyond this stated objective.
- 7.95 This expansion of enfranchisement rights to include commercial investors has been criticised by some.⁴⁸⁶ It has also been suggested by a consultee responding to our Thirteenth Programme consultation that the repeal of the residence requirement was never intended to enable businesses to enfranchise but that this is the result of the

⁴⁸² 1993 Act, s 5(2)(a). A “business lease” is a lease qualifying for rights under Pt II of the Landlord and Tenant Act 1954: 1993 Act, s 101(1).

⁴⁸³ 1967 Act, s 1(1ZC).

⁴⁸⁴ See further Ch 2, at paras 2.5 to 2.10.

⁴⁸⁵ Hansard (HC), 8 January 2002, vol 377, col 434.

⁴⁸⁶ See, for example, J Morgan, “Leasehold enfranchisement: a law of unintended consequences?” (2010) *Conveyancer and Property Lawyer* 6.

poorly drafted business lease exceptions in the 1993 and 1967 Acts (on which, see below).

Criticisms of the qualifying criteria for leaseholders of houses

Definition of a house

- 7.96 The question of what constitutes a “house” under the 1967 Act has been considered by the highest court in the land five times, and still new principles continue to emerge from the case law.
- 7.97 Perhaps the problem arises because the statutory definition of a house to some extent conflates two separate questions. First, what use of a property, beyond as a person’s primary residence, can be permitted while still calling it a house? Second, what structural form can premises take, whether clearly used as a residence or not, without creating undesirable legal and/or practical obstacles to acquiring the freehold?
- 7.98 It is possible to identify three types of property which cause particular difficulties:
- (1) premises which are in mixed residential and commercial use;
 - (2) premises which have been unused for a significant period; and
 - (3) premises affected by overhang or underhang.
- 7.99 In our view, the cases discussed below in relation to each of these types of property amply demonstrate the lack of certainty provided by the statutory definition. This uncertainty ultimately turns on the inherently subjective question of whether a building can reasonably be called a house.

(1) Premises in mixed use

7.100 Following the decision in *Hosebay*,⁴⁸⁷ the position in respect of premises used in their entirety for commercial purposes appears to be clear. Active and settled commercial use of the whole of a building will be taken as the use for which the building is currently adapted, meaning that the building will fail the “designed or adapted for living in” test. But where premises are in active and settled mixed residential and commercial use, or set up to accommodate such use, the position is less certain. There is a line of cases addressing this issue.

- (1) In *Lake v Bennett* it was held that the leaseholder of a typical high street shop, who lived in the residential flat above, “is obviously the sort of person to whom the legislature intended to give security of tenure”.⁴⁸⁸ This position was affirmed in *Tandon v Trustees of Spurgeons Homes*, another case involving a purpose-built shop with a residential flat above, with the flat once again being occupied by the leaseholder.⁴⁸⁹

⁴⁸⁷ *Hosebay Ltd v Day* [2010] EWCA 748, [2010] 1 WLR 2317 (CA).

⁴⁸⁸ *Lake v Bennett* [1970] 1 QB 663.

⁴⁸⁹ *Tandon v Trustees of Spurgeons Homes* [1982] AC 755.

- (2) *Hareford Ltd v Barnet* concerned a lease of a building comprising a self-contained, purpose-built maisonette on the first and second floors and a shop on the ground floor.⁴⁹⁰ The leaseholder did not use any of the premises for residential purposes. The maisonette was sublet on an assured shorthold tenancy and the shop was empty, having previously been sublet separately from the maisonette. The court nonetheless held that the building was designed (at least in part) for residential use and that a reasonable person would have concluded that it was a house. The leaseholder was therefore entitled to enfranchise.
- (3) *Prospect Estates Ltd v Grosvenor Estates Ltd* concerned premises originally built for residential use and consisting of a basement and four floors.⁴⁹¹ From 1958 onwards the vast majority of the building had been used as offices by sub-tenants on short commercial tenancies, with only the fourth floor being used as residential accommodation. At the relevant time the lease required the fourth floor to be used as a private residential flat in the occupation by a senior employee of the company in occupation of the offices, and the remaining floors to be used as offices. The Court of Appeal held (overturning the lower court's decision) that the premises did *not* qualify as a house.
- (4) *Henley v Cohen* concerned a purpose-built shop with a flat on the upper floor.⁴⁹² The flat had only ever been used as a storeroom for the shop until, shortly before the notice of claim was served, the leaseholder carried out works to convert the first floor into a self-contained flat. That conversion was in breach of a covenant in the lease. The Court of Appeal held that the premises were neither adapted for residential use at the date when the lease began nor ever used as such until the recent conversion. As a result, the premises did not qualify as a house.
- (5) *Jewelcraft Ltd v Pressland* also concerned a purpose-built shop with residential accommodation above it.⁴⁹³ This time, however, the premises had been adapted so that the flat and shop were each self-contained with the flat accessible only by an external staircase. Nonetheless, the Court of Appeal held that the replacement of the internal staircase with an external means of access did not take the premises out of the scope of the Act.

7.101 This line of case law reveals some difficulty in determining how much non-residential use will preclude premises from falling within the definition of a house. The courts have clearly struggled to identify the policy underlying the legislation and to apply this in individual cases.

(2) Unused premises

7.102 The recent case of *Grosvenor (Mayfair) Estate v Merix International Ventures Ltd* highlights similar difficulties in applying the statutory definition of a house where a building has been unused for a significant period.⁴⁹⁴ The case concerned a large London

⁴⁹⁰ *Hareford Ltd v Barnet London Borough Council* [2005] 2 EGLR 72.

⁴⁹¹ *Prospect Estates Ltd v Grosvenor Estates Ltd* [2008] EWCA Civ 1281, [2009] L & TR 11.

⁴⁹² *Henley v Cohen* [2013] EWCA Civ 480, [2013] L & TR 28.

⁴⁹³ *Jewelcraft Ltd v Pressland* [2015] EWCA Civ 1111, [2015] HLR 48.

⁴⁹⁴ *Grosvenor (Mayfair) Estate v Merix International Ventures Ltd* [2017] EWCA Civ 190, [2017] L & TR 18.

townhouse, originally built for residential use but then converted for use partially for office purposes, with residential accommodation on the upper floors. The lease of the property required that the lower floors be used only as offices. However, by the date of the notice of claim, the property had been unused for 13 years. As there was no active or settled use, the Court of Appeal found it difficult to apply the principles set out in *Hosebay*.

7.103 Instead, relying on the decision of the House of Lords in *Boss Holdings Ltd v Grosvenor West End Properties Ltd*, the Court found that it was necessary to determine the present identity or function of the building by reference to its physical character.⁴⁹⁵ The last use of the property is not the only relevant consideration. The building had retained its original external townhouse appearance and some original internal features, despite some adaptations to office use, and therefore was held to be a “house” within the meaning of the Act.

(3) *Premises affected by overhang and underhang*

7.104 As set out at paragraph 7.47 above, the 1967 Act provides that “houses” affected by “material” overhang or underhang will not be eligible for enfranchisement rights under the Act. However, the question of what constitutes a “material” overhang or underhang remains uncertain. The leading decision in *Malekshad* does not provide much clarity, since all five judges offered slightly different definitions.⁴⁹⁶

7.105 More fundamentally, whilst we acknowledge that there are good reasons to limit freehold acquisitions to cases which will not result in the creation of a flying freehold, we do not consider that there is any good reason why a leaseholder of a house affected by overhang or underhang should not be able to have a lease extension.

Different treatment of lease extensions and freehold acquisitions

7.106 As set out in Chapter 2 above, there have been several amendments to the 1967 Act to extend the circumstances in which a leaseholder has a right to acquire the freehold, without the same changes being made in respect of the right to a lease extension. Perhaps the clearest example is that the 1967 Act now provides a right to acquire the freehold – but not a right to a lease extension – where a house exceeds the original financial limits laid down by the Act.⁴⁹⁷ Another example is that the low rent test still applies where a leaseholder is seeking a lease extension, but is rarely any longer applicable in which a leaseholder wishes to acquire the freehold.⁴⁹⁸

7.107 It is unclear from the Parliamentary debates on the 1967 Act and subsequent amendments to it why the circumstances in which a lease extension can be obtained were not extended to match those where the freehold can be acquired. We think that

⁴⁹⁵ *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2008] UKHL 5, [2008] 2 All ER 759 was a decision which also concerned a property with a history of mixed use but which had been unused for more than 10 years before the relevant date. It was held that the residential parts of the building, while stripped back to the basic structure, were nonetheless laid out for residential use such that the building qualified as a house under the 1967 Act.

⁴⁹⁶ *Malekshad v Howard de Walden Estates Ltd* [2002] UKHL 49, [2003] 1 AC 1013.

⁴⁹⁷ 1967 Act, s 1A.

⁴⁹⁸ See full discussion above at para 7.25 onwards.

this disparity might stem from the inherent undesirability of the lease extension right provided by the 1967 Act (discussed at paragraphs 4.21 to 4.24 above). There may have been a demand for freehold acquisitions to be made more accessible without any parallel demand in respect of lease extension rights. Nevertheless, the discrepancy appears to serve no purpose.

Treatment of business leases

7.108 As explained above, the 1967 Act requires leases to which Part 2 of the Landlord and Tenant Act 1954 applies to meet additional criteria in order to qualify for enfranchisement rights.

7.109 Part 2 of the 1954 Act applies to leases where the property comprised in the lease includes premises *occupied by the leaseholder* (in whole or in part) for the purpose of their business. In other words, in the case of a lease of a mixed-use building comprising a ground floor shop and an upstairs flat, Part 2 of the 1954 Act will apply to the lease if the leaseholder runs the shop, but not if he or she leaves the shop empty or sublets the shop to a third party.⁴⁹⁹ So the leaseholder who runs the ground floor shop will be subject to additional requirements in order to qualify for the right to acquire the freehold – even if he or she also lives in the flat – but the leaseholder who sublets the entire building or leaves it empty will not.

7.110 The additional requirements applicable to 1954 Act leases were introduced in 2002 along with the removal of a general residence requirement from the 1967 Act. One of the reasons for removing the residence requirement was to widen the category of persons able to acquire the freehold. While it makes sense to have at the same time introduced some restrictions on qualifying commercial leases, it seems strange that the manner in which this was done has resulted in the removal of rights from, or the imposition of additional burdens on, leaseholders who would previously have qualified under the original residence requirement because they occupied the flat.

7.111 The focus on 1954 Act leases also makes it fairly easy to avoid the additional requirements for business leases by sub-letting the non-residential part of the premises. In those circumstances, the leaseholder seeking to enfranchise will not be in occupation for the purposes of their business, so that his or her lease will not be a 1954 Act lease. The same criticism can be made of the 1993 Act's reliance on the 1954 Act in defining business leases.

The low rent test

7.112 The low rent test (or rather, tests), its purported abolition, and the landscape which has arisen as a result, have been described as “particularly confusing”.⁵⁰⁰ As set out at paragraphs 7.29 to 7.31 above, and as noted by respondents to our Thirteenth Programme consultation, there are now several alternative versions of the low rent tests, and they are not straightforward. Some require the identification of historic rateable values which can often be very difficult – or even impossible – to obtain. One

⁴⁹⁹ It is irrelevant, for the purposes of the 1954 Act, whether the leaseholder occupies the flat.

⁵⁰⁰ *Woodfall: Landlord and Tenant* (looseleaf ed) para 26.021.

respondent suggested that, if there remains a need for a low rent test at all (which they doubted), it ought to be a single, simple test.

7.113 In addition to this general criticism, the authors of *Hague* identify the following specific issues with the current low rent tests:

- (1) it can be difficult to ascertain the “appropriate day” for the purpose of section 4(1)(i) where the rateable value of a property changes as a result of alterations to the property and/or its use;⁵⁰¹
- (2) the “proviso” under section 4(1) for leases granted between the end of August 1939 and the beginning of April 1963 has given rise to substantial litigation due to being “ill-considered” and “poorly drafted”;⁵⁰² and
- (3) the inclusion of an agreement for a lease within the definition of a lease for the purposes of section 4A can lead to some confusion in ascertaining the commencement date.⁵⁰³

7.114 One commentator, Piers Harrison, has also noted a potentially unintended consequence, in the case of leases granted on or after 7 September 2009, of the abolition of the low rent test for freehold acquisition claims in respect of the vast majority of long leases.⁵⁰⁴ As noted above, whether the low rent test is met also determines the method of valuation which will be used to calculate the price payable by the leaseholder to acquire the freehold. In summary, leaseholders who qualify for freehold acquisition under section 1 (that is, by satisfying the original low rent test) will have their premium calculated under section 9(1), which is the valuation basis most favourable to leaseholders. Leaseholders who do not satisfy the original low rent test may qualify for freehold acquisition under sections 1A or 1AA, but their premium will be calculated according to section 9(1A) or (1C), both of which are less favourable to leaseholders.⁵⁰⁵ Section 1AA conferred on leaseholders of houses (and continues to confer on owners of pre-September 2009 leases) a right to acquire the freehold where neither version of the low rent test is satisfied. However, section 1AA has been abolished in respect of post-September 2009 leases, which are no longer subject to the low rent test in respect of freehold acquisition claims. Owners of these leases can therefore qualify for freehold acquisition under section 1 of the 1967 Act, and thus can benefit from the more leaseholder-friendly valuation method in section 9(1). Harrison suggests that leaseholders of post-September 2009 leases have thereby received a windfall at the expense of landlords, without any clear justification.⁵⁰⁶

⁵⁰¹ *Hague*, para 3-23.

⁵⁰² *Hague*, paras 3-29 to 3-44.

⁵⁰³ *Hague*, para 3-47.

⁵⁰⁴ By s 300 of the Housing and Regeneration Act 2008. See discussion above at para 7.25.

⁵⁰⁵ These bases of valuation are discussed in more detail in Ch 14.

⁵⁰⁶ P Harrison, “Leasehold enfranchisement and the low rent test” (2010) 14 *Landlord & Tenant Review* 4.

Financial limits

7.115 The financial limits in section 1 of the 1967 Act have been criticised for adding an unnecessary layer of complexity to the question of whether premises qualify for the right to a lease extension. They no longer have any impact on a leaseholder's ability to acquire his or her freehold (by virtue of section 1A), and many people have therefore queried whether they should continue to exist at all.⁵⁰⁷ Another major criticism of these limits is that they often rely on historic rateable values which are either very difficult – or even impossible – to obtain.

Consecutive long leases

7.116 The authors of *Hague* note some uncertainty in section 3(3) of the 1967 Act, which provides for consecutive long leases to be treated as one. They explain that, while the Act makes clear the position where one long lease comes to an end and is followed by another long lease, there is some doubt as to whether a chain of more than two long leases can be joined together in this way. They conclude (which appears from the face of the Act to be the only correct interpretation) that there is nothing in the section to prevent the joining together of as many long leases as is necessary to satisfy the criteria.⁵⁰⁸

Trustees in bankruptcy and personal representatives

7.117 As noted above, under the 1967 Act 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 on the other hand *can* do so. There does not appear to be any justification for the different treatment of these two groups. The same issue arises under the 1993 Act.

Criticisms of the qualifying criteria for flat owners under the 1993 Act

Two-year ownership requirement

7.118 Two consultees responding to our Thirteenth Programme argued for the removal of the requirement that a leaseholder must have been a qualifying tenant for two years in order to qualify for a lease extension under the 1993 Act. This requirement has been criticised for failing to achieve the purpose it was designed for, and for leading to unnecessary disputes and litigation.

7.119 The ownership requirement was introduced in an attempt to prevent investors from benefiting from rights intended for residential leaseholders. However, the requirement is easily avoided. A claim for a lease extension is begun by a qualifying tenant (who has owned the lease for the requisite two-year period) serving a notice on his or her landlord. But the benefit of such a notice can be assigned to another party along with the lease. Accordingly, anyone buying a lease of a flat who knows that he or she will wish to seek a lease extension within the next two years has only to ask the selling leaseholder to serve a notice and to assign the benefit of that notice to the purchaser.

7.120 In practice, therefore, it is entirely possible – indeed, it is common – for the purchaser of a lease of a flat to be able to acquire a statutory lease extension without having to

⁵⁰⁷ They do, however, determine the applicable valuation basis, as explained in Ch 14.

⁵⁰⁸ *Hague*, para 3-14.

comply with the two-year ownership requirement. There is nothing to prevent an investor from purchasing a short lease with the benefit of enfranchisement rights, immediately exercising those rights and then selling the lease extension (with a view to making a profit). Furthermore, because the Act provides that the benefit of the notice may be assigned with the lease, but is not capable of subsisting apart from the lease, it is essential that there be a legal assignment of both the lease and the notice together. We understand that this requirement has led to a considerable number of disputes over whether a valid assignment has taken place.

- 7.121 The same criticism can also be directed at the ownership requirement under the 1967 Act, which applies to both freehold acquisition and lease extension claims under that Act.

Meaning of self-contained building or part of a building

- 7.122 There has been a considerable amount of case law concerning the definition of the “self-contained building or part of a building” which must be the subject of a collective enfranchisement claim. As noted above, a building is self-contained if it is “structurally detached”. We have heard that it can be difficult to apply this test in respect of increasingly complex modern developments made up of several blocks, often interconnected in some way – for example, by an underground car park.⁵⁰⁹ Often, whether a building is structurally detached will be a question of fact requiring substantial expert evidence and resulting expense.

- 7.123 When it comes to identifying a self-contained *part* of a building, the need to establish that services to that part could be provided independently can cause similar difficulties.⁵¹⁰ One member of our advisory group noted that such difficulties may increase in future, given the growing trend in favour of shared provision of facilities such as central heating. Another added that landlords sometimes rely on provisions such as these to object to a valid claim, in the hope that leaseholders will lack the funds or appetite for a protracted dispute involving complex and costly expert evidence.

The three-flat rule

- 7.124 We explained above that, where a person is the qualifying tenant of three or more flats in particular premises, there is deemed for the purposes of a collective enfranchisement of those premises to be no qualifying tenant of any of those flats.⁵¹¹

- 7.125 This provision was introduced during debates prior to the enactment of the 2002 Act to alleviate concerns surrounding the abolition of the residence requirement. It was intended to prevent speculators from buying a number of flats in a block and thereby being able to effect a collective enfranchisement by themselves. It may also prevent any one individual from having substantial control of particular premises following a collective enfranchisement. However, it can be easily avoided by sophisticated buyers

⁵⁰⁹ These issues have arisen in a number of right to manage cases, subject to a similar “structurally detached” test under s 72 of the 2002 Act. See *No.1 Deansgate (Residential) Ltd v No. 1 Deansgate RTM Co Ltd* [2013] UKUT 580 (LC) and *Albion Residential v Albion Riverside RTM Co Ltd* [2014] UKUT 6 (LC).

⁵¹⁰ See *St Stephens Mansions RTM Co Ltd v Fairhold NW Ltd* [2014] UKUT 541, a right to manage case but again subject to a similar test.

⁵¹¹ 1993 Act, s 5(5), which is considered above at para 7.75. This provision operates in tandem with s 5(6), which deals with letting flats to associated companies.

who are advised to purchase multiple flats through different people (such as family members), or to use special purpose vehicles (the shareholding, and therefore control, of which is all held by the investor) for their acquisition. The provision therefore operates to exclude only poorly-advised leaseholders – and even they can avoid the rule after purchase. They need only re-structure the ownership of the flats – for example, by assigning some leases, or granting long sub-leases, to related individuals or special purpose vehicles, who will then cooperate in a collective enfranchisement claim.

7.126 In addition, this restriction can prevent whole blocks from enfranchising. We have already considered, at paragraph 7.79 above, the example of a block consisting of seven flats let on long leases where three are owned by the same leaseholder. In this scenario, there are not enough qualifying tenants to satisfy the two-thirds requirement discussed earlier, and collective enfranchisement is thereby precluded.

Rights of head lessees

7.127 The case of *Howard de Walden Estates Ltd v Aggio* (“*Aggio*”) confirmed that where a single lease includes other premises as well as a flat (be that a shared space such as a staircase, or other flats), the leaseholder can still be a qualifying tenant in respect of that individual flat.⁵¹² Thus, a leaseholder who has a single lease of multiple flats can obtain a lease extension of each of those flats.⁵¹³

7.128 This position has been criticised as tending to benefit mainly the head lessees of blocks of flats, or large houses which have been converted into multiple flats, since these are the persons most likely to hold single leases of multiple flats. These will usually be investors without any personal residential interest in the property. There can also sometimes be difficulties in drawing up new leases following a lease extension claim by the leaseholder of multiple flats to obtain individual lease extensions of each of those flats. Furthermore, in many cases, a head lessee will not even need to rely on the principle confirmed in *Aggio*; they will often be able to achieve the same result by granting individual sub-leases of each of the flats to themselves, or to a connected entity, and extending each separately.

Participation requirements

7.129 The usual requirement that qualifying tenants of not fewer than half of the flats contained in the premises to be acquired must serve the notice of claim in a collective enfranchisement claim is enhanced in the case of premises where there are only two flats held by qualifying tenants. In that case, both qualifying tenants must serve the notice.

7.130 This requirement might be said unfairly to prejudice leaseholders who are one of only two qualifying tenants, since they must secure a participation rate amongst themselves of 100%. We have also been told that it causes particular difficulties where one of the two qualifying tenants is also the landlord.⁵¹⁴ As a respondent to our Thirteenth

⁵¹² *Howard de Walden Estates Ltd v Aggio* [2008] UKHL 44, [2009] 1 AC 39.

⁵¹³ *Maurice v Hollow-Ware Products Ltd* [2005] EWHC 815 (Ch), [2005] 2 EGLR 71 (approved in *Aggio*).

⁵¹⁴ This situation is discussed in more detail at para 8.145 onwards.

Programme explained, this requirement effectively gives the landlord in such a case the power to veto enfranchisement.

- 7.131 The participation requirements are also more onerous when there is a missing landlord: the original requirement in the 1993 Act that two-thirds of qualifying tenants must participate (which requirement was otherwise removed by the 2002 Act) still applies.⁵¹⁵ In our view, it makes little sense to apply a more onerous participation requirement where the landlord is missing and it is therefore likely to be even more desirable for the ownership and management of the building to be taken over by the leaseholders.

⁵¹⁵ The 1993 Act, s 26(2) and (3A).

Chapter 8: Qualifying criteria: proposals for reform

INTRODUCTION

- 8.1 In the last chapter, we set out the current law governing eligibility for enfranchisement rights and highlighted a number of problems with that regime. We identified, in particular, that the relevant provisions are complex, in some respects outdated, and in many respects incoherent.
- 8.2 This chapter sets out our provisional proposals for the reform of this area of law. First, we describe our general policy approach to reform. Then, we put forward a new scheme of qualifying criteria designed to identify in a simpler, more consistent fashion those leaseholders who we believe should be entitled to enfranchisement rights. We seek the views of consultees on this scheme and on particular aspects of its operation.
- 8.3 It should be noted that the proposals set out in this chapter, whilst intended to apply in the majority of cases, are not a complete picture. Under the current law, certain leaseholders who would otherwise qualify for enfranchisement rights do not so qualify, whether by reason of the premises which they occupy, the nature of their lease or the identity of their landlord. These exceptions, and whether they should remain under our proposed new scheme, are discussed in the next chapter.

OUR POLICY APPROACH TO REFORM

General policy objectives

- 8.4 Our Terms of Reference set out a number of policy objectives for the reform of enfranchisement law. The following objectives are of particular relevance to the issue of qualification for enfranchisement rights:
- (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.

The aim of our reforms to qualifying criteria

- 8.5 We consider that the policy objectives above can only be met, in terms of qualifying criteria, by the creation of a cohesive framework which identifies, with clarity and certainty, those leaseholders who qualify for each of the various enfranchisement rights. We do not think, in the light of the numerous criticisms raised above and those issues expressed to us by stakeholders and by our advisory group, that the current scheme of qualifying criteria matches this description. The qualifying criteria for enfranchisement

rights under the 1967 and 1993 Acts are confused, complex, outdated and sometimes inconsistent.

8.6 We therefore approach the reform of this area with two specific aims in mind.

- (1) First, we want to make it much simpler than at present to identify which enfranchisement rights, if any, are available to any particular leaseholder. The need for simplification of the law on qualifying criteria in particular will be clear from the preceding chapter.
- (2) Second, we want to achieve coherence, so far as possible, in this area of the law. The current legislation confers rights on some leaseholders but not on others – or even dictates that the same leaseholder enjoys one type of enfranchisement right but not another – based on technical, sometimes out-dated, distinctions. We seek a different approach.

The types of leaseholders who should qualify

8.7 A further important policy consideration is the identification of the types of leaseholders who ought to qualify for enfranchisement rights.

8.8 Historically, the policy underlying the enfranchisement legislation has, in general, been directed at improving the position of long residential leaseholders who occupy their properties as their homes.⁵¹⁶ More particularly:

- (1) the 1967 Act sought to protect long leaseholders of houses from perceived exploitation by giving them the ability to achieve greater security of tenure in their homes; and
- (2) the 1993 Act extended that ability to long leaseholders of flats, with the additional aim of giving such leaseholders control over how the buildings in which they live are managed.

8.9 As such, both the 1967 Act and the 1993 Act contain provisions which attempt to restrict the extent to which owners of business leases and investors can benefit from enfranchisement rights. We have already considered the detail of these provisions in the preceding chapter. Here, they can be summarised as follows.

- (1) The statutory definitions of “house” and “flat” (in the 1967 Act and 1993 Act respectively) each contain a requirement that the premises in question are intended (by their design, construction or adaptation) for living in.
- (2) The 1967 Act restricts the business leases which may qualify for enfranchisement rights, and imposes additional conditions which any leaseholder under such a lease must meet in order to qualify. The 1993 Act goes further by preventing business leases from qualifying for any enfranchisement rights under that Act.

⁵¹⁶ See Ch 2 above.

- (3) There is a two-year ownership requirement to be able to exercise any rights under the 1967 Act, and an equivalent two-year ownership requirement which applies to claims for a lease extension under the 1993 Act.
 - (4) The 1993 Act provides that where any person is the “qualifying tenant” of three or more flats within a building or part of a building, those flats shall be treated as having no qualifying tenant for the purposes of a collective enfranchisement.
- 8.10 We consider that, taken together, the above provisions do a reasonable job of limiting the ability of owners of business leases to make use of the enfranchisement rights – although this objective is achieved in a piecemeal fashion. We also consider that this policy objective should be continued. The enfranchisement rights were designed with residential leaseholders in mind, and our review forms part of a wider review of residential leasehold law. We therefore aim to maintain and strengthen this position by way of criteria which are effective to restrict enfranchisement rights to holders of residential leases.
- 8.11 Conversely, we do not consider that the above provisions are especially effective in practice in restricting the use of enfranchisement rights by those who own or purchase residential property as investment property. First, the residence requirement described above applies only to houses, and then only in particular limited circumstances. Second, as set out in the preceding chapter in our discussion of the criticisms of the current law, both the two-year ownership requirement for lease extensions and the three-flat rule for collective enfranchisement can be easily circumvented.
- 8.12 As such, we wish to consider as part of our review whether it would be desirable to restrict further the ability of investors in residential property to utilise the enfranchisement rights and, if so, how this might be achieved. Given that our Terms of Reference require us to consider options for reducing premiums, it may be of increased importance to limit the ability of investors to use enfranchisement rights where they do so purely to make a profit. Alternatively, if investors continue to benefit from enfranchisement rights, then it may be desirable for the premium or price which they must pay to be set differently from that payable by owner-occupiers. We discuss these issues further later in this chapter at paragraphs 8.185 to 8.193, and in our consideration of valuation in Chapter 15.
- 8.13 Irrespective of that point, what is clear is that enfranchisement is primarily directed at long leaseholders using their property (or properties) residentially. This focus will be maintained under any new scheme.

Summary of our approach

- 8.14 Our approach to the question of qualifying criteria might therefore be summarised as follows:
- (1) to simplify the law on this subject and minimise inconsistencies between the various enfranchisement rights, thereby making enfranchisement easier;
 - (2) to level the playing field between leaseholders of houses and of flats, in the sense of enabling both to enfranchise on similar terms (as to both the price payable and otherwise);

- (3) to maintain the present position whereby long leaseholders using their property residentially have enfranchisement rights, whereas owners of business leases are largely excluded from exercising those rights; and
- (4) to consider the case for reducing the extent to which or for modifying the terms on which commercial investors can benefit from enfranchisement rights.

PROVISIONAL PROPOSALS FOR REFORM

8.15 In this section, we set out our provisional proposals for a new scheme of qualifying criteria. We do so initially in summary form, before considering the various elements of that scheme in more detail. We then discuss some of the difficult cases which might arise as a result of our proposals.

One unified scheme – a summary

8.16 As set out above, we aim to simplify the law of qualifying criteria, and to make it more coherent. To this end, we suggest a new approach. We propose to replace the existing piecemeal law on qualification criteria with a single, comprehensible, unified scheme, under which the rights of different leaseholders shall not diverge without good reason.

8.17 We understand that creating a new, unified scheme of qualification for enfranchisement rights might sound ambitious. The current law could be improved merely through some clarification of the definitions in the current legislation, and the codification of the most important judgments which have been handed down in the past half-century. We do not, however, think that a clarification and codification of the existing scheme is sufficient.

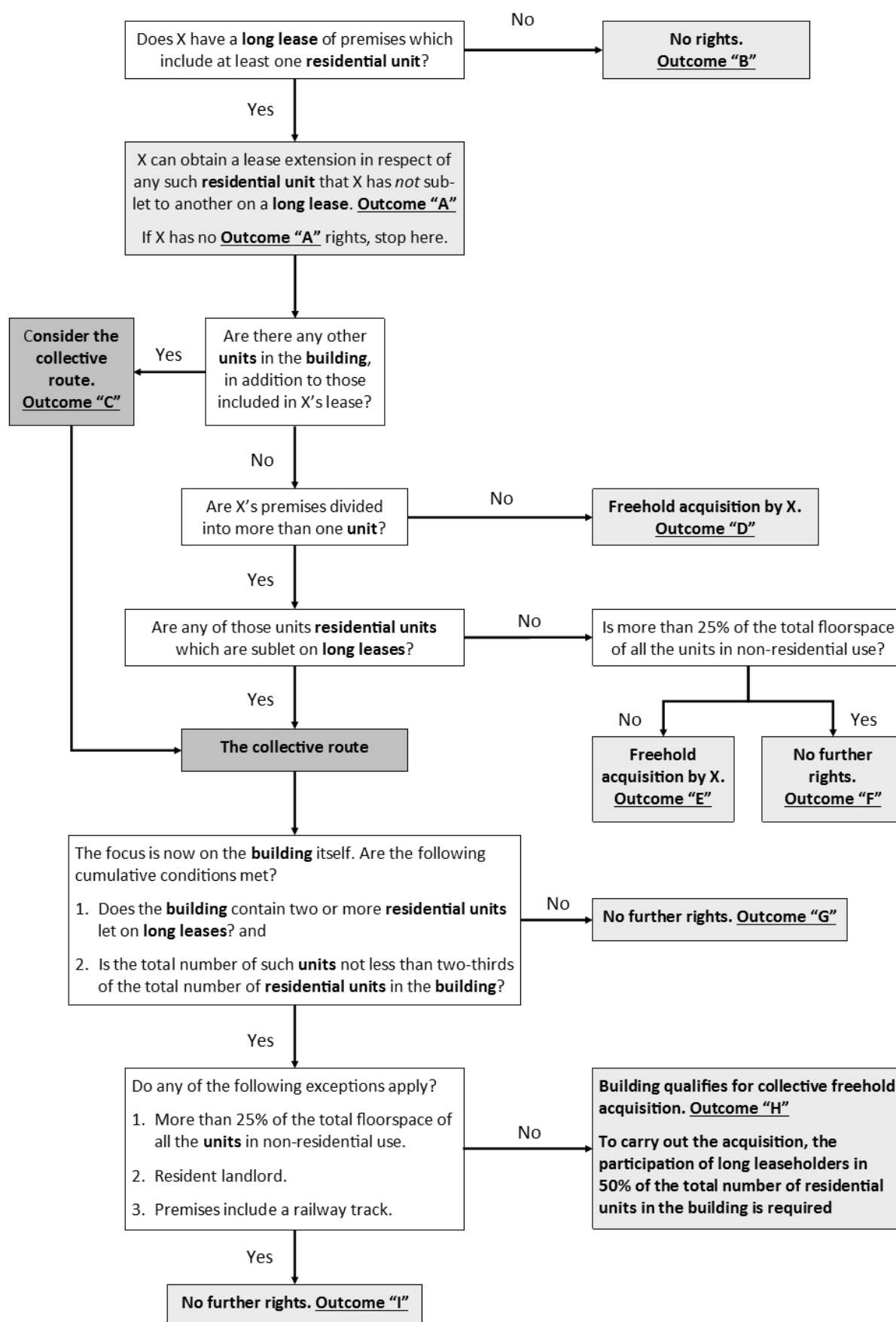
8.18 Over the past 50 years, the law in this area has developed piecemeal, by means of numerous Acts of Parliament (as discussed in Chapter 2 above). Enfranchisement rights have been gradually expanded from low value houses only to high value houses and to flats in a way which we think demonstrates little regard for coherent underlying objectives. This approach has brought us to a difficult position. The current law has reached a level of complexity and incoherence that would be extremely difficult to solve. We do not wish to add to the piecemeal nature of enfranchisement reform, nor do we wish to complicate matters further by attempting to address individual inconsistencies in the current law. Our review is an opportunity to step back, consider the landscape as a whole, and design a coherent, unified and modern regime – in contrast to earlier attempts at reform.

8.19 Our unified scheme offers two particular advantages.

- (1) A unified scheme will inherently and necessarily solve many of the inconsistencies between the treatment of houses and that of flats. Reducing such inconsistencies is one of our key aims in reforming this area. Doing so by way of a unified scheme is also in accordance with our terms of reference, which ask us to consider reforms to enable leaseholders of houses to enfranchise on similar terms to leaseholders of flats.
- (2) Our proposed scheme will be substantially simpler than the current law in practice. As well as making the system easier to navigate, we think that providing a simpler scheme will help to reduce costs for both leaseholders and landlords.

- 8.20 Our proposed scheme is described in detail in the remainder of this chapter. In brief terms, however, our proposal is as follows.
- 8.21 We suggest, firstly, a move away from the current distinction between houses and flats. Instead, we use the more flexible concept of a “residential unit”. A unit is, in essence, a separate, independent set of premises. It may form a building by itself, or be contained within a building along with other units. A residential unit is one which is constructed or adapted for use as a dwelling. We discuss this definition in more detail below. It suffices to say at this stage that a standard flat would be a residential unit, as would a normal detached, semi-detached or terraced house in the occupation of one household.
- 8.22 Whether any given leaseholder qualifies for enfranchisement rights (and if so, which) can then be established by asking a series of questions. We start by considering whether a leaseholder qualifies for the most straightforward enfranchisement right – the right to a lease extension of his or her premises. If the answer to that question is yes, we then move to the more complex question of whether he or she may also acquire the freehold of the building in which his or her premises are contained. Our approach is illustrated by the flowchart at Figure 5, to which reference is made throughout the rest of this chapter.

Figure 5: flowchart of our proposed scheme of qualifying criteria



8.23 The first question on the flowchart seeks to establish whether the leaseholder in question is the sort of leaseholder who ought to qualify for, at the very least, a lease extension. As such, it focusses on the key qualification criteria which follow from our policy approach set out above. We ask: does X have a long lease of premises which include at least one residential unit?

- (1) If so, then X will have a right to a lease extension over any such residential unit (which may or may not be all of the premises included in the lease).⁵¹⁷ This outcome is referred to as outcome “A” on the flowchart. The terms of that lease extension are dealt with in Chapter 4, but it should be noted here that it is a standardised and universal extension right, which applies regardless of whether X owns what is now a house or a flat.
- (2) If the answer to this first question is “no”, then X has no enfranchisement rights. This outcome is referred to as outcome “B” on the flowchart.

8.24 Where X does have a right to a lease extension over a residential unit, the subsequent inquiry relates to whether, and if so how, X might also be able to acquire the freehold interest in that residential unit (or in premises containing that residential unit). This question requires us to look beyond the residential unit alone and consider the building which it constitutes, or in which it is located.⁵¹⁸

8.25 In considering whether X has the right to acquire the freehold of that building individually, there are up to four questions which may need to be asked in sequence.

- (1) The first question is whether there are any other units in the building in addition to those let under X’s lease.⁵¹⁹
 - (a) If there are, then X will not be able to acquire the freehold of that building individually, although a collective freehold acquisition may still be possible. This possibility is represented by outcome “C” on our flowchart.
 - (b) If there are not, X can progress to the second question.
- (2) The second question is whether the premises let under X’s lease contain more than one unit.
 - (a) If they do not, then X will be able to acquire the freehold of the entire self-contained building individually. This outcome is outcome “D” on our flowchart.
 - (b) If, however, the premises consist of more than one unit, the third question must be asked.

⁵¹⁷ Unless that unit is sublet by X on a long lease to Y, in which case it would be Y who would have the right to the lease extension.

⁵¹⁸ For the purposes of freehold acquisition claims, by “building” we mean a “self-contained building”. This is discussed in more detail below.

⁵¹⁹ This is different from the question of whether X’s lease includes a whole building. Our reasons for asking the question in the way suggested are explained below at para 8.87.

- (3) The third question is whether any of the units in X's premises are residential units sublet by X to another person on a long lease.
 - (a) If there are any such sublet residential units, then X cannot acquire the freehold individually, but may proceed to consider a possible collective freehold acquisition.
 - (b) If there are not, the fourth question must be asked.
 - (4) The fourth question requires us to identify all of the units contained within X's premises, and determine whether each is a residential or non-residential unit. We then ask whether the floor space of the non-residential units exceeds 25% of the floor space of all the units combined.
 - (a) If so, then X has no further rights (beyond the initial lease extension right identified above). This outcome is outcome "F" on our flowchart.
 - (b) If, however, the 25% limit is not exceeded, then X can acquire the freehold of the entire building individually. This is outcome "E".
- 8.26 At this point on our flowchart, we have considered all the possible individual rights which X may have. It remains only to examine those situations where X cannot acquire the freehold individually, but may be able to participate in a collective freehold acquisition. In those cases, the focus shifts from X and his or her lease to the building itself.
- 8.27 For a building to qualify for a collective freehold acquisition claim, a number of cumulative conditions must 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 not be 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 units or fewer, the landlord must not be resident in the building; and
 - (5) the freehold of the premises must not include track of an operational railway.
- 8.28 If all these conditions are met, then the building will qualify for collective freehold acquisition. This outcome is outcome "H" on our flowchart. Following that, long leaseholders of not less than half of the residential units in the building must participate in order for such a claim to proceed.
- 8.29 If, however, one of the conditions above is not met, then the building does not qualify for collective freehold acquisition. This outcome can be seen at outcomes "G" and "I" on our flowchart. Leaseholders will be limited to their individual right to seek a lease extension of their residential unit(s).

- 8.30 We suggest that the above scheme would improve upon the current law, with all its attendant inconsistencies and complexities. Of course, we recognise that no scheme designed to confer enfranchisement rights will or can ever be completely simple. It is in the nature of property and land that there are countless intricacies and variations from one set of premises to the next. However, our proposed scheme attempts to deal with each situation with a degree of objectivity lacking in the current law, in an attempt to create a simpler and more coherent enfranchisement process.
- 8.31 We now explain our proposed scheme in more detail. We set out key definitions and address some potential issues arising from our suggested approach to qualifying criteria.

Lease extension – the preliminary right

- 8.32 As set out in Chapter 4 above, we propose that all leaseholders who qualify for a lease extension should enjoy the same right: the right to a lease extension, expiring (say) 125 years after the end of their existing lease, at a peppercorn ground rent.⁵²⁰ As we explain in Chapter 1 above, lease extensions provide leaseholders with valuable security in their homes (although they do not provide control, in the way that freehold acquisitions do). We think that establishing whether a leaseholder qualifies for the right to a lease extension should be the first logical step in our proposed scheme of qualification criteria. Further rights are built upon this one.
- 8.33 We propose that eligibility for a lease extension can be established by asking one reasonably straightforward question:
- Does the leaseholder have a long lease of premises which include at least one residential unit?
- 8.34 If so, the leaseholder can obtain a lease extension in respect of any such residential unit let under the lease, provided that it is not sublet out on a long lease to another person.⁵²¹
- 8.35 If there are multiple residential units let under the lease, then we expect the default position would be that the lease extension would be of the same residential units as are let under the existing lease. However, we think that the leaseholder could be given the option to elect to take separate extensions for the different units, with the consequence potentially being an increase in conveyancing costs which might have to be borne by the leaseholder.⁵²²
- 8.36 Each element of the above question requires further consideration. We deal first with the definition of a “residential unit”, followed by that of a “long lease”.⁵²³

⁵²⁰ We ask for views on the precise length of the lease extension at para 4.41 above.

⁵²¹ See Ch 4, at paras 4.47 to 4.52, for discussion of the extent of the premises which we provisionally propose should be included in a lease extension.

⁵²² See Ch 13 for general discussion of costs.

⁵²³ Whilst we refer in this ch to “definitions”, we are at this stage merely seeking to describe the underlying policy for a new regime. We are not attempting to identify the appropriate statutory wording to give effect to that policy.

Residential unit

- 8.37 “Residential unit” is a new concept. It is fundamental to our proposed scheme, and requires full explanation.
- 8.38 The impetus for the creation of this new concept comes from the problems we have identified with the current legislation, with its crucial distinction between houses and flats. As well as ongoing difficulties with those terms (particularly the definition of a “house”), the two-track approach has led to unjustified inconsistencies between the rights of different leaseholders. We therefore consider it desirable to adopt an overarching, unifying concept which can be used in all enfranchisement cases.
- 8.39 We recognise that the terms “house” and “flat” are longstanding features of the current law with which practitioners are familiar. We also recognise that there has been significant case law attempting to clarify what these terms mean, and we acknowledge that introducing an entirely new concept brings with it the risk of similar litigation in the future. However, we consider that the problems created by the current terminology outweigh this risk.
- 8.40 There will always be a certain number of difficult, fact-dependent cases that require the court’s input. In our view, that is inevitable when one considers the near-infinite number of possible forms that property may take. Legitimate disputes will arise whether we maintain the existing terminology or introduce a new term. But the fact that five cases have gone to the highest appellate court over the meaning of the word “house” without a conclusive resolution having been reached suggests that the current terminology has fundamental difficulties. We therefore believe that the clarity and coherence which follows from the use of one unifying term outweighs the risk of litigation over the meaning of this term.
- 8.41 Turning then to the meaning of a “residential unit”, we consider first what is meant by a “unit”. This is a physical concept, and requires examining the premises themselves. We propose a definition that draws on the 1993 Act’s existing definitions of a “flat”⁵²⁴ and a “unit”.⁵²⁵ We propose that, to be a unit, premises:
- (1) must be a separate, independent set of premises; and
 - (2) must either constitute a building, or form part of a building.
- 8.42 By a “separate, independent set of premises”, we mean a set of premises which is delineated by some degree of physical separation from other premises, and which can reasonably be used on its own, for its intended purpose, without reliance on other premises. It does not matter whether or not the whole of those premises are on the same floor. The concept of a “building” is discussed further below at paragraph 8.97 onwards.
- 8.43 If a unit is contained within a larger set of premises, it should not be possible for those larger premises themselves to be a unit. In other words, there can be no “unit within a unit” – a unit must be the smallest part of any premises which meets our suggested

⁵²⁴ 1993 Act, s 101(1).

⁵²⁵ 1993 Act, s 38(1).

definition. Put another way, premises will not be a unit if they contain smaller parts which satisfy the two conditions set out above.

8.44 We believe that it will be relatively straightforward to apply these concepts to the majority of cases. A run-of-the-mill house or flat is a separate set of premises, and can be used independently of other premises; it contains all the facilities reasonably necessary for living in.⁵²⁶ However, we acknowledge that there are degrees of separation and independence. To some extent, in less obvious cases, we expect the application of a common-sense approach to the eventual statutory language.

8.45 Some examples may help to demonstrate our thinking.

- (1) Consider, first, a student flat consisting of several en suite study-bedrooms with a shared kitchen and living area. Although the individual rooms are separate from one another (and may even have locks on the doors), they would not be units, as they contain no cooking facilities and therefore cannot be used independently of the rest of the flat. The entire flat, however, would be a unit.
- (2) At the other end of the spectrum, imagine a luxury development of flats, where residents have access to communal facilities. It is increasingly common for such facilities to include not only gyms, pools and gardens but also additional living spaces, such as large kitchens and dining areas for entertaining. In this case, however, the individual flats would be units, despite the availability of these communal facilities. The communal facilities provide additional benefits for residents, and do not detract from the fact that the flats themselves are separate sets of premises which contain all the facilities reasonably necessary for day-to-day living.

8.46 What, then, will make a unit a “residential” one? Again, our starting point is the definition of a “flat” under the 1993 Act. We think that to be a residential unit, a unit must be constructed or adapted for the purposes of a dwelling.⁵²⁷ Further, that construction or adaptation should not be in breach of covenant (save where the breach has been consented to or waived by the landlord).

8.47 As with the current law, we do not suggest a general requirement that the unit is lived in by the person who is seeking to enfranchise – indeed, it will be clear from the previous

⁵²⁶ We do not envisage that the fact that premises are accessible only by means of a communal hallway, staircase or lift would render the premises incapable of being used independently. Similarly, we suggest that a flat would still amount to a separate, independent set of premises even though the lease is likely to include only the internal parts of the flat – such as the plasterwork and floorboards – and not structural elements of the building such as the walls, roofs and joists. The same would be the case where a house is let on an “internal” lease (as discussed further at para 8.87 below). We acknowledge that care would need to be taken in the drafting of any legislation putting our proposals into effect to make these points clear.

⁵²⁷ For the avoidance of doubt, this is not to say that a unit originally constructed as a dwelling will always be residential, regardless of subsequent adaptation for other use. In other words, we propose to adopt the approach taken by the Court of Appeal in *Hosebay Ltd v Day* [2010] EWCA 748, [2010] 1 WLR 2317 (CA) (and approved by the Supreme Court on appeal) to the very similar wording (“designed or adapted for living in”) under the 1967 Act. As set out at para 7.39 above, Lord Neuberger MR (as he then was) recognised in that case that, where premises constructed for one use are later adapted for another, the purpose of the original design or construction is no longer determinative and can be overridden by the subsequent adaptations.

paragraph that it does not have to be lived in by anyone at all. Whilst the present use of a unit may be indicative of whether it is constructed or adapted for the purposes of a dwelling, we consider that this question can be answered relatively easily even where a unit is unoccupied, by examining its physical features and configuration.

Units intended for mixed-use

- 8.48 As will be seen later in this chapter, our scheme of qualifying criteria depends on the classification of any given unit as either “residential” or “non-residential”. These are mutually exclusive terms, and it is not the case that one unit can be partly residential and partly non-residential. So how should a unit be categorised if it is designed both for residential purposes and for other purposes? We are aware, for example, of the increasing use of live/work leases, where both residential and business use are permitted or mandated by the terms of the lease and where the premises may be configured partly as a living space and partly as an office or workspace.
- 8.49 We consider that enfranchisement rights should be available wherever it is expected that a long leaseholder will reside in the premises, even if they also work there or are expected to do so. For that reason, we do not propose a requirement that, to be “residential”, a unit must be constructed or adapted for the purposes of a dwelling *and no other purpose*. It is sufficient that use as a dwelling is one of the intended purposes for which the unit is configured. Accordingly, a live/work unit – or other unit configured for residential and other purposes – would satisfy the definition of a residential unit set out above. The leaseholder is expected to live there, it is configured accordingly, and so it is constructed or adapted for the purposes of a dwelling. As a further example, a classic interconnected flat above a shop, at the end of a row of terraced houses, would comprise a single residential unit.

Business leases

- 8.50 The requirement that a unit must be constructed or adapted for use as a dwelling will by itself ensure that, in the vast majority of cases, enfranchisement rights are available only to those leaseholders who are granted a lease for residential purposes. But we have also considered the situation where someone takes a long lease of a flat or a house with the intention (known to his or her landlord) of using it for the purposes of a business. An example might be a house rented for use as a private physiotherapy practice, or a flat rented for use as a design studio. Provided the premises retain their original configuration as a flat or a house, the leaseholder in either of these situations would have a long lease of a residential unit – and thus qualify for enfranchisement rights – even though they cannot really be described a residential leaseholder.
- 8.51 We do not think that those who take a lease specifically for business purposes should qualify for enfranchisement rights. As previously discussed, the enfranchisement legislation has always been directed at benefiting residential leaseholders. We wish to maintain this policy approach. Indeed, as we explain in our discussion of valuation in Chapter 15, the extent to which the premium payable for enfranchisement can be reduced may differ according to the identity of the person exercising the right. In particular, it may be possible to justify, in human rights terms, lower premiums for owner-occupiers than for others who have enfranchisement rights. Therefore, depending on whether, and to what extent, Government decides to lower the premium payable, it may be necessary from a human rights perspective either to restrict

enfranchisement rights to residential leases, or to determine the premium payable according to the identity of the leaseholder exercising the right. It is for this reason that the “residential unit” is central to our scheme of qualifying criteria, and why we also propose an additional check to ensure that holders of business leases do not qualify for enfranchisement rights.

8.52 As set out in Chapter 7, the treatment of business leases in the current law is unsatisfactory: the attempt to exclude them from enfranchisement rights by reference to the 1954 Act is ineffective, and it penalises certain deserving leaseholders by imposing additional conditions on them. We have therefore considered the following alternative ways of achieving the same goal.

(1) First, we have considered whether the existing approach could be adapted to make it more robust – a suggestion made by one member of our advisory group. As explained above, the major problem with simply referring to the 1954 Act is the requirement under that Act that the premises must be “occupied by the tenant... for the purposes of a business carried on by him” for a lease to be a business lease. The lease will no longer be excluded from enfranchisement rights if the leaseholder leaves the premises empty or sublets them. We might be able to address this issue by defining a business lease along the following lines:

- (a) a lease which falls within Part II of the 1954 Act; or
- (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 and used for those purposes; or of the 1954 Act if the premises were occupied by the leaseholder and used for the purposes intended under the lease.

(2) Secondly, we have considered a broader approach, whereby a unit which would otherwise be considered “residential” will not be treated as such if the terms of the lease do not permit it to be used for residential purposes. In other words, it would be incumbent on a landlord intending to grant a business lease of what otherwise appears to be a residential unit to ensure that the lease permits only business use, if he or she does not wish to be exposed to an enfranchisement claim.

8.53 We prefer the second approach. We think that it will almost invariably be simple to establish whether a lease permits only business use: that is merely a question of contractual construction.

8.54 Together with our basic definition of a residential unit, this approach creates a double safeguard to restrict enfranchisement rights to residential leaseholders. Where a lease is granted of a unit which is self-evidently not a dwelling – say, a warehouse, or office, or storage unit – the definition set out at paragraph 8.46 above will not be satisfied. And where a lease of a residential unit is granted, it must also be the case that the lease provides for – or at the very least, does not prohibit – it being used as such.

Examples

8.55 The following examples demonstrate how our proposed definition of a residential unit would operate in respect of a purpose-built block of flats.

- (1) The entire block is not a unit. It contains many smaller units – the flats – within it.
- (2) The common entrance hall and stairwell is not a unit. Nor is a storage unit belonging to one of the individual flats. That is because neither is a separate, independent set of premises. The hall and staircase cannot reasonably be used on their own, as their very purpose is to provide access to other premises. Likewise, the storage unit is intended to be used to complement the space available in the corresponding flat.
- (3) Each of the flats is a unit – and this is the case irrespective of whether each one is located on a single floor or spread across more than one level. Most are residential units, but the flat on the ground floor which has been converted into an office is a non-residential unit.
- (4) The individual bedrooms in the flats are not units, although they are used residentially. They are not separate, independent sets of premises.

8.56 Consider instead a three-storey detached house.

- (1) If the house is an ordinary house, lived in by a family, it would constitute a single residential unit.
- (2) If, however, that family undertakes some internal building works to create a separate flat on the top floor, there would be two residential units within the house.
- (3) If, subsequently, the family completes more works to separate the ground floor from the first floor, and sublets the ground floor to a commercial entity for use as a shop, there would be three units: a non-residential unit on the ground floor, and two residential units on the upper floors.

Consultation Question 38.

8.57 We provisionally propose to replace the language of “houses” and “flats” with the new concept of a “residential unit”.

Do consultees agree?

8.58 Do consultees think that our proposed definition of a “residential unit”, set out at paragraphs 8.37 to 8.56, will work successfully in practice?

8.59 We provisionally propose to exclude business leases from enfranchisement rights. Do consultees agree? If so, do consultees agree that the best method of achieving this exclusion is by restricting enfranchisement rights to leases which permit residential use?

Long lease

8.60 Our proposed requirement that a leaseholder must have a “long lease” of a residential unit raises several questions. What, exactly, do we mean by a “lease” in this context? And how long is “long”? We now consider each of these questions in turn.

What is a lease?

8.61 We propose a single definition of a lease which draws on the existing definitions under both 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.⁵²⁸

What is a long lease?

8.62 With a few exceptions, enfranchisement rights have only ever been available to those leaseholders whose leases are of a certain minimum length. We propose that such a requirement should remain. It serves to distinguish between those who are likely to have paid a substantial premium for a lease, and those who hold property on a shorter lease granted without payment of a premium, under which a market rent is payable. In essence, the long lease requirement serves to separate an owner from a renter. Only the former are intended to benefit from enfranchisement rights.

8.63 Our starting point in determining what constitutes a long lease is the definition contained in section 7 of the 1993 Act, discussed above at paragraphs 7.59 to 7.61. As we have already noted, this definition is not dissimilar to that under section 3 of the 1967 Act. It provides, first and foremost, that a lease will be a long lease where it is granted for a

⁵²⁸ A tenancy at will is a tenancy, usually entered into whilst 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.

term of years certain exceeding 21 years. As long as the lease is granted for that duration it does not matter whether the lease is, or may become, terminable before the end of that term by notice given by or to the leaseholder, or by re-entry, forfeiture, or otherwise.

- 8.64 We are not aware of any particular difficulties caused by the general 21-year requirement. Further, it is widely known and understood in the market. In these circumstances, we propose to maintain this requirement.
- 8.65 Beyond that, section 7 of the 1993 Act provides that certain types of leases will be long leases whether or not the term exceeds 21 years, and that certain other types of leases will not be long leases no matter how long their term. Again, these specific provisions mirror very similar provisions in the 1967 Act. We provisionally propose for our new scheme of qualification criteria to make equivalent provision for these particular types of leases.
- 8.66 It should be noted that the reference within section 7 to shared ownership leases “where the tenant’s total share is 100%” has caused some uncertainty as to whether shared ownership leases of flats are long leases for the purposes of enfranchisement rights. The position of shared ownership leases under our proposals is considered in full in Chapter 9 below.

Consultation Question 39.

- 8.67 We provisionally propose to maintain the requirement that, in general, a leaseholder must have a lease which exceeds 21 years in order to qualify for any enfranchisement rights.
- Do consultees agree?

Concurrent and consecutive long leases

- 8.68 Under section 3(6) of the 1967 Act and section 7(6) of the 1993 Act, two or more separate long leases between the same landlord and leaseholder may be treated as if they were a single long lease. We propose to maintain this approach. This proposal should be borne in mind when examining our proposed scheme and the flowchart at Figure 5. For example, where we ask whether X has a long lease which includes a residential unit, an affirmative answer should be given where X has two concurrent long leases over the two halves of a residential unit.
- 8.69 Moreover, we propose adopting the approach of both Acts to renewal leases and statutory extension leases. Renewals of long leases or periods during which a long lease is or was continued by statute (such as under Part I of the Landlord and Tenant Act 1954) will be treated as long leases.⁵²⁹

⁵²⁹ Under s 3(2) of the 1967 Act, a renewal of a long lease is deemed to be a long lease only where the prior long lease was at a low rent. In light of our proposal immediately below, relating to the removal of references

- 8.70 As we explore above, consecutive long leases will be considered a single long lease under section 3(3) of the 1967 Act, but there is no equivalent provision under the 1993 Act. We propose to make such provision in our scheme, though making it clear that there is no limit to the number of consecutive long leases which can be joined together.

Consultation Question 40.

- 8.71 We provisionally propose maintaining the current legal position that separate, concurrent long leases between the same landlord and leaseholder may be treated as if they were a single long lease.

Do consultees agree?

- 8.72 We provisionally propose maintaining the current legal position that renewals or statutory continuations of long leases are also to be treated as long leases. Further, we propose adopting (across the board) the 1967 Act's approach to consecutive long leases, in treating them as a single long lease.

Do consultees agree?

Removal of financial limits and the low rent tests

- 8.73 Our provisional approach, outlined above, moves away from qualifying criteria based on financial limits (both rent and rateable values). As well as being notoriously difficult to operate in practice (not least because it can be extremely difficult to identify a property's rateable value on the appropriate day, or at all), we do not consider that there is any good policy reason for such criteria to be maintained.

Consultation Question 41.

- 8.74 We provisionally propose that all qualifying criteria for enfranchisement rights based on financial limits (both the low rent test and rateable values) be removed.

Do consultees agree?

Removal of the two-year ownership requirement

- 8.75 It will be apparent from the foregoing explanation of our provisional proposals for reform that we do not intend to retain the two-year ownership requirement in any context. This proposal accords with our Terms of Reference, as stated above, which require us to make enfranchisement easier and quicker, by "reducing or removing" the requirement for leaseholders to have owned their lease for two years before enfranchising. We find

to low rent and other financial limits in relation to qualifying criteria, we do not propose to retain this specific requirement in our suggested scheme.

the criticisms we have raised above in paragraphs 7.118 to 7.121 compelling, and we see no room for the requirement in our suggested scheme.

- 8.76 In addition, the removal of this requirement will operate to resolve the inconsistency between the position of trustees in bankruptcy and that of personal representatives, as set out above at paragraph 7.117. Without the need to establish a minimum period of ownership, in either case the present ownership of the long lease would be enough to found an enfranchisement claim.

Consultation Question 42.

- 8.77 We provisionally propose that the requirement to own premises for two years before exercising enfranchisement rights in respect of those premises be abolished.

Do consultees agree?

Individual freehold acquisition

- 8.78 If a leaseholder has no right to a lease extension in respect of any residential unit (or units) within their premises, the possibility of freehold acquisition simply does not arise. But if the leaseholder does have such a right, the next consideration is whether he or she may also be able to acquire the freehold of the premises, either “individually” (in other words, independently of any other persons) or “collectively” (together with others).
- 8.79 In order to determine whether an individual freehold acquisition is possible, a series of four questions, outlined in the summary of our proposed scheme above, must be considered. At more than one point in this process, it may become apparent that an individual claim is not an option, but that the leaseholder could look instead to participate in a collective claim. That possibility is discussed in more detail later in this chapter, at paragraphs 8.122 to 8.157.
- 8.80 Under the current law, the long leaseholder of a house can generally acquire the freehold individually, whereas the long leaseholder of a flat must use the collective route. That position must be preserved to a large degree, in order to avoid the various problems associated with freehold flats – particularly the problem of flying freeholds.⁵³⁰ But we do not wish to achieve that by asking simply whether a leaseholder has a lease of a house or of a flat; as we have seen, that is not nearly so simple a question as it might at first appear. It is for this reason that, instead, we ask the questions which we have identified.
- 8.81 Essentially, our approach seeks to determine whether a long leaseholder owns all of the units (or perhaps the only unit) in a building.⁵³¹ If they do, then the building is to all intents and purposes in the ownership of a single person. Subject to what is said below about the 25% non-residential threshold, the freehold of the building can be acquired

⁵³⁰ See para 1.10.

⁵³¹ The concept of a “building” (which includes “part of a building”) is explained in more detail below at para 8.97 onwards.

individually by that person without any question of flying freehold units arising as a result. We think that this 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.

- 8.82 Before considering the four questions themselves, we wish to reiterate that, in the majority of cases, the outcome will be very simple – and may well be obvious at a glance. Take, for example, an ordinary terraced house, the long lease of which is owned by one person. This house is a single residential unit, and there are no other units in the building: the leaseholder will therefore be able to acquire the freehold of the building (or obtain a lease extension, if he or she prefers). Alternatively, consider an ordinary flat in a block of flats, the long lease of which is owned by one person. This person does not own all the units in the building, so he or she can either obtain a lease extension of the flat, or consider a collective freehold acquisition claim, should the ownership of the rest of the flats accommodate that. As such, outcomes under our proposed scheme do not deviate far from those under the current law; our scheme does, however, attempt to delimit the availability of freehold acquisition rights in a more objective and structured way than the current law, in the hope that this will prove useful in the more difficult cases.

The four-stage approach

- 8.83 We turn now to the four questions which must be asked to determine whether individual freehold acquisition is available to a leaseholder, and explain each of these in more detail.

Question one

- 8.84 Question one asks whether there are any other units in the building, whether residential or non-residential, in addition to those let under the leaseholder's lease – in other words, units owned by someone else.
- 8.85 If there are, then the leaseholder is unable to acquire the freehold individually, and must consider a collective freehold acquisition claim. This outcome arises because, should there be units within the building other than those within the leaseholder's premises, it necessarily follows that the leaseholder does not own an entire building. As such, they should not be able to acquire the freehold on their own (outcome "C" on our flowchart at Figure 5).
- 8.86 On the other hand, if there are no other units in the building, then we think that individual freehold acquisition should be a possibility (subject to the further checks set out in questions two, three and four below).
- 8.87 The reason we ask whether there are any other units in the building, rather than simply asking whether the leaseholder has a lease of the entire building, is because we think this will help to limit the ability of landlords to avoid the enfranchisement legislation. We are aware that, at present, some landlords grant "internal" leases of houses, retaining parts of the roof or structure for themselves, so that the leaseholder does not have a lease of a "house" within the meaning of the 1967 Act and is not entitled to enfranchisement rights. We think a leaseholder in this position, or similar, *should* be able to exercise the enfranchisement rights, since, in reality, they can be thought of as owning the whole building. We therefore wish to prevent landlords adopting similar

tactics under our new scheme. Our approach ensures that it is only where a landlord has retained an entire unit – as opposed to nominal parts of the building – that a leaseholder will be prevented from individually acquiring the freehold of the building.

Question two

- 8.88 Where the long lease under consideration includes all of the units in the relevant building, we turn to question two: do the premises let under the lease contain more than one unit?
- 8.89 If they do not, then the leaseholder is able to acquire the freehold of the entire building individually. In order to have reached this stage, the leaseholder must have passed the preliminary check of whether he or she can obtain a lease extension. Therefore, the leaseholder will necessarily own a residential unit under a long lease, and will not have sublet this residential unit on a long lease to another person. As a result, the entire building consists of one residential unit (most likely what would be considered an ordinary house), and there is no reason why the leaseholder should not be able to acquire the freehold.
- 8.90 This outcome appears on our flowchart as outcome “D”. If, however, the premises do consist of more than one unit, we must ask question three.

Question three

- 8.91 Question three asks whether any of the units in the leaseholder’s premises are residential units sublet to another person on a long lease. If there are any such sublet residential units, then the leaseholder cannot acquire the freehold individually, but may proceed to consider a possible collective freehold acquisition. This outcome is reached because there is now more than one leaseholder in the building who qualifies for enfranchisement rights.
- 8.92 If, on the other hand, there are no residential units sublet on long leases, then the reality is that the leaseholder, by virtue of his or her lease, is in possession of the whole of a multi-unit building containing at least one residential unit. There are many possible scenarios which might fit this description. One example is a building, originally constructed as a house, which the leaseholder has converted into several flats. Another is a building consisting of a ground floor shop with a separate, self-contained flat above. In these cases, the fourth question must be considered to determine whether the leaseholder can acquire the freehold of his or her particular building individually.

Question four

- 8.93 Question four is directed at identifying those multi-unit buildings which we consider ought to be amenable to freehold acquisition by an individual leaseholder. Essentially, we seek to limit that right to buildings which are predominantly residential in character, for that has always been the focus of enfranchisement rights. We suggest that this limitation can be achieved by way of an upper limit on the proportion of non-residential use to which a building can be put before it may no longer be enfranchised.
- 8.94 Accordingly, the fourth question requires each of the units contained within the building to be categorised as residential or non-residential. We then ask whether the floor space of the non-residential units exceeds 25% of the floor space of all the units combined

(borrowing the percentage limitation on non-residential use which applies to collective enfranchisement claims under the current law). If so, then the leaseholder has no right to acquire the freehold of the building, and must be content with a lease extension of any of all of the residential units within the building. If, however, the 25% threshold is not exceeded, they can acquire the freehold of the entire building individually.

Consultation Question 43.

8.95 We provisionally propose 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 units does not exceed 25% of the floor space of all the units combined.

Do consultees agree?

Relevant definitions

8.96 The four questions discussed in the preceding paragraphs seek to establish the availability of the right of individual freehold acquisition, but their application requires an understanding of various key terms. We have already explored some of these – the concepts of a long lease, a unit and a residential unit. However, it will be apparent that it is also essential to identify what is meant by a “building” in this context. There is also more to be said about the upper limit on non-residential use proposed in our discussion of question four above. We consider each of these concepts next.

The definition of a building

8.97 Within this chapter, we refer to a “building” in two different contexts.

- (1) First, for premises to be a “residential unit” which may be the subject of the right to a lease extension, we say that they must constitute or form part of a “building”.
- (2) Second, when freehold acquisition claims are under consideration, it is a “building” which stands to be acquired by a leaseholder or leaseholders. The

make-up of the “building” concerned, in terms of the units contained within it and their ownership, falls to be closely examined in order to establish whether either kind of freehold acquisition is a possibility.

As we explain below, we use the word “building” to convey two slightly different meanings in these different contexts.

- 8.98 In relation to the first context in which we refer to a building – as a greater structure within which a unit is contained – the requirement that a unit must form part of a building stems from the need to restrict enfranchisement rights to residential premises located predominantly within houses or blocks of flats. In the absence of this requirement, we are concerned that premises such as a houseboat or a caravan might be considered “residential units”. If that were the case, our proposed scheme would result in a measurable relaxation of the applicability of enfranchisement rights, raising policy issues beyond those which leasehold enfranchisement can appropriately address.
- 8.99 With that concern in mind, we propose that the definition of a building in this context can be a relatively simple one, focussed on features relating to its construction which would serve to exclude other types of structures. In line with case law discussed in our description of the current law above, we suggest that a building might be defined simply as a built or erected structure with a significant degree of permanence, which can be said to change the physical character of the land.⁵³² If necessary, it could be made explicit that homes such as mobile homes, which are not within the scope of enfranchisement legislation, do not meet this definition.
- 8.100 In relation to the second issue – defining a building for the purposes of a freehold acquisition claim – we are of the view that a much more restrictive definition is required. In these cases, the need to avoid the creation of flying freeholds is a significant concern, and so it is important to seek to limit such acquisitions to cases where there is no such risk. In other words, freehold acquisition should not be available where there are quantifiable issues of overhang and underhang.
- 8.101 As set out in the preceding chapter, under the current law this limitation is achieved as follows.
- (1) Under the 1967 Act, a house will be excluded from enfranchisement rights where the house is not structurally detached, and a material part of it lies above or beneath part of the other building.⁵³³
 - (2) Under the 1993 Act, only a self-contained building or part of a building may be the subject of a collective enfranchisement claim. A self-contained building must be structurally detached, and a self-contained part of a building must, amongst other things, be clearly vertically divided from the remainder of the building.⁵³⁴
- 8.102 We consider that the question of whether an overhanging or underhanging part of a building is “material” is highly subjective. We therefore propose to adopt the approach

⁵³² See paras 7.35 to 7.36 above.

⁵³³ 1967 Act, s 2(2).

⁵³⁴ 1993 Act, s 3(2) and (3).

of the 1993 Act to this issue. In other words, where we speak of the freehold acquisition of a building (whether individual or collective), what is being referred to is a “self-contained building or part of a building”, as defined in sections 3(2) and 3(3) of the Act (and discussed above at paragraphs 7.70 to 7.73).

8.103 Finally, we repeat that this narrow approach to the definition of a building is proposed only in respect of freehold acquisition claims (whether individual or collective). Whether a particular building in which a residential unit is located meets the rather exacting definition in the 1993 Act will not affect the long leaseholder’s initial right to a lease extension of that unit.

Consultation Question 44.

8.104 We provisionally propose 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 definitions of “self-contained building” and “self-contained part of a building”.

Do consultees agree?

8.105 We provisionally propose that, otherwise, the “building” in which a unit is contained can be defined simply as a built structure with a significant degree of permanence which can be said to change the physical character of the land.

Do consultees agree?

A new discretion for the Tribunal

8.106 Although we are proposing to adopt the 1993 Act definition of a building for the purposes of freehold acquisition claims, we are aware that this definition has given rise to litigation. We have been told of landlords who, wishing to prevent or resist a collective enfranchisement claim, construct complex buildings in such a way that they will fall outside this definition, or, at the very least, will enable them to argue that they do. One member of our advisory group has also pointed out that there are quite a number of houses – particularly main houses with mews houses which are now in separate ownership – where there is horizontal overlap between two different properties.⁵³⁵

8.107 For these reasons, we are considering whether the Tribunal should be enabled (in strictly limited circumstances) to authorise a freehold acquisition (whether individual or collective) which would not otherwise be possible. We suggest that such a discretion might be available where:

- (1) a freehold acquisition would be possible in respect of a building or part of a building, save that the building or part is not (or might not be) “self-contained” within the meaning set out above; and

⁵³⁵ A good example is provided by the case of *Malekshad v Howard de Walden Estates Ltd* [2002] UKHL 49, [2003] 1 AC 1013, discussed above at para 7.47.

- (2) despite the fact that the building or part of the building is not (or might not be) “self-contained”, the proposed freehold acquisition is not reasonably expected to cause any particular practical problems for any interested party.

8.108 In other words, where a freehold acquisition is practically desirable and not problematic, the Tribunal could allow the freehold to be acquired even if the building or part of a building is not self-contained. We also consider that this discretion could be useful where there is some doubt as to whether a building or part of a building is self-contained. Leaseholders may be able to avoid the need to engage in significant, costly argument on this point by inviting the Tribunal to exercise this discretion.

Consultation Question 45.

8.109 We invite consultees’ views on the desirability and workability of creating a discretion for the Tribunal to authorise, in limited circumstances, a freehold acquisition (whether individual or collective) where this would not otherwise be possible because the building or part of building concerned is not, or might not be, self-contained.

25% limit on non-residential use

8.110 Currently, the 1993 Act limits collective enfranchisement to buildings (or parts of buildings) in which no more than of 25% of the internal floorspace is used (or intended to be used) for non-residential purposes.⁵³⁶

8.111 We have considered this limit carefully. On one view, it is an arbitrary criterion which prevents some buildings from being enfranchised merely because they are configured in such a way as to avoid the enfranchisement legislation. We have heard, for example, anecdotal evidence from our advisory group and from stakeholders of developers constructing properties with 26% commercial use. However, the percentage equally provides a clear and relatively simple means of identifying those buildings to which, in our view, enfranchisement rights were intended to attach: buildings in predominantly residential use.

8.112 We propose below to retain the 25% limit on non-residential use in our new scheme of qualifying criteria for collective freehold acquisitions. Here, however, we discuss the idea of applying that same limit to any individual freehold acquisition where the building to be acquired consists of multiple units. This suggestion was made to us by several stakeholders, and found general approval with our advisory group.

8.113 As we have already pointed out, the enfranchisement rights have always been directed at leaseholders of predominantly residential properties. It therefore seems reasonable to us that our new scheme will need to employ some way of limiting individual freehold acquisitions of multi-unit buildings to those which are in predominantly residential use. For example, we do not consider that a leaseholder who has taken a business lease of what was originally a large house, but has for many years been configured as offices

⁵³⁶ 1993 Act, s 4(1).

with one small flat on the top floor, should be able to acquire the freehold of that building.⁵³⁷

8.114 At present, this limitation is provided by the requirement under the current law that a house must be a house “reasonably so called”. But as we have seen, it is actually very difficult to determine the exact amount of commercial use which will prevent any given house from satisfying this definition. We consider that a 25% limit on non-residential use might be able to perform that task in an objective way.

8.115 We acknowledge that expanding the applicability of the 25% rule is not without its difficulties. In particular, it may have the effect of removing the right to acquire the freehold of their premises from some leaseholders who currently have that right.⁵³⁸ On balance, however, we think that applying this limit on non-residential use to all freehold acquisitions involving multiple units is a sensible suggestion. It is an objective means of producing consistent outcomes in similar cases, in a way which we consider corresponds with the overarching aims of enabling enfranchisement only of predominantly residential properties.

8.116 This suggestion of course raises the question of how exactly non-residential use is to be measured. First, we propose that common areas are left out of the equation, as the 1993 Act does at present. Then, we propose that each unit within the building to be acquired must be considered as a whole, and categorised as either residential or non-residential. It would not be practical to attempt to categorise every square inch of floor space within a single unit, nor would that be consistent with our proposal at paragraph 8.48 above that a unit cannot be partly residential and partly non-residential.

8.117 It should be noted that the result of the above approach is that the 25% limit would not (and could not) be relevant in single-unit buildings. The unit will either be non-residential, in which case no enfranchisement rights are available, or it will be residential, in which case there is no need to consider the 25% limit. As explained at paragraphs 8.49 to 8.54 above, where a unit is in mixed use, whether it is to be categorised as residential or non-residential will depend on how the premises are configured and the use permitted under the lease.

8.118 Finally, throughout this discussion, we have referred only to a possible limit of 25%. That is the level currently set in the 1993 Act. However, we would like to hear from consultees about the appropriateness of this limit. We realise that the effect of a 25% limit might be to preclude buildings with majority residential use from being eligible for freehold acquisition, if the non-residential units are sufficiently large. It might also prevent the freehold acquisition of a building consisting of a flat above a shop. This particular scenario is considered further below at paragraphs 8.160 to 8.166. Conversely, any numerical limit will cause certain people to fall outside the scheme, and it is perhaps better to maintain the current and well-known limit of 25% than to increase or reduce it without proper justification.

⁵³⁷ It seems unlikely that this leaseholder would qualify for enfranchisement rights under the current law. However, it cannot be ruled out, given the uncertainty over the present definition of a house.

⁵³⁸ We are thinking, in particular, of the leaseholder of a building containing a flat above a shop, where the flat and shop form two separate units. This scenario is discussed in more detail at paras 8.160 to 8.166 below.

Consultation Question 46.

8.119 We provisionally propose that it is appropriate to apply a maximum percentage limit on non-residential use to individual freehold acquisition claims concerning premises containing multiple units.

Do consultees agree?

8.120 We provisionally propose that that limit should be the same as that which applies to collective freehold acquisition claims.

Do consultees agree?

8.121 We provisionally propose that the limit should be set at 25% of the internal floor space (excluding common parts).

Do consultees agree?

Collective freehold acquisition – further conditions

8.122 From the preceding discussion, it will be apparent that collective freehold acquisition may be possible in two situations.

- (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.
- (2) Secondly, 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.

8.123 In these cases, a slight shift in thinking is required. The question is no longer whether a particular leaseholder has a specific right over his or her premises. Instead, we are concerned with whether a whole building, in which there is more than one residential unit held on a long lease, may be subject to a collective freehold acquisition by some or all of the long leaseholders of residential units within that building.

The definition of a building

8.124 As with individual freehold acquisition, we propose that collective freehold acquisition is available only in respect of a “building” which is “a self-contained building or part of a building”.⁵³⁹

8.125 As noted at paragraphs 7.122 to 7.123 above, various members of our advisory group have identified some difficulties in applying this definition from the 1993 Act to collective enfranchisement claims of increasingly complex modern developments. However, for

⁵³⁹ We explain the need for this requirement, and its meaning, at paras 8.100 to 8.103 above.

the following reasons, we do not think that these difficulties justify taking a different approach.

- (1) First, our understanding is that the disputes which our advisory group members have in mind are highly fact-specific and concern particularly unique or difficult cases.⁵⁴⁰ We believe that it will be very difficult for any legislative regime to cater fully for the huge range of factual scenarios that could possibly arise and that some litigation of difficult cases like these is inevitable, whatever approach we take.
- (2) Secondly, we think that some of the difficulties we have heard about might be alleviated by our proposal to enable the collective acquisition of the freehold of an entire estate, rather than just of a self-contained building or part of a building.⁵⁴¹ Where an entire estate is to be acquired, it becomes irrelevant whether the various “buildings” which make it up are “self-contained”, provided the estate as a whole satisfies all the criteria for a collective freehold acquisition of that estate.⁵⁴²
- (3) Thirdly, we consider that these difficulties will be further reduced by our additional proposal (discussed at paragraphs 8.106 to 8.109 above) to create a new discretion for the Tribunal in these cases.

Potential participation requirements

8.126 Next, the current law requires, and we propose to adopt, a minimum level of potential participation in a collective enfranchisement before a claim can be made.

8.127 Under the current law, this minimum level is achieved by means of two criteria:

- (1) there must be at least two flats in the building held by qualifying tenants,⁵⁴³ and
- (2) at least two-thirds of all the flats in the building must be held by qualifying tenants.⁵⁴⁴

8.128 These participation requirements mean that, for a collective enfranchisement to be a possibility, a significant majority of all the flats in the premises must be owned by a leaseholder who has the right to participate in that claim. The requirements have this effect despite the fact that (in general) only the qualifying tenants of half of the total

⁵⁴⁰ One example we have been given involved two adjacent blocks of flats, Block A and Block B. Block A had access to a lift, the shaft of which cut significantly into Block B. The lift mechanism was on the roof of Block B. Block B, however, did not have access to the lift; all entry points to the lift were located in Block A. Block A wanted to carry out a collective enfranchisement, but were unable to do so. The presence of the lift shaft and mechanism within the structure of Block B meant that Block A could not be described as a “self-contained building or part of a building”.

⁵⁴¹ As discussed in Ch 6 above, at paras 6.93 to 6.97.

⁵⁴² As to which, see para 8.156 below.

⁵⁴³ See para 7.74 onwards.

⁵⁴⁴ See para 7.78 onwards.

number of flats in the premises need to commence the claim by serving a notice of claim.⁵⁴⁵

Two or more residential units

8.129 The 1993 Act requires there to be two or more flats held by qualifying tenants in a building for collective enfranchisement to take place (the “two-or-more flats requirement”).

8.130 We have considered what this requirement adds to the condition (discussed immediately below) that not less than two-thirds of the flats in the building have to be held by qualifying tenants (“the two-thirds condition”). We can think of only one possible function: to preclude the collective enfranchisement of buildings containing a single “flat”.

8.131 Consider, for example, a house which is divided into a single flat and a separate office, each held on long leases by separate persons. There is only one “flat” in the building, and that one flat is held on a long lease. More than two-thirds of the flats in the building are therefore held by a qualifying tenant, and so, without the two-or-more flats requirement, the building might qualify for a collective enfranchisement claim by the leaseholder of the flat alone.⁵⁴⁶ This outcome seems nonsensical given that there is only one flat and one qualifying tenant, and, further, it does not seem to us that the legislation intended collective enfranchisement to be available in this situation. The legislation was aimed firmly at enabling collective enfranchisement of residential properties by their occupiers.

8.132 We think that the same potential issue would arise in our proposed scheme if we did not maintain an equivalent of the two-or-more flats requirement, and merely relied on the two-thirds condition. We therefore propose adapting the two-or-more flats condition to prevent a collective freehold acquisition claim where there is only one long leaseholder of a residential unit within a building containing another unit.

8.133 To adopt this requirement in our proposed scheme requires phrasing it differently: the question needs to be whether there are two or more residential units let on long leases.

Consultation Question 47.

8.134 We provisionally propose to maintain an equivalent of the current requirement that, for a collective enfranchisement, there must be a minimum of two or more flats held by qualifying tenants in the premises to be acquired.

Do consultees agree?

⁵⁴⁵ As set out further in Ch 7 above, at para 7.81.

⁵⁴⁶ Whether the building would in fact qualify for a collective enfranchisement claim will depend on the relative sizes of the flat and office. Due to the 25% limit on non-residential use, discussed further below, the flat would need to occupy at least 75% of the floor space (excluding common parts) for a collective enfranchisement claim to be possible.

Two-thirds of residential units to be held on long leases

- 8.135 Alongside the two-or-more flats requirement in the 1993 Act is the condition that not less than two-thirds of the flats in the relevant building must be held by qualifying tenants. However, as explained above, we are attempting to move away from thinking in terms of qualifying tenants, tenancies and premises, and to focus on the nature of the units contained within a building and their use. Bringing this condition into our scheme, therefore, would require a change of wording: not less than two-thirds of the residential units in the building must be let on long leases.
- 8.136 It is immediately apparent that this condition is set at a different level from the actual participation requirement, which is 50% of the total number of flats in the relevant building (or residential units, under our terminology). We consider that this difference stems from a need to identify, based primarily on their nature, those buildings which should qualify for enfranchisement rights. Collective enfranchisement is designed to apply to buildings in majority long residential leasehold ownership, and in predominantly residential use. This latter requirement can clearly be seen, for instance, in the existence of the 25% limit on non-residential use (which we consider in the context of our proposed scheme below).
- 8.137 We think that the two-thirds requirement is designed to restrict collective enfranchisement to those buildings in majority long residential ownership: in other words, buildings in which the long leaseholders have collectively the greatest interest in the building. Alongside that, however, we also think that the two-thirds requirement results in a minimum level of potential participation in a collective enfranchisement claim. For example, in a block of 100 residential units, two leaseholders who hold their units on long leases cannot enfranchise collectively where the remaining 98 units are let by the landlord on short leases. Essentially, this requirement means there will always be potential for majority control (a minimum of 67 units, in this case) of the block following collective enfranchisement, even if only 50% of the owners of the total number of residential units actively chose to take part in the claim.
- 8.138 This potential participation is enhanced by our proposed introduction of a right to participate in an existing collective freehold acquisition, discussed in Chapter 6. If this right is introduced, then those qualifying but non-participating leaseholders will be able to buy in to the collectively-owned freehold after the enfranchisement has taken place.
- 8.139 We are of the view that the two-thirds requirement should form part of our proposed new scheme for qualifying criteria for three reasons.
- (1) We are not aware of any issues relating to the two-thirds requirement in practice. Its existence is well-known and understood, and appears to have been generally accepted.
 - (2) Whilst the requirement might be described as arbitrary, the same could be said of any numerical or proportional condition delimiting enfranchisement rights. In any event, we think that it appropriately sets the limit of buildings to which collective freehold acquisition rights should attach: buildings of which a significant majority is owned by long residential leaseholders.

- (3) We also think that it might be harder, particularly in A1P1 terms, to justify collective freehold acquisition if the right could be exercised by a number of leaseholders who do not collectively hold the majority interest in a building.

8.140 We have also considered a possible consequence which could arise from lowering the two-thirds requirement to 50% or below: in some cases, this change might result in a landlord being able to obtain a 50% interest in the freehold acquired on a collective freehold acquisition. This situation could arise where a landlord has let exactly half the units in a building on long leases, but has retained the others. On a collective freehold acquisition claim, the landlord could, under our proposals, forcibly elect to take leasebacks of the unlet units, and could potentially subsequently exercise the right to participate in respect of all those units.⁵⁴⁷ This would put the landlord (who would, in fact, now instead be a leaseholder) in a powerful position with regard to the management of the freehold interest. This is not a position which can arise so long as the two-thirds requirement exists; the maximum proportion of leasebacks which a landlord could forcibly elect to take would be one-third.

8.141 For the above reasons we think that it is desirable to adopt an equivalent of the two-thirds requirement in our proposed scheme.

Consultation Question 48.

8.142 We provisionally propose to maintain an equivalent of the current requirement that, for a collective enfranchisement, at least two-thirds of the flats in the premises to be acquired must be let on long leases.

Do consultees agree?

Actual participation requirement

8.143 As mentioned above, the 1993 Act currently 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 propose to adopt an equivalent requirement in our new scheme, as it prevents a minority of leaseholders from acquiring and controlling the freehold.⁵⁴⁸

⁵⁴⁷ See our discussion of leasebacks at para 6.129 onwards, and the right to participate at para 6.144 onwards.

⁵⁴⁸ We think that this one-half actual participation requirement should apply even where the landlord is missing, contrary to the current position where there remains a two-thirds participation requirement in such cases (on which see Ch 10 at para 10.142 above).

Consultation Question 49.

8.144 We provisionally propose 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.

Do consultees agree?

8.145 We do, however, provisionally propose one significant change to the participation requirements in the case of two-unit buildings. Under the current law, as noted above, if a building contains only two units, the owners of both units must participate in a collective enfranchisement.⁵⁴⁹ We propose to apply the 50% participation requirement across the board, so that in a two-unit building, one leaseholder alone could acquire the freehold. This proposal is designed to assist a leaseholder who wishes to acquire the freehold where the leaseholder of the other unit in their building is unable or unwilling to participate.

8.146 We acknowledge two counter-arguments to this proposal.

- (1) First, it enables one individual effectively to take control of the building. But in response, it is in the nature of collective freehold acquisition that participating leaseholders take control of the building, to the exclusion of their non-participating neighbours.⁵⁵⁰ Moreover, the change should be viewed in the light of our proposal to give the non-participating long leaseholder a statutory right to participate at a later date in the ownership (and therefore management) of the freehold acquired.
- (2) Second, it allows “collective” freehold acquisition by a single leaseholder. But in response, there was the potential for collective freehold acquisition by both flat owners, had the other participated. In any event, the ongoing right to participate would allow the other leaseholder to participate in the freehold acquisition at a later date.

Consultation Question 50.

8.147 We provisionally propose to remove the requirement that, in the case of a building containing only two residential units, both leaseholders must participate in a collective freehold acquisition claim.

Do consultees agree?

⁵⁴⁹ The Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) Order 2002 (SI 2002 No 1912) sch 2, para 2.

⁵⁵⁰ For example, we cannot see any difference between this case, and a four-flat block where A owns two flats and B owns the other two flats. Under the current law, A can acquire the freehold to the exclusion of B.

Leaseholder of multiple residential units in a building

8.148 The 1993 Act prohibits leaseholders of more than two flats in the same building from being a qualifying tenant of any of them for collective enfranchisement purposes (see paragraph 7.75 above). As noted in our criticisms of the current law, this provision is easily circumvented by those with adequate legal advice and thereby fails to achieve its objective of excluding speculators from benefiting from enfranchisement rights.⁵⁵¹ We cannot think of any other useful purpose served by this prohibition, and therefore propose that it be abolished.

Consultation Question 51.

8.149 We provisionally propose to remove the current prohibition on leaseholders of three or more flats in a building being qualifying tenants for the purposes of a collective enfranchisement claim.

Do consultees agree?

25% limit on non-residential use

8.150 We have already considered this existing restriction on collective enfranchisement claims in the context of individual freehold acquisitions.⁵⁵² As noted in that previous discussion, we propose to maintain the restriction under our new scheme of qualifying criteria for collective freehold acquisition claims too.

8.151 Again, we appreciate that this restriction may lead to dissatisfaction in particular cases. For instance, some leaseholders might find that their building cannot be acquired collectively because it has been constructed with 26% of the floor space intended for non-residential use, specifically to exclude the operation of the enfranchisement legislation. However, as explained above, we do not think that is a solvable issue, and will persist regardless of the percentage limit chosen.

8.152 Overall, we are satisfied that a limit of some kind is required in order to ensure that collective freehold acquisition remains available only to buildings which are in predominantly residential use. As the market has adapted to the 25% limit, we do not consider that there is any good reason to vary this limit in collective freehold acquisition claims.

⁵⁵¹ See the discussion at paras 7.124 to 7.126 above.

⁵⁵² See the discussion at paras 8.110 to 8.118 above.

Consultation Question 52.

8.153 We provisionally propose the continuation of the 25% limit on non-residential use in collective freehold acquisition claims.

Do consultees agree?

Other exceptions

8.154 We also propose maintaining, within the parameters of our scheme, the further exceptions which under the current law will exclude a building from a collective enfranchisement claim. As explained at paragraph 7.80 above, these exceptions relate to certain premises with resident landlords⁵⁵³ and premises which include an operational railway track.⁵⁵⁴ We have not been told of any issues relating to these exceptions. We consider that they serve a valid purpose and should remain.

Consultation Question 53.

8.155 We provisionally propose the continuation of the exceptions from collective freehold acquisition claims for resident landlords and operational railway tracks.

Do consultees agree?

Estate enfranchisement

8.156 As explained in Chapter 6, we propose that the right of collective freehold acquisition should extend beyond the acquisition of one building or part of a building to the acquisition of the whole of an estate comprising multiple buildings. Where it is this sort of acquisition which the participating leaseholders propose to carry out, we suggest that the criteria set out above relating to minimum potential participation, minimum actual participation and non-residential use, should apply equally – albeit by reference to the units on the estate as a whole rather than to the units of a particular building. An estate enfranchisement could therefore take place even if one block of flats on the estate would not by itself qualify for a collective freehold acquisition of that block or choose to pursue such a claim.

⁵⁵³ 1993 Act, s 4(4).

⁵⁵⁴ 1993 Act, s 4(5).

Consultation Question 54.

8.157 We provisionally propose 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.

Do consultees agree?

Consequences of our scheme

8.158 At paragraph 8.6 above, we set out the aim of our reforms to the law of qualifying criteria: a simpler, more coherent scheme. We think that the provisional proposals we have made in the preceding sections of this chapter can achieve that aim. The scheme of qualifying criteria we propose is considerably simpler than the current law, and may be applied to any leasehold premises.

8.159 Nevertheless, any new scheme of qualifying criteria has the potential to give rise to some difficult questions. We have identified four such issues arising out of our proposed scheme. We now consider each of these in turn.

Two-unit buildings

8.160 As we explain above, we are proposing the retention of the two-or-more flats requirement and the two-thirds condition (adapted to fit within our new scheme). A consequence of these proposals in relation to buildings containing two residential units is worth considering. Consider the following two examples.

- (1) Example 1: X is the freeholder of the whole building and has let one of the units to Y on a long lease. X retains the other unit for his or her own use, or lets it only on a short tenancy. On these facts, the building would not be eligible for collective freehold acquisition for two reasons. First, there are not two or more residential units let on long leases. Second, two-thirds of the units in the building are not residential units held on long leases. Y could, however, obtain a lease extension over his or her residential unit.
- (2) Example 2: this is a variation of Example 1. In this case, X has let one unit to Y and the other to Z, both on long leases. Now, the building *would* be eligible for collective freehold acquisition. There are two or more residential units let on long leases, and more than two-thirds of the units in the building are residential units held on long leases. Moreover, one of Y or Z, in the absence of the other wishing to participate, could acquire the freehold on his or her own: this outcome is a result of our proposals relating to participation in two-unit cases, explained in full above at paragraphs 8.145 to 8.146. Of course, both Y and Z could also obtain lease extensions over their individual residential units.

8.161 It has been suggested to us that these differences in outcome for Y are unfair, and that Y's enfranchisement rights should not differ depending on whether or not X has chosen to let the other residential unit on a long lease. In particular, it has been pointed out to us that there may be two-unit buildings where there are two long leases, but one of the

leaseholders, A, is also the freeholder of the whole building. In this scenario, the other leaseholder, B, would be able to acquire the freehold on his or her own (as Y or Z can do in Example 2 above). It seems inconsistent to say that B may acquire the freehold from A where A also holds a long lease of the second unit in the building, but not where the second unit is simply retained by A as part of A's freehold title (as in Example 1 above). After all, the effect on A will be the same, since in the latter situation A would be able to take a leaseback of the retained unit.⁵⁵⁵ We also note that B's right, where A also holds a long lease, is practically illusory. All that A would need to do in this scenario, to prevent B from being able to acquire the freehold, would be to merge his or her leasehold title with the freehold title, so that B's unit is the only one let on a long lease in the building.

8.162 In the light of this concern, it has been suggested to us that there ought to be an exception to the two-or-more flats requirement and the two-thirds condition in the case of buildings consisting of two residential units. Such an exception would enable a "collective" freehold acquisition by the leaseholder of one unit where the other is retained by the freeholder of the building. There are, however, arguments for and against such an exception. In its favour it has been said that this exception is necessary in order to protect a leaseholder in the position of B, who has no other means of acquiring any interest in the freehold of his or her building, and thus any say in the management thereof. For a person in B's position, therefore, the need for an exception is a powerful one.

8.163 Notwithstanding, other arguments lean the other way.

- (1) First, it is almost always the case that the enfranchisement rights of leaseholders of individual units in a multi-unit building will be affected by how other units in the building are let or used. It may be felt that any exception made to prevent this outcome in a particular set of facts logically calls into question the existence of the two-or-more flats requirement and the two-thirds condition altogether, as well as the 25% limit on non-residential use. But as explained in the preceding sections of this chapter, we consider that each of these rules serves a useful purpose in identifying those buildings in which leaseholders ought to benefit from enfranchisement rights.
- (2) Second, whilst a leaseholder in the position of B might draw sympathy, being the only individual affected in any particular case, he or she is not in fact in a unique position. Imagine, for example, a four-unit building, in which two units are retained by the freeholder and two let on long leases. The leaseholders in this scenario may be considered to be in an analogous position to B. It seems somewhat unfair to view their predicament as any less serious simply because there happens to be more than one of them.
- (3) Third, we acknowledge that a freeholder should be able to deal with his or her property to a certain degree without exposing himself or herself to the risk of a freehold acquisition claim; indeed, the very purpose of the qualifying criteria for enfranchisement rights is to establish where the limits of that ability lie. Many stakeholders would no doubt argue that it should be possible for a freeholder to

⁵⁵⁵ See our proposals at para 6.129 onwards.

grant, at the very least, a single long lease of one part of his or her building without exceeding those limits, even in the case of a building consisting of only two units.

8.164 This last point, of course, should be viewed in the light of our proposed new right to participate, discussed at paragraph 6.144 onwards. Under our proposed scheme, the freeholder, A, would retain his or her present ability to elect (upon B's "collective" freehold acquisition claim) to take a leaseback of his or her retained unit. He or she might then be able to regain an interest in the freehold (in his or her capacity as a leaseholder) by exercising the right to participate in respect of that unit.⁵⁵⁶ This possibility might be said to strike an appropriate balance between the interests of A and B. Further, we bear in mind that in not all of these cases will the freeholder have purchased the building and then made a conscious decision to let only one of the units within it on a long lease. In some cases, that arrangement will have been in place long before the particular freeholder had any interest in the building concerned. He or she may even have purchased the freehold predominantly as a means of acquiring the flat retained within that freehold title, without any specific interest in becoming the freehold owner of the building.

8.165 Given these competing considerations, we invite the views of consultees as to whether there should be an exception to the two-or-more flats requirement and the two-thirds condition in the case of buildings consisting of two residential units. The exception would enable a "collective" freehold acquisition by the leaseholder of one unit where the other is retained by the landlord of the building.

Consultation Question 55.

8.166 We invite the views of consultees as to whether there should be an exception to the two-or-more flats requirement and the two-thirds condition in the case of buildings consisting of two residential units, so as to enable a "collective" freehold acquisition by the leaseholder of one unit where the other is retained by the landlord of the building.

Flats above shops

8.167 One of our proposals set out above is the application of the 25% limit on non-residential use to all freehold acquisition claims of buildings containing multiple units. The purpose, as we have explained, is to address one of the issues with the definition of a house in an objective way. The 25% rule aims to impose a consistent and objective limit on the amount of commercial use which can be permitted before a building ceases to be eligible for either individual or collective freehold acquisition.

8.168 A consequence of that rule, however, might be to exclude from our scheme some buildings which can currently be acquired by an individual leaseholder. Take the

⁵⁵⁶ In Consultation Question 34 above, we invited consultees to share their views on whether a landlord who has taken a leaseback of part of the premises acquired on the collective freehold acquisition claim should then be permitted, as a leaseholder, to exercise the right to participate so as to reacquire a share of the freehold interest.

example of a building within a row of terraced houses, consisting of a first-floor flat located above a ground-floor shop, the whole of which is let to the same leaseholder.

8.169 If the shop and the flat are sufficiently interconnected – say, by an internal staircase – they will form a single unit. Provided the flat is configured as a flat and the leaseholder is entitled to live there, the building will be a residential unit and the leaseholder will be able to purchase the freehold (outcome “D” on our flowchart), or obtain a lease extension over the whole (outcome “A”).

8.170 However, it might be the case that the shop and the flat form separate units. This would be the case if (for example) there were an external staircase to the flat and no shared facilities between the two. In that scenario, the shop would be a non-residential unit, and the flat would be a residential unit. Assuming the two were roughly equal in size, the overall proportion of the building in non-residential use would be close to 50%, and so the building could not form the subject of an individual freehold acquisition claim by the leaseholder (outcome “F” on our flowchart). He or she would, however, be able to seek a lease extension over the flat (outcome “A”).

8.171 We appreciate that this result may appear to be based on an artificial (and therefore unsatisfactory) distinction: why should the leaseholder of the flat and shop with an internal staircase be able to purchase the freehold, but the leaseholder of a similar property used for similar purposes but with an external staircase not have the same right? It also represents a potential departure from the position under the current law, where the leaseholder might be able to acquire the freehold of the building, providing it is considered a house “reasonably so called”.

8.172 However, there are several reasons why we consider that this consequence of our proposed scheme should not necessarily cause undue concern.

- (1) First, the leaseholder may use up to 25% of the building for non-residential purposes and still remain able to acquire the freehold individually. This will be the case, as explained above, irrespective of whether they use the non-residential areas themselves or sublet them to a business.
- (2) As we have set out above, the courts have previously identified leaseholders of these kinds of buildings as being intended to benefit from the security of tenure provided by enfranchisement.⁵⁵⁷ However, this line of case law originated prior to the enactment of the 1993 Act, which conferred for the first time the right to a lease extension of a flat. This right provided the security of tenure that the courts desired to ensure, and we retain and enhance this right to a lease extension under our proposals.
- (3) Our advisory group was generally of the view that these specific properties (flats above shops at the end of rows of terraced houses, and specifically those which consist of two separate units rather than an interconnected shop and flat) do not nowadays warrant special consideration. It has been possible for the last 50 years for leaseholders of those properties to purchase the freehold, should that have been desirable.

⁵⁵⁷ See para 7.100(1) above.

8.173 Nevertheless, we have considered several ways in which this consequence might be avoided in these cases, should that be desirable.

8.174 First, we have considered adding a proviso to our definition of a residential unit, under which any non-residential unit (the shop) would nevertheless be treated as residential if its use for non-residential purposes is “ancillary” or “complementary” to residential use of another unit (the flat). In other words, we considered extending our approach to mixed-use units (as set out at paragraph 8.49 above) to apply as between separate units. This approach would mean that, in this example, the whole building would be in residential use, and it would thereby qualify for freehold acquisition.

8.175 However, that suggestion did not find favour with our advisory group. Members mentioned:

- (1) the difficulty of defining “ancillary” or “complementary” use, and the likelihood that the introduction of this kind of term would lead to significant litigation;
- (2) the uncertainty surrounding the extent of the proviso. How many non-residential units can be ancillary to one residential unit? How big can a non-residential unit be, relative to a residential unit, before it ceases to be ancillary to that residential unit? It is difficult to conceive of an objective way of answering these questions; and
- (3) the additional problems with the operation of this concept in situations where one or more of the relevant units have been sublet.

8.176 For those reasons, we think this is not a workable solution.

8.177 We have also considered proposing a higher percentage limit for non-residential use in two-unit buildings. However, this approach brings its own problems. First, there will always be some leaseholders who fall outside any threshold we set. For example, a 50% limit might cater for buildings where the shop and the flat are exactly the same size, but not for a building where the ground-floor shop has been extended, or even where it simply has a bay window. Second, we think that this approach might provide a route for leaseholders of large buildings to permit a significant amount of non-residential use before they stand to lose their right of freehold acquisition.

8.178 Finally, we have considered whether a “sunset” clause could mitigate our concerns with these specific properties. We could provide that, for a certain period after the commencement of new legislation, any leaseholders who would have qualified for individual freehold acquisition under the old law will still be able to benefit from that right. However, this solution is time-limited, and continues to require leaseholders to engage with all the difficulties presented by the current qualifying criteria, frequently at considerable expense. One member of our advisory group pointed out that leaseholders may not necessarily have the funds available to exercise the right within the period provided by such a clause.

8.179 Each of the above possible solutions to this issue presents some difficulties. In any event, for the reasons set out at paragraph 8.172 above, we do not consider that finding a solution is imperative. We therefore think that two-unit buildings should not be treated differently to any other buildings in relation to the 25% limit. The result is that a

leaseholder of a flat above a shop, where the two are not interconnected, is unlikely to have the right to a freehold acquisition, but this outcome is the corollary of creating certainty across the board.

Consultation Question 56.

8.180 We provisionally propose that the 25% limit on non-residential use should apply to two-unit buildings as it does to any other multi-unit building. Do consultees agree?

8.181 If consultees disagree, how should two-unit buildings be treated differently? Do consultees favour:

- (1) a proviso to the effect that a non-residential unit can be treated as residential where its use is “ancillary” or “complementary” to residential use of another unit;
- (2) a higher percentage limit; or
- (3) a sunset clause?

Alternatively, is there another potential approach we should consider?

Commercial investors

8.182 The final issue we consider in this chapter relates to the treatment of commercial investors under our proposed scheme. By moving away from the distinction between houses and flats, our provisional proposals would enable the head lessee of a block of flats to acquire the freehold of that block individually.⁵⁵⁸ That person will almost invariably be a commercial investor. Under the current law, by contrast, a head lessee in this position will not have this right, because a purpose-built block of flats would not be a “house reasonably so called”.

8.183 As we set out in paragraph 8.12 above, we are generally of the view that the rights of commercial investors to enfranchise should not be expanded. However, we do not think that, in reality, our proposed scheme results in an expansion of those rights. Even under the current law, the head lessees described above can indirectly acquire the freehold of the block of flats: they need simply grant themselves (via special purpose vehicles) long leases of the required number of flats in the block and then carry out a collective enfranchisement. We are therefore not sure that, in practice, outcomes for head lessees under our scheme will actually be any different from current reality.

⁵⁵⁸ Provided no long sub-lease has been granted of any of the flats.

Consultation Question 57.

8.184 Do consultees think that the ability of a head lessee of a block of flats to acquire the freehold of that block individually is a significant problem with our proposed scheme, compared with the reality under the current law?

Potential to go further with regard to commercial investors

8.185 As noted in the policy section of this chapter, we consider that it might be desirable to seek to reduce the availability of enfranchisement rights to commercial investors. However, the proposals above, and shown in the flowchart at Figure 5, essentially preserve the rights of the majority of those who would qualify under the current law, including commercial investors.

8.186 We recognise, however, that there are a number of risks and difficulties with any attempt to cut down the enfranchisement rights of commercial investors. In particular, such investors include pension funds and charitable trusts as well as buy-to-let landlords. Any significant reduction in their ability to make use of enfranchisement rights might have a significant impact on the property market, or on the wider economy. Further, if this objective were to be pursued, we would need to decide how best to achieve it. We have considered two possible methods of doing so.

- (1) The reintroduction of a residence test in cases where a person has a long lease of an entire self-contained building that is sub-divided into units. No enfranchisement rights would be available if the leaseholder is not residing in one or more of the units. This requirement could be combined with a maximum number of units, in excess of which the head lessee would have no enfranchisement rights in respect of the whole building even if they live there (merely a right to a lease extension of any unit in respect of which he or she satisfies the residence condition).
- (2) A reduced definition of a residential unit, to exclude units which are let on short residential tenancies. This approach would essentially involve treating the letting of residential property at a market rent as commercial use in the same way as letting office or shop space.

8.187 We consider, however, that each of these methods presents difficulties.

8.188 In respect of the first method, re-introducing a residence test would amount to a return to the pre-2002 Act position. While many have criticised the removal of the residence requirement, it was not without its flaws, and we would need to overcome those in re-introducing it. We would need to identify a workable definition of “residence”. Additionally, a residence requirement may be reasonably easy to work around in many cases. Even where a head lessee cannot satisfy the relevant decision-maker that they are residing in one of the units in their building, they would merely have to grant themselves a number of long sub-leases and organise a collective acquisition of the freehold. We do not propose to make collective freehold acquisition subject to a residence requirement, due to the difficulties this would likely create for establishing the requisite number of qualifying leaseholders.

- 8.189 Further, the first method would also require us to set a maximum number of units, which would inevitably be somewhat arbitrary. Our current thinking, however, is that the maximum should be set at around four. Having more units than this would tend to indicate that the premises in practice operate as a commercial investment even if the landlord happens to live in one of the units.
- 8.190 In respect of the second method, excluding units let on short residential tenancies from enfranchisement would be a significant departure from the current position, with wide-ranging repercussions. It could have a particularly important impact on the availability of collective freehold acquisitions to ordinary leaseholders. Treating all flats which are let on assured shorthold tenancies as non-residential would be likely to cause many blocks of flats to exceed the 25% limit on non-residential use, with the effect that collective freehold acquisition would be unavailable (unless and until enough leaseholders cease to let out their flats, which might encourage evictions).
- 8.191 Neither of the two methods above is therefore particularly satisfactory. Accordingly, we are currently of the view that it would be extremely difficult to exclude commercial investors from enfranchisement rights altogether. However, we invite consultees to share with us their views on this issue. In addition, we have considered the possibility of seeking to distinguish between leaseholders who are homeowners and those who are investors at the valuation stage instead. In other words, when it comes to the calculation of the premium payable by a leaseholder for the exercise of their enfranchisement rights, owner-occupiers might be treated more favourably than investors. We discuss this possibility further in Chapter 15 below.

Consultation Question 58.

- 8.192 Do consultees consider it desirable to attempt to restrict the enfranchisement rights of commercial investors further than the current law does?
- 8.193 If so, do consultees consider that it might be possible successfully to restrict the enfranchisement rights of commercial investors:
- (1) by means of a residence test; or
 - (2) by the adoption of a reduced definition of a residential unit, to exclude units which are let on short residential tenancies?

Are there any other options we should consider?

THE IMPACT OF REFORM

Consultation Question 59.

8.194 How and to what extent has the exercise of enfranchisement rights been slowed down, prevented, or made more costly by:

- (1) the qualifying criteria based on financial limits (the low rent test and rateable values) under the 1967 Act;
- (2) the difficulty in categorising premises as either flats or houses;
- (3) the uncertainty surrounding the definition of a “house” under the 1967 Act and the definition of a “self-contained building” under the 1993 Act;
- (4) the two-year ownership rule under the 1967 Act and (in respect of lease extensions) the 1993 Act; and
- (5) the general complexity and inaccessibility of the qualifying criteria for enfranchisement rights?

8.195 To what extent would our proposed reforms to qualifying criteria reduce:

- (1) the duration and cost of the enfranchisement process; and
- (2) the number of disputes arising under the enfranchisement regime?

Consultation Question 60.

8.196 We welcome evidence as to the likely effect of further restrictions on the ability of commercial leaseholders to enfranchise (whether at all, or at a higher premium than other leaseholders) on:

- (1) the leasehold market;
- (2) the wider housing market; and
- (3) the economy more broadly.

Chapter 9: Qualifying criteria: exceptions and qualifications

INTRODUCTION

9.1 In the previous two chapters of this Part, we discussed the qualifying criteria which leaseholders must satisfy in order to qualify for enfranchisement rights under the current law, and set out our provisional proposals for a new scheme. However, the law provides for a number of situations in which particular types of leaseholder who would otherwise appear to qualify for enfranchisement rights in fact have more limited rights, or, in some cases, none at all. This chapter discusses these exceptions and qualifications.

9.2 We begin by considering the availability of enfranchisement rights to owners of shared ownership leases. Our Terms of Reference refer explicitly to shared ownership leases, and reflect Government policy in relation to this question. 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%.

Our consideration of shared ownership leases is therefore limited to the implementation of this policy decision.

9.3 We then consider a number of further exceptions and qualifications to enfranchisement rights. We ask consultees to share their experiences of these statutory provisions in practice and their views as to whether similar provision should be made under our proposed new enfranchisement regime. We seek consultees’ views as to the possible creation of one new exception to enfranchisement rights, to cater for the position of community land trusts and similar schemes.

SHARED OWNERSHIP LEASES

9.4 Shared ownership leases have been promoted by successive governments since the 1980s as a means of making home ownership more affordable for people on low and middle incomes. Shared ownership is often described as “part-buy, part-rent”. It enables a purchaser to buy a “share” of a house or flat (usually between 25 and 75%) whilst 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 a lot lower than that required to purchase the same property outright.

9.5 Shared ownership leases are designed to help individuals onto the property ladder. The leases provide for the leaseholder to increase his or her percentage ownership of the property by increments – a process known as “staircasing”. In the majority of cases, it is possible to staircase to 100% ownership. However, it is now also acknowledged that

a significant proportion of shared ownership leaseholders may be unable to afford to staircase or, for various reasons, may choose not to do so.⁵⁵⁹

- 9.6 What happens when a shared ownership leaseholder does make full use of the staircasing provisions of their lease will depend on whether the property in question is a house or a flat. In the case of a house, the shared ownership lease will normally provide for the transfer of the freehold interest in the house to the leaseholder when he or she reaches 100% ownership – 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 provisions of the lease which follow from its shared ownership nature no longer apply. As explained at paragraph 1.9 above, flats are almost universally owned on a leasehold basis.
- 9.7 A shared ownership lease has the same fundamental limitations as any other lease. Its value reduces 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 very 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.
- 9.8 Under both the 1967 and 1993 Acts, enfranchisement rights are available to leaseholders who have a long lease. As we have seen, a “long lease” can (broadly speaking) be defined as a lease granted for a term of more than 21 years. On the face of it, shared ownership leases fall within this definition. The leases are generally granted for a term of 99 years or more. However, the position is considerably more complicated than that. Since 1980, various statutory provisions have enabled the grant of shared ownership leases of houses which do not enjoy rights under the 1967 Act, provided the leases meet certain criteria. Since its inception, the 1993 Act has made express reference to shared ownership leases within its definition of a long lease of a flat, but the correct interpretation of the relevant provision has been the subject of some debate.
- 9.9 In this section, we set out in more detail the treatment of shared ownership leases under the current enfranchisement legislation, and then discuss their proposed treatment under our new regime. It should be noted that our discussion relates only to the position of the leaseholder under the shared ownership lease itself. Where a shared ownership lease is granted by a provider which is itself a leaseholder, whether that provider enjoys enfranchisement rights is a separate question.

The 1967 Act

- 9.10 Since 1980, it has been possible for various public bodies and for housing associations to grant shared ownership leases of houses which do not enjoy enfranchisement rights under the 1967 Act. Other landlords have been able to do so since the coming into force of particular provisions of the Housing and Regeneration Act 2008.
- 9.11 The policy reason for preventing shared ownership leaseholders from using the enfranchisement provisions of the 1967 Act to purchase the freehold of their shared

⁵⁵⁹ D Cowan, A Wallace and H Carr, *Exploring Experiences of Shared Ownership Housing: Reconciling Owning and Renting* (Bristol: University of Bristol Law School 2015) p 10.

ownership house is reasonably obvious. The shared ownership lease is a device specifically designed to enable those who cannot afford to purchase a house outright to purchase it in part, at a proportionate price. The staircasing provisions in the lease regulate the leaseholder's ability to work up gradually to outright, freehold ownership, on terms agreed at the outset between the parties. The leaseholder should not be able to circumvent the provisions of the lease by relying on statutory enfranchisement rights to acquire the freehold of the house.

- 9.12 Further, it has been said that early enfranchisement by a shared ownership leaseholder would result in financial loss to the provider of the lease.⁵⁶⁰ We question the extent to which this is necessarily the case, given that the premium payable for enfranchisement would reflect the shared ownership nature of the lease (or provision could be made for it to do so). In any event, it is never guaranteed that a provider of a shared ownership lease will receive ongoing rental income on the "rented" part of the property, given the leaseholder's ability to staircase to 100% ownership at a time of his or her choosing. However, we acknowledge that if this risk is perceived by landowners or developers to exist, then it is likely to affect their willingness to provide housing on a shared ownership basis.
- 9.13 To be exempt from enfranchisement rights under the 1967 Act, a shared ownership lease must satisfy various criteria laid down in statute and in secondary legislation. The relevant legislative provisions are very detailed and we do not set them out in full here. The following paragraphs provide a summary of the key points.

The original exemption for certain public bodies and housing associations

- 9.14 An exemption from enfranchisement rights for certain shared ownership leases of houses was first provided by section 140 of the Housing Act 1980. That section provided that leases granted by certain public bodies⁵⁶¹ or by registered housing associations, at a premium, after 8 August 1980, would not be treated as long leases for the purposes of the 1967 Act provided they met certain criteria.⁵⁶² In particular, it was required that the lease make provision for the leaseholder to acquire the freehold for a consideration calculated in accordance with the terms of the lease and which was reasonable, having regard to the premium paid by the leaseholder.⁵⁶³ In the case of leases granted by housing associations, an alternative criterion was that the lease was a "lease for the elderly", meaning (in summary) a lease of one of a group of dwelling-houses providing accommodation for elderly persons with social services or special facilities nearby.⁵⁶⁴

⁵⁶⁰ See the explanatory memorandum to The Housing (Shared Ownership Leases) (Exclusion from Leasehold Reform Act 1967) (England) Regulations 2009 (SI 2009 No 2097) ("2009 regs").

⁵⁶¹ Listed in Housing Act 1980, s 140(2).

⁵⁶² Housing Act 1980, s 140(1).

⁵⁶³ Housing Act 1980, s 140(3)(a) and 140(4)(b), and Housing (Exclusion of Shared Ownership Tenancies from the Leasehold Reform Act 1967) Regulations 1982 (SI 1982 No 62), reg 2(i).

⁵⁶⁴ Housing Act 1980, s 140(4)(b), and Housing (Exclusion of Shared Ownership Tenancies from the Leasehold Reform Act 1967) Regulations 1982 (SI 1982 No 62), regs 2(ii) and 3.

9.15 Section 140 of the Housing Act 1980 still applies to leases granted before 11 December 1987. But for leases granted on or after that date, it has been repealed⁵⁶⁵ and replaced by section 33A and schedule 4A of the 1967 Act.⁵⁶⁶ Schedule 4A lists several types of shared ownership lease granted by public bodies or housing associations which will be excluded from enfranchisement rights under the 1967 Act.

- (1) Paragraph 1 of schedule 4A provides that shared ownership leases granted pursuant to the “Right to Buy” provisions of Part V of the Housing Act 1985 are excluded.⁵⁶⁷
- (2) Paragraph 2 provides an exemption for leases granted by certain public bodies which largely replicates that under section 140 of the Housing Act 1980. The main difference is that the list of public bodies covered by the exemption is more extensive than that under section 140.
- (3) Paragraph 3 provides an exemption for leases granted by housing associations which is similar to that under section 140. However, the criteria which a lease must satisfy for the exemption to apply are much more prescribed, and include criteria laid down in secondary legislation.⁵⁶⁸ For example:
 - (a) the leaseholder must be entitled to acquire additional shares in the house at any time, up to a maximum of 100%, in increments of 25% or less;⁵⁶⁹
 - (b) the lease must contain particular prescribed terms as to the price payable for such shares, and as to the corresponding reduction in rent payable by the leaseholder;⁵⁷⁰ and
 - (c) the leaseholder must be entitled 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 house.⁵⁷¹

⁵⁶⁵ Housing and Planning Act 1986, s 18 and sch 4, para 7.

⁵⁶⁶ Housing and Planning Act 1986, s 18 and sch 4, paras 3 to 6.

⁵⁶⁷ Pt V of the Housing Act 1985, which confers the “Right to Buy” on secure tenants of local authorities (and some housing associations) also made provision for shared ownership leases to be granted where the tenant cannot afford to purchase the property outright (even with the discount provided by the Right to Buy). This scheme (described as “Rent to Mortgage”) was brought to an end on 17 July 2005. See Housing Act 1985, ss 142A to 153.

⁵⁶⁸ Housing Association Shared Ownership Leases (Exclusion from Leasehold Reform Act 1967 and Rent Act 1977) Regulations 1987 (SI 1987 No 1940) (“1987 regs”), reg 2 and sch 1.

⁵⁶⁹ 1987 regs, reg 2 and sch 1, para 2(a).

⁵⁷⁰ 1987 regs, reg 2 and sch 1, para 2(c) and (d).

⁵⁷¹ 1987 regs, reg 2 and sch 1, para 4.

- (4) Finally, paragraph 4 provides an exemption for “leases for the elderly”⁵⁷² granted by “relevant housing providers”⁵⁷³ which comply with certain prescribed requirements.⁵⁷⁴

Expansion of the exemption to other landlords

- 9.16 Shared ownership leases have traditionally been offered by housing associations. In recent years, however, Government has sought to encourage their provision by other housing providers, including private developers. Amendments were therefore made to the 1967 Act by the Housing and Regeneration Act 2008 to give non-housing association providers the same protection against the risk of early enfranchisement as is afforded to housing associations.
- 9.17 The relevant provision is paragraph 3A of schedule 4A to the 1967 Act.⁵⁷⁵ It provides an exemption from enfranchisement rights for certain shared ownership leases granted after 7 September 2009 by a landlord other than a housing association. Leases will qualify for the exemption where they meet various criteria, which are almost identical to those applicable to leases granted by housing associations.⁵⁷⁶ The main difference is that a lease granted by a non-housing association provider need not provide for the leaseholder to acquire additional shares in the house at any time. Instead, the lease may provide that the leaseholder must wait up to 12 months after first acquiring an interest in the house before acquiring additional shares or acquiring the landlord’s interest in the house.⁵⁷⁷

Leases of houses in designated protected areas

- 9.18 The policy of the UK Government in respect of shared ownership leaseholders is that they should be able to move to full ownership if they can afford to do so. There are some cases, however, where it is not desirable for shared ownership properties to be acquired outright – for example, in rural areas where it would be difficult to replace these homes if they are lost from the affordable housing sector. Strict planning conditions can limit options for new-build schemes, or it may simply be difficult for housing providers to secure existing properties where the housing market is small. We also understand that there has been some difficulty securing land for development in rural areas if the landowner cannot be assured that the housing built upon it will remain affordable in perpetuity.
- 9.19 One way to prevent the sale of shared ownership housing on the open market is to give the relevant housing association a right of first refusal to repurchase the property at market value if a leaseholder who has increased his or her shares to 100% wishes to sell. But the ability to exercise this right depends on the necessary funding being

⁵⁷² 1967 Act, sch 4A, para 4(3) and 1987 regs, reg 3 and Sch 2, para 1.

⁵⁷³ 1967 Act, sch 4A, para 4(3).

⁵⁷⁴ 1987 regs, reg 3 and sch 2, para 2.

⁵⁷⁵ Inserted by Housing and Regeneration Act 2008, s 301(1).

⁵⁷⁶ Para 3A provides for various conditions and other matters to be prescribed. The matters prescribed pursuant to this paragraph can be found in the Housing (Shared Ownership Leases) (Exclusion from Leasehold Reform Act 1967) (England) Regulations 2009 (SI 2009 No 2097).

⁵⁷⁷ 2009 regs, regs 5 and 7.

available at the appropriate time. Further, it does not assist when the shared ownership lease is granted by a non-housing association landlord.

- 9.20 Another option is for the shared ownership lease to place a cap on the percentage share which the leaseholder is entitled to acquire by way of staircasing. If the leaseholder can only ever acquire a maximum share in the property of, for example, 80% (a figure which, as we explain below, is now anticipated in some circumstances) then he or she will only ever be able to sell it as a shared ownership property, thus retaining the property within the affordable housing sector. However, prior to 2009, any attempt to use this method to keep shared ownership properties within the affordable housing sector would have been subject to a loophole. As discussed above, the statutory provisions excluding shared ownership leases from enfranchisement rights under the 1967 Act generally depend upon the lease in question making provision for the leaseholder to staircase to 100% ownership of their home.⁵⁷⁸ Therefore, the imposition of any cap on the leaseholder's ability to staircase would mean that the lease would no longer satisfy the criteria to be excluded from enfranchisement rights. It would be possible for the leaseholder to use the provisions of the 1967 Act to acquire the freehold of their home instead. As well as the difficulties with early enfranchisement discussed at paragraphs 9.11 and 9.12 above, the leaseholder would then be free to sell the property on the open market, thus defeating the very point of limiting the ability to staircase.
- 9.21 To address this problem, the section 302(1) of the Housing and Regeneration Act 2008 added a further paragraph 4A into schedule 4A of the 1967 Act. The effect of paragraph 4A, and the various conditions and other matters which may be prescribed accordingly,⁵⁷⁹ is that in "designated protected areas", shared ownership leases of houses which meet various criteria can be exempt from enfranchisement rights under the 1967 Act even if they do not provide for the leaseholder to staircase all the way to 100% ownership of his or her home and acquire his or her landlord's interest. Instead, in such areas, leases will be exempt provided:
- (1) the lease contains a condition enabling the leaseholder to acquire at least an 80% share in the house;⁵⁸⁰
 - (2) if the lease entitles the leaseholder to acquire a greater share than that, the lease also contains conditions to the effect that where the leaseholder holds more than an 80% share and wants to sell that share, he or she must sell it to the landlord, or a housing association or private registered provider of social housing nominated by the landlord;⁵⁸¹ and

⁵⁷⁸ The exceptions are those which relate to leases for the elderly, as described at paras 9.14 and 9.15(4). In those cases, there is no requirement that the lease provides for the leaseholder to acquire the landlord's interest in the house.

⁵⁷⁹ The matters prescribed pursuant to this paragraph can be found in the Housing (Shared Ownership Leases) (Exclusion from Leasehold Reform Act 1967) (England) Regulations 2009 (SI 2009 No 2097).

⁵⁸⁰ 2009 regs, reg 8(2).

⁵⁸¹ 2009 regs, reg 8(3).

- (3) the lease otherwise satisfies criteria virtually identical to those which apply to leases granted by non-housing association providers under paragraph 3A.⁵⁸²
- 9.22 The Housing (Right to Enfranchise) (Designated Protected Areas) (England) Order 2009 lists all the rural areas in England that are designated protected areas for the purposes of paragraph 4A.⁵⁸³
- 9.23 The effect is that, in designated protected areas, landlords can now grant shared ownership leases of houses under which the leaseholder can only staircase up to a maximum of 80%, and still ensure that they will not be open to early enfranchisement by the leaseholder. The new exemption ensures that shared ownership houses remain affordable for future purchasers, and is also likely to increase the land available for development by giving landowners greater assurance that the houses built thereon will be retained as affordable housing for future purchasers.

The 1993 Act

- 9.24 The 1993 Act takes quite a different approach to shared ownership leases. Whereas the 1967 Act sets out a strict list of criteria which a shared ownership lease must satisfy if it is to be exempt from enfranchisement rights under that Act, the 1993 Act attempts to deal with the question simply within its definition of a long lease.⁵⁸⁴
- 9.25 Subsection 7(1) of the 1993 Act, which defines a long lease for the purposes of enfranchisement rights under that Act, provides, in subparagraph (d), that a long lease includes “a *shared ownership lease... where the tenant’s total share is 100%*”. The obvious implication is that a shared ownership lease of a flat where the leaseholder has not yet staircased to 100% is not a long lease, and thus carries with it no rights under the Act. However, several conflicting decisions in the High Court and the Upper Tribunal have led to significant confusion on this point.
- (1) *Brick Farm Management Ltd v Richmond Housing Partnership Ltd* was a case primarily concerned with collective enfranchisement rights against charitable landlords.⁵⁸⁵ However, in giving his judgment, Mr Justice Stanley Burnton (as he then was) said that shared ownership leases where the leaseholder holds a lower than 100% share are long leases under section 7(1), by virtue of subparagraph (a) of that subsection. Subparagraph (a) provides that a lease granted for a term exceeding 21 years is included within the Act’s definition of a long lease, and, as the judge correctly observed, a shared ownership lease will virtually always be granted for more than 21 years. He concluded that paragraph (d) of subsection 7(1) is otiose. These comments, however, were not made in a part of the judgment that is binding, but by way of observation.

⁵⁸² 2009 regs, regs 9 and 10.

⁵⁸³ Housing (Right to Enfranchise) (Designated Protected Areas) (England) Order 2009 (SI 2009 No 2098).

⁵⁸⁴ As explained at para 7.54 above, a leaseholder must have a “long lease” of a flat in order to be a “qualifying tenant” enjoying enfranchisement rights under the 1993 Act.

⁵⁸⁵ *Brick Farm Management Ltd v Richmond Housing Partnership Ltd* [2005] EWHC 1650 (QB), [2005] 1 WLR 3934.

- (2) Three years later, in an unreported decision,⁵⁸⁶ another High Court judge reached the opposite view. Interpreting subsection 76(2) of the 2002 Act (which defines a long lease for various purposes within the 2002 Act, and which mirrors section 7(1) of the 1993 Act), Jonathan Gaunt QC, sitting as a Deputy High Court Judge, held that a shared ownership leaseholder who held only a 50% share in her home did not have a long lease.⁵⁸⁷
 - (3) More recently, in *Corscombe Close Block 8 RTM Co Ltd v Roseleb Ltd*,⁵⁸⁸ the Upper Tribunal examined the status of shared ownership leases in relation to the right to manage. Again, the provision under discussion was subsection 76(2) of the 2002 Act. His Honour Judge David Mole QC held that a shared ownership lease for a term of over 21 years was a long lease and therefore qualified for collective enfranchisement rights. Approving Mr Justice Stanley Burnton's earlier comments in *Brick Farm Management*, he said that the provisions in subsections 76(2)(a) to (f) should be read as a series of gateways by which a lease might qualify as a long lease, as opposed to a stack of sieves so that a lease could fall through one but be caught by another.⁵⁸⁹
- 9.26 As yet, no decision of the appellate courts has emerged to settle the debate once and for all. It therefore remains unclear whether shared ownership leaseholders of flats qualify for either the right to a lease extension or the right of collective enfranchisement under the 1993 Act.
- 9.27 Commenting on the *Corscombe Close* decision,⁵⁹⁰ Carr queries whether the judges in *Brick Farm Management* and *Corscombe Close* were correct to characterise shared ownership leases as long leases. He suggests that if Parliament had genuinely intended shared ownership leases to be treated generally as long leases, it would have inserted an express provision to that effect into schedule 1 to the Housing Act 1988 (which lists various types of tenancies which cannot be assured tenancies under that Act). The absence of such a provision casts considerable doubt on the comments made in *Brick Farm Management* and *Corscombe Close*. Further, the explanatory notes to the 2002 Act are explicit: "*Where the lease is a shared ownership lease, it is only counted as a long lease for the purposes of the right to manage if the leaseholder owns a 100 per cent share of the lease*".⁵⁹¹ These notes, however, do not have legal effect.
- 9.28 It is also unclear how enfranchisement rights are supposed to operate where shared ownership leaseholders who own less than 100% of their properties are concerned. For example, how should the premium payable on either a lease extension or a collective enfranchisement be adjusted to reflect the shared ownership nature of the lease? Is the

⁵⁸⁶ *Richardson v Midland Heart Ltd* [2008] L&TR 31.

⁵⁸⁷ It does not appear that Mr Gaunt QC was referred to the decision in *Brick Farm Management*.

⁵⁸⁸ *Corscombe Close Block 8 RTM Co Ltd v Roseleb Ltd* [2013] UKUT 81 (LC).

⁵⁸⁹ *Corscombe Close Block 8 RTM Co Ltd v Roseleb Ltd* [2013] UKUT 81 (LC), para 15.

⁵⁹⁰ C Carr, "Right to manage – shared ownership leases" (2014) 18(4) *Landlord and Tenant Review* 150.

⁵⁹¹ Commonhold and Leasehold Reform Act 2002, Explanatory Notes, Commentary on the Sections: Pt 1, ss 76 and 77.

“part-buy, part-rent” nature of the shared ownership lease to be retained following a collective enfranchisement? The 1993 Act makes no provision in this regard.

- 9.29 Notwithstanding these considerable doubts and uncertainties, the decisions of the High Court and the Upper Tribunal in *Brick Farm Management Ltd* and *Corscombe Close* may have generated expectations amongst owners of shared ownership leases that enfranchisement rights are available to them. We understand that many housing associations already 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.

Government’s policy on shared ownership leases and enfranchisement

- 9.30 Government now has a settled policy on the availability of enfranchisement rights to shared ownership leases. Government wishes shared owners to be able to extend the lease of their house or flat, but not to be able to acquire the freehold of their house or to participate in a collective freehold acquisition of their block of flats. This policy is reflected in our Terms of Reference, in which 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%

- 9.31 In this section, we ask questions as to how this policy might best be implemented.

Lease extensions for all shared ownership leaseholders

- 9.32 As set out in the preceding section, shared ownership leaseholders of houses currently have no statutory right to a lease extension (provided the landlord has ensured that the lease complies with the applicable criteria under the relevant paragraph of schedule 4A to the 1967 Act). Whether shared ownership leaseholders of flats who have not yet staircased to 100% ownership are statutorily entitled to a lease extension is unclear.
- 9.33 Shared ownership leases are intended to enable people to access home ownership in an affordable manner. The expectation of those buying a shared ownership lease is that they will have the rights and responsibilities of other homeowners.⁵⁹² The absence of a clear statutory right to a lease extension represents a clear negative differentiation of the position of shared ownership leaseholders. It leaves them – unlike other owners of long leases – with a wasting asset that cannot be extended, reducing the return on their investment and creating significant difficulties in selling the property once the remaining term becomes unmortgageable. Although we understand that many housing associations do offer lease extensions to their shared ownership leaseholders on a voluntary basis, we have been told that these are not always offered on terms as favourable as an ordinary leaseholder would enjoy under statute. Further, leaseholders may not be sufficiently protected if there is a move to greater provision of shared

⁵⁹² This is the stated position in the government’s guidance on shared ownership for England: Home and Communities Agency, *Shared Ownership: Joint guidance for England* (October 2016): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/557219/Shared_Ownership_-_Joint_Guidance.pdf, para 5.

ownership leases by private developers (which we understand to be Government's aim).

- 9.34 In any event, there is no apparent reason why shared ownership leaseholders should not be entitled to a lease extension. The policy objection which applies to freehold acquisition by shared ownership leaseholders, as discussed at paragraph 9.11 above, does not appear to apply to the grant of a new, lease extension of a house or a flat. It would be possible to provide that any lease extension of a shared ownership lease must be on the same terms as the leaseholder's existing lease, so that it would remain a shared ownership lease complete with staircasing provisions. It is arguable that the grant of a lease extension might reduce the imperative for shared ownership leaseholders to make use of the staircasing provisions in their leases to acquire 100% shares in their properties. Similarly, a lease extension will increase the value of the lease, thus perhaps making future staircasing more expensive.⁵⁹³ However, it is accepted by Government that there will be shared ownership leaseholders who will never staircase to 100% ownership. Many would consider that the undesirability of leaving these leaseholders with a wasting asset, gradually becoming unsaleable, must far outweigh a potential reduction in staircasing. Further, leaseholders who cannot afford both to staircase and extend their lease will be able to secure their home through extending the lease, giving them more time to be able to fund staircasing. We also consider that lenders ought to welcome confirmation that shared ownership leases can be extended in the same way as ordinary long leases. The right to a lease extension will secure the value of such leases for the long-term and (presumably) enhance the willingness of lenders who might otherwise be reluctant to offer finance to those purchasing shared ownership leases from private developers.
- 9.35 We suggest that shared ownership leaseholders should be entitled to a lease extension which is of the same length as that available to any other leaseholder – a question on which we seek the views of consultees at paragraph 4.41 above. We also consider that on any extension of a shared ownership lease, the leaseholder's share of the property must remain the same, and the terms of the lease extension must replicate any terms of the existing lease which relate to its shared ownership nature. Extending the shared ownership lease on those terms seems to us to be necessary in order to ensure that a lease extension cannot be used to circumvent the staircasing provisions of the shared ownership lease.
- 9.36 It will be necessary to consider how the premium to be paid by a shared ownership leaseholder for a lease extension is to be calculated. For example, the valuation method applicable to ordinary long leases might need to be adapted to take account of the part-buy, part-rent structure of shared ownership leases (and, in particular, the rent payable by the leaseholder on the "rented" part of the property). Additional issues of valuation and procedure might also arise where the provider of the shared ownership lease (that is, the shared ownership leaseholder's landlord) is him or herself a leaseholder.⁵⁹⁴ We seek the views of consultees on these questions, and any other issues which consultees

⁵⁹³ Generally, the cost of staircasing will be calculated by reference to the "market value" of the leaseholder's interest in the property. For example, see the 2009 regs, regs 3 and 5(6). The market value of a lease will be affected by its length.

⁵⁹⁴ For consideration of intermediate leases generally, see Ch 16.

consider may arise on the exercise of the right to a lease extension by a shared ownership leaseholder.

Consultation Question 61.

9.37 We provisionally propose:

- (1) that shared ownership leaseholders should be entitled to a lease extension which is of the same length as that available to any other leaseholder; and
- (2) that the terms of the lease extension must replicate any terms of the existing lease which relate to its shared ownership nature.

Do consultees agree?

9.38 We invite the views of consultees as to:

- (1) the calculation of the premium payable by a shared ownership leaseholder for a lease extension;
- (2) any issues of valuation and procedure which arise where the provider of the shared ownership lease is itself a leaseholder; and
- (3) any other issues which may arise on the exercise of the right to a lease extension by a shared ownership leaseholder.

No freehold acquisition for shared ownership leaseholders

9.39 As set out above, Government has decided that shared ownership leaseholders should not have the right to purchase the freehold of their houses or be able to participate in a collective freehold acquisition of their blocks of flats prior to having staircased their lease to 100% ownership. In considering how to implement this policy it is important to bear in mind its potential impact on the ability of other leaseholders in blocks of flats or on an estate to carry out a collective freehold acquisition.

9.40 We have proposed (at paragraphs 8.135 to 8.141 above) to retain an equivalent of the requirement under the current law that two-thirds of the flats in a building must be let on long leases in order for a building or estate to be eligible for collective freehold acquisition. It is therefore important to establish, firstly, whether shared ownership leases are to be treated as “long leases”. If they are not to be treated as long leases, it is quite possible that there will be cases where the two-thirds requirement described above will not be met – for example, in a mixed development with a significant number of flats let on shared ownership leases and short-term tenancies as well as on ordinary long leases. If, on the other hand, shared ownership leases are long leases – but ones which simply happen to be excluded from participating in a collective freehold acquisition – it is more likely that the two-thirds requirement will be satisfied. However, the further requirement of participation by leaseholders of at least half of the residential units will still have to be met, and this is likely to present some challenge wherever a number of shared ownership leases are involved.

- 9.41 We seek the views of consultees on whether the qualification requirements for a collective freehold acquisition should be relaxed to take into account shared ownership properties and, if so, what form this relaxation of requirements should take. For example, should shared ownership properties be ignored altogether when determining the number of residential units in a building or on an estate, and whether the necessary percentage requirements are met? Or should shared ownership leaseholders be treated as long leaseholders for these purposes, even though they cannot themselves participate in the collective freehold acquisition? Is there another approach which might be preferable?

Consultation Question 62.

- 9.42 We invite the views of consultees as to whether the proposed requirements for a collective freehold acquisition claim that:

- (1) two-thirds of the residential units in a building or on an estate must be let on long leases; and
- (2) leaseholders of at least half of the residential units in the building or on the estate must participate in the claim;

should be relaxed where a building or estate includes residential units let on shared ownership leases.

- 9.43 If consultees think that the requirements should be relaxed, then how should this be done?

- (1) Should shared ownership properties be ignored altogether when determining the number of residential units in a building or on an estate, and whether the necessary percentage requirements are met?
- (2) Alternatively, should shared ownership leaseholders be treated as long leaseholders for these purposes, even though they cannot themselves participate in the collective freehold acquisition?
- (3) Is there another approach which could be used?

- 9.44 Finally, the question arises as to the mechanism by which the exclusion of shared ownership leases from the right to acquire the freehold under any new statutory scheme should be achieved. As discussed above, the 1967 Act lays down detailed criteria that shared ownership leases of houses must satisfy in order to be exempt from enfranchisement rights, whereas the 1993 Act treats all shared ownership leases of flats the same, regardless of their precise terms.

- 9.45 On the one hand, the approach of the 1993 Act has the obvious attraction of simplicity. Further, if there are good policy reasons for shared ownership leaseholders not to have rights of freehold acquisition, then one must ask why landlords should be required to jump various hurdles to qualify for this protection, and whether it is justifiable for shared

ownership leaseholders potentially to have different rights merely by reason of the drafting of their particular lease.

- 9.46 On the other hand, though, the existence of criteria such as those set out in the 1967 Act could ensure that the proposed exemption from enfranchisement rights is limited to genuine shared ownership leases and cannot be used as a way for landlords to avoid enfranchisement claims.
- 9.47 On balance, we therefore consider that shared ownership leases should be required to comply with particular statutory criteria in order to be exempt from rights of freehold acquisition. However, we also consider that, unlike under the 1967 Act, there is no good reason for these criteria to differ depending on the identity of the landlord (though there may be good policy reasons for different treatment of shared ownership leases of properties within designated protected areas, or of properties for the elderly). We provisionally propose a set of criteria modelled on those set out in paragraphs 3 and 3A of schedule 4A to the 1967 Act. In particular, we propose that the shared ownership lease must:
- (1) entitle the leaseholder to acquire additional shares in the house 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 or properties for the elderly, where a lower maximum entitlement should be permissible);
 - (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; and
 - (3) entitle 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.

Consultation Question 63.

9.48 We provisionally propose that:

- (1) shared ownership leases should be required to comply with particular statutory criteria in order to be exempt from rights of freehold acquisition; and
- (2) those criteria should be the same regardless of the type of landlord.

Do consultees agree?

9.49 We provisionally propose that those statutory criteria should require that the shared ownership lease:

- (1) entitles the leaseholder to acquire additional shares in the house 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 provide 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.

Do consultees agree? We also invite the views of consultees as to any other criteria which they consider shared ownership leases should be required to satisfy in order to be exempt from rights of freehold acquisition.

THE NATIONAL TRUST

The current law

9.50 The National Trust is considered to own some of the UK's most valued properties and landscapes. It manages this land according to its view of the long-term public interest. To that end, section 21(1) of the National Trust Act 1907 makes provision for certain land held by the Trust at the time of that Act to be held for the benefit of the nation, and for that land to be inalienable. Under section 21(2), the council of the Trust is given power to declare any land or buildings subsequently vested in the Trust to be held in the same way. Today, the National Trust owns more than 250,000 hectares of land and around 25,000 buildings in England, Wales and Northern Ireland. The Trust itself estimates that around 95% of its land has been declared inalienable.

9.51 The National Trust does, however, grant long leases of residential properties on its land, which raises a potential conflict between statutory enfranchisement rights and the principle of statutory inalienability. In fact, the 1967 and 1993 Acts provide specifically for this conflict. Section 32 of the 1967 Act provides that there shall be no right under

that Act to acquire the freehold of property if an interest in that property is vested inalienably in the National Trust. In other words, leaseholders of houses on inalienable land of the National Trust may only acquire a single lease extension of 50 years at a modern ground rent. And section 95 of the 1993 Act provides that leaseholders of flats can neither obtain a lease extension nor acquire collectively the freehold of their building where an interest in the relevant property is vested inalienably in the Trust. It is unclear why leaseholders of National Trust houses are entitled to a lease extension but leaseholders of flats are not; we have not been able to identify any reason of principle for this distinction. However, we understand that the National Trust owns very few flats let on long leases, so the distinction may be of limited significance in practice.

Reasons for special treatment

- 9.52 From the National Trust's perspective, it is essential that the Trust is exempt from the usual enfranchisement rights if it is to achieve its purpose of preserving land and buildings permanently for the benefit of the nation. It is said that if National Trust leaseholders were entitled to acquire the freehold of their properties or to extend their leases repeatedly – or even perhaps to obtain one very long lease extension of 125 years or more – the Trust's ability to ensure these properties are used for the benefit of the nation would be greatly reduced, if not eliminated altogether.
- 9.53 On the other hand, some stakeholders have suggested that the Trust's willingness to grant long leases of its residential properties in the first place – including long leases which will be subject to a 50-year lease extension under the 1967 Act – casts some doubt on this argument. After all, even a "short" long lease of 21 years, extended by a further 50 years, would seem to most people to be a significant period during which the property will be unavailable to the Trust. Further, if the Trust is content to grant long residential leases of these properties, the properties presumably are not of sufficient cultural or historical importance that they require protection from ordinary use. If the Trust's concern is with the preservation of the properties and safeguarding them from aesthetic changes, the terms of the leases (or restrictive covenants, on a freehold acquisition) could provide sufficient protection against such risks.
- 9.54 The National Trust has explained to us that its policy has generally been to cap the length of its long leases at 99 years.⁵⁹⁵ In property terms, this is not considered an unreasonable period for which to permit a particular use of the property by others, before its use can be reviewed by the Trust once again. The Trust explained that in deciding to grant around 600 long residential leases of inalienable land, it has recognised that, for the time being, the best way of securing the future of those properties is to allow someone to live in them, giving them a fully productive use whilst ensuring the buildings are maintained and repaired and are not subject to damaging alterations. Limiting the length of the long leases to 99 years or less means that as times change and buildings can be enjoyed by the nation in different ways, the Trust can review the best way of ensuring the nation benefits from the conservation of such buildings. That review may result in a building being used differently in the future, so as to ensure that the Trust stays true to its promise to look after the properties forever.

⁵⁹⁵ We have been told that, in the case of leases of houses, this has generally been achieved by granting 49-year leases which can then be extended, once, under the 1967 Act for a further 50 years.

- 9.55 The Trust has also explained that where a voluntary lease extension is requested (whether by a leaseholder of a house who has already had one statutory 50-year lease extension, or by a leaseholder of a flat who has no statutory right to a lease extension), it will endeavour to grant such an extension where it can, provided that to do so is an appropriate means of securing the preservation of the relevant property for the future. In these cases, the leaseholder will generally be granted a lease extension which will “top up” the remaining term of their lease to 99 years from the present day. The Trust considers, however, that a lease extension which would defer their right to possession beyond 99 years in the future presents difficulties with making judgements as to the best use of the property for future generations.
- 9.56 The Trust also suggested that its practice of granting long residential leases could become markedly more conservative if its leaseholders were to be granted enhanced enfranchisement rights.

Impact on leaseholders

- 9.57 It is clear that the current exceptions provided for the National Trust have a significant impact on those affected. We have heard directly from a number of National Trust leaseholders whose enfranchisement rights are limited by these exemptions. Leaseholders expressed dissatisfaction with the disparity between the position of non-National Trust leaseholders and their own position. Several have told us that, without a statutory right either to acquire the freehold of their homes or to multiple lease extensions, they are saddled with unsaleable properties and may also lose their homes upon the expiry of their leases. More than one has told us that the Trust has indicated that it will not grant a further voluntary lease extension after the expiry of the single, statutory 50-year lease extension.

Options for the future

- 9.58 Against this background, we have identified several options for the treatment of long leases of National Trust properties (whether houses or flats) within our new enfranchisement regime.
- (1) First, leases of property in which an interest is vested inalienably in the National Trust could be excluded from enfranchisement rights altogether, leaving the Trust to operate a system of voluntary lease extensions at their own discretion, along the lines described at paragraph 9.55 above.
 - (2) Alternatively, National Trust property could be subject to enfranchisement claims in the same way as any other property.⁵⁹⁶ If so, it might be necessary to consider whether lease extensions and freehold transfers of National Trust property ought to contain particular terms designed to preserve the unique nature of the subject property.

⁵⁹⁶ The National Trust is, of course, a registered charity. Disposals of land by registered charities are subject to a general restriction in s 117 of the Charities Act 2011, requiring the consent of the Charity Commission or a court order to be obtained unless a particular procedure laid down by that Act is followed. The authors of *Hague* suggest, at para 14-45, that a disposal of land pursuant to enfranchisement legislation would fall within one of the statutory exceptions from this general restriction, being a disposal authorised by a statutory provision, but that careful charity trustees might wish to follow this procedure in any event.

- (3) Another option would be to devise a compromise between these two propositions. For example:
- (a) National Trust leaseholders could enjoy the same right to a lease extension as other leaseholders, but not any rights of freehold acquisition. However, we are proposing an enhanced right to a lease extension under our new regime, entitling leaseholders to unlimited, very long lease extensions of 125 years or more.⁵⁹⁷ As explained above, repeated lease extensions – or even one long lease extension – present much the same difficulty for the Trust as freehold acquisitions.
 - (b) National Trust leaseholders could be entitled only to a more limited lease extension right than other leaseholders – such as a single lease extension taking the remaining term of the lease to 99 years. This approach would effectively put the Trust’s current policy on voluntary lease extensions on a statutory footing, and might strike an appropriate balance between the Trust’s general purposes and its leaseholders’ need for security of tenure.
 - (c) The new regime of enfranchisement rights could be made applicable to leases of National Trust property only in respect of leases granted after its commencement. This limitation would preserve the rights of existing leaseholders of houses to a single lease extension of 50 years. It would also enable the National Trust to take account of the new enfranchisement regime in future decisions as to the grant of leases, in light of their specific position under the 1907 Act.

9.59 We acknowledge that any decision on how to move forward on this issue raises difficult questions of policy and we invite consultees to share their views with us.

Consultation Question 64.

9.60 We invite the views of consultees as to the treatment of long leases of National Trust properties within our new enfranchisement regime. Should National Trust property let on long residential leases:

- (1) be excluded altogether from statutory enfranchisement rights;
- (2) be subject to enfranchisement claims in the same way as any other property;
or
- (3) be subject to more limited enfranchisement rights than other property?

9.61 If National Trust properties are to enjoy more limited enfranchisement rights than other property, how should this limitation be achieved?

⁵⁹⁷ See Ch 4 above, at paras 4.38 to 4.41.

THE CROWN

9.62 The Crown⁵⁹⁸ is not bound by either the 1967 Act or the 1993 Act.⁵⁹⁹ However, the Crown has given an undertaking to Parliament that, in most cases, it will act “by analogy” with the legislation – including by applying the valuation bases set out in the Acts – to give its leaseholders the same rights that they would enjoy if their landlord were not the Crown.⁶⁰⁰ The undertaking provides that the Crown agrees to be bound by arbitration in the event of a dispute over valuation or other terms.

9.63 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; or
- (4) where the property, or the area in which it is situated, has a long historic or particular association with the Crown.

9.64 However, in these cases (known as “Excepted Areas”), the Crown has adopted its own voluntary policy of granting lease extensions only within the spirit of the legislation. Freehold acquisition is not available. 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. The terms of the lease will be a matter for negotiation between the parties and a rent will be payable.

9.65 We will be discussing with Crown representatives whether the Crown’s position would remain the same in respect of a reformed enfranchisement scheme. We would like to hear from any consultees who have made lease extension or freehold acquisition claims against the Crown (whether pursuant to the undertaking or the voluntary policy) about their experiences of this process.

⁵⁹⁸ The Crown for this purpose includes the Crown Estate Commissioners, the Duchy of Lancaster, the Duchy of Cornwall, government departments and a Minister in charge of those departments.

⁵⁹⁹ 1967 Act, s 33(1) and 1993 Act, s 94(1). An exception may apply in the case of a lease extension claim by a sub-lessee against a landlord under a 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 such a lease extension: 1967 Act, s 33(1)(a) and (b) and 1993 Act, s 94(2).

⁶⁰⁰ 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.

Consultation Question 65.

- 9.66 We would like to hear from any consultees who have made lease extension or freehold acquisition claims against the Crown (whether pursuant to the Crown's undertaking to Parliament or its voluntary policy). What has been your experience? Have you encountered any difficulties?

COMMUNITY LAND TRUSTS AND OTHER COMMUNITY HOUSING SCHEMES

- 9.67 Community land trusts ("CLTs") are non-profit organisations set up to develop and manage homes (and sometimes other community spaces) for the benefit of a particular community. Their aim is to ensure that housing remains genuinely affordable for local people for the long-term. While still a very small sector, CLTs are increasing in popularity in the UK. The National Community Land Trust Network states that there are now almost 290 CLTs in England and Wales, and that the sector has grown six-fold in the last six years.⁶⁰¹
- 9.68 CLTs hold their land on trust for the benefit of the community. They provide housing both by letting homes at an affordable rent, and by granting long leases. In the case of long leases, affordability is preserved either by the grant only of shared ownership leases or by the use of covenants restricting resale prices. The National Community Land Trust Network's response to Government's *Tackling unfair practices in the leasehold market* consultation (submitted jointly with UK Cohousing and Locality) stated that one-third of all CLT housing completed to date had been sold on a long lease.⁶⁰²
- 9.69 We understand that other community-led housing models also make use of long leases. For example, co-housing schemes, which provide self-contained homes together with shared community spaces run by residents, are often offered on a leasehold basis to facilitate the management of the community-owned shared spaces. And whilst housing cooperatives normally provide rented housing offered on what looks like a rolling periodic basis, it is possible following the decision of the Supreme Court in *Berrisford v Mexfield Housing Co-operative Ltd*⁶⁰³ that in some cases these tenancies will be held to amount to long leases.⁶⁰⁴
- 9.70 The prospect of freehold acquisition claims by their leaseholders presents particular concerns for these various models of community-led housing. In their response to the *Tackling unfair practices* consultation, the National Community Land Trust Network, UK

⁶⁰¹ See <http://www.communitylandtrusts.org.uk/what-is-a-clt/about-clts>.

⁶⁰² See http://www.communitylandtrusts.org.uk/_filecache/79d/b06/446-final-response-consultation-response-leasehold-reform-ncltn-ukcn-and-locality.pdf.

⁶⁰³ *Mexfield Housing Co-operative Ltd v Berrisford* [2012] 1 AC 955.

⁶⁰⁴ In this decision, the Supreme Court held that various clauses in Mexfield's standard occupancy agreement specifying that the tenancy could only be brought to an end by notice in particular circumstances rendered the agreement (in so far as it purported to be a tenancy) void for uncertainty of term. However, the agreement amounted to a "tenancy for life" under the common law. By s 149(6) of the Law of Property Act, the agreement therefore took effect as a lease for a term of 90 years determinable on the leaseholder's death by one month's notice from the landlord, and determinable in accordance with its own terms.

Cohousing and Locality stated that leasehold enfranchisement “threatens the permanent affordability of CLT homes and, in turn, deters private landowners from providing lower-cost land for future CLT housing.” For housing cooperatives, the exercise of freehold acquisition rights by tenants would be inconsistent with the nature of the cooperative model, under which tenants do not themselves own any equity in their individual homes. Instead, all the residential units are jointly owned through the cooperative organisation of which each tenant will be a member. That said, we acknowledge that the likelihood of any housing cooperative tenant being able to afford to enfranchise – given that they will be paying a rent typical of a short tenancy – is bound to be slim.

- 9.71 There is already one means, via planning law, by which CLTs can ensure that the properties they let on long leases are not subject to freehold acquisition claims. Under amendments made to the Town and Country Planning Act 1990 by the Localism Act 2011, it is possible for particular community organisations (which would include CLTs) to obtain a “Community Right to Build Order” (“CRBO”) permitting community-led development on a particular site within a designated neighbourhood area.⁶⁰⁵ The right of freehold acquisition will not be exercisable in respect of land developed under a CRBO if the community organisation specified as such in their proposal for the Order.⁶⁰⁶
- 9.72 However, obtaining a CRBO is a complex and costly process, requiring a local referendum before it can be approved.⁶⁰⁷ In their response to the *Tackling unfair practices* consultation, the National Community Land Trust Network, UK Cohousing and Locality explained that very few CLTs have chosen to go down this route and requested that the Government consider creating an exemption from enfranchisement rights for CLTs, and perhaps other community-led housing schemes. They did not, however, suggest that this exemption should apply automatically to all developments by CLTs; rather, they suggested that CLTs should be required to make an express decision as to whether the exemption would be applicable in respect of each development that they undertake.
- 9.73 We therefore seek the views of consultees as to whether there should be a new exemption from enfranchisement rights for CLTs and other forms of community-led housing and, if so, how this exemption should operate.

⁶⁰⁵ Town and Country Planning Act 1990, s 61Q and sch 4C.

⁶⁰⁶ Town and Country Planning Act 1990, sch 4C, para 11 and Neighbourhood Planning (General) Regulations 2012, reg 28.

⁶⁰⁷ Town and Country Planning Act 1990, sch 4C, para 10 and sch 4B, para 14.

Consultation Question 66.

9.74 We invite consultees' views as to whether there should be a new exemption from enfranchisement rights for community land trusts and other forms of community-led housing.

9.75 If so, we invite the views of consultees as to:

- (1) the housing models to which the exemption should apply;
- (2) the way in which the exemption should work, and the circumstances in which it should apply;
- (3) the enfranchisement rights which should fall within the exemption; and
- (4) any other issues which consultees consider relevant to such an exemption.

OTHER EXCEPTIONS AND QUALIFICATIONS

9.76 There are many other exceptions and qualifications to the availability of enfranchisement rights which are not likely to be so widely applicable, or to raise such pressing issues of policy, as the exceptions discussed above. We acknowledge, however, that their application in practice is extremely important to those whom they affect.

9.77 In this section, we briefly summarise those exceptions and qualifications. We then ask consultees to tell us about their experiences of these situations in practice, and to tell us whether these exceptions and qualifications ought to be retained.

Property designated as being of outstanding interest

9.78 The 1967 Act contains an exemption intended to ensure that properties designated as being of outstanding scenic, historic, scientific or architectural interest – such as properties belonging to English Heritage – are not subject to enfranchisement claims under the Act.⁶⁰⁸ Such properties are considered to be comparable in their importance to the public to those held inalienably by the National Trust.

9.79 The 1993 Act does not contain an equivalent exemption.

The section 28 redevelopment exception for public bodies

9.80 Section 28 of the 1967 Act provides that notice given by a leaseholder of his or her desire to acquire the freehold or a lease extension of his or her house under the Act shall be of no effect where:

⁶⁰⁸ 1967 Act, s 32A.

- (1) the landlord of the property comprising the house is one of various specified public bodies; and
- (2) a Minister of the Crown has certified that the property will be required for “relevant development” within ten years.⁶⁰⁹

9.81 “Relevant development” is development for the purposes (other than investment purposes) of the public body in question.⁶¹⁰

9.82 Public bodies which are entitled to avail of the section 28 redevelopment exception include local authorities, New Town authorities,⁶¹¹ housing action trusts and university bodies.⁶¹²

The section 29 power to reserve the future right to develop

9.83 Section 29 of the 1967 Act enables a local authority landlord to require that any conveyance executed or lease extension granted under the Act shall include “such covenants on the part of the tenant restricting the carrying out of development or clearing of land as are necessary to reserve the land for possible development by the authority.”⁶¹³

9.84 The same power is also available to New Town authorities, housing action trusts and university bodies.⁶¹⁴

The section 30 power to reserve a right of pre-emption

9.85 Section 30 of the 1967 Act enables a New Town authority landlord to require that any conveyance executed or lease extension granted under the 1967 Act shall include:

- (1) a covenant against leasing the property comprised in the conveyance or grant, or any part of it, without the local authority’s written consent; and
- (2) a covenant giving the local authority the right of first refusal upon any sale of the property or any part of it.⁶¹⁵

⁶⁰⁹ 1967 Act, s 28(1).

⁶¹⁰ 1967 Act, s 28(6).

⁶¹¹ “New Towns” were new settlements created following the Second World War. Their original purpose was to provide places for the disadvantaged and displaced poor of London. “New Town authorities” are the new towns’ residuary bodies and any development corporations within the New Towns Act 1981.

⁶¹² 1967 Act, s 28(5).

⁶¹³ 1967 Act, s 29(1) and (2).

⁶¹⁴ 1967 Act, s 29(6) and (6C).

⁶¹⁵ 1967 Act, s 30(1), (2) and (7)(a).

- 9.86 The same power is also available to local authorities in respect of housing provided by them as part of an “overspill” area⁶¹⁶ under the Town Development Act 1952.⁶¹⁷

Housing associations

- 9.87 As discussed at paragraphs 9.14 to 9.15 above, housing associations have for many years been able to grant shared ownership leases of houses which are excluded from enfranchisement rights under the 1967 Act.
- 9.88 Additionally, the 1967 Act does not apply to 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 is owned by a charity.⁶¹⁸

Charitable housing trusts

- 9.89 The 1967 Act provides an exception from enfranchisement rights in certain cases where the leaseholder’s immediate landlord is a charitable housing trust and the house forms part of the housing accommodation provided by the trust as part of its charitable purposes.⁶¹⁹ Where the relevant lease was created after 1 November 1993, the leaseholder will have no right to acquire the freehold of the house.⁶²⁰ Where the lease was created before that date, the leaseholder will have a right to acquire the freehold only if he or she meet the conditions for the exercise of that right as set out in section 1 of the 1967 Act as originally enacted.⁶²¹ Lease extensions, however, are available.
- 9.90 The 1993 Act provides a similar, although wider, exception. Leaseholders of flats where the immediate landlord is a charitable housing trust and the flat forms part of the housing accommodation provided by the trust in pursuit of its charitable objectives are excluded from the Act’s definition of a “qualifying tenant”.⁶²² In other words, they will have neither the right to a lease extension under the Act, nor the right to participate in a collective enfranchisement.
- 9.91 In *Brick Farm Management Ltd v Richmond Housing Partnership Ltd*,⁶²³ a group of former local authority tenants who had acquired long leases pursuant to the Right to Buy sought to carry out a collective enfranchisement. By this time, the freehold of the block of flats had been sold by the local authority to a charitable housing trust. There were also a number of flats in the block let on assured tenancies. The trust defended the claim on the basis that all of the flats in the block formed part of the housing

⁶¹⁶ “Overspill” areas are areas into which former residents of Greater London were moved in the 1950s in response to housing shortages and low standards of some of existing housing.

⁶¹⁷ 1967 Act, s 30(1), (2) and (7)(b).

⁶¹⁸ Housing Act 1985, s 172.

⁶¹⁹ 1967 Act, s 1(3).

⁶²⁰ 1967 Act, s 1(3A)(a).

⁶²¹ 1967 Act, s 1(3A)(b). In other words, the leaseholder will have no right to acquire the freehold of the house if he or she qualifies for that right only by reason of amendments made to the qualifying criteria by virtue of ss 1A, 1AA or 1B of the Act.

⁶²² 1993 Act, s 5(2)(b). See also para 7.54 above.

⁶²³ *Brick Farm Management Ltd v Richmond Housing Partnership Ltd* [2006] EWHC 1004 (Ch), [2005] 1 WLR 3934.

accommodation provided by the trust in pursuit of its charitable objectives, so none of the long leaseholders were qualifying tenants.

- 9.92 Mr Justice Stanley Burnton (as he then was) rejected this argument. He held that only “social housing” would amount to accommodation provided by the trust in pursuit of its charitable objectives. On his view, social housing would include the flats let on assured tenancies, but not the flats let on long leases. Accordingly, the long leaseholders were qualifying tenants and were entitled to bring a collective enfranchisement claim.
- 9.93 This outcome seems to us to be correct on the facts. The long leaseholders were entitled to enfranchise collectively while the building was still owned by the local authority, and it would seem strange if it was intended that they should lose this right simply because a charitable housing trust happened to purchase the building. The difficulty with this decision, however, is that it appears to equate “social housing” with rented accommodation. If it is meant that only rented housing will ever be seen as being provided in pursuit of charitable purposes, then it is difficult to see how these exceptions in the 1967 and 1993 Acts can have any practical effect. Rented accommodation is virtually always let on a short tenancy rather than a long lease, and so would not give rise to any enfranchisement rights for the tenant in any event. Further, we are not convinced it is the case that owner-occupied properties could never be considered social housing. We have in mind, for example, properties bought on shared ownership leases, or perhaps on long leases granted by a body such as the Joseph Rowntree Trust.

Ecclesiastical landlords and cathedral precincts

- 9.94 Under the 1993 Act, there is no right to acquire the freehold or a lease extension in respect of property which is within the precincts of a cathedral church.⁶²⁴
- 9.95 Under both the 1967 Act and the 1993 Act, the Church Commissioners are required to sanction the provisions to be included in a conveyance or lease extension to be granted under the relevant Act, including the price or premium payable.⁶²⁵

Consultation Question 67.

- 9.96 We invite consultees to share their experiences of the existing exemptions and qualifications to enfranchisement rights. We also invite consultees’ views as to whether these exemptions and qualifications should be retained in any new enfranchisement regime.

⁶²⁴ 1993 Act, s 96.

⁶²⁵ 1967 Act, s 31 and 1993 Act, sch 2, para 8.

THE IMPACT OF REFORM

Consultation Question 68.

9.97 If you have experience of the grant of lease extensions to shared ownership leaseholders (either under the 1993 Act or on a voluntary basis), please tell us about the terms on which these lease extensions have been granted.

Consultation Question 69.

9.98 We welcome evidence as to how Government's policy decision to give shared ownership leaseholders a statutory right to a lease extension would affect:

- (1) the willingness of landlords and developers to offer shared ownership leases; and
- (2) the market value of shared ownership leases.

Part IV: How should enfranchisement rights be exercised?

In Part II we described the enfranchisement rights currently available to leaseholders under the 1967 and 1993 Acts. We also set out the central criticisms that have been made of those rights, and proposed a revised set of enfranchisement rights for leaseholders.

In Part III we outlined the criteria that must be met before any of the rights set out in the 1967 and 1993 Acts can be exercised. We highlighted the main criticisms that have been made of those criteria, and proposed revised criteria that must be met by a leaseholder seeking to claim any of the enfranchisement rights described in Part II.

In this Part we consider how enfranchisement rights under the 1967 and 1993 Acts are currently claimed, determined, and put into effect, and consider the case for reform.

First, in Chapter 10, we describe the current procedures under the 1967 and 1993 Acts, and consider the key criticisms that have been made. Secondly, in Chapter 11, we set out our proposals for a single procedural regime to be followed regardless of the enfranchisement right being claimed. We describe the steps to be taken by leaseholders bringing an enfranchisement claim, as well as how landlords could either accept or oppose that claim. We also set out the further steps that the parties will need to take to progress and complete the claim, and describe the circumstances in which a claim might otherwise come to an end.

Thirdly, in Chapter 12 we set out how disputes or issues between the parties are resolved under the 1967 and 1993 Acts. We outline the criticisms that have been made of those provisions, and describe a series of proposed reforms to simplify the resolution of disputes that arise in enfranchisement claims, and also propose the introduction of a more cost-effective means by which some valuation disputes could be determined.

Finally, in Chapter 13, we outline the circumstances in which one party may at present be ordered to pay the other party's costs of an enfranchisement claim. In particular, we look at orders in respect of the costs incurred by the other party in resolving any dispute or issue that has arisen before a court or tribunal (that is, litigation costs). We also look at the other costs incurred by that other party during an enfranchisement claim (that is, non-litigation costs). We consider the key criticisms that have been raised in respect of both litigation and non-litigation costs, and outline our proposals for the reform of both.

Chapter 10: Procedure: current law and criticisms

INTRODUCTION

- 10.1 In this chapter we set out the current law relating to the procedures for exercising any of the existing enfranchisement rights. We outline the process for claiming a lease extension, or the freehold, of a house under the 1967 Act. We then describe both the process for claiming a lease extension of a flat and the process by which leaseholders can join with others to claim the freehold to their building under the 1993 Act.
- 10.2 In respect of each of these claims, we explain how the claim is made and can be opposed. We also outline the subsequent steps that the parties must take in order to resolve any dispute, and how the right, once established, is put into effect. We describe:
- (1) the notices to be served by leaseholders and landlords, and the form and content of those notices;
 - (2) how those notices are to be served, and the effects that serving such a notice will have;
 - (3) the steps to be taken by the parties where a claim is not agreed;
 - (4) any further steps that have to be taken in claims involving particular types of landlords, including missing landlords; and
 - (5) how enfranchisement claims are completed, and how they can be terminated or withdrawn.
- 10.3 Finally, we set out the main criticisms that have been made of the current law by stakeholders and others.

LEASE EXTENSIONS OF HOUSES

Notices

Leaseholder's notice

- 10.4 A leaseholder who wishes to make a lease extension claim in respect of his or her house must serve a specific type of written notice.⁶²⁶ We refer to that notice as a “notice of claim”.⁶²⁷ The 1967 Act sets out certain details which must be contained in the notice

⁶²⁶ 1967 Act, s 14(1).

⁶²⁷ The notice is generally referred to as a notice of tenant's claim.

of claim, including the address of the house, sufficient particulars of the property claimed, and further details of the lease, including the date on which it was acquired.⁶²⁸

- 10.5 The notice of claim must be in the form that has been prescribed by regulations made under the 1967 Act,⁶²⁹ or in a form that is “substantially to the same effect”.⁶³⁰ While there is some overlap between the details required by the prescribed form and the 1967 Act itself, amendments over time have led to discrepancies between the two. A full list of the details required by the 1967 Act and by the prescribed form can be found at Appendix 1.
- 10.6 A notice of claim which does not follow the prescribed form, or which fails to provide all the details required by the 1967 Act, can in some cases be invalid. If a notice of claim is invalid, the leaseholder will need to start again by serving a new notice of claim.⁶³¹
- 10.7 There is, however, a specific “saving provision” in the 1967 Act, whereby a notice of claim will “not be invalidated by an inaccuracy in the particulars required by this paragraph or any misdescription of the property to which the claim extends”.⁶³² However, this provision only applies to the particulars which are required by the 1967 Act and does not extend to other details required only by the prescribed form.⁶³³
- 10.8 Whether an error within a notice of claim is an inaccuracy or misdescription for the purposes of this saving provision or is an error that will make the notice invalid is far from straightforward.⁶³⁴ The court should “form an overall view as to whether... the notice can fairly be regarded as satisfying the mandatory requirements of [the] Schedule”.⁶³⁵ The knowledge of the landlord who receives the notice of claim is irrelevant to its validity.⁶³⁶

⁶²⁸ 1967 Act, sch 3, para 6. In contrast to claims for the freehold of a house, it remains necessary to provide details of the rateable value of the house and premises in order to show that the lease is a long lease at a low rent: see Ch 7 at para 7.25.

⁶²⁹ 1967 Act, s 22(5). The prescribed form is currently found in the Leasehold Reform (Notices) Regulations 1997 (SI 1997 No 640), as amended by the Leasehold Reform (Notices) (Amendment) (England) Regulations 2002 (SI 2002 No 1715) in respect of England, and the Leasehold Reform (Notices) (Amendment) (Wales) Regulations 2002 (SI 2002 No 3187) in respect of Wales.

⁶³⁰ Leasehold Reform (Notices) Regulations 1997 (SI 1997 No 640), reg 2.

⁶³¹ The possibility of serving a new notice sometimes can lead a landlord to decide to waive any defect in a notice of claim.

⁶³² 1967 Act, sch 3, para 6(3). There may also be some limited scope for relying on the “reasonable recipient” test set out in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749: see *Speedwell* below, at [47]. An error may be sufficiently obvious that a reasonable recipient can have been in no reasonable doubt as to the proper meaning of the notice.

⁶³³ *Speedwell Estates Ltd v Dalziel* [2001] EWCA Civ 1277, [2002] HLR 43, at para 48. For example, failing to identify the basis on which the freehold is to be valued under the 1967 Act will invalidate the notice as it is a requirement of the prescribed form rather than a required set out in the 1967 Act itself. Conversely, a leaseholder who provides all the details required by the prescribed form is not expected to check that he or she also fulfils para 6(1) of sch 3 to the 1967 Act: *Speedwell Estates Ltd*, at para 36.

⁶³⁴ *Hague*, para 5-05.

⁶³⁵ *Speedwell Estates Ltd*, above, at [29]. See also *Cresswell* at [152].

⁶³⁶ *Natt v Osman* [2014] EWCA Civ 1520, [2015] 1 WLR 1536, at [32].

10.9 The saving provision also allows a notice of claim to be amended with the permission of the court where the notice included “property not properly included in the house and premises, or does not extend to property that ought to be so included”.⁶³⁷

10.10 A notice of claim must be signed.⁶³⁸ If the notice is unsigned, it might yet be valid if there is a signed covering letter as an “accompanying document”.⁶³⁹ Where there are joint leaseholders, each leaseholder must be represented on the notice: either each must sign their own name, or some person or people must sign on their behalf (with the requisite authority).⁶⁴⁰

Landlord’s notice

10.11 A landlord who has received a notice of claim has two months within which he or she can give the leaseholder a written notice in response.⁶⁴¹ We refer to the latter notice as a “counter-notice”.⁶⁴² In a counter-notice, the landlord can admit or dispute the leaseholder’s right to enfranchise.⁶⁴³

10.12 As with the notice of claim, the counter-notice must be in the form prescribed by regulations, or in a form “substantially to the same effect”.⁶⁴⁴ The prescribed form requires the landlord to indicate whether they admit or deny the claim. If the claim is denied, the landlord must set out the grounds on which the claim is denied; however, that statement appears not to constrain the landlord’s ability to rely on further alternative arguments at a later stage.⁶⁴⁵

⁶³⁷ 1967 Act, sch 3 para 6(3); *Malekshad v Howard de Walden Estates Ltd (No 2)* [2003] EWHC 3106 (Ch), [2004] 1 WLR 862.

⁶³⁸ Signature by the leaseholder is anticipated on the prescribed form. However, a signature of a duly authorised agent will suffice: *Tennant v London County Council* [1957] 121 JP 428 CA, a case on the Landlord and Tenant Act 1954.

⁶³⁹ Edmund Davies LJ in *Byrnlea Property Investments Ltd v Ramsay* [1969] 2 QB 253, and Lord Denning MR in *Stidolph v American School in London Educational Trust Ltd* [1969] 20 C & PR 802.

⁶⁴⁰ *Wax v Chelsea (Viscount)* [1996] 2 EGLR 80.

⁶⁴¹ 1967 Act, para 7(1) of sch 3.

⁶⁴² The 1967 Act refers to such a notice as a “notice in reply”.

⁶⁴³ See para 10.12 below.

⁶⁴⁴ This prescribed form is also found in the Leasehold Reform (Notices) Regulations 1997 (SI 1997 No 640) (as amended).

⁶⁴⁵ See *Hague* at para 5-20. There might, however, be negative cost consequences for the landlord if the leaseholder upon whom no counter-notice has been served issues a claim in the county court to confirm his or her eligibility to enfranchise, only for the landlord to respond to that claim by indicating that the leaseholder’s eligibility was in fact admitted. Furthermore, there may be scope for claims for negligence or breach of statutory duty where a counter-notice is not served and loss is caused to the claimant, but this point is unclear: in *Seven Strathray Gardens Ltd v Pointstar Shipping & Finance Ltd and Ultratown Ltd* [2004] EWCA Civ 1669, [2005] HLR 20, the question was left open.

10.13 The use of a counter-notice is not, however, mandatory. A landlord who does not serve a valid counter-notice within the two-month time limit (or at all), can still challenge the claim.⁶⁴⁶

Service of notices

Time for service

10.14 A leaseholder can serve a notice of claim:

- (1) at any point during the term of his or her lease;⁶⁴⁷ or
- (2) when the term of the lease has come to an end, but he or she has become a leaseholder anew “whether by grant or by implication of law”.⁶⁴⁸

10.15 There are, however, several exceptions where a notice of claim is of no effect, including where the leaseholder has already given notice terminating his or her lease.⁶⁴⁹ A notice of claim will also be of no effect where the landlord has given notice terminating the lease pursuant to one of a number of statutory provisions, and two months have since elapsed.⁶⁵⁰

On whom should a notice of claim be served?

10.16 A notice of claim can be served on any person who has an interest in the house which is superior to the leaseholder’s own lease.⁶⁵¹ A leaseholder may therefore serve a notice of claim on his immediate landlord, any intermediate landlord, or the freeholder of the house. The leaseholder must, however, also serve copies of the notice of claim on any other person whom he or she knows or believes to hold such an interest in the house.⁶⁵² Any recipient of a notice of claim or a copy of that notice must also serve copies on any other person whom he or she knows or believes to hold such an interest.⁶⁵³ A leaseholder or a recipient of a notice who fails to serve a copy on such a person without

⁶⁴⁶ *Church Commissioners for England v Woods* (2 June 1970) Bloomsbury and Marylebone County Court (unreported).

⁶⁴⁷ 1967 Act, s 3(2).

⁶⁴⁸ Which would be deemed to be a continuation of the long lease by s 3(2) of the 1967 Act.

⁶⁴⁹ 1967 Act, sch 3, para 1(1). Such notice includes a business tenant’s request for a new business tenancy under s 26 of the Landlord and Tenant Act 1954, or termination notice under s 27(1) of that Act: 1967 Act, sch 3, para 1(3).

⁶⁵⁰ 1967 Act, sch 3, paras 2(1), (1A) and (1B). The relevant statutory provisions are ss 4 and 25 of the Landlord and Tenant Act 1954, and para 4(1) of sch 10 to the Local Government and Housing Act 1989. This exception does not apply where the landlord gives his or her written consent to delayed service of the notice of claim (1967 Act, sch 3, para 2(1D)).

⁶⁵¹ 1967 Act, sch 3, para 8(1)(a).

⁶⁵² 1967 Act, sch 3, para 8(1)(b). The notice of claim must also contain details of those given copies of the notice.

⁶⁵³ 1967 Act, sch 3, para 8(1)(d). The recipient must also add the names of those whom he or she serves with copies to the list of recipients set out in the notice of claim: 1967 Act, sch 3, para 8(1)(e).

reasonable cause, or unreasonably delays in doing so, will be liable for any losses that result.⁶⁵⁴

10.17 It is also important to note that the person who has been properly served by the leaseholder with a notice of claim is not necessarily the person who will be responsible for responding to and dealing with the leaseholder's claim. The person who must do so is the "reversioner": that is, by default, the landlord who holds a lease of the house that is superior to the leaseholder's lease and entitles that landlord to possession of the house for 30 years or more,⁶⁵⁵ or if there is no such landlord, the freeholder.⁶⁵⁶ For example, if a leaseholder's immediate landlord's own lease expires less than 30 years after the expiry of the leaseholder's own lease, he or she will not be the reversioner. If there is no intermediate leaseholder who holds a sufficient interest in the house, the freeholder will be the reversioner. Anyone who receives a notice of claim and knows who the reversioner is, or believes himself or herself to be the reversioner, must give a written notice to that effect to the leaseholder and to any other person holding an interest in the house that is superior to the leaseholder's lease.⁶⁵⁷

10.18 Any of the "other landlords" may make an application to the county court to replace the default reversioner with another person.⁶⁵⁸

Mode of service

10.19 Notices of claim must be served in accordance with section 23(1) of the Landlord and Tenant Act 1927.

- (1) The notice can be served personally, left for the landlord at his or her last known address,⁶⁵⁹ or posted there by registered post or recorded delivery.⁶⁶⁰ Where it is sent by registered post or recorded delivery it will be deemed to have been served on the landlord even if it later shown not to have been received.⁶⁶¹
- (2) An incorrectly addressed notice which still reaches the landlord is validly served.⁶⁶²

⁶⁵⁴ 1967 Act, sch 3, para 8(3).

⁶⁵⁵ If there is more than one such person, the person with the lease that is inferior to the leases held by the other persons will be the reversioner.

⁶⁵⁶ 1967 Act, sch 1, paras 1(1)(b) and 2.

⁶⁵⁷ 1967 Act, sch 3, para 8(2)(b). A recipient who fails to comply with this requirement without reasonable cause, or unreasonably delays in doing so will be liable for any losses that result: 1967 Act, sch 3, para 8(3).

⁶⁵⁸ Any landlords who are not the reversioner are "other landlords": 1967 Act, sch 1, para 1(3). Such applications are considered in Ch 16 at para 16.33.

⁶⁵⁹ *Stylo Shoes Ltd v Prices Tailors Ltd* [1960] Ch 396; *Price v West London Investment BS Ltd* [1964] 1 WLR 616. The "last known place of abode" includes a person's last known business address: *Price v West London Investment Building Society Ltd* [1964] 1 WLR 616.

⁶⁶⁰ Landlord and Tenant Act 1927, s 23(1).

⁶⁶¹ This is in contrast to other means of posting, and the provisions of the 1993 Act.

⁶⁶² *Stylo Shoes Ltd v Prices Tailors Ltd* [1960] Ch 396.

- (3) A landlord who is a company or a public body can be properly served if the notice is sent to its secretary or another proper officer at its principal office.⁶⁶³
- (4) Service on an authorised agent, such as a solicitor or surveyor, is good service, as is service on an agent duly authorised to accept or demand rent.⁶⁶⁴
- (5) There is deemed service on the current landlord if there has been a change of landlord of which the leaseholder was not notified.⁶⁶⁵

10.20 While many leaseholders will be aware of an address at which their landlord can be served, others may not. Some assistance can, however, be obtained as a result of obligations placed on landlords to supply their leaseholders with addresses at which notices can be served. In particular, where a lease is not of business premises within Part II of the Landlord and Tenant Act 1954, a landlord must supply their name and address in demands for rent or other sums due under the lease; if that address is outside England or Wales, an additional address within England or Wales at which notices can be served must be provided.⁶⁶⁶ A landlord also must, in any case, provide the leaseholder with an address at which notices can be served.⁶⁶⁷ However, these requirements only apply to a leaseholder's immediate landlord; they do not assist a leaseholder who wishes to serve a notice, or copies of notices, on other landlords.

Effects of serving a notice

The lease extension claim

10.21 The moment a notice of claim is served on the landlord is the "relevant time" under the 1967 Act: in other words, it is the time from which various time limits within the Act begin to run.⁶⁶⁸

10.22 Once a notice of claim has been served, a statutory contract is created between leaseholder and landlord.⁶⁶⁹ The landlord is bound to grant a lease extension for a term ending 50 years after the end date of the existing lease.⁶⁷⁰ The statutory contract can, however, be terminated by mutual consent.⁶⁷¹

⁶⁶³ Landlord and Tenant Act 1927, s 23(1).

⁶⁶⁴ *Townsend's Carriers Ltd v Pfizer Ltd* (1977) 22 P & CR 361.

⁶⁶⁵ Landlord and Tenant Act 1927, s 23(2).

⁶⁶⁶ Landlord and Tenant Act 1987, s 47(1).

⁶⁶⁷ Landlord and Tenant Act 1987, s 48(1).

⁶⁶⁸ 1967 Act, sch 3, para 8(1)(a).

⁶⁶⁹ This contract is registrable under s 2(4)(iv) the Land Charges Act 1972 or be made the subject of a notice under Pt 4 of the Land Registration Act 2002.

⁶⁷⁰ 1967 Act, s 14(1).

⁶⁷¹ 1967 Act, s 23(2); *Collin v Duke of Westminster and Others* [1985] QB 581.

Continuation of the leaseholder's lease

10.23 When a notice of claim is served, the leaseholder's lease of the house will not terminate (either by expiry on the end date of the lease or by a notice to quit,⁶⁷² or by the termination of a superior lease) "during the currency of the claim" or for three months afterwards.⁶⁷³ The "currency of the claim" ends when the lease extension is granted, or when the notice of claim is withdrawn, abandoned, or ceases to have effect.

10.24 Where a lease is continued automatically because of the service of a notice of claim, certain other consequences follow.

- (1) If, following expiry of the lease, the leaseholder would have been entitled to a new or continuing lease of the house,⁶⁷⁴ then the date on which the leaseholder must pay an increased rent under such a lease is delayed.
- (2) The date on which the landlord can obtain possession where the leaseholder has no statutory protection beyond the 1967 Act is delayed.⁶⁷⁵

There is, however, provision for compensation to be paid to the landlord in respect of such delays.⁶⁷⁶

On other notices affecting the leaseholder's lease

10.25 The service of a notice of claim renders notices to terminate the lease given by the landlord (pursuant to various statutory provisions), both beforehand and subsequently, of no effect.⁶⁷⁷ Nor does a leaseholder's notice to terminate his or her lease have any effect if given during the currency of a lease extension claim.⁶⁷⁸

10.26 Once a notice of claim has been served, a landlord can no longer seek to forfeit the lease by issuing a claim for possession of the house against the leaseholder.⁶⁷⁹ The landlord can, however, seek permission from the court to bring such a claim if the enfranchisement claim has not been made in good faith.⁶⁸⁰

10.27 Possession proceedings that are already underway are not automatically ended by the service of a notice of claim. The lease is deemed to continue for the purposes of the

⁶⁷² Under s 4 of the Landlord and Tenant Act 1954 and para 4 of sch 10 to the Local Government and Housing Act 1989.

⁶⁷³ 1967 Act, sch 3, paras 3(1) and 5(1)(c).

⁶⁷⁴ Under the Landlord and Tenant Act 1954, the Rent Act 1977, the Housing Act 1988 or the Local Government and Housing Act 1989.

⁶⁷⁵ 1967 Act, sch 3, para 3(1).

⁶⁷⁶ 1967 Act, ss 27 and 27A.

⁶⁷⁷ 1967 Act, sch 3, para 2(2). The relevant statutory provisions are ss 4 and 25 of the Landlord and Tenant Act 1954, or under para 4(1) of sch 10 to the Local Government and Housing Act 1989: 1967 Act, sch 3, para 2(1A) and (1B).

⁶⁷⁸ 1967 Act, sch 3, para 1(2).

⁶⁷⁹ 1967 Act, sch 3, para 4(1).

⁶⁸⁰ *Central Estates (Belgravia) Ltd v Woolgar (No 1)* [1972] 1 QB 48.

enfranchisement claim; the court will make appropriate orders to deal with the possession proceedings.⁶⁸¹ The forfeiture of the lease can be enforced by the court, but only where there is a lack of good faith or unreasonable delay on the part of the leaseholder.⁶⁸²

Contract suspension

10.28 The service of a valid notice of claim will automatically discharge a landlord's contract for sale, lease or disposal of an interest in the house if the contract did not state what was to happen if a notice of claim were served, and was entered into on the basis that vacant possession of the house (or a part of it) would or might be obtained on termination of the leaseholder's lease.⁶⁸³

Registration

10.29 The statutory contract created by the successful service of a notice of claim is registerable under the Land Charges Act 1972 as an estate contract. It may, alternatively, be the subject of a notice under the Land Registration Act 2002. The effect of such registration is that a prospective purchaser of the landlord's interest will have notice of the pending claim, and be bound by the notice if he or she acquires that interest.

Assignment of the benefit of a notice

10.30 The benefit of the notice of claim is only assignable with the lease.⁶⁸⁴ If the lease is assigned or vests otherwise than as affecting the whole of the house and premises, the notice ceases to have effect. The leaseholder may then become liable to pay compensation to the landlord reflecting the interference caused by the notice with the exercise by the landlord of his or her power to dispose of the house and premises.⁶⁸⁵

Particular types of landlord

Missing landlords

10.31 In contrast to the position in respect of a claim for the freehold of a house,⁶⁸⁶ and indeed for any enfranchisement claim in respect of a flat,⁶⁸⁷ a leaseholder making a claim for a lease extension of a house is unable to proceed with that claim if he or she is unable to serve the landlord.⁶⁸⁸

⁶⁸¹ 1967 Act, sch 3, para 4(2).

⁶⁸² 1967 Act, sch 3, para 4(2) and 4(3)(b).

⁶⁸³ 1967 Act, s 5(7).

⁶⁸⁴ This requirement has caused particular difficulties for leaseholders. As noted in *Hague* at para 5-11, the safest course of action is to incorporate an express assignment of the benefit of the notice of claim within the assignment of the lease. An obligation to transfer the benefit of a notice of claim within a contract for an assignment of the lease will not be sufficient: *Aldavon Co Ltd v Deverill* [1999] 2 EGLR 69.

⁶⁸⁵ 1967 Act s 5(2).

⁶⁸⁶ See para 10.54.

⁶⁸⁷ See paras 10.94 and 10.140.

⁶⁸⁸ 1967 Act, s 27(1) is expressly limited to leaseholders who are seeking to acquire the freehold to their house.

Insolvent landlords

10.32 When the landlord is an individual who has been made bankrupt, a notice of claim may be served on the trustee in bankruptcy.⁶⁸⁹ The trustee is bound to conduct the proceedings in place of the landlord. Similarly, notices may be served on administrators, liquidators and receivers of companies.

10.33 If a company has been dissolved its assets will pass to the Crown as *bona vacantia*.⁶⁹⁰ The Crown is not bound by the 1967 Act and so a notice of claim cannot be served on the Treasury Solicitor. And while the Crown has undertaken to allow freehold acquisitions, leaseholders are unable to extend their leases.⁶⁹¹

Deceased landlords

10.34 Deceased landlords are not, of course, “missing” and nor are they landlords; the dead cannot hold legal estates. The challenge for leaseholders is to find the person by whom the deceased’s estate is held. This can be done by searching the Probate Registry for a death certificate and a Grant of Probate to identify the deceased landlord’s personal representatives. If a grant of probate has been made, personal representatives may be served with a notice of claim.

10.35 Where a grant has not been obtained but the deceased left a will,⁶⁹² a notice of claim may be served on the deceased’s personal representatives and the public trustee.⁶⁹³ Where a grant has not been obtained and the landlord died intestate⁶⁹⁴ – such that there are no personal representatives to serve – there is no provision for serving a notice of claim. One view is that the Bona Vacantia Division of the Government Legal Department will deal with the deceased’s estate. The Treasury Solicitor acts for the Crown to administer the estates of people who die intestate or without known kin.⁶⁹⁵ The Treasury Solicitor’s guidance states clearly that the Treasury Solicitor will not deal with a range of estates including where:

⁶⁸⁹ A long lease forms part of the bankrupt’s estate: Insolvency Act 1986, ss 283 and 436.

⁶⁹⁰ *Bona vacantia* is the term used for ownerless property.

⁶⁹¹ During the passage of the Commonhold and Leasehold Reform Act 2002, the Crown gave an undertaking that it would agree to the transfer of freeholds or the grant of lease extensions in respect of residential leases under the same terms as set out in the 1967 and 1993 Acts: see *Hague*, at 14-50. However, in respect of land which has passed to the Crown as *bona vacantia* rather than land already owned by the Crown, the Treasury Solicitor has made clear that while freeholds may be acquired, lease extensions will not be granted: see “Apply to buy a freehold reversion” (December 2013), <https://www.gov.uk/guidance/apply-to-buy-your-freehold-reversion-bvc4>. If the Treasury Solicitor disclaims the title, it will revert to the Crown. In such a case, the Crown Estate usually will, but is not obliged to, sell a new freehold title to the leaseholder, but will not grant a lease extension.

⁶⁹² Where a deceased leaves a will, the property of the deceased vests in the executor from the moment of the testator’s death (*Woolley v Clark* (1822) 5 B & Ald 744).

⁶⁹³ Law of Property (Miscellaneous Provisions) Act 1994, s 18.

⁶⁹⁴ That is, without leaving a will.

⁶⁹⁵ See <https://www.gov.uk/government/organisations/bona-vacantia>.

- (1) there are known or likely to be entitled relatives who survived the deceased even if these have subsequently died, cannot be traced or do not wish to deal with the estate;
- (2) the net value of the estate is below £500;
- (3) the estate is insolvent;
- (4) the deceased lived outside England and Wales.⁶⁹⁶

Incapacitated landlords

10.36 The 1967 Act provides that where a landlord lacks capacity within the meaning of the Mental Capacity Act 2005, so that he or she is unable to exercise his or her functions as landlord, those functions can be exercised:

- (1) by an attorney appointed under an enduring power of attorney or lasting power of attorney, or a deputy appointed for him by the Court of Protection, with power to exercise those functions; or
- (2) if no attorney or deputy has that power, by a person authorised by the Court of Protection.⁶⁹⁷

Recalcitrant landlords

10.37 The 1967 Act does not contain any provisions dealing specifically with landlords who are uncooperative or deliberately obstructive: it contains no default provisions that can be relied on, unlike the position under the 1993 Act.⁶⁹⁸

Procedure for resolving disputed claims

10.38 If the service of a notice of claim does not lead to an admission by the reversioner that the leaseholder is entitled to a lease extension of the house, the leaseholder may apply to the court for an order declaring that he or she is entitled to a lease extension. Such an application cannot be made, however, before the landlord has given a counter-notice, or two months have expired since the notice of claim was given.

10.39 As noted in Chapter 12,⁶⁹⁹ any dispute or issue between the parties will be resolved on application to the county court, save in the case of issues of valuation, which are dealt with by the Tribunal. In contrast to the position under the 1993 Act, the 1967 Act does not provide deadlines by which such applications must be made.

⁶⁹⁶ Refer a deceased person's estate to the Treasury Solicitor, published 6th December 2013.

⁶⁹⁷ 1967 Act, s 26(2); 1993 Act sch 2, para 3; Mental Health Act 2005, sch 6, para 13(2).

⁶⁹⁸ See para 10.99 below.

⁶⁹⁹ See Ch 12 at para 12.10.

Completing a claim

10.40 As noted above,⁷⁰⁰ the service of a notice of claim creates a statutory contract. Certain conditions are incorporated into this contract.⁷⁰¹

10.41 The leaseholder may serve a notice on the landlord requiring him or her to raise within four weeks any modifications in the terms of the existing lease that are to be made by the terms of the lease extension if:

- (1) he or she has not received a counter-notice within two months of serving a notice of claim; or
- (2) he or she has received a counter-notice admitting the claim or – if the claim has been denied – he or she has established the entitlement to extend the lease either by agreement or court order.⁷⁰²

The landlord may also serve such a notice in the event that the condition in paragraph 10.41(2) is satisfied.⁷⁰³ If either party omits to reply to one of these notices, they are deemed not to require any modifications.⁷⁰⁴

10.42 The Regulations provide that the landlord will prepare the lease and submit it to the leaseholder.⁷⁰⁵ The leaseholder must raise any issues he or she has with the draft within 21 days. After that time he or she is deemed to have accepted the draft.⁷⁰⁶ The completion date may be fixed by either party giving written notice to the other. This date will be the first working day after four weeks from the giving of the notice.⁷⁰⁷ This notice may be served after the time for approval of the draft lease. The conditions in the Regulations also provide for the extension of time limits and the service of default notices on a party who has failed to meet its obligations, as well as other matters matching those in the procedure for acquiring the freehold under the 1967 Act.⁷⁰⁸

Mortgages

10.43 Where a lease extension is to be binding on the landlord's mortgagee,⁷⁰⁹ evidence of the consent of the mortgagee does not need to be lodged with HM Land Registry. In

⁷⁰⁰ See para 10.22 above.

⁷⁰¹ The conditions are found in the Leasehold Reform (Enfranchisement and Extension) Regulations 1967 (SI 1967 No 1879), sch, Pt 2 (the "1967 regs").

⁷⁰² 1967 regs, sch, Pt 2, condition 2(1).

⁷⁰³ 1967 regs, sch, Pt 2, condition 2(2).

⁷⁰⁴ 1967 regs, sch, Pt 2, condition 2(4).

⁷⁰⁵ 1967 regs, sch, Pt 2, condition 3(1).

⁷⁰⁶ 1967 regs, sch, Pt 2, condition 3(2).

⁷⁰⁷ 1967 regs, sch, Pt 2, condition 4(1).

⁷⁰⁸ 1967 regs, sch, Pt 2, conditions 5 to 8.

⁷⁰⁹ See Ch 4 at para 4.16.

most cases, however, the landlord is required to give his or her mortgagee the counterpart to the lease extension within one month of completion.⁷¹⁰

10.44 The extended term is conferred on the leaseholder by way of the grant of a new, longer lease in substitution for the existing lease. The authors of *Hague* suggest that the 1967 Act operates to substitute the new lease for the old lease as security for any mortgage then secured over the old lease.⁷¹¹ HM Land Registry, however, requires evidence of the discharge of the existing mortgage together with any new deed of mortgage, or a deed of substituted security.⁷¹² In most cases, the leaseholder will also be required to give the lease extension to his or her mortgagee within one month of its grant.

Termination or withdrawal of a claim

Agreed withdrawal

10.45 As noted above, although the service of a notice of claim creates a statutory contract between the parties for the grant of a lease extension, this does not prevent the parties from subsequently agreeing that the notice of claim shall cease to be binding.⁷¹³ Such an agreement can be express, or inferred from the conduct of the parties.

Deemed withdrawal under the 1967 Act

10.46 As noted above, a notice of claim will be deemed withdrawn if the lease that is to be renewed is assigned without the benefit of the notice.⁷¹⁴ In addition, a notice of claim for a lease extension will cease to have effect if the leaseholder subsequently gives notice of his or her intention to have the freehold of the house.⁷¹⁵

ACQUIRING THE FREEHOLD OF HOUSES

Notices

10.47 A leaseholder who is seeking to acquire the freehold to his or her house must serve a written notice.⁷¹⁶ The particulars that are to be inserted in that notice are the same as are required in respect of a notice served by a leaseholder who is seeking to acquire a lease extension of his or her house.⁷¹⁷ Indeed, the notice must be given in the same prescribed form as is used in such a claim for a lease extension.⁷¹⁸ We again refer to this notice as a “notice of claim”.⁷¹⁹

⁷¹⁰ 1967 Act, s 14(5).

⁷¹¹ *Hague*, para 7-59.

⁷¹² Land Registry, *Practice Guide 27*, at 9.7.2.

⁷¹³ See para 10.22 above.

⁷¹⁴ 1993 Act, s 43(4), and see para 10.30 above.

⁷¹⁵ 1967 Act, s 5(8).

⁷¹⁶ 1967 Act, s 8(1).

⁷¹⁷ See para 10.4 above.

⁷¹⁸ See para 10.5 above. In either case, the prescribed form requires the leaseholder to select whether he or she is applying for a lease extension or for the freehold to the house.

⁷¹⁹ The notice is generally referred to as a notice of tenant's claim.

10.48 The position in respect of savings provisions and the signature of notices of claim is as stated in respect of claims for a lease extension of a house at paragraphs 10.01 to 10.10 above.

10.49 Furthermore, the position in respect of the service of a notice in response by the landlord is also the same as stated in respect of lease extension claims at paragraphs 10.11 to 10.13 above. We again refer to the former notice as a “counter-notice”. This counter-notice must be in the same prescribed form as that in a lease extension claim. However, the prescribed form does require the landlord to provide some particulars that apply only in respect of a claim for the freehold of the house, such as the statutory basis on which the price for the freehold is to be valued.⁷²⁰

Service of notices

10.50 The time for service of a notice of claim in respect of a claim for the freehold of a house is the same as regards a claim for a lease extension.⁷²¹

10.51 A notice of claim in respect of a claim for the freehold of a house must also be served on the reversioner. The mode of service of a notice of claim in respect of the freehold of a house is the same as applies in a lease extension claim.⁷²²

Effects of serving a notice

10.52 The service of a notice of claim in respect of the freehold of a house has the same effects as the service of a notice of claim in respect of lease extension.⁷²³

Procedure for resolving disputed claims

10.53 The procedure for resolving a disputed claim in respect of the freehold of a house is the same as applies in respect of a claim for a lease extension.⁷²⁴

Particular types of landlord

Missing landlords

10.54 In contrast to the position in a lease extension claim, a leaseholder who wishes to acquire the freehold of his or her house, but cannot find or cannot identify the person who should be served with the notice of claim, may apply to the court for an order transferring the house to the leaseholder.⁷²⁵ Leaseholders must show both that they are entitled to acquire the freehold and that they are unable to serve the notice of claim on the missing landlord.

⁷²⁰ The statutory bases for valuation of the freehold are considered in Ch 14.

⁷²¹ See paras 10.14 and 10.15 above.

⁷²² See paras 10.19 and 10.20 above.

⁷²³ See paras 10.21 to 10.30 above.

⁷²⁴ See paras 10.38 and 10.39 above.

⁷²⁵ 1967 Act, s 27(1).

10.55 The court may give directions relating to advertising to try to locate the landlord.⁷²⁶ If the landlord is found prior to the transfer of the house, the landlord will be treated as having been served with a notice of claim at the date of the application. The court will give such directions to the parties as it thinks fit.

10.56 The form and content of the transfer, and any outstanding rent payable up to the date of the transfer will be determined by the court. The price to be paid for the freehold will be determined by the Tribunal. Once these sums have been paid into court, the conveyance can be executed in accordance with the court's order.⁷²⁷

10.57 The 1967 Act does not set out what is to happen in the event that the landlord is found after the transfer of the freehold.

Insolvent, deceased, or incapacitated landlords

10.58 The position in respect of insolvent, deceased, or incapacitated landlords is the same in respect of a claim for the freehold of a house as it is in respect of a claim for a lease extension.⁷²⁸

Recalcitrant landlords

10.59 As noted above,⁷²⁹ the 1967 Act does not contain any provisions dealing specifically with landlords who are uncooperative or deliberately obstructive. However, in a claim for the freehold of a house (but not for a lease extension) a missing landlord claim can be raised as an alternative within an application to the county court where service of a notice of claim has been attempted, but the landlord is actively avoiding being served.

Completing a claim

10.60 Various conditions are incorporated into the statutory contract created by the service of a notice of claim.⁷³⁰

10.61 The leaseholder must prepare the conveyance.⁷³¹ If it is to contain any restrictive covenant and the leaseholder intends to execute a mortgage or convey any interest to a third party, he or she must inform the landlord of this intention. If necessary, the landlord must be allowed time to register the covenants at least 14 days before completion.⁷³²

⁷²⁶ 1967 Act, s 27(2).

⁷²⁷ Payments into court where the landlord is not present to accept them are made to the Court Funds Office. The funds are then held for 20 years, following which they will revert to the Crown. Landlords with entitlements to sums so held must make an application to the Office before they are released (along with any interest that has accrued). Leaseholders may also make claims against these funds.

⁷²⁸ See paras 10.32 to 10.36 above.

⁷²⁹ See para 10.37 above.

⁷³⁰ As with lease extension claims, the conditions in respect of freehold acquisition claims are found in the 1967 regs.

⁷³¹ 1967 regs, sch, Pt 1, condition 9(1).

⁷³² 1967 regs, sch, Pt 1, condition 9(3).

10.62 The completion date is set by either party serving of a notice on the other requiring completion. The completion date is the first working day after the expiration of four weeks from the giving of the notice.⁷³³

10.63 If either party defaults on his or her obligations during the completion of the claim, the non-defaulting party may serve at least two months' notice on the defaulting party. This notice must specify the default and require it to be remedied before the expiration of the notice.⁷³⁴

- (1) if the leaseholder defaults on this notice, the contract is discharged and the landlord can forfeit the deposit;⁷³⁵
- (2) if the landlord defaults on this notice, the contract is discharged, the leaseholder is released from the obligation to pay the landlord's costs and the deposit is returnable.⁷³⁶

10.64 Time limits for completion may be extended in the following instances:

- (1) where the leaseholder is a sub-lessee, the reversioner may require that any period affecting the landlord is doubled;⁷³⁷
- (2) where court or tribunal proceedings take place;⁷³⁸ or
- (3) in the event of the death or mental incapacity of either party.⁷³⁹

Mortgages

10.65 As noted in Chapter 5,⁷⁴⁰ evidence of discharge of a mortgage of the landlord's title will need to be provided unless the purchase price is paid to the mortgagee or into court. A leaseholder will be required to pay the purchase money into court where the landlord or mortgagee gives the leaseholder written notice to do so,⁷⁴¹ where the landlord is bankrupt or in liquidation,⁷⁴² or where the leaseholder has been given written notice that steps have been taken to enforce the mortgage.⁷⁴³ A leaseholder may pay the purchase price (or such lesser sum as is required to clear the mortgage) where the amount

⁷³³ 1967 regs, sch, Pt 1, condition 6(1).

⁷³⁴ 1967 regs, sch, Pt 1, condition 10(1).

⁷³⁵ 1967 regs, sch, Pt 1, condition 10(2).

⁷³⁶ 1967 regs, sch, Pt 1, condition 10(3).

⁷³⁷ 1967 regs, sch, Pt 1, Condition 13(1). Other than complying with a default notice under condition 10.

⁷³⁸ 1967 regs, sch, Pt 1, condition 13(2).

⁷³⁹ 1967 regs, sch, Pt 1, condition 13(3).

⁷⁴⁰ See Ch 5 at para 5.8.

⁷⁴¹ 1967 Act, s 36.

⁷⁴² 1967 Act, s 13(3).

⁷⁴³ For example, by the appointment of a receiver or the issuing court proceedings: 1967 Act, s 13(3)(b).

outstanding under the mortgage cannot be ascertained,⁷⁴⁴ or where difficulties arise in making payment to the mortgagee.⁷⁴⁵

Termination or withdrawal of a claim

10.66 The position in respect of express or deemed withdrawal of a notice of claim in respect of claims for the freehold of a house is the same as regards lease extension claims.⁷⁴⁶

LEASE EXTENSIONS OF FLATS

Notices

10.67 In many respects, the 1993 Act's approach to notices differs dramatically from the 1967 Act: for instance, there are currently no prescribed forms,⁷⁴⁷ and the consequences of failure to serve a counter-notice in time can be severe. However, its starting point is similar.

Leaseholder's notice

10.68 A leaseholder of a flat wishing to exercise the right to a lease extension must give his or her landlord a written notice.⁷⁴⁸ We refer to this notice as a notice of claim.⁷⁴⁹ Various particulars are required to be included in a notice of claim, including the name and address of the leaseholder and the relevant flat, and the proposed purchase price.⁷⁵⁰ Furthermore, the notice of claim must specify the date by which the landlord must reply.⁷⁵¹ These requirements are set out in full at Appendix 2.

10.69 There are saving provisions for notices of claim in lease extension claims which, in many ways, mirror the saving provision for notices of claim in respect of houses.⁷⁵² A notice of claim for a lease extension of a flat shall not be invalidated "by any inaccuracy in any of the particulars required... or by any misdescription of any of the property to which the claim extends".⁷⁵³ The approach to the 1993 Act's saving provisions has generally been the same as that under the 1967 Act, including that they extend only to the details required to be provided to show that the leaseholder or leaseholders qualify

⁷⁴⁴ 1967 Act, s 13(1)(a).

⁷⁴⁵ For example, where the mortgagee cannot be found or ascertained, the mortgagee refuses to take steps reasonably required to enable the outstanding sum to be ascertained or paid, or where the tender of the sum cannot be made either at all, or without the leaseholder incurring unreasonable costs or delay: 1967 Act, s 13(1)(b) and (2).

⁷⁴⁶ See paras 10.45 and 10.46 above.

⁷⁴⁷ All notices must, however, be in writing: 1993 Act, s 99(1)(a).

⁷⁴⁸ 1993 Act, s 42.

⁷⁴⁹ The 1993 Act refers to this notice as a "tenant's notice". In practice, this notice is generally referred to as a "section 42 notice".

⁷⁵⁰ 1993 Act, s 42(3). The analysis in para 10.111 below, regarding the proposed purchase price in respect of collective enfranchisement claims, applies equally to individual lease extension claims.

⁷⁵¹ 1993 Act, s 42(3)(f) and (5).

⁷⁵² Considered above at paras 10.7 to 10.8.

⁷⁵³ 1993 Act, sch 12, para 9. Additionally, there are similar provisions in the 1993 Act allowing amendment to a notice of claim (para 9(2) of sch 12) as there are in the 1967 Act, considered at para 10.9 above.

for enfranchisement rights.⁷⁵⁴ However, there is one significant difference between the 1967 Act and the 1993 Act in this regard: a single omission of a particular in the prescribed form under the 1967 Act might not be fatal to the notice of claim in respect of a house, whereas an omission of a particular under the 1993 Act will invalidate a notice of claim for a lease extension of a flat.⁷⁵⁵

10.70 Notices of claim must be signed. It was initially the case that these types of notices had to be signed personally by the leaseholder giving them.⁷⁵⁶ That position has now been modified, and the notices can be signed either by or on behalf of the leaseholder.⁷⁵⁷ As is the case under the 1967 Act, joint leaseholders must all sign (or each have the notice signed on their behalf), as it is only together that they constitute a leaseholder.⁷⁵⁸

Landlord's notice

10.71 A landlord who has received the notice of claim must respond by serving his or her own written notice in reply.⁷⁵⁹ We refer to that notice as a counter-notice.⁷⁶⁰ Certain details must be included in a counter-notice: for example, an address for any further notices to be given to the landlord must be provided.⁷⁶¹

10.72 A counter-notice must admit the claim to a lease extension, deny it, or admit or deny it but make a statement about the landlord's intention to apply to defeat the lease extension claim on the grounds of redevelopment.⁷⁶² When the counter-notice admits the claim, each of the individual proposals made in the notice of claim must be admitted or denied; if any proposals are denied, a counter-proposal must be made to each individually.⁷⁶³

10.73 A counter-notice must be given by the date specified in the leaseholder's notice of claim. Unlike the 1967 Act, failure to reply in time can have serious consequences for the landlord: the leaseholder is entitled to a grant of a lease extension on the terms

⁷⁵⁴ In other words, the saving provisions are relevant to details required by s 42(3), but not to elements outside those sections, such as the leaseholder's proposals. Inaccuracies as to matters not falling within the saving provisions might instead be assisted by the application of the "reasonable recipient" test from *Mannai* considered at fn 632 above: *John Lyon's Free Grammar School v Secchi* [2000] L & TR 308.

⁷⁵⁵ In *Hague*, it is suggested that this variation between the Acts arises due to a difference of wording (para 25-19). The 1967 Act states that a notice of claim will not be invalidated by "any inaccuracy in the particulars"; but the 1993 Act states invalidity will not arise by "any inaccuracy in any of the particulars".

⁷⁵⁶ 1993 Act, s 99(5)(a) as originally enacted.

⁷⁵⁷ 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.

⁷⁵⁸ 1993 Act, s 5(4)(b) (engaged in the context of lease extension claims by s 39(3)(a)).

⁷⁵⁹ 1993 Act, s 45.

⁷⁶⁰ The 1993 Act also refers to these notices as "counter-notices".

⁷⁶¹ 1993 Act, ss 21(6) and 45(4).

⁷⁶² 1993 Act, s 45(2). Failure to make one of these three choices renders the counter-notice invalid: *Burman v Mount Cook Land Ltd* [2001] EWCA Civ 1712, [2002] Ch 256.

⁷⁶³ 1993 Act, s 45(3).

(including the price) proposed in the notice of claim.⁷⁶⁴ This is only possible, of course, where the claim is otherwise valid; the landlord who has omitted to serve a counter-notice may therefore seek to contest whether he or she was served with the notice, whether that notice was valid, and whether the leaseholder was entitled to a lease extension.

Other notices

10.74 A leaseholder who wishes to acquire a lease extension under the 1993 Act may first serve an information notice on his or her immediate landlord (or someone receiving rent on that landlord's behalf).⁷⁶⁵ The main purpose of such notices is to provide the leaseholder with the information he or she will need in order to ensure that the notice of claim is directed to the correct person.⁷⁶⁶

10.75 An information notice requires the recipient to provide information about the freeholder, the duration of the leasehold interest of the immediate landlord (if he or she is not the freeholder), and the names and addresses of persons with superior interests to that of the leaseholder: "intermediate landlords".⁷⁶⁷ Where the immediate landlord is not the freeholder, a leaseholder can serve further notices, either on the immediate landlord asking for the information regarding intermediate leaseholders referred to above, or on the intermediate landlord him or herself requiring particulars about their leasehold interest.⁷⁶⁸

10.76 A time limit of 28 days applies for the recipient of an information notice to respond.⁷⁶⁹ He or she is, however, only required to provide information "so far as [it is] known to the recipient". Where a landlord replies to an information notice notifying the leaseholder of his or her interest, failure to serve a copy of the notice of claim on that landlord will result in that notice ceasing to have effect at the end of the time limit specified in it.⁷⁷⁰

Service of notices

To whom must the notice of claim be given?

10.77 The leaseholder must give the notice of claim to the "competent landlord".⁷⁷¹ The competent landlord is the landlord who holds the freehold, or a lease that is superior to the leaseholder's lease and the term of which is long enough to grant a lease extension

⁷⁶⁴ 1993 Act, s 49(1), and *Willingale v Globalgrange Ltd* [2001] 33 HLR 17, considered below at fn 828.

⁷⁶⁵ 1993 Act, s 41.

⁷⁶⁶ An information notice can also serve other purposes. In particular, recipients of an information notice come under an obligation to state whether they have already received a notice of claim (or a copy thereof) regarding a collective enfranchisement claim under the 1993 Act, if that claim is still current.

⁷⁶⁷ 1993 Act, s 41(1) and (2). Intermediate landlords are considered in Ch 16.

⁷⁶⁸ 1993 Act, s 41(3).

⁷⁶⁹ 1993 Act, s 41(6).

⁷⁷⁰ 1993 Act, sch 11, para 4(1).

⁷⁷¹ 1993 Act, s 42(2)(a).

to the leaseholder.⁷⁷² Where more than one landlord satisfies this test, the landlord's interest that is closest to the leaseholder's interest will be the competent landlord.⁷⁷³

10.78 However, where the leaseholder's immediate landlord is not also the competent landlord,⁷⁷⁴ a notice of claim that has been given to a landlord who is not the competent landlord (that is, "other landlord") will be treated as having been given to the competent landlord.⁷⁷⁵ Whether the notice of claim has been given to a competent landlord or to one of the other landlords, the leaseholder will be required to give copies of the notice to every person whom he knows or believes to be either the competent landlord or one of the other landlords.⁷⁷⁶ He or she must also record on the notice the people to whom copies are to be given.⁷⁷⁷ Recipients of such notices or copies of notices are similarly required to provide copies to landlords who are not noted as having already received a notice or a copy, and to add their name to the list of recipients.⁷⁷⁸ In addition, if a recipient considers himself or herself to be the competent landlord, he or she must notify the leaseholders and other landlords accordingly. Any leaseholder or landlord who does not comply with these obligations will be liable for any loss that results.⁷⁷⁹

10.79 At the end of this process, the competent landlord should have been identified. He or she will then conduct all proceedings arising out of the notice of claim on behalf of other intermediate landlords.⁷⁸⁰ Any counter-notice given by the competent landlord, agreement between the leaseholder and the competent landlord, and any determination of the court or Tribunal will be binding on the other landlords.⁷⁸¹ Any other landlord may, however, be separately represented in any legal proceedings.⁷⁸²

10.80 In addition, the leaseholder must also give a notice of claim (rather than a copy) to any third party to the leaseholder's lease.⁷⁸³ Until the third party is served with the notice of claim, the notice is treated as not having been given.⁷⁸⁴

⁷⁷² 1993 Act, s 40(1) and (4)(b).

⁷⁷³ See also Ch 16.

⁷⁷⁴ That is, where the immediate landlord is not the freeholder, and does not hold a sufficient term to grant a lease extension to the leaseholder.

⁷⁷⁵ 1993 Act, sch 11, para 1.

⁷⁷⁶ 1993 Act, sch 11, para 2(1) and (2).

⁷⁷⁷ 1993 Act, sch 11, para 2(3).

⁷⁷⁸ 1993 Act, sch 11, para 3.

⁷⁷⁹ 1993 Act, sch 11, para 4.

⁷⁸⁰ 1993 Act, s 40(4)(c).

⁷⁸¹ A competent landlord who acts in good faith and with reasonable diligence shall not be liable for any loss caused to any other landlord: 1993 Act, sch 11, para 6(4).

⁷⁸² 1993 Act, sch 11, para 7. The other landlords are also able to apply to the court for directions as to how the competent landlord should act: 1993 Act, sch 11, para 6(1).

⁷⁸³ 1993 Act, s 42(2)(b). For example, a management company made a party to the lease and covenanting to carry out the landlord's management obligations.

⁷⁸⁴ *John Lyon's Free Grammar School v Secchi* [2000] 32 HLR 820; *Hague*, para 30-06.

Mode of service

10.81 A notice of claim can be sent by post.⁷⁸⁵ Service can be effected at an address that has been given by the landlord as an address for service of an enfranchisement claim under the 1993 Act.⁷⁸⁶ The 1993 Act also permits service of a notice of claim at certain addresses supplied to the leaseholder under the Landlord and Tenant Act 1987.⁷⁸⁷ Notices sent by post are presumed to have been delivered unless the contrary is proved.⁷⁸⁸ As such, it remains open for a landlord to defeat a claim for a lease extension by arguing that he or she did not in fact receive the leaseholder's notice of claim.

10.82 The Landlord and Tenant Act 1987 only makes provision for service at postal addresses, and does not deal with other forms of communication. It has been held that a notice of claim cannot be served by fax⁷⁸⁹ but can be served by email.⁷⁹⁰ It has also been held that a counter-notice cannot be served by fax on the basis that such service is not "in writing".⁷⁹¹

Split reversions

10.83 In contrast to the position in respect of collective enfranchisement claims,⁷⁹² the 1993 Act makes no provision that allows a lease extension claim to include property that is let to the leaseholder by a separate landlord.⁷⁹³ For example, if a garden is let to the leaseholder under a separate lease with a separate landlord, the leaseholder will not be able to include the garden in his or her lease extension claim.⁷⁹⁴

Effects of serving a notice

Contractual effect

10.84 The service of a notice of claim creates a statutory contract.⁷⁹⁵ In the event of any default in carrying out the obligations that arise from the service of the notice, the other party

⁷⁸⁵ 1993 Act, s 99(1)(b).

⁷⁸⁶ 1993 Act, s 99(2).

⁷⁸⁷ 1993 Act, s 99(3). Particulars of these provisions are set out at para 10.20 above.

⁷⁸⁸ 1993 Act, s 99(1)(b), engaging s 7 of the Interpretation Act 1978: where a document is served by post, service is deemed to have been effected by properly addressing, pre-paying and posting the document. It is possible for the would-be recipient to prove the contrary, however, and this would mean the document had not been served.

⁷⁸⁹ *Stoll Construction Limited v Kelly* (3 November 2000) Brentford county court (unreported).

⁷⁹⁰ *Achieving Perfection Limited v Gray* (18 May 2015) Brighton county court (unreported).

⁷⁹¹ 1993 Act, s 99. *Cowthorpe Road 1-1A freehold Limited v Wahedally* (16 February 2016) Central London county court (unreported).

⁷⁹² See para 10.132 below.

⁷⁹³ 1993 Act, s 7(6) allows a lease of the flat (or a part of it), and a separate lease (or leases) of either a part of the flat or appurtenant property only, to be treated as a single long lease where those leases have the same landlord and leaseholder.

⁷⁹⁴ This problem does not apply if the garden is let by a separate landlord under the same lease.

⁷⁹⁵ 1993 Act, s 43(1). The same is true of a notice of claim under the 1967 Act, whether in respect of a lease extension or the freehold. However, as noted at para 10.127 below, a notice of claim in the case of collective enfranchisement under the 1993 Act has no such contractual effect.

will have the same rights and remedies that would be available had the contract been freely entered into.⁷⁹⁶

Lease continuation

10.85 The service of a notice of claim prevents the leaseholder's lease terminating during the currency of the claim and for three months afterwards, whether because the term of the lease has expired, a notice to quit has been given, or a superior lease has been terminated.⁷⁹⁷

On other notices affecting the lease

10.86 Once a notice of claim has been served, provided it remains valid, a further notice of claim for a lease extension of a flat cannot be served in respect of the same flat.⁷⁹⁸ Where the original notice is withdrawn, or deemed to have been withdrawn, the prohibition on giving a fresh notice extends for 12 months after the withdrawal.⁷⁹⁹ This prohibition will not apply, however, where the original notice of claim was deemed to have been invalid.⁸⁰⁰

10.87 A notice of claim will render a landlord's notice to terminate the lease invalid where:

- (1) the notice of claim is served within two months of the termination notice,⁸⁰¹ or
- (2) the termination notice is served during the currency of the claim.⁸⁰²

If it transpires that the notice of claim is invalid, the landlord may serve another notice on the leaseholder.⁸⁰³

10.88 No claim for possession of a flat on the grounds of forfeiture may be brought after a notice of claim has been served in respect of that flat unless the court grants the landlord permission to do so.⁸⁰⁴ Permission will only be granted where the notice was given solely or mainly for the purpose of avoiding the consequences of the breach of the terms of the leaseholder's lease.⁸⁰⁵

⁷⁹⁶ 1993 Act, s 43(4).

⁷⁹⁷ 1993 Act, sch 12, para 5(1).

⁷⁹⁸ 1993 Act, s 42(6).

⁷⁹⁹ 1993 Act, s 42(7).

⁸⁰⁰ *Poets Chase Freehold Co Limited v Sinclair Gardens Investments (Kensington) Limited* [2007] EWHC 1776 (Ch), [2008] 1 WLR 768.

⁸⁰¹ 1993 Act, sch 12, para 2(3). Outside that two-month limit, it is the notice of claim and not the termination notice that is rendered invalid: 1993 Act, sch 12, para 2(1).

⁸⁰² 1993 Act, sch 12, para 4.

⁸⁰³ 1993 Act, sch 12, para 2.

⁸⁰⁴ 1993 Act, sch 12, para 6.

⁸⁰⁵ 1993 Act, sch 12, para 6. If, however, the forfeiture proceedings were already pending, the s 42 notice of claim was invalid unless given with the permission of the court: 1993 Act, sch 12, para 3(2).

10.89 In contrast, where a landlord has already made a claim for possession of a property on the grounds of forfeiture, the leaseholder will only be able to give a valid notice of claim with the court's permission.⁸⁰⁶

Landlord's rights

10.90 A landlord who has been served with a notice of claim has a number of rights in the period of two months before he or she is obliged to serve a counter-notice:

- (1) the landlord and his or her agents have a right of access to the flat to obtain a valuation;⁸⁰⁷
- (2) the landlord may give notice to the leaseholder that he or she is obliged to pay a deposit on account of the premium;⁸⁰⁸ and
- (3) the landlord may notify the leaseholder that he or she is required to deduce title to the lease within 21 days of service of the notice of claim.⁸⁰⁹

Registration

10.91 Notices of claim are registrable under the Land Charges Act 1972 or can be made the subject of a notice under the Land Registration Act 2002.⁸¹⁰ The effect of such registration is that a prospective purchaser of the landlord's interest will have notice of the pending claim, and be bound by the notice if he or she acquires that interest.

Assignment of benefit of a notice

10.92 As in the case of a notice of claim for a house served under the 1967 Act, a notice of claim for a lease extension under the 1993 Act can only be assigned with the lease itself.⁸¹¹ This requirement has caused difficulties for leaseholders hoping to sell their flats with the benefit of a notice of claim for a lease extension of the flat.

Particular types of landlord

Missing landlords

10.93 In some cases, a leaseholder who wishes to bring a claim for a lease extension will discover that he or she cannot find, or cannot identify, one or more of the persons he or she is required to serve with the notice of claim, or a copy of that notice.

⁸⁰⁶ 1993 Act, sch 12, para 3(2). The test for granting permission is the same as applies where a landlord is seeking permission to bring a possession claim on such grounds: see para 10.88 above.

⁸⁰⁷ 1993 Act, s 44. The landlord must give reasonable notice before exercising the right to access; s 44(2) provides that this must be no less than three days.

⁸⁰⁸ Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations SI 1993 No 2407 (the "1993 regs"), sch 2, para 2.

⁸⁰⁹ 1993 regs, sch 2, para 4.

⁸¹⁰ 1993 Act, s 97(1).

⁸¹¹ 1993 Act, s 43(3). Where the lease is assigned without the benefit of a notice, the notice will be deemed to have been withdrawn.

- 10.94 Where the leaseholder's competent landlord cannot be found or cannot be identified, the leaseholder may apply to the court for a vesting order.⁸¹² The court shall only make the order if satisfied that the leaseholder was, at the date of the application, entitled to a lease extension.⁸¹³ The effect of that order is that the leaseholder's existing lease is surrendered, and he or she is granted a lease extension on terms that will be determined by the Tribunal.⁸¹⁴ But if the competent landlord is located before the lease extension is executed, the rights and obligations of the parties will be as if the leaseholder had given a notice of claim to the competent landlord, and the court will give further directions.⁸¹⁵
- 10.95 Where it is only one of the "other landlords" on whom a copy of the notice of claim is required to be served who cannot be found or identified, the court may simply dispense with the need to do so.⁸¹⁶ Any notice of claim served subsequently must contain a statement reflecting the terms of the dispensing order made.
- 10.96 Before either a vesting order or an order dispensing with service on one of the other landlords is made, the court may require the leaseholder to "take such further steps by way of advertisement or otherwise as the court thinks proper for the purpose of tracing the person in question".⁸¹⁷
- 10.97 The 1993 Act does not state what ought to happen where the landlord is located after a lease extension has been granted pursuant to the vesting order. It is unclear whether, in addition to applying to the court to release the funds held for him or her, the landlord is also entitled to dispute the legitimacy of the leaseholder's application or the terms of the transaction.⁸¹⁸

Insolvent, deceased and incapacitated landlords

- 10.98 The position in respect of insolvent, deceased and incapacitated landlords of a leaseholder seeking a lease extension for a flat is substantively the same at that set out above in respect of claims for a lease extension of a house.⁸¹⁹

⁸¹² 1993 Act, s 50(1).

⁸¹³ 1993 Act, s 50(3).

⁸¹⁴ 1993 Act, s 51(1). As such, while the application is made to the county court, the terms of the lease extension must be settled by the Tribunal before a final order is made by the county court. That final order will, among other things, require the premium to be paid by the leaseholder to the landlord to be paid into court.

⁸¹⁵ 1993 Act, s 50(4).

⁸¹⁶ 1993 Act, s 50(2). There is no power to dispense with the service of a notice on a third party to a lease.

⁸¹⁷ 1993 Act, s 50(4).

⁸¹⁸ In *Trumros Ltd v Khan* [2008] PLSCS 78, a landlord's application to set aside the transaction was dismissed on the basis of the delay between the discovery of the transaction and the application. However, the court indicated that, even if the application had been made promptly, it would likely have failed because the leaseholders had made adequate enquiries.

⁸¹⁹ See paras 10.32 to 10.36 above.

Recalcitrant landlords

10.99 The 1993 Act does not contain any provisions dealing specifically with landlords who are uncooperative or deliberately obstructive. There are, however, a number of provisions which may be used by leaseholders of flats whose efforts to obtain lease extensions are being frustrated by a recalcitrant landlord.

- (1) Missing landlord claims can be asserted in the alternative within an application to the court where service of the notice of claim has been attempted but the landlord is actively avoiding being served.
- (2) Default notices and enforcement orders can be made if the landlord refuses to comply with a preliminary information notice.⁸²⁰
- (3) Leaseholders are entitled to acquire a lease extension on the terms stated in their notice of claim if the landlord fails to engage with the procedure and omits to serve a counter-notice.

Procedure for resolving disputed claims

10.100 Where the landlord denies the claim in his or her counter-notice, he or she must apply to the court within two months of doing so to seek a declaration that the leaseholder has “no right... to acquire a new lease of his flat”.⁸²¹

- (1) If the landlord fails to make the requisite application within the two-month limit, or withdraws the application once made, the claim proceeds as if no counter-notice had been given: the leaseholder is entitled to a lease extension on the terms proposed in his or her notice of claim.⁸²²
- (2) If the landlord makes the application and it is decided in his or her favour, the notice of claim ceases to have effect.⁸²³
- (3) If the landlord makes the application, but it is decided in the leaseholder’s favour, the court must make an order declaring that the counter-notice was of no effect and requiring a further counter-notice to be served by a certain date.⁸²⁴

10.101 If a landlord admits the leaseholder’s claim for a lease extension, but does not accept the terms proposed in the notice of claim – for example, the proposed price, or other terms of any lease extension – either landlord or leaseholder may apply to the Tribunal

⁸²⁰ 1993 Act, s 92.

⁸²¹ 1993 Act, s 46(1) and (2).

⁸²² 1993 Act, s 46(2). See also s 49, and *Willingale v Globalgrange Ltd* [2001] 33 HLR 17, considered below at fn 828.

⁸²³ The 1993 Act, s 46(3).

⁸²⁴ The 1993 Act, s 46(4).

for the determination of the matters in dispute.⁸²⁵ That application must be made no later than 6 months after the counter-notice was given.⁸²⁶

10.102 If a landlord disputes the validity of the notice of claim (as opposed to simply denying the leaseholder's right to a lease extension, or the proposed terms) he or she will normally be advised to serve a counter-notice together with a letter stating that it is served without prejudice to the landlord's contention that the notice is not valid. The landlord is then able to issue a claim in the county court for a declaration that the notice of claim is not valid.⁸²⁷

10.103 In the event that the landlord failed to give a valid counter-notice within the required period, the leaseholder is entitled to apply to the court for an order that he or she be granted a lease extension on the terms set out in the notice of claim.⁸²⁸ Such an application must be made no later than six months after the date on which the counter-notice was required to be given.⁸²⁹ Where such an order has been made, either party may then apply to the court for an order giving effect to that order if the lease extension has not been entered into within two months of the order becoming final, or such other period fixed by the court when making that order.⁸³⁰ Such an application must be made within two months of that same date.⁸³¹

Completing a claim

10.104 Once the terms of a lease extension have been agreed or determined by the Tribunal,⁸³² the landlord must prepare the lease and serve it on the leaseholder within 14 days.⁸³³ The leaseholder has a further 14 days to make any amendments, after which point he or she will be deemed to have approved it.⁸³⁴ The landlord then has 14 more

⁸²⁵ 1993 Act, s 48(1).

⁸²⁶ 1993 Act, s 48(2).

⁸²⁷ 1993 Act, s 90(2), which grants the court a residual jurisdiction to deal with matters arising under the 1993 Act. Alternatively, the landlord may simply raise validity of the notice as a defence to a leaseholder's application to the Tribunal as set out at para 10.101 above. The Tribunal will then stay the leaseholder's application and give the landlord a period in which an application to the county court must be made.

⁸²⁸ 1993 Act, s 49(1). Despite the apparently permissive terms of that section, the Court of Appeal has held (in relation to the equivalent provision for a collective enfranchisement claim: 1993 Act, s 25) that the court has no discretion as to the terms if the leaseholder shows that he or she had a right to acquire a lease extension, and that the notice has been properly served: *Willingale v Globalgrange Ltd* [2001] 33 HLR 17. Although it has been asserted (see *Woodfall on Landlord and Tenant Service*, Bulletin No. 1, January 2008) that the *Willingale* constitutes a breach of Article 1 of the First Protocol on the basis that it is a disproportionate interference with peaceful enjoyment of one's property to be unable to challenge the enfranchisement premium, this line of argument has not been accepted by the courts.

⁸²⁹ 1993 Act, s 49(3).

⁸³⁰ 1993 Act, s 49(4).

⁸³¹ 1993 Act, s 49(6).

⁸³² See para 10.101 above.

⁸³³ 1993 regs, sch 2, para 7(1).

⁸³⁴ 1993 regs, sch 2, paras 7(2) and (3).

days in which to make further amendments, with his or her consent to those proposed by the leaseholder being presumed in the absence of a response.⁸³⁵

10.105 Either party may serve a notice to complete on the first working day after 21 days beginning with the date of service of the notice, once the draft lease is approved or deemed approved.⁸³⁶ However, the completion date may not be outside of the “appropriate period”. This period is two months after the terms have been agreed by the parties,⁸³⁷ or from the date the decision of the tribunal fixing the terms becomes final.⁸³⁸ If the lease has not been entered into by the end of the “appropriate period”, either party may apply to the county court for an order of specific performance or else discharge of obligations arising from the notice of claim.⁸³⁹ The landlord is obliged to notify any landlord who has served a notice of acting independently of the date of completion as soon as is possible.⁸⁴⁰

Mortgages

10.106 As noted in Chapter 4,⁸⁴¹ a leaseholder is not required to obtain the consent of his or her landlord’s mortgagee to the grant of a lease extension. Further, in contrast to the position under the 1967 Act, the lease extension will take effect subject to any mortgage over the existing lease.⁸⁴² A deed of substitution is not, therefore, required.⁸⁴³

10.107 However, the landlord is usually required to give his or her mortgagee the counterpart to the lease extension within one month of its grant.⁸⁴⁴ The leaseholder is also usually required to give the lease extension to his or her mortgagee within one month of its registration.⁸⁴⁵

Termination or withdrawal of claim

Express withdrawal

10.108 A leaseholder may serve notice of his or her withdrawal of a notice of claim at any point prior to the lease extension being entered into.⁸⁴⁶ The notice must be served on the

⁸³⁵ 1993 regs, sch 2, paras 7(4) and (5).

⁸³⁶ 1993 regs, sch 2, para 8(1).

⁸³⁷ 1993 Act, s 48(6)(a).

⁸³⁸ 1993 Act, s 101(9).

⁸³⁹ 1993 Act, s 48(3).

⁸⁴⁰ 1993 regs, sch 2, para 8(3).

⁸⁴¹ See Ch 4 at para 4.16.

⁸⁴² 1993 Act, s 58(4).

⁸⁴³ HM Land Registry will automatically register the charge against the title to the lease extension.

⁸⁴⁴ 1993 Act, s 58(3).

⁸⁴⁵ 1993 Act, s 58(5) and (6).

⁸⁴⁶ 1993 Act, s 52(1).

competent landlord, every intermediate landlord and any third party to the existing lease.⁸⁴⁷

Deemed withdrawal

10.109 A notice of claim will be deemed to have been withdrawn if:

- (1) no application to determine the terms of acquisition of the lease extension has been made to the Tribunal within six months of a counter-notice admitting the applicant's entitlement to a lease extension;⁸⁴⁸
- (2) no application for an order giving effect to the agreed or determined terms of acquisition of a lease extension is made to the county court within two months of the end of the period of two months after the terms of the lease extension have been agreed or determined (or such other period as fixed by the Tribunal);⁸⁴⁹
- (3) following the landlord's failure to serve a counter-notice:
 - (a) the leaseholder fails to make an application for an order determining the terms of acquisition (in accordance with his or her notice of claim⁸⁵⁰) to the court within six months of the deadline for the service of the counter-notice;⁸⁵¹
 - (b) where an order referred to in paragraph 3(a) above has been made, but no lease has thereafter been entered into within a period of two months, either party fails to apply for a further order giving effect to the terms of that first order no later than two months after the end of the period of two months after that first order became final, or on such other date as had been fixed by the court;⁸⁵² or
- (4) the lease is assigned without the benefit of the notice.⁸⁵³

10.110 If a valid notice of claim is either expressly withdrawn or is deemed withdrawn under these provisions, no subsequent notice may be served within 12 months of the date of

⁸⁴⁷ 1993 Act, s 52(2).

⁸⁴⁸ 1993 Act, ss 53(1)(a) and 48(1). See para 10.101 above.

⁸⁴⁹ 1993 Act, ss 53(1)(b) and 48(3). In other words, no application for an order giving effect to the agreed or determined terms has been made during the period in which such an application can be made: see para 10.105 above.

⁸⁵⁰ See para 10.73 above.

⁸⁵¹ 1993 Act, ss 53(2) and 49(1). See para 10.103 above.

⁸⁵² 1993 Act, ss 53(3) and 49(6). In other words, no application for an order giving effect to the agreed or determined terms has been made during the period in which such an application can be made: see para 10.103 above.

⁸⁵³ 1993 Act, s 53(4)(a).

withdrawal.⁸⁵⁴ The cost consequences of such a withdrawal are considered in Chapter 13.⁸⁵⁵

COLLECTIVE ENFRANCHISEMENT

Notices

Leaseholders' notice

10.111 In order to start a collective enfranchisement claim, the leaseholders must give a written notice to the landlord.⁸⁵⁶ We refer to that notice as a notice of claim.⁸⁵⁷ The 1993 Act sets out in significant detail what must be included in the notice of claim, including a statement of grounds, a proposed purchase price,⁸⁵⁸ and a plan of the premises to be acquired with related details.⁸⁵⁹ The leaseholders must also name a nominee purchaser in the notice of claim, in whose name the freehold will be acquired.⁸⁶⁰ A notice of claim must also set a date for the landlord to serve a counter-notice, which must not be less than two months in the future.⁸⁶¹ Although the 1993 Act contains an express power to prescribe the form of a notice, no such form has in fact been prescribed.⁸⁶²

10.112 The 1993 Act contains saving provisions for notices of claim in respect of collective enfranchisement claims that are drawn in the same terms as the saving provisions that apply in respect of lease extension claims.⁸⁶³ Those savings provisions are considered at paragraph 10.69 above.

10.113 Notices of claim must also be signed by the leaseholders who are giving the notice. The rules relating to who must sign the notice are the same as apply to a notice of claim for lease extensions of flats.⁸⁶⁴

⁸⁵⁴ 1993 Act, s 42(7).

⁸⁵⁵ See Ch 13 at para 13.23.

⁸⁵⁶ 1993 Act, ss 13 and 99(1). The 1993 Act requires a notice of claim to be given to the "reversioner": see 1993 Act, s 13(2)(a)(i). See further para 10.123 below.

⁸⁵⁷ The 1993 Act refers to such a notice as an "Initial Notice".

⁸⁵⁸ In *Westbrook Dolphin Square Ltd v Friends Life Ltd* [2014] EWHC 2433 (Ch), [2015] 1 WLR 1713, it was held that the proposed purchase price must be made in good faith, and must constitute a figure which the participating leaseholders "genuinely believe" could be a purchase price calculated under the Act. It must be a "genuine opening offer", but does not have to be an offer which the participating leaseholders believe will be accepted.

⁸⁵⁹ 1993 Act, s 13(3).

⁸⁶⁰ "Nominee purchaser" is defined in the glossary.

⁸⁶¹ 1993 Act, s 13(3)(g) and (5).

⁸⁶² 1993 Act, s 99(6).

⁸⁶³ 1993 Act, sch 3, para 15(2).

⁸⁶⁴ See para 10.70 above.

Landlord's notice

- 10.114 A landlord who is given a notice of claim must respond by serving a written notice in reply.⁸⁶⁵ We refer to such notices as counter-notices.⁸⁶⁶ Certain details must be included in a counter-notice: for example, an address for any further notices to be given to the landlord must be provided.⁸⁶⁷ As is the case with notices of claim, while the 1993 Act contains a power to prescribe the form of notices, that power has not been exercised.
- 10.115 A counter-notice must be given by the date specified in the original notice of claim. A failure to reply in time can have serious consequences for the landlord: the nominee purchaser is entitled to a transfer of the freehold on the terms (including the price) proposed in the notice of claim.⁸⁶⁸ This is only possible, of course, where the notice of claim is otherwise valid; the landlord who omits to serve a counter-notice may still contest the validity of the claim as normal, and may argue that the notice of claim is not valid, or has not been served on him or her.
- 10.116 A counter-notice must either admit the claim made in the notice of claim, deny the claim for reasons given in the counter-notice, or either admit or deny the claim but state that an application to defeat the collective enfranchisement claim is to be made (on the grounds of redevelopment).⁸⁶⁹
- 10.117 When the counter-notice admits the claim, certain specific details must be given, including whether each individual proposal in the notice of claim is accepted or rejected (and if the latter, making a counter-proposal).⁸⁷⁰
- 10.118 Where the counter-notice denies the claim, the nominee purchaser is required to apply to the court for a declaration that the leaseholders have the right to acquire the freehold.⁸⁷¹ If the dispute is decided in favour of the nominee purchaser, the landlord must serve a further counter-notice in response to the claim (a requirement which will be stipulated in the court order).⁸⁷²

⁸⁶⁵ 1993 Act, s 21(1).

⁸⁶⁶ 1993 Act also refers to such notices as 'counter-notices'.

⁸⁶⁷ 1993 Act, ss 21(6) and 45(4).

⁸⁶⁸ 1993 Act, ss 25(1) and 49(1) respectively, and *Willingale v Globalgrange Ltd* [2001] 33 HLR 17.

⁸⁶⁹ 1993 Act, s 21(2). Failure to make a choice from the three given invalidates the counter-notice: Chadwick LJ, in the context of individual lease extensions, *Burman v Mount Cook Land Ltd* [2001] EWCA Civ 1712, [2002] WLR 1172.

⁸⁷⁰ 1993 Act, s 21(3).

⁸⁷¹ 1993 Act, s 22. Once the nominee purchaser satisfies the court that the participating leaseholders were entitled to exercise the right to collective enfranchisement on the relevant date, the court has no discretion; it must make the declaration. There is a two-month time limit on the making of such an application: s 22(2) of the 1993 Act.

⁸⁷² 1993 Act, s 22(3). Alternatively, the landlord might serve a counter-notice without prejudice to the contention that the notice of claim is invalid, in order to avoid the time for service of a counter-notice elapsing, and then bring proceedings in the county court for a declaration to the effect that the notice of claim was invalid under s 90(2): *Hague*, para 26-09.

Other notices

10.119 A leaseholder who wishes to participate in a collective enfranchisement claim under the 1993 Act may first serve an information notice on his or her immediate landlord (or someone receiving rent on the landlord's behalf).⁸⁷³ The main purpose of such notices is to provide the leaseholders with the information they need to identify their freeholder, and any other landlords on whom they will need to serve a copy of the notice of claim.

10.120 Such information notices enable a leaseholder to seek information:

- (1) from his or her landlord about the name and address of, among other categories, any freeholder of the premises and of leaseholders with superior interests;
- (2) from his or her freeholder about the name and address of, among other categories, other leaseholders or licensees; and
- (3) from any freeholder, other leaseholder or other licensee about their interest in the relevant premises.⁸⁷⁴

10.121 The recipient of such an information notice comes under certain duties. For instance, he or she must comply with the request for information within 28 days.⁸⁷⁵ But an information notice can also engage duties for the leaseholders and nominee purchaser. For instance, where a relevant landlord responds to an information notice, notifying the leaseholder of his or her interest in the premises, that relevant landlord must be given a copy of the notice of claim by the participating leaseholders; if he or she does not, the notice of claim will cease to have effect at the end of the period specified within it.⁸⁷⁶

Service of notices

Who must give the notice of claim?

10.122 A notice of claim must be given by the qualifying tenants of at least half of the flats in the premises to be acquired.⁸⁷⁷ Where there are only two qualifying tenants, both must participate in the collective enfranchisement and must give the notice of claim.⁸⁷⁸

To whom must the notice of claim be given?

10.123 Where the whole of the freehold is owned by a single person, the notice of claim must be given to the "reversioner".⁸⁷⁹ In those circumstances, the reversioner will be the

⁸⁷³ 1993 Act, s 11.

⁸⁷⁴ 1993 Act, s 11.

⁸⁷⁵ 1993 Act, s 11(7).

⁸⁷⁶ 1993 Act, sch 3, para 14.

⁸⁷⁷ 1993 Act, s 13(2)(b).

⁸⁷⁸ The Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order SI 2002 No 1912 (or the Welsh equivalent: SI 2002 No 3012), sch 2, para 2.

⁸⁷⁹ 1993 Act, s 9(1). The authors of *Hague* (para 25-07) point out a drafting error that was introduced by the amendment of s 13(2), in that "that subsection no longer refers to the position where there is a single freeholder and only that person's interests are being acquired." However, it is considered that "the original position must still apply."

freeholder, subject to provisions allowing for his or her replacement.⁸⁸⁰ Where the leaseholders propose to acquire the interests of someone other than the freeholder,⁸⁸¹ the freeholder of the building remains the reversioner.⁸⁸² Where there are multiple freeholders, and thus a split freehold, the notice of claim must be served on any one of the freeholders;⁸⁸³ but if none can be found or their identity ascertained, any other leaseholder with an interest in the premises superior to the enfranchising leaseholders can be served, and will be the reversioner.⁸⁸⁴

10.124 Under the 1993 Act, the reversioner conducts proceedings arising out of the notice of claim on behalf of all the landlords who hold intermediate interests between the freeholder and the leaseholders. As in the case of a claim for a lease extension of a flat,⁸⁸⁵ the other landlords will be bound by the reversioner's acts, although any of the other landlords can apply to the court for directions, or seek to be separately represented.

10.125 Where intermediate leasehold interests are sought in addition to the freehold, the leaseholders must also give copies of the notice of claim to "every other person known or believed by them to be a relevant landlord of those premises".⁸⁸⁶ The notice of claim should state whether any such copies are being provided, and, if so, to whom.⁸⁸⁷

Mode of service

10.126 The provisions relating to the service of a notice of claim described at paragraphs 10.81 and 10.82 above also apply to the service of a notice of claim under the 1993 Act.

Effects of serving a notice

10.127 Unlike notices of claim for houses under the 1967 Act and those for lease extensions under the 1993 Act, notices of claim in collective enfranchisement cases do not create statutory contracts. The notice of claim has effect from the point at which it is served until a binding contract or vesting order is made, or point at which it is deemed to be ineffective or to have been withdrawn.⁸⁸⁸

⁸⁸⁰ 1993 Act, sch 1, para 5(a), discussed in detail in Ch 16.

⁸⁸¹ For example, where the freehold to land over which the leaseholders are entitled under the terms of their leases in common with the occupiers of other premises is to be acquired (1993 Act, s 1(2)(a)).

⁸⁸² Both the freeholder and those who hold other interests to be acquired are 'relevant landlords': s 9(2)(b).

⁸⁸³ Each freeholder, and those who hold other interests to be acquired are 'relevant landlords': s 9(2A)(b).

⁸⁸⁴ 1993 Act, ss 9(2A), 13(2A) and para 5A, Pt 1A, sch 1. In that case, the reversioner will not be the freeholder. References to freeholder in this ch should be read as including such a recipient.

⁸⁸⁵ See para 10.79 above.

⁸⁸⁶ 1993 Act, s 9(2) and sch 3, para 12(1). Intermediate leasehold interests are addressed in Ch 16.

⁸⁸⁷ 1993 Act, sch 3, para 12(2).

⁸⁸⁸ 1993 Act, s 13(11).

Landlord's obligations

10.128 Anyone who receives a notice of claim or a copy must give a copy to anyone he or she knows or believes to be a relevant landlord.⁸⁸⁹ Failure to comply with this obligation without reasonable cause will result in liability for any loss suffered by the leaseholders, the freeholder or any other landlord.⁸⁹⁰

Landlord's rights

10.129 Landlords gain certain rights once they are served with a notice of claim under the 1993 Act:

- (1) rights to access to the premises to obtain a valuation or, "if it is reasonable, in connection with any other matter arising out of the claim";⁸⁹¹ and
- (2) the right to ask the nominee purchaser to deduce the title of any leaseholder by whom the notice of claim was given.⁸⁹²

10.130 The nominee purchaser must also notify the landlord of any agreement between that nominee and any other person for the disposal of an interest in the premises as soon as possible.⁸⁹³ This provision is relevant to the valuation of the interest to be acquired by the nominee purchaser as it affects the calculation of hope value.⁸⁹⁴

Lease continuation

10.131 A lease within the premises continues during the currency of the claim and for three months afterwards despite:

- (1) its expiry by the passage of time;
- (2) the service of a notice to quit from the landlord; or
- (3) the termination of a superior lease.⁸⁹⁵

10.132 The above provision does not, however, prevent early termination of a lease in other situations, such as surrender or forfeiture.⁸⁹⁶ However, a notice terminating the lease of

⁸⁸⁹ 1993 Act, sch 3, para 13(1). This obligation only applies to the reversioner and relevant landlords: sch 3 to the 1993 Act, para 13(2).

⁸⁹⁰ 1993 Act, sch 3, para 14(2).

⁸⁹¹ 1993 Act, s 17. The landlord must give reasonable notice before exercising the right to access; s 17(3) provides that this must be no less than 10 days.

⁸⁹² 1993 Act, s 20.

⁸⁹³ 1993 Act, s 18.

⁸⁹⁴ See Ch 14 at paras 14.67 to 14.69.

⁸⁹⁵ It should be noted that where the claim was not effective "and but for this sub-paragraph the lease would have so terminated before the end of those three months, the lease shall so terminate at the end of those three months" (1993 Act, sch 3, para 6(1)).

⁸⁹⁶ 1993 Act, sch 3, para 6(2). Regarding forfeiture, the position is slightly more complex in that the permission of the court is required, as with the 1967 Act: 1993 Act, sch 3, para 7. Permission will only be granted under the 1993 Act if the leaseholder is participating in the claim for the purpose (solely or mainly) of avoiding the

a flat held by a participating leaseholder⁸⁹⁷ will be invalid if it is served during the currency of the claim.⁸⁹⁸

Contract suspension

10.133 Existing contracts for the disposal of the freehold or an interest in the freehold are suspended once a valid notice of claim has been served.⁸⁹⁹

Registration and prohibition on dealings

10.134 A notice of claim is registrable under the Land Charges Act 1972 (if the freehold is unregistered) or can be made the subject of a notice under the Land Registration Act 2002 (if the freehold is registered), in a similar manner to a notice of claim for a house under the 1967 Act, as if it were an estate contract.⁹⁰⁰ The leaseholders bear the responsibility of registering the notice of claim, as they also bear the risk of the possibility of a future purchaser of the freehold not being bound by it.⁹⁰¹

10.135 Where a notice of claim has been registered:

- (1) a landlord of the building cannot:
 - (a) “make any disposal severing his interest in those premises”; or
 - (b) grant out of his interest “any lease under which, if it had been granted before the relevant date, the interest of the tenant would to any extent have been liable on that date to acquisition by virtue of section 2(1)(a) or (b)”;⁹⁰² and
- (2) no relevant landlord can grant the interests referred to at (1)(b) above.⁹⁰³

Any transaction that is entered into contrary to this prohibition is void.

consequences of the breach of terms of his or her lease. If permission is granted, the leaseholder stops being a participating leaseholder.

⁸⁹⁷ Whether given by the leaseholder or by the landlord (under the Landlord and Tenant Act 1954, s 4 or under the Local Government and Housing Act 1989, sch 4, para 4(1)).

⁸⁹⁸ 1993 Act, sch 3, para 5.

⁸⁹⁹ 1993 Act, s 19(4).

⁹⁰⁰ 1993 Act, s 97(1).

⁹⁰¹ See, for instance, *Wiggins v Regent Wealth Ltd* [2014] EWCA Civ 1078, [2015] 1 WLR 1188. That would also now seem to include the reversioner himself or herself avoiding being bound by transferring the freehold to a third party (their spouse, for instance) and then having the freehold retransferred to them. In *Curzon v Wolstenholme* [2017] EWCA Civ 1098, [2018] 1 P & CR 9, an unprotected notice of claim was held not to be reactivated on the transfer back to the original freeholder.

⁹⁰² 1993 Act, s 19(1)(a). Section 2(1)(a) and (b) refer to the various obligations (principally in respect of superior leases) and entitlements (chiefly common areas) to acquire several other leasehold interests as part of a collective enfranchisement claim.

⁹⁰³ 1993 Act, s 19(1)(b).

10.136 Transactions outside the scope of the above prohibition remain valid. However, those who acquire an interest in a valid transaction are treated as:

- (1) having become the owner of the relevant interest before the notice of claim was given;
- (2) as having been given the notice of claim correctly; and
- (3) as having completed all the steps that the person disposing of their interest had completed.⁹⁰⁴

Further notices of claim

10.137 Once a valid notice of claim is served in respect of certain premises, no subsequent notice of claim can be given in respect of all or part of those premises, as long as the earlier notice continues to be valid.⁹⁰⁵

Interaction with a notice of claim for a lease extension of a flat

10.138 Where a collective enfranchisement claim is in progress, a subsequently served notice of claim for a lease extension of a flat of a leaseholder will be suspended during the currency of the collective enfranchisement claim.⁹⁰⁶ A collective enfranchisement claim remains “current” if the notice of claim to acquire the freehold of flats is still in force, a binding contract has been created to carry out the conveyance, or the court has made a vesting order that awaits compliance.⁹⁰⁷

10.139 If there is an existing notice of claim for a lease extension of a flat in force, the service of a notice of claim for collective enfranchisement will suspend the former notice during the currency of latter claim.⁹⁰⁸ The landlord must notify a leaseholder whose lease extension notice is suspended.⁹⁰⁹ If the enfranchisement claim ceases to be current, the suspension of any notices of claim for a lease extension of a flat will be lifted.⁹¹⁰ The landlord is obliged to notify the leaseholder that the suspension is at an end, and the procedural timetable for the individual lease extension claim will restart.⁹¹¹

Particular types of landlord

Missing landlords

10.140 The 1993 Act allows an application to be made to the court for a vesting order where the leaseholders are unable to find, or cannot identify the freeholder, or (where it is proposed to acquire the interests of someone other than the freeholder, or there is a

⁹⁰⁴ 1993 Act, s 19(3). This applies equally to subsequent transactions.

⁹⁰⁵ 1993 Act, s 13(8).

⁹⁰⁶ 1993 Act, s 54(1).

⁹⁰⁷ 1993 Act, s 54(11).

⁹⁰⁸ 1993 Act, s 54(2).

⁹⁰⁹ 1993 Act, s 54(3).

⁹¹⁰ 1993 Act, s 54(4).

⁹¹¹ 1993 Act, s 54(6) to (8).

split reversion) none of the relevant landlords can be found or identified.⁹¹² The effect of that order will be to transfer the freehold and any other interests to be acquired on terms determined by the Tribunal.⁹¹³

10.141 The 1993 Act also allows leaseholders who are unable to find or identify any of the relevant landlords to whom a copy of a notice should be given to apply for an order dispensing with the need to do so.⁹¹⁴ And where the missing relevant landlord is the freeholder, but there are other relevant landlords, the leaseholders may apply for an order appointing one of the other relevant landlords as reversioner.⁹¹⁵ Where the court makes an order dispensing with service on a missing landlord, the notice of claim as served on the other landlords must state the effect of the order.⁹¹⁶

10.142 While changes to the 1993 Act introduced by the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") reduced the number of leaseholders required to give a notice of claim from two thirds of the total number of flats in the building to one half of that number,⁹¹⁷ no change was made to the provisions relating to missing landlords. As such, any such application must be made by not less than two thirds of the leaseholders of the total number of flats contained in the building. They must then show that they are leaseholders and that there was nothing, on the date of their application, to preclude them from serving a valid notice of claim.⁹¹⁸

10.143 Before making any of these orders, the court may require the leaseholders to take certain further steps to try to trace the missing landlord or landlords.⁹¹⁹ If any of the missing landlords are located or found before a vesting order is made, the claim proceeds as normal: that is, as if a notice of claim had been served on the relevant landlords.

10.144 The Tribunal determines the terms of acquisition and the form of the conveyance. The vesting order will take effect once the applicants have paid the appropriate sum into court, which is the premium determined by the Tribunal as well as any other amounts it

⁹¹² 1993 Act, s 26(1).

⁹¹³ 1993 Act, s 27(1).

⁹¹⁴ 1993 Act, s 26(2) and (3A).

⁹¹⁵ 1993 Act, s 26(3). This further power does not apply in the case of a split reversion. If each of the split reversioners cannot be found or identified the court may make a vesting order: 1993 Act, s 26(1)). If only some of the split reversioners cannot be found or identified the court may only make an order dispensing with the requirement to serve those reversioners: 1993 Act, s 26(3A).

⁹¹⁶ 1993 Act, s 26(7). The notice is thereafter deemed to have been served on the missing landlord: s 26(8).

⁹¹⁷ See Ch 2 at para 2.27.

⁹¹⁸ 1993 Act, s 26(4).

⁹¹⁹ 1993 Act, s 26(5). Typically, leaseholders will carry out checks before serving the notice of claim in the hope that the court will not then require further steps to be taken.

concludes are due from the leaseholders.⁹²⁰ The court then designates a person to execute the conveyance in place of the landlord.⁹²¹

10.145 As noted at paragraph 10.97 above, the 1993 Act does not state what should happen in the event that the landlord is located after the vesting order has been made and the freehold transferred to the nominee purchaser.

Landlord and Tenant Act 1987

10.146 The provisions of Part III of the 1987 Act allow a majority of qualifying tenants of flats to acquire the freehold of their building where their landlord is in breach of certain obligations with respect to the leases.⁹²² These obligations are either:

- (1) those owed under the lease; that is, in relation to the repair, maintenance and insurance of the premises;⁹²³ or
- (2) those dependent on the service of a notice on the landlord, but the landlord's elusiveness makes it impracticable for the leaseholder to serve the relevant notice.⁹²⁴

A further ground is that on the date of – and throughout the period of two years immediately prior to – the application, there was an appointment of a manager of the premises in force under Part II of the Act by reason of an act or omission by the landlord.⁹²⁵

10.147 Where a landlord is “missing”, he or she will necessarily be in breach of some of these obligations. The 1987 Act deals specifically with applications where the landlord cannot be found or his identity cannot be ascertained.⁹²⁶ These provisions are often used by leaseholders in the place of the 1993 Act missing landlord procedures since marriage value is not payable where the freehold is claimed under the 1987 Act.⁹²⁷

10.148 Acquisition orders can therefore be obtained from the court on fault-based grounds. Normally, an application for an acquisition order must be prefaced with a notice alerting the landlord to the application and providing the landlord with an opportunity to remedy

⁹²⁰ 1993 Act, s 27(5). These sorts of sums are outstanding sums due under the leases, rent obligations, service charges or sums due under collateral agreements.

⁹²¹ 1993 Act, s 27(3).

⁹²² Landlord and Tenant Act 1987, s 29(2)(a) and (b). The provisions of the Landlord and Tenant Act 1987 are outside our Terms of Reference, but do, however, present an alternative route for leaseholders dealing with missing landlords under the 1993 Act.

⁹²³ Landlord and Tenant Act 1987, s 29(2A).

⁹²⁴ Landlord and Tenant Act 1987, s 29(2).

⁹²⁵ Landlord and Tenant Act 1987, s 29(3).

⁹²⁶ Landlord and Tenant Act 1987, s 33. Note the same words to define “missing landlord” are used in the 1987 Act as are in the 1967 Act and the 1993 Act.

⁹²⁷ Marriage value is considered in Ch 14 at paras 14.53 to 14.66.

the breaches.⁹²⁸ Where the landlord is missing and service of the final notice is not possible, the court can dispense with this requirement.⁹²⁹

Insolvent, deceased, incapacitated or recalcitrant landlords

10.149 The position in respect of insolvent, deceased, incapacitated, or recalcitrant landlords is the same as in respect of claims for lease extensions of flats under the 1993 Act. Reference should be made to paragraphs 10.98 and 10.99 above.

Procedure for resolving disputed claims

10.150 Where a landlord serves a counter-notice not admitting the leaseholders' claim to acquire the freehold, the nominee purchaser must apply to the court for a declaration that the leaseholders are entitled to acquire the freehold.⁹³⁰ Such an application must be made not later than two months after the date on which the counter-notice was given.⁹³¹ If the nominee purchaser's application is granted, the freehold will be required to serve a further counter-notice by a date specified by the court. If the nominee purchaser's application is dismissed, the notice of claim will cease to have effect when the order becomes final.⁹³²

10.151 If a landlord wishes to dispute the validity of a notice of claim, he or she may either raise the point as a defence or counter-claim in the nominee purchaser's application for a declaration of entitlement, or bring a separate claim for a declaration that the notice of claim is invalid.⁹³³

10.152 Where the leaseholders' claim is admitted, but the terms or acquisition are in dispute, and remain in dispute two months after the counter-notice was given, either the nominee purchaser or landlord may apply to the Tribunal for a determination of those matters.⁹³⁴ Such an application must be made no later than six months after the counter-notice of claim was given. These provisions create a four-month window in which an application must be made.

10.153 If a counter-notice has been given admitting the right and the terms of acquisition, or those terms have been agreed or determined by the Tribunal, but a binding contract has not been entered into within two months of that agreement or final determination,⁹³⁵ the nominee purchaser or landlord may apply to the court to make such order as it sees

⁹²⁸ Landlord and Tenant Act 1987, s 27.

⁹²⁹ Landlord and Tenant Act 1987, s 27(3).

⁹³⁰ 1993 Act, s 22(1).

⁹³¹ 1993 Act, s 22(2).

⁹³² 1993 Act, s 22(6). The 12-month prohibition on the service of further notices of claim does not apply.

⁹³³ See *Hague*, para 26-09. The authors note that the landlord should also serve a counter-notice without prejudice to his or her argument that the notice of claim is invalid; otherwise, if the notice of claim is found to be valid, the landlord will have failed to serve a counter-notice and can be compelled to transfer the freehold on the terms set out in the notice of claim: see para 10.115.

⁹³⁴ 1993 Act, s 24(1).

⁹³⁵ Or alternatively, the date set by the Tribunal when giving its determination.

fit.⁹³⁶ Such an application must be made within two months from the end of the earlier two-month period.⁹³⁷

10.154 Where no counter-notice has been served, the nominee purchaser can apply to the court for an order determining the terms on which it shall acquire the claimed interests.⁹³⁸ As noted at paragraph 10.115, if the court is satisfied that the participating leaseholders were entitled to exercise the right to collective enfranchisement and that a notice of claim has been properly served, it must declare that the nominee purchaser is entitled to acquire the claimed interests on the terms set out in the notice of claim. Such an application must be made no later than six months after the date on which the counter-notice was to be served.⁹³⁹ Where such an order is made, but a binding contract has not been entered into within two months of the date of the order,⁹⁴⁰ either party may apply to the court to make such order as it sees fit.⁹⁴¹ Again, such an application must be made within two months from the end of the earlier two-month period.⁹⁴²

Completing a claim

10.155 After the terms for the acquisition of the building are either agreed by the parties or settled by the Tribunal, the reversioner is obliged to prepare a draft contract. This must be given to the nominee purchaser within 21 days.⁹⁴³ The nominee purchaser then has 14 days to make any amendments to the draft contract, after which point he or she is deemed to consent to its terms.⁹⁴⁴ If any amendments are made by the nominee purchaser, the reversioner likewise has 14 days to respond, after which consent to those amendments is deemed to be given.⁹⁴⁵

10.156 The reversioner is able to require the nominee purchaser to pay a deposit upon the exchange of contracts. This will be the larger sum out of £500 and 10% of the premium.⁹⁴⁶

10.157 The reversioner has a lien over the price payable. This lien extends to other sums, too: namely, any sums due to the reversioner under the leases, any amount due in respect

⁹³⁶ 1993 Act, s 24(3). The court may make an order vesting the interests in the nominee purchaser on the terms agreed or determined (or subject to any modification made by the Tribunal upon application), or provide that the notice of claim is deemed withdrawn.

⁹³⁷ 1993 Act, s 24(5).

⁹³⁸ 1993 Act, s 25(1).

⁹³⁹ 1993 Act, s 25(4).

⁹⁴⁰ Or such other period as set by the court when the order was made.

⁹⁴¹ 1993 Act, s 25(6). The court may make an order vesting the interests in the nominee purchaser on the terms agreed or determined (or subject to any modification made by the Tribunal upon application), or provide that the notice of claim is deemed withdrawn.

⁹⁴² 1993 Act, s 25(7).

⁹⁴³ 1993 regs, sch 1, para 6(1).

⁹⁴⁴ 1993 regs, sch 1, para 6(2) and (3).

⁹⁴⁵ 1993 regs, sch 1, para 6(5).

⁹⁴⁶ 1993 regs, sch 1, para 7(2).

of a failure to disclose agreements with non-participating leaseholders,⁹⁴⁷ and any non-litigation costs payable to the landlord.⁹⁴⁸

The conveyance

10.158 The conveyance will provide for the freehold to be transferred to the nominee purchaser along with any leasehold interests and any other property to be acquired, subject only to tribunal-approved incumbrances.⁹⁴⁹ It is mandatory for the conveyance to state that it is being executed pursuant to Chapter I of Part I of the 1993 Act.⁹⁵⁰

Mortgages

10.159 Where a mortgage over a landlord's existing freehold title is to be discharged, evidence of this should be provided to HM Land Registry. The nominee purchaser can be required to pay the purchase price into court where the landlord or mortgagee gives the nominee purchaser a notice requiring him or her to do so in order to protect their rights, or because the landlord is insolvent, or where steps have been taken to enforce the mortgage.⁹⁵¹ The nominee purchaser may pay the purchase price⁹⁵² into court where the amount outstanding under the mortgage cannot be ascertained,⁹⁵³ or where difficulties arise in respect of the mortgage.⁹⁵⁴

10.160 Any leaseback to the former landlord will take effect immediately after the acquisition of the freehold, and must be registered at HM Land Registry. Any such leaseback will take priority over any mortgage used to finance the purchase price.⁹⁵⁵

Termination or withdrawal of claim

Express withdrawal: the participating leaseholders' right to withdraw

10.161 The participating leaseholders may collectively withdraw their notice of claim at any time before a contract is entered into by serving a "notice of withdrawal".⁹⁵⁶ This notice must be in writing,⁹⁵⁷ and must be given to the nominee purchaser, the reversioner and every other relevant landlord who has given the nominee purchaser a notice that he or

⁹⁴⁷ 1993 Act, s 18(2).

⁹⁴⁸ 1993 Act, s 33. Non-litigation costs are dealt with in Ch 13.

⁹⁴⁹ 1993 Act, s 34.

⁹⁵⁰ 1993 Act, s 34(10) and the Land Registration Rules 2003, r 196(1).

⁹⁵¹ 1993 Act, sch 8, para 4(3)(a) and (b).

⁹⁵² The sum paid will be the amount of the mortgage if known, or, where that amount is not known, the whole of the purchase price, or such lesser amount as the nominee purchaser thinks right to provide payment of the mortgage: 1993 Act, sch 8, para 4(1).

⁹⁵³ 1993 Act, sch 8, para 4(1)(a).

⁹⁵⁴ For example, where the mortgagee cannot be found or his or her identity cannot be ascertained, the mortgagee refuses to take reasonable steps to enable the sum due to be ascertained or paid, or the tender of the sum cannot be made either at all, or without the leaseholder incurring unreasonable costs or delay: 1993 Act, sch 8, para 4(2).

⁹⁵⁵ See *Hague*, para 28-20, and Land Registry, *Practice Guide* 27, para 9.3.

⁹⁵⁶ 1993 Act, s 28(1).

⁹⁵⁷ 1993 Act, s 99(1)(a). There is not, however, a prescribed form.

she wishes to act independently.⁹⁵⁸ Whether withdrawal is possible, and the number of participating leaseholders who are required to serve a notice of withdrawal, are matters for consensual agreement between participating leaseholders before the notice of claim is served.

Deemed withdrawal

10.162 Deemed withdrawal of the notice of claim acts as a sanction for non-compliance with procedural requirements. It will be deemed withdrawn where:

- (1) the nominee purchaser fails to take court proceedings to establish the leaseholders' entitlement to acquire the freehold, or such proceedings are subsequently withdrawn;⁹⁵⁹
- (2) no application to determine the terms of acquisition is made to the Tribunal within six months of a counter-notice being served admitting entitlement to enfranchisement;⁹⁶⁰
- (3) a contract has not been entered into, or a vesting order application has not been made, within two months of the terms of acquisition having been agreed or determined by the Tribunal;⁹⁶¹
- (4) the court exercises its discretion to determine that the notice of claim is deemed to be withdrawn, despite an application for a vesting order having been made;⁹⁶²
- (5) the nominee purchaser has failed to apply to the court for an order determining the terms of acquisition following a landlord's failure to serve a counter-notice;⁹⁶³
- (6) the court exercises its discretion to determine the withdrawal of the notice of claim, on the basis that the terms have been determined by the court but no contract has been entered into within the prescribed two-month period;⁹⁶⁴
- (7) an order determining the terms of acquisition following a landlord's failure to serve a counter-notice has been made but no application for a vesting order has been made within two months;⁹⁶⁵
- (8) the nominee purchaser's appointment is terminated and a replacement is not found within 28 days;⁹⁶⁶

⁹⁵⁸ 1993 Act, sch 1, para 7(1) or (4).

⁹⁵⁹ 1993 Act, s 29(1)(a) and (b), referring to s 22(1). See para 10.150 above.

⁹⁶⁰ 1993 Act, s 29(2)(a), referring to s 24(1). See para 10.152 above.

⁹⁶¹ 1993 Act, s 29(2)(b), referring to s 24(5). See para 10.153 above.

⁹⁶² 1993 Act, s 29(5)(d), referring to s 24(4)(c).

⁹⁶³ 1993 Act, s 29(3), referring to s 25(1). See para 10.154 above.

⁹⁶⁴ 1993 Act, s 29(5)(e), referring to s 25(6)(c).

⁹⁶⁵ 1993 Act, s 29(4), referring to s 25(7).

⁹⁶⁶ 1993 Act, s 29(5)(a), referring to s 15(10).

- (9) the nominee purchaser retires or dies and a replacement is not found within 56 days;⁹⁶⁷ and
- (10) the nominee purchaser fails to comply with a notice requiring title to be deduced within 21 days.⁹⁶⁸

10.163 Where a notice of claim has been withdrawn, deemed to have been withdrawn, or ceases to have effect, if it has been registered as a land charge or is the subject of a notice, the nominee purchaser must without delay take all necessary steps to have the registration cancelled.⁹⁶⁹

10.164 Whether a valid notice of claim is expressly or deemed withdrawn, the qualifying tenants may not serve a further notice of claim until 12 months have passed.⁹⁷⁰

MAIN CRITICISMS OF THE CURRENT LAW

Content of notices

10.165 While both the 1967 and 1993 Acts contain powers allowing forms to be prescribed by statutory instrument, only the power under the 1967 Act has been exercised.⁹⁷¹ As such, while there are prescribed forms to be used for leasehold houses, there are no prescribed forms to be used for leasehold flats.

10.166 In addition, many stakeholders have told us that the forms prescribed under the 1967 Act are complicated and difficult for leaseholders to complete accurately. They have also highlighted that the information required by the prescribed notices does not properly reflect the requirements set out in the 1967 Act.

Service of notices

10.167 Both the 1967 and 1993 Acts require a notice of claim to have been “given” to the landlord. However, as explained at paragraphs 10.19 and 10.81, the treatment of notices under the 1967 Act and under the 1993 Act are distinct. In particular, 1967 Act notices sent by registered post or recorded delivery to the addressee’s last known place of abode in England and Wales are treated as having been served on that addressee even if he or she is able to prove that the notice was not in fact received (“deemed” service).⁹⁷² In contrast, a notice of claim for a house under the 1967 Act delivered by ordinary post, or any notice of claim under the 1993 Act, is not deemed served at any address.⁹⁷³ It remains open to the addressee of such a notice to establish – on the balance of probabilities – that he or she had not in fact received the notice. There

⁹⁶⁷ 1993 Act, s 29(5)(b), referring to s 16(8).

⁹⁶⁸ 1993 Act, s 29(5)(b), referring to s 20(3).

⁹⁶⁹ Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, sch 1, para 8.

⁹⁷⁰ 1993 Act, s 29(1)(b). As noted at para 10.86 above, the prohibition will not apply where the notice of claim was not valid.

⁹⁷¹ See paras 10.67 and 10.111 above.

⁹⁷² See para 10.19 above.

⁹⁷³ *Calladine-Smith v Saveorder Ltd* [2011] EWHC 2501 (Ch), [2012] L & TR 3

appears to be no rational basis for this discrepancy. The absence of deemed service can cause significant uncertainty for leaseholders who have served a notice at the address for their landlord, but have not received an acknowledgment or other response. If the landlord subsequently shows that he or she had not received the notice, then the notice will be of no effect.

10.168 There are other problems with the provisions relating to service in the 1967 and 1993 Acts. For example:

- (1) While the 1993 Act allows a notice of claim to be served at an address provided by a landlord under section 47 or 48 of the Landlord and Tenant Act 1987,⁹⁷⁴ many landlords do not comply with the requirement to provide such an address.⁹⁷⁵
- (2) The obligations under sections 47 and 48 of the 1987 Act apply only to the leaseholders' immediate landlords. As a result, the 1993 Act will not assist where a notice of claim must be served on a competent landlord who is not the leaseholders' immediate landlord.
- (3) Sections 47 and 48 of the 1987 Act only provide for postal addresses to be given to leaseholders; other forms of communication are not included.
- (4) In contrast, the 1967 Act does not refer to sections 47 or 48 of the 1987 Act, but instead requires service in accordance with section 23(1) of the Landlord and Tenant Act 1927.⁹⁷⁶
- (5) Neither the 1967 Act or the 1993 Act refers to service on a company landlord at its registered office. It is therefore unclear whether an enfranchisement notice can be properly given to a company if sent to its registered office.⁹⁷⁷

10.169 A leaseholder must give a notice of claim to more than one party where the competent landlord's interest is jointly owned by more than one person. He or she must also give the notice to more than one person where the reversionary interest in the premises (whether leasehold or freehold) is split between more than one landlord ("a split freehold or other reversion"),⁹⁷⁸ and/or third parties.⁹⁷⁹ Copies of the same notice must also be

⁹⁷⁴ Landlord and Tenant Act 1987, ss 47 and 48, considered at para 10.20 above.

⁹⁷⁵ The penalties imposed on landlords for any failure to comply with the 1987 Act, ss 47 or 48 are in terms of restrictions on the landlord's right to recover sums due under the lease until such time as the landlord complies with that obligation.

⁹⁷⁶ Landlord and Tenant Act 1927, s 23(1), considered at para 10.19 above.

⁹⁷⁷ Companies Act 2006, s 86.

⁹⁷⁸ In some cases, the premises held by a leaseholder will be made up of distinct parts let under separate leases by different landlords. In other cases, although the leaseholder holds the premises under a single lease, separate head leases may have been granted thereafter to different landlords in respect of distinct parts of the premises; where those different landlords hold a sufficient interest to allow them to grant a lease extension, they would both be competent landlords. Such arrangements were sometimes employed – prior to amendments made to the 1993 Act in 1996 – by landlords in an effort to prevent a building being the subject of a collective enfranchisement claim: see Ch 2, at para 2.21.

⁹⁷⁹ Such as a management company that has undertaken to perform the landlord's repairing obligations.

given to any intermediate landlords.⁹⁸⁰ This requirement causes delay. It also adds to leaseholders' costs, and in most cases, will lead to those additional parties also incurring costs.

10.170 As explained at paragraph 10.76 above, the obligation imposed by the service of an information notice is limited to supplying information "so far as it is known to the recipient".⁹⁸¹ In addition, if the recipient of the information notice fails to serve any response, the leaseholders must then incur the further expense and delay of serving the recipient with a default notice,⁹⁸² and then applying to the court to compel the recipient to comply.⁹⁸³

Challenges to the validity and service of notices

10.171 There is too much uncertainty, and there are too many disputes, about both the validity of notices, and whether they were properly served by the parties. Some landlords will try to prove that leaseholders' notices of claim are invalid, or not properly served, in the hope of blocking an enfranchisement claim by leaseholders who are otherwise entitled to bring such a claim. While establishing that a notice of claim is invalid or not properly served might merely postpone the date of valuation,⁹⁸⁴ it will also increase the leaseholders' costs and may discourage some leaseholders from making a further claim.

10.172 The validity of a notice, and the fact of its service, become more significant in claims under the 1993 Act. If a landlord fails to serve a valid counter-notice in response to a valid notice of claim served by his or her leaseholders, the leaseholders will be entitled to acquire the interest claimed on the terms set out in their notice of claim.⁹⁸⁵ While the price offered by the leaseholders in their notice of claim must be put forward in good faith, in practice it is often significantly lower than the price that the landlord would consider acceptable, and that leaseholders would realistically expect to pay. Accordingly:

- (1) when leaseholders receive a counter-notice from their landlord, the current law creates an incentive for them to argue that the counter-notice is invalid; and
- (2) when leaseholders do not receive a counter-notice from their landlord, the current law creates an incentive for them to proceed with the claim even when they suspect that a counter-notice was not given to them because their notice of claim had not been received by their landlord. It also encourages both parties to incur further expenses arguing about whether the landlord did or did not receive the notice of claim.

⁹⁸⁰ Intermediate landlords are considered in Ch 16.

⁹⁸¹ 1993 Act, s 11(1).

⁹⁸² 1993 Act, s 92(2).

⁹⁸³ 1993 Act, s 92(1).

⁹⁸⁴ In a rising property market, a later valuation date can increase the price to be paid by leaseholders for the landlords' interest.

⁹⁸⁵ See para 10.73 above.

Dealing with landlords who cannot be found

10.173 The "missing landlord" procedures within the Acts, that apply when a landlord cannot be found, are complex and almost impossible for leaseholders to follow.⁹⁸⁶ There is no guidance as to the steps leaseholders should take before an application to the court for a vesting order is made.⁹⁸⁷ Leaseholders who are deciding whether to make such an application can therefore be left in doubt as to whether to incur the significant costs of doing so.

10.174 There are also particular inconsistencies between the enfranchisement rights.

- (1) A higher percentage of leaseholders are required to participate in a collective enfranchisement claim to acquire the freehold where one or more of the landlords is missing than where the landlords are not missing.⁹⁸⁸
- (2) Leaseholders of a house who are seeking a lease extension cannot use the missing landlord procedure.⁹⁸⁹
- (3) The 1993 Act does not make provision for dispensing with service on a missing third party to the existing lease (for example, a management company) where leaseholders are seeking to extend that lease.⁹⁹⁰

10.175 The costs that leaseholders incur in seeking to locate their landlords, and in making an application to the court if necessary can, in some cases, exceed the price to be paid to the landlords for enfranchising. While a court can order that the leaseholders' costs should be paid by the landlords, the shortfall between the leaseholders' costs and the price paid may never in fact be recovered.

Vesting orders

10.176 There are also several problems that arise where leaseholders are required to obtain a vesting order from the court.

- (1) There can be significant delays in applications for vesting orders being listed for a hearing in the county court.
- (2) The adoption of a two-stage process – requiring the court to refer some issues to the Tribunal for determination – incurs further costs and creates additional delay.⁹⁹¹
- (3) In a collective enfranchisement claim, if the landlord is traced before the court makes a vesting order then no further proceedings can be taken; but the Act does

⁹⁸⁶ See paras 10.54 to 10.57, 10.93 to 10.97, and 10.140 to 10.145 above.

⁹⁸⁷ See paras 10.55, 10.96, and 10.143 above.

⁹⁸⁸ See para 10.142 above.

⁹⁸⁹ See para 10.31 above.

⁹⁹⁰ See para 10.80 above.

⁹⁹¹ See para 10.144 above.

not make express provision for what should then happen, instead allowing the court to give directions for the remainder of the claim.⁹⁹²

Assignment of the benefit of a notice

10.177 Leaseholders will often want to sell their premises with the benefit of an existing notice of claim. The need for such leaseholders formally to assign that notice of claim, and to do so at a particular point in time, creates further traps for unwary leaseholders and their advisers, and a further opportunity for landlords to obstruct an enfranchisement claim.⁹⁹³

Identifying disputes as to the terms of any lease or transfer

10.178 Both the 1967 and 1993 Acts require any disputes between the parties as to the terms of acquisition to be determined by the Tribunal.⁹⁹⁴ But the Tribunal no longer has the power to consider those terms where the parties have agreed Heads of Terms.⁹⁹⁵ As a result, the parties often face the prospect of incurring additional costs to negotiate and settle the terms of any lease or transfer that will give effect to those Heads of Terms.

10.179 In addition, where agreement on Heads of Terms has been reached, the 1993 Act provides that a leaseholder must apply to the county court for an order giving effect to those terms within a period calculated from the date of that agreement.⁹⁹⁶ We have been told by stakeholders that when leaseholders apply to the court for a vesting order to enforce Heads of Terms, landlords will sometimes argue that no agreement had in fact been reached, and that it is now too late to apply to the Tribunal for a determination of those terms. Conversely, landlords will sometimes argue that the agreement had been reached on a date that is earlier than that relied on by the leaseholders, and that it is now too late for the leaseholders to apply to the court to enforce that agreement. This requirement can, therefore, cause delay and lead to further costs being incurred.

The conveyancing process

10.180 Each of the current enfranchisement rights have separate conveyancing procedures.⁹⁹⁷ Some stakeholders tell us that these separate procedures create unnecessary complexity and the potential for confusion and mistakes. Others point out that, whereas the procedures adopted by the 1993 Act contain automatic consequences for a party's default, the procedures adopted by the 1967 Act rely on the service of default notices on a party who has failed to comply with his or her obligations.⁹⁹⁸ Other

⁹⁹² See para 10.143 above.

⁹⁹³ See paras 10.30 and 10.92 above.

⁹⁹⁴ See paras 10.39, 10.101 and 10.152 above.

⁹⁹⁵ 'Heads of Terms' refers to an agreement in principle between the parties as the terms on which any proposed transaction should take place. In order to give effect to that agreement, the parties will then need to translate that agreement into the formal terms of a written lease or transfer.

⁹⁹⁶ 1993 Act, ss 24 and 28. See paras 10.105 and 10.154 above.

⁹⁹⁷ See paras 10.40, 10.60, 10.104 and 10.155 above.

⁹⁹⁸ See paras 10.42 and 10.63 above.

stakeholders have questioned whether it is necessary for such prescriptive provisions to be in place.

Timetable and deemed withdrawal

10.181 Both the 1967 and 1993 Acts provide a timetable setting out the dates by which procedural steps should be taken. But the 1993 Act also provides that a notice of claim will be treated as having been withdrawn if certain procedural steps are not taken in accordance with the timetable set out.⁹⁹⁹ This consequence creates a series of traps into which leaseholders can fall, causing their notices of claim to be treated as having been withdrawn, and making them liable to pay the landlord's non-litigation costs. Many stakeholders consider that these provisions are either unnecessary or disproportionate to their intended purpose.

Procedure for dealing with mortgages

10.182 As identified above, there are inconsistencies between the treatment of mortgages between the 1967 and 1993 Acts. These inconsistencies can cause confusion for leaseholders and their advisers, leading to mistakes, delay and further costs. For example:

- (1) A deed of substitution is required to transfer across a leaseholder's mortgagee's charge from an existing lease to a lease extension granted under the 1967 Act, but there is no such requirement under the 1993 Act.
- (2) While a leaseholder who has obtained a lease extension under the 1967 Act must usually send the lease extension to his or her mortgagee within one month of its grant, a leaseholder who has obtained a lease extension under the 1993 Act must do so within one month of the registration of the lease extension.
- (3) Rentcharges are not automatically redeemed in the case of a claim to acquire the freehold of a house under the 1967 Act,¹⁰⁰⁰ whereas in a collective enfranchisement claim made under the 1993 Act, rentcharges are, subject to two exceptions,¹⁰⁰¹ redeemed automatically. While the purchase price should take account of any rentcharge that will continue to bind the transferred freehold interests, it is not clear that suitable reductions are always made in practice.¹⁰⁰²

10.183 Stakeholders have also made other criticisms of the current provisions. In particular:

- (1) A deed of substitution or new charge is required where the leaseholder acquires the freehold under the 1967 Act and the freehold and leasehold titles are to be merged on completion. As the leasehold security held by the mortgagee would be replaced by the freehold security that is no longer subject to a leasehold interest it is difficult to see why any such deed is required.

⁹⁹⁹ See paras 10.109 and 10.162 above.

¹⁰⁰⁰ Instead, they are redeemed at the option of the landlord: see Ch 5 at para 5.7 above.

¹⁰⁰¹ See Ch 6 at para 6.15 above.

¹⁰⁰² See Ch 5 at para 5.7 above.

- (2) 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. Such fees are often paid by leaseholders as it would often be more expensive to establish whether consent is required. Where consent is required, this can cause delay to the transaction itself, or to the registration of that transaction.
- (3) Unfairness can result where the landlord's mortgagee receives less than the total sum outstanding under the mortgage. The landlord's mortgagee is not entitled to receive a notice of claim, or any subsequent proceedings, and therefore has no control over any agreement reached, or influence over any determination made.¹⁰⁰³
- (4) The obligation upon leaseholders acquiring a freehold title under the 1967 or 1993 Acts to pay the purchase monies into court where written notice has been given that the landlord's mortgagee has taken steps to enforce the mortgage is unjustified, and incurs further unnecessary costs, where all parties have agreed what should happen to the purchase monies.¹⁰⁰⁴

¹⁰⁰³ For example, a landlord who holds a freehold subject to a mortgage may have little incentive to argue that the leaseholder should pay a higher price where the amount outstanding on the mortgage is likely to exceed any reasonable sum payable by a leaseholder for the freehold if the landlord has no other assets that could be used to pay any shortfall between the sum paid by the leaseholders and the sum outstanding on the mortgage.

¹⁰⁰⁴ See *Hague*, at para 13-12.

Chapter 11: Procedure: proposals for reform

INTRODUCTION

- 11.1 In Chapter 10 we described the current law on the procedures for bringing enfranchisement claims in respect of houses under the 1967 Act and in respect of flats under the 1993 Act. We also outlined the main criticisms that have been made of the current law.
- 11.2 In this chapter we provisionally propose the creation of a single procedure by which any of our proposed enfranchisement rights can be claimed. We believe a single procedure will remove inconsistencies and reduce the risk that any party will make a mistake by confusing one procedure with another at any stage. But we also propose that the single procedure adopted should be as simple as possible to reduce further the risk of mistakes, and limit the opportunities for one party to try to take tactical advantage of the other.
- 11.3 In this chapter, we outline our provisional proposals in respect of:
- (1) the initial steps to be taken in an enfranchisement claim, and the content and service of notices by both leaseholders and landlords;
 - (2) the additional steps that leaseholders will need to take where the identity of the landlord is not known, or where the landlord does not have an address at which he or she can properly be served;
 - (3) the treatment and rights of intermediate landlords and third parties to existing leases;
 - (4) the steps that parties can take to progress the claim;
 - (5) the process by which effect is given to an agreed or determined enfranchisement claim; and
 - (6) the circumstances in which a claim may otherwise be brought to an end.

GENERAL POLICY APPROACH

- 11.4 As part of our Terms of Reference, Government has asked us to consider the scope for making enfranchisement:
- easier, quicker and more cost effective (by reducing the legal and other associated costs), particularly for leaseholders
- 11.5 In developing provisional proposals for reforming the procedure for bringing an enfranchisement claim we have sought to:
- (1) simplify the process, making it easier for both parties to understand the steps they need to take to bring or respond to an enfranchisement claim;

- (2) remove any procedural traps that would allow one party to try to take tactical advantage of the other;
- (3) remove the possibility that a procedural mistake can give rise to a windfall gain or loss for either party;
- (4) reduce the need for parties to incur legal costs to be able to navigate the procedure successfully;
- (5) encourage parties to identify and resolve any areas of dispute at an early stage;
- (6) simplify the process for resolving remaining disputes; and
- (7) ensure that enfranchisement claims can be concluded within a reasonable time.

We believe that each of the above elements will contribute to achieving the policy aim set by Government.

OUR PROPOSED NEW REGIME

- 11.6 We recognise that, in most cases, a leaseholder will have a single landlord, whose identity is known. The landlord will respond to leaseholder's enfranchisement claim, and thereafter will continue to cooperate in the process for agreeing or determining that claim. Once matters are settled, the parties will proceed to transfer the freehold, or grant a lease extension, without delay. In such cases, it is important that any procedure that the parties are required to follow should be as easy to identify and as straightforward as possible.
- 11.7 But a procedural regime should also provide for more difficult circumstances, and less cooperative parties. For example, it must provide for enfranchisement claims to proceed even if the identity of the landlord is unknown, or if the leaseholders do not hold his or her current address. It must also allow either party to progress the claim even if the other side has not responded at all, or, having responded, subsequently stops cooperating.

Outline of a single procedure

- 11.8 We provisionally propose a single procedure that would apply regardless of the enfranchisement right being claimed.
- 11.9 We suggest that the key elements of that procedure should be as follows.
- (1) Standard forms to be prescribed for use by the parties. In particular:
 - (a) an Information Notice, that leaseholders may serve on their immediate landlord or any superior landlord requiring him or her to provide details as to the identity and address of any person holding a superior interest to their own;
 - (b) a Claim Notice, setting out the basis of the leaseholders' claim and their proposed terms of acquisition, and providing a date by which the recipient should respond; and

- (c) a Response Notice, setting out whether the recipient of a Claim Notice admits or denies that the leaseholders are entitled to bring their claim, the basis for any such denial, and (without prejudice to any denial) the recipient's proposed terms of acquisition.
- (2) Enfranchisement claims to be started by leaseholders completing a Claim Notice and either:
 - (a) serving that notice on their immediate landlord (or on the person who is able to transfer or grant the claimed interest, if different) ("the competent landlord") at:
 - (i) either the address provided by the competent landlord as the address at which enfranchisement notices can be served, or the competent landlord's current address ("Service Route A"); or
 - (ii) where neither of those addresses are available, at an address that falls within a list of prescribed categories of addresses for landlords and (if the interest is registered) at the addresses given by the landlord to HM Land Registry ("Service Route B"); or
 - (b) where the identity of their competent landlord is unknown, or neither Service Routes A nor B are available, by making an application to the Tribunal for an order permitting them to proceed with their claim ("the No Service Route").
- (3) A Claim Notice to be treated as having been properly served on an identified competent landlord (that is to say, deemed service) if the leaseholders have delivered by hand or sent their Claim Notice by post to the address(es) permitted by either Service Route A or B.
- (4) The recipient of the Claim Notice should:
 - (a) deliver or send copies of that notice to any intermediate leaseholders, and to any third party¹⁰⁰⁵ to the existing lease; and
 - (b) complete and deliver or send a Response Notice to the leaseholders.
- (5) An intermediate landlord to be permitted to replace the competent landlord as the person entitled to respond to the claim. The replacement of the competent landlord can be either by written agreement with the competent landlord, or on application to the Tribunal. If such replacement is agreed or ordered, the intermediate landlord will be permitted to deliver or send a fresh Response Notice to the leaseholders that will replace any such existing notice.
- (6) No challenge to the validity of any Claim Notice to be permitted save in so far as:

¹⁰⁰⁵ A party to the lease who is neither the leaseholder nor the landlord. For example, a management company that is a party to the lease and promises in that lease to carry out the landlord's rights and responsibilities in respect of the management of the building.

- (a) the prescribed form has not been used;
 - (b) the notice fails to make clear to a reasonable recipient of the notice:
 - (i) the enfranchisement right that is being claimed;
 - (ii) the identity of those bringing the claim; or
 - (iii) the address at which any notice of response should be served;
 - (c) the notice has not been signed.
- (7) No challenge to the validity of any Response Notice to be permitted save in so far as:
- (a) the prescribed form has not been used;
 - (b) that notice fails to make clear to a reasonable recipient of that notice:
 - (i) whether the leaseholder's right to enfranchise is admitted or denied; and
 - (ii) the landlord's address for service; or
 - (c) that notice has not been signed.
- (8) Any party to be entitled to amend his or her notice by serving the amended notice on the receiving party at any time before the claim is settled or determined by the Tribunal. The service of an amended Claim Notice would permit the recipient to serve their own amended Response Notice.
- (9) Leaseholders to be able to apply to the Tribunal for a determination of their eligibility, and the terms of acquisition, if:
- (a) the competent landlord (or a substituted intermediate landlord) has served a Response Notice on the leaseholders, and any issues remain in dispute after a prescribed period;
 - (b) a Claim Notice has been served by the leaseholders under either Service Route A or B, and no Response Notice has been served on the leaseholders within a prescribed period; or
 - (c) an order has been made by the Tribunal under the No Service Route.
- (10) An application under (9)(a) to remain necessary where the parties have agreed Heads of Terms, but have not settled either:
- (a) the full terms of a draft lease extension or transfer;
 - (b) any other terms to be satisfied prior to or upon completion; or
 - (c) the date on which the transaction is to be completed.

- (11) In either of the cases set out at (9)(b) and (c) above, the Tribunal will determine the leaseholders' application on the evidence provided to it by the leaseholders, and in the light of its own expertise. It will not be required to make an order on the terms set out in the Claim Notice in those circumstances.
- (12) If the lease extension or transfer (as agreed or settled by the Tribunal) has not been executed by the date agreed or set by the Tribunal, either party to be entitled to apply to the Tribunal for an order giving effect to that transaction.
- (13) Competent landlords who have failed to serve a Response Notice under Service Route A or B, or against whom an order has been made under the No Service Route, to be allowed to apply to the Tribunal:
 - (a) (if an application to the Tribunal for a determination of the claim has not been made, or has not been determined) for an order permitting the competent landlord to serve a Response Notice and participate in any such proceedings; or
 - (b) (if such an application has been made and determined, but the transfer or grant has not been completed) for an order setting aside the Tribunal's determination on limited prescribed grounds.

If an order is made under either (13)(a) or (b) above, the Tribunal is to have power to order that the competent landlord should pay all or part of any of the leaseholders' costs that had been wasted as a result, or set other conditions for granting the competent landlord's application.

- (14) Leaseholders to be entitled to withdraw their Claim Notice at any stage prior to the completion of the transaction. The cost consequences of doing so are considered in Chapter 13.
- (15) No deemed withdrawal of notices because of a leaseholder's failure to take the next procedural step within time. However, landlords – and other leaseholders who may wish to bring their own collective freehold acquisition claim – to be entitled to apply to the Tribunal for an order striking out a Claim Notice where the leaseholders have failed to take the next procedural step, or otherwise advance their claim, within a prescribed period.

11.10 This single procedure is illustrated in the two flowcharts which follow. First, Figure 6 outlines how leaseholders can start an enfranchisement claim. Secondly, Figure 7 sets out the steps that can be taken to progress such a claim once started. We then consider the procedure in more detail.

Figure 6: starting an enfranchisement claim

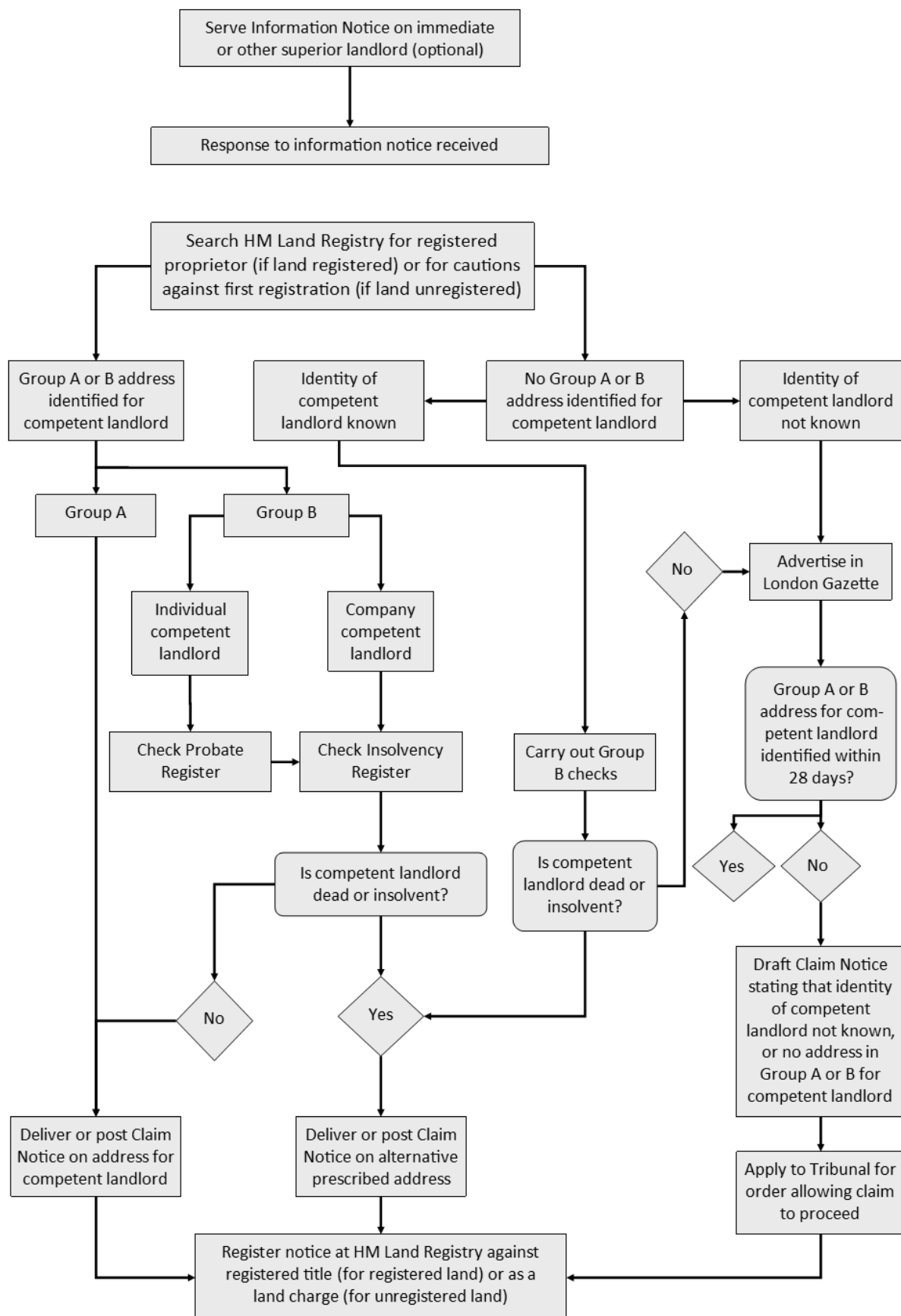
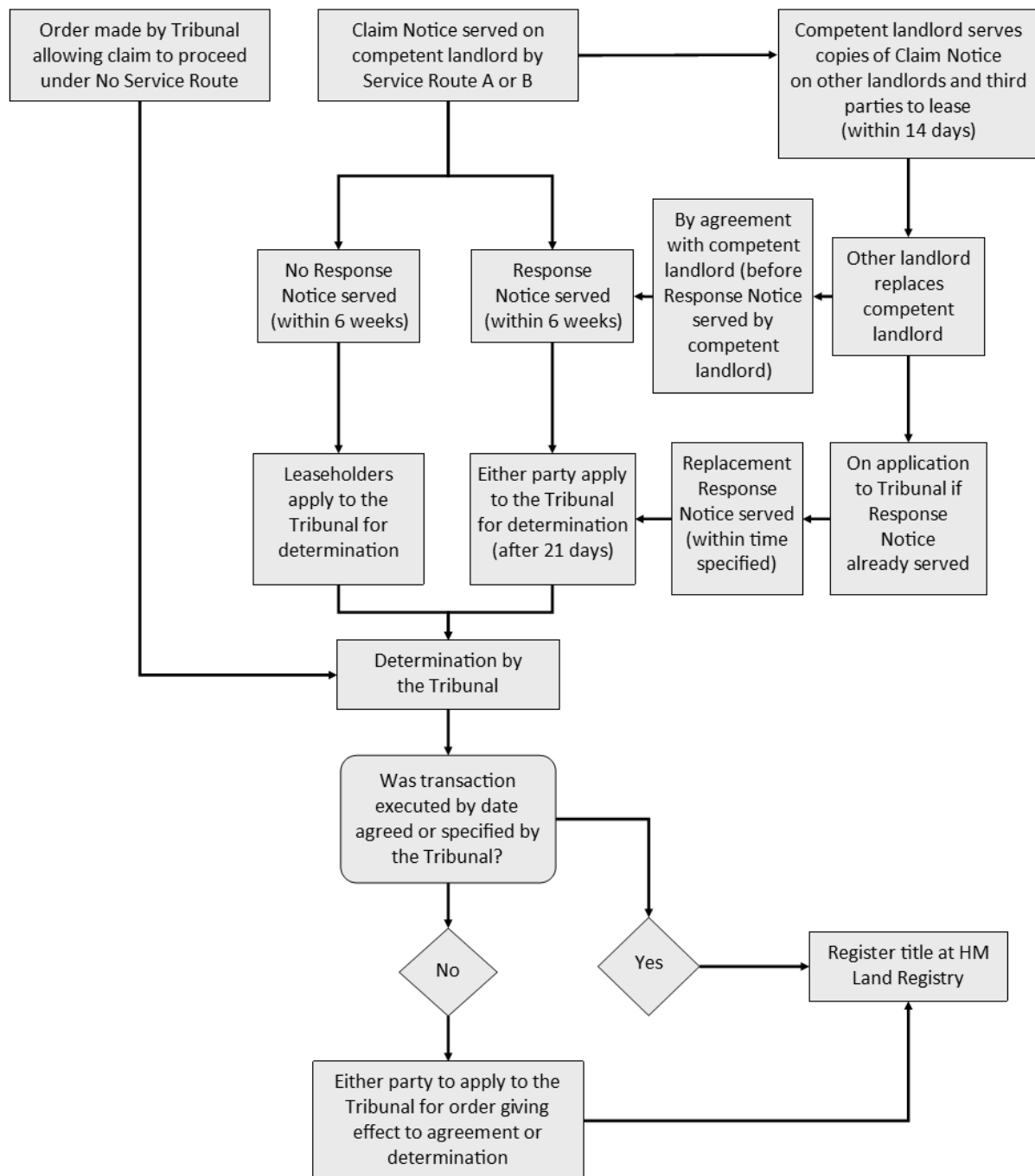


Figure 7: progress of an enfranchisement claim



A single procedure

11.11 We propose that a single procedure should apply regardless of the enfranchisement right being claimed. A single procedure will reduce uncertainty for both leaseholders and landlords, and for their advisers, by removing the need to select between different procedures.

11.12 While the procedure that we propose is different from the procedures that apply to claims made under either the 1967 or 1993 Acts, the basic procedural framework will remain familiar. In most cases, an enfranchisement claim will be started by leaseholders serving a notice setting out the details of their claim on their landlord; and landlords will be able to serve their own notice setting out their response to that claim. If the parties do not reach an agreement, or do not progress the transaction, the matter will be referred to the Tribunal for a decision to be made, or for action to be taken.

Consultation Question 70.

11.13 We provisionally propose that a single procedure should apply to all enfranchisement rights.

Do consultees agree?

Notices

Prescribed forms

11.14 We propose the introduction of a single set of prescribed forms for the parties to complete to bring or respond to an enfranchisement claim. This would include:

- (1) an Information Notice;
- (2) a Claim Notice; and
- (3) a Response Notice.

11.15 In the future, it may be possible to introduce an Information and/or a Claim Notice that will be created online using the answers provided by leaseholders to a series of questions about their proposed claim. At the end of the sequence of questions, a completed Information and/or Claim Notice would be generated using the answers provided. The notice could then be downloaded and printed out. It may also be possible in future to adopt a similar approach to the creation of Response Notices.

11.16 For the moment, however, it is likely that parties will be required to insert information within relevant sections of a pro forma document that will be available to download and/or print out from the internet.¹⁰⁰⁶

¹⁰⁰⁶ We anticipate that it will be relatively straightforward to create a document that can be made available online. In contrast, a more sophisticated system that generates a completed document from a series of questions posed is likely to take significantly greater time and resources to establish and maintain.

Consultation Question 71.

11.17 We provisionally propose that a single set of prescribed forms be introduced for bringing and responding to enfranchisement claims, namely an Information Notice, a Claim Notice and a Response Notice.

Do consultees agree?

Signatures

11.18 We have considered whether enfranchisement notices must be signed by the parties who are giving them. In doing so, we have noted that, in the context of the statutory right to manage set out in Part 2 of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”), some landlords, wishing to resist claims made by right to manage companies, have sought to challenge the validity of claim notices on the basis that the notices have not been properly signed.¹⁰⁰⁷ If disputes of this kind were to arise in enfranchisement claims, they would likely cause delay and add significantly to the parties’ costs. The prospect of such disputes arising may also deter some leaseholders from starting a claim.

11.19 One potential solution to this problem might be simply to remove any requirement for enfranchisement notices to be signed. Once filled out, an enfranchisement notice could simply be delivered by hand or sent by post to the other party. Removing the requirement for signatures would necessarily remove any room for arguments about whether a notice had been validly signed.

11.20 It can be argued, however, that the presence of a signature on a notice continues to serve an important function: it makes clear to the recipient that the person in whose name the notice is said to be given has, in fact, authorised the giving of that notice. This is of particular importance in collective freehold acquisition claims, where the claim can only be made where a prescribed proportion of leaseholders have agreed to bring that claim. It might also be the case that removing the need to sign enfranchisement notices would not, of itself, reduce the number of disputes between the parties about the validity of notices. Many landlords, on receiving a Claim Notice without signatures, would require proof that each of the leaseholders named in the notice had authorised the bringing of that claim. The dispute would then shift from an argument about whether a notice had been signed to an argument about whether it had been authorised. And as

¹⁰⁰⁷ For example, in *Assehold Ltd v 14 Stansfield Road RTM Company Ltd* [2012] UKUT 262 (LC) the claim notice was to be signed “by the authority of the [RTM] company” in accordance with the prescribed form. The notice was signed by a person who was authorised to do so by all three directors of the company, but who was not a member or officer of the company. The landlord argued, unsuccessfully, that the notice was required to be signed by a member or officer of the company because this was referred to on the prescribed form. In *Pineview Ltd v 83 Crampton Street RTM Company Ltd* [2013] UKUT 598 (LC), the landlord argued, again unsuccessfully, that the notice was defective because it was signed on behalf of the RTM company by its solicitors, rather than a company member or officer. In *Elim Court RTM Company Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, [2018] QB 571, the landlord argued that because the notice was being given by a company, it had to be signed in accordance with the Companies Act 2006 (that is, by two officers or an officer and a witness).

no signatures would appear on an enfranchisement notice, the issue of authorisation could arise in the case of every leaseholder who is participating in the claim. This might lead to an increase in the parties' costs rather than a reduction in those costs.

11.21 We think that if enfranchisement notices must be signed, it should be made as easy as possible for the parties to do so. First, we think that a signature could be applied to an enfranchisement notice either by hand or electronically.¹⁰⁰⁸ Secondly, we think that clear rules would be needed to set out who would be able to sign an enfranchisement notice on behalf of a party. For example, where a leasehold or freehold is held by a company, rules should set out who is able to sign a notice on behalf of that company. Finally, we also believe that it should be possible for a person to sign an enfranchisement notice for and on behalf of another, if that person has been authorised to do so.¹⁰⁰⁹ While we accept that this might create room for disputes between parties as to whether the signatory had in fact been authorised to sign, we believe that parties giving a notice should have the choice to sign a notice in this way if they wish to do so.

11.22 We also believe that if parties are required to sign enfranchisement notices, the ability of the landlord to challenge the validity of a notice on the basis that it has not been properly signed could be limited. For example, a Claim Notice might remain valid so long as it has been signed by (or for and on behalf of) the minimum number of leaseholders required to bring that claim, rather than all the participating leaseholders. Alternatively, a Claim Notice might remain valid so long as it has either been signed or expressly authorised by, the minimum number of leaseholders required to bring that claim. We note, however, that while the latter approach would further reduce the number of challenges by landlords to the validity of Claim Notices that might be brought, it could also significantly undermine the requirement for such notices to be signed at all. Nevertheless, leaseholders, and their representatives, might conclude that it would be better to have a Claim Notice signed in order to avoid a dispute being raised by their landlord as to whether the giving of the Claim Notice had been authorised by the leaseholders.

11.23 We also propose that each signatory to a Claim Notice should complete a statement of truth confirming that specified checks (if required) have been carried out prior to the notice being served.¹⁰¹⁰

¹⁰⁰⁸ In a recent consultation paper, the Law Commission has concluded that an electronic signature will generally satisfy a statutory requirement for a document to be signed: *Electronic execution of documents* (2018) Law Commission Consultation Paper No 237.

¹⁰⁰⁹ As noted in Ch 10 at paras 10.10 and 10.70, this is the current position in respect of notices of claim served under the 1967 Act and, as a result of changes introduced by the Leasehold Reform (Amendment) Act 2014 and the Housing (Wales) Act 2014, the current position in respect of notices of claim served under the 1993 Act in England and Wales.

¹⁰¹⁰ See paras 11.83 to 11.94 below.

Consultation Question 72.

- 11.24 Do consultees consider that a party who is giving an enfranchisement notice should be required to sign that notice?
- 11.25 Do consultees consider that an enfranchisement notice should only be challengeable for validity if it has not been signed by or on behalf of the minimum number of leaseholders required to bring the claim? If not, what do consultees believe the minimum requirement should be for such a notice to remain valid?
- 11.26 Do consultees consider that a Claim Notice should include a statement of truth confirming that specified checks (if required) have been carried out?

Information Notices

- 11.27 Leaseholders may choose to serve an Information Notice on their immediate landlord, and/or on a superior landlord, if they believe that they need more information in order properly to identify the person on whom a Claim Notice should be served.
- 11.28 An Information Notice will require the recipient to provide the leaseholders with the identity and address of his or her own landlord, and of any other superior landlord of whom he or she is aware. Those details could be entered by the immediate landlord on a portion of the Information Notice and returned to the leaseholders at the address provided for that purpose in the notice within a prescribed period.
- 11.29 We propose that if the recipient of an Information Notice does not return a properly completed Information Notice within the prescribed period, he or she may be ordered to pay any costs of the leaseholders that are wasted as a result of that information not having been provided when requested.

Consultation Question 73.

11.30 We provisionally propose that:

- (1) leaseholders be permitted to serve an Information Notice on their immediate landlord or a superior landlord requiring the recipient to provide the name and address of his or her landlord and any other superior landlord of whom he or she is aware; and
- (2) the recipient of an Information Notice who fails to respond should be liable to pay any costs of leaseholders that are wasted as a result of the information not having been provided.

Do consultees agree?

Claim Notices

11.31 A Claim Notice must be completed by leaseholders who are seeking to make an enfranchisement claim. The purpose of that notice would be both to notify the competent landlord that an enfranchisement claim is to be made against him or her, and to provide details of that claim.

11.32 We have considered the information that leaseholders should be required to include in a Claim Notice. Should the information required be restricted to that which identifies the leaseholders bringing the claim, sets out the right being asserted, and establishes the leaseholders' right to do so? Or should the Claim Notice also include further details about the claim, including the terms on which the leaseholders propose to acquire the freehold or lease?

11.33 We believe that there are clear advantages for both parties in expecting leaseholders to set out the detail of their claim at an early stage. First, it requires leaseholders to have considered what they are seeking, and the terms on which they are willing, and indeed able, to acquire the lease extension or freehold. Secondly, it allows landlords to understand the detail of the claim being advanced as soon as it is made, rather than allowing those details to emerge subsequently in exchanges of correspondence.

11.34 We acknowledge that the more information leaseholders are required to provide in a Claim Notice, the greater the risk that those details will prove to have been incomplete, or, in some cases, wrong. Nevertheless, as we also propose to limit the ability of landlords to challenge the validity of a Claim Notice based on such errors,¹⁰¹¹ we believe that the advantages of requiring leaseholders to provide a greater level of detail in the Claim Notice will outweigh any disadvantages in doing so.

11.35 We therefore propose that the prescribed Claim Notice should be completed by the leaseholders inserting the following information.¹⁰¹²

- (1) The names of each of the leaseholders who are bringing the claim.
- (2) In respect of each named leaseholder:
 - (a) the address of the leasehold premises that is relevant to his or her entitlement to bring the claim; and
 - (b) prescribed details of the lease under which that leasehold interest is held.
- (3) In the case of a collective freehold acquisition:
 - (a) the number of residential units in the building;
 - (b) the number of residential units held by leaseholders eligible to participate in the claim;

¹⁰¹¹ See paras 11.116 to 11.119 below.

¹⁰¹² We propose that the form and content of the Claim Notice should be prescribed in secondary legislation.

- (c) the names and addresses of those eligible leaseholders who are not participating in the claim; and
 - (d) the name and address of the nominee purchaser.¹⁰¹³
- (4) The name of the landlord on whom the notice is to be served (the competent landlord), if known.
- (5) The address of the premises held by the competent landlord that is, or includes, (whether in whole or in part) the interest claimed.
- (6) The type of enfranchisement right being claimed in respect of those premises.
- (7) The legal basis of the leaseholders' claim to be entitled to bring that claim.¹⁰¹⁴
- (8) A plan showing the location of the claimed premises.¹⁰¹⁵
- (9) A plan showing the extent of the premises claimed.¹⁰¹⁶
- (10) The terms on which it is proposed the interest should be acquired. In particular:
 - (a) (in the case of collective freehold acquisitions) whether the leaseholders require the landlord to take a leaseback of any parts of the premises;¹⁰¹⁷
 - (b) the price to be paid;¹⁰¹⁸ and
 - (c) the terms of any transfer/lease extension.¹⁰¹⁹

¹⁰¹³ We do not think that the need to identify the nominee purchaser in the Claim Notice will cause significant delay as most of the articles of association will be prescribed in secondary legislation. We also think that it is reasonable to expect leaseholders who are seeking to take over the management of a building to have discussed and settled important questions about how that management is to be organised in practice before starting a claim.

¹⁰¹⁴ This information would be provided by the leaseholders ticking one or more boxes appearing alongside a list of qualification criteria set out on the pro-forma document.

¹⁰¹⁵ Of a scale that allows the premises to be identified by reference to adjoining roads.

¹⁰¹⁶ Leaseholders will only be required to set out the limits of the property claimed, rather than distinguish between any grounds on which any part is being included.

¹⁰¹⁷ Leasebacks are considered in Ch 6. We have provisionally proposed (at para 6.131) that leaseholders making a collective freehold acquisition claim should be able to elect to require landlords to accept leasebacks of any or all parts of the premises being acquired (other than common parts) which are not let to participating leaseholders. This would include the flats of qualifying but non-participating leaseholders, flats which are not let to qualifying leaseholders, and commercial units.

¹⁰¹⁸ At present we consider that this should be the price to be offered for the claimed interest. But some of the options for valuation reforms set out elsewhere might also make it possible for certain input values to be specified (eg the freehold vacant possession value of the unit).

¹⁰¹⁹ This does not require the leaseholders to have settled their proposed terms of any lease or transfer at this stage.

- (11) An address within England and Wales at which any Response Notice must be served.
- (12) The date by which any Response Notice must be served.
- (13) 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.¹⁰²⁰
- (14) Confirmation that the leaseholders have carried out specified checks prior to completing the notice (if required).¹⁰²¹

11.36 We also believe that the Claim Notice should be accompanied by proof of the leaseholders' title to their leasehold premises. In most cases, this could be done by providing the Office Copy entry and filed plan for the premises from HM Land Registry. In cases of unregistered land, this could be done by providing a copy of the lease, assignment or assent that gave the leaseholder his or her interest in the premises. We believe that in bringing forward the point at which title must be proved by leaseholders, further time and costs will be saved at a later stage.

11.37 We recognise that introducing a single prescribed Claim Notice for bringing any type of enfranchisement claim is likely to present leaseholders with a form that includes sections that are not relevant to them. There is the potential to cause confusion by creating a form that is more complicated than is necessary to deal with any given type of claim. Equally, however, the adoption of separate forms for bringing different enfranchisement claims may create a risk that leaseholders will complete a notice intended for one type of claim when intending to bring a different claim. Further, the development of an online form would remove this risk as the form could be set up to show only the questions that are necessary to answer for the particular right being exercised.

11.38 We therefore seek consultees' views on whether we should introduce a single Claim Notice that can be completed by leaseholders – whichever enfranchisement claim they seek to bring – or separate forms for each of those claims.

¹⁰²⁰ See para 11.68 below.

¹⁰²¹ See paras 11.83 to 11.94 below.

Consultation Question 74.

11.39 We provisionally propose that Claim Notices should include full details about leaseholders' claims, and proof of the leaseholders' title.

Do consultees agree?

11.40 We invite the views of consultees as to whether a single prescribed Claim Notice should apply to all enfranchisement claims, or whether separate forms should be provided for different enfranchisement claims.

Collective freehold acquisition: inviting participation

11.41 In Chapter 6 above, we noted that a group of leaseholders can carry out a collective enfranchisement claim without inviting other eligible leaseholders to participate in the claim – or even informing them that a claim is to be made. One means of resolving this issue would be by requiring leaseholders who wish to carry out a collective freehold acquisition to invite all other eligible leaseholders to participate in the claim before serving their Claim Notice. As noted in Chapter 6 above,¹⁰²² while the 1993 Act contained no such requirement, amendments set out in the 2002 Act proposed that all qualifying tenants had to be served with a “notice of invitation to participate” before a notice of claim could be given to the landlord.

11.42 However, the provisions of the 2002 Act on the “notice of invitation to participate” have never been brought into force, and almost identical provisions within the 2002 Act relating to the right to manage have caused both significant difficulties for leaseholders and considerable opportunities for landlords seeking to frustrate their leaseholders' claim. We set out in Chapter 6 the reasons why we do not propose the introduction of a requirement to invite all leaseholders to participate in a collective freehold acquisition claim. Instead, we have proposed a new right to participate to address this issue. We think that the creation of the right to participate, discussed in more detail in Chapter 6, together with possible costs incentives to encourage the invitation of all leaseholders, should be sufficient to ensure that all leaseholders who wish to participate in a collective freehold acquisition claim will either be invited to do so, or will be able to do so thereafter on reasonable terms.

Consultation Question 75.

11.43 We provisionally propose that leaseholders seeking to bring a collective freehold acquisition claim should not be required to serve notices on other leaseholders inviting their participation in the proposed claim.

Do consultees agree?

¹⁰²² See paras 6.149 to 6.151 above.

No statutory contract

11.44 In enfranchisement claims under the 1967 Act, and in lease extension claims under the 1993 Act, the service of a notice of claim creates a statutory contract between the parties. No such contract arises in respect of collective enfranchisement claims under the 1993 Act.

11.45 We do not believe that any of our proposed statutory enfranchisement rights require the creation of a statutory contract upon service of the leaseholder's Claim Notice. Statute would create the enfranchisement rights and define the circumstances in which those rights would apply. Statute would also set out how those rights could be claimed, how the terms of any lease extension or transfer would be determined (if not agreed) and how any agreed or determined terms would be put into effect. As such, the obligations on the parties would – in so far as they were not created by agreement between the parties – be statutory rather than contractual.

Consultation Question 76.

11.46 We provisionally propose that the service of a Claim Notice upon a competent landlord should not create a statutory contract between the leaseholders and the landlord.

Do consultees agree?

11.47 We invite the views of consultees as to whether there are any other effects of a statutory contract that we would need to provide for in some other way.

Response Notices

11.48 A competent landlord who has received a Claim Notice must serve a Response Notice on the leaseholders at the address provided by them in their Claim Notice within a prescribed period.

11.49 The prescribed Response Notice should be completed by the landlord inserting the following information:

- (1) whether the landlord admits or denies the leaseholders' entitlement to the enfranchisement right claimed in their Claim Notice;
- (2) if the right is being denied by the landlord, the basis for doing so;¹⁰²³
- (3) (without prejudice to any such denial) whether the landlord accepts or rejects each of the leaseholders' proposed terms of acquisition (including any proposed leasebacks), including price, as set out in the Claim Notice, and a statement of the landlord's proposed terms (including whether the landlord proposes to take a

¹⁰²³ By marking against a checklist of statutory criteria.

leaseback of any units not let on a long residential lease, which he or she has not already been required by the leaseholders to take);¹⁰²⁴

- (4) a draft contract, lease or transfer setting out the landlord's proposed terms of acquisition;¹⁰²⁵ and
- (5) an address for service of proceedings within England and Wales.

11.50 We also provisionally consider that the Response Notice should be accompanied by proof of the landlord's title and his or her declaration of any defects in that title. In most cases, this could be done by providing the Office Copy entry and filed plan for the premises from HM Land Registry. In cases of unregistered land, this could be done by providing an epitome of title.¹⁰²⁶ As noted above, we believe that in bringing forward the point at which title must be proved by leaseholders, further time and costs will be saved at a later stage.

11.51 As with Claim Notices, we propose below a limit on the ability of leaseholders to challenge the validity of a Response Notice if particular information is incomplete or wrong.¹⁰²⁷

Consultation Question 77.

11.52 We provisionally propose that Response Notices should:

- (1) state whether the leaseholder's right to enfranchise is admitted or denied, and the basis for any such admission or denial;
- (2) state whether the landlord accepts or rejects the leaseholder's proposals, and set out the landlord's own proposed terms;
- (3) attach a draft contract, lease or transfer;
- (4) contain an address within England and Wales at which the landlord can be served; and
- (5) be accompanied by proof of the landlord's title.

Do consultees agree?

¹⁰²⁴ Leasebacks are relevant only in the case of freehold acquisition claims. See discussion in Ch 6.

¹⁰²⁵ In the case of a draft lease, any differences between the terms of the leaseholders' existing lease and the lease extension should be clearly marked.

¹⁰²⁶ An epitome of title consists of a chronological index of all material documents that show how the unregistered title to the property has passed to the party producing the document, together with copies of each of those documents.

¹⁰²⁷ See paras 11.116 to 11.119 below.

Service of notices

On whom should a Claim Notice be served?

11.53 In order to complete a Claim Notice, leaseholders will need to insert the name of the landlord on whom the notice is to be served. In simple terms, the landlord will be the person who holds a sufficient interest in the premises to be able to grant a lease extension or to transfer the freehold.

11.54 Of course, in freehold claims, the person to whom a Claim Notice should be directed is the freeholder. Similarly, where the leaseholders' immediate landlord is also the freeholder, and there are no other leases ("intermediate leases") between the leaseholders' title and that of the freeholder, the Claim Notice must be directed to the freeholder.¹⁰²⁸

11.55 In other cases, the position can be more complicated. Where the leaseholders' immediate landlord is not also the freeholder of the premises, leaseholders will have to select the correct landlord to be served. To do so, leaseholders must establish whether their immediate landlord has a sufficient interest in the premises to be able to grant them a lease extension (the competent landlord). If not, the leaseholders will need to investigate the title of each superior landlord until they find the landlord who does hold a sufficient interest.¹⁰²⁹

11.56 Given these complexities, we have considered whether leaseholders bringing a claim for a lease extension should simply be required to serve their immediate landlord rather than their competent landlord, if different. However, we believe that it remains reasonable for the leaseholders' claim to be placed directly into the hands of the landlord who is able to grant the interest claimed. We also believe that a continued obligation on leaseholders to identify the competent landlord is balanced by other changes we propose to make in relation to the service on other landlords.¹⁰³⁰

11.57 Further complexity can be caused, however, where there is more than one freeholder or other competent landlord of the premises. For example, the whole of the premises may be owned jointly by more than one person. Alternatively, different parts of the premises may be held under separate leases each held by different landlords (there is a split freehold or other reversion).¹⁰³¹

11.58 We think that, in the cases of joint legal owners of a single freehold, or of a split freehold or other reversion, the process would be simpler and most cost-effective for leaseholders if they did not have to serve multiple landlords with a Claim Notice. Instead, we propose that leaseholders should only be required to serve one landlord, and the landlord in receipt of a Claim Notice should be obliged to send copies of the notice to other landlords. In addition, for the reasons set out below,¹⁰³² leaseholders

¹⁰²⁸ Intermediate leases are considered in Ch 16.

¹⁰²⁹ See Ch 16.

¹⁰³⁰ See paras 11.102 to 11.105 below.

¹⁰³¹ The term split freehold applies where the leaseholder's landlords are freeholders; where the leaseholder's landlords are themselves leaseholders, the term split reversion applies.

¹⁰³² See paras 11.102 to 11.105 below.

would be assisted if they did not have to provide copies of the Claim Notice to intermediate landlords or third parties to an existing lease.¹⁰³³

11.59 We acknowledge that requiring the competent landlord, rather than the leaseholders, to serve other landlords would increase the burden on the competent landlord. However, we believe that burden more reasonably lies on the competent landlord than on the leaseholders, who will have played no role in the creation of, and derive no benefit from, intermediate interests or other complex ownership structures. We believe that it is, therefore, unreasonable to expect them to meet the additional costs of serving multiple landlords.

Consultation Question 78.

11.60 We provisionally propose that:

- (1) leaseholders making an enfranchisement claim should serve their Claim Notice on their competent landlord (the first superior landlord who holds a sufficient interest in the premises to be able to grant the interest claimed); and
- (2) in the case of joint owners of a single freehold, or in the case of a split freehold or other reversion, leaseholders will only be required to serve the Claim Notice on one landlord, and it will be for that landlord to serve copies of that notice on other landlords.

Do consultees agree?

Starting a claim

11.61 At present, leaseholders normally start an enfranchisement claim by serving the appropriate notice on the appropriate landlord.¹⁰³⁴ If leaseholders are unable to do so, either because they do not know the identity of that landlord or because they do not have an address at which he or she can be reached, then they may, in most cases, apply to the county court for an order that allows their claim to proceed in the absence of the landlord.¹⁰³⁵

11.62 We intend to apply that basic position to all of our proposed enfranchisement rights. We also acknowledge that in most cases leaseholders will know both the identity of the landlord on whom their notice should be served, and an address at which that landlord can be reached. And in most of those cases, a landlord who is served with a notice at that address will receive that notice and choose to respond with a notice of his or her

¹⁰³³ Such as a management company that has been made a party to the lease and promises to carry out the landlord's management functions during the term of the lease.

¹⁰³⁴ See Ch 10 at paras 10.16, 10.77 and 10.123 above.

¹⁰³⁵ The exception is a claim for a lease extension of a house under the 1967 Act: see Ch 10 at para 10.31 above.

own. We intend that our proposed procedure should work well in the majority of claims in which the parties cooperate, but also deal appropriately with more difficult cases.

- 11.63 Nevertheless, we believe that the current rules about the service of notices contained in the 1967 and 1993 Acts fail to provide sufficient certainty for leaseholders who wish to bring an enfranchisement claim. In most cases,¹⁰³⁶ leaseholders who post a notice to their competent landlord at his or her address will be able to assess the likelihood that he or she will receive the notice at that address and choose to respond. But they cannot be certain that their claim will be treated as having been validly started by the service of that notice even if the landlord does not respond: it is open to the landlord to argue that he or she did not respond because the notice was not in fact received. The result is that leaseholders may spend time and money progressing a claim that will, thereafter, be held not to have been started at all.
- 11.64 We therefore propose that leaseholders who know the identity of their competent landlord should be able to identify an address at which their Claim Notice will be deemed served if it is delivered by hand or sent to that address by post, even if the competent landlord does not receive it or respond to it (a “designated address”).
- 11.65 As set out below, we have divided the categories of designated addresses between Group A and Group B. Leaseholders must serve their Claim Notice at an address falling within Group A if they are able to do so. A leaseholder who serves a Claim Notice on his or her landlord at an address within Group A is described as using Service Route A. A leaseholder who serves a Claim Notice on his or her landlord at an address falling within Group B is described as using Service Route B.
- 11.66 We further propose that if leaseholders do not know the identity of their competent landlord, or they do not have a designated address for a known competent landlord, they should be able to make a simple application to the Tribunal for an order allowing them to proceed with their claim.

Designated addresses

- 11.67 As set out above, leaseholders who know the identity of their competent landlord will be able to serve a Claim Notice at a designated address, knowing that the notice will be treated as having been properly served if it is delivered by hand or sent to that address by post, even if it has not in fact been received.
- 11.68 We believe it would be sensible, however, to distinguish between two groups of designated addresses, and to provide that leaseholders should serve a Claim Notice at an address falling in the first group (Group A) rather than the second group (Group B) wherever possible to do so.
- 11.69 Group A is intended to include only those categories of address where there is a high probability that any notice sent will be received by the landlord. We propose that Group A should consist of:

¹⁰³⁶ The exception is a 1967 Act Notice of Claim sent by leaseholders to the landlord at his last known place of abode: see Ch 10 at para 10.19 above.

- (1) any address (including an email address) that has been provided by the competent landlord to the leaseholders as an address at which an enfranchisement notice may be served; and
- (2) the competent landlord's current address.

11.70 Group B is intended to include a range of other categories of addresses at which there is a reasonable likelihood that any notice will be received by the landlord. We propose that Group B should consist of:

- (1) the competent landlord's last known address;¹⁰³⁷
- (2) the latest address given by the competent landlord for the purposes of section 47 of the Landlord and Tenant Act 1987;¹⁰³⁸
- (3) the latest address given by the competent landlord for the purposes of section 48 of the 1987 Act;¹⁰³⁹ and
- (4) the latest email address given by the competent landlord for the purposes of serving notices (including notices in proceedings).

We also propose that in addition to service on the landlord at one of the above categories of address, the Claim Notice should (in the case of registered land) also be delivered by hand or sent by post to the competent landlord at each of the addresses appearing as the addresses of the landlord as registered proprietor of the property at HM Land Registry.

11.71 In drawing up this list, we have sought to include addresses that have been provided by the landlord in response to a statutory requirement to do so. This list includes addresses provided by the landlord to leaseholders as an address at which they may serve notices more generally, or to HM Land Registry as addresses at which it may serve notices on the registered proprietor. While we accept that our scheme may increase the importance for landlords of keeping such addresses up to date, we do not think this requirement creates an unfair or unreasonable burden.

11.72 We also propose that addresses can only be designated addresses within Group A or B if they are within England and Wales. Although such a qualification may require a landlord to ensure that he or she has provided his or her leaseholders and/or HM Land Registry with an address for service within the jurisdiction, we do not consider this requirement to be unreasonable. Indeed, we note that immediate landlords are already under an obligation to provide leaseholders with an address within England and Wales

¹⁰³⁷ In the case of a company, this will be deemed to be at its registered office (as at the day on which the notice was delivered by hand or sent).

¹⁰³⁸ See Ch 10, at para 10.20 above.

¹⁰³⁹ See Ch 10, at para 10.20 above.

at which they can serve notices.¹⁰⁴⁰ It will, however, remove the significant difficulties currently faced by leaseholders needing to serve a notice outside the jurisdiction.¹⁰⁴¹

11.73 As set out above,¹⁰⁴² we consider that service at an email address should only be permitted where that address has been given by the competent landlord:

- (1) to the leaseholders as an address at which enfranchisement notices can be served (when it will fall within Group A);
- (2) for the purposes of serving notices (including notices in proceedings) (when it will fall within Group B); or
- (3) to HM Land Registry, as an address at which the registered proprietor can be served with notices (when it will provide an additional address for service within Group B).

We believe it is reasonable to allow service by email in those cases as the landlord has provided that email address knowing that it will be used for the service of legal proceedings or other important legal documents. We do not believe that it would be appropriate to allow leaseholders to serve notices on their landlord at email addresses provided by that landlord as an address at which he or she can be reached more generally, or at an email address that landlord has used in the past.

The main method of starting a claim: Service Routes A and B

11.74 We anticipate that the overwhelming majority of leaseholders will be able to start their enfranchisement claim by serving notices on their competent landlord at an address falling within Group A. We refer to a claim started in this way as a claim started using Service Route A.

11.75 We also believe that in the majority of cases where leaseholders know the identity of their competent landlord but are not able to start their claim using Service Route A, they will have an address for their competent landlord that falls within Group B. We refer to a claim started in this way as a claim started using Service Route B.

11.76 Where leaseholders are able to use either Service Route A or B, they should:

- (1) insert into the Claim Notice:
 - (a) the name of their competent landlord;
 - (b) the address on which he or she is to be served; and

¹⁰⁴⁰ Landlord and Tenant Act 1987, s 48.

¹⁰⁴¹ Practitioners have told us that postal services abroad are often poor and it can therefore be difficult to predict when a notice is likely to arrive. This can create difficulties for leaseholders in identifying the date by which their landlord is required to respond to a notice of claim since that date is determined by the date on which their own notice is served on the landlord. In addition, notices of claim under the 1993 Act are required to set out that date within the notice itself.

¹⁰⁴² Paras 11.69 and 11.70 above.

- (c) the category of designated address into which that address falls; and
- (2) deliver the completed Claim Notice to their competent landlord at that address, or send it to that address by post (or by email where permitted).

11.77 If the competent landlord serves a Response Notice within the prescribed period for serving such a notice, then the leaseholder will be able to apply to the Tribunal to determine any issues that remain in dispute between the parties at the end of a further prescribed period.¹⁰⁴³

11.78 If no Response Notice has been served within the prescribed period for serving such a notice, then the leaseholders will be able to apply to the Tribunal for a determination of their claim after the end of that period. Before the Tribunal determines the claim, based on the evidence and its own expertise, the leaseholder must prove that the Claim Notice was delivered by hand or sent by post to a designated address.

The alternative method of starting a claim: No Service Route

11.79 In some cases, it will not be possible for leaseholders to start a claim by using either Service Route A or B. We propose that in those circumstances, leaseholders should be able to apply to the Tribunal for an order allowing them to proceed with their claim.

11.80 Where leaseholders:

- (1) do not know the identity of their landlord; or
- (2) do not have a designated address for a known landlord falling within either Group A or B;

they should:

- (3) complete the Claim Notice by recording that (1) or (2) above applies; and
- (4) apply to the Tribunal for an order permitting the leaseholders to proceed with their claim.

11.81 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, set out at paragraph 11.80 above, are satisfied. If not, the Tribunal may either dismiss the claim, or give further directions. We also propose that the Tribunal should be able to order that the leaseholder's costs of making such an application be paid by the landlord, and deducted from any price to be paid for the interest in land claimed.¹⁰⁴⁴

¹⁰⁴³ The length of the provisionally proposed prescribed periods are set out at para 11.144 below.

¹⁰⁴⁴ See Ch 13 at para 13.109.

Consultation Question 79.

11.82 We provisionally propose that:

- (1) Claim Notices sent by post or delivered by hand to competent landlords at specified categories of address (falling within Group A or B, as set out at paragraphs 11.69 and 11.70) should be deemed served; and
- (2) where it is not possible to serve competent landlords in that way, leaseholders should be able to apply to the Tribunal for an order allowing them to proceed with their enfranchisement claim.

Do consultees agree?

Pre-service checks

11.83 We acknowledge that the introduction of a more straightforward service regime for leaseholders may increase the risk that an enfranchisement claim may be started, or indeed concluded, without the competent landlord having been made aware of it.

11.84 Other proposals in this paper will reduce the risk of landlords being prejudiced in those circumstances. For example, the removal of the obligation (under the 1993 Act) for a landlord to grant or transfer the claimed interest at the price set out in the notice of claim when the landlord has failed to serve a counter-notice means that a landlord would not be prejudiced if he or she did not respond to a claim as a result of being unaware of it.¹⁰⁴⁵ And adopting a more prescriptive valuation methodology would reduce the extent to which it would be possible for a landlord to argue for a higher premium.¹⁰⁴⁶ But it will always be beneficial for landlords to be aware of and able to participate in enfranchisement claims. A balance therefore has to be struck between making a regime that introduces simple, certain and cost-effective deemed service rules, and ensuring that reasonable steps are taken to ensure that landlords will generally be notified of the claim.

11.85 One possible corollary to a deemed service regime would be specified pre-service checks that would need to be carried out by leaseholders prior to starting a claim using either the Service or the No Service Route.¹⁰⁴⁷ When considering pre-service checks, it is necessary to consider whether it is reasonable and proportionate for such checks to be carried out, and if so, what checks should be made.

11.86 We believe that in all cases, leaseholders should search HM Land Registry to identify the name and address of the current registered proprietor of the competent landlord's interest (if registered), and also conduct a search for any cautions against first registrations in respect of that interest (if unregistered). Under the current law,

¹⁰⁴⁵ See para 11.97 below.

¹⁰⁴⁶ See Ch 15.

¹⁰⁴⁷ We think that any pre-service checks that are required of leaseholders should be set out in secondary legislation.

leaseholders would usually carry out such a check before serving a notice of claim, and we think it would be reasonable to require it in all cases if leaseholders are to benefit from a deemed service regime. And as noted above, leaseholders using Service Route B must (in the case of registered land) serve their landlord at each of the addresses provided for him or her as registered proprietor at HM Land Registry, in addition to serving their landlord at another address within Group B.

11.87 We also acknowledge that there can be circumstances in which the person recorded as the current owner of a property will no longer be the correct recipient of a notice in respect of that property. If a landlord has died, his or her property will become vested in a personal representative or the Public Trustee. And if a landlord has become insolvent, property will become vested in an administrator, liquidator, receiver or trustee in bankruptcy.

11.88 We therefore propose that where leaseholders are proposing to commence an enfranchisement claim using Service Route B (but not A), they should:

- (1) in the case of an individual landlord:
 - (a) search the Probate Register to check whether a grant of probate has been issued to anyone in respect of that landlord; and
 - (b) search the Insolvency Register to check whether their known landlord has in fact become insolvent.
- (2) in the case of a company landlord, search Companies House to confirm the status of the company.

These checks can be carried out online,¹⁰⁴⁸ and confirmation that they have been carried out should be included in the Claim Notice.¹⁰⁴⁹

11.89 These pre-service checks may reveal that the landlord on whom the leaseholders had expected to be able to serve a Claim Notice is no longer the correct recipient of the notice. We propose that, in those circumstances, alternative designated addresses should apply, and that leaseholders should be able to serve a Claim Notice at those alternative designated addresses with the confidence that their claim will be treated as having been validly served (and hence started).

11.90 If checks reveal that the landlord has died, the Claim Notice should be served on any personal representatives to whom probate has been granted. We propose that a Claim Notice should be deemed to have been served on those representatives if delivered by hand or sent by post to the address given for the personal representatives on the grant of probate. If there are no personal representatives, any notice will be deemed served if delivered by hand or sent by post to the office of the Public Trustee.

11.91 If checks reveal that an individual landlord has been made bankrupt, we propose that a Claim Notice will be deemed to have been served on him or her if delivered by hand or

¹⁰⁴⁸ We anticipate that a link to the appropriate website search pages could be included on the Government website from which a Claim Notice can be obtained.

¹⁰⁴⁹ As set out above, that confirmation would be attested by a statement of truth.

sent by post to his or her trustee in bankruptcy. We propose that a Claim Notice will be deemed to have been served on the trustee if delivered by hand or sent by post to the address for the trustee that appears on the Insolvency Service's website.

- 11.92 If checks reveal that a company landlord has been made insolvent, we propose that a Claim Notice will be deemed to have been served if it is delivered by hand or sent by post to the administrator, liquidator or receiver at the address registered with Companies House. Where there is no such person yet appointed, a Claim Notice would be deemed served if sent by post to the Official Receiver.¹⁰⁵⁰
- 11.93 We also consider that where the identity of the landlord is not known and the leaseholders are proposing to start their claim using the No Service Route, they should be required to place an advertisement in the London Gazette inviting any owners of the identified property to contact the leaseholders within 28 days. Confirmation that this has occurred should be included in any application to be made under the No Service Route.
- 11.94 Where the identity of the landlord is known, but the leaseholders do not have an address for that landlord falling within Group A or B, the leaseholders should carry out the checks referred to at paragraph 11.88 above. If the checks do not provide the leaseholders with an alternative designated address, they should then place an advertisement in the London Gazette in the manner described at paragraph 11.93 above.

¹⁰⁵⁰ We have addressed circumstances in which a company landlord has been struck off the register in Ch 10 at para 10.33.

Consultation Question 80.

11.95 We provisionally propose that:

- (1) before serving a Claim Notice, leaseholders should be required to check their competent landlord's address as shown at HM Land Registry;
- (2) before serving a Claim Notice using Service Route B leaseholders should be required to:
 - (a) search the Probate Register;
 - (b) search the Insolvency Register; and
 - (c) (in the case of a company landlord) check its status at Companies House;
- (3) if an individual landlord is dead, the designated address for service should be the address of any personal representatives at the address given in any grant of probate;
- (4) if an individual landlord is insolvent, the designated address for service should be the address for his or her trustee in bankruptcy as shown on the Insolvency Service website;
- (5) if a company landlord is insolvent, the designated address for service should be 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;
- (6) before serving a Claim Notice using the No Service Route, leaseholders should place an advertisement in the London Gazette inviting owners of the premises to contact the leaseholders within 28 days; and
- (7) where leaseholders know the identity of the landlord but do not have an address for him or her falling within Group A or B, they should carry out the checks referred to at (2) above, before placing an advertisement in the London Gazette.

Do consultees agree?

Responding to a claim

11.96 We provisionally propose that a competent landlord who has received a Claim Notice must, by the prescribed date set out in that notice:

- (1) send copies of the Claim Notice to any intermediate or other landlord of whom he or she is aware;

- (2) send copies of the Claim Notice to any third party to the lease;¹⁰⁵¹ and
- (3) serve a Response Notice at the address set out in the Claim Notice.

11.97 At present, there is no clear penalty for a landlord who does not serve a counter-notice in response to a Notice of Tenant's Claim under the 1967 Act, but there is a significant penalty for landlords who fail to respond to a notice of claim under the 1993 Act, as they are required to accept the price given in the Claim Notice. We propose to remove that penalty: landlords who have been served with a Claim Notice but fail to serve a Response Notice will not be required to dispose of their interest on the leaseholders' terms. We have also proposed simplifying the basis on which any claimed interest is valued.¹⁰⁵² We believe these changes will reduce the likelihood, and significance, of any dispute between the parties on that issue.

11.98 In making this proposed change, we acknowledge that leaseholders would lose their current entitlement to obtain the claimed interest at the price set out in their Claim Notice. But we do not believe that opportunity should form a part of a fair and reasonable procedure for dealing with enfranchisement claims. In particular:

- (1) the current position creates a potential windfall for leaseholders and a potential penalty for landlords;
- (2) the size of that windfall or penalty is not fixed: it is equal to the difference between the value placed on the interest by the leaseholders in their Claim Notice, and the proper value of that interest (as might otherwise have been agreed or determined);
- (3) in many cases, the windfall or penalty imposed would be out of all proportion to any costs or other losses that might have been caused to leaseholders as a result of the landlord's default;
- (4) the potential for a windfall or penalty creates an incentive for leaseholders to argue that their landlord has failed to serve a counter-notice (or that his or her notice is invalid), and for the landlord to argue that he or she had in fact served a valid counter-notice (or that he or she was not required to do so because he or she had not received a valid notice from the leaseholders); and
- (5) the costs incurred by the parties in raising this argument are incurred to obtain a windfall or avoid a penalty, rather than in pursuit of a fair determination of the enfranchisement claim.

11.99 In any event, we consider that the loss of this potential windfall for leaseholders is balanced by the increased ease and certainty with which they will be able to start and proceed with their enfranchisement claim.

11.100 These changes are likely to reduce the importance of landlords responding to an enfranchisement claim. Nevertheless, we believe that, in most cases, landlords who have been served with Claim Notices will continue to decide to respond by serving a

¹⁰⁵¹ Such as a management company that has undertaken to perform the landlord's repairing obligations.

¹⁰⁵² See Ch 15.

Response Notice. As we go on to explain below, a landlord who failed to do so would have to accept the determination of the Tribunal, or apply to the Tribunal to join the proceedings, or set aside a determination made.

Consultation Question 81.

11.101 We provisionally propose that landlords who fail to serve a Response Notice within the prescribed period should no longer be required to transfer their freehold interest, or grant a lease extension, upon the terms set out in the Claim Notice.

Do consultees agree?

Service on intermediate landlords and third parties

11.102 At present, leaseholders are required to serve a copy of the notice of claim on all intermediate landlords and an original of that notice on all third parties to their existing lease. As such, they are required to identify and locate anyone holding a superior interest to their own who is not the person on whom the Claim Notice must be served, as well as any management company, or other third party to their lease. This requirement can add significantly to the leaseholders' costs of bringing their claim.

11.103 We consider that this requirement imposes an unreasonable burden on leaseholders. They will have played no part, and had no say, in the creation of intermediate or third-party interests. While some leaseholders will have been aware of these interests before they purchased their own leasehold interest, others will not have been. In any event, we do not think that the fact that a leaseholder knows of the existence of intermediate interests justifies the burden of service being placed on them: in many cases, leaseholders will not have had any ongoing contact with, or owe any contractual obligations to, holders of intermediate interests.

11.104 Accordingly, we propose transferring responsibility for notifying intermediate leaseholders, and third parties, of the enfranchisement claim to the person on whom the Claim Notice was served.¹⁰⁵³

11.105 We recognise that by placing the burden of informing intermediate landlords of an enfranchisement claim on the competent landlord or freeholder, there is a risk that intermediate landlords will not be notified, and an agreement reached between leaseholders and competent landlords may cause prejudice to the intermediate landlord. Nevertheless, considering potential changes to valuation, we think the prejudice caused may well be reduced. But in cases where prejudice has been caused by a competent landlord's failure, without reasonable cause, to serve a copy of a notice

¹⁰⁵³ Landlords would be able to rely upon the same designated address categories as apply to leaseholders serving a Claim Notice. If a landlord is not able 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 landlord.

on an intermediate landlord, we propose that the intermediate landlord should be able to bring a claim for any losses arising.¹⁰⁵⁴

Consultation Question 82.

11.106 We provisionally propose that:

- (1) the competent landlord (rather than the leaseholder) should be responsible for serving copies of the Claim Notice upon intermediate leaseholders or third parties; and
- (2) where the competent landlord fails to serve a copy of a notice on an intermediate landlord, the intermediate landlord should be able to bring a claim against the competent landlord for any losses arising.

Do consultees agree?

Conduct of response to the leaseholders' claim

11.107 The purpose of informing intermediate landlords of the leaseholders' claim is to give them an opportunity to participate in the process if they so wish.

11.108 Whether intermediate landlords will choose to do so will normally depend on the amount that is likely to be payable to the intermediate landlord, and the extent to which they believe the landlord will act fairly in relation to their interest. For example, in lease extension claims, the Claim Notice should be served on the landlord who holds a sufficient interest to grant the leaseholders a lease extension. But the landlord's interest may be subject to an intermediate lease that runs for most (but not all) of the proposed extended term. In such cases, the intermediate leaseholder would be entitled to a sizeable proportion of the price payable by the leaseholders, and may not be confident that the landlord who has been served with the notice will have a sufficient interest in the outcome to argue the case adequately.¹⁰⁵⁵

11.109 An intermediate landlord who has been served with a copy of a Claim Notice will be entitled to be heard at any hearing of the claim, and will be entitled to make written submissions. However, as set out below, we do not believe that the leaseholders should bear any additional financial burden because of the participation of more than one landlord in relation to their claim.¹⁰⁵⁶

¹⁰⁵⁴ At present, both the 1967 and 1993 Acts provide for a recipient of a notice of claim who without reasonable cause fails to provide a copy of that notice to a person whom he knows or believes to hold a relevant interest, or unreasonably delays in doing so, to be liable for any losses arising: 1967 Act, sch 3, para 8(3) and 1993 Act, sch 3, para 14(2). See Ch 10 at paras 10.17 and 10.78.

¹⁰⁵⁵ See Ch 16.

¹⁰⁵⁶ We propose to consult on whether leaseholders should make any contribution to their landlord's non-litigation costs: see Ch 13. If leaseholders are to continue contributing to their landlords' costs, we propose that they should make the same fixed contribution, regardless of the number of landlords who chose to participate in the claim in this way.

11.110 An intermediate landlord who has been served with a copy of a Claim Notice will not, however, be automatically entitled to conduct the response to the leaseholders' claim, or enter into any settlement of that claim.

11.111 We propose, however, that an intermediate landlord who has been provided with a copy of a Claim Notice should be entitled to seek to replace the competent landlord as the person responsible for dealing with the leaseholders' claim where his or her interest is likely to be worth more than the competent landlord, or it is otherwise reasonable to do so. We consider that this should be done either:

- (1) by agreement in writing with the landlord already served, and any other intermediate landlords; or
- (2) by an order made on application to the Tribunal.

11.112 We consider that the intermediate landlords and competent landlord should be permitted to reach an agreement between themselves at any point prior to the date set out in the Claim Notice for the landlord to respond to that notice.¹⁰⁵⁷ If such an agreement were reached, the intermediate landlord would replace the competent landlord as the respondent to the claim, and would be able to serve his or her own Response Notice within a prescribed period. Once served, any Response Notice previously given by the competent landlord would cease to have effect.

11.113 If agreement is not reached within that period, an application to the Tribunal would have to be made. This application would have the effect of staying the enfranchisement claim until it has been determined. Such a dispute could be determined without the involvement of the leaseholders. As such, there would be no further costs for them to meet. However, we acknowledge the risk that intermediate landlords or others might raise weak points with the primary intention of delaying the enfranchisement claim. We propose, therefore, that the Tribunal should have the power to determine such disputes summarily at an early stage.

11.114 While in most cases we would expect the Tribunal to exercise its discretion by granting the application if the intermediate landlords' financial interest exceeded that of the landlord, the parties' respective financial interests will not always be the determining factor. We also acknowledge that there might be other good reasons for granting any such application. For example, an intermediate landlord might be able to show that there was a commercial or other relationship between the leaseholder and the competent landlord which created a risk that the competent landlord would not adequately protect the intermediate landlord's interests.

11.115 We also propose that, where leaseholders hold their interest under a split freehold, the freeholder who was not initially served with a Claim Notice should be able to agree or apply to replace the other freeholder in a similar manner.

¹⁰⁵⁷ Alternatively, the deadline might be the date on which an application has been made by the leaseholders to the Tribunal.

Challenging the validity of notices

- 11.116 Any requirement that a party should provide specific information in a notice that is to be given to another party creates a risk that the notice will not be completed correctly, and/or that the information given will contain mistakes or be incomplete. In some instances, these errors might lead to the notice being treated as invalid (not an effective notice at all). In other cases, a party might be bound by the information contained in his or her notice. In yet other circumstances, a party might be permitted to correct such faults, even at a relatively late stage of proceedings.
- 11.117 We consider that the proper response to such errors should depend upon the extent to which they have made it impossible or substantially more difficult for the recipient of the notice to respond. Errors which do not prevent a recipient from identifying the person making the claim, or the nature of that claim, and do not otherwise prevent the recipient from responding to the claim, should not invalidate a notice. If the other party considers that such errors mean that further information or clarification are required, that should be raised in correspondence between the parties at an early stage.
- 11.118 We also think that a landlord should not be permitted to challenge the validity of a Claim Notice given in a collective freehold acquisition claim on the basis that there is an inaccuracy, defect or omission in the articles of association of company nominee purchaser. A landlord would nevertheless be able to raise such points, either before or at the time of giving his or her Response Notice. The Tribunal would then be able to determine any related dispute, and require the leaseholders to make any necessary amendments to the articles of association prior to completion of any transfer to the company nominee purchaser.
- 11.119 We also provisionally consider that either party should be entitled to amend their notice at any time prior to any settlement, or final determination of the terms on which the interest is to be acquired. We do not, however, believe that a party would choose to use such a power in every case in which the original notice contains an error or mistake. Instead, we believe it likely that the power would be used only in respect of substantial errors in the identification of the extent of the property to be acquired.¹⁰⁵⁸

Identifying and determining the terms of any lease or transfer at an early stage

- 11.120 We believe that the current distinction between terms of acquisition (interpreted as Heads of Terms only) and the terms in which any lease extension or transfer is to be drawn is unhelpful, and can cause additional costs and delay. The parties can spend time and money negotiating over Heads of Terms, which, if not agreed, must be determined by the Tribunal. If those Heads of Terms are agreed (perhaps at a late stage), the Tribunal's jurisdiction ends, and the leaseholders then have a further period in which to negotiate the terms of a lease extension or transfer. And if those terms cannot be agreed, an application is to be made to the county court for a vesting order.
- 11.121 We therefore provisionally propose to extend the jurisdiction of the Tribunal to determine any dispute between the parties as to the written terms of the lease extension

¹⁰⁵⁸ We take into account the Tribunal's powers to award costs for unreasonable conduct. See Ch 13 at paras 13.32 and 13.113.

or transfer.¹⁰⁵⁹ As set out above, we also provisionally propose that the landlord should serve a draft lease or transfer with his or her Response Notice. As such, we believe the parties will be able to start to negotiate those terms thereafter, and that the likely point of application to the Tribunal in respect of any dispute will not be significantly delayed as a result.

11.122 We also think that the extension of the Tribunal's jurisdiction, and the requirement for the landlord to serve a draft transfer or lease extension, when taken together with our suggested changes to the point at which title is proven by the parties, will significantly reduce the time taken between issue of a Claim Notice and a final executed transaction.

Determining the claim

11.123 Many enfranchisement claims are settled by agreement between the parties. Given the changes we have proposed to the procedural and valuation regimes, we think that the number of cases settled in this way is likely to increase.

11.124 As set out in Chapter 12, we propose that any dispute that remains between the parties in respect of an enfranchisement claim should be decided by the Tribunal rather than the county court. We propose that the Tribunal should be given jurisdiction to determine applications relating to specific disputes between the parties that have arisen at particular points during the enfranchisement process.¹⁰⁶⁰

Leaseholders' applications to the Tribunal for a determination of their claim

11.125 We propose that leaseholders should be able to apply to the Tribunal to determine their enfranchisement claim in the following circumstances.

- (1) The landlord (or an intermediate landlord) has served a Response Notice on the leaseholders, and any matters remain in dispute after a prescribed period. Such an application may be made regardless of whether the dispute relates to the leaseholders' entitlement to bring a claim, the extent of any interest to be acquired, or the terms on which it is to be acquired.¹⁰⁶¹
- (2) A Claim Notice has been served by the leaseholders under Service Route A or B, and no Response Notice has been served on the leaseholders within the prescribed period.¹⁰⁶² In this case, the Tribunal will require the leaseholders to prove that service has taken place in accordance with Service Route A or B and their entitlement to bring a claim, and will determine the extent of any interest and the terms on which it is to be acquired (including the terms of any lease extension

¹⁰⁵⁹ We have been told that it is, in any event, often the practice of the Tribunal to direct parties to file a draft lease or transfer in cases where the leaseholders have indicated on their application form that the terms of acquisition are in dispute.

¹⁰⁶⁰ We do, however, propose that the Tribunal should also be given a residual discretion to determine any other issue arising in relation to an enfranchisement claim. A similar residual discretion is currently given to the county court: 1993 Act, s 90(2).

¹⁰⁶¹ To include the terms of any transfer or draft lease.

¹⁰⁶² See para 11.144 below.

or transfer). While a landlord will not be heard on those points,¹⁰⁶³ the Tribunal will reach its decision based on the evidence produced by the leaseholders and its own expertise.

- (3) An order has been made, or is being sought, under the No Service Route. If that order is granted, the Tribunal may determine the claim in the manner set out at (2) above.

Landlords' applications to the Tribunal

11.126 A landlord who has served a Response Notice within the prescribed period will, if any matters remain in dispute after a prescribed period,¹⁰⁶⁴ be able to apply to the Tribunal for a determination of the enfranchisement claim.

11.127 We recognise that as a result of our proposed changes to the service of leaseholders' enfranchisement notices, it may be more likely that the leaseholders' right to acquire their landlord's interest, and the terms on which they can do so, will be determined without the landlord having been heard. Such cases are likely, however, to remain a relatively small proportion of the total number of enfranchisement claims advanced by leaseholders. In addition, we believe that in consequence of the removal of the leaseholders' right (under the 1993 Act) to acquire the landlord's interest upon the leaseholders' proposed terms in the event that a counter-notice is not given, the proposed changes to the valuation of such interests, and the Tribunal's continued role in determining a claim, the risk of causing prejudice to landlords by proceeding in their absence will be substantially reduced.

11.128 Nevertheless, we acknowledge that there may remain a need to allow a landlord who has not in fact received a Claim Notice, or who has not served a Response Notice within the permitted time, to apply to the Tribunal in defined circumstances.

11.129 First, where an application to the Tribunal for a determination of the claim has not been made, or has not yet been determined, we provisionally propose that the landlord should be able to apply for an order permitting him or her to serve a Response Notice and participate in any proceedings thereafter. While we provisionally propose that the Tribunal should have a discretion as to whether such an order should be made, we believe that it would be likely to grant such an order provided that any scheduled hearing on the claim would not be unreasonably disrupted or delayed. We also provisionally propose that the Tribunal should have power to make such an order conditional on the payment by the landlord of any of the leaseholders' costs wasted as a result.

11.130 Secondly, we seek the views of consultees as to whether it is necessary to allow a landlord against whom a determination of an enfranchisement claim (whether in whole or in part) has been made, to apply to the Tribunal to set aside that decision and, if so, on what grounds that should be possible.

11.131 In doing so, we note that it is likely to be necessary to balance the remaining risk to landlords of having an enfranchisement claim determined without having been heard,

¹⁰⁶³ Unless they have successfully applied to the Tribunal for permission to participate in a claim despite not having served a Response Notice in time: see below.

¹⁰⁶⁴ See para 11.144 below.

against the benefits to leaseholders of a clearer and more robust service regime. In particular, we note that allowing landlords to set aside any decision simply on the basis that the landlord had not in fact received the Claim Notice would remove the substance of the deemed service provisions set out above. We therefore invite consultees to consider what additional criteria should need to be satisfied by landlords wishing to set aside a decision.

Consultation Question 83.

11.132 We invite the views of consultees as to:

- (1) whether a landlord should be entitled to apply to the Tribunal for an order setting aside a determination of an enfranchisement claim that has been made in his or her absence; and
- (2) if so, the criteria which the landlord should be required to satisfy before any such order can be made.

Service of applications

11.133 Applications to the Tribunal are currently made by the applicant delivering or sending an application notice to the Tribunal. The application notice must contain the name and address of the respondent. The application notice is then sent by the Tribunal to the respondent by post.¹⁰⁶⁵

11.134 In any application made by leaseholders to the Tribunal following the commencement of an enfranchisement claim using either Service Route A or B, the address given for the respondent landlord in that notice should be:

- (1) the address provided by the landlord for the service of proceedings in his or her Response Notice; or
- (2) if no Response Notice has been received, the address given for the landlord by the leaseholders in their Claim Notice.¹⁰⁶⁶

11.135 In any application made by a landlord to the Tribunal during an enfranchisement claim, the address given for the leaseholders should be the address contained in their Claim Notice.

11.136 We note that the advantages of our proposed deemed service regime for the giving of Claim Notices would be lost if landlords were able to unpick any decision reached by the Tribunal in their absence on the basis that they had not received the application

¹⁰⁶⁵ In England, the position in respect of the First-tier Tribunal (Property Chamber) is set out in r 26 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013 No 1169). In Wales, the position in respect of the Leasehold Valuation Tribunal is set out in the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004 (SI 2004 No 681), regs 3 and 5.

¹⁰⁶⁶ If the only address included within the Claim Notice was an email address, the applicant leaseholders should provide a postal address within Group A or B.

notice from the Tribunal. We provisionally propose, therefore, that the deemed service provisions relating to the service of Claim Notices should also apply to the service of application notices to the Tribunal in respect of enfranchisement claims.

Execution

11.137 Once the form of a lease extension or transfer has been agreed or determined, the parties should proceed to arrange the execution of the document by all relevant parties by the date that has been agreed or set by the Tribunal. We believe that it should be the landlord who is responsible for obtaining the signature of any third party to a lease extension.

11.138 If execution of the document does not happen by the date that has been agreed or set by the Tribunal,¹⁰⁶⁷ either party should be able to make a further application to the Tribunal for an order that a specified person (eg a judge of the Tribunal) be entitled to execute the lease or transfer in place of the party in default.

Conveyancing regulations

11.139 As noted above, detailed regulations 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.

11.140 We have outlined above our proposal to bring forward the point at which any formal lease extension or transfer is drawn up and agreed or determined.¹⁰⁶⁸ We have also proposed that where any such document that has been agreed or determined but remains unexecuted after the date agreed or set by the Tribunal, either party should be able to ask the Tribunal to do so.¹⁰⁶⁹

11.141 In light of those changes, we do not believe that it is necessary or appropriate to make detailed regulations that seek to control the manner in which the parties should prepare and reach agreement in respect of the terms of any lease extension or transfer, or execute such documents. Outside enfranchisement claims, the terms of such documents are negotiated and agreed between parties without particular difficulty, and without statutory control. Given that either party will be able to apply to the Tribunal if formal terms have not been agreed, or the formal document has not been executed, we do not believe that regulatory intervention should be required in enfranchisement claims.

11.142 We are nevertheless interested in hearing consultees' views as to whether it will remain necessary to prescribe some stages of the conveyancing process in enfranchisement claims generally, or in particular categories of claim.

¹⁰⁶⁷ See para 11.09(10) above.

¹⁰⁶⁸ See paras 11.120 to 11.122 above.

¹⁰⁶⁹ See paras 11.137 to 11.138 above.

Consultation Question 84.

11.143 We provisionally propose that detailed conveyancing regulations need not generally be made in relation to enfranchisement claims. Do consultees agree? Notwithstanding the general proposition, are there particular stages of the conveyancing process, or particular types of claim, in relation to which conveyancing regulations would still need to be made?

Prescribed periods

11.144 We provisionally propose that the following timetable should apply to enfranchisement claims.¹⁰⁷⁰

- (1) A landlord should respond to a Claim Notice by serving a Response Notice no later than a date that is six weeks after the date on which the Claim Notice was sent by post or delivered by hand to the competent landlord.¹⁰⁷¹
- (2) A competent landlord must serve intermediate landlords and any third parties within 14 days of receipt of the Claim Notice.
- (3) If a Response Notice has not been served by the competent landlord by that date (or, if later, the date set out in the Claim Notice), the leaseholders will be able to apply to the Tribunal for an order determining their claim immediately.
- (4) If a Response Notice has been served by the competent landlord on the leaseholders by that date (or, if later, the date set out in the Claim Notice) either party will be able to apply to the Tribunal for a determination of the claim 21 days thereafter.
- (5) A Response Notice served after the date in (1) (or, if later, the date set out in the Claim Notice) would have no effect until such time as the Tribunal had made an order allowing the landlord to participate in the claim.¹⁰⁷²

11.145 In selecting the periods within which these procedural steps should be taken, we have sought to balance the need to allow parties sufficient time to complete the required steps in particularly complex cases against the need to ensure that progress in more straightforward claims is made without any undue delay. We believe that the periods chosen will – in most cases – give the parties sufficient time to complete the required steps.

¹⁰⁷⁰ References to a number of days within this section are to a number of calendar days.

¹⁰⁷¹ That date should be stated in the Claim Notice. An error in the calculation of the date set out in the Claim Notice should not make that notice invalid. If the date inserted in the notice gives less than six weeks, a saving provision within the Claim Notice will set the correct date. We also think that a leaseholder should be entitled to set a later date by which the Response Notice should be filed if he or she wishes to do so. Leaseholders who have set a later date would be bound by that date.

¹⁰⁷² See para 11.129 above.

Consultation Question 85.

11.146 We provisionally propose that:

- (1) a landlord should serve a Response Notice no later than six weeks after the date on which the Claim Notice was sent by post or delivered by hand to the competent landlord;
- (2) a landlord who has received a Claim Notice should serve any intermediate landlords and third parties to the existing lease within 14 days; and
- (3) if a Response Notice has been served, either party should be entitled to apply to the Tribunal for a determination of the claim 21 days thereafter.

Do consultees agree?

Withdrawal of claims

11.147 We believe that leaseholders should continue to be able to withdraw their enfranchisement claim at any stage prior to the completion of the transaction itself. We set out our proposals in respect of the costs consequences in Chapter 13.

11.148 At present, a leaseholder's enfranchisement claim under the 1993 Act will be deemed to have been withdrawn if one of many deadlines for the progression of the claim are not met.¹⁰⁷³ The effect has been to create a series of traps into which leaseholders may fall, causing their claim to be treated as having been withdrawn, and making them liable to pay the landlord's non-litigation costs.

11.149 We do not consider that the procedural trap created by the provisions for deemed withdrawal are either necessary or proportionate to their intended purpose. In some instances, these provisions may bring an end to claims that leaseholders no longer intended to progress. In such circumstances, the extinguishing of the claim, and its replacement with a liability for the leaseholders to pay the costs incurred by the landlord in dealing with such a claim, may well be an appropriate and fair outcome. However, we believe that in the majority of deemed withdrawal cases leaseholders intended to pursue their claim, but simply failed to take the next step within the prescribed timescale.¹⁰⁷⁴ In those cases, the deemed withdrawal provisions punish the leaseholders, not only by forcing them to start again (and having to wait 12 months before doing so), but by requiring them to pay their landlord's costs.

11.150 We are also told that, in some instances, landlords will encourage leaseholders to believe that agreement is likely to be reached – and therefore the next step need not be taken – just long enough to distract the leaseholders from meeting a deadline for

¹⁰⁷³ See Ch 10 at paras 10.109 and 10.162 above.

¹⁰⁷⁴ Practitioners and other stakeholders have told us that in most enfranchisement claims that are deemed to have been withdrawn under these provisions the failure to adhere to a statutory deadline was the result of inadvertence or oversight rather than the lack of desire to continue with the claim.

proceeding with their claim. Many of the leaseholders caught out in this way will be dissuaded from starting a fresh claim as a result.

11.151 We accept, however, that there should be a mechanism for dealing with stale enfranchisement claims. We believe that a landlord who has served a Response Notice in respect of an enfranchisement claim (whether as the original recipient, or as a party who has taken over the response to the claim from that recipient) should be able to apply to the Tribunal for an order striking out a Claim Notice if the leaseholders have failed to take the next procedural step within a prescribed period. We also consider that no such application should be made unless the applicant has given the leaseholders 14 days' written notice of his or her intention to apply.¹⁰⁷⁵ If such an application succeeded, then the Tribunal would be able to order that the leaseholders pay the landlord's non-litigation costs, and a further fixed sum relating to the application.

11.152 We also acknowledge that, in collective freehold acquisition claims, a stale notice could prevent other groups of leaseholders from bringing their own claim.¹⁰⁷⁶ As such, we provisionally propose that other groups of leaseholders should be permitted to apply to the Tribunal for an order striking out an existing Claim Notice in respect of the same premises in respect of which no steps have been taken by the leaseholders in the preceding prescribed period. Again, we believe that no such application should be made unless the applicant has given the leaseholders 14 days' written notice of the intended application.

¹⁰⁷⁵ We think that a period of 14 calendar days strikes the correct balance between enabling most leaseholders to be able to respond before an application is made by the landlord, and causing undue delay in the enfranchisement process.

¹⁰⁷⁶ 1993 Act, s 13(8), provides that where premises have been specified in a collective enfranchisement notice, no subsequent notice specifying the whole or any part of those premises may be given under this section while the earlier notice continues in force. See Ch 10 at para 10.131.

Consultation Question 86.

11.153 We provisionally propose that:

- (1) an enfranchisement claim should not be deemed to have been withdrawn because procedural time limits have been missed by the leaseholder;
- (2) a landlord who has served a Response Notice should be able to apply to the Tribunal for an order striking out a Claim Notice if a procedural time limit has been missed by the leaseholder;
- (3) in a collective freehold acquisition claim, other groups of leaseholders should also be able to apply to the Tribunal for an order striking out the Claim Notice if the leaseholders bringing that claim have missed a procedural time limit; and
- (4) in either case (2) or case (3) above, the applicant for such an order should be required to give the leaseholder(s) bringing the claim 14 days' written notice of the intended application.

Do consultees agree?

Assignment of the benefit of a Claim Notice

11.154 We have proposed elsewhere the removal of the requirement that a leaseholder has owned the qualifying leasehold interest for a period of 2 years before a lease extension claim can be made.¹⁰⁷⁷ If that change is made, the difficulties that arise where a vendor fails to assign properly the benefit of an existing notice would be substantially reduced.

11.155 We nevertheless think that it should no longer be necessary for leaseholders who wish to sell their leasehold interest expressly to assign the benefit of any notice that has already been given. We provisionally propose that the benefit of a Claim Notice should transfer to the purchaser of the leasehold automatically. However, as we also believe that the assignor's liability for the landlord's costs must also be assigned to the assignee, we propose that the parties to any assignment may expressly provide that the benefit of such a notice will not pass to an assignee.

11.156 We also provisionally propose that where a Claim Notice has been assigned, the landlord will continue to be able to serve documents on the assignor until he or she is given written notice of the assignment of the lease.

¹⁰⁷⁷ See Ch 8 at para 8.75.

Consultation Question 87.

11.157 We provisionally propose that the benefit of a Claim Notice should be transferred automatically upon assignment of the leaseholder's lease, save where the assignment expressly states that the benefit of the Claim Notice will not be transferred.

Do consultees agree?

11.158 We provisionally propose that when a Claim Notice has been assigned, the landlord should continue to be able to serve documents on the assignor until he or she is given notice of the assignment of lease.

Do consultees agree?

Other effects of serving a Claim Notice

11.159 We believe that, in principle, where a leaseholder has raised a valid enfranchisement claim it should be determined on its merits without being affected by any steps that the landlord has already taken, or takes thereafter, that might affect the leaseholder's continued occupation of the premises or ability to proceed with his or her claim.

11.160 We noted above that the 1967 and 1993 Acts each make separate provision for the effect of the service of a notice of claim upon any steps already taken by a landlord in respect of the leaseholder's lease, and upon the landlord's ability to take such steps after that notice has been served. We do not propose any significant departure from the substance of those regimes. However, we do propose that a single set of rules should apply to any Claim Notice served, regardless of the type of enfranchisement claim being advanced.

11.161 We propose that:

- (1) the service of a valid Claim Notice does not create a statutory contract;¹⁰⁷⁸
- (2) the service of a valid Claim Notice prevents the expiry of any existing lease held by the leaseholder(s) who are bringing the claim during the period between the service of that notice and the conclusion of the claim; where the enfranchisement claim does not conclude with the grant of a further lease, any existing lease will not expire before the end of three months following the conclusion of the claim;
- (3) the service of a valid Claim Notice prevents the competent landlord (and any other recipient of a copy of that notice) from taking any steps to bring an end to the lease of any leaseholder in the premises that are subject to the enfranchisement claim (whether by service of a notice to quit under the 1954 Act

¹⁰⁷⁸ See paras 11.44 to 11.45 above.

or the 1989 Act,¹⁰⁷⁹ the termination of a superior interest, or by forfeiture of the lease) before the conclusion of the claim;

- (4) the service of a valid Claim Notice will stay or suspend any proceedings or other steps already taken by the competent landlord (and any other recipient of a copy of that notice) to bring an end to the lease of any leaseholder in the premises that are subject to the enfranchisement claim until the conclusion of the claim; if the claim is concluded other than by the grant of a lease extension, or the transfer of the freehold, the stay or suspension will be lifted at the conclusion of the claim;¹⁰⁸⁰
- (5) in the circumstances set out at (3) and (4) above, the landlord would be able to apply to the Tribunal for permission to commence or continue such action; the Tribunal would only be able to grant permission if the enfranchisement claim had not been brought in good faith, or had not been brought within a reasonable period of the action being commenced;¹⁰⁸¹
- (6) if the expiry of a leaseholder's lease has been delayed by the issue of a Claim Notice that does not lead to a grant or transfer of the claimed interest, a landlord who obtains possession of the premises after the stay or suspension has been lifted may seek compensation in respect of any such period of delay;
- (7) if the termination of a leaseholder's lease has been delayed by the issue of a Claim Notice that does not lead to a grant or transfer of the claimed interest, a landlord who is successful in obtaining possession of the leaseholder's premises after the stay or suspension has been lifted may seek compensation in respect of any such period of delay;
- (8) the service of a valid Claim Notice on a competent landlord (or other recipient of a copy of the notice) to acquire a freehold interest would suspend any existing contract for a disposal by the recipient of any interest affected by the enfranchisement claim until the conclusion of the claim;¹⁰⁸² where the claim concludes with the transfer of the claimed freehold interest, the contract would be frustrated; where the claim concludes otherwise than with the transfer of the claimed freehold interest, the suspension would be lifted;
- (9) the service of a valid Claim Notice would prevent any other Claim Notice being served in respect of the same claimed interest between the service of the first notice and the conclusion of that claim; but where that claim concludes otherwise

¹⁰⁷⁹ See Ch 10, at para 10.23 above.

¹⁰⁸⁰ The effect would be to extend the period of any notice by the period between the service of a valid notice and the conclusion of the claim. We do not propose that any notice served will be invalid, or that a new notice will need be served after the stay has been lifted.

¹⁰⁸¹ A claim would be brought in good faith if made honestly and otherwise than for an ulterior motive.

¹⁰⁸² The service of a valid Claim Notice on a competent landlord (or other recipient of a copy of the notice) to acquire a lease extension would not suspend any existing contract for disposal by the recipient of any interest in the property which is the subject matter of the claim. However, any purchaser would be bound by the Claim Notice if it had been registered in accordance with para 11.167 below.

than by the grant or transfer of the claimed interest, a further Claim Notice can be served without delay;¹⁰⁸³ and

- (10) the service of a valid Claim Notice seeking a collective freehold acquisition of premises will stay or suspend any existing or subsequent enfranchisement claim for a lease extension of a residential unit situated within those premises; this would allow leaseholders to make lease extension claims during a collective freehold acquisition claim (and thereby fix the valuation date in respect of the lease extension claim) but would stay or suspend the conduct of that claim until the collective freehold acquisition claim is concluded.

11.162 Where we have referred to the “conclusion of the claim” above, we mean:

- (1) the service of a notice of withdrawal by the leaseholders where served;
- (2) if an order striking out the Claim Notice, or dismissing the claim, has been made but not appealed, at the end of the period for bringing such an appeal;
- (3) if an appeal against such an order has been brought, upon the withdrawal of the appeal, or at the end of the period for bringing any further appeal(s) against the determination of that appeal; or
- (4) in any other case, the completion of any grant or transfer of the claimed interest.

Registration of a Claim Notice

11.163 We noted above that any notice of claim under the 1967 and 1993 Acts can be registered as an estate contract.¹⁰⁸⁴ Provided the notice of claim has been registered, any subsequent purchaser of the landlord’s interest will acquire that interest subject to the notice. And in the case of a collective enfranchisement claim, the landlord against whom a notice of claim has been registered is also prohibited from severing his interest in the premises, or granting any lease out of that interest that would, if made previously, have been liable to be acquired by the leaseholders as part of their claim.

11.164 Despite the protection afforded by the registration of a notice, we are told that leaseholders bringing a collective enfranchisement claim often overlook the need to register their notice. As a result, the landlord who has received a notice is able to transfer the freehold to an associated company,¹⁰⁸⁵ thereby forcing the leaseholders to re-start their claim against the new landlord. This conduct can lead to delay and significant wasted costs for leaseholders. In some cases, the momentum to bring a collective enfranchisement claim is lost, and a fresh claim will not be made.

¹⁰⁸³ We have made proposals in respect of vexatious claims at Ch 13, paras 13.99 to 13.100. We have also made proposals in respect of striking out stale claims at paras 11.151 to 11.152 above.

¹⁰⁸⁴ As a land charge under the Land Charges Act 1972 (in respect of unregistered land), or as the subject of a notice registered against the registered title to the land under the Land Registration Act 2002 (in respect of registered land).

¹⁰⁸⁵ A transfer to an associated company is not caught by the provisions of the Landlord and Tenant Act 1987 which seek to prohibit the freeholder of a building from making certain disposals without having first offered the same to the leaseholders on the same terms. Equally, a grant of a head lease of an individual flat (whether or not to an associated company) would fall outside the 1987 Act.

- 11.165 We believe that, in principle, a landlord who has received a notice of claim should not be able to defeat that claim (even if it can subsequently be renewed) by disposing of his or her interest. This principle might suggest that any prohibition on disposal by the landlord should arise at the point at which notice is received rather than only by registration. But we also recognise that it is not only the landlord who would be affected by a prohibition that arises prior to registration. The purchaser of the freehold would have the transaction set aside if it had been transferred to him or her in breach of any prohibition. Whether such an outcome was reasonable or fair might turn on whether the purchaser in fact had notice of the leaseholder's notice. A purchaser would be taken to have notice of matters that have been registered against the registered title or as a land charge against unregistered land.
- 11.166 We do not consider that the requirement to register a notice creates a particularly onerous burden on leaseholders. And we do not believe that the burden is great enough to justify the setting aside of a transaction against a purchaser who had no notice of the collective freehold acquisition claim. Nor do we believe that burden is significant enough to justify the costs of determining whether or not the landlord had actually received a Claim Notice, or whether the purchaser had notice of the collective freehold acquisition claim at the time of his or her purchase. While a purchaser of a building that is liable to a collective freehold acquisition claim should know that such a claim might be made in the future, knowledge that it has already been made would clearly impact on his or her decision to purchase and to incur the transaction and other costs of doing so.
- 11.167 As such, we think that a landlord should only be prohibited from dealing with his or her interest from the point at which the leaseholders' notice has been registered. But in order to reduce the number of leaseholders who neglect to do so, we propose that the Claim Notice should carry a clear warning as to the need to register the notice.
- 11.168 In making a provisional proposal to this effect, we acknowledge that a landlord might dispose of their interest after a Claim Notice has been deemed served but before the leaseholder's application to register a notice or land charge has been received by HM Land Registry. In some instances, this might occur because the landlord had not in fact received the Claim Notice; in other cases, the landlord who has received the Claim Notice might seek to take advantage of the opportunity to dispose of his interest before the Claim Notice can be registered.
- 11.169 To try to reduce the possibility of a disposal occurring between service of a Claim Notice and registration of that notice, we provisionally propose that a landlord who has been deemed served with a Claim Notice will be liable to pay the leaseholder's wasted costs if the landlord disposes of his or her interest between the date on which the notice was deemed served, and the point at which any notice appeared on the register. This would only apply, however, where the leaseholder's application to register the Claim Notice was made not less than 14 days after the Claim Notice was posted or delivered by hand to the competent landlord. While this proposal will affect a few landlords who – without knowledge of any relevant enfranchisement claim – dispose of their interest during this period, we do not believe that the number will be significant enough to justify introducing a requirement that the leaseholder proves the landlord's receipt of the Claim Notice in each case before the landlord's liability to pay the leaseholder's wasted costs arises.

Consultation Question 88.

11.170 We provisionally propose that a landlord who has been deemed served with a Claim Notice will be liable to pay the leaseholder's wasted costs if the landlord disposes of his or her interest between the date on which the Claim Notice was deemed served and the point at which the notice appeared on the register of title or is entered as a land charge, provided that the leaseholder's application to register was made not less than 14 days after the Claim Notice was posted or delivered by hand to the competent landlord.

Do consultees agree?

Dealing with mortgages and rentcharges

Mortgages over the landlord's interest

11.171 In the case of a lease extension claim, we have provisionally proposed that the lease extension will automatically bind the landlord's mortgagee. However, we also provisionally propose that the landlord should be under an obligation to inform his or her mortgagee of the proposed grant not less than 21 days prior to completion and to confirm to the leaseholder that he or she has done so. If the mortgagee requests, or if the landlord has not provided the leaseholder with the required confirmation, the leaseholder will be required to pay the purchase monies into court. Once completed, the landlord must provide the original lease extension to his or her mortgagee within one month of completion unless the mortgagee indicates that they do not require the same.

11.172 In the case of an individual or collective freehold acquisition, we have provisionally proposed that the transfer of the freehold will automatically discharge any mortgage secured against the freehold.¹⁰⁸⁶ We have also set out the circumstances in which the leaseholders or nominee purchaser will be required to pay monies into court rather than to the landlord.¹⁰⁸⁷

¹⁰⁸⁶ See Ch 5 at para 5.31, and Ch 6 at para 6.105.

¹⁰⁸⁷ See Ch 5 at para 5.32, and Ch 6 at para 6.105.

Consultation Question 89.

11.173 We provisionally propose that, in the case of a lease extension claim, where the landlord's interest is held subject to a mortgage:

- (1) a landlord should be under an obligation to:
 - (a) inform his or her mortgagee of the grant of a lease extension not less than 21 days before completion;
 - (b) 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 landlord's mortgagee requests; or
 - (b) the leaseholder has not received confirmation that the required notice has been given to the landlord's mortgagee.

Do consultees agree?

Mortgages over the leaseholder(s) interest(s)

11.174 In the case of a lease extension claim, we have provisionally proposed that the lease extension will automatically take effect subject to any mortgage secured against the existing lease.¹⁰⁸⁸ A deed of substitution will not, therefore, be required. The leaseholder will, however, be under a duty to provide the original of the lease extension to his mortgagee within one month of registration unless the mortgagee indicates that they do not require the same. If the leaseholder fails to do so, he or she will be liable for any losses that occur as a result.

11.175 In the case of an individual freehold acquisition, where the leaseholder elects to merge the leasehold and freehold titles (but not otherwise) we provisionally propose that a deed of substituted security will not be required where the leaseholder has given written notice to his mortgagee, and no objection has been received from the mortgagee in response within 21 days. If an objection is raised, the transfer will be registered without the merger of titles. The parties will then have to resolve this dispute if agreement is not reached.

¹⁰⁸⁸ See Ch 4 at para 4.53.

Consultation Question 90.

11.176 We provisionally propose that, in the case of a lease extension claim, where the leaseholder's interest is held subject to a mortgage:

- (1) the leaseholder should be under an obligation to give the lease extension to his or her mortgagee within one month of registration; and
- (2) if the leaseholder does not do so, he or she will be liable for any losses that occur as a result.

Do consultees agree?

11.177 We provisionally propose that, in the case of an individual freehold acquisition claim, where a leaseholder elects to merge his or her leasehold and freehold titles, a deed of substituted security will not be required if written notice has been given to the leaseholder's mortgagee and no objection has been raised.

Do consultees agree?

Third party consent to a transaction

11.178 We provisionally propose that in any case where the consent of a third party to any disposal is required, the transaction and registration can take place without that consent. However, the landlord will be required to notify the person who has the benefit of that restriction not less than 21 days before completion, and again within 14 days of completion. A landlord who fails to provide such notice will be liable for any losses occurring as a result.

Consultation Question 91.

11.179 We provisionally propose that where the consent of a third party to any grant or transfer is required:

- (1) the grant or transfer may be registered without such consent being given; but
- (2) the landlord should be required to inform the beneficiary of the transaction not less than 21 days before completion, and also within 14 days of completion; and
- (3) if the landlord fails to inform the beneficiary as required, he or she will be liable for any losses that occur as a result.

Do consultees agree?

Registration of transfers and lease extensions

11.180 We also provisionally propose that there should be a single set of rules and procedures for the registration of transfers and lease extensions following an enfranchisement claim. We think that the adoption of a single regime should reduce the possibility for confusion and error, and therefore further reduce costs. In considering the appropriate regime, we have sought to balance the interests of third parties who may be affected by the exercise of enfranchisement rights – but are not necessarily a party to the transaction – against the objective of reducing the work and associated costs for leaseholders where it is reasonable to do so.

11.181 We provisionally propose the following.

- (1) Every transfer or lease extension executed pursuant to the exercise of an enfranchisement right should contain an express statement to that effect.
- (2) Where a leaseback has been granted as part of a collective freehold acquisition, such a lease should contain a statement that it had been granted pursuant to a collective freehold acquisition claim, and whether it was taken at the election of the landlord or otherwise.
- (3) HM Land Registry forms should invite the applicant to confirm whether the transfer or lease extension was executed in the circumstances described at (1) or (2) above.¹⁰⁸⁹
- (4) HM Land Registry should:
 - (a) record that a transfer or lease extension was granted pursuant to the exercise of enfranchisement rights on the registered title of that interest;¹⁰⁹⁰
 - (b) in the event of the introduction of a prohibition on further collective freehold acquisition claims within a prescribed period or disposals of the freehold by the nominee purchaser (in either case, without the permission of the Tribunal),¹⁰⁹¹ note that prohibition and period on the registered title to the freehold;
 - (c) where a lease has been granted as a leaseback to the landlord as part of a collective freehold acquisition, record on the registered title of that lease that the lease was granted pursuant to the enfranchisement regime;¹⁰⁹²

¹⁰⁸⁹ We believe that this would minimise the prospect that a lease extension or transfer could be registered without the relevant statement being included within the document itself.

¹⁰⁹⁰ Such a statement would be of particular importance for non-participating leaseholders in respect of a collective freehold acquisition of the freehold to their building.

¹⁰⁹¹ See Ch 6 at paras 6.88 to 6.92, and 6.133 to 6.139.

¹⁰⁹² Alternatively, if part of the head lease were to be retained, the Register should record that this has occurred as part of a collective freehold acquisition. Similarly, where intermediate leases or common parts lease are to be severed in order to facilitate collective freehold acquisition, this should also be recorded on the Register.

- (d) where any intermediate leasehold interest is surrendered and re-granted as part of any lease extension claim, record on the registered titles of the extended lease and the intermediate interests that this had occurred pursuant to a lease extension claim; and
- (e) where any lease is extended pursuant to a right to participate, record on the registered title to that lease that it was extended pursuant to that right.

Consultation Question 92.

11.182 We provisionally propose the following.

- (1) 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.
- (2) HM Land Registry should:
 - (a) include a note on the relevant registered title(s) of any interest granted or transferred (or in the case of an intermediate lease, surrendered and re-granted) as part of an enfranchisement claim that the interest had been executed pursuant to the relevant statutory provisions;
 - (b) in the case of a collective freehold acquisition, include a note of any period during which a further such claim cannot be made without the permission of the Tribunal.

Do consultees agree?

THE IMPACT OF REFORM

Consultation Question 93.

11.183 How and to what extent has the exercise of enfranchisement rights been slowed down, prevented or made more costly by:

- (1) the existence of separate procedural regimes for different enfranchisement rights;
- (2) the current rules on missing and uncooperative landlords;
- (3) the time taken collecting up-to-date landlord contact details;
- (4) the time it takes to prepare enfranchisement notices;
- (5) the current law on the service and validity of notices;
- (6) the consequences of a landlord's failure to serve a counter-notice under the 1993 Act; and
- (7) the provisions for deemed withdrawal of a notice of claim set out in the 1993 Act?

Where possible, please provide figures to support your response.

11.184 To what extent would our proposals for a unified and consolidated enfranchisement procedure, with prescribed notices and forms, reduce:

- (1) the duration and cost of the enfranchisement process; and
- (2) the number of disputes arising under the enfranchisement regime?

11.185 To what extent would our proposals for dealing with missing or uncooperative landlords speed up the enfranchisement process and reduce the costs typically incurred by leaseholders in these cases?

Chapter 12: Dispute resolution

INTRODUCTION

- 12.1 Any procedure that allows leaseholders to acquire a lease extension, or to obtain the freehold of their premises, other than with the voluntary agreement of their landlord, must include mechanisms for resolving disputes or other issues that arise during that process.
- 12.2 The 1967 and 1993 Acts allocate the powers to determine disputes, or to decide other issues arising during enfranchisement claims, between the county court and the Tribunal.¹⁰⁹³ While in a few instances both of them are able to determine a particular type of dispute or issue, in most cases only one of these forums has been given that power; and the identity of that forum depends on the type of dispute or issue that has arisen.¹⁰⁹⁴
- 12.3 As a result, parties must take care to ensure that any application they need to make to have a particular dispute decided is made in the correct forum. In addition, parties may find, depending on the types of dispute that arise during any enfranchisement claim, that they have to apply in more than one forum in order to have those disputes resolved. Indeed, in some cases, parties may encounter a series of disputes or issues that lead to applications needing to be made first to the court, then to the Tribunal, before a further application is made to the court. In other cases, a party will need to make an application to the court at the same time as making a separate application to the Tribunal in order to protect their ability to continue a claim.
- 12.4 This division of powers to determine enfranchisement disputes creates complexity for the parties that is likely to increase costs, either as a result of parties having to take legal advice in order to navigate the process correctly, mistakes being made, or because multiple hearings are necessary.
- 12.5 We have proposed elsewhere a single procedure for all types of enfranchisement claims.¹⁰⁹⁵ We have also made proposals for simplifying the procedure and reforming the basis on which the terms of obtaining a lease extension or freehold – including the price to be paid – are set.¹⁰⁹⁶ We think that each of these proposals will make it less likely that disputes will arise and/or will reduce the complexity of the resolution of those disputes that do.

¹⁰⁹³ As elsewhere in this Consultation Paper, “the Tribunal” refers, in England, to the First-tier Tribunal (Property Chamber), and in Wales, to the Leasehold Valuation Tribunal in Wales.

¹⁰⁹⁴ As the bodies able to determine a dispute or issue at first instance. The parties are also able to appeal any such decision: see paras 12.21 to 12.23 below. It should also be noted that, as set out below, the Civil Procedure Rules 1998 (as amended) allow cases started in the county court to be transferred to the High Court. In addition, in England, the Tribunal Rules (First-tier Tribunal) (Property Chamber) Regulations 2013 (SI 2013 No 1169) allow cases started in the First-tier Tribunal to be transferred to the Upper Tribunal.

¹⁰⁹⁵ See Ch 11.

¹⁰⁹⁶ See Ch 15.

- 12.6 In this chapter we consider where any disputes or issues that arise during an enfranchisement claim should be heard. We also examine whether some simpler, more cost effective, procedure for determining a dispute might be adopted in particular types of case.

GENERAL POLICY

- 12.7 As part of our Terms of Reference, Government has asked us to consider the scope for making enfranchisement:

easier, quicker and more cost effective (by reducing the legal and other associated costs), particularly for leaseholders ...

- 12.8 In establishing our proposals about the determination of disputes that arise between the parties during the course of an enfranchisement claim, we have sought to:

- (1) simplify the procedure in order to:
 - (a) make it easier for parties to identify the steps that they need to take;
 - (b) reduce the need for parties to incur legal costs in order to be able to navigate the procedure successfully;
 - (c) reduce the costs wasted as a result of making mistakes;
 - (d) remove the possibility of any party having to apply to more than one body during the course of the claim where possible; and
 - (e) reduce the instances in which an application to any court or tribunal will need to be made.

CURRENT LAW

- 12.9 Neither the 1967 nor 1993 Acts provide for a single body to determine disputes between the parties that arise in respect of an enfranchisement claim. The different types of disputes or issues that need to be determined under those Acts are allocated – or, in some cases, shared between – different courts or tribunals. That distribution is different in each Act.

The 1967 Act

- 12.10 Disputes or issues arising under the 1967 Act are to be determined by the county court, except in relation to the following.

- (1) Valuation issues.¹⁰⁹⁷ In particular:

¹⁰⁹⁷ This includes determining the correct basis of valuation, eg s 9(1), 9(1A) or 9(1C) of the 1967 Act. See Ch 15.

- (a) the price payable to acquire the freehold of a house and premises;¹⁰⁹⁸
 - (b) the amount of rent to be payable in respect of a lease extension;
 - (c) the amount of compensation payable to a leaseholder where his or her landlord has successfully applied to the court for an order for possession of the house and premises on the basis that the landlord proposes to demolish or reconstruct the whole or a substantial part of the house and premises for the purposes of redevelopment;¹⁰⁹⁹
 - (d) the amount of compensation payable to a leaseholder where his or her landlord has successfully applied for an order for possession of the house and premises on the basis that it is required by him or her for occupation as the only or main residence of the landlord or an adult member of the landlord's family;¹¹⁰⁰ and
 - (e) the amount of compensation payable to a landlord where his or her leaseholder makes an unsuccessful enfranchisement claim less than 2 years before the expiry of the original term, and the landlord was thereby prevented from recovering a market rent for the house and premises for a period after that expiry.¹¹⁰¹
- (2) The amount of procedural costs payable to a landlord.¹¹⁰²
- (3) Schemes of estate management.¹¹⁰³

Those matters are now dealt with exclusively by the Tribunal.

12.11 There are also certain matters that, although normally heard in the county court, may be heard by the Tribunal where the parties agree, or where an application has been made relating to an issue within the Tribunal's exclusive jurisdiction that refers to the same transaction.¹¹⁰⁴ These are, in particular, the determination of disputes relating to:

- (1) the contents of any conveyance or lease extension;¹¹⁰⁵

¹⁰⁹⁸ This includes the determination of the amount to be paid (including any unpaid rent) where a vesting order is to be made by the county court in the case of a landlord who cannot be found: s 1967 Act, s 27(5). See Ch 10 at para 10.56.

¹⁰⁹⁹ 1967 Act, s 17.

¹¹⁰⁰ 1967 Act, s 18. Such an order can only be made where the landlord's interest was acquired before 18 February 1966.

¹¹⁰¹ 1967 Act, s 27A.

¹¹⁰² 1967 Act, ss 9(4) and 14(2). The current law in relation to procedural costs is set out in Ch 13.

¹¹⁰³ Under the powers set out in the 1993 Act, ch IV. See Ch 6 at paras 6.27 to 6.32.

¹¹⁰⁴ 1967 Act, s 21(2). If proceedings have been issued in the county court in respect of those matters, the court is able to refer those matters to the Tribunal: 2002 Act, sch 12, para 3.

¹¹⁰⁵ 1967 Act, ss 10, 29(1) or 15 as the case may be.

- (2) a sub-tenant's share of compensation in the event of the landlord exercising his or her right to possession, or for establishing or giving effect to that right;¹¹⁰⁶ and
- (3) the apportionment of rent.¹¹⁰⁷

12.12 Accordingly, there are some disputes or issues that must be litigated in the Tribunal, and others that can, in some circumstances, be litigated there. But in addition, where proceedings started in the county court include such matters, the county court can transfer so much of those proceedings as relate to that matter to the Tribunal for it to determine.¹¹⁰⁸

12.13 The Tribunal Rules¹¹⁰⁹ also provide that the First-tier Tribunal (Property Chamber)¹¹¹⁰ can refer a case to the President of the Property Chamber requesting that it be considered for transfer to the Upper Tribunal. The rule applies where the issues in dispute are likely to be appealed to the Upper Tribunal and will (a) require lengthy or complex evidence, or a lengthy hearing, (b) involve a complex or important principle of issue, or (c) involve a large financial sum.

12.14 There remain, however, a number of disputes or issues that can only be determined by the county court.¹¹¹¹ It is the county court that must determine disputes relating to:

- (1) a party's entitlement to enfranchise under the 1967 Act;
- (2) the performance or discharge of obligations arising from the service of a notice of claim, including proceedings for specific performance or for payment of damages or compensation;¹¹¹² and
- (3) apportionment or aggregation of rateable value.¹¹¹³

It is also the county court to which leaseholders must make any application for a vesting order in respect of landlords who cannot be found.¹¹¹⁴

12.15 While the 1967 Act provides that these issues should be determined by the county court, the High Court has a general power¹¹¹⁵ to order that a claim that has been started in the county court should be transferred to, and determined by, the High Court. As such, it is possible that any of the county court's powers under the 1967 Act could be exercised

¹¹⁰⁶ 1967 Act, ss 17 and 18 and sch 2.

¹¹⁰⁷ 1967 Act, s 20(3).

¹¹⁰⁸ 2002 Act, sch 12, para 3. The court can give effect to the Tribunal's determination in an order of the court.

¹¹⁰⁹ Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013 No 1169).

¹¹¹⁰ But not the Leasehold Valuation Tribunal in Wales.

¹¹¹¹ 1967 Act, ss 20(2) and (3).

¹¹¹² For example, see Ch 10 at para 10.16.

¹¹¹³ 1967 Act, s 37(6), incorporating the Rent Act 1977, s 25(2).

¹¹¹⁴ 1967 Act, s 27. See Ch 10 at para 10.54.

¹¹¹⁵ County Courts Act 1984, s 41.

by the High Court instead. But while this discretion is absolute,¹¹¹⁶ it is considered only likely to occur in very exceptional circumstances.¹¹¹⁷

12.16 The High Court also has jurisdiction in respect of a possession claim brought on the grounds of forfeiture following the issuing of a notice of claim.¹¹¹⁸ It has also accepted jurisdiction in cases concerning the proper construction of the 1967 Act.¹¹¹⁹ Finally, the High Court shares jurisdiction with the county court in respect of claims for damages or pecuniary compensation arising out of the performance or discharge of obligations arising from the service of a notice of claim.¹¹²⁰

The 1993 Act

12.17 Any disputes or issues arising in relation to a lease extension or collective enfranchisement claim under the 1993 Act are to be determined by the county court, except in so far as they:

- (1) fall within the express powers of the Tribunal;¹¹²¹ or
- (2) are joined to any proceedings properly brought in the High Court.¹¹²²

In addition, where the county court is dealing with any disputes or issues falling within its jurisdiction, it can also hear and determine any other matters which have been joined, even if those other proceedings are in fact outside its jurisdiction.¹¹²³

12.18 The Tribunal's jurisdiction¹¹²⁴ relates to the terms on which the interest claimed will be acquired, including the question of price. In particular, it is the Tribunal that determines:¹¹²⁵

¹¹¹⁶ *Challis v Watson* [1913] 1 KB 547.

¹¹¹⁷ See *Hague*, para 16-02. In *South v Chamberlayne* [2001] 3 EGLR 54, Lightman J stated that the test was whether there were issues of fact or law that merited a High Court trial.

¹¹¹⁸ The leave of the court would be required to bring such a claim, and can only be granted if the notice had been given in "bad faith": 1967 Act, sch 3 para 4(1) and Ch 10 at para 10.26. In addition, Civil Procedure Rules r 55.3(2) provides that a possession claim may only be started in the High Court if the claimant files a certificate setting out his or her reasons for so doing that is verified by a statement of truth. Civil Procedure Rules, Practice Direction 55A, para 1.1 makes clear that a possession claim should only be started in the High Court in exceptional circumstances. Circumstances that may justify starting in the High Court include complicated disputes of facts, or points of law of general importance (Civil Procedure Rules, Practice Direction 55A, para 1.3).

¹¹¹⁹ For example, *Harris v Plentex Ltd* (1980) 40 P&CR 483, and *South v Chamberlayne* [2001] 3 EGLR 54.

¹¹²⁰ 1967 Act, s 20(7).

¹¹²¹ 1993 Act, s 90(2). The express powers are described at para 12.18 below.

¹¹²² 1993 Act, s 90(3). The High Court may also hear proceedings transferred from the county court, for example, where complex issues are raised: see *Westbrook Dolphin Square Limited v Friends Life Limited* [2012] EWCA Civ 666, [2012] 1 WLR 2752 and para 12.15 above.

¹¹²³ 1993 Act, s 90(4).

¹¹²⁴ 1993 Act, s 91.

¹¹²⁵ Drawn from the list set out in *Hague*, para 16-09.

- (1) the terms of acquisition relating to any interest to be acquired by a nominee purchaser in a collective enfranchisement claim,¹¹²⁶ or by the leaseholders in any claim for a lease extension;
- (2) the terms of any leaseback to the freeholder;¹¹²⁷
- (3) any amount payable as a result of non-disclosure of agreements with non-participating leaseholders by the nominee purchaser;¹¹²⁸
- (4) the amount of compensation payable to the landlord where his or her recovery of possession of the premises has been delayed by an unsuccessful enfranchisement claim brought not more than 2 years before the expiry of the original term;¹¹²⁹
- (5) the amount of procedural costs payable by leaseholders under the 1993 Act and, the liability of any person to pay such costs;¹¹³⁰
- (6) the apportionment of any amount, including costs, between two or more persons;¹¹³¹
- (7) where there is an application for a vesting order¹¹³² the form of conveyance ordered by the court¹¹³³ and the actual or estimated amounts due under leases of flats in the premises at the time of the execution of the conveyance, which forms part of the “appropriate sum” to be paid into court;¹¹³⁴
- (8) where there is an application for a vesting order in the case of a missing landlord,¹¹³⁵ the terms of the acquisition of the freehold,¹¹³⁶ or the lease extension,¹¹³⁷ as the case may be, and the amounts to be paid into court in those proceedings;¹¹³⁸

¹¹²⁶ This includes determining whether a piece of land can be acquired as part of a collective enfranchisement claim: *Stephenson v Leathbond Limited* [2005] EGLR 79. See Ch 10 at para 10.152.

¹¹²⁷ 1993 Act, s 36 and sch 9. See Ch 6 at paras 6.16 to 6.26.

¹¹²⁸ 1993 Act, s 18(2).

¹¹²⁹ 1993 Act, ss 37A or 61A.

¹¹³⁰ In respect of costs payable under ss 33 or 60 of the 1993 Act. See Ch 13 at paras 13.16 to 13.20.

¹¹³¹ 1993 Act, s 91(2).

¹¹³² 1993 Act ss 24, 25 and sch 5. See Ch 10 at paras 10.153 and 10.154.

¹¹³³ 1993 Act, sch 5, para 2(1)(a).

¹¹³⁴ 1993 Act, sch 5, para 3(1)(b).

¹¹³⁵ 1993 Act, ss 26 or 50. See Ch 10 at paras 10.140 and 10.94.

¹¹³⁶ 1993 Act, ss 27(1)(b) and (2).

¹¹³⁷ 1993 Act, ss 51(1) and (2).

¹¹³⁸ 1993 Act, ss 27(5) and 51(5), respectively.

- (9) the amount of compensation to be paid to the leaseholder when the landlord obtains an order for possession on redevelopment grounds.¹¹³⁹

12.19 In most instances, these issues will be brought before the Tribunal directly on an application by one of the parties to the claim.¹¹⁴⁰ However, where such issues arise¹¹⁴¹ during the course of county court proceedings, the court is able to transfer the part of those proceedings that relate to those issues for the Tribunal to determine.¹¹⁴² The court will then give effect to that determination in an order of the court.¹¹⁴³

12.20 Where a matter over which the Tribunal has jurisdiction arises in county court proceedings, the determination of that matter must be transferred to the Tribunal. The court will then give effect to the Tribunal's determination via a court order if that matter is related to a matter being dealt with by the court. The forms of court proceedings which seem to fall within this scheme are:

- (1) where the court is considering an application for a vesting order¹¹⁴⁴ and the Tribunal needs to decide certain matters, including the sums due to the landlord from the leaseholders under the terms of the existing lease;¹¹⁴⁵
- (2) where the court is considering an application for a vesting order where there is a missing landlord; and
- (3) where the court makes an order for possession on redevelopment grounds and the question of compensation needs to be determined.¹¹⁴⁶

Appeals

12.21 Disputes between parties are not necessarily resolved as a result of the decision reached by the county court or Tribunal. Either party may seek to appeal to a superior court or Tribunal.

12.22 In the case of an application determined by the Tribunal, an appeal lies to the Upper Tribunal. Permission to appeal must be sought first from the Tribunal; if it is refused, a

¹¹³⁹ 1993 Act, s 61 and sch 14, para 2(1). See Ch 10 at paras 10.72 and 10.116.

¹¹⁴⁰ The Tribunal also has power to request that the matter is referred directly to the Upper Tribunal: see 12.13 above.

¹¹⁴¹ The county court claim must be properly before that court. It seems, therefore, that such a transfer may be necessary where (1) the court is considering an application for a vesting order under either ss 24 or 25 of the 1993 Act, and the Tribunal is required to determine sums payable under sch 5 to the 1993 Act, (2) the court is considering a vesting order in the case of a missing landlord under ss 26 and 27, or ss 50 and 51 of the 1993 Act, and the Tribunal is required to determine issues set out in ss 27 and 51 respectively, or (3) the court makes an order for possession on the grounds of re-development and the Tribunal is required to determine the issue of compensation.

¹¹⁴² 2002 Act, sch 12, para 3(1)(a).

¹¹⁴³ 2002 Act, sch 12, para 3(2).

¹¹⁴⁴ 1993 Act, ss 24 or 25.

¹¹⁴⁵ Those matters are set out in full in sch 5 to the 1993 Act.

¹¹⁴⁶ 1993 Act, s 61.

further application for permission may be made to the Upper Tribunal. A party may only appeal to the Court of Appeal from the Upper Tribunal on a point of law.¹¹⁴⁷

12.23 In the case of a claim determined by the county court, an appeal can be brought with either the permission of the lower court, or of the appeal court.¹¹⁴⁸ The court that will hear the appeal depends, in most cases, on the type of judge who determined the case.¹¹⁴⁹ If a second appeal is brought, it will be to the Court of Appeal, and it is the permission of that court that is required.

CRITICISMS OF THE CURRENT LAW

Complexity

12.24 As a result of the division of powers between the court and the Tribunal, the parties have to identify which forum has the power to deal with their particular dispute. The answer is not always easy to find in the legislation. Many parties find it difficult to understand why disputes or issues cannot be dealt with in a single forum.

12.25 In addition, even if parties to an enfranchisement claim have correctly identified the body that has the power to deal with a particular dispute or issue, they can often find that other disputes or issues have to be dealt with before a different body. For example:

- (1) If a landlord disputes the right of a group of leaseholders to acquire collectively the freehold of a block of flats under the 1993 Act on the basis that the building does not qualify or that their claim notice was invalid, it may be necessary for the leaseholders to (a) make a protective application to the Tribunal (in order to avoid their notice of claim being deemed withdrawn), and (b) bring proceedings in the county court to determine their entitlement to enfranchise, before (c) returning to the Tribunal for a determination of the terms of acquisition, and then (d) applying to the county court in relation to any dispute over the terms of the contract.
- (2) Where a landlord is missing or cannot be identified, a leaseholder wishing to enfranchise is required to start proceedings as to entitlement to enfranchise in the county court and then to obtain a determination from the Tribunal of the price payable before returning to the court for an order giving effect to that entitlement.¹¹⁵⁰

12.26 As a result, parties will often incur the costs of taking expert legal advice to identify the correct application to make, and to guide them through the process. A party who does

¹¹⁴⁷ Tribunals, Courts and Enforcement Act 2007, s 13(1), (2).

¹¹⁴⁸ Civil Procedure Rules 1998, Pt 52.3(2).

¹¹⁴⁹ The Access to Justice Act 1999 (Destination of Appeals) Order 2016 (SI 2016 No 917) provides that appeals from decisions of a district judge in the county court will lie to a circuit judge of the county court unless he or she was exercising the jurisdiction of a circuit judge with the permission of the designated civil judge; appeals from decisions of circuit judges (including recorders and district judges with the permission of the designated civil judge to exercise the jurisdiction of a circuit judge) lie to the High Court: see Civil Procedure Rules, Practice Direction 52A. Whether a claim is heard by a district or circuit judge is likely to depend upon the procedural track to which the claim was allocated: Civil Procedure Rules, Practice Direction 2B.

¹¹⁵⁰ These two examples are given in the *Interim report of the working group on property disputes in the courts and tribunals*, May 2016, CJC working group, ch 2, para 5. The Interim Report is referred to in detail below.

not do so runs a higher risk of making mistakes that may lead to further expense, such as the need to incur further fees to bring the correct application or, in some instances, an order that he or she pays the costs incurred by the other party in dealing with a mistaken application. Parties may also face increased costs and delay as a result of having to make a number of separate applications to different bodies.

12.27 In addition, the allocation of some powers to the county court exclusively means that particular disputes must be resolved by a body whose powers to order one party to pay some or all of the other party's litigation costs are more extensive than those of the Tribunal.¹¹⁵¹ The possibility that a dispute that has to be determined by the county court will arise during the course of an enfranchisement claim increases the risk that any party will be ordered to pay the other party's litigation costs during the course of an enfranchisement claim. But it also creates uncertainty and unpredictability for leaseholders deciding whether to bring such a claim: it is difficult for them to predict whether, during the course of a claim, the landlord will raise an issue that, if determined against them, may result in leaseholders being ordered to pay their landlord's costs relating to that dispute.

PREVIOUS REVIEWS

12.28 In 2001 the Leggatt Committee conducted a review of tribunals, and produced a report entitled *Tribunals for Users: One System, One Service*.¹¹⁵² One of the terms of reference of the Leggatt Committee was:

To review the delivery of justice through tribunals ... to ensure that ... there are fair, timely, proportionate and effective arrangements for handling those disputes, within an effective framework for decision-making which encourages the systematic development of the area of law concerned, and which forms a coherent structure, together with the superior courts, for the delivery of administrative justice

12.29 In respect of land and property disputes, the Committee considered that:

There are confusing overlaps of jurisdiction between courts and tribunals, as well as between tribunals. The tribunal model is a useful one, because it brings experts within the decision-making process... But the nature and conduct of these disputes are even closer to those handled by courts than those before ETs, and indeed in some jurisdictions can be heard in whole or in part by both courts and tribunals.

12.30 The Committee noted that:

An expert decision-making forum, without overlapping jurisdictions, is a precondition of effective procedural reform.

But it felt unable to suggest that the Tribunal should form a specialised section of the county court, sitting with valuers and surveyors, because:

¹¹⁵¹ These powers are considered in Ch 13.

¹¹⁵² Report of the Review of Tribunals by Sir Andrew Leggatt, *Tribunals for users: one system, one service: report of the review of tribunals* (London: Stationery Office, 2001) <http://webarchive.nationalarchives.gov.uk/20070815230000/http://www.tribunals-review.org.uk/index.htm>.

Courts and tribunals have different remedies, and the underlying law would need close examination. Any such consideration goes well beyond our Terms of Reference. It will also require specialist expertise.

Accordingly, the Committee recommended that the Law Commission assist Government to work out a comprehensive solution:

with a view to removing the overlaps and scope for forum-shopping to be found in the current arrangements.

12.31 In 2003, we published a report in response to the Leggatt Committee's review.¹¹⁵³ Although the report made recommendations for the reform of tribunals, it did not recommend altering the "interlocking" jurisdiction that existed between the county court and tribunals under the 1967 and 1993 Acts,¹¹⁵⁴ as it considered that such divided jurisdictions had:

... Only caused occasional difficulties in cases before the tribunal and the system works satisfactorily in the majority of cases.¹¹⁵⁵

We also concluded that:

... The occasional difficulty in these jurisdictions can be appropriately resolved by good case management powers... [Case management] powers should enable the courts to refer cases or parts of cases to the tribunals where appropriate.¹¹⁵⁶

We did, however, acknowledge that if its proposed tribunal reforms were accepted by Government, some powers currently exercised by the courts could be transferred to tribunals.¹¹⁵⁷

12.32 In 2008, we published a report on the proportionate resolution of housing disputes.¹¹⁵⁸ Although our earlier consultation paper¹¹⁵⁹ had provisionally proposed transferring the jurisdiction over claims for possession and disrepair from the county court to the

¹¹⁵³ Land, Valuation and Housing Tribunals: The Future (2003) Law Com No 281.

¹¹⁵⁴ Land, Valuation and Housing Tribunals: The Future (2003) Law Com No 281, paras 6.12 to 6.17 and 6.58.

¹¹⁵⁵ Land, Valuation and Housing Tribunals: The Future (2003) Law Com No 281, paras 6.17 and 6.58. In its response to the Law Commission's consultation, the Residential Property Tribunal Service had stated that the difficulties arising from split jurisdictions in enfranchisement claims were "not acute". The report also noted that tribunal users had not identified the division of powers between the county court and the tribunal as a problem.

¹¹⁵⁶ Land, Valuation and Housing Tribunals: The Future (2003) Law Com No 281, para 6.59. The Law Commission noted that reliance on case management powers was also proposed by the senior judiciary in response to its consultation.

¹¹⁵⁷ Land, Valuation and Housing Tribunals: The Future (2003) Law Com No 281, at para 6.58. In the event, the Law Commission's recommendations for reform of tribunals were rejected by Government in favour of its own reforms, subsequently enacted in the Tribunal Courts and Enforcement Act 2007.

¹¹⁵⁸ Housing: Proportionate Dispute Resolution (2008) Law Com No 309. Although this report did not deal with enfranchisement claims, it did address the issues relating to a transferring jurisdiction between the county court and the tribunal in specific housing matters.

¹¹⁵⁹ Housing: Proportionate Dispute Resolution – The Role of Tribunals (2007) Law Com No 180.

tribunal, its final report recommended such a transfer should be a long-term goal towards which measured and tested progress should be made.¹¹⁶⁰ We also recommended that Government should keep the possibility that further specific housing matters be transferred to the tribunal under review. It is notable, however, that we also concluded that it was a general principle that:

... Wherever possible, persons bringing proceedings, whether before a court or tribunal should be able to have their matters dealt with in a single process.¹¹⁶¹

CIVIL JUSTICE COUNCIL DEPLOYMENT PROJECT

12.33 Problems presented by the current division of jurisdiction between the county courts and the Tribunal in relation to a range of property disputes, including enfranchisement, have more recently been considered by a working group formed by the Civil Justice Council (“the Working Group”).¹¹⁶²

12.34 In general, the Working Group considered that the “boundaries between issues considered fit for determination by the court, and those allocated to the Tribunal, are not always drawn by reference to any consistent principle and are largely unrelated to complexity or value”. But the Working Group recognised that “the Tribunal has only very limited powers of enforcement and cannot grant the remedies available to the Court, such as a money judgment or a mandatory order”.¹¹⁶³

12.35 Nevertheless, the Working Group proceeded on the basis that it would be desirable for dispute resolution to occur in a single forum. The benefits included:

- (1) cost reductions for the parties;
- (2) cost reductions for HM Courts and Tribunals Service;
- (3) increased continuity and consistency in decision making; and
- (4) reductions in the time dispute resolution takes.¹¹⁶⁴

Flexible deployment of judges

12.36 While accepting the advantages of disputes being resolved by a single court or tribunal, the Working Group did not recommend the re-allocation of the existing powers between

¹¹⁶⁰ Housing: Proportionate Dispute Resolution (2008) Law Com No 309, at paras 5.47 and 5.48 and 6.29. The report described the provisional proposal as “extremely controversial” (at para 5.5). In its final recommendations, the Law Commission recommended that that housing disrepair cases should be transferred to the tribunal; alternatively, that Government should establish the power to create a pilot scheme in respect of such a transfer.

¹¹⁶¹ Housing: Proportionate Dispute Resolution (2008) Law Com No 309, at para 6.38.

¹¹⁶² *Interim report of the working group on property disputes in the courts and tribunals*, May 2016, CJC working group.

¹¹⁶³ *Interim report of the working group on property disputes in the courts and tribunals*, May 2016, CJC working group, ch 1, para 3.

¹¹⁶⁴ *Interim report of the working group on property disputes in the courts and tribunals*, May 2016, CJC working group, ch 1, para 4.

the courts and tribunals. Rather, the Working Group proposed allowing judges who were qualified to sit as both judges in the Tribunal and in the county court to exercise the powers of a county court judge when hearing a case before the Tribunal; and to exercise the powers of a Tribunal judge even when hearing a case in the county court.¹¹⁶⁵ Judges were, in other words, to be allowed to ‘change hats’ in order to be able to exercise the full range of powers within a single venue.

12.37 In doing so, the Working Group acknowledged that approach would present problems. In particular, difficulties were caused by the different procedural rules, costs provisions, and appeals procedures between the county courts and the Tribunal. In addition, a Tribunal judge would only be able to sit as a county court judge where an application had been made to the county court on that issue; he or she would have no power to deal with county court issues unless this had happened. As such, applications to more than one body would still need to be made.

Procedural rules

12.38 The differences in procedural rules applicable to the courts¹¹⁶⁶ and the Tribunal¹¹⁶⁷ posed a challenge to effective flexible deployment:

the challenge here is to ensure that parties (and indeed judges and members) are able to proceed with a case without any confusion or difficulty that might be caused by the operation of two sets of rules.¹¹⁶⁸

12.39 There was a “real concern that both litigants in person and professionals may find hybrid cases confusing so that access to justice is undermined”. Hybrid cases can cause particular difficulties for litigants in person, who might struggle more with the concept of judges being able to change hats. However, the Working Group (and most of its consultees) considered that the difficulties in this regard could be overcome with “guidance and cooperation”.¹¹⁶⁹

12.40 The Working Group did, however, note that the practical issue of whether county court proceedings could be started in the Tribunal would need to be addressed:

Many of the statutory powers of County Court judges can only be exercised where proceedings have been issued and/or an application made in the County Court. The objective of flexible deployment would be frustrated if, in order for a tribunal judge to exercise his or her powers as a County Court judge, the litigant in the tribunal were

¹¹⁶⁵ All Tribunal judges can hear cases and decide issues within the jurisdiction of the county court; and all county court judges can hear and decide issues within the jurisdiction of the Tribunal: County Courts Act 1984, as amended by the Crime and Courts Act 2013; and the Tribunals, Court and Enforcement Act 2007.

¹¹⁶⁶ The Civil Procedure Rules, governed by the Civil Procedure Act 1997.

¹¹⁶⁷ In England, the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, derived from the Tribunals Courts and Enforcement Act 2007. In Wales, the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004.

¹¹⁶⁸ *Interim report of the working group on property disputes in the courts and tribunals*, May 2016, CJC working group, ch 4, para 10.

¹¹⁶⁹ *Interim report of the working group on property disputes in the courts and tribunals*, May 2016, CJC working group, ch 4, para 11.

forced to make an application in a different building and to find their way through a separate administrative system.¹¹⁷⁰

Costs

12.41 The different costs regimes between the courts and the Tribunal cause particular difficulties. In addition, concerns were raised by the Working Group about legal aid and conditional fee agreements.

12.42 However, the Working Group considered that:

For many cases of course, the Residential Property Tribunal will deal with matters that might have been a County Court small claim. In that event the costs rules that apply are very similar and the problem would not arise.¹¹⁷¹

Other issues

12.43 Other issues, such as the destination of an appeal in a “mixed case”, were raised but were not resolved: it was considered that there was more work to be done on this point.¹¹⁷²

Working Group recommendations

12.44 The Working Group made a number of general property law dispute resolution recommendations in its report, which are as follows:

- (1) a list of specified property disputes where flexible deployment can be used should be drawn up for consideration by the Lord Chief Justice and the Senior President of Tribunals;
- (2) in the case management of such cases, judges should decide whether the court or the Tribunal is the most appropriate forum;
- (3) the county court and the Tribunal should have the power to transfer cases to each other;
- (4) the county court and the Tribunal should have the power to retain cases that they would otherwise have had to transfer; and
- (5) in deciding whether to retain or transfer a case, judges should take into account: the need to avoid a multiplicity of proceedings; proportionality; the desirability for

¹¹⁷⁰ The Working Group also noted that the Civil Procedure Rules 1998 might provide a potential solution: “It is worth observing that CPR Practice Direction 2C states that a claim or application may be started in any county court hearing centre unless any rule, practice direction or enactment provides otherwise and that by Practice Direction 2A, county court offices shall be situated at such places as the Lord Chancellor directs for the transaction of the business of the court and therefore are not confined to traditional court premises.”

¹¹⁷¹ *Interim report of the working group on property disputes in the courts and tribunals*, May 2016, CJC working group, ch 4, para 17. These observations were made generally in respect of the work carried out by the Tribunal rather than specifically in the context of leasehold enfranchisement. It is unlikely that any enfranchisement issue dealt with by the county court would be allocated to the small claims track.

¹¹⁷² *Interim report of the working group on property disputes in the courts and tribunals*, May 2016, CJC working group ch 4, para 20.

the case to be decided by those with expertise in property matters and the parties' funding arrangements.

12.45 It was concluded that this report would be an interim report, since there was further work to be done in areas such as the pilot deployment project (considered below), along with some of the practical considerations such as costs and appeals (considered above).

Pilot projects

12.46 Alongside the Working Group, a pilot deployment project was set up and is still being undertaken by the Tribunal. The Interim Report noted that although only a handful of cases had been tried under it, the general view of judges and parties is that it had been a modest success.¹¹⁷³ Since those comments were made in the Interim Report, there have been subsequent reports on the progress of the pilot. The most recent report was issued in January 2018.¹¹⁷⁴

12.47 While a limited number of cases have been completed within the pilot, it is expected that the Civil Justice Council will be invited to consider making procedural rule changes to allow flexible deployment to be adopted more widely.

Other proposals for the future

12.48 In October 2017, the Communities Secretary announced plans to consult on the creation of a new Housing Court.¹¹⁷⁵ In July 2018, the new Communities Secretary, Rt Hon James Brokenshire MP, announced that there would be "a call for evidence in the autumn to better understand and improve the experience of people using courts and tribunal services in property cases, including considering the case for a specialist Housing Court."¹¹⁷⁶

12.49 In a speech given in May 2018,¹¹⁷⁷ Sir Geoffrey Vos, Chancellor of the High Court, while noting his support for Government's proposed Housing Court, advocated the integration of courts and tribunals hearing the same types of cases:

I would like to see all the bifurcation between courts and tribunals in the same subject areas removed. It makes perfect sense to resolve all disputes between one landlord and one tenant in one place before one judge... I struggle to see the argument against such a rationalisation.

¹¹⁷³ *Interim report of the working group on property disputes in the courts and tribunals*, May 2016, CJC working group ch 4, para 21.

¹¹⁷⁴ Report on Property Chamber Deployment Project for Civil Justice Council Meeting, 26th January 2018. Therein, it was noted that in two cases a Tribunal, having determined the terms of acquisition, had proceeded to make vesting orders. But it was also noted that the parties in a number of claims had refused to allow the Tribunal to determine issues relating to the validity of claims. Nevertheless, some court users had expressed a wish for the pilot to be extended in suitable cases.

¹¹⁷⁵ Rt Hon Sajid Javid MP, Conservative Party Conference, 1 October 2017.

¹¹⁷⁶ Rt Hon James Brokenshire MP, 2 July 2018: <https://www.gov.uk/government/speeches/policy-exchange-housing-speech>.

¹¹⁷⁷ 9 May 2018, at the Professionalism in Property Conference 2018: <https://www.pipconference.co.uk/downloads/PDFs/chc-speech-property-lecture-09052018.pdf>.

The Chancellor noted that the Working Group's pilot project, which he described as "one pragmatic step towards what I am proposing", was working well, but said that, "... it would obviously be better if we were able to take a more holistic view."

12.50 Government has also announced that it wants people to have a clearer and simpler route to redress in the housing sector. In February 2018, the Government published a consultation on strengthening consumer redress in the housing market, including consideration of the creation of a single housing ombudsman service which could provide a single, transparent and accountable body covering the whole of the housing sector and filling existing gaps in redress, with a particular focus on private tenants, buyers of new build homes and leaseholders.¹¹⁷⁸ Government is currently considering the responses to the consultation and will publish a response in due course.

NEW REGIME

Outline of provisional proposals

12.51 We provisionally propose that the existing powers of the Tribunal should be extended to allow it to deal with all disputes and issues arising in respect of any enfranchisement claim. It would no longer be necessary (or possible) for a party to issue a claim or application in the county court or High Court at any stage in the enfranchisement process.¹¹⁷⁹

12.52 We also provisionally propose that there should be an alternative route for the determination of valuation disputes that could be adopted either where the value of the claimed interest is low, or where the difference between the parties' respective valuation positions would make it disproportionate for the parties to incur the costs of preparing for a determination of their dispute using the usual procedure.

Further detail

A single venue for determining disputes and resolving issues

12.53 We acknowledge that it is vital that any disputes or issues that arise during an enfranchisement claim should be resolved by a court or tribunal that has the skills and expertise required to do so. It is also essential that a court or tribunal that has those judicial skills also has, or can be provided with, the facilities necessary to carry out those functions.

12.54 Subject to those requirements, we believe that it is in the interests of both parties that all disputes or issues arising during an enfranchisement claim should be resolved by the same court or tribunal whenever possible. We also consider that if more than one body is able to deal with any disputes or issues that can arise, the body better suited overall to dealing with all of those matters should have the exclusive jurisdiction to do so.

12.55 Historically, the Tribunal has been regarded as a specialist body dealing, for the most part, with matters of valuation; other issues were for county courts to determine.

¹¹⁷⁸ <https://www.gov.uk/government/consultations/strengthening-consumer-redress-in-housing>.

¹¹⁷⁹ We consider the powers of the Tribunal to make orders in respect of the parties' litigation costs in Ch 13, including in respect of those issues that are currently determined by the county court.

However, we believe that the Tribunal, in its current form, has the necessary skills and expertise to deal with all disputes and issues arising in enfranchisement claims, including the matters currently dealt with by the county courts. In contrast, although judges within the county courts have the skills and expertise to deal with matters within that court's current jurisdiction, we believe that matters of valuation remain better suited to determination by the Tribunal as a result of the inclusion of expert valuers as members.

12.56 We therefore think that the current division of responsibility for the resolution of enfranchisement disputes and issues between the county court and the Tribunal is no longer justified and should end. All such matters should be the subject of determination by the Tribunal.

12.57 As noted above,¹¹⁸⁰ a pilot scheme is currently operating under which court and Tribunal judges can “double hat” in order to determine disputes where some issues fall within the jurisdiction of the court and others within the jurisdiction of the Tribunal. Although we acknowledge that this approach softens the edges of the current jurisdictional boundaries between the county court and the Tribunal, we do not believe that it provides the benefits that can be obtained by a single jurisdiction conferred by statute. We believe that the selection of a single forum to determine disputes will avoid the need for such steps to be taken, and introduce simplicity and clarity into the resolution of enfranchisement disputes that will be welcomed by all parties. A simpler system should be easier for parties to understand, and will help to reduce the cost of resolving disputes.¹¹⁸¹

12.58 We recognise that the transfer to the Tribunal of the determination of matters currently dealt with by the county court will also require some ancillary powers to be given to the Tribunal. For example, it would be necessary to give members of the Tribunal the power to execute transfers or leases where one party cannot or will not do so. We do not, however, see any reason why such powers should not be extended to the Tribunal where it is necessary to give effect to its extended jurisdiction.

12.59 Similarly, we acknowledge that the Tribunal currently lacks some of the practical infrastructure that supports the work of the county court. For example, the Tribunal would not at present be able to send parties to prison for contempt, or to instruct bailiffs. In addition, the Tribunal currently has no means of accepting payments to be held by the Court Funds Office. We do not believe at present, however, that such problems could not be resolved by the sharing of existing county court facilities or resources, as required.

¹¹⁸⁰ See paras 12.46 and 12.47 above.

¹¹⁸¹ In our Report on Updating the Land Registration Act 2002 (2018) Law Com No 380, we similarly concluded that deployment did not remove the advantage of conferring an express statutory jurisdiction on the Land Registration Division of the First-tier Tribunal in respect of specified matters. See paras 21.8 and 21.9.

Consultation Question 94.

12.60 We provisionally propose that the current division of responsibility for the resolution of enfranchisement disputes and issues between the county court and the Tribunal should end. All such matters should be determined by the Tribunal.

Do consultees agree?

Alternative procedure for some claims

12.61 At present, each party to an enfranchisement claim will normally have instructed their own expert valuer to assess the likely value of the claimed interest before their respective notices are served. Where that valuation remains in dispute, each party will usually be expected to produce a written valuation report prepared by an expert valuer ahead of any hearing.

12.62 In Chapter 15, we outline options for changing the methodology for valuing property interests in enfranchisement claims. Some of those options would eliminate the need for any expert valuation evidence.¹¹⁸² Others have the potential to reduce the range of issues in respect of which expert valuation evidence would be necessary. In particular, the prescribing of capitalisation and deferment rates, and relativity, or the removal of marriage value, could limit the issues on which expert valuation advice is required to the freehold vacant possession value of the premises.¹¹⁸³

12.63 It is possible, therefore, that parties to an enfranchisement claim might be able to serve notices on each other without having obtained detailed valuation evidence from an expert. It might be sufficient, for example, to have researched relevant local sale prices in order to ascertain the likely freehold vacant possession value of the flat or house.

12.64 In such circumstances, where the parties have not been able to settle their valuation dispute it is possible that permitting a single valuation expert to determine the claim instead of holding a contested hearing would reduce the costs incurred by the parties.¹¹⁸⁴ Of course, to have that effect, the costs incurred as a result of using the single expert would have to be less than the further costs that the parties would be likely to incur in preparing for a final hearing before the Tribunal.

12.65 We therefore think that there is merit in considering whether, in suitable cases, the Tribunal should have the power to direct valuation-only disputes to be determined by a single valuation expert rather than by the Tribunal at a full hearing. We consider that this idea could be best achieved by allowing the matter to be referred to a valuation member of the Tribunal to determine on his or her own.¹¹⁸⁵ We should make clear that

¹¹⁸² See Ch 15 at para 15.41.

¹¹⁸³ See Ch 15.

¹¹⁸⁴ In most cases, the costs of a contested hearing would include the provision of expert evidence on behalf of each party.

¹¹⁸⁵ The valuation member's determination should have the same status, and be subject to appeal in the same way, as a determination by the full Tribunal.

this alternative track would be in addition to the Tribunal's existing power (exercisable with the agreement of both parties) to carry out a determination on the papers.

12.66 We provisionally consider that it is likely that cases will be suitable for this alternative disposal either where the value of the premises is low, or where the difference between the sum proposed by the leaseholders and the sum sought by their landlord in respect of the claimed interest is such that it would be disproportionate to require a determination of that issue at a full hearing.

12.67 Furthermore, we provisionally think that it would be possible to prescribe the point at which the value of the premises, or size of the dispute between the parties' valuations for the claimed interest, triggered disposal by this alternative method. But we also consider that the Tribunal should have the power to order that cases otherwise falling below this threshold would nevertheless proceed by the more traditional means. For example, there might be cases in which the cost saving that might normally be achieved in such cases would not in fact be achieved. Alternatively, a landlord might seek to argue that the case had a significance beyond the valuation of his or her current interest and that, accordingly, a full hearing and determination would be appropriate.¹¹⁸⁶ It might be, however, that in the latter cases the Tribunal should have the power to order that the landlord should be required to meet the leaseholders' reasonable litigation costs for such a hearing.

Consultation Question 95.

12.68 We invite the views of consultees as to whether it would be desirable for certain valuation-only disputes to be determined by a single valuation expert rather than by the Tribunal at a full hearing. If so, we invite consultees' views as to:

- (1) the types of case in which such an alternative track for dispute resolution would be appropriate (in particular, whether it should operate only in respect of low value claims, or wherever the difference between the parties' positions is such that it would be disproportionate to proceed with a full hearing); and
- (2) the rules that should govern its operation.

¹¹⁸⁶ We do not believe, however, that the more usual method should be adopted simply because one or other party does not consent to the use of this alternative method. We also believe that it should be possible for this alternative method to be used where both parties agreed.

THE IMPACT OF REFORM

Consultation Question 96.

12.69 We welcome evidence as to the typical cost and duration of an enfranchisement dispute:

- (1) in the county court; and
- (2) in the Tribunal.

12.70 How and to what extent has the exercise of enfranchisement rights been slowed down, prevented or made more costly by:

- (1) the threat of lengthy and potentially expensive litigation; and
- (2) the fact that some disputes arising during an enfranchisement claim may need to be resolved by the Tribunal, whilst others fall to be determined by the court?

12.71 To what extent would our proposal that all enfranchisement disputes be dealt with in a single forum save landlords and leaseholders time and money?

Consultation Question 97.

12.72 We welcome evidence as to the proportion of leases likely to be suitable for resolution by a single valuation expert. Do consultees consider that dealing with cases on this alternative track is likely to save landlords and leaseholders time and money?

Chapter 13: Costs

INTRODUCTION

- 13.1 Any process for transferring a freehold title or granting a lease extension will inevitably lead both parties to incur some costs beyond the payment of the purchase price. Even where the fact and terms of such a transfer or grant have been agreed, both sides are likely to incur costs in giving legal effect to that agreement.
- 13.2 Where no such agreement has been reached, and one party is instead relying on a statutory right to acquire the freehold or a lease extension from the other party, those costs are likely to increase. Each party may spend money bringing or opposing such a claim, and/or in arguing about the terms on which any transfer or grant should be made. Further sums are likely to be spent if there remains a dispute that must be resolved by a court or tribunal. The amount spent by either side will be affected not only by the complexity both of the disputed issues and the procedure, but also by the individual choices and resources of the parties.
- 13.3 In either case, the costs may be of the parties directly, the costs of professionals and others who have been asked to help, or fees charged by others. Where one party relies upon a statutory right, those costs can be divided into litigation costs (that is, the costs incurred by the parties in relation to any court or tribunal hearing) and non-litigation costs (that is, the other costs of the parties incurred during the claim, including the costs of giving legal effect to the lease extension or transfer of the freehold).

Non-litigation costs

- 13.4 The majority of residential house or flat sales are negotiated on the basis that each party will pay their own costs of giving legal effect to the agreed terms. While purchasers will have to pay the price agreed with the sellers for the property, they will not also have to pay for or contribute to the sellers' procedural costs.
- 13.5 In this chapter we consider whether:
- (1) the position should be different where leaseholders are seeking to acquire the freehold, or to extend the term, of their existing leasehold premises;
 - (2) the position should be different where leaseholders are seeking to do so in reliance upon a statutory right rather than on a voluntary agreement with their landlord; and
 - (3) there is any justification for requiring one party to pay or contribute to the costs incurred by the other party in such cases.
- 13.6 At present, both the 1967 and 1993 Acts require leaseholders to pay the landlords' non-litigation costs falling within prescribed categories, provided that those costs are reasonable. If the parties are not able to agree the amount of costs that should be paid, either party can apply to the Tribunal for a determination of the correct amount.

- 13.7 It should be noted that we have been told that where transfers or grants to existing leaseholders take place on a voluntary basis, outside the provisions of the 1967 or 1993 Acts, landlords also normally expect leaseholders to pay their costs of those transactions.

Litigation costs

- 13.8 The costs incurred by the parties in any proceedings before a court or the Tribunal are expressly excluded from the costs recoverable under the 1967 and 1993 Acts. Instead, either landlords or leaseholders must rely upon the powers of the court or the Tribunal to make an order that another party should pay all or part of their costs of such proceedings.
- 13.9 Those powers are, however, very different. A court – while having a broad discretion to make orders in respect of costs – starts from the general rule that the unsuccessful party should pay the successful party's costs. In contrast, the Tribunal is only able to make an order in respect of costs where those costs have been wasted by the actions of a party's representative, or where a party has behaved unreasonably.¹¹⁸⁷
- 13.10 As a result, whether a dispute is to be resolved by a court or by the Tribunal currently has particular significance for the parties in terms of the costs that can be awarded.¹¹⁸⁸
- 13.11 We have provisionally proposed that the Tribunal should have jurisdiction to deal with all disputes and issues that arise during an enfranchisement claim.¹¹⁸⁹ In this chapter we also consider what powers the Tribunal should have to make orders in respect of the litigation costs of the parties who appear before it.

GENERAL POLICY AIMS

- 13.12 As part of our Terms of Reference, Government has asked us to consider the scope for making enfranchisement:
- easier, quicker and more cost effective (by reducing the legal and other associated costs), particularly for leaseholders, including by ... reducing or removing the requirements for leaseholders ... to pay their landlord's costs of enfranchisement.
- 13.13 The aim of making enfranchisement easier, quicker and more cost effective, particularly for leaseholders, has been considered elsewhere. Proposals have been made for the simplification both of the process for determining the price to be paid by leaseholders for their new interest,¹¹⁹⁰ and of the process by which a statutory claim is brought and resolved.¹¹⁹¹

¹¹⁸⁷ See paras 13.30 to 13.32 below.

¹¹⁸⁸ See para 13.34 below.

¹¹⁸⁹ See Ch 12 at para 12.56.

¹¹⁹⁰ See Ch 15.

¹¹⁹¹ See Ch 11.

13.14 In addressing the aim of reducing or removing the requirement for leaseholders to pay their landlord's costs, we have looked at the following questions in respect of non-litigation costs.

- (1) Is there any justification for requiring leaseholders to pay any part of their landlords' non-litigation costs?
- (2) If so, should leaseholders pay all, or only a part of, those costs?
- (3) If part only, how should that contribution be determined?

13.15 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.

CURRENT LAW: NON-LITIGATION COSTS

Categories of costs recoverable by landlords under the 1967 and 1993 Acts

13.16 The categories of costs that can be recovered in relation to lease extension claims – whether of a house under the 1967 Act, or of a flat under the 1993 Act – are broadly the same.¹¹⁹² Leaseholders will be liable for the reasonable costs incurred by their landlords as a result of the service of the leaseholders' notice of claim where those costs are of or incidental to:

- (1) any investigation into the leaseholders' right to a lease extension;¹¹⁹³
- (2) any valuation obtained to fix the amounts that will be payable by the leaseholders to their landlord in respect of the lease extension;¹¹⁹⁴ and
- (3) the grant of a lease extension.

13.17 The categories of costs that are recoverable by landlords in relation to the acquisition by leaseholders of the freehold of a house under the 1967 Act are the equivalent of the above categories, but in respect of the acquisition of a freehold rather than leasehold title. However, landlords are also permitted to recover the costs of deducing title to the house and premises, and providing such abstracts of title as the leaseholders require.¹¹⁹⁵

13.18 The categories of costs that can be recovered by landlords in respect of a collective enfranchisement claim under the 1993 Act are broadly the same as for the acquisition of freehold title under the 1967 Act. However, the investigation can also relate to the

¹¹⁹² 1967 Act, s 14(2) and 1993 Act, s 60, respectively.

¹¹⁹³ Provided the same is reasonably undertaken.

¹¹⁹⁴ The amount payable in respect of a lease extension of a flat is a premium payable for a lease extension at a peppercorn rent. In contrast, the amount payable in respect of a lease extension of a house and premises is the ground rent that will become payable in accordance with 1967 Act, s 15 (see Ch 4 at paras 4.4 and 4.12).

¹¹⁹⁵ 1967 Act, 9(4).

right to acquire the specified premises or other property, and to any other question arising out of the notice of claim.¹¹⁹⁶

The Tribunal's approach to the assessment of costs

13.19 The costs that can be recovered in respect of each of these categories are expressly restricted to those that have been reasonably incurred. The 1993 Act also states that the costs of any professional services will only be regarded as reasonable if, and to the extent that, a landlord might reasonably have been expected to incur those costs if personally liable for them.¹¹⁹⁷

13.20 If the parties cannot agree what amount should be paid, either party can apply to the Tribunal for a determination of the correct amount.¹¹⁹⁸ Although the Tribunal has a broad discretion in dealing with such applications, and the outcome depends upon the facts of each case, some general guidance can be drawn from Tribunal decisions.

- (1) Neither the 1967 nor 1993 Acts allow landlords to recover all the costs that they have in fact incurred in each category. Those costs must be reasonable. In addition, the 1993 Act introduces a limited test of proportionality¹¹⁹⁹ of the kind associated with the assessment of litigation costs on the "standard basis".¹²⁰⁰
- (2) Costs claimed by landlords must be explained and substantiated.¹²⁰¹
- (3) The costs of investigating leaseholders' right to acquire will not include the costs of preparing and serving any counter-notice, or taking general advice in respect of the landlords' rights.¹²⁰²

¹¹⁹⁶ 1993 Act, s 33(1).

¹¹⁹⁷ 1993 Act, ss 33(2) and 60(2).

¹¹⁹⁸ 1967 Act, s 21(1)(ba), and 1993 Act, s 91(2)(d).

¹¹⁹⁹ 1993 Act, ss 33(2) and 60(2). See *Drax v Lawn Court Freehold Limited* [2010] UKUT 81 LC at [22]. In reaching its decision in *Drax*, the Upper Tribunal expressly rejected a direct analogy between 1993 Act, s 33, and the indemnity basis on which costs are recoverable on compulsory purchase: see *Drax* at [20] to [21]. Subsequent First-tier Tribunal decisions have, however, stressed that the provisions of the 1993 Act are self-contained, and that the decision in *Drax* does not import assessment on a standard basis: eg 59-60 *Belsize Park Freehold Limited v Kapoor Investment Limited* (2015) First-tier Tribunal (unreported), at [26] to [29]. Nevertheless, the prospective price to be paid for any interest can be relevant to whether costs incurred are reasonable in amount: eg *Dashwood Properties Limited v Beril Prema Christostom-Gooch* [2012] UKUT 215.

¹²⁰⁰ Civil Procedure Rules, Practice Direction 44, para 6.2 provides that a court assessing costs on the standard basis will only allow costs that it finds were reasonably and proportionately incurred, and were reasonable or proportionate in amount; it will also disallow costs where it doubts that these tests were met.

¹²⁰¹ *Drax v Lawn Court Freehold Limited* [2010] UKUT 81 (LC), as analysed in 59-60 *Belsize Park Freehold Limited v Kapoor Investment Limited* (2015) First-tier Tribunal (unreported) at [27].

¹²⁰² See *Hague*, para 6-43(c).

- (4) Valuation costs include the valuation of the interest to be acquired, but not any negotiations between the parties.¹²⁰³ Valuation costs should be calculated by reference to an hourly rate and not by reference to the purchase price.¹²⁰⁴
- (5) Valuation costs can also include counsel's fee for advising on the correct basis for valuation.¹²⁰⁵
- (6) In addition to legal and valuation fees, landlords will also be able to recover the reasonable fees of their managing agents – in so far as these relate to the prescribed cost categories – even if this is work that landlords could have carried out themselves. They will also be able to recover their own 'in house' costs.¹²⁰⁶
- (7) When considering the costs of professional advisers, the Tribunal will normally consider (i) the work done, (ii) the time spent doing that work, and (iii) the hourly rate charged.
- (8) The Tribunal will consider whether it was reasonable for landlords to have instructed a particular firm of solicitors. While landlords cannot demand the additional costs of a 'luxury choice', the Tribunal will take into account that enfranchisement is a specialist area that may require particular expertise.¹²⁰⁷ In addition, it is common to accept that an hourly rate that would be unreasonable in one part of the country may not be in another, such as central London.¹²⁰⁸
- (9) Where there is, or is likely to be, an overlap between work done on behalf of landlords in a particular case and other cases (for example, in respect of claims being brought in relation to the same landlord's wider estate) the Tribunal will expect sums claimed in any single case to be discounted from the normal level.¹²⁰⁹

Costs of other landlords or parties

13.21 The 1993 Act provides that a nominee purchaser will also be liable for the statutory costs of any relevant landlord incurred pursuant to notice of claim given in a collective enfranchisement claim.¹²¹⁰ The 1993 Act also provides that a leaseholder will be liable for the statutory costs of any relevant person incurred pursuant to a notice of claim for

¹²⁰³ See *Hague*, para 6-43(a).

¹²⁰⁴ *Fitzgerald v Safflane Ltd* [2010] UKUT 37 (LC).

¹²⁰⁵ See *Holicater Ltd v Great Yarmouth Borough Council* [2012] UKUT 131 (LC).

¹²⁰⁶ See the decision of the Upper Tribunal in *Columbia House Properties (No. 3) Ltd v Imperial Hall Freehold Ltd* [2015] UKUT 45 (LC). The First-tier Tribunal to whom the case was returned for assessment following the successful appeal criticised that decision as potentially leading to a significant increase in the costs recovered by landlords (unreported, 4 September 2015).

¹²⁰⁷ *Wraith v Sheffield Forgemasters Limited* [1998] 1 WLR 132.

¹²⁰⁸ See, for example, *The Trustees of the Ilchester Estate v Futter* (2016) First-tier Tribunal (unreported).

¹²⁰⁹ In *Sinclair Garden Investments (Kensington) Limited v Wisbey* [2016] UKUT 203 a 20% discount was applied.

¹²¹⁰ 1993 Act, s 33.

a lease extension of a flat.¹²¹¹ Accordingly, nominee purchasers will be liable for any such costs incurred by any freeholder and intermediate leaseholder, and leaseholders may also be liable for any such costs incurred by a third party to their lease.

Costs of enfranchisement claims that do not reach completion

13.22 The liability of a leaseholder in an individual freehold or lease extension claim for his or her landlord's reasonably incurred costs begins as soon as a notice of claim is given. Any such costs incurred between that point and the conclusion of the claim will be recoverable by the landlord.¹²¹² This remains the case even if the notice of claim proves to have been invalid.¹²¹³

13.23 Such a leaseholder would also remain liable for those costs if the claim did not proceed to completion. Whether the leaseholder voluntarily decides not to proceed with their claim, or is deemed to have withdrawn it because of their failure to comply with one of the time limits set out in the 1993 Act,¹²¹⁴ the leaseholder will have to pay the landlord's reasonable costs incurred up to that point.

13.24 In collective enfranchisement claims under the 1993 Act, however, where a notice of claim is deemed to have been withdrawn because leaseholders have failed to meet a statutory deadline for progressing the claim, both the participating leaseholders and the nominee purchasers will be liable to pay those costs.¹²¹⁵ In contrast, it is the participating leaseholders alone who are liable to pay those costs if a notice of withdrawal has been served by the leaseholders.¹²¹⁶

Leaseholders' deposits and landlords' security for costs

13.25 In each enfranchisement claim where a premium or price is to be paid to the landlords on completion of the transfer or grant, the landlords are entitled to require the leaseholders to pay a deposit in advance.¹²¹⁷ In particular:

¹²¹¹ 1993 Act, s 60.

¹²¹² Subject to the Tribunal's power to assess those costs, as set out at para 13.20 above. There is also an exception in cases where the landlord has successfully opposed the enfranchisement claim on the grounds of redevelopment, or where the claim fails as a result of compulsory purchase. There are also more limited exceptions in relation to the 1967 Act: see *Hague*, paras 6-43(1) to (5).

¹²¹³ *Scottish Widows v Abbas*, LON/ENF/259/98 LVT (unreported), and *Hague* at para 6-43, fn 220.

¹²¹⁴ See Ch 10.

¹²¹⁵ 1993 Act, ss 29(6) and 28(4). The nominee purchaser will not be liable, however, where the deemed withdrawal arises following the removal or resignation of the nominee purchaser: 1993 Act, ss 15(10) and 16(8).

¹²¹⁶ 1993 Act, ss 28(1) and (6).

¹²¹⁷ As there is no premium payable in respect of a lease extension of a house and premises, no deposit is required or can be demanded. However, landlords can refuse to grant a lease extension of a house and premises under the 1967 Act unless their costs are paid, or reasonable security for such payment is made: 1967 Act, ss 14(3) and 15(6).

- (1) leaseholders seeking to acquire the freehold of a house and premises under the 1967 Act must pay a deposit to the landlord (of 3 times the ground rent, or £25, whichever is greater) if requested to do so by their landlord;¹²¹⁸
- (2) landlords can require the payment of a deposit (the greater of £500 or 10% of the agreed or determined purchase price) upon exchange of contracts;¹²¹⁹ and
- (3) leaseholders seeking to obtain a lease extension of a flat under the 1993 Act must pay a deposit (the greater of £250 or 10% of the amount proposed in the leaseholder's notice as payable upon the grant of a lease) on being given written notice to do so by the landlords.¹²²⁰

13.26 Deposits are expressed as being paid on account of both the price and any other sums payable by the leaseholders to their landlord under the Acts.¹²²¹ If the transaction is completed, the deposit held will be deducted from the sums then payable to the landlord.

13.27 A deposit paid in respect of the acquisition of the freehold of a house can be forfeited by landlords if the leaseholders fail to complete, in breach of the statutory contract.¹²²² As such, while leaseholders nevertheless remain liable to pay their landlords' costs,¹²²³ the payment of a deposit does provide some security for those costs. Similarly, while in claims for a lease extension of a flat leaseholders may give their landlords a notice requiring the return of a deposit if the notice of claim is withdrawn, is deemed withdrawn, or ceases to have effect, landlords are entitled to deduct their costs first. Again, the deposit provides some security for those costs.

13.28 The Acts do not, however, provide any other means by which landlords can seek security from leaseholders for the costs that are likely to be incurred and recovered by the landlords under those Acts.

CURRENT LAW: LITIGATION COSTS

13.29 As set out in Chapter 12, the 1967 and 1993 Acts divide the jurisdiction to resolve disputes or issues arising under those Acts between the county court and the Tribunal. However, as noted above (at paragraph 13.9), the powers of the court and of the Tribunal in respect of the costs that the parties incur in relation to any such proceedings are markedly different.

¹²¹⁸ See the Leasehold Reform (Enfranchisement and Extension) Regulations 1967 (SI 1967 No 1879).

¹²¹⁹ See the 1993 regs. This relatively late stage for payment of a deposit has been the subject of criticism: see *Hague* at para 1-50(2)(h), fn 297.

¹²²⁰ 1993 Regulations sch 2, para 2(2).

¹²²¹ Leasehold Reform (Enfranchisement and Extension) Regulations 1967 (SI 1967 No 1879), sch, para 1, for example.

¹²²² This does not include leaseholders who serve a written notice on the landlord – within one month of the price having been agreed or determined – that they are unable or unwilling to purchase at that price: 1967 Act, s 9(3) and *Hague* at para 6-42.

¹²²³ Except in the limited circumstances set out in the 1967 Act: see *Hague*, para 6-43.

- 13.30 The statutory power of the county court to make orders in respect of the costs of and incidental to its proceedings, is regulated by the Civil Procedure Rules 1998.¹²²⁴ The court has a wide discretion. And while the general rule is that an unsuccessful party will pay the costs of the successful party,¹²²⁵ the rules outline the factors that a court will need to consider if it decides that a different order should be made.¹²²⁶
- 13.31 Both the 1967 and 1993 Acts provide that the costs recoverable by landlords in respect of any enfranchisement claim will not include the landlords' costs of any proceedings before the Tribunal.¹²²⁷ As such, while landlords will be able to recover their reasonable costs of obtaining a valuation, they will not recover the fees paid to the valuer for attending and giving evidence before the Tribunal.
- 13.32 The Tribunal does, however, have powers to award costs against a party where it considers that a party's representative has wasted costs, or a party has behaved unreasonably in relation to bringing, defending or conducting proceedings.¹²²⁸ The limit of £500 previously in place in respect of an award of costs for unreasonable conduct has been removed in England.¹²²⁹

¹²²⁴ Senior Courts Act 1981, s 51, and Parts 44 to 47 of the Civil Procedure Rules.

¹²²⁵ Civil Procedure Rules, r 44.2(2)(a). This general rule does not apply to cases allocated by the court to the small claims track, a track tailored to low value claims of up to £10,000: see Civil Procedure Rules, r 27.14. It is unlikely, however, that any application under the 1967 or 1993 Acts would be allocated to that track: where a party decides, and is permitted, to start proceedings under Part 8, rather than Pt 8 of the Civil Procedure Rules (and hence the claim is not automatically allocated to the multi-track) it is unlikely that the court would decide that the small claims track was the proper track for such an application.

¹²²⁶ The county court also has a power to order a claimant company to provide security for a defendant's costs of proceedings before that court. It can do so where (i) there is reason to believe that the company would be unable to pay the defendant's costs if ordered to do so, and (ii) in all the circumstances of the case, it is just to make that order: Pt 25 of the Civil Procedure Rules 1998. While the first condition might well be satisfied in the case of a nominee purchaser company bringing a county court claim, it is unlikely that the second condition would be met if the effect would be to prevent the participating leaseholders from pursuing their claim: see *Grover Court Ltd v Grover Court Properties Limited* (1996) Bromley County Court (unreported).

¹²²⁷ 1967 Act, ss 9(4A) and 14(2A), and 1993 Act, ss 33(5) and 60(5).

¹²²⁸ First-tier Tribunal (Property Chamber) Rules 2013 (SI 2013 No 1169) r 13(1). The Tribunal may also order a party to reimburse any fees paid.

¹²²⁹ The cap (of £500, or such other figure as is specified in procedure regulations) had been set out in the Commonhold and Leasehold Reform Act 2002, sch 12, para 10(3) in respect of an award of costs made against a party who had "acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings". This provision continues to apply in Wales. The Tribunals, Courts and Enforcement Act 2007, s 29, gave the First-tier Tribunal (Property Chamber) and the Upper Tribunal, the power to determine by whom and to what extent the costs of and incidental to its proceedings are to be paid. The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013 No 1169) ("the Tribunal Rules"), r 13, made pursuant to that power, allowed the Tribunal to make an order for costs against a party where he or she had acted "unreasonably in bringing, defending or conducting proceedings". But an order under r 13 was not subject to any cap. In June 2018, the Tribunal Procedure Committee published a response to a consultation in which the Committee decided that the case for introducing a cap (or more than one cap) on the costs recoverable under r 13 had not been made out; but it also considered that the lack of consensus amongst consultees justified the issue being kept under review:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721587/tribunal-rules-consultation-response.pdf.

13.33 The Upper Tribunal has, however, determined¹²³⁰ that unreasonable conduct does not include parties who have merely failed to state their case clearly, or who have sought an unrealistic outcome.¹²³¹ Instead, the Tribunal should ask whether (i) there is a reasonable explanation for the conduct complained of, and (ii) a reasonable person in that party's position would have conducted themselves as the party did. There is, therefore, a close similarity between this approach and that adopted in relation to cases allocated to the small claims track in the county court under the Civil Procedure Rules.¹²³²

13.34 As a result, in most cases heard by the Tribunal, landlords are unlikely to be able to recover the costs of those proceedings from the leaseholders, even if it is the landlords' arguments that prevailed.

CRITICISMS OF THE CURRENT LAW: NON-LITIGATION COSTS

13.35 Some leaseholders have objected in principle to an obligation to pay any part of their landlords' non-litigation costs. Other leaseholders have criticised the amount of those costs that they have been required to pay, and/or the unpredictability of the amount, and have raised concerns about the effect that both can have upon the balance of power between the parties in enfranchisement claims. The risk that leaseholders will have to pay a significant contribution to their landlords' non-litigation costs, as well as pay the price that is agreed or determined, can encourage leaseholders to agree to accept, at an early stage, terms that they might otherwise have sought to reject as unreasonable.

13.36 Leaseholders have also raised concerns about the additional costs that they will incur if they seek to challenge their landlords' non-litigation costs. The costs of raising a challenge, particularly where the dispute has to be resolved by the Tribunal, can often make it uneconomic to do so. As leaseholders are often more sensitive to the risk of an increase in the overall cost of enfranchisement, landlords are sometimes able to take advantage of their relatively stronger bargaining position in order to push claimed costs higher.

13.37 In contrast, some landlords have criticised their inability to recover the full costs incurred in dealing with an enfranchisement claim. This concern is particularly acute where the price likely to be paid for a freehold is small. In such cases there may be a risk that the

¹²³⁰ *Willow Court Management v Ratna Alexander* [2016] UKUT 290 (LC).

¹²³¹ But it does include conduct which is "vexatious, and designed to harass the other side rather than advance the resolution of the case" (*Willow Court Management v Ratna Alexander* [2016] UKUT 290 at [24]).

¹²³² The small claims track is one of three tracks to which civil claims are allocated in the county court. A claim will not be allocated to the small claims track if the disputed value of the claim is more than £10,000: CPR, Pt 26.6. CPR, Pt 27.14 provides that the sums that one party to a small claim can be ordered to pay another party to that claim will be limited to specified categories of cost (such as issue fees, court fees, witness expenses, and capped sums in respect of loss of earnings, and expert's fees) unless that party has behaved unreasonably. In *Dammerman v Lanyon Bowdler LLP* [2017] EWCA Civ 269, [2017] CP Rep 25 the Court of Appeal doubted that any general guidance could be given to courts seeking to determine whether a party had behaved unreasonably; nevertheless, the Court of Appeal did refer to *Ridehalgh v Horsefield* [1994] Ch 205 in which it was said that a court should ask whether the party's behaviour "permits of reasonable explanation". Significantly, in *Willow Court Management v Ratna Alexander* [2016] UKUT 290 (LC) at [24], the Upper Tribunal stated that it saw no reason to depart from the guidance given in *Ridehalgh*, despite the slightly different context.

shortfall between the costs incurred by the landlord and the amount of those costs that he or she is able to recover from the leaseholders will be greater than the price that the leaseholders are to pay for the freehold.

13.38 Some stakeholders are concerned by the operation of the provisions within the 1993 Act for deemed withdrawal of enfranchisement claims, and the leaseholders' obligation to pay their landlord's non-litigation costs that arises as a result.¹²³³ Those provisions can trap unwary leaseholders who have missed a procedural deadline set out in the 1993 Act, and leave them with nothing to show for the costs paid to the landlord. For many, these costs appear to operate as a penalty for default, rather than proper compensation for their landlord's wasted expenditure. Some practitioners tell us that, in many instances, those who have been caught out in this way are reluctant to start the process again.

13.39 On the other hand, some landlords have been critical of the different provisions within the 1967 and 1993 Acts in respect of the payment of deposits. Other landlords have expressed concern about the lack of any proper provision that would allow them to obtain security from the leaseholders for the costs that they are likely to incur as a result.

CRITICISMS OF THE CURRENT LAW: LITIGATION COSTS

Costs-shifting powers

13.40 Some stakeholders have raised concerns about any power for a court or tribunal to order that one party should pay the litigation costs of another party (that is, "costs-shifting"). Such a power can, of course, be as readily deployed in favour of a leaseholder as a landlord: either party may succeed on any particular claim or issue. Further, the absence of such a power is also sometimes seen as benefiting the party that can best afford to meet its own litigation costs. However, many stakeholders consider that the effect created by the possibility of being ordered to pay the other party's litigation costs will, in most cases, be felt more heavily by leaseholders than landlords. It is the party that is more able to bear that risk that is most likely to benefit from costs-shifting.

13.41 Others, however, have pointed out that some parties are well able to bear that risk, and may in fact choose to accept that risk if they were given the option to do so. While in many cases it will be landlords rather than leaseholders who are more able to bear the risk of an adverse costs order, this will not always be the case.¹²³⁴ Some enfranchisement claims are contested by parties of relatively equal bargaining power.

Unreasonable conduct costs in the Tribunal

13.42 We are also aware that criticisms have been raised by stakeholders about the Tribunal's power to order one party to pay the litigation costs of the other party where the former party has acted unreasonably.¹²³⁵ Some stakeholders think that the Tribunal's power is drawn too narrowly and allows parties to argue poor points largely without fear of any costs sanction. In contrast, others are concerned that the existence of such a power,

¹²³³ See Ch 10 at paras 10.109 and 10.162.

¹²³⁴ See Ch 1 at para 1.63.

¹²³⁵ See para 13.32 above.

particularly without any cap on the sum that can be recoverable from the other side, can be abused by a more powerful party to any dispute.

13.43 In its response to its recent consultation, the Tribunal Procedure Committee noted that there was scope for this power to be abused: one party may threaten to apply for such an order as a means of bringing pressure to bear on the other party.¹²³⁶ The Committee's report also set out arguments made both by consultees in favour, and those against, the introduction of a cap on the sum that could be awarded. On the one hand, a cap would help ensure access to justice for all parties,¹²³⁷ restrain expectations of a party who had been subject to the other party's unreasonable conduct, limit the impact of any threat that might be made, and reflect the no "costs-shifting" character of the Tribunal. On the other hand, appropriate compensation should be available to parties where the other party had behaved unreasonably, and the Tribunal's discretion to make such an award should not be fettered; the power to make such an order can be a valuable deterrent to unreasonable conduct. Although these responses were directed to the mooted introduction of a cap on the amount recoverable by any party, we believe that similar arguments would apply to whether the Tribunal should be able to make such orders at all, and if so, what the scope of that power should be.

Different powers in respect of costs

13.44 The current division of powers in respect of costs between the courts and the Tribunal has a particular significance for the parties. The risk that one party will be ordered to pay the other party's litigation costs is substantially greater in the courts than in the Tribunal.

13.45 Many parties consider that, even if it were necessary to give powers to determine a particular issue to one body rather than another,¹²³⁸ the distinct treatment of litigation costs by those two bodies is more difficult to understand. In particular, it is not clear why one particular type of enfranchisement issue should be subject to costs-shifting powers, whereas another is not.

Unpredictability

13.46 Any party who wishes either to bring or to oppose an enfranchisement claim will almost always try to estimate the cost of doing so in advance. Although a party cannot be certain how the other party will choose to respond to any claim, or opposition to a claim,

¹²³⁶ Reply from the Tribunal Procedure Committee to Responses to the consultation on possible changes to the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 concerning costs in leasehold cases and residential property cases, June 2018: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721587/tribunal-rules-consultation-response.pdf.

¹²³⁷ The Committee noted in its consultation response (see fn 1236 above) that "a threat of a costs award may have a very real effect, particularly upon those of limited means, thereby restricting access to justice": para 21. The Property Chamber judiciary noted, anecdotally, that the frequency of applications for orders under r 13(1)(b) were greater than under the previous rule (see fn 1229 above), some parties made an application for costs in the application notice commencing a claim, and the application for costs was often made in respect of the whole of the party's costs rather than just the costs incurred as a result of unreasonable conduct.

¹²³⁸ We have considered the question as to whether a single body should be empowered to determine disputes in Ch 12.

he or she can attempt to assess both the amount of money that they are likely to spend on fees or their own legal costs, and the risk that they will be ordered to meet some or all of the costs incurred by the other party.

13.47 The combined effect of the division of powers between different bodies, the complexity of the provisions, and the distinct powers of those bodies in respect of costs, is that the latter risk is made more difficult to assess.

13.48 While both leaseholders and landlords face this problem, as noted above, it will often be leaseholders rather than landlords who are more sensitive to both risk and the difficulty of assessing risk. Leaseholders will often have a clear view of the maximum amount of money that they would be prepared to spend to acquire their claimed interest. Landlords, often with greater resources, may be able to accept a higher potential cost, and seek to exploit this difference in tolerance during the course of the claim itself. Landlords may also be able to treat such costs as a business expense, thereby reducing their tax liability. This can lead to leaseholders agreeing to pay a higher price to acquire the claimed interest rather than risk unpredictable additional costs being incurred during a dispute.

OUR PROPOSED REFORMS: NON-LITIGATION COSTS

Should leaseholders contribute to their landlord's non-litigation costs?

13.49 We have considered whether there is any justification for requiring leaseholders to contribute towards the non-litigation costs incurred by their landlords in enfranchisement claims.

13.50 The usual practice in most residential house or flat sales is that each party pays its own costs. In most cases, the parties will have taken those costs into account in deciding on the price to be paid: a party's decision on price will be made in light of the likely scale of his or her own legal costs. Yet in the case of a transfer of freehold title, or the grant of a lease extension, to existing leaseholders – whether arising as the result of an enfranchisement claim, or (we have been told) by voluntary agreement – leaseholders will pay or contribute to their landlord's costs.

13.51 Should the fact that the purchasers already hold a lease of the house or flat, or the fact that the landlords are compelled to transfer the freehold, or grant a lease extension, to the leaseholders, alter the position?

13.52 We have identified arguments in support of the proposition that leaseholders should not be required to contribute towards their landlords' non-litigation costs.

- (1) Many people consider the sale of houses or flats on long leasehold terms to be inherently unfair.¹²³⁹ One of the effects of this inherent unfairness is that existing leaseholders come under an increasing degree of financial and other pressures as the remaining fixed term reduces. Leaseholders' eagerness to resolve these problems – by persuading their landlords to agree to sell the freehold, or extend the term of the leases, voluntarily – creates an imbalance in any negotiation between those parties that does not exist in a negotiation between the landlords

¹²³⁹ See Ch 1 at paras 1.39 to 1.46.

and a third party. That imbalance can lead leaseholders to agree, among other things, to pay or contribute towards the landlords' costs when third parties would not do so. The 1967 and 1993 Acts were introduced, in part, to prevent this imbalance being exploited or causing hardship.

- (2) If there is no fair basis on which existing leaseholders should pay or contribute to the landlords' costs of transferring the freehold title, or extending a lease, by agreement, the fact that landlords have been compelled to do so by statute does not provide a sufficient justification for altering the balance of cost allocation between the parties.
- (3) Alternatively, as the history of enfranchisement legislation sets out,¹²⁴⁰ landlords' property interests have been subject to compulsory acquisition for many years. Most current landlords will have acquired those interests knowing that they are held subject to the leaseholders' enfranchisement rights. As such, the compulsory transfer of the freehold or grant of a lease extension to an existing leaseholder are merely features of the landlord's ownership.

13.53 We have also identified arguments in support of the view that leaseholders should make at least some contribution to their landlords' non-litigation costs.

- (1) Although leasehold interests do have the inherent weakness set out above,¹²⁴¹ it will not necessarily have been the case that those interests would have been wrongly priced when first acquired. Moreover, it is difficult to establish how commonly leaseholders would have been misled as to the character of the interest offered by the landlords. If leaseholders acquired their interest following inadequate advice from professionals, it is difficult to see that landlords should be required to share the burden of relieving the leaseholders from any loss they have suffered. Further, since in many cases the landlords' interest would have been transferred one or more times since the original sale, it is more difficult to conclude that all current landlords had themselves benefited from any unfairness.
- (2) While landlords hold their interests subject to a long-established statutory regime, that regime currently provides for the leaseholders to pay some of the landlords' costs. And although such statutory provisions are always capable of being amended, the current position does inform the basis on which such assets are voluntarily acquired or sold.

13.54 We think that these arguments finely balanced. As such, we do not intend to make a provisional proposal as to whether leaseholders should pay any part of their landlord's non-litigation costs. Instead we invite the views of consultees as to whether any such contribution should be made.

¹²⁴⁰ See Ch 2.

¹²⁴¹ See para 13.52.

Consultation Question 98.

13.55 We invite the views of consultees as to whether leaseholders should be required to make any contribution to their landlord's non-litigation costs.

A contribution by leaseholders to their landlord's non-litigation costs

13.56 In the event that consultees think that leaseholders should continue to make a contribution to their landlord's non-litigation costs, we have identified a number of ways in which that contribution might be quantified.

Fixed costs

13.57 We have considered the adoption of fixed costs that would be payable by leaseholders in respect of their landlord's non-litigation costs.

13.58 Any such scheme would allow leaseholders to determine the amount of their landlord's non-litigation costs that they would be liable to pay at an early stage. It would also remove the imbalance of power that can exist between the parties as a result of the leaseholders' current liability to pay an uncertain and unpredictable sum towards their landlord's costs. And it would remove the difficulties that can arise from the need to have the landlord's claim in respect of non-litigation costs assessed by a court or tribunal in the event that agreement is not reached.

13.59 We recognise, however, that such schemes necessarily carry the risk that landlords will be under-compensated in some cases, but over-compensated in others. Such a scheme should therefore try to reflect the different type and complexity of claims, and the likely costs associated with each of them. But it must also seek to retain the benefits of simplicity and predictability for leaseholders and landlords alike.

13.60 It may also be necessary to consider how such a scheme could be applied to claims that were started but did not end in a completed transaction, and how it might provide incentives for parties to settle claims at an early stage.

Capped costs

13.61 We have also considered whether landlords' recoverable costs could be capped rather than fixed.

13.62 Capping costs would allow leaseholders to know the likely maximum extent of their liability to pay the landlords' non-litigation costs. While this approach would prevent landlords from being over-compensated (as might sometimes be the case if costs were fixed), any reduction in the imbalance of power between the parties would depend upon the level at which any cap were set. If set too high, the cap may have little benefit to leaseholders.

Fixed costs subject to a cap

13.63 We have also considered whether fixed and capped costs might be combined.

13.64 A fixed costs regime can take different forms. In the most basic of fixed costs regimes, there would be no need for a cap on those costs: there would be one sum payable by leaseholders in respect of their landlord's non-litigation costs. However, more nuanced fixed cost regimes – where the amount of fixed costs payable by leaseholders would vary depending on a range of possible factors – might benefit from the introduction of an overall cap on costs.¹²⁴²

13.65 Such a cap would allow for a degree of variation in the fixed cost regime, designed to reflect the level of costs that landlords are likely to incur in giving effect to different types of enfranchisement claim, while ensuring that the amount paid by leaseholders would not exceed a particular sum.

Relating the non-litigation costs to the price paid for the interest acquired

13.66 It might also be possible for the leaseholders' contribution to the non-litigation costs incurred by their landlord to be related to the price to be paid by the leaseholders for the transferred freehold or lease extension.

13.67 The most straightforward approach would be to allow landlords to recover a fixed percentage of the price to be paid as the leaseholders' contribution towards landlords' non-litigation costs. It might be possible to choose a single percentage figure that produced reasonable results in respect of most enfranchisement claims. However, a single figure is unlikely to produce reasonable results in relation to either low value claims (such as the purchase of a freehold by a leaseholder holding subject to a particularly long lease) or high value claims (such as short leases in prime central London) where the risk of under- or over-compensation would be higher. In addition, any system that leads to leaseholders' contributions to landlords' non-litigation costs increasing as the length of the unexpired term decreases is likely to accentuate the inherent problems with leasehold tenure described above.¹²⁴³

13.68 However, it might be possible to reduce these difficulties by applying different percentages to different price ranges, or by allowing a percentage to be applied subject to minimum and maximum sums. But there is, as in other cases, likely to remain a balance to be struck between a system that sought to reflect accurately the likely costs in most circumstances, and a system that was simpler for leaseholders to use and understand.

Linking non-litigation costs to the landlord's response to the claim

13.69 We have also considered whether it might be possible to create a regime for the payment of landlords' non-litigation costs that reflected the landlords' approach to their leaseholder's claim.

13.70 Although the category of costs recoverable by landlords under the 1967 and 1993 Acts do not include their costs of litigation, the amount that a landlord is likely to spend in relation to any enfranchisement claim will reflect his or her approach to their leaseholders' claim. For example, a landlord who chooses to investigate the title of each of the participants in a collective enfranchisement claim, perhaps in the hope of

¹²⁴² An illustration of one possible fixed costs regime is set out at para 13.88 below.

¹²⁴³ See para 13.52 above.

demonstrating that one or more of those participants were not in fact entitled to bring that claim, is likely to incur greater costs than a landlord who does not do so. Similarly, a landlord who seeks to contest other aspects of the claim, whether the price to be paid, or the other terms of acquisition, will incur higher non-litigation costs than a landlord who does not, regardless of whether the dispute has to be determined by a court or tribunal.

13.71 As noted above, in the county court an award of litigation costs is generally made in favour of the party that is considered to have been successful in the claim or on the issue determined by the court.¹²⁴⁴ Where one party to an enfranchisement claim raises issues that increase the non-litigation costs of the other party, it might be possible to reflect whether the first party had succeeded on those issues when deciding what order to make in respect of those non-litigation costs. For example, it might be possible to allow a landlord to recover his non-litigation costs only if he or she either accepts the terms set out in the Claim Notice, or is successful (whether in whole or in part) on the points raised in his or her Response Notice.

13.72 Such an approach has the potential to encourage landlords to settle claims early unless they are confident that the points they raise have sufficient merit. But it may prove difficult to calibrate the appropriate level of incentive, and to avoid encouraging satellite disputes that would in themselves cause further costs to be incurred. In addition, such an approach may risk penalising landlords who raise reasonable enquiries of leaseholders, even if the leaseholder's claim ultimately succeeds.

Reducing the categories of recoverable costs

13.73 It would also be possible to reduce the categories of non-litigation costs that are recoverable by landlords. For example, in light of our proposal that leaseholders should produce evidence of their titles with their Claim Notice, it might be possible to remove the costs of establishing the leaseholders' entitlement to bring an enfranchisement claim from the list of recoverable costs. Similarly, some of the options we have highlighted for reform to valuation methodology for enfranchisement claims might lead to the removal or reduction in the recoverability of the landlord's related costs.

Preserving the current categories while reforming assessment procedures

13.74 It might be possible to adapt the current position by introducing a more cost-effective means of assessment of those costs in the event of a dispute, while making the fact that the transaction can proceed to completion without the costs having been agreed or determined clearer for the parties (so the transfer or lease extension does not need to be delayed in the meantime).

Expanding the categories of recoverable non-litigation costs

13.75 Finally, we have also considered whether it would be appropriate to expand the categories of costs that landlords are entitled to recover from leaseholders, and/or allowing landlords to recover all their reasonably incurred costs.

13.76 Many landlords believe that it is unjust not to allow them to recover the costs that they have incurred in dealing with their leaseholder's enfranchisement claim where those

¹²⁴⁴ See para 13.20 above.

costs have been reasonably incurred. They argue that an assessment process should prevent landlords from recovering excessive sums.

13.77 Expanding the categories of recoverable costs would not, however, be consistent with our Terms of Reference. It is also unlikely to address the concerns that have been raised about the effect of any imbalance between the abilities of a leaseholder and a landlord to bear the risks of incurring further costs during any assessment process. Instead, it would tip the balance of the cost regime further towards the interests of landlords.

Other costs regimes

13.78 In looking at these options, we have also considered other costs regimes, including those that apply in respect of the compulsory transfer of property rights from one party to another, and in respect of the resolution of related disputes. In particular, we have noted that.

- (1) A person whose property is to be acquired by means of a compulsory purchase order is entitled to receive compensation, including payment of his legal, financial and surveyor's costs; they will also be compensated for their own time spent dealing with the order.¹²⁴⁵
- (2) While proceedings before the Upper Tribunal to determine the level of compensation to be paid to a person whose property is to be acquired are otherwise the same as those that apply to applications to the Tribunal under the 1967 and 1993 Acts, the Upper Tribunal is also required – unless there are special reasons not to do so – to order that person to pay the costs of the acquiring authority if that person has failed to provide written details of their claim, or is awarded a sum that does not exceed the amount offered to him by the acquiring authority.¹²⁴⁶
- (3) As noted above, the Civil Procedure Rules regulate the power of the county court and High Court to award litigation costs to any party.¹²⁴⁷ Those rules include a range of circumstances in which only fixed sums will be recoverable by the receiving party.¹²⁴⁸
- (4) The right to manage provisions of the 2002 Act make an RTM company liable for a landlord's litigation costs but only where the Tribunal dismisses an application by the company for a determination of its entitlement to acquire the right to

¹²⁴⁵ See *Encyclopaedia of Compulsory Purchase and Compensation* (Release 161 2018), A-0046, and the Land Compensation Act 1961, s 5(6).

¹²⁴⁶ Land Compensation Act 1961 Act, s 4.

¹²⁴⁷ See para 13.30 above.

¹²⁴⁸ While originally limited to the cost of simple procedural steps (such as commencing proceedings, serving documents, or entering judgment), the fixed cost regime has since expanded significantly to include first fixed costs in respect of particular categories of proceedings, and thereafter in respect of the trial costs of all claims allocated to the fast track (now, broadly, claims valued at between £10,000 to £25,000): see *The White Book Service 2018*, para 45.0.1.

manage the landlord's building.¹²⁴⁹ In contrast, the RTM company is not, however, entitled to recover its costs if its entitlement to acquire the right to manage is confirmed by the Tribunal.

13.79 While the landlords' procedural costs are distinct from the price that is to be paid to the landlords for their interest, it seems to us that a requirement for leaseholders to pay any part of the landlords' procedural costs is properly considered to be part of the compensation to be paid in respect of compulsorily acquiring the landlords' asset.¹²⁵⁰ As such, to the extent that any procedural costs regime provides for less than full compensation to the landlords, the same considerations that arise in respect of the payment of price would apply.¹²⁵¹ As such, the question is whether the payment of less than the landlords' full non-litigation costs can be justified by considerations of the public interest.

13.80 Although the availability of public funding for legal proceedings (such as before a court, or the Tribunal) is likely to engage article 6 of the ECHR,¹²⁵² it is doubtful that restrictions on the ability of one party to recover its own legal costs from another party would do so.¹²⁵³ Regimes which make no, or limited provision, for a party to recover such costs from an opponent are now commonplace, and no successful challenge to those regimes has yet been brought.

A potential approach: fixed non-litigation costs

13.81 From these options we have considered further how a fixed costs regime might operate in determining the amount of a leaseholder's contribution to his or her landlord's non-litigation costs in an enfranchisement claim.

13.82 We acknowledge that the non-litigation costs that landlords will reasonably incur will vary according to the complexity of the proposed transaction. A landlord is likely to incur lower non-litigation costs in relation to a claim made by a single leaseholder – whether a lease extension claim or an individual freehold acquisition claim – than in relation to a collective freehold acquisition claim.

13.83 Equally, we do not believe that the likely non-litigation costs incurred by landlords are simply a multiple of the number of leaseholders participating in bringing a claim. The costs to a landlord may not increase significantly as the total number of participants

¹²⁴⁹ 2002 Act, s 88(3).

¹²⁵⁰ In the context of compulsory purchase, compensation paid to the party whose interest is to be acquired includes a payment for 'disturbance' which can include legal costs and other professional fees: see, eg, MHCLG "Guidance on Compulsory Purchase Process and the Crichel Down Rules" (February 2018), p43: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684529/Compulsory_purchase_process_and_the_Crichel_Down_Rules_-_guidance_updated_180228.pdf. As such, both the price to be paid for the interest, and associated legal costs are bundled together within the 'compensation' that is payable, and must satisfy the ECHR.

¹²⁵¹ Article 1, Protocol 1 of the European Convention on Human Rights ("ECHR") does not guarantee the right to full compensation in all circumstances; legitimate objectives of public interest may justify the payment of less than full market value for property.

¹²⁵² The right to a fair trial. For example, *Steel and Morris v United Kingdom* [2005] EMLR 314.

¹²⁵³ It has, however, been argued by one writer that a fixed cost regime could constitute a breach of Article 6: see H Blundell, "Contempt, committal and Qader: the battle for costs in low value personal injury claims" [2017] *Journal of Personal Injury Law* 168, 174.

increases. For example, a landlord's costs of dealing with a collective freehold acquisition claim on behalf of 12 participating leaseholders may not be significantly greater than dealing with such a claim on behalf of 10 or even six participating leaseholders.

13.84 We have also looked at whether additional fixed sums might be recoverable in collective freehold acquisition cases bearing more complex features (that is, those likely to increase the landlord's costs significantly). We have considered whether it might be appropriate to provide for additional fixed sums to be paid in cases where:

- (1) more than one type of leasehold flat must be valued;
- (2) the freehold to be acquired is being separated from surrounding land retained by the landlord; or
- (3) one or more leasebacks is to be agreed.

13.85 We believe, however, that it will be necessary to balance the need to reflect the differing complexities of claims against the objective of simplifying the process and creating greater certainty at the outset for both parties. A balance may also need to be struck between creating a system that would allow a figure to be ascertained by leaseholders in advance, and one that would reflect changes to the proposed transaction that might occur between the start of a claim and its conclusion that have the effect of increasing a landlord's non-litigation costs.

13.86 We have also considered whether it would be appropriate to allow additional sums to be recovered in any enfranchisement claim where there are split freeholds or other reversions, intermediate landlords, or third parties. In the case of split freeholds or other reversions and intermediate landlords, we think it unlikely to be fair that leaseholders should be required to pay more, as the leaseholders are unlikely to have played any role, or had any say, in the creation of such interests and derived no benefit from them. As such, we provisionally think that leaseholders who have a split freehold or other reversion, or one or more intermediate landlords, should not face a higher bill than a leaseholder who has a single landlord.

13.87 However, in the case of third party management companies, appointed by the terms of a lease to manage the building and collect leaseholders' service charge contributions, we provisionally think that a small further sum should be payable by the leaseholders where the third party has in fact incurred costs taking advice on the claim. While leaseholders are unlikely to have played any role in the creation of such a company, we believe that in most cases the continued importance of the company to the management of the building justifies a small further sum being paid provided that the management company has in fact sought advice in relation to an enfranchisement claim. In addition, management companies are often leaseholder-owned organisations that might not otherwise be able to pay for legal advice.

What might a fixed costs regime look like?

13.88 In light of the above, we set out the following broad outline for a possible fixed costs regime.

- (1) A single fixed sum that would be payable by leaseholders to their landlord in respect of an individual claim (whether to acquire a lease extension, or the freehold of a house).
- (2) A fixed base sum that would be payable in respect of collective freehold acquisition claims. The sum payable would increase as the number of participating leaseholders increased. The following is an illustration of how such a scheme might operate:
 - (a) a fixed base sum payable for each of the first five leaseholders included in a claim of, say, £250;
 - (b) a further fixed base sum payable (in addition to the amount payable under (a) above) for each of the next five leaseholders included in the claim of, say, £225;
 - (c) a further fixed base sum payable (in addition to the amounts payable under (a) and (b) above) for each of the next 10 leaseholders included in the claim of, say, £210; and
 - (d) a further fixed base sum payable (in addition to the amounts payable under (a), (b) and (c) above) for each additional leaseholder included in the claim of, say, £205.

We anticipate that the scale and figures would be set out in secondary legislation following consultation with relevant parties.

- (3) The fixed base costs recoverable by a landlord in respect of a collective freehold acquisition claim would also be subject to an overall cap. As a result, in some cases, the participation of a higher number of leaseholders would not lead to any increase in the landlord's recoverable costs.
- (4) Further, additional fixed sums that would be payable to the landlord where:
 - (a) more than two types of leasehold unit had to be valued;
 - (b) the freehold formed part of other land to be retained by the landlord; or
 - (c) one or more leasebacks had been agreed.
- (5) In the case of intermediate leaseholders and split reversions, the leaseholders would remain liable to pay the above costs to the competent landlord (or another landlord who had conduct of the response to the claim in the place of the competent landlord). However, that landlord would then be required to apportion the costs received between all landlords in accordance with the apportionment of the purchase price.
- (6) A small additional sum would be recoverable where a management company seeks advice in relation to an enfranchisement claim.

Consultation Question 99.

13.89 We invite the views of consultees as to how any contribution that is to be made by leaseholders to their landlord's non-litigation costs should be calculated. Should the contribution be based on:

- (1) fixed costs;
- (2) capped costs;
- (3) fixed costs subject to a cap on the total costs payable;
- (4) the price paid for the interest in land acquired by the leaseholder;
- (5) 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) fewer categories of recoverable costs than currently set out in the 1967 and 1993 Acts;
- (7) the same categories of recoverable costs set out in the Acts, but with a reformed assessment procedure; or
- (8) wider categories of recoverable costs than currently set out in the Acts?

13.90 We also invite consultees' views as to whether, if a fixed costs regime were to be adopted:

- (1) such a regime should apply to collective freehold acquisition claims as well as individual enfranchisement claims; and
- (2) if a fixed costs regime were to apply to collective freehold acquisition claims:
 - (a) what additional features might justify the recovery of additional sums; and
 - (b) whether landlords should be able to recover all their reasonably incurred costs in respect of those additional features (subject to assessment), or only further fixed sums.

13.91 We provisionally propose 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.

Do consultees agree?

Procedural costs related to aborted, withdrawn or invalid claims

13.92 We have also considered whether a proportion of the fixed non-litigation costs that would otherwise be recoverable by landlords upon a successfully completed claim should be recoverable from the leaseholders if the claim does not reach that stage. In particular, we have considered whether the leaseholders should be liable to pay landlords a specified percentage of the fixed sum that would be recoverable upon completion in the event that the claim fails, is withdrawn, or the Claim Notice is struck out.

13.93 Different percentages might apply to claims that had reached certain stages. For example where:

- (1) a Claim Notice has been served (whether or not the notice is valid);
- (2) a Response Notice accepting the leaseholder's right to enfranchise has been served;
- (3) the terms of acquisition have been agreed or determined.

Consultation Question 100.

13.94 We provisionally propose that where an enfranchisement claim fails or is withdrawn, or the Claim Notice is struck out, leaseholders should be liable to pay a percentage of the fixed non-litigation costs that would have been payable had the claim completed.

Do consultees agree?

13.95 We also provisionally propose that the percentage of the fixed non-litigation costs that should be payable in those circumstances should vary depending on the stage that the claim has reached.

Do consultees agree? If so, what percentages should apply at particular stages of the claim?

Security for landlord's procedural costs

13.96 In place of any existing requirement for the payment of a deposit in some (but not all) claims, we propose to create a right for landlords to seek security for their costs from the leaseholders at an early stage. If a fixed costs regime were established, security would need to be given for the fixed sum identified at the start of the claim. If no such fixed costs regime were introduced, a specific figure for which security should be given would need to be set by secondary legislation.

13.97 To exercise this right, landlords would simply need to complete the appropriate sections of their Response Notice. If security was not provided within a specified period, the Claim Notice would be stayed.

Consultation Question 101.

13.98 We provisionally propose that a landlord should have a right to seek security for his or her non-litigation costs. Do consultees agree?

Vexatious claims

13.99 We also consider that, the introduction of fixed sum contributions to landlords' costs (and removal of the prohibition on serving a fresh notice within 12 months of a notice being withdrawn), may make it necessary to deal with leaseholders who make repeated claims against landlords without merit.

13.100 We are therefore proposing a right for a landlord to apply to the Tribunal for an order prohibiting named leaseholders from serving a further Claim Notice without obtaining the permission of the Tribunal.

Consultation Question 102.

13.101 We provisionally propose that a landlord should have a right to apply to the Tribunal for an order prohibiting named leaseholders from serving any further Claim Notice without the permission of the Tribunal.

Do consultees agree?

OUR PROPOSED REFORMS: LITIGATION COSTS

13.102 In Chapter 12 we proposed that all disputes and issues arising out of an enfranchisement claim should be resolved by the Tribunal rather than the county court.

13.103 At present, those enfranchisement disputes that are dealt with by the Tribunal are resolved on the basis that its power to order one party to pay the costs of the other party to a dispute is limited.¹²⁵⁴ As noted above, those powers are broadly equivalent to the powers that only apply to claims brought on the small claims track in the county court.¹²⁵⁵

13.104 There is, however, nothing to prohibit the adoption of a different set of powers by the Tribunal in respect of particular types of claim. Indeed, land registration cases determined by the Tribunal under are not subject to the same restrictions.¹²⁵⁶

Costs shifting in the Tribunal

13.105 We have considered, therefore, whether there is a case for allowing the Tribunal to exercise wider costs powers when it deals with those disputes and issues currently

¹²⁵⁴ See paras 13.31 to 13.34 above.

¹²⁵⁵ See para 13.33 and fn 1232 above.

¹²⁵⁶ See Pt 1 of Ch 5 of the 2013 Rules.

determined in the county court. Transferring the powers of the county court to the Tribunal in respect of those matters would preserve the current position of the parties in respect of litigation costs.

13.106 In addressing that question, we have taken account of the factors we identified above in respect of non-litigation costs.¹²⁵⁷ But we have also identified factors that apply specifically to litigation costs. In particular:

- (1) leaseholders can be persuaded by their landlord to give up an enfranchisement claim, or to accept less favourable terms than they had hoped for. In many cases the landlord will be able to persuade the leaseholders to do so because of the weak merits of the claim advanced by the leaseholders. But that pressure can also come from the financial costs faced by leaseholders who wish to continue to pursue their claim; and
- (2) the pressure faced by leaseholders is likely to be increased where continuing the claim carries an additional risk that they will also be ordered to pay some or all of the landlord's costs if the landlord is successful in any dispute. As noted above,¹²⁵⁸ the power to order one party to pay another party's costs has the potential to benefit leaseholders; but the imbalance of resources that often exists between leaseholders and landlords usually means that the prospect of costs-shifting has a greater impact on leaseholders than landlords.

13.107 Having considered these factors, we do not believe that a proper balance between the parties would be struck by requiring leaseholders who have conducted their enfranchisement claim reasonably to face a risk that they will be ordered to pay any part of their landlord's litigation costs if they are unsuccessful in respect of the whole or any part of that claim.

13.108 In addition, introducing such a power in respect of some types of enfranchisement disputes or issues but not others would, to some degree, carry across the problems of distinct jurisdictions for different disputes or issues to the treatment of costs. We therefore provisionally propose that the Tribunal's existing limited powers to make orders in respect of litigation costs in enfranchisement claims should apply to all matters it is to decide.

13.109 There would, however, be some exceptions to this general rule. First, 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 will be able to order that the landlord pay the leaseholder's costs, and that sum be deducted from any price to be paid for the interest claimed by the leaseholders.¹²⁵⁹ Secondly, where a landlord who had failed to serve a Response Notice, or against whom an order had been made under the No Service Route, 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

¹²⁵⁷ See paras 13.49 to 13.53 above.

¹²⁵⁸ See para 13.40 above.

¹²⁵⁹ See Ch 11 at para 11.81 above.

pay any of the leaseholder's costs wasted as a result.¹²⁶⁰ Finally, where a landlord 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.

Consultation Question 103.

13.110 We provisionally propose that the existing 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 (except in respect of orders made under the No Service Route, orders permitting a landlord to participate in a claim or to set aside a determination, and orders striking out a Claim Notice).

Do consultees agree? If not, what types of disputes and/or issues should be excluded from such restrictions and why? What powers to make orders in respect of litigation costs should apply in such excluded cases? Should parties be able to agree that costs shifting will apply to all or part of a claim?

Unreasonable conduct costs

13.111 We acknowledge that the absence of costs shifting between the parties can encourage parties to pursue arguments, or take positions, that are wholly unmeritorious in the hope of causing the other party to incur further unnecessary costs or not to proceed with a claim. A party may choose to do so because it has greater resources, and/or interests that extend beyond the outcome in a particular claim.¹²⁶¹ We recognise that a case could therefore be made for reconsidering the scope of the Tribunal's existing powers to order that one party pay another party's litigation costs where that other party's conduct has fallen below a particular standard.

13.112 We are not, however, convinced that such a change would benefit leaseholders overall. Expanding the scope of the term unreasonable conduct is likely to lead to satellite litigation between the parties in which detailed arguments about an opponent's conduct throughout an enfranchisement claim are likely to be raised. While in some cases this might operate to the benefit of leaseholders, we think that – as in the case of costs shifting powers more generally – such an extended power is more likely to be of benefit of those with greater resources.¹²⁶² Accordingly, greater fairness is likely to be achieved by continuing to restrict the circumstances in which a costs order can be made in light of the conduct of a party to an enfranchisement claim.

13.113 We do, however, think that the Tribunal's existing power to order a party who has behaved unreasonably to pay the other party's litigation costs where those costs were incurred as a result of that conduct should remain. As currently interpreted,¹²⁶³ that

¹²⁶⁰ See Ch 11 at para 11.129.

¹²⁶¹ For example, where a landlord has other properties which could be affected by the outcome in a particular case, or in relation to a particular issue.

¹²⁶² See para 13.40 above.

¹²⁶³ See para 13.33 above.

power provides a useful backstop against unacceptable behaviour by a party. We also note that the question of whether that power is to be subject to a cap on the sum that can be recovered is to be kept under review by the Tribunal Procedure Committee.

Consultation Question 104.

13.114 We provisionally propose that the scope of the Tribunal's existing power to order one party to pay any of the litigation costs of another party should not be extended.

Do consultees agree?

THE IMPACT OF REFORM

Consultation Question 105.

13.115 We welcome evidence as to:

- (1) the typical costs incurred by landlords in dealing with enfranchisement claims; and
- (2) the proportion of those costs which can be recovered from leaseholders.

13.116 To what extent does the obligation on leaseholders to pay their landlords' reasonable costs arising from the enfranchisement process have an impact on leaseholders' willingness to bring or pursue enfranchisement claims?

13.117 Do consultees consider that any of the options we have set out at paragraphs 13.56 to 13.77 for reforming non-litigation costs would make leaseholders more willing to bring and pursue enfranchisement claims?

13.118 What would be the impact on landlords of removing, or capping, their entitlement to recover their non-litigation costs from leaseholders (other than the fact that they would have to meet those costs themselves)?

Consultation Question 106.

13.119 How and to what extent do the different powers of the Tribunal and the county court to award litigation costs in enfranchisement disputes have an impact on the behaviour of both landlords and leaseholders with respect to such disputes?

Part V: What should it cost to enfranchise?

We have made provisional proposals to reform the enfranchisement rights which should be available to leaseholders (Part II), the criteria that must be satisfied for leaseholders to exercise those enfranchisement rights (Part III), and the process by which enfranchisement rights are claimed, determined and put into effect (Part IV).

In this Part, we address the question of what leaseholders must pay to their landlord in respect of the interest that they acquire as a result of exercising their enfranchisement rights. Leaseholders must pay a “premium” in order to acquire a lease extension or to acquire the freehold, and the calculation of that premium is known as “valuation”.

In Chapter 14, we start by explaining that our Terms of Reference require us to consider the options that are available to reduce the premiums payable by leaseholders. We then explain how premiums are calculated under the current regime, and we use two hypothetical examples to demonstrate how those calculations work. We then outline the criticisms that have been levelled at the existing regime.

In Chapter 15, we comment on the need to ensure landlords receive sufficient compensation when leaseholders exercise enfranchisement rights, and we set out some overarching considerations for reform. We then explain, and invite views on, various options for reducing premiums payable by leaseholders.

This Part uses technical valuation terms, and we include a separate glossary of those terms on the next page.

Chapter 14: Valuation: current law and criticisms

VALUATION GLOSSARY

“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. See paragraph 14.28.

“Decapitalisation”: the process of deriving an annual income which is equivalent to a given capital sum. See paragraph 14.89.

“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. See paragraph 14.47.

“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. See paragraph 14.26.

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

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

“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. See paragraph 14.67.

“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. See paragraph 14.53.

“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. See paragraph 14.88.

“Original valuation basis”: the basis for valuing the freehold of a house under section 9(1) of the 1967 Act. See paragraph 14.81.

“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. Whilst 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. See paragraph 14.34.

“Site value”: under the 1967 Act, the value of the land on which a house is situated, not including the value of that house. Site value is decapitalised to calculate the modern ground rent payable during the additional term of a lease extension. See paragraph 14.88.

“White knight”: a third party who contributes to the premium payable on a collective enfranchisement in respect of the non-participating leaseholders’ share of that premium.

“Years’ purchase”: years’ purchase is tied to the principle of inflation, and the fact that, in general, money will buy less in the future than it does now. It is a multiplier which is calculated through the setting of a yield (or other variable) and a number of years (for instance, until the expiry of a lease). See paragraph 14.28.

“Yield rate”: yield rate has the same meaning as “capitalisation rate”.

INTRODUCTION

- 14.1 Leaseholders must make a payment to their landlord in order to exercise their enfranchisement rights. For example, if a leaseholder has 60 years remaining on his or her lease, the landlord is entitled to have the flat back in 60 years’ time. If the lease is extended by 90 years, then the landlord will not be entitled to have the flat back for 150 years. If the freehold of a house or block of flats is bought through enfranchisement, then the landlord will no longer have any rights in the house or flat. Every enfranchisement claim, therefore, involves the transfer of a property interest from a landlord to a leaseholder. Leaseholders are required to make a payment to the landlord – which can be described as a premium, a price, or compensation – to reflect the property interest that they are acquiring from their landlord. We use the term premium to describe this payment.
- 14.2 Leaseholders may consider it to be unfair that they have to pay anything in order to obtain full security in their homes, or that they have to pay too much: they are being required to pay again for the home which they have already bought. Conversely, landlords may feel that they are entitled to full compensation because the lease extension or freehold is being granted against their will and the leaseholder is getting something that they or their predecessors have not previously paid for.
- 14.3 In addition to paying the premium, enfranchisement also costs money as a result of professional fees relating to the enfranchisement procedure itself (“professional costs”).

Professional costs are incurred by both leaseholders and landlords, although leaseholders are required to make a contribution towards their landlords' professional costs.

- 14.4 This chapter is concerned principally with premiums, and the way in which they are calculated. Calculating the premium is known as “valuation” as it involves putting a financial value on the interest the landlord has that will be acquired by the leaseholder. Professional costs are considered further in Chapter 13. The two forms of payment are distinct: the premium is money paid to the landlord for the lease extension or freehold; while the professional costs will be paid to professionals such as lawyers and valuers. The two are, however, related, as changes to how the premium is calculated will have a direct effect on professional costs. That is because the simpler it is to calculate the premium, the lower the professional costs that are associated with valuation will be.

POLICY AIMS

- 14.5 Our Terms of Reference include a specific provision in respect of premiums. Government has asked us “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”.
- 14.6 This chapter and the next are focussed on identifying options for reform that reflect that term of reference.
- 14.7 Providing options to reduce the premium payable is not, however, the only part of our Terms of Reference that is relevant to valuation. We are also asked:
- (1) to introduce a clear prescribed methodology for calculating the premium (price);
 - (2) to simplify the legislation; and
 - (3) to make enfranchisement easier, quicker and more cost effective (by reducing the legal and other associated costs), particularly for leaseholders.
- 14.8 These aspects of our Terms of Reference relate in part to professional costs. They are relevant to valuation because, as noted in paragraph 14.3 above, some of the professional costs relate to calculating the premium. Therefore, the simpler the method of calculating the premium, the lower the professional costs associated with that exercise will be. But it is important, in considering reform, to keep the premium and the professional costs distinct. For the leaseholder, the cost of enfranchisement is the sum-total of the premium and the professional costs. Lowering the professional costs therefore lowers the total cost of enfranchisement. But that is not the same as lowering the premium. To lower the premium, it is necessary to consider the basis on which the premium is calculated: the only way to reduce the premium is to change the method of valuation.
- 14.9 Reducing the premium would be beneficial to leaseholders, and detrimental to landlords. Whilst our Terms of Reference include ensuring “sufficient” compensation is paid to landlords, it is not possible to reduce premiums without reducing the compensation which the landlord receives. Reducing professional costs has the potential to benefit both leaseholders and landlords, depending on the extent to which

leaseholders pay landlords' professional costs (which is considered further in Chapters 13).

EXAMPLES

14.10 Throughout this chapter and Chapter 15, we refer to two sample lease extension claims to demonstrate the effect that the various options for reform might have on the premium payable. The example flat particulars are set out in Figure 8. The particulars for Flats A and B are not based on real flats or real leases. These examples, and others that we refer to in these chapters, have been chosen in order to demonstrate the valuation process as simply as possible. Our choice of examples is not intended to make assumptions about the frequency with which any particular leases are found in the market. Explanations of the various components of the valuation are set out later in this chapter.

Figure 8: two examples

Flat A - a two-bedroom flat on the first floor of a period conversion

Value on a freehold basis: £200,000

Details of existing lease:

Unexpired term: 130 years

Ground rent: £250 per annum

Value of lease: £198,000¹²⁶⁴

Details of lease after extension:

Unexpired term: 220 years

Ground rent: nil

Value of lease: £198,000¹²⁶⁵

Flat B

Value on a freehold basis: £200,000

Details of existing lease:

Unexpired term: 60 years

Ground rent: £250 per annum

Value of lease: £160,000¹²⁶⁶

Details of lease after extension

Unexpired term: 150 years

Ground rent: nil

Value of lease: £198,000

CURRENT LAW

14.11 As set out in Chapter 2, there are four enfranchisement rights under the current law:

- (1) the right to a lease extension of a house;
- (2) the right to acquire the freehold of a house;

¹²⁶⁴ Based on a relativity of 99%, as to which see below at para 14.34.

¹²⁶⁵ As above at fn 1264. Although it may seem contrary to expectations, by convention where a ground rent is not onerous its presence will make no difference to leasehold relativity.

¹²⁶⁶ The existing lease value is calculated on the basis of a relativity of 80% being one percentage point below the Gerald Eve graph, as to which see below at para 14.65.

- (3) the right to a lease extension of a flat; and
- (4) the right to acquire the freehold of a block of flats collectively.

14.12 There is no premium payable for a lease extension of a house. The absence of a premium gives the appearance that a lease extension is an attractive option. However, the rent payable under the lease extension is what is called a modern ground rent. As a result, what the leaseholder saves by not paying a premium he or she pays by way of rent over the extended 50-year term of the lease. The calculation of the modern ground rent is dealt with in the context of section 9(1) valuations at paragraph 14.88 onwards below.

14.13 As to the premium payable to acquire the freehold of a house, there are several different bases of valuation contained in section 9 of the 1967 Act. Which basis of valuation applies in which case is determined by the date the lease was entered into, the location of the house, the historic rateable value(s) of the house, the yearly rent, the premium payable on the grant of the lease and/or the term of the lease.

14.14 The valuation provisions relating to flats are contained in schedules 6 and 13 to the 1993 Act. Schedule 6 applies to collective enfranchisement claims and schedule 13 to lease extension claims.

14.15 The various bases of valuation are summarised in Figure 9.

Figure 9: summary of different bases of valuation

(1) Where the lease of a house is being extended, no premium is payable. The modern ground rent payable under the lease extension is calculated in accordance with section 15 of the 1967 Act.

(2) Where the freehold of a house is being acquired, valuation is determined by section 9 of the 1967 Act. Section 9 deals separately with four categories of house:

- Section 9(1) applies to low value houses let at a low rent;¹²⁶⁷
- Section 9(1A) applies to houses that do not fall within the low value limits in section 9(1) (namely, because the rateable value on 31 March 1990 exceeded certain limits);
- Section 9(1AA) applies to houses falling within 9(1A) where the lease has already been extended under the 1967 Act; and
- Section 9(1C) applies to houses not falling within any of the above.¹²⁶⁸

(3) Where the lease of a flat is being extended, schedule 13 to the 1993 Act applies.

(4) Valuation in respect of the collective freehold acquisition is governed by schedule 6 to the 1993 Act.

14.16 Despite this myriad of provisions, the approach to calculating the premium payable when acquiring the freehold of a house or flats or a lease extension of a flat, in all but

¹²⁶⁷ See paras 7.50 and 7.30 above for the meaning of “low value house” and “low rent test”.

¹²⁶⁸ The bases of valuation in ss 9(1AA), 9(1A) and 9(1C) are very similar. Section 9(1AA) simply amends the assumptions in s 9(1A) to reflect the fact that a lease extension has already been obtained, and s 9(1C) is a slightly amended version of s 9(1A).

section 9(1) of the 1967 Act, is broadly the same. Consequently, this chapter begins by considering this general approach before going on to consider the methodology under section 9(1) of the 1967 Act, which is referred to as the “original valuation basis”.

The general approach

14.17 The basic principle underpinning this approach is that the landlord is to be paid the market value for the interest the landlord has that will be acquired by the leaseholder; in other words, the freehold interest, an intermediate leasehold interest or, in a lease extension claim, a 90-year reversion.

14.18 “Market value” is defined in the International Valuation Standards 2017 as:

the estimated amount for which an asset or liability should exchange on the *valuation date* between a willing buyer and a willing seller in an arm’s length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.¹²⁶⁹

14.19 Because the market value is an estimated amount and because, within limits, there is normally room for differences of opinion, different valuers could arrive at different opinions of market value. Further, whilst the price paid on enfranchisement might be based on market value, it is not, in fact a market value within the meaning of the International Valuation Standards estimate. Firstly, this estimate specifically excludes an estimated price inflated or deflated by special terms or circumstances such as leaseback, whereas there might be leasebacks or other special terms which the valuer on an enfranchisement needs to take into account. Second, “an arm’s length transaction” is one between parties who do not have a particular, or special, relationship. A landlord and leaseholder do have a particular, or special, relationship and, in certain circumstances, the Acts recognise that. Finally, a valuation under the Acts is subject to assumptions, which do not exist in the market. All of these aspects of the statutory valuation will be explored in more detail below.

14.20 In the 1993 Act the price payable when acquiring a freehold or lease extension is explicitly broken down into three parts:

- (1) the value of the landlord’s interest, calculated on the assumption (among others) that the leaseholders are not in the market; that is, that they are not a potential buyer of the interest;
- (2) marriage value, that is, the additional value that arises because the leaseholders are, in fact, in the market and are likely to pay more for the freehold of their property than any other potential buyer; and
- (3) other compensation.

¹²⁶⁹ International Valuation Standards 2017 (IVS 2017), para 30, published by the International Valuation Standards Council (IVSC), an independent, not-for-profit organisation that acts as the global standard setter for valuation practice and the valuation profession. The IVSC encourages the adoption of the International Valuation Standards across the globe so as to underpin consistency, transparency and confidence in valuations worldwide.

14.21 Under both sections 9(1A) and 9(1C) of the 1967 Act there is no assumption that the leaseholder is not in the market. While marriage value is not expressly said to be payable under these provisions, the absence of an assumption that the leaseholder is not in the market means that it is payable. "Other compensation" is payable under section 9(1C), but not 9(1A).

14.22 "Other compensation" may be payable in respect of loss or damage a landlord suffers on enfranchisement as a result of owning other property.¹²⁷⁰ In other words, property other than the flat in respect of which a lease extension is being granted, or the house and premises, or block of flats, the freehold of which is being acquired. For example, the acquisition of a block of flats may prevent the landlord developing adjoining land which he or she owns, in which case compensation will be payable in respect of the resultant diminution in value of that adjoining land.

14.23 Each of the other two components can be broken down further as set out below.

(A) The value of the landlord's interest

14.24 In section 9(1A) and 9(1C) of the 1967 Act the value of the landlord's interest when the leaseholder is acquiring the freehold of a house is –

...the amount which at the relevant time the house and premises, if sold in the open market by a willing seller, might be expected to realise...

14.25 In paragraph 3(1) of schedule 6 to the 1993 Act when leaseholders are acquiring the freehold of their flats by way of collective enfranchisement the relevant provision is as follows:

...the value of the freeholder's interest in the specified premises is the amount which at the relevant date that interest might be expected to realise if sold on the open market by a willing seller (with no person who falls within sub-paragraph (1A) buying or seeking to buy) ...

14.26 In a claim for a lease extension of a flat the landlord does not lose the entirety of its interest, so paragraph 3 of schedule 13 to the 1993 Act is structured slightly differently. However, its effect is still that the value of the landlord's interest which is to be acquired is taken as its value in the open market. The relevant provisions are as follows.

- (1) The diminution in value of the landlord's interest is the difference between—
 - (a) the value of the landlord's interest in the leaseholder's flat prior to the grant of the lease extension; and
 - (b) the value of his interest in the flat once the lease extension is granted.
- (2) Subject to the provisions of this paragraph, the value of any such interest of the landlord as is mentioned in sub-paragraph (1)(a) or (b) is the amount which at the relevant date that interest might be expected to realise if sold on the open

¹²⁷⁰ 1967 Act, s 9A and 1993 Act, sch 6, para 5 and sch 13, para 5.

market by a willing seller (with neither the leaseholder nor any owner of an intermediate leasehold interest buying or seeking to buy).

14.27 In each of the above three cases the landlord's interest is commonly valued using what can be described as the “term and reversion” method, as the landlord is losing the right to receive a rent for the remainder of the term and is losing the reversion (the right to vacant possession of the property once the lease comes to an end). In a lease extension claim the “term” is not lost and neither is the whole of the reversion. However, as the rent is reduced to a peppercorn and vacant possession will not be received for a further 90 years, a landlord loses the existing value of the term and 90 years of its reversion. We explain the calculation of the term and reversion below.

(1) Term

14.28 To compensate the landlord for the loss of rental income, the future rent is capitalised. In other words, the value of that income stream is calculated to determine what capital sum the landlord needs to receive on the valuation date to replace the income stream represented by the rent being paid over time. This valuation is achieved by applying a capitalisation or yield rate: see Figure 10 below. The capitalisation rate is 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.¹²⁷¹ The rate used in an enfranchisement valuation is a matter for expert evidence, ideally derived from the market.¹²⁷² Once a valuer has selected a rate, he or she will then use a valuation table to look up a “Years Purchase” (YP) multiplier for the relevant number of years remaining on the lease.

14.29 Figure 10 demonstrates the calculation of the value of the “term”. The same calculation is used whether the owners of Flats A and B are seeking a lease extension or participating in a collective enfranchisement claim. In a collective enfranchisement claim, the value of the term of each of the flats is calculated and ultimately aggregated. The same calculation would also be used if Flat A or B was, in fact, a house let on the same terms and the leaseholder wanted to obtain the freehold.

Figure 10:

Calculation of the “term” for Flat A in Figure 8

The ground rent is £250 per annum.

The capitalisation/yield rate selected by the valuer is 7%.

The lease has 130 years left to run.

The Years Purchase for 130 years at 7% is 14.2836.

14.2836 multiplied by £250 produces a figure of £3,571.

¹²⁷¹ E Shapiro, D Mackmin, G Sams, *Modern Methods of Valuation* (11th ed 2013), p 67.

¹²⁷² See *Gallagher Estates Ltd v Walker* [1974] 28 P & CR 113.

The current value of the right to receive £250 each year for the next 130 years based on a capitalisation rate of 7% is £3,571.

Calculation of the “term” for Flat B in Figure 8

The ground rent is £250 per annum.

The capitalisation/yield rate selected by the valuer is 7%.

The lease has 60 years left to run.

The Years Purchase for 60 years at 7% is 14.0392.

14.0392 multiplied by £250 produces a figure of £3,510.

The current value of the right to receive £250 each year for the next 60 years based on a capitalisation rate of 7% is £3,510.

14.30 Where there are future rent reviews under a lease, account needs to be taken of the fact that the landlord has no immediate right to that increased rental stream. The landlord’s right to any increase in rent that would follow a rent review is “deferred” as it would not be received until a future date. Consequently, a deferment rate is also needed to calculate the present value of that future entitlement (see paragraph 14.47 below).

(2) Reversion

14.31 When the freehold is acquired either of a house under the 1967 Act or of a block of flats under the 1993 Act, the landlord loses the right to vacant possession of the property at the expiry of the lease. When a lease is extended under the 1993 Act, the landlord’s right to vacant possession is delayed by 90 years. The valuation of the reversion seeks to compensate the landlord for the value today of the right to vacant possession of the property (and therefore the freehold interest in the property) at the expiry of the lease.

Freehold vacant possession value

14.32 The freehold vacant possession value is usually calculated by ascertaining the value of the property if it were to be sold on a long lease, and adjusting the long lease value to arrive at a freehold value.

14.33 The value of the property sold on a long lease is a matter for expert evidence. It is ascertained by an analysis of sales of comparable properties and is regularly the source of disputes. The process has most recently been described as follows:

Valuation essentially proceeds by analogy. The valuer looks for an analogue that is as close as possible to that which he has to value, and which has been the subject matter of a real transaction. He then works on the premise that if the subject matter of his valuation were to be the subject of a similar transaction, it would command the same value as the analogue. Since the analogue will never be identical to the subject matter of the valuation, the valuer will have to make adjustments to the value revealed by the analogue in order to reflect the differences between the analogue and the subject matter of his own valuation. In the case of a property valuation, the analogues

are usually called "comparables". In a property valuation, typical adjustments will reflect differences between the comparables in location, terms of letting and so on.¹²⁷³

Figure 11: valuation by comparables

To find the value of Flat A, a two-bedroom flat on the first floor of a period conversion, the valuer will look for other two-bedroom, first floor flats in period conversions which have sold relatively recently in the immediate vicinity ("the comparables"). The valuer will take the sale prices for those comparables and make adjustments to them to reflect differences between the comparables and Flat A. Consequently:

- if a comparable benefits from access to a communal garden, and sold for £206,250, then the valuer will make a deduction from that price to reflect the fact that Flat A does not have that right. So, if the valuer estimates that access to a communal garden is worth 4% of the flat's value, he or she will deduct 4% from the sale price of £206,250 to arrive at a value of £198,000 for Flat A.
- if a comparable is located on a busier road than the subject and sold for £180,000, the valuer will make an addition to that sale price to reflect the fact that the location is likely to have depressed the price paid. If the valuer estimates that the road makes a 10% difference to price, he or she will add £18,000 to the sale price, to arrive at a value of £198,000 for Flat A.

14.34 The value of a leasehold interest in a property relative to the value of the same property were it to be held freehold – referred to as "relativity" – is usually expressed as a percentage. Of course, in order to calculate the freehold vacant possession value having ascertained the long lease value, the relativity needs to be known (rather than calculated). However, this aspect of valuation is usually uncontroversial. In *Contractreal Ltd v Smith* the existence of a difference in value between a long lease and an unencumbered freehold of the same property was taken to be an established matter of valuation principle, which ought not to be departed from except where there was evidence to justify that course:

It is generally recognised that there is a qualitative difference between freehold and leasehold tenure and that a leasehold, however long its term, is not as valuable as an equivalent freehold. The relativity of even the longest lease may approach 100% but will not reach it. This valuation principle is reflected in many Tribunal decisions and in *Earl Cadogan v Erkman* [2011] UKUT 90 (LC) the Tribunal set out an appropriate range of relativities at paragraph 98:

Leases with unexpired terms of 100 to 114 years - 98%; 115 to 129 years - 98.5% and above 130 years - 99%.¹²⁷⁴

Figure 12: freehold vacant possession value relative to leasehold value

In Figure 8, Flat A is held on a lease with 130 years remaining. The value of that leasehold interest is £198,000.

¹²⁷³ *Mundy v The Trustees of the Sloane Stanley Estate* [2018] EWCA Civ 35, [2018] HLR 13, at [28], by Lewison LJ, repeating what he had said in *Marklands Ltd v Virgin Retail Ltd* [2003] EWHC 3428 (Ch), [2004] 2 EGLR 43, at [9].

¹²⁷⁴ *Contractreal Ltd v Smith* [2017] UKUT 178 (LC), at [70], by Mr A J Trott FRICS.

The freehold interest in Flat A with vacant possession (that is, not subject to a lease) is more valuable, as its owner is not bound by the lease terms and its interest is not a wasting asset.

If the long lease with 130 years remaining is worth £198,000 and relativity is 99%, as a matter of valuation principle, the freehold interest in the same flat is worth £200,000 ($198,000/99 \times 100 = £200,000$).

14.35 The above would be a relatively straightforward exercise were it not for the fact that the Acts provide that the open market value is to be ascertained subject to various assumptions. These assumptions require further adjustments to be made, which are not necessarily as easy to quantify as the value of garden access, for example. It is assumed that the vendor is selling an estate in fee simple:

- (1) subject to the relevant lease(s);¹²⁷⁵
- (2) on the basis the relevant Act does not apply to the house, flat or building containing the flat. In other words, the leaseholder has no right to acquire the freehold or a lease extension;¹²⁷⁶
- (3) discounted for the risk of holding over;¹²⁷⁷
- (4) discounted for leaseholder's improvements;¹²⁷⁸
- (5) subject to the rights and burdens in the conveyance/lease extension;¹²⁷⁹ and
- (6) subject to other appropriate assumptions.¹²⁸⁰

14.36 Deductions are also to be made for defects in title¹²⁸¹ and, in a collective enfranchisement claim, for any leasebacks.¹²⁸² Further, any artificial increase in value is to be disregarded. In other words, an increase in value, which the landlord has brought about by granting or transferring intermediate leases or altering their terms.¹²⁸³

The "no Act assumption"

14.37 The "no Act assumption" means that the value of the landlord's interest must be ascertained as if the sale were voluntary, rather than a compulsory sale though the

¹²⁷⁵ 1967 Act, s 9(1A)(a) and 1993 Act, sch 6, para 3(1)(a) and sch 13, para 3(2)(a).

¹²⁷⁶ 1967 Act, s. 9(1A)(a) and 1993 Act, sch 6, para 3(1)(b) and sch 13, para 3(2)(b).

¹²⁷⁷ 1967 Act, s 9(1A)(b). Whilst there is no express provision in the 1993 Act, schs 6 and 13, if, in the real world, there would be a risk of the leaseholder holding-over and the market would value that risk, then regard should be had to it in the statutory valuation.

¹²⁷⁸ 1967 Act, s 9(1A)(d) and 1993 Act, sch 6, para 3(1)(c) and sch 13, para 3(2)(c).

¹²⁷⁹ 1967 Act, s 9(1A)(f) and 1993 Act, sch 6, para 3(1)(d) and sch 13, para 3(2)(d).

¹²⁸⁰ 1993 Act, sch 6, para 3(2) and sch 13, para 3(4).

¹²⁸¹ 1993 Act, sch 6, para 3(3) and sch 13, para 3(5).

¹²⁸² 1993 Act, sch 6, para 3(4).

¹²⁸³ 1993 Act, sch 6, para 3(5) and sch 13, para 3(6).

exercise of enfranchisement rights under the Act. Lord Hoffman explained the purpose of the no Act assumption in the following terms:

The purpose of this assumption is entirely to prevent the value of the property from being *diminished* by an argument that the price offered by the hypothetical buyer would have been affected by his knowledge that, if he bought the property, he would be liable to expropriation under statutory powers.¹²⁸⁴

14.38 It has long been established that the 1967 Act can apply to buildings in multiple occupation which may now in addition be subject to rights under the 1993 Act. However, a valuation under section 9 of the 1967 Act is to be carried out on the basis that the leaseholder has no rights to acquire the freehold under the 1967 Act, but without disregarding rights under the 1993 Act. The 1993 Act rights are likely to be valuable if the leaseholder's rights under the 1967 Act have to be disregarded. Similarly, in the case of a collective enfranchisement or lease extension claim under the 1993 Act, there is a similar assumption as regards rights under the 1993 Act, but no disregard for rights that an occupying head lessee might have under the 1967 Act.

14.39 The no Act assumption is particularly relevant when determining short lease values for the purposes of the marriage value calculation. Consequently, it is discussed further at paragraph 14.61 onwards below.

Discount for holding over

14.40 Part I of the Landlord and Tenant Act 1954 and schedule 10 to the Local Government and Housing Act 1989 make provision for security of tenure on the coming to an end of long residential leases. Part I applies to leases granted before 1 April 1990 and expiring before 15 February 1999 and provides that, on the coming to an end of the lease and in certain circumstances, the leaseholder is entitled to a Rent Act tenancy.¹²⁸⁵ Schedule 10 applies to leases granted after 1 April 1990 or expiring after 15 February 1999 and provides that, on the coming to end of the lease and in certain circumstances, the leaseholder is entitled to an assured tenancy.¹²⁸⁶

14.41 Valuations of houses under sections 9(1A) and 9(1C) of the 1967 Act are explicitly on the assumption that the leaseholder has a right to remain in possession of the house and premises on the coming to an end of the lease. However, this assumption is not without criticism. Some tenancies are in fact within the protection of Part II of the 1954 Act. Furthermore, the rules for qualification under the 1954 Act and the 1989 Act are not the same as the rules for qualification under the 1967 Act and it is therefore possible to have a tenancy valued on the assumption that rights under Part I or schedule 10 exist where, in reality, they do not.

14.42 Whilst there is no express provision in the 1993 Act, if, in the real world, there would be a risk of the leaseholder of a flat holding-over and the market would value that risk, then regard should be had to it in the statutory valuation.

¹²⁸⁴ *Earl Cadogan v Sportelli* [2010] 1 AC 226, at [18], by Lord Hoffman.

¹²⁸⁵ A lease to which the Rent Act 1977 applies under which the rent is restricted at a below market rent.

¹²⁸⁶ A lease at market rent to which the Housing Act 1988 applies.

14.43 The difference between the 1967 Act and the 1993 Act is as much as anything a question of onus of proof. In the light of the assumption in section 9(1A) of the 1967 Act, the onus of proof is on the landlord to demonstrate that in reality there is no risk of holding over (because, for example, the qualifying conditions in schedule 10 to the Local Government and Housing Act 1989 would not be met) whereas, in the absence of an assumption in schedules 6 and 13 to the 1993 Act, the onus of proof falls on the leaseholder to show that there is a risk.

Discount for leaseholder's improvements

14.44 Any increase in the value of a flat or house which is attributable to an improvement carried out at his or her own expense by the leaseholder, or any predecessor in title, is discounted from the premium.¹²⁸⁷ In a collective enfranchisement claim, this discount applies only to flats held by participating leaseholders: flats held by non-participating leaseholders should be valued as they stand, namely without disregarding any leaseholder's improvements.¹²⁸⁸ The purpose of the assumption is to prevent the leaseholder having to pay a price which reflects a value in the property for which he or she has already paid. This rationale, of course, does not apply where it is the reversion to a non-participating leaseholder's flat that is being acquired.

Rights and burdens in the conveyance/lease extension

14.45 It is to be assumed that the vendor is selling with and subject to the rights and burdens which will be in the conveyance of the freehold of the house or building or in the lease extension which is to be granted.¹²⁸⁹

Deduction for defects in title

14.46 If there is any defect in title, there must be made such deduction as would be made on a sale in the open market between a willing seller and a willing buyer.¹²⁹⁰

Applying a deferment rate

14.47 The landlord is not entitled to the freehold vacant possession value until the expiry of the current lease. Therefore, once the freehold vacant possession value is found it needs to be deferred. In other words, a deferment rate needs to be applied to find a capital sum which, if invested now, would provide an equivalent value upon the original term date of the lease.

14.48 In *Sportelli*, a case which concerned property in Prime Central London ("PCL"),¹²⁹¹ the Lands Tribunal directed the determination, as a preliminary issue, of the "proper

¹²⁸⁷ 1967 Act, s 9(1A)(d) and 1993 Act, sch 6, para 3(1)(c) and sch 13, para 3(2)(c).

¹²⁸⁸ See the wording of the 1993 Act, sch 6, para 3(1)(c).

¹²⁸⁹ 1967 Act, s 9(1A)(f) and 1993 Act, sch. 6, para 3(1)(d) and sch 13, para 3(2)(d).

¹²⁹⁰ 1993 Act, sch 6, para 3(3) and sch 13, para 3(5).

¹²⁹¹ 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. Whilst the term PCL is not necessarily used with precision, it generally refers to these areas.

deferment rate to be applied”.¹²⁹² In deciding that preliminary issue, the Tribunal determined that the generic deferment rate for leases of houses with at least 20 years left to run was 4.75%.¹²⁹³ To this generic deferment rate the Tribunal added 0.25% for flats, bringing the deferment rate for flats to 5%. This addition reflects both the greater management problems associated with flats and the possibility that there might be a better prospect of growth in the house as opposed to the flat market.

14.49 The Tribunal in *Sportelli* encouraged other leasehold valuation tribunals to adopt the rates determined in the absence of weighty evidence to the contrary.¹²⁹⁴ However, these rates will not necessarily be appropriate where the lease has less than 20 years unexpired. Where there is a lease with an unexpired term under 5 years, the deferment rate is based on the net rental yield,¹²⁹⁵ and where it is between 10 and 20 years, the starting point is *Sportelli*, but regard needs to be had to the property cycle at the time of the valuation.¹²⁹⁶

14.50 Although *Sportelli* concerned valuations in PCL, the Tribunal stated that it saw no reason in principle why the deferment rate should be different outside PCL. However, the Court of Appeal, on appeal, cautioned that more variation was inherently possible outside PCL, though the rate adopted by the Tribunal “will no doubt be the starting point”. In subsequent cases, different deferment rates have been applied to different areas of the country.¹²⁹⁷

14.51 Once the appropriate deferment rate has been determined, the valuer again uses valuation tables to look up what the present value (“PV”) is of £1 on the expiry of the lease at that rate. That value is then multiplied by the freehold vacant possession value to give the current value of the reversion. Figure 13 below illustrates how the landlord’s loss of reversion is calculated in a claim for a lease extension, namely by calculating the value of the reversion before the lease extension, calculating the value of the reversion once the lease has been extended and deducting the latter from the former.

¹²⁹² *Earl Cadogan v Sportelli* [2007] 1 EGLR 153. The determination of the deferment rate was appealed to the Court of Appeal (*Earl Cadogan v Sportelli* [2007] EWCA Civ 1280, [2008] 1 WLR 2142). However, that part of the appeal was dismissed so the Tribunal’s decision still stands. There was a further appeal to the House of Lords, but the determination of the deferment rate did not form part of that appeal.

¹²⁹³ This was calculated from the addition of an appropriate “risk-free rate” and an appropriate “risk premium”, with a deduction for capital growth, “the real growth rate”, that is: deferment rate = risk-free rate + risk premium – real growth rate. The “risk-free rate” is the return demanded by investors for holding an asset with no risk (often proxied by the return on a government security held to redemption) and the “risk premium” is the additional return required by investors to compensate for the risk of not receiving a guaranteed return. The Tribunal determined a risk-free rate of 2.25%, a risk premium of 4.5%, and a real growth rate of 2%, to produce the generic deferment rate of 4.75%. ie $2.25 + 4.5 - 2 = 4.75$.

¹²⁹⁴ A comparison was made by Carnwath LJ to the decapitalisation rate, which had been similarly set in *Imperial College of Science and Technology v Ebdon* [198] 1 EGLR 209. In the appeal in that case (*Imperial College of Science and Technology v Ebdon* [1987] 1 EGLR 164), Glidewell LJ said that the decapitalisation rate would depend on the facts of each case, but that the *Ebdon* decision could operate as a quasi-guideline.

¹²⁹⁵ *Trustees of the Sloane Stanley Estate v Carey-Morgan* [2011] UKUT 415 (LC).

¹²⁹⁶ *Cadogan Square Properties Ltd v Cadogan* [2010] UKUT 427 (LC).

¹²⁹⁷ See, crucially, *Zuckerman v Trustees of the Calthorpe Estate* [2009] UKUT 235, where a deferment rate of 6% was selected for several claims under the 1993 Act.

Figure 13:

Calculation of the “reversion” for Flat A in Figure 8.

The “before” calculation

The value of Flat A to the landlord with vacant possession (namely a freehold interest”) is £200,000.

The deferment rate is set at 5%.

Before the enfranchisement claim, the lease has 130 years left to run.

The present value of £1 after 130 years at 5% is 0.0018.

The current value of the right to receive £200,000 in 130 years based on a deferment rate of 5% is £352 ($£200,000 \times 0.0018$).

The “after” calculation.

After the enfranchisement claim, the lease has 220 years left to run.

The present value of £1 after 220 years at 5% is 0.00002.

The current value of the right to receive £200,000 in 220 years based on a deferment rate of 5% is £4 ($£200,000 \times 0.00002$).

Value of lost reversion

The value of the landlord’s interest in the reversion has therefore reduced by £348 (namely £352 minus £4).

Calculation of the “reversion” for Flat B in Figure 8.

The “before” calculation

The value of Flat B to the landlord with vacant possession (namely a freehold interest) is £200,000.

The deferment rate is set at 5%.

Before the enfranchisement claim, the lease has 60 years left to run.

The present value of £1 after 60 years at 5% is 0.0535.

The current value of the right to receive £200,000 in 60 years based on a deferment rate of 5% is £10,707 ($£200,000 \times 0.0535$).

The “after” calculation

After the enfranchisement claim, the lease has 150 years left to run.

The present value of £1 after 150 years at 5% is 0.0007.

The current value of the right to receive £200,000 in 150 years based on a deferment rate of 5% is £133 ($£200,000 \times 0.0007$).

Value of lost reversion

The value of the landlord's interest in the reversion has therefore reduced by £10,574 (namely £10,707 minus £133).

14.52 In a collective enfranchisement claim under the 1993 Act or a claim to acquire the freehold of a house under the 1967 Act, the landlord's reversion is being acquired in its entirety. Consequently, there is no need for the "after" calculation. However, the value of the lost reversion is calculated in the same way as in the "before" calculation. In a collective enfranchisement claim, the reversion to each flat in the building is calculated and aggregated.

(B) Marriage value

14.53 Marriage value comprises the additional value an interest in land gains when the landlord's and the leaseholder's separate interests are "married" into single ownership. The aggregate value of those two interests held separately is often significantly less than the value if they are both held by the same person. For example, a pair of Chinese vases are worth more as a pair than the sum of their individual values. The amount by which they are worth more is marriage value. That value can be realised either by sale (to the person with the other vase) or by purchase (of the other vase) and the intrinsic value of each vase will be enhanced because of the hope of being able to do a deal with the other vase owner at some point in the future. These are all different ways of looking at the same value (although the value of the hope of being able to do a deal is generally and logically less than marriage value arising by sale or purchase).

14.54 Applying the above to a landlord and leaseholder, if the lease is one Chinese vase and the freehold is its pair, when the leaseholder gains the freehold he or she gains the enhanced value from having a pair of vases: the marriage value. Because the leaseholder, unlike any other potential purchaser, will gain that value on purchasing the freehold, he is likely to outbid anyone else in the market. It is assumed that the leaseholder will overbid half of the total marriage value.¹²⁹⁸

14.55 Marriage value is defined, in relation to collective enfranchisement claims, in paragraph 4(2) of schedule 6 to the 1993 Act as –

any increase in the aggregate value of the freehold and every intermediate leasehold interest in the specified premises, when regarded as being (in consequence of their being acquired by the nominee purchaser) interests under the control of the participating tenants, as compared with the aggregate value of those interests when held by the persons from whom they are to be so acquired, being an increase in value—

(a) which is attributable to the potential ability of the participating tenants, once those interests have been so acquired, to have lease extensions granted to them without payment of any premium and without restriction as to length of term, and

¹²⁹⁸ 1967 Act, s 9(1D), 1993 Act, schs 6 and 13, para 4(1).

(b) which, if those interests were being sold to the nominee purchaser on the open market by willing sellers, the nominee purchaser would have to agree to share with the sellers in order to reach agreement as to price.

14.56 In relation to lease extension claims, marriage value is described in paragraph 4(2) of schedule 13 to the 1993 Act as being the difference between:

- (1) the aggregate of:
 - (a) the value of the existing lease; and
 - (b) the value of the landlords' existing interests in the flat; and
- (2) the aggregate of:
 - (a) the value of the lease extension; and
 - (b) the value of the landlords' interests following the grant of a lease extension.

14.57 Schedule 13 effectively breaks down the first part of the definition in schedule 6. However, the difference between the two is because in a collective enfranchisement claim, the freehold is being acquired not by the leaseholders themselves but by a nominee purchaser, and none of the landlords (the freeholder and any intermediate landlords) retain any interest following the enfranchisement. The definition of marriage value in schedule 6 to the 1993 Act has been heavily criticised, not least for its lack of clarity.¹²⁹⁹

14.58 As regards houses, in the 1967 Act marriage value is not explicitly defined but is referred to as "arising by virtue of the coalescence of the freehold and leasehold interests". In the 1967 Act, the leaseholder is not excluded from the market and so his or her overbid will be taken into account.

14.59 Both the 1967 Act and the 1993 Act provide that where a lease has more than 80 years unexpired, no marriage value is payable.¹³⁰⁰ Further, where marriage value is payable to the landlord, the amount is now fixed at 50% reflecting how it is most likely to be apportioned in the market.¹³⁰¹ In other words, the leaseholder would overbid 50% of the marriage value, thus giving the landlord half and acquiring half for himself or herself. For an example of the calculation of marriage value, see Figure 14 below.

14.60 The 80-year cut-off was introduced by the Commonhold and Leasehold Reform Act 2002 ("2002 Act"). The Government consultation that preceded it had suggested a 90-year cut-off. The theory behind the cut-off was that "where the unexpired term of a lease is very long the marriage value is likely to be negligible, because the merging of the two interests will, in such cases, add to the individual values of the interests only

¹²⁹⁹ See *Hague*, paras 27-18 to 27-21.

¹³⁰⁰ 1967 Act, s 9(1E), 1993 Act, schs 6 and 13, para 4(2A).

¹³⁰¹ 1967 Act, s 9(1D), 1993 Act, schs 6 and 13, para 4(1).

marginally”.¹³⁰² Many landlords and valuers would firmly disagree and, indeed, the authors of *Hague* point out that this will not necessarily be the case in respect of higher value houses, where there may be considerable marriage value despite there being many years left on the lease.¹³⁰³ Whilst there is a certain artificiality to the figure of 80 years, ultimately, it was a political – and leaseholder-friendly – decision in 2002 which saw premiums reduce for leaseholders with leases of over 80 years. At the same time, it has produced distortions in the market for leasehold properties. Without the cut-off, one would expect the value of a lease to decrease linearly, but the fact that marriage value becomes payable once there are 80 years remaining means that leases with around 85 years or fewer left will begin dramatically to drop in price.

14.61 As is apparent from the definition in paragraph 4(2) of schedule 13 to the 1993 Act (set out above) and as can be seen at Figure 14 below, calculating marriage value requires establishing the value of the existing lease. In doing so, and to produce a consistent valuation, the same statutory assumptions that apply to valuing the freehold interest (as above) apply.¹³⁰⁴ In particular, therefore, it has to be assumed that there is no right to extend the existing lease, or to buy the freehold of the building in which the flat is situated. This assumption creates a problem for the valuer because the potential comparables – short leases being sold in the market – nearly all have the benefit of Act rights. There are two ways in which the valuer may approach this problem. The first is to find the real-world value of a short lease by reference to comparables and then deduct from this the estimated value of the benefit of the Act rights. The second is to use a graph of relativity. As set out above, relativity is the value of a property sold on a lease relative to its freehold value. Neither of these approaches are without their difficulties, as any deduction for Act rights is arguably arbitrary in the absence of evidence. Further, a number of different graphs of relativity have been devised, and there is no consensus as to which graph ought to be used.

14.62 In *The Trustees of the Sloane Stanley Estate v Mundy*, the Upper Tribunal considered the method which is generally to be used in order to value an existing lease of the relevant flat on the assumption that the existing lease of the relevant flat does not have Act rights.¹³⁰⁵ In particular, it was asked to consider the use of the “Parthenia model” to calculate relativity. The Parthenia model was based upon sales of properties between 1987 and 1991, that is, before the distortion of the market caused by the 1993 Act and the prospect thereof. That data was then analysed using a statistical technique known as “hedonic regression”, a technique which extrapolates the effect of the lease length on the value of the lease.¹³⁰⁶

14.63 The *Mundy* case is significant because when the Parthenia model was used to value the short leases in that case, it produced lower premiums for the lease extensions than the more commonly used relativity graphs. It is therefore claimed by Parthenia that use

¹³⁰² Commonhold and Leasehold Reform (2000) Cm 4843, para 76.

¹³⁰³ *Hague*, para 9-51.

¹³⁰⁴ See *McHale v Earl Cadogan* [2010] EWCA Civ 1471, [2011] HLR 14 at [29] onwards.

¹³⁰⁵ *The Trustees of the Sloane Stanley Estate v Mundy* [2016] UKUT 223 (LC).

¹³⁰⁶ Regression is the decomposition of the price of a property to find the value of the hedonic attribute of interest, namely lease length.

of its model is a way of reducing the premium payable by leaseholders to enfranchise. However, the model was rejected by the Upper Tribunal.

- 14.64 The main problem that the Upper Tribunal found with the Parthenia model was that it produced an impossible result. In the case of one of the flats, the value of the lease in the real world (with rights under the Act) was agreed at £2m. It was also agreed that a lease with rights under the Act was more valuable than a lease without rights under the Act. However, the Parthenia model produced a higher figure of £2.2m for the same lease without rights under the Act. The Upper Tribunal described the Parthenia model as a clock that struck 13:

Even if the application of the model produced an answer in another case which was not impossible, that does not mean that the model has been shown to be reliable. If a clock strikes 13, it is broken. It is not a reliable time piece. It cannot be relied upon as a reliable means of telling the time even when it strikes an hour, such as 11 or 12, which are possible times of day.

- 14.65 The Tribunal heard a substantial amount of evidence in relation to a large number of other graphs of relativity which have been prepared over the years and summarised the effect of that evidence and the Tribunal's reaction to it in Appendix C to its decision. The Tribunal found that the market was using a graph of relativity produced by the firm Gerald Eve ("the Gerald Eve graph") and that the graph was the least unreliable. The main difference between the Gerald Eve graph and the Parthenia model is that the Gerald Eve graph is based on relativities derived from settlements reached on enfranchisement claims (between 1974 and 1996) whereas the Parthenia model derives relativity from sales in the market.
- 14.66 On appeal it was argued that the comparison between the value of the lease in the real world (with rights under the Act) and the value of the lease without such rights, as shown by the Parthenia model, was an illegitimate comparison.¹³⁰⁷ The two interests were fundamentally different. The legal effect of the assumptions that the Act requires precludes the valuer (and the Tribunal) from having regard to any leasehold transaction in the real world where the lease attracts rights under the Act. In other words, there is no direct relationship between the no Act and subject-to-Act valuations, and, therefore, a comparison of the two is illegitimate as a matter of law. Further, the reason why the value of the lease in the real world is an impermissible comparator is that the market itself had been "corrupted" by the Gerald Eve graph. This argument was rejected. Among other things, the Court of Appeal said that whether to accept or reject the Parthenia model was a question of fact for the Tribunal, which could only be interfered with on appeal if the decision was perverse.

Figure 14:

Calculating the marriage value payable in respect of Flat B in Figure 8

Since the unexpired term of the lease is less than 80 years, marriage value is payable. The premium therefore comprises two elements. First, the reduction in value of the landlord's interest in Flat B,

¹³⁰⁷ *Mundy v The Trustees of the Sloane Stanley Estate* [2018] EWCA Civ 35, [2018] HLR 13.

namely the loss of the value of the “term”, as shown in Figure 10, and the reduction in value of the reversion, as shown in Figure 13. Second, marriage value.

The marriage value is the difference between:

(i) the value of the landlord’s interest and the leaseholder’s interest in Flat B before the lease extension; and

(ii) the value of the landlord’s interest and the leaseholder’s interest in Flat B after the lease extension.

The value of the landlord’s interest before the lease extension is the value of the term (£3,510 as set out in Figure 10 and the value of the reversion (£10,707 as set out in Figure 13), namely £14,217.

Having established the freehold vacant possession value as being £200,000, the valuer can apply a relativity to this figure to calculate the existing lease value. It is a matter of valuation judgement what relativity to apply. However, following the approach of the Tribunal in *Mundy*, it is assumed for the purposes of the example that the valuer chooses a relativity of 80%, being one percentage point below the Gerald Eve graph. This produces an existing lease value of £160,000 (£200,000 x 80/100).

After the lease extension the landlord has no right to receive a rent and therefore the “term” has no value. The reversion, however, has a value of £133 as shown in Figure 13.

After the lease extension the leaseholder has a lease of 150 years. Following the Upper Tribunal’s guidance, set out at paragraph 14.34 above, the value of this lease is 99% of the freehold vacant possession value, namely £198,000.

The marriage value is therefore £23,916, being the difference between:

(i) £14,217 + £160,000 = £174,217; and

(ii) £133 + £198,000 = £198,133.

The leaseholder is required to pay half of the marriage value, namely £11,958.

Hope value

14.67 As set out above, there is also a value in the hope of being able to release marriage value in the future (“hope value”). Hope value is, in essence, a deferred form of marriage value. If the landlord is selling his or her freehold interest subject to a lease, but the leaseholder is not at that time interested in purchasing the freehold, there is “no immediate prospect of releasing the marriage value”.¹³⁰⁸ However, a potential purchaser of that freehold interest might well consider there to be a possible *future* benefit in selling the freehold to, or in acquiring the leasehold from, the leaseholder: the marriage value would be released at this later sale. This potential for a delayed release of marriage value is referred to as hope value.

14.68 It should be noted that it is “impossible for both marriage value and hope value to form part of the same valuation”.¹³⁰⁹ The reason for that is simple. If marriage value is taken

¹³⁰⁸ *Earl Cadogan v Pitts and another; Earl Cadogan and others v Sportelli and another* [2010] 1 AC 226, Lord Neuberger.

¹³⁰⁹ *Sportelli* (above) by Lord Hoffman at [4].

into account, the hypothetical future purchaser will be the leaseholder; if hope value is relevant, the hypothetical future purchaser will not be the leaseholder. The two are mutually exclusive.

14.69 Therefore, under section 9(1A) of the 1967 Act the fact that marriage value is payable excludes the possibility of hope value being included in the valuation.¹³¹⁰ However, in a collective enfranchisement claim, it is possible for marriage value to be payable in respect of some flats (the flats of the participating leaseholders) and hope value to be payable in respect of others (the flats of the non-participating leaseholders), so long as both are not payable in respect of the same flat.

Summary of the general approach

Figure 15:

The premium payable for a lease extension of Flat A

As the lease has more than 80 years unexpired, the premium payable is the value of the term plus the value of the reversion lost by the landlord:

- 1) value of term from Figure 10, £3,571; plus
- 2) value of the lost reversion from Figure 13, £348.

Total premium = £3,919

The premium payable for a lease extension of Flat B

As the lease has less than 80 years unexpired, the premium payable is the value of the term plus the value of the reversion lost by the landlord plus marriage value:

- 1) value of term from Figure 10, £3,510; plus
- 2) value of the lost reversion from Figure 13, £10,574; plus
- 3) marriage value from Figure 14, £11,958.

Total premium = £26,042

14.70 Whilst the examples are of lease extensions of flats under the 1993 Act, the same principles apply to collective enfranchisement claims under the 1993 Act and valuations under all but section 9(1) of the 1967 Act. In collective enfranchisement claims, the premiums arrived at for each flat are aggregated. However, as stated, marriage value is only payable in respect of the flats of participating leaseholders, whilst hope value is payable in respect of the flats of non-participants. Further, there may be added to the premium additional sums, for example, to reflect any development value in the building, which we now explain.

¹³¹⁰ This was confirmed in *Sportelli* (above), even regarding cases where no marriage value is technically payable due to the lease having longer than 80 years left to run.

Additional considerations in collective enfranchisement claims: development and other additional value

14.71 Applying the above approach upon the acquisition of the freehold of a house or a lease extension of a flat results in a price payable which ought to compensate the landlord in full for the interest being acquired. However, this might not necessarily be the case upon the acquisition of a block of flats. As explained above, upon such a claim a premium is calculated for each flat and these premiums aggregated. However, there may be value which is not referable to any individual flat, but arises because the block as a whole is being acquired. For example, if there is value in being able to develop an individual flat, perhaps because a loft space forms part of the flat and could be converted into a further bedroom, then this possibility is likely to be reflected in the freehold vacant possession value of that flat and will therefore be reflected in the premium payable for a lease extension of that flat. However, if there is value in being able to develop a block of flats, for example, by building a further floor of flats on to its flat roof, that value is not part of the value of any particular flat and will therefore not be reflected in the aggregated premiums of the flats.

14.72 Further, there may be additional value which is referable to a particular flat, but which can only be released upon the expiry of the lease or through an earlier deal between the leaseholder and the landlord. This too may not be reflected in the aggregated premiums of the flats. For example, if in the above example the loft space was not part of the flat but was owned by the landlord, the value of being able to incorporate it into the flat could be realised upon the expiry of the lease or through an earlier deal between the leaseholder of the flat and the landlord. However, it is unlikely to be reflected in the premium for the flat calculated as set out above. Where there is additional value which is not dependent on a deal between parties, for example, the value of being able to build on a flat roof, it is relatively straightforward to compensate the landlord for the loss of this value: a sum reflecting the value can be added to the aggregated premiums. However, where additional value can only be released by striking a deal, the approach to calculating the total premium payable is not so simple. The additional value in such circumstances can be characterised as a form of marriage value, as the effect of doing a deal is the same as if the leaseholders' and landlord's interests were in common ownership. Where there is only the hope of doing a deal, the value is a form of hope value. These points are further explained in the following paragraphs.

14.73 As set out above, in relation to collective enfranchisement claims, marriage value is described in the 1993 Act as an increase in value which is attributable to the potential ability of the participating leaseholders to have lease extensions granted to them without payment of any premium and without restriction as to length of term.¹³¹¹ However, the definition has been interpreted widely. In *Maryland Estates Ltd v Abbathure Flat Management Ltd* it was held that seven factors could be taken into account in valuing the freehold interest for the purpose of determining the marriage value, namely, the ability of the leaseholders to:

- (1) extend their leases at no premium;
- (2) vary the terms of the leases;

¹³¹¹ 1993 Act, sch 6, para 4(2)(a).

- (3) effectively extinguish the ground rent;
- (4) manage the property themselves and control management charges;
- (5) carry out repairs at their own choosing and control costs;
- (6) eliminate possible disputes with the landlord; and
- (7) grant themselves new rights over the property.¹³¹²

14.74 *Maryland* followed *Sinclair Gardens Investments (Kensington) Ltd v Franks*,¹³¹³ and was followed by *Forty-Five Holdings v Grosvenor (Mayfair) Estate*.¹³¹⁴ In all three cases, the leaseholders were set to gain a benefit upon acquiring the freehold to their blocks from the grant of lease extensions which went beyond the benefit of having a longer term. In *Sinclair Gardens*, lease extensions would have overcome the difficulty in obtaining a satisfactory system of management. In *Forty-Five Holdings*, lease extensions would not have contained the existing restrictions on alterations, thereby enabling the leaseholder (who owned both flats) to unlock the development potential of the roof space. In all three cases, it was held that the value of this benefit was recoverable as part of the marriage value payable under paragraph 4 of schedule 6 to the 1993 Act.

14.75 In *Money v Cadogan Holdings*, upon acquiring the freehold of their block, the leaseholders were going to obtain the benefit of being able to release a covenant restricting the use of the basement flat to use as a caretaker's flat.¹³¹⁵ However, it was not open to the landlord to argue that the value of this benefit should be included as marriage value under paragraph 4, as the lease of the caretaker's flat had more than 80 years unexpired. The Upper Tribunal found, however, that the value of the hope of doing a deal with the leaseholder for the release or modification of covenants was part of the inherent value of the landlord's interest and recoverable under schedule 6, paragraph 3. In other words, it was a form of hope value.

14.76 In *Cravecrest Limited v Sixth Duke of Westminster*, it was agreed that the block of flats was worth more as a house than as flats.¹³¹⁶ However, conversion was only possible if both the freehold and intermediate leasehold interests were held by the same person; that is, these interests coalesced. As the additional value did not arise from the coalescence of the freehold and under leasehold interests, this was not marriage value under paragraph 4. However, the Court of Appeal held that this "inherent development-hope value" could be recovered under paragraph 3.

14.77 In *Padmore v Barry and Peggy High Foundation*,¹³¹⁷ the Tribunal found that the value of the landlord's interest under paragraph 3 included £150,000, being the value of the hope of being able to do a deal with the leaseholders in order to develop the flats as a

¹³¹² *Maryland Estates Ltd v Abbathure Flat Management Ltd* [1999] 1 EGLR 100.

¹³¹³ *Sinclair Gardens Investments (Kensington) Ltd v Franks* [1997] 76 P & CR 230.

¹³¹⁴ *Forty-Five Holdings v Grosvenor (Mayfair) Estate* [2009] UKUT 234 (LC).

¹³¹⁵ *Money v Cadogan Holdings* [2013] UKUT 211 (LC).

¹³¹⁶ *Cravecrest Limited v Sixth Duke of Westminster* [2013] EWCA Civ 731.

¹³¹⁷ *Padmore v Barry and Peggy High Foundation* [2013] UKUT 646 (LC).

single house. The landlord did not dispute that they could have claimed this sum, but sought, and obtained on appeal, the larger sum of £194,000 as marriage value under paragraph 4, being the value of the ability to develop the property in the hands of the nominee purchaser.

- 14.78 The above cases illustrate how additional value can arise and how it can be included in the premium payable on a collective enfranchisement. However, they also illustrate another potential problem with the 80-year cut-off in respect of marriage value (or the definition of marriage value as interpreted by the courts). In most cases the shorter the lease, the more valuable the ability to grant oneself a lease extension. However, where, for example, the lease contains a covenant which restricts the use of the property (for example, to that of a caretaker's flat) or development of the property (for example, so that a flat cannot be extended into the roof or a number of flats cannot be converted into a house) it is arguable that the longer the lease, and therefore the longer the leaseholder would be bound by the covenant, the more valuable it becomes to grant oneself a lease extension. Doing so provides a means of being able to be free of the covenant, by granting a lease extension which does not contain the covenant.

The “original valuation basis”

When does the “original valuation basis” apply?

- 14.79 The original valuation basis is contained in section 9(1) of the 1967 Act and applies to the right to purchase the freehold of a house in some instances. Due to the various amendments, the right to acquire the freehold of a house pursuant to the 1967 Act can arise under one of a number of sections of the Act. Which section the right arises under will depend on which of a number of financial limits the house falls within. The section under which the right to acquire the freehold arises determines the applicable basis of valuation.
- 14.80 The original valuation basis applies to houses that originally qualified for enfranchisement rights under the 1967 Act. Accordingly, if a lease satisfies the original “low rent test” (set out in paragraph 7.30(1) above) and the house satisfies certain financial limits (set out in paragraph 7.50 above), then the premium for acquiring the freehold of the house will be determined under the original valuation basis in section 9(1).

What is the “original valuation basis”?

- 14.81 The 1967 Act was brought into force with the overarching concept that, while the land belonged to the landlord, morally the house belonged to the leaseholder. As the authors of *Hague* suggest, this concept was no doubt intended to reflect the position at the grant of a normal 99-year building lease under which the landlord reserved a “ground rent” and the builder erected a building, making his profit by selling the lease with the building erected. With this concept in mind, section 9(1) requires the calculation of the “site value” of the property.
- 14.82 As with the other bases of valuation, the starting point under section 9(1) is market value and the purchase price is subject to “such deduction (if any) in respect of any defect in

the title to be conveyed to the tenant”.¹³¹⁸ Further, some of the same assumptions are to be made under section 9(1) as are to be made under the other valuation provisions:

- (1) the vendor is selling an estate in fee simple subject to the relevant lease;¹³¹⁹
- (2) the Act confers no right to acquire the freehold;¹³²⁰ and
- (3) the vendor is selling with and subject to the rights and burdens in the conveyance.¹³²¹

14.83 However, section 9(1) requires various other assumptions to be made. Consequently, it is also to be assumed that:

- (1) the leaseholder and members of his or her family are not buying or seeking to buy;¹³²²
- (2) the lease has been extended under the 1967 Act, even if it has not been (that is, it has been extended by 50 years at a rent calculated in accordance with section 15 of the 1967 Act, a modern ground rent);¹³²³ and
- (3) the sale is subject to any rentcharge to which the freehold is subject.¹³²⁴

14.84 The first of these assumptions means that both marriage value *and* hope value are excluded from the purchase price regardless of the length of the lease.¹³²⁵ The absence of marriage value and the fact that any reversionary value is deferred for an additional 50 years, without the payment of a premium, but upon the payment of a rent which assumes there is no building on the site (as to which see below) makes section 9(1) the most favourable basis of valuation for leaseholders of houses.

14.85 What is being valued under section 9(1) is, therefore:

- (1) the right to receive rent up to the end of the original lease;
- (2) the right to receive a modern ground rent for 50 years after that; and
- (3) the right to possession at the end of the hypothetical lease extension.

¹³¹⁸ 1967 Act, s 9(2).

¹³¹⁹ 1967 Act, s 9(1)(a).

¹³²⁰ 1967 Act, s 9(1)(a).

¹³²¹ 1967 Act, s 9(1)(c).

¹³²² 1967 Act, s 9(1).

¹³²³ 1967 Act, s 9(1)(a).

¹³²⁴ The latter part of this assumption's meaning and purpose is described as “obscure” (*Hague*, para 9-06). As to the meaning of “rentcharge” see Figure 20 below.

¹³²⁵ This was confirmed by the House of Lords in *Earl Cadogan v Sportelli* [2010] 1 AC 226. This has seemingly only been the case, however, since the Housing Act 1969, s 82, amended the 1967 Act to restrict the hypothetical market by introducing that bracketed phrase.

14.86 The valuation methodology applicable to (1) and (3) is as set out above, so:

- (1) in valuing the right to receive rent up to the end of the original lease ((1) above), a capitalisation rate is applied to the ground rent payable over that term; and
- (2) in valuing the right to possession ((3) above) at the end of the hypothetical lease extension, a deferment rate is applied to the freehold value of the house.

14.87 Whilst valuing the right to receive a modern ground rent ((2) above) requires capitalising that rent, it also involves:

- (1) calculating the modern ground rent; and
- (2) discounting the capitalised rent to reflect the fact that the second (hypothetical) lease would not start until the end of the original lease (that is, applying a deferment rate).

Calculating the modern ground rent

14.88 Where a lease has been extended for 50 years pursuant to the 1967 Act, section 15(2) provides that the rent payable during that extended term shall be a “ground” rent in the sense that it shall represent the letting value of the site, without including anything for the value of buildings on the site, with a review at 25 years. However, sites are not generally let in the open market for 50-year terms with one rent review at 25 years. Consequently, in the absence of comparables, valuers calculate the capital value of the site and then ascertain the return an investor would seek in respect of a site of that value taking into account the statutory assumptions. There are three established methods for valuing the site: see Figure 16. Given the hypothetical nature of the valuation to be carried out, it is normal practice to calculate the site value by more than one method, and then check the values against each other.

14.89 Having established the site value, the second stage involves decapitalising the site value at an appropriate percentage. In other words, whereas capitalising a rent involves taking an income stream and finding an equivalent capital value, decapitalising involves taking a capital value and finding an equivalent income stream.

Figure 16: methods of calculating the site value

“The cleared site approach” is used where the house is near the end of its economic life.¹³²⁶ It involves the use of comparable transactions, so the site value is derived by reference to the price of sites sold for development or redevelopment for comparable uses, usually on a price per square foot or per square metre basis. Ascertaining a value by reference to area is open to criticism, as the Act requires the single house plot to be valued whereas sales in the market are generally of sites with multiple plots. Dividing the sale price of a large site by the number of plots thereon will not necessarily result in the correct order of value for a single plot. Further, where a plot includes a large garden, the garden land may be considerably less valuable pro rata than the land upon which the building stands.

“The standing house approach” is used where the house is likely to remain standing for the foreseeable future. Using this method, the site value is reached by ascertaining the freehold vacant possession

¹³²⁶ See *Farr v Millerson’s Investments Ltd* (1971) 22 P & CR 1055.

value of the house, its “entirety value”,¹³²⁷ and applying a percentage to this value representing the proportion which relates to the site. For example, in *Lewis v James*,¹³²⁸ the Lands Tribunal decided that the site value was 25% of the freehold vacant possession value of a two-bedroom, 1920s, terrace house in Swansea, South Wales.

“The new for old approach” is used where the house has an indeterminate future economic life.¹³²⁹ It is the derivation of site value by ascertaining what the property as a whole would be worth if a new building was substituted for the existing building and then taking a proportion of that value, or alternatively subtracting the present-day cost of putting up such a building. This approach is seldom used and is widely criticised, the main criticism being that there are too many assumptions to be made in the valuation.

CRITICISMS OF THE CURRENT LAW

(1) Balancing the competing interests of landlords and leaseholders

14.90 The interests of the landlord and leaseholder in enfranchisement are, to an extent, inevitably polarised. As noted in Chapter 1, the leaseholder may feel that he or she should not have to pay for something that is already his or hers, or may feel that the premium payable is too high; the landlord may feel that he or she is entitled to the full price for the property interest which is being compulsorily taken from him or her.

14.91 In drawing a balance between the competing interests of the landlord and leaseholder, the “original basis of valuation” under the 1967 Act favoured the leaseholder. As explained above, the Act assumed that whilst the land belonged to the landlord, morally the house belonged to the leaseholder. That approach reflected the position at the grant of a 99-year building lease. At that point the reversion was so remote that the only value to the landlord of the house and land was the ground rent income and the question of who was morally entitled to the building was of no practical importance. By 1967, many Victorian building leases were due to expire shortly. When they did, the landlords stood to obtain what many would see as a windfall, as they would receive back the land with the house. The solution provided by the Act would equally be seen by many as depriving the landlord of a substantial part of the true value of his or her reversion and so providing the leaseholder with a windfall gain. Whilst the 1967 Act was passed primarily to meet the anxieties of ordinary householders in South Wales and other areas where the long leasehold system was widespread, those who in fact derived most benefit from it in financial terms were relatively wealthy leaseholders of houses in Belgravia, Chelsea, Kensington, Westminster and similar expensive areas of London. These leaseholders qualified to enfranchise under the 1967 Act because the rateable values of their properties were just under £400, which was the upper limit in Greater London for the premium to be calculated under section 9(1).

14.92 The various amendments to the 1967 Act and the introduction of the 1993 Act have shifted the balance between landlord and leaseholder, so that the subsequently introduced bases of valuation seek to compensate the landlord in full at a market value for the loss of its interest. While there are many examples of landlords arguing that they

¹³²⁷ The house is assumed to be modernised, in good condition and there is no disregard of leaseholder's improvements.

¹³²⁸ *Lewis v James* (1981) 258 EG 651.

¹³²⁹ See *Farr v Millersons Investments Limited* (1971) 22 P & CR 1055.

have not been so compensated, leaseholders may argue that premiums are too high and do not reflect the fact that the asset they are buying is their home. In other words, leaseholders may feel that the pendulum has swung too far back in favour of landlords.

- 14.93 The discontent amongst leaseholders has been fuelled more recently by the practice of some developers of selling leasehold properties with rent review clauses leading to very high ground rents. One particular practice has been to provide that the ground rent doubles every ten or five years of the lease. As a result, what looks at face value as a modest ground rent, will become a substantial annual sum as the lease goes on. For example, where the initial rent is £295 and the lease provides for it to double every ten years, the rent will be £9,440 per annum by the 50th anniversary. In other words, 32 times higher. The mathematic effect of a doubling provision is easily overlooked by a consumer. A popular fable that illustrates the effect of doubling is to place a grain of rice on the first square of a chess board, two on the second, four on the third, and to continue doubling for each of the 64 squares. The end result is that the final square requires billions of tonnes of rice. Such rent reviews make the need to enfranchise and buy out that ground rent more imperative, whilst at the same time significantly increasing the price the leaseholder has to pay to do so under current valuation methods.
- 14.94 In terms of balancing the interests of landlords and leaseholders, the criticism of the current law from the point of view of leaseholders is therefore twofold. First, some see the current valuation method as having swung too far in favour of landlords. Secondly, just as consumers may be surprised at the mathematical consequences of a doubling ground rent provision, so might they be surprised to see the financial consequences of such ground rent provisions feeding in to the valuation methodology. The current valuation methodology endorses those onerous ground rent terms because it values the landlord's actual contractual entitlement to ground rent.
- 14.95 Government announcements of plans to ban the sale of leasehold houses and to ban monetary ground rents in future leases do not help those who already own a leasehold house. Existing leaseholders look to enfranchisement to buy their way out of leasehold and out of their ground rents. If it is unaffordable for them to do so – and if that unaffordability relates in part to an onerous ground rent being endorsed by the valuation methodology – then there are concerns that existing leasehold houses become a “tainted” market. Buyers will not buy when more favourable terms are available on the purchase of new houses.

(2) Complicated and expensive process

- 14.96 The valuation provisions and methodology are not readily understandable to the lay person. Many lawyers struggle to understand them and many professional valuers struggle with the more complex cases. It is therefore very difficult to enfranchise without some professional assistance, and expensive specialist expertise will often be necessary. Where the capital value of the property is low, the professional fees may be disproportionate to the price payable.
- 14.97 One of the reasons why the process is so complicated and requires expert assistance is that there is a significantly wide valuation margin and a lack of standardisation. Different experts will form different views as to the appropriate elements of the valuation and indeed the various elements will vary between locations, properties and over time. This in turn gives ample scope for disputes, both during negotiations and before the

Tribunal, and thereby increases costs. Further, this results in a lack of certainty as to the ultimate price the leaseholder will have to pay.

14.98 For example, disputes can arise in respect of the following.

- (1) Freehold vacant possession values.
- (2) Capitalisation rates: often the amount involved is not worth arguing about and the rate is commonly agreed between valuers at between 5 and 7%. However, in *St Emmanuel House (Freehold) Ltd v Berkeley Seventy Six Ltd* a pension fund employed a valuer, financial expert and leading and junior counsel and successfully argued that the capitalisation rate should be much lower, resulting in a decision that it should be 3.35%.¹³³⁰
- (3) Discount for the risk of holding over: in *Re Clarise Properties Ltd's Appeal*,¹³³¹ a case under section 9 of the 1967 Act, the Upper Tribunal held that a deduction of 20% should be made from the value of the eventual reversion because of the risk of an assured tenancy arising under schedule 10. An assured tenancy is a tenancy at a market rent and, therefore, whilst the landlord may be kept out of possession by the existence of such a tenancy, he or she is fully compensated for that. Such tenancies differ from Rent Act tenancies where the rent is below the market rate. As the authors of *Hague* say, the deduction in *Clarise* is controversial, since there was no evidence adduced to support it, and it was substantially higher than the traditional 10% which was used to calculate the risk of a Rent Act tenancy arising under Part 1 of the Landlord and Tenant Act 1954, and the much lower discount generally applied to reflect the risk of an assured tenancy arising.¹³³²
- (4) Discount for leaseholder's improvements: in addition to disagreement between valuers as to the amount of any discount to be applied, disputes can arise as to:¹³³³
 - (a) whether a particular item is a repair, improvement or renewal;
 - (b) whether the improvement has in fact added value: it can be argued that many improvements of a cosmetic nature – for example, specialised flooring, designer wallpaper, and so on – do not in themselves add value because they merely reflect the personal taste of a particular leaseholder; and in high value properties even more substantial works may be of no value when the likely buyer is someone who plans to rip out and replace all fixtures and fittings;

¹³³⁰ *St Emmanuel House (Freehold) Ltd v Berkeley Seventy Six Ltd* CHI/21UC/OCE/2017/0025, 0026 and 0027.

¹³³¹ *Re Clarise Properties Ltd's Appeal* [2012] UKUT 4 (LC).

¹³³² *Hague*, para 9-17.

¹³³³ *Hague*, para 9-35.

- (c) whether works carried out independently at different times consist of a single improvement or several improvements;
 - (d) whether and how to apportion value where the improvement is only partially completed at the time that the lease is granted: the increase in value may be argued not to occur until the works have been completed and therefore to be irrelevant, or it might be necessary to apportion the increase in value as between those works carried out before the lease was granted and those which were completed after;¹³³⁴
 - (e) in the case of historic improvements:
 - (i) whether or not they were carried out under the lease; and
 - (ii) whether they were carried out by the leaseholder, or his predecessors in title, “at their own expense”.
- (5) Development value: at present, whilst many leaseholders and landlords would be happy for there to be a restriction on development so as to avoid arguments over development value, this is difficult to achieve. The Acts permit the inclusion of restrictive covenants in the transfer in only limited circumstances and in limited terms. Further, restrictive covenants under the general law are only binding if they benefit some identifiable land and it is often the case on enfranchisement that no such land is retained by the landlord.
- (6) Other appropriate assumptions: see for example the case of *Money v Cadogan Holdings* at paragraph 14.75 above.¹³³⁵

(3) Artificiality

14.99 As set out above, the price payable is to be ascertained by reference to the market value of the interest being acquired, but subject to various statutory assumptions, most notably the assumption that there are no Act rights attached to that interest; that is to say, that the leaseholder of a property has no right to buy the freehold of that property or claim a lease extension of it. In reality, nearly all leasehold properties benefit from Act rights and therefore “the market value” is, to a certain extent, artificial. This leads to two problems: (1) how to value an interest on a hypothetical sale in the market; and (2) circularity.

Hypothetical valuation

14.100 The two financial experts in *Mundy*, Professors Lizieri and MacGregor, both rejected the application of the Parthenia model because they considered that there had been substantial changes in the market and the economic environment since 1991, resulting in historic data lacking relevance when calculating current values. These changes included:

¹³³⁴ A task that was necessary in *Loder Dyer v Viscount Chelsea and Cadogan Estates Ltd* [1997] EGCS 25 CA: a case concerned with the proviso to s 4(1). See also *Moreau v Howard de Walden Estates Ltd* (30 April 2003) LRA/2/2002 Lands Tribunal (Unreported).

¹³³⁵ *Money v Cadogan Holdings* [2013] UKUT 0211 (LC).

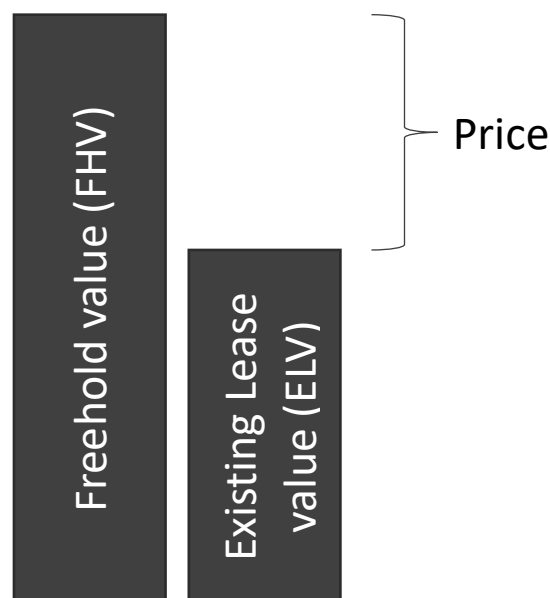
- (1) substantial and structural changes to the level of interest rates and discount rates;
- (2) changes in the nature of the market; and
- (3) changes in the institutional and legal structure of the residential market.

If historic real-world sales are no longer relevant and all recent sales are tainted by the Act, then it is hard to see how the value of an existing lease without Act rights can ever be ascertained with certainty. While the valuation is said to be directed at ascertaining market value, it is attempting to value something which no longer exists to be valued.

Circularity

14.101 Buyers of leasehold property in the real world are buying on the basis that the Acts confer the right to buy the freehold of such property or to extend the lease of it. Consequently, in deciding what to pay for a short lease, buyers in the market will have regard to what they are likely to have to pay to acquire a long lease or freehold interest. In turn, the price they have to pay is determined by the price short leases are selling for in the market. This is illustrated in Figure 17 below.

Figure 17: relationship between freehold value, existing lease value, and lease extension premium



14.102 In other words, the market value determines the price payable under the Acts and the price payable under the Acts determines the market value: it is entirely circular. This circularity is arguably compounded by Tribunal decisions.

14.103 In *Mundy* the Tribunal said that valuers are to focus on actual market forces at the valuation date. In other words, they were to take account of factors which were influencing the market, for example, a particular case or graph of relativity and ignore the fact that the market was badly informed or operating illogically or inappropriately. As set out above, the Tribunal found that the market was using the Gerald Eve graph and that the graph was the least unreliable. The premiums assessed by tribunals in

future cases will now follow the Tribunal's decision and that, in turn, produces the result that in the market, when a purchaser of an existing lease with rights under the Act is advised on the amount of the estimated premium for a lease extension, he will be advised on the basis of the Gerald Eve graph. In other words, the Tribunal bases its decisions on the behaviour of the market, and the market bases its behaviour on the decisions of the Tribunal.

14.104 The problem can be further exemplified by considering the decision in *Mundy* relative to the decision in *Kosta v Carnwath (re: 47 Phillimore Gardens)*.¹³³⁶ Mr Kosta, the leaseholder, attempted to rely on the Parthenia model. The landlord's valuer thought reliance on an average of the available graphs of relativity would be more palatable than reliance purely on the Gerald Eve graph. Consequently, he adopted an average relativity in circumstances where that relativity coincided with the relativity derived from the Gerald Eve graph. The Tribunal in *Mundy* said of *Kosta*:

In *Kosta* the Tribunal held that a prospective purchaser of an existing leasehold interest, acting prudently, would have taken an average of the relevant graphs contained in the RICS 2009 report when assessing relativity. We have had the benefit of hearing detailed evidence about the construction and use of those graphs. From such evidence we are satisfied that at the valuation dates a prospective purchaser would not have taken an average relativity from those graphs. It is most likely that they would have referred to the [Gerald Eve] graph first and foremost. The evidence was that the market had only started to adopt an average relativity from the graphs following the decision in *Kosta*.

14.105 In other words, as a matter of legal precedent, the approach in *Kosta* cannot be relied upon following the decision in *Mundy*. However, where the valuation date falls after the decision in *Kosta*, but before the decision in *Mundy*, applying the guidance in *Mundy* that one must look at factors which influenced the market at the valuation date, the decision in *Kosta* can be taken into account.

(4) Technical problems

14.106 There are a number of technical criticisms of the valuation provisions in the 1967 Act and the 1993 Act and, where relevant, these have been included in the discussion of the current law above. However, for the purposes of the discussion of the reform of section 9(1), it is helpful to set out those specifically directed at the 1967 Act.

- (1) The 1967 Act contains different valuation formulae for house claims dependent on a combination of arbitrary qualifying conditions.
- (2) There are alternative low rent tests depending on when the lease was granted, and each test contains a number of different rules and conditions.
- (3) The qualification criteria often depend on historic rateable values, which can be difficult or even impossible to obtain.
- (4) Section 9(1) is entirely different to the other formulae and arguably inequitable to the landlord. It is based on an incorrect fiction that the leaseholder owns the

¹³³⁶ *Kosta v Carnwath (re: 47 Phillimore Gardens)* [2014] UKUT 319 (LC).

house but not the land, and an unrealistic assumption that the leaseholder has exercised his or her right to a 50-year lease extension (which very few leaseholders would in reality do).

- (5) The provisions regarding leaseholder's repairs under section 9(1A) are illogical, and lead to the absurd conclusion that a leaseholder who, in breach of covenant, allows his house to fall into disrepair pays less for his freehold than a leaseholder who maintains his house in proper repair.
- (6) A valuation under section 9(1C) allows the landlord to seek payment of compensation under section 9A, but not if the valuation is under either section 9(1) or section 9(1A). It is hard to find any realistic justification for this.
- (7) Leaseholders of houses are sometimes able to bring the valuation of the freehold within section 9(1) by obtaining a notional reduction in rateable value to take into account any leaseholder's improvements in accordance with schedule 8 to the Housing Act 1974. However, there are a number of criticisms of this schedule.
 - (a) The leaseholder's improvements that are within the schedule include improvements made in pursuance of an obligation to the landlord (and may even include the house itself if constructed pursuant to a building lease).
 - (b) The schedule includes unduly strict time limits that are a trap for the unwary;
 - (c) The schedule fails to provide for a notional reduction in respect of leaseholder's improvements made after 1 April 1973, bearing in mind particularly that the relevant date for determining whether or not a house comes within the rateable value limit for a valuation under section 9(1) is now 31 March 1990.
 - (d) The schedule provides only for a certificate from the valuation officer to specify the notional reduction only on 1 April 1973 whereas the relevant date under section 9(1A) is now 31 March 1990.
 - (e) The procedural provisions of the schedule are unsatisfactory in failing:
 - (i) to require the landlord to serve a counter-notice to the leaseholder's notice claiming a notional reduction;
 - (ii) to require the leaseholder to deliver to the landlord a copy of his application to the Valuation Officer; or
 - (iii) to deal with sub-tenancies.
 - (f) There is no provision for an appeal from the Valuation Officer's decision.

Chapter 15: Valuation: options for reform

INTRODUCTION

- 15.1 As explained in Chapter 14, we have been asked to examine options to reduce the premium payable whilst ensuring sufficient compensation is paid to landlords to reflect their legitimate property interests.
- 15.2 In considering reform of valuation, we first discuss the meaning of “sufficient compensation”. We then set out some overriding considerations that are relevant to some or all of the options to reduce the premium before setting out those options, which we divide into two categories:
- (1) the adoption of simple formula; and
 - (2) options based on current valuation methodology.
- 15.3 Finally, we consider the use of an online calculator to determine the premium payable.

THE MEANING OF SUFFICIENT COMPENSATION

- 15.4 Views will invariably differ on what constitutes sufficient compensation. In legal terms, however, one aspect of sufficient compensation relates to Article 1 to the First Protocol (“A1P1”) to the ECHR, which provides for the peaceful enjoyment of property. A1P1 says:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

- 15.5 A1P1 has been incorporated into English law by the Human Rights Act 1998. The right to peaceful enjoyment of property is not, however, an absolute right. It is a qualified right, which means that an interference with peaceful enjoyment of property can be justified in certain circumstances. In *AXA General Insurance Ltd v Lord Advocate*,¹³³⁷ Lord Reed explained:

If an interference has been established, it is then necessary to consider whether it constitutes a violation. It must be shown that the interference complies with the principle of lawfulness and pursues a legitimate aim by means that are reasonably proportionate to the aim sought to be achieved. This final question focusses upon the question whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights: *Sporrong* and *Lönnroth*, para 69. In that regard, the Strasbourg court accepts that a margin of appreciation must be left to the national authorities.

¹³³⁷ *AXA General Insurance Ltd v Lord Advocate* [2012] 1 AC 868, at [108].

15.6 In *James v United Kingdom* the provision for enfranchisement that had been introduced in the 1967 Act was challenged as being an infringement of A1P1.¹³³⁸ The challenge failed. The court held that enfranchisement was a deprivation of property and so A1P1 was engaged, but the deprivation was justified as it was a proportionate response in pursuit of a legitimate aim. In reaching this conclusion, the fact that compensation was paid was significant. Payment of compensation is a crucial factor in determining whether a deprivation of property is proportionate.

15.7 The court's conclusions in *James* in relation to A1P1 can be summarised as follows.

(1) As to the deprivation of property, public interest and reasonableness, the court concluded that:

- (a) compulsory transfer of property from one individual to another may constitute a legitimate means for promoting the public interest. A taking of property effected in pursuance of legitimate social, economic or other policies may be in the public interest even if the community at large has no direct use or enjoyment of the property taken. The leasehold reform legislation is not therefore by its very nature an infringement of A1P1;¹³³⁹
- (b) the court will respect a national legislature's judgement as to what is in the public interest when implementing social and economic policies unless that judgement is manifestly without reasonable foundation. The elimination of social injustice by leasehold reform legislation was a legitimate aim for the United Kingdom to pursue and could not be characterised as manifestly unreasonable. It fell within the state's margin of appreciation;¹³⁴⁰ and
- (c) a measure depriving a person of his or her property must additionally be appropriate for achieving its aim and not disproportionate thereto, but it does not have to meet a test of strict necessity. Provided that the means chosen could be regarded as reasonable and suited to achieving a legitimate aim and a fair balance, the court would not question the legislature's judgement of the best solution. The means chosen to regulate an injustice was not inappropriate or disproportionate, nor was it unreasonable to restrict the right of enfranchisement to less valuable houses since these were perceived as the cases of greatest hardship.¹³⁴¹

(2) As to compensation, the court concluded that:

- (a) the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate

¹³³⁸ *James v United Kingdom* (1986) 8 EHRR 123.

¹³³⁹ *James* (above), paras 39 to 45.

¹³⁴⁰ *James* (above), paras 46 to 47.

¹³⁴¹ *James* (above), paras 50 to 52.

interference which could not be considered justifiable under A1P1. A1P1 does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of 'public interest', such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value;¹³⁴²

- (b) in determining the level of compensation the state has a wide margin of appreciation to afford a fair balance between the interests of the private parties concerned, the general interest of society and the landlords' right of property. In the circumstances a fair balance did not call for compensation at full market value. Nor did the compensation procedures laid down inherently lead to such delay in payment of compensation as to involve a violation of A1P1;¹³⁴³ and
 - (c) there were no grounds for finding the enfranchisement of the applicants' property to be arbitrary because of the terms of compensation. The requirements of the phrase "subject to conditions provided for by law" in A1P1 were satisfied in the circumstances of the taking.¹³⁴⁴
- (3) As to the deprivation of property and reasonableness in individual cases, the court concluded that it was not unreasonable for Parliament to determine that landlords generally should be deprived of the enrichment which would otherwise ensue on reversion of the property, even if in a number of cases 'undeserving' leaseholders thereby benefited. The operation of the legislation in practice and the scale of anomalies under it did not render it unacceptable under A1P1, nor did it place an excessive burden on the applicants, the Grosvenor Estate, over and above the disadvantageous effects for landlords generally.¹³⁴⁵

15.8 In legal terms, therefore, sufficient compensation is compensation at a level that falls within the Government's "margin of appreciation" so that the deprivation of the landlord's property is a proportionate interference with his or her right to peaceful enjoyment of property within A1P1. In order to be proportionate, the landlord needs to be provided with compensation – the premium. The premium need not be the full market value, but would normally involve a payment reasonably related to the value of the landlord's interest. It is at least implicit in this guidance that the further away the compensation payable is from the market value, the greater the justification that will be required.

15.9 Leaseholders may well argue that in assessing compensation their human rights ought to be taken into account. A1P1 does indeed do so. As set out at 15.7(2)(b) above, determining the level of compensation in accordance with A1P1 necessarily involves considering the interests of leaseholders and balancing those against the interests of landlords. Further, considering the interests of leaseholders necessarily plays a part in

¹³⁴² *James* (above), para 54.

¹³⁴³ *James* (above), paras 55 to 57.

¹³⁴⁴ *James* (above), para 67.

¹³⁴⁵ *James* (above), para 69.

determining what is in the general interest of society. Moreover, the right to the peaceful enjoyment of one's possessions enshrined in A1P1 is not confined to landlords; the right can be invoked equally by leaseholders. For example, in *Stretch v United Kingdom* the court held that there had been a violation of A1P1 where the applicant had been deprived of the benefit of a renewal of a commercial lease granted to him by a local authority.¹³⁴⁶ However, there is no specific right in the ECHR (beyond A1P1), which would be apposite to leaseholders in the context of enfranchisement premiums.

- 15.10 Article 8(1) of the ECHR provides that "everyone has the right to respect for his private and family life, his home and his correspondence". However, in *Harrow London Borough Council v Qazi*, Lord Hope of Craighead concluded that:

The context in which the reference to the person's "home" must be understood is indicated by the references in the same paragraph to his private and family life and to his correspondence. The emphasis is on the person's home as a place where he is entitled to be free from arbitrary interference by the public authorities. Article 8(1) does not concern itself with the person's right to the peaceful enjoyment of his home as a possession or as a property right. Rights of that kind are protected by Article 1 of the First Protocol.¹³⁴⁷

- 15.11 In *Malekshad v Howard de Walden Estates Ltd*, Sedley LJ, in considering the applicability of Article 8 to the 1967 Act, concluded that:

...a statute which limits a lessee's occupancy to the term of his lease cannot by itself offend against Article 8, if only because it is a plainly proportionate limitation of the Convention right to respect for his home in favour of the lessor's legal right to the reversion.¹³⁴⁸

- 15.12 The fact that a lease will come to an end on the expiry of the period of the lease, and the landlord is then entitled to the reversion, is inherent in the nature of a lease. The loss of the home in that way is not therefore contrary to Article 8. Equally, the need to pay for an extension of the lease, or to buy the freehold, to avoid that result, is not contrary to Article 8.

- 15.13 Ultimately, therefore, the matter comes down to a question of where, acting within its margin of appreciation under A1P1, the state decides to draw the balance between the landlord and the leaseholder in the premium the leaseholder pays for a lease extension or for the freehold.

- 15.14 Whether an interference with A1P1 is justified is fact-specific. It is not possible to say, without careful scrutiny, whether a measure reducing premiums would be held to be compatible with A1P1. It may depend not only on the premium payable, but on who is able to pay that price, on the qualification criteria, on the existence of different valuation bases for different properties (such as the retention of valuations under section 9(1)),

¹³⁴⁶ *Stretch v United Kingdom* (2004) 38 EHRR 12.

¹³⁴⁷ *Harrow London Borough Council v Qazi* [2003] UKHL 43 at [50].

¹³⁴⁸ *Malekshad v Howard de Walden Estates Ltd* [2001] EWCA Civ 761, [2002] 3 WLR at [49]. Whilst the decision of the Court of Appeal was reversed by the House of Lords, the argument based on Article 8 was not pursued before the House of Lords.

and the social policy objective that is being pursued. Given those variables, in setting out options for reform at this stage, it is not possible to say with any certainty whether particular options would be compatible with A1P1. In setting out options for reform we have not, at this stage, therefore, sought to assess their compatibility with A1P1. It will, however, be necessary fully to scrutinise any reform that is pursued.

15.15 Human rights considerations are not confined to the premium payable. In assessing proportionality, procedural protection is also significant.

15.16 Where an individual's property has been expropriated, there should be a procedure ensuring an overall assessment of the consequences of the expropriation, including the award of an amount of compensation in line with the value of the expropriated property, the determination of the persons entitled to compensation and the settlement of any other issues relating to the expropriation.¹³⁴⁹ Further, where the assessment of compensation is arbitrary, the European Court of Human Rights will usually find a breach of A1P1.¹³⁵⁰

15.17 Not only is there a need to achieve a fair balance in determining the price payable, there is also a need for balance in the process for determining that price. For example, the leaseholder seeking a lease extension may be the owner of only one flat, whereas the landlord will necessarily own the reversion to at least two flats and possibly many more. Where the premium is relatively modest, it is unlikely to be cost effective for the leaseholder to expend money seeking a determination from the Tribunal of the price payable rather than simply agreeing a price with the landlord, even if that price is higher than the Tribunal might ultimately determine. However, for a landlord with multiple properties and the potential for many more claims, even if the premium in an individual case is modest, it may be worth pursuing that case through the Tribunals and possibly through the courts rather than agree a price which sets an unhelpful precedent. This problem is arguably created or at least exacerbated by the cost of negotiating the premium and/or having it determined by the Tribunal, as set out below.

OVERARCHING CONSIDERATIONS FOR REFORM

Provision of a more consistent valuation methodology for all types of claim

15.18 The myriad of valuation provisions in the current law, particularly in relation to houses, is liable to create confusion for leaseholders as to which applies to them. The legislation could therefore be simplified if there was one valuation methodology applicable to all types of enfranchisement claim. That would save leaseholders from incurring professional costs determining which valuation method applies to them, and remove the risk of selecting the incorrect method (and potentially costly consequences that might follow from doing so).

15.19 As set out above, the approach to calculating the premium payable when acquiring the freehold of a house or flats or a lease extension of a flat, in all but section 9(1) of the 1967 Act, is broadly the same. Unless reform takes the form of one of the options set out below that involves a simple formula, a consistent valuation methodology based on

¹³⁴⁹ *Efstathiou and Michailidis & Cie Motel Amerika v Greece* (2006) 43 EHRR 491 at [29].

¹³⁵⁰ See, for example, *Kanala v Slovakia* (10/7/2007 ECtHR unreported) and *Papachelas v Greece* (2000) 30 EHRR 923.

sections 9(1A), 9(1C) of the 1967 Act and the 1993 Act could be introduced for all leaseholders across all types of claim.

15.20 We do not think that a single valuation methodology could, however, be used for all leaseholders of houses who currently benefit from the original valuation basis in section 9(1). As explained in Chapter 13, section 9(1) provides the most favourable valuation, but it would not be suitable to be adopted as the single method for all enfranchisement claims.¹³⁵¹ If a single method of valuation is introduced, then our Terms of Reference require us to consider an exception for those who might otherwise have benefited from section 9(1) as otherwise the premium would be increased for a great many leaseholders of houses. There are two ways in which an exception could be made: retaining section 9(1); or introducing an equivalent (but updated) provision.

Retention of section 9(1) or an equivalent provision

15.21 Section 9(1) could be retained in its current form either indefinitely or for a limited period of time by means of a sunset provision.

15.22 Alternatively, a new provision could be introduced aimed at providing a right to buy the freehold of a house at a price equivalent to that calculated in accordance with section 9(1), by simpler means. The rationale for simplification can be summarised as being (1) it is difficult to work out when section 9(1) applies; and (2) the valuation methodology under section 9(1) is not readily understandable.

15.23 As to (1), the applicability of section 9(1) or an equivalent provision could be determined by reference to capital value, council tax banding or the location of the property. Alternatively, the current provisions for determining whether section 9(1) applies, which relate to leases granted after 1 April 1990, could be used: see Figure 18.

Figure 18: ascertaining whether section 9(1) applies to leases granted after 1 April 1990

As originally drafted, the 1967 Act only granted enfranchisement rights to leaseholders of houses which were let at a “low rent” and had a rateable value falling within certain limits.¹³⁵² The “original basis of valuation” then applied to all houses which fell within the Act. As amendments to the Act were made, the number of houses falling within its scope were increased and different bases of valuation were introduced. The result is that, in order to benefit from the “original basis of valuation”, a house must meet the original qualification criteria, which (in part) were based on rateable values. As from 1 April 1990, however, domestic rateable values were abolished and therefore the original qualification criteria became unworkable for subsequently built houses. Consequently, a different test was introduced. The test, which applies to leases granted after 1 April 1990, is whether:

(1) the yearly rent payable is not more than £1,000 if the property is in Greater London and £250, if the property is elsewhere (which replaced the previous mechanism for establishing that the rent was low by reference to rateable values);¹³⁵³ and

¹³⁵¹ It is based on factors (such as rateable value) which are historic. In policy terms, the formula reflects the idea that the original lease was a building lease, so that the leaseholder had built the house; nowadays, most leases are granted of houses that have already been built.

¹³⁵² See para 14.79 and 14.80 above.

¹³⁵³ See para 7.30(1)(b) above.

(2) if the premium payable upon the grant of a lease was instead paid as an annual rent, that rent would be less than £25,000 per annum (which replaced the previous mechanism for establishing that the value of the house was low by reference to rateable values).¹³⁵⁴

15.24 As to the valuation methodology under section 9(1), analysis of a sample of section 9(1) claims suggests that a term and reversion valuation produces a premium roughly three times that produced under section 9(1). It is thought that replacing the valuation methodology under section 9(1) with a valuation based on term and reversion, for example term and reversion divided by three, would produce a simpler and more understandable methodology. For example, it would do away with the unrealistic assumption that the lease had been extended by 50 years and thereby remove the need to find the letting value of the site, without buildings and with a review at 25 years, in respect of which there are no comparables.

Consultation Question 107.

15.25 We invite the views of consultees as to:

- (1) whether the section 9(1) valuation methodology should be retained indefinitely or temporarily, and if so for how long; or
- (2) whether the section 9(1) valuation methodology should be replaced with a fixed proportion of a “term and reversion” valuation or another simplified methodology; and
- (3) whether the test for whether section 9(1) (or a simplified methodology) applies should be determined:
 - (a) by reference to capital value;
 - (b) by reference to council tax banding;
 - (c) by reference to the location of the property;
 - (d) by reference to an amended version of the current test for leases granted after 1 April 1990 (in other words, calculating “R” under section 1(1)(a)(ii) of the 1967 Act); or
 - (e) by some other means.

Creation of a separate regime for low value cases

15.26 Whilst a consistent regime has the advantage of simplicity, there are obvious difficulties in a “one size fits all” approach. In particular, in many lease extension claims the freehold vacant possession value of the flat, the length of the unexpired term of the lease and/or the level of ground rent are such that the premium payable for a lease

¹³⁵⁴ See para 7.50(2) above.

extension is modest. In such cases, the professional costs incurred in enfranchisement may exceed the premium.

15.27 Some stakeholders have therefore suggested that a separate regime should be applicable to low value – or straightforward – claims. Such an approach can be found in Scottish legislation, as to which see Figure 20 below.

15.28 The need for a separate approach for low value claims is dependent on the general approach taken to valuation. If one of the simple formulae – set out under Option 1 below – is adopted for all claims, then the need to separate low value (or straightforward) claims falls away. If any other option is adopted, however, then separating low value claims merits consideration.

Consultation Question 108.

15.29 We invite the views of consultees as to:

- (1) whether a separate, simplified valuation regime should be created for low value and/or straightforward enfranchisement claims; and
- (2) how such low value and/or straightforward claims should be identified.

Differential pricing for different types of leaseholder

15.30 The original policy intention behind the introduction of enfranchisement rights was to enable people to extend the lease or buy the freehold of their homes. But as we have seen in Chapter 2, enfranchisement rights are no longer confined to occupying leaseholders.¹³⁵⁵ Nowadays, the leaseholders who exercise enfranchisement rights take many different forms, including homeowners, buy-to-let investors and developers.

15.31 In Chapter 8 above, we considered whether it would be desirable for commercial investors to be excluded from any new enfranchisement regime and, if so, how this might be achieved. We formed the provisional view that it would be very difficult to achieve such a result, but asked consultees to share with us their views on this issue.

15.32 An alternative means of limiting the extent to which commercial investors can benefit from enfranchisement rights could be for the premium which they must pay to be set differently from that payable by owner-occupiers. For example, different valuation formulae could be adopted for different types of leaseholder so as to produce more favourable premiums in cases where the right to enfranchise is being used for its original purpose – to enable a person to extend the lease or purchase the freehold of his or her own home. If a valuation methodology involving the use of rates were to be adopted, and those rates were to be prescribed (as to which, see paragraphs 15.68 to 15.78 below), differentiation between different types of leaseholder could be achieved by the setting of different prescribed rates.

¹³⁵⁵ This is primarily as a result of the removal of the residence requirement in 2002 (see Ch 2, paras 2.23 to 2.26).

15.33 Indeed, depending on how Government chooses to reform valuation, distinguishing between different types of leaseholders when calculating premiums might be one means of ensuring continued compliance with human rights obligations. As we explain at paragraph 15.6 above, the exercise of enfranchisement rights engages a landlord's rights under A1P1 to the ECHR. In determining whether Government is acting within its margin of appreciation in interfering with a landlord's A1P1 rights, the social policy objective being pursued is relevant. It might be argued, for example, that the aim of enabling people to exercise enfranchisement rights in relation to their homes could justify a lower premium payable to a landlord than a policy which enables an investor to buy a lease extension or to buy the freehold of an investment property. So, if Government chooses a valuation methodology which produces a premium falling within the Government's margin of appreciation regardless of the identity of the leaseholder, then there may be no merit in drawing a distinction between different types of leaseholder. But if, in order to benefit homeowners, Government wished to lower the premium payable for enfranchisement to a level that would not be justified for any other type of purchaser, then this kind of differentiation might be essential.

15.34 That said, there are a number of arguments which lean against differentiating between leaseholders when calculating premiums. The obvious difficulty is the same as that discussed at Chapter 8 above in relation to excluding commercial investors from enfranchisement rights altogether: how might one determine which leaseholders should qualify for a more favourable valuation? One possibility would be to adopt the approach of Stamp Duty Land Tax, which provides a discount for first-time buyers (of properties up to a certain value). In terms of our proposed scheme, a more favourable valuation might be available to a person exercising enfranchisement rights for the first time (or perhaps also subsequently, provided they no longer own the property which was the subject of the first enfranchisement). Another option would be to adopt the approach of Capital Gains Tax, which provides relief in respect of private residences, where a person has lived in a property as their only or main home (along with various other conditions). Our scheme could provide that a more favourable valuation is available to leaseholders identified along similar lines. This approach is appealing because it focusses on owner-occupiers specifically.

15.35 And even if the appropriate delimitation could be made, we foresee the following difficulties with any two-tier valuation scheme.

- (1) First, it undoubtedly adds a layer of complexity to the law: two methodologies are needed, and it will be necessary on every enfranchisement claim to identify which valuation is applicable to the particular leaseholder involved. This is likely to increase the scope for landlords and leaseholders to disagree. Our review of enfranchisement law is intended to make the process simpler for all parties and reduce the possibility of disputes. To introduce new complexities runs directly counter to that aim.
- (2) Secondly, it may be argued that the approach is unfair on landlords. The lease extension or freehold being purchased is the same, regardless of the identity of the leaseholder. From a landlord's perspective, it may be difficult to justify a scheme under which premiums should differ depending purely on the identity of the leaseholder. Indeed, the very existence of a two-tier scheme explicitly recognises a policy of private compulsory purchase by commercial investors. The

social justification for the existence of enfranchisement rights – on which the decision of the European Court of Human Rights in *James* was based – is not so readily applicable to these leaseholders. It may therefore be difficult to justify the exercise of enfranchisement rights under the less favourable valuation basis in relation to A1P1.

- (3) Thirdly, the existence of two different valuation methodologies might distort the market. It may encourage a practice of landlords refusing to grant leases, or refusing consent to assign existing leases, to owner-occupiers, in order to ensure that leaseholders do not benefit from the lower valuation methodology. Alternatively, potential owner-occupiers might be expected to pay more than investors to purchase the same flat, to reflect the fact that the cost to them of exercising enfranchisement rights will be lower. And even if investors do not themselves directly benefit from a more favourable valuation, they might realise (at least a proportion of) the financial benefit of that more favourable valuation by selling their flat at a higher price to an owner-occupier – a new type of hope value.

15.36 We seek consultees' views as to the desirability of differentiating between leaseholders when setting premiums, and, if so, the mechanism by which this could be achieved.

Consultation Question 109.

15.37 Do consultees consider it desirable to seek to treat commercial investors differently from owner-occupier leaseholders in respect of the premium payable for the exercise of enfranchisement rights?

15.38 If so:

- (1) do consultees consider that it might be possible to distinguish between such leaseholders:
 - (a) by reference to whether the leaseholder is exercising enfranchisement rights for the first time;
 - (b) by reference to whether the leaseholder is exercising enfranchisement rights in respect of his or her only or main home; or
 - (c) by some other means?
- (2) how might the valuation methodology be varied so as to produce different premiums for different types of leaseholder?

Prescribing rates

15.39 As we have seen, valuation often involves the use of rates to determine capitalised or deferred capital sums, and for relativity. Identifying the appropriate rates can be contentious. The rate used can make a significant difference to the premium that will be paid. In addition, professional costs are incurred. Any option for reform that continues the need for these rates could be combined with putting in place a process for

prescribing the rates. The rates could then be prescribed in a manner favourable to leaseholders, so that premiums are reduced. In addition, leaseholders and landlords would benefit from saving professional costs.

OPTIONS FOR REDUCING PREMIUMS

15.40 Our options for reducing premiums are divided into two categories:

- (1) the adoption of simple formula; and
- (2) options based on current valuation methodology.

Option 1: simple formula

15.41 It would be possible for enfranchisement premiums to be set by reference to a simple formula with prescribed figures.

15.42 Current valuation methodology seeks to arrive at a market value.¹³⁵⁶ Examining market value will inevitably involve variables, and therefore uncertainties, and associated professional fees. Indeed, we think that it would be impossible to come up with a valuation approach that is based on market value, but at the same time is calculated solely by reference to prescribed figures. A simple formula, using prescribed figures, would move away from market value. The difficulty of doing so, however, is that the premium payable is less likely to reflect the actual value of the asset being taken from the landlord, presenting an increased risk of the approach not providing sufficient compensation and being challenged by landlords on human rights grounds.

15.43 As set out above, the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under A1P1. Further, while A1P1 does not guarantee a right to full compensation, the level of compensation payable must not be so inflexible as to fail to take into account substantially different situations. For example, in *Kelsall* the Administrative Court found that the compensation scheme under the Fur Farming Prohibition Act 2002 did not comply with A1P1 as it operated unfairly between the different farmers by not taking into account the differing values of premium breeds.¹³⁵⁷

15.44 In *Papachelas v Greece*, the European Court of Human Rights found that a presumption which applied to the calculation of compensation for compulsory purchase contravened A1P1.¹³⁵⁸ This presumed that landowners who adjoined major roads derived benefit from them and should be required to contribute towards their cost. Therefore, where part of the land expropriated was used to build a road, the landowner's contribution towards the cost of the road was set off from the compensation. The Court held that the presumption was "too inflexible and takes no account of the diversity of the situations",

¹³⁵⁶ That is the case with many other similar statutory valuation approaches, for example, in compulsory purchase, although they may have nuances and different ways (and different assumptions) to ascertain market value.

¹³⁵⁷ *R (Kelsall) v Secretary of State for Environment, Food & Rural Affairs* [2003] EWHC (Admin) 459, [2003] ACD 53.

¹³⁵⁸ *Papachelas v Greece* (1999) 30 EHRR 923.

especially as there was no right for the landowners to challenge the presumption. The presumption created a “burden that was individual and excessive”.

Option 1A: ground rent multiplier

15.45 It would be possible to calculate the enfranchisement premium by reference to the ground rent. A Private Members’ Bill has highlighted the possibility of this approach. At its first reading the Bill was described in the following way:

The Bill’s first aim is to introduce a simple and fair scheme, with a clear and transparent statutory pricing model, and the amount for a leaseholder to purchase their freehold would be capped at no more than 10 times the annual ground rent. At the moment, leaseholders are often quoted costs of over 100 times the ground rent to purchase the freehold. We can change this: such a system already exists in many other countries, including Scotland and Northern Ireland, and I believe it is time that people in England and Wales had the same rights.¹³⁵⁹

15.46 The effect of using a ground rent multiplier on the valuation of premiums for Flats A and B in Chapter 13 is set out in Figure 19.

Figure 19: valuation of premiums for Flats A and B if ground rent multiplier of 10 is used

The premium for Flat A would reduce from £3,918 to £2,500.

The premium for Flat B would reduce from £26,042 to £2,500.

15.47 Basing a premium on (say) ten times current, or average, ground rent has a number of obvious attractions.

- (1) The valuation approach would be simple and, in many (but not all) cases premiums would be reduced. The ground rent is easily ascertainable in the majority of cases – all a leaseholder needs is a copy of his or her lease, which will specify the ground rent. This becomes slightly more complicated where there are ground rent reviews or where the ground rent is to be determined as a percentage of capital value, for example. If a multiplier were based on current ground rent only, then a recent ground rent demand ought to provide clarity as to what is payable in the event this cannot be easily ascertained from the lease. However, ignoring rent reviews would lead to greater disparity between the price payable on enfranchisement and market value, as to which, see below.
- (2) Once the ground rent is known, the calculation is simple. It can be carried out by the leaseholder without any professional help and there is very little, if any, room for dispute. Consequently, the leaseholder can be certain as to what the price will be and need incur no costs in ascertaining it or agreeing it with the landlord.
- (3) The resulting price will not reflect the market value of the interest being acquired. It will therefore be largely artificial and will still affect the value of short leases in the market. However, it requires no hypothetical assumptions to be made and those short lease values will have no impact on premiums payable.

¹³⁵⁹ *Hansard* (HC), 7 November 2017, vol 630, col 1384. The second reading of the Bill is scheduled for 26 October 2018.

Consequently, it avoids the problems identified above under the heading “artificiality” in Chapter 14.

- 15.48 We understand from stakeholders that developers themselves sometimes use a multiplier of ground rent as the basis for offering to sell the freehold of a house both through an informal enfranchisement, and when freeholds are sold to other investors. The multipliers offered (even in relation to the same house) vary, sometimes significantly, over time. We understand, however, that the multiplier is likely to be based on the lease characteristics, in particular, the rent review mechanism, comparable evidence and an interpretation of current investor bidding and market sentiment, which may explain why the multipliers vary over time.
- 15.49 The difficulties with this approach are, first, that it excludes from the enfranchisement premium any reversionary value, which may be substantial, and secondly, even where there is no reversionary value, the level of ground rent is largely arbitrary, meaning that the resulting premium upon enfranchisement would be arbitrary. Unlike rents under assured tenancies, for example, the ground rent under a long lease is not set by the market. Further, whilst the landlord may have extracted a large premium on the grant of a lease in return for a low ground rent and vice versa, there is not necessarily a correlation between the premium paid and the ground rent payable. Indeed, unsuspecting leaseholders may well find that they have paid a large premium for a lease which provides for the payment of a large ground rent. In any event, the ground rent may bear no relation to the capital value of the property.
- 15.50 Historically ground rents have been low figures: £100 per annum, for example. However, over the last decade pension funds, insurance companies and some unit trusts have moved into the market to purchase high quality, recently developed property, let to leaseholders on long terms with index linked ground rents thus creating a demand amongst landlords for such ground rents.¹³⁶⁰ Further, there has been a great deal of publicity recently in relation to leases being granted subject to very onerous ground rents.¹³⁶¹ If the ground rent is multiplied by a set figure, not only is no account taken of any reversionary value, no account is taken of the length of the lease or the nature of the ground rent and its attractiveness to the market. The arbitrary outcome is demonstrated by the valuations for Flats A and B set out in Figure 19 above. The enfranchisement premium for both is the same, despite the length (and therefore value) of the two leases being very different. Consequently, a premium based solely on the ground rent will bear no relation to the value of landlord’s asset unless there is no reversionary value, and even then it might not do so.
- 15.51 Not only does a ground rent multiplier which takes no account of lease length create unfairness to landlords, it also creates unfairness as between leaseholders. Take a two-bedroom leasehold house that was recently for sale in Belgravia, London at a price of £2.65million. The lease had 62 years left to run and the ground rent was a peppercorn. By contrast, in Chelmsley Wood, Birmingham a three-bedroom property leasehold house was on the market for £75,000. The lease had 80 years left to run and the ground rent was £1,650 per annum, subject to review at 25-year intervals. Whilst the asking

¹³⁶⁰ As found by the First-tier Tribunal in *St Emmanuel House (Freehold) Limited v Berkeley Seventy-Six Limited* CH/21UC/OCE/2017/0025.

¹³⁶¹ The example at Figure 22 below is of the terms of a lease granted by developers Taylor Wimpey.

prices no doubt took into account, to a certain extent, the respective lease lengths and ground rents, the potential inequity of a ground rent multiplier is nonetheless apparent. If the premium to purchase the freehold of a house were set at 10 times the current ground rent, the leaseholder of the high value house with a relatively short lease in Belgravia will pay 10 peppercorns; that is, nothing, whilst the leaseholder in the West Midlands with a longer lease will pay £16,500, nearly a quarter of the property's capital value.

15.52 As regards A1P1, it might be difficult to justify a ground rent multiplier. First, the results illustrated above arguably do not achieve greater social justice, in a way that would justify a payment of compensation that is not based on market value. Second, the calculation of compensation is arguably too inflexible to take into account substantially different situations.

15.53 We think that there may be scope for using a simple multiplier (or for a multiplier based on a capitalisation rate, which could be prescribed and changed over time) in cases where there is no reversionary value to a lease. This could be done, for example, by adopting provisions similar to those of the Long Leases (Scotland) Act 2012 or by using the rentcharge redemption formula: see Figure 20.

Figure 20: multipliers in Scottish legislation and in rentcharge redemption legislation

The Long Leases (Scotland) Act 2012 provided for the automatic conversion of certain leasehold interests into outright ownership. The compensation payable to landlords under that Act was based on a capitalised amount of annual rent.¹³⁶² However, the Long Leases (Scotland) Act 2012 only applied to leases granted for more than 175 years, with more than 100 years left to run, in respect of houses, and more than 175 years left to run, otherwise.¹³⁶³ In other words, the qualifying leases had little or no reversionary value. Further, the Act only applied where the annual rent was less than £100.

A rentcharge is an annuity secured on some specified land. The Rentcharges Act 1977 allows the owner of land which is subject to a rentcharge to redeem it by paying an equivalent capital sum to the owner of the rentcharge. The sum payable is calculated according to a formula set out in the Rentcharges (Redemption Price) (England) Regulations 2016. Rentcharges have no reversionary value and so their capital value simply decreases over the course of their term.

15.54 The calculation of compensation under the Long Leases (Scotland) Act 2012 and the rentcharges formula are analogous to a ground rent multiplier. However, they both apply to interests which have no reversionary value and the calculation uses what can be described as “market” rates. Consequently, the interests being valued lend themselves to a simple formula, and the figure produced is more reflective of a market value than that produced if a multiplier of ground rent was used in all cases. However, under the current law, the calculation of the premium in respect of an existing lease with no reversionary value is relatively simple: it is the capitalised value of the ground rent. If a capitalisation rate was prescribed and an online calculator was provided, as to which see below, then the existing valuation provisions could be made as accessible and as

¹³⁶² Long Leases (Scotland) Act 2012, s 47. The amount is calculated by reference to the sum which, if invested in a 2.5 consolidated stock before the conversion date, would produce the rental amount due under the lease.

¹³⁶³ Long Leases (Scotland) Act 2012, s 1.

easy to apply as the provisions of the Long Leases (Scotland) Act 2012 and the Rentcharges Act 1977.

Option 1B: set percentage of freehold value

15.55 An alternative way to calculate the price payable, yet still on the basis of a simple formula, would be to set the price as a percentage of the capital value of the property. For example, the premium could be set at 10% of the capital value of the flat or house. This approach could have the advantage of being simple and cost effective depending on how the capital value is to be ascertained.

15.56 The value used could be the value of the leasehold interest itself, using sale/asking prices to determine the value. The difficulty with taking sale/asking prices is that those prices reflect, among other things, the length of the lease. Accordingly, a premium based on a percentage of the value of the leasehold interest would *reduce* as the length of the lease reduces, when in those circumstances the premium ought to *increase*. This problem could be solved by using a percentage of the capital value of the freehold. The effect of using, for example, 10% of freehold value on the valuation of premiums for Flats A and B is set out in Figure 21.

Figure 21: valuation of premiums for Flats A and B if 10% percentage of capital value is used

The premium for Flat A would increase from £3,918 to £20,000.

The premium for Flat B would reduce from £26,042 to £20,000.

15.57 As can be seen, such an approach could actually increase premiums and would therefore be contrary to our Terms of Reference. In any event, the premiums do not reflect the different lease lengths or any difference in the ground rent payable. Consequently, landlords would be likely to challenge such an approach on the basis that the level of compensation is inflexible, and does not provide sufficient compensation in respect of the landlord's interest. If this option is taken forward, careful consideration will be needed to determine the circumstances in which it is considered to provide sufficient compensation.

Option 2: options based on current valuation methodology

15.58 Our second set of options for reducing premiums involve components of the existing valuation methodology. In order to set out these options, it is necessary first to explain the possible reforms to the key current valuation components, and then to consider how some or all of these reforms may be combined.

Valuation components

(1) Ground rent

15.59 Provision could be made in relation to the treatment of ground rent in any valuation in order to simplify the calculation, and also reduce the overall premium.

15.60 In what is thought are likely to be the majority of leases, the ground rent will be a low sum, which is easily ascertainable. Providing for such a ground rent to be capitalised (rather than simply multiplied, as in Option 1A) is not a particularly difficult concept or complicated calculation and an online calculator could provide the answer (if the

capitalisation rate is set). Consequently, in relation to leases under which the ground rent is low, fixed and ascertainable, we think that that ground rent can be taken into account in calculating the enfranchisement premium.

- 15.61 Where there are ground rent reviews, the treatment of ground rent becomes slightly more complicated: first, the value of the reviewed rent to the landlord is deferred; second, the quantum of the reviewed rent might not be known (for example, if it is based on an index or the value of the property at the time); third, the review mechanism might change the appropriate capitalisation rate. In order to simplify the treatment of ground rent where there are reviews, a limit could be placed on the number of ground rent reviews which are to be taken into account when calculating premiums. Whilst calculating an average ground rent for the remainder of the term would be an alternative option, not only would this be more difficult to do, it would place disproportionate weight on any future higher ground rent payable.
- 15.62 Some leases provide for the ground rent to be, for example, £100 for the first 25 years, £150 for the next 25 years and £200 for the remainder of the term. In other words, the ground rent is reviewed to a fixed amount. Other leases provide for the ground rent to double every 25 years, for example, which is a review based on a prescribed formula (rent x 2). However, in some leases the reviewed rent is not so easily ascertainable. For example, the ground rent might be linked to the Retail Prices Index or to the capital value of the property.
- 15.63 Where a rent is linked to an index, it is possible to estimate the future value of that rent as that is what ground rent investors are currently doing in the market. However, the calculation is fairly sophisticated and not one which leaseholders could be expected to do themselves, although it may be possible to overcome this difficulty with the assistance of an online calculator.
- 15.64 Where the rent is to be reviewed to a percentage of capital value, it could be provided that it is to be treated as being reviewed to a percentage of the current capital value, which is what currently happens in practice.
- 15.65 The ground rent to be taken into account could, in any event, be capped. For example, it could be capped in line with Nationwide Building Society's new lending policy, at 0.1% of the property's value.¹³⁶⁴ This would reduce premiums in certain cases, particularly where the ground rent is onerous. Consequently, it would help leaseholders currently liable to pay onerous ground rents to buy out those ground rents at a more reasonable price. Further, it could also simplify the calculation of premiums based on such ground rents.
- 15.66 The effect of the approaches set out above are demonstrated in Figure 22.

¹³⁶⁴ <https://www.nationwide.co.uk/about/media-centre-and-specialist-areas/media-centre/press-releases/archive/2017/5/05-protect-homeowners>.

Figure 22: Capitalised ground rent for House C

Details of existing lease:

Unexpired term: 241.5 years

Ground rent: £295 per annum doubling on 1 January 2020 and every 10 years thereafter until 2060

Freehold value: £400,000

(1) If the rent for the remainder of the term is capitalised at a rate of 4.5%, as it might be in any valuation at present,¹³⁶⁵ the capitalised ground rent payable would be £60,758;

(2) The average ground rent over the term is £7,917.80. If this were capitalised at the same rate of 4.5%, the capitalised ground rent payable would be £175,947;

(3) If only the first rent review on 1 January 2020 were taken into account, at which point the ground rent rises to £590, the ground rent capitalised at the same rate of 4.5%¹³⁶⁶ would total £12,692; and

(4) If the ground rent were capped at 0.1% of the freehold value at the valuation date (in other words, the current ground rent of £295 remained payable until 31 December 2019, but it is assumed that from 1 January 2020 the ground rent payable for the remainder of the term is £400 (0.1/100 x £400,000), at the same rate of 4.5%¹³⁶⁷ the capitalised ground rent would total £8,740; and

(5) If, instead of doubling, the ground rent were reviewed every ten years for the remainder of the term in line with the Retail Prices Index (RPI), at the same rate of 4.5% the capitalised ground rent would total £8,352.¹³⁶⁸

Consultation Question 110.

15.67 We invite the views of consultees as to whether the treatment of ground rent reviews in any valuation methodology should be restricted in any of the ways set out at paragraphs 15.59 to 15.66.

¹³⁶⁵ The selection of the capitalisation rate has a huge impact on the premium. For example, if instead a capitalisation rate of 6.5% were used, the capitalised ground rent would be £28,071. We noted above that capitalisation rates were commonly agreed at between 5% and 7%, but that in a recent Tribunal decision, a rate of 3.35% was adopted: para 14.98 above. We have adopted the figure of 4.5% as falling within that range. In an enfranchisement claim, there are likely to be arguments that the rate should be either higher or lower. Standardisation of capitalisation rates, as we discuss throughout this chapter, would avoid those arguments. We emphasise that we use the rate of 4.5% purely for illustrative purposes. The examples allow us to provide comparisons between different options for reform.

¹³⁶⁶ If only one rent review were taken into account then a higher capitalisation rate would be appropriate, which would further reduce the capital sum. However, to illustrate the effects of the different treatment of ground rent alone, the same capitalisation rate has been applied.

¹³⁶⁷ As above, a higher capitalisation rate would be appropriate in respect of a capped ground rent.

¹³⁶⁸ This calculation follows a conventional approach of assessing the first review rent based on current RPI and then capitalising that amount at an appropriate rate for the remainder of the term.

(2) Capitalisation rates

15.68 It ought, in theory, to be possible to prescribe a capitalisation rate or rates. For example, rates could be set by a committee, which met periodically to determine the rate or the prescribed rate could track some other rate of return such as the Bank of England base rate. If rates were prescribed, the valuation process would be simplified; leaseholders and landlords would not need recourse to specialist advice as to the appropriate capitalisation rate; and inconsistent valuations and costly and lengthy disputes could be avoided.

15.69 Prescribing a capitalisation rate could also be used to reduce premiums: a lower capitalisation rate produces a higher capital value and vice versa. Consequently, if the prescribed rates were higher than those generally used at present, the premium payable on enfranchisement would go down: see Figure 23.

Figure 23: Capitalised ground rent at 5.5% rather than 4.5% for House C¹³⁶⁹

(1) Calculated in accordance with current practice, the capitalised ground rent payable would reduce from £60,758 to £40,142;

(2) The capitalised average ground rent would reduce from £175,947 to £143,960;

(3) The capitalised ground rent taking into account only the first rent review would reduce from £12,692 to £10,313;

(4) The capitalised ground rent capped at 0.1% of the property's value would reduce from £8,740 to £7,125; and

(5) The capitalised RPI linked ground rent would reduce from £8,352 to £6,813.¹³⁷⁰

15.70 The difficulty with prescribing rates is that the appropriate capitalisation rate would ordinarily vary between locations, properties and over time according to various factors. In many cases the appropriate capitalisation rate will be reasonably standard and a change of one or two percentage points to the rate will make little difference to the resultant value. However, even if there were more than one prescribed rate, there are likely to be cases where the applicable prescribed rate does not reflect the market rate and (depending on the level at which they are set) may result in premiums that are detrimental to both landlords and leaseholders.

¹³⁶⁹ As in Figure 22 above, for illustrative purposes, the same rate of 5.5% has been applied throughout, although a higher capitalisation rate would be appropriate if there was only one review or the ground rent was capped on review.

¹³⁷⁰ As in Figure 22, this calculation follows a conventional approach of assessing the first review rent based on current RPI and then capitalising that amount at an appropriate rate for the remainder of the term.

Consultation Question 111.

15.71 We invite the views of consultees as to whether capitalisation rates for enfranchisement valuations should be prescribed and, if so:

- (1) how;
- (2) by whom;
- (3) how often; and
- (4) in respect of what different types of interest.

(3) Deferment rates

15.72 In effect, the deferment rate has been prescribed since the decision in *Sportelli*.¹³⁷¹ However, it is still subject to dispute, particularly in respect of properties outside London, and before long it may be argued that changes in the market since the decision in *Sportelli* justify the issue of the deferment rate being revisited as a whole. Consequently, prescribing a deferment rate ought to simplify the valuation process and, again, can be used as a way of reducing premiums.

15.73 A higher deferment rate produces a lower premium and vice versa. Consequently, if the prescribed rate was higher than that determined in *Sportelli*, the premium payable on enfranchisement would go down. For example, the price payable for the reversionary interest in Flat B at Figure 13 in Chapter 14 (freehold vacant possession value £200,000 and 60 years remaining on the lease) at the *Sportelli* rate of 5% was shown to be £10,707. If that rate were increased to 6% the price would go down to £6,063. As to the effect on the premium as a whole see Figure 29 below.

15.74 A single deferment rate could be prescribed, or alternatively it might be appropriate for rates to vary according to the location of the property or the length of the lease.

¹³⁷¹ *Earl Cadogan v Sportelli* [2010] 1 AC 226, a case which concerned property in Prime Central London and in which, as considered in Ch 14 at para 14.48, the Lands Tribunal directed the determination, as a preliminary issue, of the “proper deferment rate to be applied”. In deciding that preliminary issue, the Tribunal found that the deferment rate for leases with at least 20 years unexpired could be calculated from the addition of a “risk-free rate” of 2.25% and a “risk premium” of 4.5% with a deduction for capital growth, “the real growth rate”, of 2% to produce a generic rate of 4.75% for houses.

Consultation Question 112.

15.75 We invite the views of consultees as to whether deferment rates for enfranchisement valuations should be prescribed and, if so:

- (1) how;
- (2) by whom;
- (3) how often; and
- (4) in respect of which geographical areas.

(4) Relativity/“no Act” deduction

15.76 Relativity could be prescribed. If it were, arguments as to the appropriate graph or the appropriate discount to be applied to reflect the effect of the Act would be avoided and the artificiality arising from the lack of “no Act building” comparables would become irrelevant. The argument that leases are devalued by lack of rights could also be avoided. As with capitalisation and deferment rates, relativity could be set so as to reduce premiums.

Figure 24: effect of relativity on premiums

For example, in *Kosta*, the lease of the house had 52.45 years remaining.¹³⁷² The freehold value of the house was £16,138,743. The landlord’s valuer’s opinion of relativity was 76%, which was based on the Gerald Eve graph. This led to an enfranchisement premium of £2,763,890. The leaseholder’s valuer adopted a relativity of 86.39% based on what was to become known as the Parthenia model. This produced an overall premium of £1,925,521. In other words, a ten-percentage point increase in relativity led to around a 30% reduction in the premium.

15.77 The 80-year cut off in respect of marriage value could also be removed. For the rationale for this cut-off and the criticisms of it see paragraph 14.60 above. If relativity or a no Act deduction were prescribed, the time and expense of calculating marriage value would be reduced, possibly to such an extent that the cut-off is no longer justified and removing the cut-off would address the problems it causes. Whilst removing the cut-off alone would increase premiums for some leaseholders with leases with more than 80 years remaining, the effect of this could be off-set by the level at which relativity is prescribed and doing so arguably produces a fairer result for landlords.

15.78 In a collective freehold acquisition claim it would also be possible to include hope value based on a further standardised graph reflecting the discount to be applied to marriage value to reach hope value.

¹³⁷² *Kosta v Carnwath (re 47 Phillimore Gardens)* [2014] UKUT 319 (LC).

Consultation Question 113.

15.79 We invite the views of consultees as to whether relativity or a no Act deduction should be prescribed for enfranchisement valuations and, if so:

- (1) how;
- (2) by whom;
- (3) how often;
- (4) in respect of which geographical areas; and
- (5) whether the 80-year cut-off should be removed.

(5) The non-participants' share of the premium, including hope value

15.80 In Chapter 6 above, we have provisionally proposed a new power for leaseholders exercising the right of collective freehold acquisition to insist, if they so choose, that the freeholder take a leaseback or leasebacks of any parts of the premises (other than common parts) which are not let to participating leaseholders.¹³⁷³ As set out in that Chapter, if this proposal were to be adopted it would enable leaseholders significantly to reduce the premium payable, since the freeholder will be retaining a substantial interest in those parts.

15.81 Further, if a freeholder is required to take a leaseback of a non-participating flat, he or she would be entitled to the premium payable by the non-participating leaseholder of that flat upon any subsequent lease extension claim by that leaseholder, or in any further collective freehold acquisition claim in which that leaseholder participates. In other words, on the original collective freehold acquisition claim, the participating leaseholders would not be required to compensate the freeholder for the loss of the prospect of receiving marriage value as part of that premium – the hope value – in future.

(6) Discount for the risk of holding over

15.82 Whilst, in theory, removing any discount to reflect the risk of the leaseholder holding over at the end of the lease will increase the premium payable, in practice this may make little difference, other than to simplify the valuation. If the leaseholder has a right to hold over after the lease has come to an end, then this will most commonly be under an assured tenancy at a market rent pursuant to schedule 10.¹³⁷⁴ Further, where this is the case the discount is arguably nil. However, calculating a discount is generally arbitrary and can lead to disputes.

¹³⁷³ See paras 6.129 to 6.132.

¹³⁷⁴ See para 14.40 above.

Consultation Question 114.

15.83 We invite the views of consultees as to whether the possible right to hold over at the end of a long lease should be disregarded on an enfranchisement valuation.

(7) Discount for leaseholder's improvements

15.84 As the purpose of this discount is to prevent the leaseholder having to pay a price which reflects a value in the property for which he has already paid, it is arguably inequitable to the leaseholder not to allow a discount to be made on this basis. However, as the discount is going to be case specific, it would not be possible to prescribe it. There are therefore two options:

- (1) retain the current position which is that the value of the long lease to be taken into account in the valuation is the unimproved value of the long lease; or
- (2) remove the discount, thereby eradicating disputes in relation to it. As the leaseholder can make a claim at a date of his or her choosing (which is obviously more difficult to do in the case of a collective freehold acquisition), he or she could choose to make a claim before carrying out works of improvement.

15.85 To avoid any artificial depreciation of the property's value, for example by gutting it prior to making a claim, provision ought to be made for the property to be valued on the basis that it has been repaired in accordance with the terms of the lease. This is in effect what happens under the present provisions as what is being valued is that landlord's interest, which includes the right to enforce the lease covenants.

Consultation Question 115.

15.86 We invite the views of consultees as to whether a discount for leaseholder's improvements on an enfranchisement valuation should be retained.

(8) Development value

15.87 Development value could be excluded by providing that any enfranchised property is to be subject to a restriction against development, which is protected on the register. This need not necessarily preclude the leaseholders taking free of the restriction through negotiations with the landlord. However, those negotiations could take place outside of the statute with there being no jurisdiction for the Tribunal to determine a dispute in default of agreement. In other words, the development value could be negotiated and paid for as it would in the real world and in default of agreement, the restriction would remain.

15.88 The landlord who was intending to develop would lose any profit that he was expecting to make. However, he or she could be compensated in respect of sums actually expended in anticipation of being able to develop, including any additional sum the landlord himself or herself may have paid for the property which was referable to the

prospect of being able to develop. He or she would then have the opportunity to invest these sums and make a profit elsewhere, whilst retaining the value of the restriction over his or her original property.

15.89 In order not to stymie development for all time and for all purposes, it would need to be possible for leaseholders to obtain a release of any restriction. If the restriction were released then the landlord ought to be compensated at that stage. Consequently, the restriction would, in effect, be a personal covenant with the landlord and thought would have to be given to whether its benefit ought to be capable of being, and could be, transferred.

15.90 Any restriction on development ought not to place a leaseholder in any worse position than he or she is under in his or her existing lease and, therefore, any provision ought to be subject to this caveat.

Consultation Question 116.

15.91 We invite the views of consultees as to whether it should be possible for leaseholders to elect to accept a restriction on development to prevent development value from being payable as part of an enfranchisement valuation.

Option 2A: term and reversion

15.92 The price payable on enfranchisement could be limited to the value of the term and reversion only. In other words, the requirement to pay marriage value, or in a collective enfranchisement claim, hope value or any other additional value, including development value, could be removed altogether. Compensation would then be based on what the landlord would receive if the lease ran its course: the capitalised ground rent and the deferred freehold value, but no marriage, hope or additional value. That is the minimum that an investor, bidding in the market, would pay the landlord to purchase his or her interest.¹³⁷⁵ Using the analogy in Chapter 14, it is the equivalent of one of the Chinese vases being smashed. The holder of the other vase still has the vase, but the value of that vase has been reduced as there is no longer any additional value referable to the possibility of it being reunited with its pair.

15.93 This approach would not only reduce the premiums payable by leaseholders with less than 80 years left to run on their leases,¹³⁷⁶ it would also simplify the valuation process and thereby reduce professional fees. Relativity (or a deduction for Act rights) is arguably the most difficult element of the valuation to calculate and, therefore, prescribe. If marriage value were no longer payable, the need to calculate relativity (or an Act rights deduction) would fall away. However, if a term and reversion valuation were adopted for all claims, then house owners who would have previously benefited from a section 9(1) valuation would end up paying more. Consequently, it would be contrary to

¹³⁷⁵ An investor may pay hope value, in addition to the value of the term and reversion, to reflect the hope of being able to do a deal with the leaseholder to release the full marriage value.

¹³⁷⁶ Leases with more than 80 years left to run are not required to pay marriage value in any event.

our Terms of Reference to propose a term and reversion valuation alone should replace section 9(1) valuations.

15.94 Not only would abolishing marriage value reduce the premium in respect of leases with less than 80 years remaining, it ought to reduce the professional fees of having to value such leases.

Without prescription of rates

15.95 If valuation is based on term and reversion only (that is, no marriage value is payable), then the premium payable in respect of Flat B, as set out in Figure 15 in Chapter 14, would reduce as set out in Figure 25 below. No marriage value is payable in respect of Flat A as the unexpired term of the lease exceeds 80 years and therefore marriage value is not payable in any event.

Figure 25: effect on valuation of Flat B if premium were based on “term and reversion” only

The premium payable in respect of Flat B would be reduced from £26,042 to £14,084.¹³⁷⁷

With prescription of rates

15.96 If valuation is based on term and reversion, and rates are prescribed in a way that is favourable to leaseholders, then the premiums that might be payable in respect of Flats A and B are set out in Figures 26 and 27.

Figure 26: effect on valuation of Flat A and Flat B if marriage value is not payable, and if capitalisation rate is prescribed at 8%

The premium for Flat A would reduce from £3,918 to £3,472.¹³⁷⁸ That reduction is caused solely by the prescription of the capitalisation rate.

The premium for Flat B would reduce from £26,042 to £13,669. The reduction comprises £416 attributable to prescription of the capitalisation rate,¹³⁷⁹ and £11,957 attributable to marriage value not being payable.

Figure 27: effect on valuation of Flat A and Flat B if marriage value is not payable, and if deferment rate is prescribed at 6%

The premium for Flat A would reduce from £3,918 to £3,673.¹³⁸⁰ That reduction is caused solely by the prescription of the deferment rate.

¹³⁷⁷ The marriage value element of the original valuation being £11,958.

¹³⁷⁸ The Years Purchase for 130 years at 8% is 12.4994 which multiplied by £250 produces a reduced figure for the capitalised ground rent of £3,125.

¹³⁷⁹ The Years Purchase for 60 years at 8% is 12.3766 which multiplied by £250 produces a reduced figure for the capitalised ground rent of £3,094.

¹³⁸⁰ The Present Value of £1 after 130 years at 6% is 0.0005 which multiplied by £200,000 produces a current reversionary value of £103. The reversionary value after the lease has been extended is £1, so the freeholder's loss of reversion is valued at £102 as opposed to £348 at a deferment rate 5%.

The premium for Flat B would reduce from £26,042 to £9,541. The reduction comprises £4,644 attributable to prescription of the deferment rate, and £11,857 attributable to marriage value not being payable.

Option 2B: term and reversion, plus marriage and hope value

15.97 Rather than limiting the price payable on enfranchisement to the value of the term and reversion only, marriage and hope value could also be included in the price payable. However, such value could be strictly limited to “an increase in value...which is attributable to the potential ability of the participating tenants... to have new leases granted to them without payment of any premium and without restriction as to length of term”,¹³⁸¹ but otherwise on the same terms as the existing leases. In other words, any additional value including development value, as discussed at paragraphs 14.71 to 14.78 above, would not be included in the premium.

Without prescription of rates

15.98 If valuation is based on term and reversion, and marriage value – and rates are not prescribed – then the premiums payable in respect of both Flats A and B would remain unchanged.

With prescription of rates

15.99 If valuation is based on term and reversion, and marriage value, and rates are prescribed in a way that is favourable to leaseholders, then the premium payable in respect of Flat A is as set out above at Figures 26 and 27. The prescription of relativity alone makes no difference to the premium payable in respect of Flat A, as no marriage value is payable. The premium payable in respect of Flat B with favourably prescribed capitalisation and deferments rates and relativity respectively is set out in Figures 28, 29 and 30.

Figure 28: effect on valuation of Flat B if capitalisation rate is prescribed at 8%

The premium for Flat B would reduce from £26,042 to £25,834.¹³⁸² This reduction is caused solely by the prescription of the capitalisation rate.

Figure 29: effect on valuation of Flat B if deferment rate is prescribed at 6%

The premium for Flat B would reduce from £26,042 to £23,770. This reduction is caused solely by the prescription of the deferment rate.

Figure 30: effect on valuation of Flat B if relativity is prescribed at 81%

The premium for Flat B would reduce from £26,042 to £25,042.

¹³⁸¹ Part of the definition of marriage value: 1993 Act, sch 6, para 4(2)(a).

¹³⁸² The Years Purchase for 60 years at 8% is 12.3766 which multiplied by £250 produces a reduced figure for the capitalised ground rent of £3,094.

Option 2C: term and reversion, plus marriage and hope value, plus additional value

15.100 The present valuation methodology could be retained. However, it could be made simpler and professional fees could be reduced by incorporating one or more of the suggested reforms to the valuations components at 1 to 8 above:

- (1) limit the extent to which the ground rent on review is to be taken into account;
- (2) prescribe a capitalisation rate;
- (3) prescribe a deferment rate;
- (4) prescribe relativity or a no Act deduction;
- (5) grant landlords leasebacks of non-participating leaseholders' flats;
- (6) provide that no discount is to be made for the risk of holding over;
- (7) remove the discount for leaseholders' improvements; and/or
- (8) provide for a restriction on the development of enfranchised property.

15.101 Save for (1), none of the above need necessarily reduce the compensation being received by the landlord.

- (1) As stated and as illustrated at Figure 22 above, limiting the extent to which the ground rent on review is to be taken into account would reduce the capitalised value of the ground rent and thereby reduce the overall premium.
- (2) Whilst there are obvious difficulties with a "one size fits all" approach, capitalisation rates could be prescribed in line with market rates, for different interests – such as individual houses, individual flats, a block of flats, or an intermediate lease – and varied over time so as to produce premiums similar to those at present.
- (3) The *Sportelli* deferment rates could be prescribed, possibly with regional variations, which, on the whole, ought to make little difference to current premiums.
- (4) Relativity could be prescribed at current levels.
- (5) If landlords were granted leasebacks of the flats of non-participating leaseholders, they would not receive any hope value in respect of these flats, but would retain the ability to recover marriage value in the future.
- (6) Providing that no discount is to be made for the risk of holding over would, if anything, increase some premiums.
- (7) Removing the discount for leaseholders' improvements, again, has the potential only to increase some premiums.

- (8) Whilst restricting development as suggested would mean that landlords would not receive development value, they would instead receive the benefit of any covenant restricting development and could be compensated for out of pocket expenses.

15.102 However, current valuation methodology could be retained whilst at the same time reducing the premium again by incorporating one or more of the suggested reforms to the valuations components at 1 to 8 above.

- (1) As stated and as illustrated at Figure 22 above, limiting the extent to which the ground rent on review is to be taken into account would reduce the capitalised value of the ground rent and thereby reduce the overall premium.
- (2) As illustrated at Figures 23, 26 and 28 above, capitalisation rates could be prescribed so as to reduce premiums.
- (3) As illustrated at Figures 27 and 29 above, deferment rates could be prescribed so as to reduce premiums.
- (4) As illustrated at Figure 30 above, relativity could be prescribed so as to reduce premiums.
- (5) Granting landlords leasebacks of the flats of non-participating leaseholders, would not deprive landlords of hope/marriage value in respect of those flats, but would remove the need for the participating leaseholders to pay hope value, thereby reducing the premium.
- (6) Whilst providing that no discount is to be made for the risk of holding over would, if anything, increase some premiums, any increase could be offset by the prescription of rates.
- (7) Whilst removing the discount for leaseholders' improvements has the potential only to increase some premiums, any increase could again be offset by the prescription of rates.
- (8) Restricting development as suggested would remove the need for leaseholders to pay development value thereby significantly reducing the premiums payable by some leaseholders.

Consultation Question 117.

15.103 We invite the views of consultees as to which, if any, of the valuation options we have discussed (set out at Options 2A to C in Chapter 15) are preferable and, so far as any preferred option contains a range of possible reforms, which of those reforms should be adopted.

PROVISION OF AN ONLINE CALCULATOR

15.104 In order to make enfranchisement easier, quicker and more cost effective (by reducing the legal and other associated costs), we provisionally consider that the valuation methodology could be supported by an online calculator. A calculator would use various inputs that reflect the individual characteristics of the lease (such as the level of ground rent) and would calculate the enfranchisement premium payable. Depending on the valuation methodology adopted, an online calculator could limit or even remove the need for expert assistance. Such a calculator could look like one of the online calculators that already exists: see Figure 31.

Figure 31: online calculators for enfranchisement premiums

A calculator offered by Myleasehold Ltd and Bishop and Sewell requires the following inputs:

- unexpired term;
- lease value type (namely, “existing” or “long”);
- lease value; and
- ground rent per annum (where there are rent reviews the calculator suggests entering an average or mid-range amount).

A calculator offered by the Leasehold Advisory Service requires the following inputs:¹³⁸³

- location of the flat (outside or inside Prime Central London);
- long lease value;
- current ground rent (the calculator does not take into account rising ground rents); and
- lease expiry date.

A calculator offered by Marr-Johnson & Stevens LLP requires the following inputs:¹³⁸⁴

- property address;
- whether the property is a house or a flat;
- freehold/long leasehold value;
- years remaining on the present lease;
- current ground rent;
- years from now to the next rent review; and
- ground rent at the next rent review.

¹³⁸³ <https://www.lease-advice.org/external-link/calculate-cost-lease-extension/>.

¹³⁸⁴ <https://www.m-js.co.uk/calculator>.

A calculator offered by Fridaysmove requires the following inputs:¹³⁸⁵

- remaining (unexpired) duration of lease in years;
- value of the property with the short lease;
- value of the property if under a long lease (interestingly this asks the user to make a deduction for Act rights);
- annual ground rent (the notes ask for an average of the ground rent for the remainder of the term); and
- a yield percentage (the notes say that 5% is common for Prime Central London but that the rates applied by Tribunals vary considerably).

The website “Freehold Calculator”¹³⁸⁶ offers “simple” and “detailed” calculators. For the simple calculator the inputs are:

- the current value;
- years left on the lease; and
- annual ground rent.

The detailed calculator leaves it to the user to select relativity et cetera. However, it suggests a capitalisation rate of 6% and a deferment rate of 5%.

15.105 The above calculators perform the basic valuation which is common to all valuations under all provisions except section 9(1) of the 1967 Act. In other words, they perform a term and reversion calculation. The aim (other than as a marketing tool) is to provide leaseholders with an estimate of the price they are likely to pay for a lease extension of a flat (one of the above also calculates the price payable for the freehold of a house). In most of the above calculators, the capitalisation rate, deferment rate(s) and deduction for Act rights/relativity is fixed. The difficulty at present is that these elements are not fixed and therefore the calculators can only provide an estimate of the premium based on the views of those setting up the calculator.

15.106 Whilst the above calculators apply primarily to lease extensions of flats, they could be used in collective freehold acquisition claims by inputting the relevant figures for each flat in the block and stating whether the leaseholder of that flat was or was not participating in the claim. An online calculator, however, would take account of only the basic valuation components and may not be suitable for collective freehold acquisition and other high value claims.

¹³⁸⁵ <http://www.fridaysmove.com/lease-extension-calculator/calculator-page-1>.

¹³⁸⁶ <http://www.freeholdcalculator.com/home.php>.

Consultation Question 118.

15.107 We invite the views of consultees as to the desirability of an online calculator for enfranchisement valuations and the types of claim for which it could be appropriate.

THE IMPACT OF REFORM

Consultation Question 119.

15.108 How and to what extent has the current methodology for calculating premiums payable on enfranchisement slowed down, prevented or made more costly the exercise of enfranchisement rights?

Consultation Question 120.

15.109 We have set out the following options for the reform of valuation:

- (1) the adoption of a simple formula; and
- (2) options based on current valuation methodology, involving different combinations of current valuation components and/or the prescription of certain rates.

To what extent would each of these options reduce the duration and cost of the enfranchisement process, and the number of disputes arising?

Consultation Question 121.

15.110 We welcome evidence as to the likely impact of the possible valuation methodologies set out in Chapter 15 on different sectors of the economy – in particular, the institutional investment sector, the charitable sector and the leasehold market (for both owner-occupiers and buy-to-let leaseholders).

Consultation Question 122.

15.111 We welcome evidence as to:

- (1) the proportion of existing leases which are currently eligible for section 9(1) valuations; and
- (2) the likely impact on landlords and leaseholders of (a) retaining the section 9(1) valuation methodology for a limited period, or (b) replacing it with a simplified valuation methodology.

Consultation Question 123.

15.112 We welcome evidence as to the likely impact on the leasehold market (and wider housing market) of differentiating between classes of enfranchising leaseholder (for example, those who occupy the property as a residence and those who do not) in respect of the premium payable.

Consultation Question 124.

15.113 We welcome evidence as to the costs, benefits and practicalities of constituting and maintaining a body whose function is to prescribe certain rates for a reformed valuation methodology.

Consultation Question 125.

15.114 We welcome evidence as to the costs, benefits and practicalities of setting up and maintaining an online valuation calculator.

Part VI: Intermediate and other leasehold interests

In Part II we made provisional proposals to reform the enfranchisement rights which are available to leaseholders. In Part III we set out the criteria that must be satisfied for leaseholders to exercise those enfranchisement rights, and made provisional proposals for reform of this area. In Part IV, we described the process by which enfranchisement rights are claimed, determined and put into effect, and provisionally suggested a new single procedure for claims. In Part V, we set out various options for the reform of valuation in enfranchisement claims.

In many cases, an enfranchisement claim will concern only two parties: the landlord who owns the freehold to the property, and the leaseholder who owns the lease. But some other claims will involve other leasehold interests, namely intermediate leases (that is, a lease that has another interest above and below it) and common parts leases (that is, a lease of the common parts of a building which contains repairing covenants in relation to those common parts).

In this Part, therefore, we explain intermediate leases and common parts leases and how they are dealt with under the 1967 and 1993 Acts. We then outline the main criticisms that have been made of the current law, and set out our provisional proposals for reform.

Chapter 16: Intermediate and other leasehold interests

INTRODUCTION

- 16.1 In many enfranchisement claims the leaseholder's immediate landlord will also be the freeholder of the building. In such cases, the leaseholder can claim the freehold or a lease extension directly from the freeholder. In other cases, the leaseholder's immediate landlord will not also be the freeholder of the building, but will hold a lease in the building granted by the freeholder. In a smaller number of cases, the leaseholder's immediate landlord will not be the only person holding a lease that lies between the leaseholder's lease and the freehold. The immediate landlord's own landlord may be another leaseholder. There can be a lengthy chain of leases between the leaseholder (exercising enfranchisement rights) and the freeholder.

Figure 32: example of intermediate leasehold interests

A	A is the freeholder. A is the landlord under Lease 1.
↓ Lease 1	Lease 1 is an intermediate 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 an under lease.
C	C is both a leaseholder (under Lease 2), and a landlord (under Lease 3).
↓ Lease 3	Lease 3 is an under lease.
D	D is the leaseholder under Lease 3.

- 16.2 A lease that is superior to another lease (in other words, a lease under which the leaseholder is also the landlord under another lease) can be referred to as a "superior lease", a "head lease" or an "intermediate lease". In Figure 32, Lease 1 and Lease 2 are both intermediate leases. A lease that is inferior to another lease (in other words, a lease under which the landlord is also the leaseholder under another lease) can be referred to as an "inferior lease", "sub-lease" or "under lease". In Figure 32, Lease 2 and Lease 3 are both sub-leases, and C and D are both sub-lessees.

- 16.3 We describe any lease that exists between the leaseholder who has a right to enfranchise and the freeholder as an "intermediate lease". We describe the owner of such a lease as:

- (1) an "intermediate leaseholder", where we discuss the rights and obligations that arise by virtue of the owner being a leaseholder; and

- (2) an “intermediate landlord”, where we discuss the rights and obligations that arise by virtue of the owner also being a landlord.

16.4 In Figure 32, therefore:

- (1) B is the “intermediate leaseholder” in relation to Lease 1, and the “intermediate landlord” in relation to Lease 2; and
- (2) C is the “intermediate leaseholder” in relation to Lease 2, and the “intermediate landlord” in relation to Lease 3.

16.5 Intermediate leases are relevant to enfranchisement claims where the interest claimed by the leaseholder will, if acquired, affect an intermediate lease. If the freehold is claimed, any intermediate leases will be affected. If a lease extension is claimed, any intermediate lease that is between the leaseholder and the person who holds a sufficient interest in the property to be able to grant the lease extension (referred to as the “competent landlord”) will be affected. We give examples of when intermediate leases may be affected by a lease extension in Figure 33 below.

16.6 Some enfranchisement claims may also involve “common parts leases”. A common parts lease is a lease of the common parts of a building which contains repairing covenants in relation to those common parts. Such a lease may have been granted over a part of the property that has the potential to be developed, such as a roof space. In other cases, it may have been granted over parts of a building which leaseholders are entitled to use in common, such as a swimming pool, or a laundry room.

16.7 In this chapter, we set out in more detail the circumstances in which intermediate leases and common parts leases can arise in practice, and consider the current law relating to the treatment of those interests in enfranchisement claims. We also describe the way in which intermediate leasehold interests are valued. We then set out the main criticisms of the current law in each of these areas, and outline our provisional proposals for reform.

GENERAL POLICY APPROACH

16.8 Our Terms of Reference set out a number of policy objectives for the reform of enfranchisement law. In considering the treatment of intermediate and other leasehold interests, we have sought to simplify statutory provisions where possible, and to ensure that the presence of an intermediate lease, or common parts lease, does not present an unreasonable statutory, financial or practical impediment to leaseholders wishing to bring an enfranchisement claim.

EXAMPLES OF INTERMEDIATE LEASES

16.9 At its simplest, an intermediate lease will consist of a lease of the whole of the premises comprised in the freehold, whether that is a single house or a block of flats. In other words, the intermediate lease contains all of the property that forms part of the freehold, but the leaseholder’s interest in that property lasts only for a limited fixed term.

16.10 As set out above, there may be more than one intermediate lease, each including the whole of the freehold premises, whether that is a single house or a block of flats.

16.11 In some cases, the premises contained within an intermediate lease will be greater than the premises contained within a sub-lease. In other words, the intermediate lease will include premises that are not included within the sub-lease. In other cases, the intermediate lease will not include all of the premises contained within a sub-lease.

16.12 In the case of a block of flats, an intermediate lease will often include the common parts of the building as well as the flats. In some cases, the common parts will be held on a lease that does not also contain the flats; such a lease is known as a "common parts lease".

16.13 The owner of an intermediate lease may:

- (1) as the "intermediate leaseholder", be required by the terms of the lease to pay rent to his or her landlord (who will either be the superior landlord or the freeholder); and
- (2) as the "intermediate landlord" in respect of a sub-lease, be entitled to receive rent from the sub-lessee under the terms of the sub-lease.

CURRENT LAW: INTERMEDIATE LEASEHOLDERS' RIGHT TO ENFRANCHISE

16.14 Both the 1967 and 1993 Acts include provisions which prevent there being more than one leaseholder of a house or flat who is able to exercise an enfranchisement right at the same time. The leaseholder who has the most inferior lease will be treated as the leaseholder who is entitled to exercise enfranchisement rights. As a result, an intermediate leaseholder of a house will not be able to acquire the freehold or obtain a lease extension, and an intermediate leaseholder of a flat will not be able to extend his or her lease, or join with others to make a collective enfranchisement claim.

16.15 In the case of houses, the virtual abolition of the residence test by the 2002 Act required other changes to be made to the 1967 Act.¹³⁸⁷ As the right to enfranchise no longer depended upon establishing residence at the property, it would otherwise have been possible for more than one leaseholder to be entitled to enfranchise. The 1967 Act therefore now provides that leases which are superior to one held by a leaseholder who has enfranchisement rights do not also have enfranchisement rights under the 1967 Act.¹³⁸⁸

16.16 Where a leaseholder of a house, who would otherwise be entitled to enfranchise under the 1967 Act, lets part of that house to a person who is a leaseholder with rights under the 1993 Act, the leaseholder of the house (and for these purposes they cannot be the same person) does not have any right to enfranchise under the 1967 Act unless they also fulfil a residency test.¹³⁸⁹

¹³⁸⁷ See paras 2.24 to 2.25.

¹³⁸⁸ 1967 Act, s 1(1ZA), as inserted by the 2002 Act.

¹³⁸⁹ 1967 Act, s1(1ZB).

16.17 The 1993 Act makes equivalent provision in respect of flats: there may not be more than one qualifying tenant of a flat at any one time.¹³⁹⁰ If there is more than one qualifying lease of a flat, the right is given to the leaseholder with the most inferior interest.¹³⁹¹

16.18 However, in *Howard de Walden Estates Ltd v Aggio*,¹³⁹² the court decided that an intermediate leaseholder can be a qualifying tenant of a flat or flats under the 1993 Act where there is no sub-lease of the flat or flats. For example, in a converted house with a flat on each of three floors, there is an intermediate lease of the entire building and sub-leases of the flats on the two upper floors. The ground floor flat is occupied under an assured shorthold tenancy, granted by the intermediate leaseholder. The intermediate leaseholder cannot be a qualifying tenant of the flats on the upper two floors. The sub-lessee of those flats are the qualifying tenants of their respective flats and the intermediate leaseholder is their landlord. However, as there is no sub-lease of the ground floor flat, the intermediate leaseholder is, following the decision in *Aggio*, the qualifying tenant of that flat. As such, the intermediate leaseholder can participate, along with the sub-lessees of the flats on the upper two floors, in any claim to acquire the freehold of the building. The intermediate leaseholder can also claim a lease extension of the ground floor flat. In a lease extension claim, the intermediate lease will be severed so that it will remain in place in respect of the flats on the upper two floors and the common parts of the building, but not in respect of the ground floor flat.

16.19 Owners of intermediate leases may, however, find themselves unable to acquire the freehold under the 1993 Act by participating in a collective enfranchisement claim. Although the intermediate leaseholder may be regarded as a qualifying tenant of each of the flats – provided there are no inferior leaseholders who are “qualifying tenants” – he or she will not be treated as a qualifying tenant of any of those flats if he or she would be regarded as the qualifying tenant of three or more flats within the building.¹³⁹³

CURRENT LAW: THE RIGHT TO ACQUIRE INTERMEDIATE LEASEHOLD INTERESTS

16.20 Intermediate leases are important in enfranchisement claims. Such interests form part of the legal structure of the building and have to be dealt with in some way in order for leaseholders to be able to acquire either their freehold or a lease extension.

16.21 Some intermediate leasehold interests are also very valuable; indeed, it might be the case that the intermediate landlord will receive the lion's share of the premium which the leaseholder will pay.

16.22 The 1967 and 1993 Acts make specific provision as to how intermediate landlords are to be involved in claims, what rights and obligations they have, and how such interests

¹³⁹⁰ 1993 Act, s 5(3).

¹³⁹¹ 1993 Act, s 5(4)(a).

¹³⁹² [2008] UKHL 44, [2009] 1 AC 39.

¹³⁹³ See para 7.75 above. This problem is easily circumvented by the grant of sub-leases to special purpose vehicles. Provided each special purpose vehicle only owns one or two leases of flats (and so does not trigger the “three or more flats rule”), then the special purpose vehicles will be qualifying tenants of those flats and will therefore be able to participate in a collective enfranchisement.

are to be valued. Many of these provisions have been referred to elsewhere. But we bring them together here to provide an outline of the treatment of intermediate leases.

Claims in respect of houses

16.23 The freeholder and all intermediate landlords have all the rights and obligations of the “landlord” under the 1967 Act in so far as their interests are affected.¹³⁹⁴ The procedural provisions of the 1967 Act apply to both claims to acquire the freehold and claims for a lease extension.

Contents and receipt of notices of claim

16.24 The leaseholder is required to serve a copy of the notice of claim on anyone he or she knows, or believes, has an interest in the house and premises which is superior to his or her own lease.¹³⁹⁵ A copy must therefore be served on an intermediate landlord.

16.25 Particulars of any other long lease of the house, including an intermediate leasehold interest, must be set out in the schedule to the leaseholder’s notice of claim. This requirement is intended to provide information to help the landlord decide if the leaseholder making the claim is the most inferior leaseholder (and hence has enfranchisement rights¹³⁹⁶) and if a residency test still applies.¹³⁹⁷ If a residency test does apply, then the leaseholder must give further details of any periods during the last 10 years where he or she has not occupied the house as his or her residence.

16.26 Where an intermediate landlord receives a notice of claim, he or she is obliged to serve copies of it on any person who was not mentioned in the notice of claim, but who he or she knows or believes to be the freeholder or an intermediate landlord. The intermediate landlord must add the names of those persons to the notice of claim and inform the leaseholder making the claim of those other persons.¹³⁹⁸

16.27 If an intermediate landlord fails to comply with these obligations upon receipt of a notice of claim, or is guilty of unreasonable delay in complying, he or she will be liable to the leaseholder (and anyone with a superior lease) for their consequential losses.¹³⁹⁹

16.28 If the intermediate landlord’s interest is subject to a mortgage, then the intermediate landlord must notify the mortgagee (or receiver if one has been appointed) of the claim, and provide such further information as the mortgagee may require from time to time.¹⁴⁰⁰

¹³⁹⁴ 1967 Act, sch 1, para 1(1)(a).

¹³⁹⁵ 1967 Act, sch 3, para 8(1)(b). See para 10.16 above.

¹³⁹⁶ 1967 Act, s 1(1ZA).

¹³⁹⁷ 1967 Act, s 1(1ZB).

¹³⁹⁸ 1967 Act, sch 3, para 8(1)(d), 8(1)(e) and 8(2)(a).

¹³⁹⁹ 1967 Act, sch 3, para 8(3).

¹⁴⁰⁰ 1967 Act, sch 3, para 9.

Conduct of the claim

16.29 An enfranchisement claim is conducted on behalf of all the landlords by the “reversioner”.¹⁴⁰¹ The “reversioner” is the intermediate landlord who is entitled to possession of the house for at least 30 years after the expiry of the sub-lease. If there is more than one lease that fulfils this criterion, then the “reversioner” will be the holder of the lease which is most immediate to the sub-lease.¹⁴⁰² Where none of the intermediate interests fulfil the criteria the freeholder is the reversioner.¹⁴⁰³

16.30 If the intermediate landlord considers that he or she is the reversioner, he or she must give written notice to the leaseholder and serve copies on all other persons interested in the property.¹⁴⁰⁴

16.31 If the intermediate landlord is the reversioner, he or she will become more central to the enfranchisement process.

- (1) The intermediate landlord will have the power to deal with:
 - (a) the leaseholder’s notice of claim (and object to the claim if there are grounds to do so);
 - (b) the deduction of the title of all landlords;¹⁴⁰⁵
 - (c) the conveyance or lease extension; and
 - (d) the ascertainment and receipt of the purchase price.
- (2) The intermediate landlord will be entitled to take and defend proceedings, including on behalf of him or herself as well as the other landlords.¹⁴⁰⁶
- (3) The intermediate landlord’s actions will be binding on other landlords.

16.32 Provided that he or she acts in good faith and with reasonable care and diligence, the intermediate landlord will not be liable for loss and damage caused to the other landlords. If there is a dispute between the landlords as to how the reversioner should act, any landlord can apply to the court for directions.

¹⁴⁰¹ See paras 10.17 and 10.51.

¹⁴⁰² The 1967 Act essentially provides for the person with the greatest monetary interest in the reversion to act as the reversioner. This will not, however, always be the person who will receive the greater share of any premium payable, as any rent payable during the term is ignored.

¹⁴⁰³ However, where there is Crown interest in the property, the appropriate Crown authority has power to act as the reversioner.

¹⁴⁰⁴ 1967 Act, sch 3, para 8(2)(b).

¹⁴⁰⁵ There is, however, a process by which other landlords can deal directly with the leaseholder in respect of the deduction of their own title.

¹⁴⁰⁶ This does not, however, extend to bringing possession proceedings where another landlord wishes to redevelop (1967 Act, s 17), or to occupy the premises for him or herself or for his or her family (1967 Act, s 18).

16.33 Notwithstanding the above, any landlord may apply to the county court to be appointed as the reversioner in place of the person who would otherwise be the reversioner. The court may make such an appointment, on terms and conditions as it thinks fit, if it considers that:

- (1) having regard to the respective interests of the other landlords, or the absence or incapacity of the reversioner, or other special circumstance, one of the other landlords ought to act as reversioner; or
- (2) the reversioner is unwilling to act, and that one of the other landlords could appropriately replace him and is willing to do so; or
- (3) by reason of complication in the title, the statutory provisions designating the reversioner are inapplicable.¹⁴⁰⁷

16.34 The court can also remove the reversioner and appoint another person in place if it appears to the court proper to do so having regard to any delay or default on the part of the reversioner.¹⁴⁰⁸

16.35 Other landlords must give the reversioner information and assistance that he or she requires except where the leaseholder deals directly with that other landlord on issues of title and the ascertainment of the purchase price payable for the freehold.¹⁴⁰⁹ Where the leaseholder is acquiring the freehold, other landlords must make available to the reversioner on completion all deeds and other documents.¹⁴¹⁰ Other landlords must also make “such contribution as may be just” towards the reversioner’s costs that he or she cannot recover from the leaseholder.¹⁴¹¹

16.36 Where there are missing landlords involved in the claim, it is the reversioner that must apply to the court for directions.¹⁴¹²

Acquiring the freehold

16.37 When a leaseholder acquires the freehold of a house and premises under the 1967 Act, the leasehold interests of intermediate landlords are also acquired by the leaseholder.¹⁴¹³ An intermediate landlord must therefore be a party to any transfer.

16.38 The leaseholder who is to acquire the freehold must pay a separate price to each intermediate landlord for their respective intermediate interests.¹⁴¹⁴ The reversioner has power to agree the separate prices for each interest being acquired. An intermediate

¹⁴⁰⁷ 1967 Act, sch 1, para 3(1).

¹⁴⁰⁸ This application can be made by the leaseholder or by any of the landlords.

¹⁴⁰⁹ 1967 Act, sch 1, para 5(5)(a).

¹⁴¹⁰ 1967 Act, sch 1, para 5(5)(b).

¹⁴¹¹ 1967 Act, sch 1, para 5(6).

¹⁴¹² 1967 Act, sch 1, para 4(3).

¹⁴¹³ 1967 Act, sch 1, para 1(1)(a).

¹⁴¹⁴ As opposed to an apportionment between freeholder and intermediate landlords of a single price to be paid by the leaseholder. See paras 16.46 and 16.68 below.

landlord may have the price for his or her interest agreed by one of the other landlords. However, an intermediate landlord who is not the reversioner is permitted to agree the value of his interest directly with the leaseholder by giving written notice to that effect to both the reversioner and to the leaseholder.¹⁴¹⁵

16.39 An intermediate landlord can also require the reversioner to apply to the Tribunal to have the value of his or her interest determined, and can be separately represented in those proceedings and in any other proceedings relating to the price payable for his or her interest.¹⁴¹⁶ The leaseholder is liable to pay an intermediate landlord's reasonable valuation costs.¹⁴¹⁷

16.40 The reversioner can give a good receipt for the purchase price on behalf of other landlords, although other landlords can require payment of their part of the purchase price directly to them or their agent.¹⁴¹⁸

Lease extensions

16.41 A lease extension granted under the 1967 Act is for a term that expires 50 years after the expiry of the original term. The person who grants that interest is the first superior landlord who holds a sufficient interest to be able to grant that new term. If there is no intermediate landlord who is able to do so (either because there are no intermediate leases or, for example, because the intermediate landlord has only a 20-year reversion) then it will be the freeholder who grants the extended lease. As that person may or may not be the same person as the "reversioner", it is possible that the person granting the extended lease may not be the "reversioner" who has the conduct of the claim.

16.42 The lease extension takes effect as if there had been a surrender and regrant of all intermediate leases, save where the leaseholder also holds an intermediate lease, in which case the intermediate lease will be surrendered without any regrant.¹⁴¹⁹

16.43 An intermediate landlord may surrender his or her lease (without the deemed regrant) where the rent payable under the intermediate lease to the landlord, is either greater, or less, by no more than £4 a year, than the rent he or she will receive after the lease extension is granted.¹⁴²⁰

16.44 The extended lease will contain the statutory rent review provisions but must be framed to ensure the grantor and any intermediate landlords can invoke those provisions, and

¹⁴¹⁵ 1967 Act, sch 1, para 5(3).

¹⁴¹⁶ 1967 Act, sch 1, para 1(1)(b).

¹⁴¹⁷ 1967 Act, s 9(4)(e).

¹⁴¹⁸ 1967 Act, sch 1, paras 1(1)(b) and 5(4). An intermediate landlord does not need to make payment towards the redemption of a rentcharge where it is not necessary, nor is he required to discharge a mortgage on another landlord's interest where it is not necessary.

¹⁴¹⁹ 1967 Act, sch 1, paras 10(2) and 11(1).

¹⁴²⁰ Alternatively, the intermediate landlord may require the lease extension to provide for him or her to be able to surrender the lease at a later date should that criterion become satisfied as a result of any revision in the rent payable under the extended lease. Other intermediate landlords have a similar right should their lease meet this criterion after any intermediate landlord elects to surrender. See 1967 Act, sch 1, para 11.

must contain provisions in respect of the costs of landlords' obligations as to services, maintenance or insurance.¹⁴²¹

Covenants in intermediate leases

16.45 Where an intermediate lease contains a covenant against assignment or sub-letting (either absolute or restricted), it is ignored. Where the leaseholder acquires the freehold, the intermediate leasehold title is also acquired and so the question of whether there is any breach of covenant on the part of the intermediate leaseholder does not arise. However, where a lease extension is granted, the intermediate lease is not bought out, and therefore continues to exist once the new extended sub-lease has been granted. The 1967 Act therefore provides that the grant of any sub-lease which would otherwise constitute a breach of the terms of the intermediate lease is not in fact a breach.¹⁴²²

Valuation of the intermediate interest

16.46 Where a freehold is being acquired under the 1967 Act, each individual leasehold interest being acquired should be given its own separate price.¹⁴²³

16.47 Save where the intermediate interest is a "minor superior tenancy", the separate price which is determined for each intermediate interest is ascertained on the same basis as the freehold interest, with appropriate modifications.¹⁴²⁴ Whilst not expressly provided, by convention, the half-share of marriage value is divided between the intermediate landlords and the freeholder in shares proportionate to the values of their interests.¹⁴²⁵

16.48 A "minor superior tenancy" means a superior tenancy having an expectation of possession of not more than one month (after expiry of the inferior lease) and in respect of which the "profit rent"¹⁴²⁶ is not more than £5 per year.¹⁴²⁷ Further, the profit rent cannot be a negative (or nil) amount.¹⁴²⁸

16.49 The premium payable for such tenancies is calculated using the following formula:

¹⁴²¹ 1967 Act, s15(2) and (3), and sch 1, para 10(4).

¹⁴²² 1967 Act, sch 1, para 5(6).

¹⁴²³ 1967 Act, sch 1, para 7(1)(b). It would be wrong to calculate a single price for the enfranchisement or lease extension claim and then to apportion it between interests: *Jones v Wrotham Park Settled Estates* [1980] AC 74.

¹⁴²⁴ 1967 Act, sch 1, para 7(1)(b).

¹⁴²⁵ The authors of *Hague* say that this is "the generally adopted convention by valuers" (para 11-14). The practice was also accepted in *Silverman v Catherine Investments Ltd* (1984) 271 EG 381.

¹⁴²⁶ 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.

¹⁴²⁷ 1967 Act, sch 1, para 7A(2).

¹⁴²⁸ *Nailrile Ltd v Cadogan* [2009] 2 EGLR 151, a case on the 1993 Act which has an identical formulation, as is considered below.

$$P = £ \frac{R}{Y} - \frac{R}{Y(1 + Y)^n}$$

where:

P = the price payable;

R = the profit rent;

Y = the maturity rate, expressed as a decimal fraction, of the “over 30 not over 30.5 year” National Loans Fund interest rate;¹⁴²⁹ and

n = the period expressed in years (counting any part of a year as a whole year) which the minor superior tenancy would have to run if it were not being extinguished by enfranchisement.¹⁴³⁰

16.50 The first part of this formula (£R/Y) capitalises the profit rent as if in perpetuity, and the second part then makes an appropriate deduction to compensate for its earlier termination. The formula applies instead of section 9 of the 1967 Act.¹⁴³¹ Consequently, it applies regardless of which subsection of section 9 the valuation would otherwise be conducted under, and means that no marriage value is ever payable to the holder of any minor superior tenancy.

Claims in respect of flats

Information notices

16.51 The right of a leaseholder to give an information notice is set out in Chapter 10. For present purposes, it should be noted that:

- (1) an intermediate landlord can be served with an information notice, and is obliged to respond if so served; and
- (2) a notice of claim ceases to have effect if a landlord who has responded to an information notice is not provided with a copy of the notice of claim by the date given for service of a counter-notice.¹⁴³²

¹⁴²⁹ Valuation of Minor Intermediate Leasehold Interests (England) Regulations 2017 (SI 2017 No 871), reg 2(2). The maturity rate is “the published interest rate at the close of business on the last trading day of the week before the week in which the relevant time falls” (reg 2(3)). As originally enacted Y = the yield (expressed as a decimal fraction) from 2.5% Consolidated Stock. However, 2.5% Consolidated Stock was fully redeemed on 5 July 2015. This formula therefore became unworkable. The Housing and Regeneration Act 2016 removed the minor superior tenancies formula from the 1967 Act and provided power for the Secretary of State to prescribe the manner of valuation. The Regulations came into force on 1 October 2017 and reinstated the original formula with Y differently defined. The 2017 Regulations only apply in England.

¹⁴³⁰ 1967 Act, s 7A(5), pre-amendments by the Housing and Regeneration Act 2016. The formula was based on that for calculating the redemption price of a rentcharge under the Rentcharges Act 1977 (and now see the Rentcharges (Redemption Price) (England) Regulations 2016 (SI 2016 No 870)).

¹⁴³¹ 1967 Act, s 7A(1).

¹⁴³² 1993 Act, sch 3, para 14(1) in respect of collective enfranchisement claims, and sch 11, para 4(1) in respect of lease extension claims.

Collective enfranchisement

16.52 In a collective enfranchisement claim, there are some leases that the nominee purchaser must acquire, and others that they are entitled to acquire should they wish to do so.

16.53 The nominee purchaser must acquire the interest of a leaseholder under any lease which is superior to the lease held by a qualifying tenant (both participating and non-participating).¹⁴³³

16.54 The nominee purchaser is entitled to acquire, where the acquisition of such an interest is “reasonably necessary for the proper management or maintenance” of the parts in question, a leasehold interest that consists of or includes:¹⁴³⁴

- (1) any common parts of the relevant premises; or
- (2) any additional property acquired under section 1(2)(a).¹⁴³⁵

16.55 Where the property let by such a lease extends beyond the flat of a qualifying tenant, common parts, or land acquired under section 1(2)(a) of the 1993 Act, the nominee purchaser will not acquire those additional areas and the lease can be severed to that extent. The acquisition of these interests are dealt with more fully below.

16.56 The 1993 Act also excludes from acquisition any intermediate leasehold interests held by a public-sector landlord.¹⁴³⁶

16.57 Any transfer must provide for the disposal of an intermediate lease or common parts lease (or part thereof if a lease is to be severed to allow the leaseholders to acquire part only of it) to the nominee purchaser.¹⁴³⁷

Contents and receipt of the notice of claim

16.58 A notice of claim must specify any leasehold interest that the leaseholders propose to acquire including those they are obliged to acquire, and those which they are electing to acquire, and the price offered for those interests.¹⁴³⁸

¹⁴³³ 1993 Act, s 2(2).

¹⁴³⁴ 1993 Act, s 2(3).

¹⁴³⁵ See para 6.10 above. In *Hemphurst Ltd v Durrells House Ltd* [2011] UKUT 6, the Upper Tribunal (Lands Chamber) held that participating leaseholders could elect to acquire part only of such a lease where they wanted to exclude other parts and so severance of such a lease was required. The landlord was granted permission to appeal to the Court of Appeal but the appeal was not pursued.

¹⁴³⁶ That is, a local authority, new town corporation, housing action trust, urban development corporation, the Development Board for rural Wales, the Corporation, or a registered social landlord: 1993 Act, s 2(5) and (6), and s 38(1), referring to the Housing Act 1985, s 171(2).

¹⁴³⁷ 1993 Act, s 34(2).

¹⁴³⁸ 1993 Act, s 13(3)(c) and s 13(3)(d)(iii). In the case of an intermediate lease, the offer would usually exclude any share of marriage value because that is paid to the freeholder and then shared out.

16.59 Copies of the notice of claim must be served on every relevant landlord and state the names of the landlords being served with the notice of claim.¹⁴³⁹ As under the 1967 Act, anyone served with a notice of claim must give copies to any other landlord they know or believe to be a relevant landlord and who is not named as having been served with the notice of claim.¹⁴⁴⁰ There are penalties for landlords who fail to comply or delay in complying with this obligation.¹⁴⁴¹

Conduct of the claim

16.60 An intermediate landlord is referred to as a “relevant landlord” in the 1993 Act. The freeholder will be the reversioner (unless replaced under the provisions discussed below) and will conduct the claim on behalf of all relevant landlords. This approach prevents the nominee purchaser from having to deal with more than one landlord. Provided that the reversioner acts in good faith, and with reasonable care and diligence, then he or she will not be liable to other landlords for any loss or damage caused.¹⁴⁴²

16.61 An intermediate landlord has:

- (1) an obligation to provide all information and assistance that the reversioner reasonably requires and to deliver all documents to ensure completion takes place,¹⁴⁴³ and
- (2) a right of access to the flats or premises for the purpose of obtaining a valuation.¹⁴⁴⁴

16.62 The court does, however, have the power to order that the freeholder be replaced as the reversioner by a relevant landlord. Such an order can be made:

- (1) where all relevant landlords agree on the replacement, and are party to the application;
- (2) on the application of a relevant landlord where:
 - (a) the respective interests of the relevant landlords, or the absence or incapacity of the freeholder, or other special circumstance, require it; or
 - (b) the freeholder is unwilling to act as reversioner; or
- (3) on the application of the nominee purchaser or relevant landlord, where it appears that the reversioner is guilty of any delay or default.¹⁴⁴⁵

¹⁴³⁹ 1993 Act, sch 3, para 12(2).

¹⁴⁴⁰ 1993 Act, sch 3, para 13(1).

¹⁴⁴¹ 1993 Act, sch 3, para 14(2).

¹⁴⁴² 1993 Act, sch 1, para 6(4).

¹⁴⁴³ 1993 Act, sch 1, para 8(1)(a) and (b).

¹⁴⁴⁴ 1993 Act, s 17(1).

¹⁴⁴⁵ 1993 Act, sch 1, paras 2 to 5.

- 16.63 If an intermediate landlord is appointed as the reversioner, then they will generally have conduct of the claim on behalf of all relevant landlords (including the freeholder). This responsibility includes taking or defending proceedings, save where any other landlord wishes to resist a claim on the grounds of redevelopment.¹⁴⁴⁶ If there is a dispute between landlords as to how a claim should be dealt with, the reversioner or any other landlord can apply to court for directions.¹⁴⁴⁷ The reversioner must also apply to court for directions if any of the other landlords are missing.¹⁴⁴⁸
- 16.64 Any other landlord may give notice that he or she wishes to act independently in respect of certain matters.¹⁴⁴⁹ Such a notice can only be given after service of the counter-notice. An intermediate landlord may also be separately represented in any proceedings where his title comes into question, or which relate to the terms of acquisition of his interest.¹⁴⁵⁰
- 16.65 In addition, any landlord can require the reversioner to apply to the Tribunal to have the terms of acquisition of his or her interest determined, and may require that the price to be paid for his interest be paid directly to him or her or to an agent (subject to serving notice on the reversioner and nominee purchaser).¹⁴⁵¹ The intermediate landlord must then cooperate with completion or the reversioner can give good receipt for the money.¹⁴⁵²
- 16.66 The nominee purchaser can require an intermediate landlord (or indeed any particular landlord) to deal directly with him by serving a notice on the reversioner and the other landlord with whom they wish to deal directly.¹⁴⁵³
- 16.67 Each landlord must contribute towards the reversioner's costs in so far as those costs are not recoverable from the leaseholders or nominee purchaser.¹⁴⁵⁴ The authors of *Hague* note that an intermediate landlord who wishes to oppose a claim, when the freeholder does not, may have to provide an indemnity to the freeholder for his or her costs.¹⁴⁵⁵

¹⁴⁴⁶ 1993 Act, sch 1, para 9.

¹⁴⁴⁷ 1993 Act, sch 1, para 6(2).

¹⁴⁴⁸ 1993 Act, sch 1, para 6(3).

¹⁴⁴⁹ Those matters are deducing, evidencing or verifying the title of any property; negotiating and agreeing the terms of the acquisition with the nominee purchaser; and executing a conveyance (1993 Act, sch 1, para 7(1)), and such notice can be given only after the reversioner has given a counter-notice.

¹⁴⁵⁰ 1993 Act, sch 1, para 7(1)(b).

¹⁴⁵¹ 1993 Act, sch 6, para 7(3) and (4).

¹⁴⁵² 1993 Act, sch 6, para 7(4).

¹⁴⁵³ 1993 Act, sch 1, para 7(2).

¹⁴⁵⁴ 1993 Act, sch 1, para 8(2).

¹⁴⁵⁵ *Hague*, para 23-14.

Valuation

16.68 As with the 1967 Act scheme, a separate price should be paid for each interest.¹⁴⁵⁶ That price is the aggregate of the value of the interest and any compensation payable.

16.69 Save where the intermediate interest is a “Minor Intermediate Leasehold Interest”, (known as a “MILI”), the value of any intermediate interest is determined in the same way as the freehold, with appropriate modifications to reflect the fact that it is a lease which is being notionally sold.¹⁴⁵⁷

Minor Intermediate Leasehold Interests (“MILIs”)

16.70 MILIs are defined as:

a lease complying with the following requirements, namely:

(a) it must have an expectation of possession of not more than one month; and

(b) the profit rent in respect of the lease must be not more than £5 per year;

and, in the case of a lease which is in immediate reversion on two or more leases, those requirements must be complied with in connection with each of the sub-leases.¹⁴⁵⁸

16.71 The formula for determining the value of MILIs (in England) is now found in secondary legislation,¹⁴⁵⁹ and is essentially the same as that relating to “Minor Superior Tenancies” under the 1967 Act (on which, see paragraphs 16.48 and 16.49 above):

$$P = £ \frac{R}{Y} - \frac{R}{Y(1 + Y)^n}$$

Where:

P = the value of the minor intermediate leasehold interest;

R = the profit rent;

Y = the maturity rate, expressed as a decimal fraction, of the “over 30 not over 30.5 year” National Loans Fund interest rate; and

n = the number of years (rounding up any part of a year to a whole year) remaining on the minor intermediate lease on the relevant date.

¹⁴⁵⁶ 1993 Act, sch 6, para 6(1)(a).

¹⁴⁵⁷ The valuation therefore occurs under the 1993 Act, sch 6, para 3.

¹⁴⁵⁸ 1993 Act, sch 6, para 7(3).

¹⁴⁵⁹ Valuation of Minor Intermediate Leasehold Interests (England) Regulations 2017 (SI 2017 No 871), reg 3, engaged by 1993 Act, sch 6, para 7(2).

Marriage value

16.72 Where the price payable for the freehold includes marriage value, it is to be:

divided between the freeholder and the owners of the intermediate leasehold interests in proportion to the value of their respective interests in the specified premises.¹⁴⁶⁰

16.73 Unlike under the 1967 Act, the division of marriage value “applies equally in the case where the intermediate lease is a [MILI]”.¹⁴⁶¹

Interests with negative value

16.74 The 1993 Act makes express provision in respect of freehold and leasehold interests which have negative values. Where an interest, either freehold or leasehold, in the specified premises, has a negative value, the price payable for that interest is nil. Where an intermediate lease has a negative value, the positive value of any superior lease or freehold is reduced until the negative amount is extinguished, but no further.¹⁴⁶² Adjustments are also made to the apportionment of marriage value and any additional compensation payable to take into account reduced or negative values.

16.75 Whilst the provisions offsetting negative value against positive value were designed to prevent freeholders inflating the price payable by leaseholders, they have been used by leaseholders as a means of reducing the price: see paragraph 16.99 below.

Lease extensions

16.76 Unlike collective enfranchisement claims, intermediate leases are not, with one exception, acquired by the leaseholder in a lease extension claim. Rather there is a deemed surrender and regrant of any intermediate lease.¹⁴⁶³ The exception to this position is where the intermediate lease is a lease of only the flat which is the subject matter of the claim, and that intermediate lease is owned by the leaseholder in addition to their sub-lease (or held on trust for the tenant). In this case there is a surrender of that intermediate lease but no regrant.¹⁴⁶⁴

16.77 The intermediate landlord is compensated for the reduction in the value of his or her interest, but the interest continues until its contractual expiry. The terms of the lease extension need to reflect that.¹⁴⁶⁵

16.78 The terms of the new extended lease will be important to the intermediate landlord as he or she may be managing the building and administering the service charge. If there are problems with the current service charge provisions, the intermediate landlord may wish to see those provisions altered. The new lease will also reserve a right to develop

¹⁴⁶⁰ 1993 Act, sch 6, para 9(2). It is the freeholder who is responsible for paying the intermediate landlord his or her share: para 9(3). Where the freehold is owned by different persons, see 1993 Act, sch 6, para 9A.

¹⁴⁶¹ *Hague*, para 27-32.

¹⁴⁶² 1993 Act, sch 6, paras 14(2), 15(2), 18(2) and 19(2).

¹⁴⁶³ 1993 Act, sch 11, para 10(1).

¹⁴⁶⁴ 1993 Act, sch 11, para 10(3).

¹⁴⁶⁵ 1993 Act, sch 11, para 10(1).

to the leaseholder's immediate landlord,¹⁴⁶⁶ who, depending on when the right is exercised, may well be an intermediate landlord. The right can be exercised during the 12 months prior to the expiry of the leaseholder's existing lease and during the five years prior to the expiry of the new extended lease.¹⁴⁶⁷

Content and receipt of notice of claim

16.79 A copy of the notice of claim must be given to any intermediate landlords.¹⁴⁶⁸ As with collective enfranchisement claims, a recipient is under a duty to pass on copies of the notice to any person that he or she knows, or believes to be, another landlord and who is not named on the notice of claim as having already been provided with copies. There are penalties for non-compliance or delays.¹⁴⁶⁹

16.80 A notice of claim must specify the amount the leaseholder proposes to pay to any intermediate landlord.¹⁴⁷⁰

Conduct of the claim

16.81 A claim for a lease extension is directed to, and dealt with by, the "competent landlord". This is the person who holds the most inferior interest in the flat that has a sufficiently long remaining term to be able to grant the leaseholder's lease extension out of that interest.¹⁴⁷¹ The competent landlord may also be an intermediate landlord, and there may or may not be other intermediate leases between the competent landlord's intermediate lease and the leaseholder's sub-lease.

16.82 Where any other landlord¹⁴⁷² is missing, the competent landlord must apply to court for directions, and the court may make such order as it thinks proper with a view to giving effect to the rights of the leaseholder and protecting the rights of other landlords.¹⁴⁷³

16.83 An intermediate landlord who is not the competent landlord can elect to be separately represented in any legal proceedings where his or her title comes into question, or which relate to the determination of the amount payable to him or her.¹⁴⁷⁴ The election is made by the intermediate landlord giving notice to the competent landlord and to the

¹⁴⁶⁶ 1993 Act, s 57(7)(b). The right to develop is set out in s 61 of the 1993 Act.

¹⁴⁶⁷ 1993 Act, s 61.

¹⁴⁶⁸ 1993 Act, sch 11, para 2(1). There are severe consequences for the leaseholders if the notice of claim is not also given to an intermediate landlord who responded to a s 41 information notice – the notice of claim ceases to have effect.

¹⁴⁶⁹ 1993 Act, sch 11, para 4(2).

¹⁴⁷⁰ 1993 Act, s 42(3)(c). A failure to specify a separate sum will invalidate the notice of claim: *Howard de Walden Estates Ltd v Subhanberdin* (2008) Central London County Court (unreported).

¹⁴⁷¹ 1993 Act, s 40(1).

¹⁴⁷² Including an intermediate landlord who is not the competent landlord but has a lease which is inferior to the competent landlord, but superior to the leaseholder's sub-lease.

¹⁴⁷³ 1993 Act, sch 11, para 6(3).

¹⁴⁷⁴ An intermediate landlord has a right of access to the leaseholder's flat in order to obtain a valuation: 1993 Act, s 44(1)(b).

leaseholder of this intention; but such notice can only be given after the counter-notice has been served.¹⁴⁷⁵

16.84 However, the competent landlord may enter into a binding agreement with the leaseholder as to the terms of the lease extension and effect a grant of that lease extension without the cooperation of an intermediate landlord. That agreement will be binding on any intermediate landlord. Provided the competent landlord acts in good faith and with reasonable care and diligence, he will not be liable for the losses of other landlords.¹⁴⁷⁶ Nevertheless, if there is a dispute between landlords as to how to deal with a claim, the competent landlord must apply to court for directions.¹⁴⁷⁷

16.85 The competent landlord may receive completion monies on behalf of an intermediate landlord. However, the intermediate landlord can give notice to the competent landlord and the leaseholder that he or she requires the monies to be paid directly to an agent.¹⁴⁷⁸ The intermediate landlord must cooperate with completion arrangements if he or she wants to receive funds directly.¹⁴⁷⁹

16.86 As with collective enfranchisement claims, intermediate landlords have an obligation to provide all information and assistance that the reversioner reasonably requires and to deliver all documents to ensure completion takes place.¹⁴⁸⁰ In addition, each landlord must contribute towards the competent landlord's costs in so far as those costs are not recoverable from the leaseholder.¹⁴⁸¹

Valuation

16.87 As set out above, intermediate leases are deemed to be surrendered and re-granted where an inferior lease is extended.¹⁴⁸² Consequently, whilst an intermediate landlord retains his or her interest, that interest, following a lease extension, will be subject to a longer lease at a peppercorn rent. As such, the intermediate landlord suffers a loss, for which her or she is compensated.

16.88 In relation to the calculation of the compensation, save where the intermediate leasehold interest is a MILI,¹⁴⁸³ the 1993 Act provides that:

¹⁴⁷⁵ 1993 Act, sch 11, para 7(1).

¹⁴⁷⁶ 1993 Act, sch 11, para 6(4).

¹⁴⁷⁷ 1993 Act, sch 11, para 6(1).

¹⁴⁷⁸ 1993 Act, sch 11, para 7(2).

¹⁴⁷⁹ 1993 Act, sch 11, para 7(2).

¹⁴⁸⁰ 1993 Act, sch 11, para 8(1).

¹⁴⁸¹ 1993 Act, sch 11, para 8(2).

¹⁴⁸² 1993 Act, sch 11, para 10(1).

¹⁴⁸³ See para 16.70 above. Both the definition of a MILI and the formula to be used in determining its value are the same on both a collective enfranchisement and a lease extension claim.

In connection with the grant of the lease extension to the tenant there shall be payable by the tenant to the owner of any intermediate leasehold interest an amount which is the aggregate of—

(a) the diminution in value¹⁴⁸⁴ of that interest as determined in accordance with paragraph 7; and

(b) any amount of compensation payable to him under paragraph 9.¹⁴⁸⁵

16.89 “Diminution in value” is defined as “the difference between... the value of that interest prior to the grant of the new lease; and... the value of that interest once the new lease is granted”.¹⁴⁸⁶ Consequently, as when calculating the diminution in value of the competent landlord's interest, two valuations are required: (1) a valuation of the intermediate landlord's interest before the lease extension is granted; and (2) a valuation of that interest after the lease extension has been granted. These valuations follow the same methodology as that identified in Chapter 14.¹⁴⁸⁷ In other words, a “term and reversion” calculation is carried out.

16.90 As regards the intermediate landlord's reversion, the grant of the lease extension will necessarily eliminate it: had the intermediate landlord's reversion been long enough to be able to grant a new lease extended by 90 years, then that landlord would be the competent landlord. Consequently, the diminution in value of the reversion of the intermediate landlord is the value of its reversion.

16.91 The diminution in value of the intermediate landlord's term will be any loss of rent, to which the intermediate landlord was entitled prior to the grant of the new lease. The intermediate lease is deemed to be surrendered and re-granted on the same terms, including as to the rent payable. Consequently, whilst the rent the sub-lessee has to pay to his or her immediate landlord is reduced to a peppercorn when the lease is extended, the rent that an intermediate landlord has to pay to its landlord remains the same. For example, in a block of four flats, each leaseholder pays a ground rent of £100 per annum to an intermediate landlord. The rent payable by that intermediate landlord to the freeholder under the head lease is £200 per annum. Before any of the sub-leases are extended, the intermediate landlord receives a “profit rent” of £200 per annum (namely, the difference between (i) the total rent of £400 per annum received from the sub-lessees, and (ii) the rent of £200 per annum paid to the freeholder under the head lease). But after one of the leases is extended, that profit rent reduces to £100 per annum. This is illustrated in Figure 33 below.

¹⁴⁸⁴ The same assumptions (with “appropriate” modifications) are made in determining values as are made in determining the value of the freehold in collective enfranchisement claims: 1993 Act, sch 13, para 8.

¹⁴⁸⁵ 1993 Act, sch 13, para 6.

¹⁴⁸⁶ 1993 Act, sch 13, para 6.

¹⁴⁸⁷ See para 14.26 above.

Figure 33: reduction in profit rent

Before lease extension				After lease extension			
Freeholder				Freeholder			
↑				↑			
£200				£200			
↑				↑			
Intermediate landlord's profit:				Intermediate landlord's profit:			
£400 receivable - £200 payable = £200				£300 receivable - £200 payable = £100			
↑	↑	↑	↑	↑	↑	↑	↑
£100	£100	£100	£100	£0	£100	£100	£100
Rent payable by sub-lessees				Rent payable by sub-lessees			

16.92 In either the before or after valuations the profit rent may be positive, negative or nil. There are therefore five possible scenarios:

- (1) the intermediate lease profit rent is positive both before and after the lease extension;
- (2) the intermediate lease profit rent is positive before, and nil after, the lease extension;
- (3) the intermediate lease profit rent is positive before, and negative after, the lease extension;
- (4) the intermediate lease profit rent is nil before, and negative after, the lease extension; and
- (5) the intermediate lease profit rent is negative both before and after the lease extension.

16.93 Calculating the diminution in value of the intermediate landlord's interest in scenarios (1) and (2) above is relatively straightforward. In scenario (1) the profit rent before and after is capitalised, and the latter deducted from the former. For example, the intermediate landlord in Figure 33 will receive the capitalised value of £200 per annum less the capitalised value of £100 per annum. In scenario (2), the latter figure will be nil. Alternatively, and by way of a short-cut to reach the same figure, the gross rent lost can

be capitalised.¹⁴⁸⁸ In other words, an alternative way to calculate the compensation payable to the intermediate landlord in Figure 33 is to capitalise the £100 per annum that the intermediate landlord loses. However, this approach only produces the same figure, and therefore is only appropriate, if there are no rent reviews or, if there are rent reviews, the reviews in the intermediate lease are at the same time as the rent reviews in the sub-leases.¹⁴⁸⁹

16.94 The approach to the capitalisation of an intermediate landlord's profit rent differs from the approach to the capitalisation of rent payable to a freeholder. This is because, unlike a freeholder, an intermediate landlord holds a wasting asset. Consequently, a "dual rate" as opposed to a "single rate" is applied to the profit rent. This comprises:

- (1) a remunerative rate, being the rate of return on the investment; and
- (2) an accumulative (or annual sinking fund, "asf") rate, being a rate to accumulate a sinking fund to replace the investment once the lease ends.

16.95 In *Nailrile v Cadogan*, the Lands Tribunal held that the remunerative rate to be used is a matter of market evidence, but it is likely that the rate will be the same in both the before and after valuations, and that the accumulative rate should be the risk-free rate¹⁴⁹⁰ of 2.25% (being the risk-free rate adopted in calculating the deferment rate in *Sportelli*, based on index linked gilts) for both the before and after valuations.¹⁴⁹¹

16.96 The valuation of a negative income flow (that is, scenarios (3), (4) and (5) above) is more problematic. In *Nailrile*, the Lands Tribunal considered how this valuation should be done, and concluded that where the profit rent for the intermediate landlord is negative, the interest is to be valued adopting the "single rate" approach. In other words, by applying one capitalisation rate. The Tribunal also gave guidance as to the appropriate rate to use.

16.97 The decision in *Nailrile* establishes some other general principles that are applicable to the valuation of intermediate leases on a lease extension.¹⁴⁹²

- (1) The proper way to value an intermediate leasehold interest in any one flat is as a component of a sale of the intermediate lease as a whole if:
 - (a) the hypothetical seller of the intermediate lease could be expected to have an interest not just in the subject flat but also in the other flats in the block; and

¹⁴⁸⁸ *Nailrile Ltd v Cadogan* [2009] EGLR 151, at [30], approving *Visible Information Packaged Systems Ltd v Squarepoint (London) Ltd* [2000] 2 EGLR 93.

¹⁴⁸⁹ *Nailrile* (above), at [121].

¹⁴⁹⁰ This is the rate of return demanded by investors for holding an asset with no risk (often proxied by the return on a government security held to redemption).

¹⁴⁹¹ *Nailrile* (above), at [140].

¹⁴⁹² *Nailrile* (above), at [229]: further general conclusions were made on the subject of valuation and relativity.

- (b) it could be expected also that it would only sell its interest in the block as a whole.¹⁴⁹³
- (2) In valuing the intermediate lease, the intermediate leaseholder's landlord is to be excluded as a possible purchaser.¹⁴⁹⁴
- (3) Whilst schedule 13 to the 1993 Act is only in terms applicable where the interest has a positive value, its provisions apply though the after value of the intermediate lease is negative.¹⁴⁹⁵
- (4) It is *not* the case that, if the MILI provisions apply to the valuation of the intermediate lease before the lease extension is granted, they must *also* be applied to the valuation of the intermediate lease after the lease extension is granted.¹⁴⁹⁶
- (5) The requirement that a MILI “must have an expectation of possession of not more than one month” means that there must have been an expectation of possession but it must not be for more than one month. In other words, where an intermediate lease expires before the sub-lease and therefore has no expectation of possession, it cannot be a MILI.¹⁴⁹⁷
- (6) The requirement that the profit rent in respect of a MILI must be not more than £5 per year means that there must be a positive profit rent and it must be less than £5.¹⁴⁹⁸
- (7) Where the rent is subject to review, the intermediate leasehold interest is not a MILI if the post-review profit rent attributable to the flat is or could be in excess of £5.¹⁴⁹⁹
- (8) Compensation may be payable if, as a consequence of the lease extension claim, the landlord may receive less on a subsequent collective enfranchisement claim.¹⁵⁰⁰

¹⁴⁹³ *Nailrile* (above), at [32].

¹⁴⁹⁴ *Nailrile* (above), at [33] to [37].

¹⁴⁹⁵ *Nailrile* (above), at [38].

¹⁴⁹⁶ *Nailrile* (above), at [42] to [43].

¹⁴⁹⁷ *Nailrile* (above), at [44].

¹⁴⁹⁸ *Nailrile* (above), at [46].

¹⁴⁹⁹ *Nailrile* (above), at [46].

¹⁵⁰⁰ Under the 1993 Act, sch 13, para 5: *Nailrile* (above), at [60] to [65].

Marriage value

16.98 In a similar way to collective enfranchisement claims, where marriage value is payable, it is divided between the competent landlord and the intermediate leaseholders.¹⁵⁰¹ That division occurs in the following way:

The amount payable to the landlord in respect of his share of the marriage value shall be divided between the landlord and the owners of any such intermediate interests in proportion to the amounts by which the values of their respective interests in the flat will be diminished in consequence of the grant of the lease extension.¹⁵⁰²

Nailrile and Greensleeves

16.99 *Nailrile* consisted of five conjoined appeals, each concerning the valuation of intermediate leasehold interests. In one of those cases, referred to as 62 Cadogan Square, the intermediate landlord was a company owned by the leaseholders. The rent payable under the intermediate lease as at 25 March 2006 was £45,500 per annum. All of the sub-leases were granted at rents that both initially, and on review, in total matched the rent payable under the intermediate lease.

16.100 Each of the six leaseholders at 62 Cadogan Square gave notice claiming a lease extension under the 1993 Act at almost exactly the same time. They did so with the intention of proceeding to a collective enfranchisement claim under the 1993 Act after the individual lease extensions had been agreed. The objective of this two-stage approach was to reduce the total amount payable to the freeholder. On each of the lease extensions, the rent payable to the intermediate landlord in respect of each flat would reduce to a peppercorn. The intermediate landlord would thereby be left with no income with which to meet its obligation to pay rent to the freeholder, and therefore with an intermediate lease with a substantial negative value. The intermediate landlord would be compensated for that loss on each of the lease extension claims; compensation which, in effect, would be paid back to the leaseholders as owners of the company. However, on the subsequent collective enfranchisement claim, the price payable to the freeholder would be reduced by the amount of the negative value in the intermediate lease. The Lands Tribunal held that, in such circumstances, compensation may be payable to the freeholder at the time of the lease extensions in respect of its potential loss in a future collective enfranchisement claim.

16.101 In *Greensleeves*,¹⁵⁰³ the freeholder's valuer was unaware of the decision in *Nailrile*. As at 62 Cadogan Gardens, the leaseholders were shareholders of the company which held the intermediate lease of their building. The leaseholders all claimed lease extensions and the freeholder failed to claim compensation in respect of the risk of a future collective enfranchisement claim. The leaseholders then made a collective enfranchisement claim. It was agreed by the parties that the value of the intermediate lease had been reduced by the lease extension claims to *minus* £201,900. It was also agreed that the freeholder's interest was worth £166,770. Consequently, as a result of

¹⁵⁰¹ Again, it is for the landlord to distribute the marriage value paid: 1993 Act, sch 13, para 10(4).

¹⁵⁰² 1993 Act, sch 13, para 10(2).

¹⁵⁰³ *Alice Ellen Cooper-Dean Charitable Foundation Trustees v Greensleeves Owners Ltd* [2015] UKUT 320 (LC).

the offsetting provisions in the 1993 Act, the premium payable for the freehold was reduced to £0.

Sub-leases of lease extensions under the 1967 or 1993 Acts

16.102 Sub-lessees have limited enfranchisement rights where their immediate landlord has a lease that has been extended under either the 1967 or 1993 Act.

16.103 A lease extension under the 1967 Act must include a provision stating that no long lease created immediately, or derivatively by way of sub-demise under the lease, shall confer on the sub-lessee any right to the freehold or a lease extension as against the leaseholder's (his or her landlord's) landlord.¹⁵⁰⁴ After the expiry of the lease extension, a sub-lessee will not be entitled to the protection of Parts I and II of the 1954 Act, the Rent (Agriculture) Act 1976, or the Rent Act 1977, nor can he or she claim a lease extension under the 1967 Act as against the landlord.

16.104 Where such a sub-lease is being negotiated, the leaseholder of the extended lease (which will become an intermediate lease on the grant of the new sub-lease) must inform the proposed sub-lessee that the sub-lease is being granted out of a lease extended under the Act.¹⁵⁰⁵ The Act fails to provide for any penalty if the leaseholder fails to provide that information to the sub-lessee, but the authors of *Hague* suggest that the sub-lessee may have a civil claim against the leaseholder for breach of statutory duty or, perhaps, for misrepresentation.¹⁵⁰⁶

16.105 A lease extension granted under the 1993 Act similarly requires the new extended lease to state that any long sub-lease created out of that lease does not confer a right on the sub-lessee to claim a lease extension under the Act as against the superior landlord.¹⁵⁰⁷ Anyone granting or negotiating to grant a sub-lease out of an extended lease must inform the other party of that fact.¹⁵⁰⁸

MAIN CRITICISMS OF THE CURRENT LAW

Intermediate leasehold interests

Different rules for different types of enfranchisement claim

16.106 Although the existence of intermediate leasehold interests creates a common problem for leaseholders who are seeking to acquire either a lease extension, or the freehold to their premises, each of the existing enfranchisement rights has its own scheme for

¹⁵⁰⁴ 1967 Act, s 16(4) and sch 1, para 10(4).

¹⁵⁰⁵ 1967 Act, s 16(6).

¹⁵⁰⁶ *Hague*, para 7-46.

¹⁵⁰⁷ 1993 Act, s 57(7)(a) referring to s 59(3). However, this does not appear to prevent a sub-lessee claiming a lease extension as against his or her immediate landlord.

¹⁵⁰⁸ 1993 Act, s 59(4). This applies unless the grantor knows the grantee is aware of the fact or where the grantor is him or herself unaware of the fact.

dealing with that problem. As in other areas of the current law,¹⁵⁰⁹ the absence of a single scheme introduces unnecessary complexity and costs for leaseholders.

The procedure for dealing with intermediate leasehold interests

16.107 We have been told of a number of problems relating to the current procedures for dealing with intermediate leasehold interests.

- (1) The restriction on an intermediate landlord giving notice of his or her intention to act independently prior to the service of the competent landlord's counter-notice causes problems where the intermediate landlord is a company controlled by the leaseholders. This requires the freeholder to communicate with the leaseholders about the terms of the counter-notice which the landlord may wish to keep confidential.¹⁵¹⁰
- (2) There can be delays where different landlords do not agree how to deal with a leaseholder's claim, or where the leaseholder settles the premium with one landlord but not others.
- (3) Applications to court to replace the reversioner can be costly and time consuming.
- (4) Leaseholders' costs can increase as they must serve intermediate landlords with notices of claim, pay the statutory costs of intermediate landlords, and incur extra costs where an intermediate landlord is missing.
- (5) The wording of the 1993 Act suggests that the competent landlord is under an obligation to pay the intermediate landlord his or her part of the premium upon it being "tendered" by the leaseholder.¹⁵¹¹ Even where the competent landlord has a good reason to refuse to complete – for example, where his or her costs have not been paid, and the leaseholder has not offered any security for those costs – the landlord is obliged to pay the intermediate landlord at the point that the leaseholder offers to pay the premium.¹⁵¹²
- (6) There is no provision for an extension of time limits¹⁵¹³ in collective enfranchisement claims where an application to court has been made to replace the reversioner.¹⁵¹⁴

¹⁵⁰⁹ Such as procedure (see Chs 10 and 11 above).

¹⁵¹⁰ *Hague*, para 23-13.

¹⁵¹¹ In other words, when the sum is offered to the competent landlord, rather than when it is actually paid: 1993 Act, s 56(4).

¹⁵¹² *Hague*, para 32-02.

¹⁵¹³ Eg the 21-day limit in which a reversioner is required to serve a notice requiring evidence of the leaseholders' right to participate in a collective claim: 1993 Act, s 20(1), and the Leasehold Reform (Collective Enfranchisement and Renewal) Regulations 1993 (SI 1993 No 2407), sch 1, para 2(1).

¹⁵¹⁴ *Hague*, para 23-08.

Treatment of intermediate leases in a collective enfranchisement claim

16.108 We have been told that the current requirement for intermediate leases to be bought out during a collective enfranchisement claim can deter “white knight” investors from helping leaseholders to bring (and fund) such a claim. If an investor helps to fund the premium payable for the freehold on the basis that he or she is granted an intermediate lease of the non-participating leaseholders’ flats, that intermediate lease will be liable to acquisition on any subsequent collective enfranchisement claim. This outcome might mean that some leaseholders are unable to exercise their right to acquire the freehold as a result of a lack of funding.

16.109 Similarly, it has been drawn our attention¹⁵¹⁵ that leaseholders who have acquired an intermediate interest in their own flat will have that intermediate interest acquired by a nominee purchaser on a subsequent collective enfranchisement claim. This situation might arise where the leaseholder has acquired an intermediate interest rather than extending his or her sub-lease, but the titles to the two leases were not merged.

16.110 We are also told that a potential injustice can arise from the requirement that, in a collective enfranchisement claim, leaseholders must acquire all intermediate leases. Where an intermediate leaseholder (who has a lease of the whole building) occupies one flat within the building under that intermediate lease, the leaseholders participating in the collective enfranchisement will have to acquire his or her intermediate lease as part of their claim. Although the intermediate leaseholder will be compensated for the loss of the flat, he or she will not actually keep his or her flat.¹⁵¹⁶ It seems that this will be the case even if the intermediate leaseholder has made a claim for a lease extension of the flat before the collective enfranchisement claim is started.¹⁵¹⁷

Valuation of intermediate leasehold interests

16.111 The authors of *Hague* criticise the existing legislation relating to the treatment of MILIs in the following terms:

The basis on which an intermediate landlord is compensated under the 1993 Act is flawed. The use of the “formula” in relation to the determination of the amount to be paid to the intermediate landlord where the intermediate lease is a minor intermediate lease is virtually unworkable, given that the formula is designed to ascertain a price and not a value. Where the formula is applied under the 1967 Act the amount determined by it is the whole price; under the 1993 Act, the intermediate landlord receives in addition a proportion of marriage value.¹⁵¹⁸

¹⁵¹⁵ By Philip Rainey QC.

¹⁵¹⁶ It is, of course, possible for the participating leaseholders to agree that the intermediate leaseholder should retain his or her flat.

¹⁵¹⁷ *Hague*, para 20-08. The authors suggest an alternative interpretation that would avoid this problem. Section 2(4)(a) of the 1993 Act excludes from acquisition a flat that is demised by a head lease but is not held by a qualifying tenant. It is suggested that, in its context, the term “qualifying tenant” refers to a qualifying tenant whose interest is inferior to the head lease (and does not, therefore, include the head lease itself).

¹⁵¹⁸ *Hague*, para 1-50(3)(d)(iii).

16.112 It has also been suggested to us¹⁵¹⁹ that the 1993 Act¹⁵²⁰ potentially produces an inequitable result for a freeholder who is faced with a two-stage enfranchisement claim such as that in *Nailrile* and *Greensleeves*.

Leases containing common parts and common parts leases

16.113 One stakeholder¹⁵²¹ has highlighted a potential injustice that may result from the power in the 1993 Act for leaseholders in a collective enfranchisement claim to elect to acquire (through the nominee purchaser) any lease within the building that contains common parts where “the acquisition of that interest is reasonably necessary for the proper management or maintenance of those common parts”.¹⁵²² Leases that include both a flat and any common part are potentially caught by this provision, even where that lease is a sub-lease and not an intermediate lease.¹⁵²³

16.114 Further, we are told that in relation to the acquisition of common parts leases (where such a lease does not include a flat and is not an intermediate lease), there appears to be a conflict between the desirability of leaseholders acquiring such leases to ensure that they are able properly to manage the building after the freehold acquisition has occurred, and the desirability of preserving development rights. Development leases granted by landlords over, for example, roofs, roof spaces and airspaces can fall to be acquired as a lease of common parts,¹⁵²⁴ and this can hinder development.

OUR PROPOSED NEW REGIME

16.115 We believe that some of the problems with the current regime for intermediate leases will be solved by changes that we have provisionally proposed in other chapters of this Consultation Paper. We outline how these proposals will address those problems below. We also make some further provisional proposals that we believe will address remaining problems.

Procedure

16.116 In Chapter 11 we set out our provisional proposals relating to the procedure for bringing an enfranchisement claim. These proposed reforms include new provisions relating to the service of notices, missing landlords, the conduct of the claim, and the agreement and completion of a transfer or lease extension. In relation to intermediate landlords, those proposals are aimed at limiting the costs leaseholders incur in exercising their enfranchisement rights, predominantly by moving some of the obligations from leaseholders to their landlords.

¹⁵¹⁹ By Damian Greenish, one of the authors of *Hague*.

¹⁵²⁰ In particular, the combined effects of schs 6, 11 and 13 to the 1993 Act.

¹⁵²¹ Paul Pascoe, in his written response to the Government’s consultation, *Tackling unfair practices in the leasehold market* (July 2017).

¹⁵²² 1993 Act, s 2(3) and (4). See para 16.54 above.

¹⁵²³ Mr Pascoe said that investors might acquire flats in a block and then, as participating leaseholders in a collective enfranchisement claim, seek to acquire the leases of non-participating leaseholders, on the basis that the non-participating leaseholders’ demised premises contain common parts.

¹⁵²⁴ See, for example, *Panagopoulos v Earl Cadogan* [2010] EWCA Civ 1259, [2011] Ch 177.

16.117 In addition to our general proposals relating to enfranchisement procedure, we also provisionally consider that a new and specific statutory duty should be imposed on the person who has conduct of the claim to act with reasonable care and skill and to act in good faith in respect of the interests of all other landlords. The statutory duty would permit any landlord adversely affected by any dishonest or negligent action of another landlord to recover damages from that other landlord. We think that such a new duty would help to ensure that all landlords act fairly when dealing with an enfranchisement claim that also affects other landlords.

Consultation Question 126.

16.118 We provisionally propose creating a statutory duty on the landlord who has conduct of an enfranchisement claim to act with reasonable care and skill, and to act in good faith, in respect of the interests of other landlords.

Do consultees agree?

Treatment of intermediate leases

16.119 We noted above the criticism of the current regime that intermediate leases created as part of a collective enfranchisement claim can be acquired on a subsequent collective enfranchisement claim.¹⁵²⁵ We have considered whether intermediate leases that were granted as a result of an earlier collective enfranchisement claim – for example, a leaseback to the freeholder, or a intermediate lease granted to a white knight or group of leaseholders who have funded the non-participants' share of the cost of the freehold acquisition – should be immune from being acquired as part of any subsequent collective freehold acquisition. We do not, however, think that such an approach would work if our proposal to introduce a right to participate is introduced.¹⁵²⁶ In any event, we have proposed a restriction on successive collective freehold acquisitions which means such an intermediate lease is safe from compulsory acquisition for a minimum period of time.¹⁵²⁷

16.120 Save where the landlord is required to take a leaseback,¹⁵²⁸ those investing and taking an intermediate lease in these circumstances have a choice as to whether to do so. Such an investment can also be protected in other ways. While a landlord who is forced to take a leaseback may also be critical of such a position, he or she would remain free to dispose of any such interest if he or she decides not to retain it after the freehold has been acquired.

¹⁵²⁵ See para 16.108 above.

¹⁵²⁶ See Ch 6.

¹⁵²⁷ See paras 6.133 to 6.139 above.

¹⁵²⁸ See paras 6.129 to 6.132 above.

Consultation Question 127.

16.121 We invite the views of consultees as to whether an intermediate lease created as part of a collective freehold acquisition claim should be acquired by a nominee purchaser on any subsequent collective freehold acquisition of the premises.

16.122 We do, however, think that leaseholders who have acquired an intermediate lease in their own flat should not have that lease compulsorily acquired on a collective freehold acquisition.¹⁵²⁹ Where that intermediate lease includes premises other than the flat (and appurtenant property) the lease may be severed to allow the nominee purchase to acquire the part of the lease which is not the flat (or appurtenant property) and where the grounds set out in our proposal at paragraph 16.129(1) below are fulfilled.

Consultation Question 128.

16.123 We provisionally propose that, where the leaseholder of a flat also holds an intermediate lease in respect of that flat, the intermediate lease of that flat should not be acquired on any collective freehold acquisition of the premises.

Do consultees agree?

16.124 We refer above to the position of an intermediate leaseholder who, despite being treated as a qualifying tenant in relation to a flat by reason of holding that intermediate lease,¹⁵³⁰ nonetheless stands to have the intermediate lease acquired by the nominee purchaser on a collective enfranchisement.¹⁵³¹ Accordingly, where there is an intermediate lease of the whole building, but not all the flats within the building are let on long sub-leases (so the intermediate leaseholder would be treated as the qualifying tenant of some of the flats), we think that either:

- (1) the whole of the intermediate lease should not be acquired on a collective freehold acquisition; or
- (2) the whole of the intermediate lease should be acquired on a collective freehold acquisition, but there should be a leaseback to the intermediate leaseholder of flats of which he or she would be the qualifying tenant of those flats.

We consider that either approach would protect the position of an intermediate leaseholder where there is no inferior sub-lease of a flat, and would also have the effect of preventing the other leaseholders having to pay to acquire that part of an intermediate

¹⁵²⁹ See para 16.109 above.

¹⁵³⁰ In accordance with the decision in *Aggio*: see para 16.18 above.

¹⁵³¹ See para 16.110 above.

lease. In addition, the intermediate leaseholder would remain the leaseholder of the flat, and therefore would be entitled to exercise our proposed new right to participate.¹⁵³²

Consultation Question 129.

16.125 We provisionally propose that, in a collective freehold acquisition claim, where there is an intermediate lease of the whole building, but not all the flats within the building are let on long sub-leases (so the intermediate leaseholder would be treated as the qualifying tenant of some of the flats), either:

- (1) the whole of the intermediate lease should not be acquired; or
- (2) the whole of the intermediate lease should be acquired, but there should be a leaseback to the intermediate leaseholder of flats of which he or she would be the qualifying tenant?

Do consultees agree with either of these alternative proposals? If so, which approach is preferred and why?

Common parts leases

16.126 We discuss above the potential injustice that may result from the power in section 2(3) of the 1993 Act for leaseholders in a collective enfranchisement claim to elect to acquire (through the nominee purchaser) any lease within the building that contains common parts.¹⁵³³ We have considered whether that provision should be repealed. However, we believe that the acquisition of such leases can be necessary to enable leaseholders to manage their building effectively. We also believe that if common parts leases could not be acquired in this way, it would be very easy for landlords to create a leasehold scheme within a building which would make collective freehold acquisition unattractive for leaseholders.

16.127 Instead, we think that:

- (1) leases which include only common parts should be capable of being acquired by a nominee purchaser;
- (2) where such leases also include other property, we believe that the existing powers in the 1993 Act should be preserved,¹⁵³⁴ but that the lease should either:
 - (a) be severed where that is possible, so that the part of the lease containing only common parts is acquired but the remainder of the area included in the lease is not; or

¹⁵³² Unless the intermediate leaseholder granted a sub-lease out of the leasehold interest which itself qualified for enfranchisement rights,

¹⁵³³ See para 16.113 above.

¹⁵³⁴ 1993 Act, s 2(3) and (4). See para 16.54 above.

- (b) be retained by the leaseholder, but with the introduction of new, or a variation to existing, easements to ensure proper management or maintenance of the common parts; and
- (3) in the event that the parties are not able to agree, the outcome in any case will be determined by the Tribunal as part of its broader determination of the terms of acquisition.

16.128 This approach would preserve the power to allow nominee purchasers to acquire parts of premises that have been included within such a lease as part of a collective freehold acquisition. However, we think that it would achieve a better balance of the competing interests by allowing the objective of such a power to be met in a way that is likely to be significantly less disruptive for the leaseholder.

Consultation Question 130.

16.129 We provisionally propose that, as part of any collective freehold acquisition claim:

- (1) leases containing common parts together with other property should continue to be capable of being acquired by the nominee purchaser where it is reasonably necessary for the proper management or maintenance of those common parts; and
- (2) the Tribunal should have power to sever a lease containing common parts together with other property, or to introduce new or varied easements to ensure proper management or maintenance of those common parts, as an alternative to ordering that the whole of the lease be acquired by the nominee purchaser.

Do consultees agree?

16.130 We have also considered whether there should be a power to introduce new easements over a flat where that might be necessary or desirable to enable access to a common part which is not part of that flat.¹⁵³⁵ However, we have concluded that such a proposal would be tantamount to the use of the statutory enfranchisement procedure to correct a defect in a current lease. We believe that problem is best dealt with by other means, such as by reference to the powers to vary leases contained in Part IV of the Landlord and Tenant Act 1987.

16.131 We refer above to concerns about development leases being acquired on a collective enfranchisement claim.¹⁵³⁶ We provisionally propose that a lease of common parts should not normally be acquired on a collective freehold acquisition claim where that lease has been granted for development purposes. Whether the lease had been granted for such purposes or not would be a matter for the Tribunal to determine. In making that determination, the Tribunal should consider the substantive purpose of any

¹⁵³⁵ This would currently fall outside of the scope of s 2(3) of the 1993 Act as the common parts do not form part of the area demised to the leaseholder of the flat.

¹⁵³⁶ See para 16.114 above.

such lease, and therefore should not treat any statement of purpose contained within the lease as being conclusive.

16.132 If leases of common parts granted for development purposes were to be excluded from collective acquisition claims, we think that the Tribunal should have the power to sever such a lease, and/or to introduce new, or vary existing, easements, where doing so would permit the proper management of any common parts, while at the same time substantially preserve the intended development.

Consultation Question 131.

16.133 We provisionally propose that a lease of common parts granted for development purposes should not be acquired by a nominee purchaser on a collective freehold acquisition claim unless:

- (1) the severance of any part of that lease; and/or
- (2) the introduction of new, or the variation of existing, easements;

would both permit the proper management of any common parts, and substantially preserve the intended development.

Do consultees agree?

Sub-leases granted out of extended leases

16.134 We propose to remove the restrictions on the enfranchisement rights of sub-lessees whose long sub-lease was granted out of a lease that had been extended under any statutory enfranchisement right. As a result, it would be the sub-lessee rather than his or her landlord who would be able to exercise enfranchisement rights.

16.135 We propose that the removal of this restriction should apply to leases granted before and after a new regime comes into force, and so will assist existing leaseholders who hold such sub-leases at present.

16.136 We believe that such an approach is necessary to facilitate the right to participate which we have proposed should be available to the sub-lessee,¹⁵³⁷ and because the new regime will not restrict the number of lease extensions a leaseholder can obtain. This new regime would be easy to circumvent if the current restrictions on such sub-lessees remained.

¹⁵³⁷ See para 6.144 and following above.

Consultation Question 132.

16.137 We provisionally propose that leaseholders holding sub-leases granted out of leases that had previously been extended under the existing or any future statutory enfranchisement regime should be entitled to bring, or participate in, an enfranchisement claim.

Do consultees agree?

Valuation

16.138 The options we set out in Chapter 15 for the reform of the current valuation provisions in the 1967 and 1993 Acts apply equally to the valuation of intermediate leasehold interests. If one of the simple formulae discussed in that chapter were to be adopted, then provision would need to be made for apportioning the premium payable in cases where there is more than one landlord. The fairest way to do so would be by reference to the value of the various landlords' interests. However, if the value of those interests needed to be calculated, the benefits of a simple formula would be somewhat defeated.

16.139 Our further proposals specific to the valuation of intermediate leasehold interests are set out below.

Consultation Question 133.

16.140 We provisionally propose 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.

Do consultees agree?

16.141 If not, do consultees agree that the thresholds in the formulae that apply to a Minor Superior Tenancy and/or a Minor Intermediate Leasehold Interest ought to be increased?

Consultation Question 134.

16.142 We provisionally propose 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*.

Do consultees agree?

THE IMPACT OF REFORM

Consultation Question 135.

16.143 We welcome evidence as to the likely impact (financial and otherwise) on landlords of a new statutory duty requiring them to act with reasonable care and skill, and in good faith, in respect of the interests of other landlords.

Part VII: Summary of proposals and consultation questions

Chapter 17: Consultation Questions

Consultation Question 1.

- 17.1 We invite the views of consultees as to whether a reformed enfranchisement regime should treat particular issues differently in England and in Wales. Consultees are welcome to share their views on this point here, or in response to questions which we ask later on particular issues.

Paragraph 3.42

Consultation Question 2.

- 17.2 We provisionally propose 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 nominal ground rent. Do consultees agree?

- 17.3 We invite the views of consultees as to:

- (1) the appropriate length of such a lease extension; and
- (2) the points at which the landlord should be entitled to terminate the lease (paying appropriate compensation to the leaseholder) for the purposes of redevelopment.

Paragraph 4.40

Consultation Question 3.

- 17.4 We invite the views of consultees as to whether the right to a lease extension should in all cases be a right to an extended term at a nominal ground rent, or whether leaseholders should also have the choice:

- (1) only to extend the lease (without changing the ground rent); or
- (2) only to extinguish the ground rent (without extending the lease).

Paragraph 4.46

Consultation Question 4.

17.5 We provisionally propose that:

- (1) a leaseholder claiming a lease extension should be entitled to a lease extension of the whole of the premises let under his or her existing lease, whether or not the entirety of the premises falls within the curtilage of the building;
- (2) landlords should be able to propose that other land be included within a lease extension, and that there should be no time limit within which that proposal can be made; and
- (3) there should be no power for landlords to argue that parts of the premises let under a leaseholder's existing lease should be excluded from a lease extension.

Do consultees agree?

Paragraph 4.52

Consultation Question 5.

17.6 We provisionally propose that a lease extension should automatically:

- (1) be subject to any mortgage that is secured over the existing lease, and
- (2) bind the landlord's mortgagee.

Do consultees agree?

Paragraph 4.54

Consultation Question 6.

- 17.7 We provisionally propose that (except in the case of Aggio-style leases and cases where the common parts of a building are owned and managed by a third party) 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 non-contentious modernisations. Do consultees agree?
- 17.8 We invite the views of consultees as to the terms that should be included within such a prescribed list.
- 17.9 Do consultees consider that it would be appropriate to adopt a standard or model lease for Aggio-style leases? Alternatively, would it be appropriate to use a standard or model lease as a starting point in such cases?

Paragraph 4.91

Consultation Question 7.

- 17.10 Do consultees consider that the ability of parties to enter into a lease extension outside the 1967 and 1993 Acts creates significant problems in practice?
- 17.11 What steps, if any, do consultees consider could be taken to control or limit the use or impact of parties entering into a lease extension outside of a new statutory enfranchisement regime?

Paragraph 4.98

Consultation Question 8.

- 17.12 We invite consultees to tell us about their experiences in practice of the statutory provisions under the 1967 and 1993 Acts which enable a landlord and leaseholder, with court approval, to enter into a lease extension under which the leaseholder is precluded from exercising further enfranchisement rights in the future.
- 17.13 Do consultees consider that similar provision should be made under any new enfranchisement regime?

Paragraph 4.101

Consultation Question 9.

17.14 To what extent would our proposed uniform right to a lease extension at a nominal ground rent, for both houses and flats, increase the likelihood of leaseholders seeking lease extensions under (future) enfranchisement legislation?

Paragraph 4.103

Consultation Question 10.

17.15 We welcome evidence as to whether, and if so, how, an increase in the length of a statutory lease extension would affect:

- (1) the leasehold market; and
- (2) the mortgageability of leases.

Paragraph 4.104

Consultation Question 11.

17.16 We have asked whether leaseholders should have the option of:

- (1) extending their leases without changing the ground rent; or
- (2) extinguishing their ground rent without extending the term of the lease.

We welcome evidence as to the likely uptake of these options by leaseholders.

Paragraph 4.105

Consultation Question 12.

17.17 To what extent does the current ability of parties negotiating a lease extension to include such terms as they may agree in the lease extension:

- (1) increase the duration and cost of the enfranchisement process;
- (2) increase the potential for disputes; and
- (3) lead to the imposition of onerous or undesirable terms upon leaseholders under the lease extension, resulting in additional future costs to leaseholders?

17.18 To what extent would restricting parties' ability to introduce new terms into a lease extension to terms which are drawn from a prescribed list:

- (1) reduce the time and cost involved in acquiring a lease extension;
- (2) reduce the potential for disputes; and
- (3) reduce future costs to leaseholders arising from the terms of the lease extension?

17.19 Would this reform lead to a higher proportion of leaseholders seeking to exercise their right to a lease extension?

Paragraph 4.106

Consultation Question 13.

17.20 We provisionally propose that, where an individual freehold acquisition claim is made:

- (1) the leaseholder should be entitled to a transfer of:
 - (a) the whole of the building in which his or her residential unit is situated, even if parts of that building are not included within his or her existing lease; and
 - (b) the whole of his or her premises let under the existing lease, whether or not the entirety of those premises falls within the curtilage of the building; and
- (2) there should be no statutory deadline or time limit for landlords to propose that other land originally let to the leaseholder, but now assigned to another, should also be included in the transfer, or that parts of the premises that are above or below other premises in which he has an interest should be excluded from the transfer.

Do consultees agree?

Paragraph 5.30

Consultation Question 14.

17.21 We provisionally propose that, where an individual freehold acquisition claim is made:

- (1) any mortgage secured against the freehold title should automatically be discharged upon execution of the transfer; but
- (2) the leaseholder should be under a duty to pay:
 - (a) the whole of the price; or
 - (b) (if less) the sum outstanding under the mortgage;to the mortgagee or, alternatively, into court; and
- (3) any sums due from the leaseholder to the landlord should be reduced by any sums paid under (2) above.

Do consultees agree?

17.22 We also provisionally propose that where an individual freehold acquisition claim is made – save in the case of estate rentcharges imposed to secure positive covenants – a landlord should be under a duty to use his or her best endeavours to redeem any rentcharge.

Do consultees agree?

Paragraph 5.34

Consultation Question 15.

17.23 We invite the views of consultees as to whether a leaseholder making an individual freehold acquisition claim should acquire the freehold 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.

17.24 We provisionally propose that, on an individual freehold acquisition claim, additional terms may only be added to the transfer where the leaseholder elects to include a term drawn from a prescribed list of terms.

Do consultees agree?

17.25 We invite the views of consultees as to the types of additional terms that should be included within such a prescribed list.

Paragraph 5.48

Consultation Question 16.

17.26 We invite the views of consultees as to whether, where a leaseholder's existing lease contains rights and obligations in respect of land that is to be retained by the landlord, the leaseholder should (where there is no current estate management scheme in place) acquire the freehold subject to terms in respect of the retained land that:

- (1) reflect the rights and obligations set out in the leaseholder's existing lease; or
- (2) appear within a prescribed list of appropriate covenants.

17.27 We invite the view of consultees as to the types of terms that should be included within such a prescribed list.

Paragraph 5.56

Consultation Question 17.

17.28 We provisionally propose that any obligation 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.

Do consultees agree?

17.29 We invite the views of consultees as to whether unpaid sums due from a leaseholder who has acquired the freehold of their premises 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.

Paragraph 5.62

Consultation Question 18.

17.30 We provisionally propose that where a leaseholder's existing lease does not contain rights and obligations in respect of land that is to be retained by the landlord, the leaseholder should (where there is no current estate management scheme in place) acquire the freehold subject to terms in respect of the retained land that appear within a prescribed list of appropriate covenants.

Do consultees agree?

17.31 We invite the views of consultees as to the types of terms that should be included within any prescribed list.

Paragraph 5.66

Consultation Question 19.

17.32 Do consultees believe that the ability of parties to enter into a transfer of the freehold of a house outside the 1967 Act creates significant problems in practice?

17.33 What steps, if any, do consultees believe could be taken to control or limit the use or impact of parties entering into a freehold transfer to an individual leaseholder outside of a new statutory enfranchisement regime?

Paragraph 5.70

Consultation Question 20.

17.34 To what extent does the current ability of parties negotiating the terms of a claim to acquire the freehold of a house to agree the terms of the freehold transfer without restriction:

- (1) increase the duration and cost of the enfranchisement process;
- (2) increase the potential for disputes; and
- (3) lead to the inclusion of unusual terms within the freehold transfer, resulting in additional future costs to former leaseholders?

17.35 To what extent would limitations on the ability of parties to include new rights and obligations in a freehold transfer to an individual leaseholder:

- (1) reduce the time and cost involved in acquiring the freehold individually;
- (2) reduce the potential for disputes; and
- (3) reduce future costs to former leaseholders arising from the terms of the freehold transfer?

17.36 Would this reform result in a higher proportion of leaseholders seeking to exercise their right of individual freehold acquisition?

Paragraph 5.72

Consultation Question 21.

17.37 We provisionally propose:

- (1) a general requirement that a collective freehold acquisition claim must be carried out by a nominee purchaser which is a company; and
- (2) an exception to the above requirement where:
 - (a) the premises to be acquired contain four residential units or fewer;
 - (b) all residential units are held on long leases;
 - (c) the leaseholders of all residential units are participating in the claim; and
 - (d) all those leaseholders agree.

Do consultees agree?

17.38 Do consultees consider that some of the requirements of company law are inappropriate or onerous for a nominee purchaser company and should be relaxed? If so, please tell us which.

Paragraph 6.67

Consultation Question 22.

17.39 We provisionally propose that the nominee purchaser company used for a collective freehold acquisition claim must be a company limited by guarantee.

Do consultees agree?

Paragraph 6.79

Consultation Question 23.

17.40 We provisionally propose that the articles of association of any nominee purchaser company exercising the right of collective freehold acquisition must contain certain prescribed articles. We also propose that those prescribed articles may only be departed from where:

- (1) all the residential units within the premises are held on long leases; and
- (2) the leaseholders of all residential units are members of the nominee purchaser company.

Do consultees agree?

17.41 We invite the views of consultees as to:

- (1) the matters in respect of which it would be desirable for articles to be prescribed; and
- (2) any matters in respect of which it would be desirable to require provision in the articles of association, albeit with some freedom as to that provision.

Paragraph 6.86

Consultation Question 24.

17.42 We provisionally propose that a nominee purchaser company, having carried out a collective freehold acquisition, be restricted from disposing of the premises acquired, save where:

- (1) all the residential units within the premises are held on long leases;
- (2) the leaseholders of all residential units are members of the nominee purchaser company; and
- (3) all members of the company agree with the proposed disposition;

OR

- (4) the Tribunal makes an order permitting the proposed disposition.

Do consultees agree?

17.43 We invite the views of consultees as to the grounds on which the Tribunal should be empowered to permit a disposition of the premises acquired collectively by a nominee purchaser company.

Paragraph 6.91

Consultation Question 25.

17.44 We provisionally propose that the right of collective freehold acquisition should extend to the acquisition of the freehold of an entire estate consisting of multiple buildings.

Do consultees agree?

17.45 We invite the views of consultees as to how such a right might operate. Do consultees consider that there are any problems with the approach we have suggested at paragraph 6.95, or any other issues for which we would need to provide?

Paragraph 6.96

Consultation Question 26.

17.46 We provisionally propose that a nominee purchaser carrying out a collective freehold acquisition should acquire:

- (1) the freehold to the building or buildings in which the flats are situated, including any common parts; and
- (2) any other land let with the flats within the building.

Do consultees agree?

17.47 We provisionally propose that a nominee purchaser carrying out a collective freehold acquisition should be entitled to acquire the freehold of other land over which the leaseholders exercise rights in common, provided that the right is shared only with other occupiers within the building(s) being acquired.

Do consultees agree?

Paragraph 6.103

Consultation Question 27.

17.48 We provisionally propose that, on a collective freehold acquisition:

- (1) any mortgage secured against the freehold title should automatically be discharged upon execution of the transfer; but
- (2) the nominee purchaser should be under a duty to pay:
 - (a) the whole of the price, or
 - (b) (if less) the sum outstanding under the mortgage,to the mortgagee or, alternatively, into court; and
- (3) any sums due from the nominee purchaser to the landlord should be reduced by any sums paid under (2) above.

Do consultees agree?

17.49 We also provisionally propose that on a collective freehold acquisition – save in the case of estate rentcharges imposed to secure positive covenants – a landlord should be under a duty to use his or her best endeavours to redeem any rentcharge.

Do consultees agree?

Paragraph 6.107

Consultation Question 28.

17.50 We provisionally propose that, where a nominee purchaser making a collective freehold acquisition claim is to acquire the whole of the landlord's freehold interest, any rights and obligations that are not ordinarily discharged upon payment of the purchase price should be continued automatically.

Do consultees agree? What do consultees consider would be the best statutory means by which this could be achieved?

17.51 We provisionally propose that, where a nominee purchaser making a collective freehold acquisition claim is to acquire the whole of the landlord's freehold interest, the parties should only be able to adopt additional covenants if those covenants are drawn from a list of prescribed covenants.

Do consultees agree? Which covenants do consultees consider should be included within such a prescribed list?

Paragraph 6.117

Consultation Question 29.

17.52 We invite the views of consultees as to whether, on a collective freehold acquisition claim where the leaseholders' existing leases contain rights and obligations in respect of land that is to be retained by the landlord, the nominee purchaser should (where there is no current estate management scheme in place) acquire the freehold subject to terms in respect of the retained land that:

- (1) reflect the rights and obligations set out in the leaseholders' existing leases; or
- (2) appear within a prescribed list of appropriate covenants.

17.53 We invite the views of consultees as to the types of term that should be included within such a prescribed list.

Paragraph 6.124

Consultation Question 30.

17.54 We provisionally propose that, on a collective freehold acquisition claim where the leaseholders' existing leases do not contain rights and obligations in respect of land that is to be retained by the landlord, the nominee purchaser should (where there is no current estate management scheme in place) acquire the freehold subject to terms in respect of the retained land that appear within a prescribed list of appropriate covenants.

Do consultees agree?

17.55 We invite the views of consultees as to the types of terms that should be included within such a prescribed list.

Paragraph 6.127

Consultation Question 31.

17.56 We provisionally propose to introduce a new power for leaseholders exercising the right of collective freehold acquisition to insist, if they so choose, that the freeholder take a leaseback or leasebacks of all parts of the premises (other than common parts) which are not let to participating leaseholders.

Do consultees agree?

Paragraph 6.132

Consultation Question 32.

17.57 We provisionally propose that, where premises have been the subject of a collective freehold acquisition claim, the leaseholders in those premises should be prohibited from making a further collective freehold acquisition claim in respect of the same premises for a set period.

Do consultees agree?

17.58 We provisionally propose that five years would be an appropriate duration for such a prohibition.

Do consultees agree?

Paragraph 6.138

Consultation Question 33.

17.59 Do consultees believe that the ability of parties to enter into a transfer of the freehold of a block of flats outside the 1993 Act creates significant problems in practice?

17.60 What steps, if any, do consultees believe could be taken to control or limit the use or impact of parties entering into a freehold transfer to a group of leaseholders outside of a new statutory enfranchisement regime?

Paragraph 6.142

Consultation Question 34.

17.61 We provisionally propose a new right to participate: the right for leaseholders who did not participate in a prior collective freehold acquisition claim, or who did not qualify for the right at the time of the prior claim, subsequently to purchase a share of the freehold interest held by those who did participate.

Do consultees agree?

17.62 Do consultees consider that the right to participate should be available only in respect of collective freehold acquisition claims completed in the future, or also in respect of collective enfranchisement claims that completed before commencement of the new regime?

17.63 We have identified at paragraph 6.156 a number of issues which will need to be addressed in order for the right to participate to operate successfully. We invite consultees to share with us their views on how these issues might be resolved, and to tell us of any further difficulties they foresee with the operation of the proposed right.

Paragraph 6.157

Consultation Question 35.

17.64 We welcome evidence as to the costs and benefits of requiring leaseholders pursuing a collective freehold acquisition claim to:

- (1) use a company limited by guarantee as the nominee purchaser;
- (2) comply with the applicable rules of company law; and
- (3) use a set of partly-prescribed articles of association for the company limited by guarantee.

Paragraph 6.160

Consultation Question 36.

17.65 To what extent does the current ability of parties negotiating the terms of a collective enfranchisement to agree the terms of the freehold transfer without restriction:

- (1) increase the duration and cost of the enfranchisement process;
- (2) increase the potential for disputes; and
- (3) lead to future difficulties (financial or otherwise) resulting from the inclusion of unusual terms within the freehold transfer?

17.66 To what extent would limitations on the ability of parties to include new rights and obligations in a freehold transfer to a nominee purchaser:

- (1) reduce the time and cost involved in acquiring the freehold collectively;
- (2) reduce the potential for disputes; and
- (3) reduce future difficulties (financial or otherwise) resulting from the inclusion of unusual terms within the freehold transfer?

17.67 Would this reform result in a higher proportion of leaseholders seeking to exercise the right of collective freehold acquisition?

Paragraph 6.161

Consultation Question 37.

17.68 To what extent would our proposed new ability for leaseholders exercising the right of collective freehold acquisition to require the freeholder to take leasebacks of all parts of the premises (other than common parts) which are not let to participating leaseholders make collective freehold acquisition more affordable? Would this reform result in a higher proportion of leaseholders seeking to exercise the right of collective freehold acquisition?

Paragraph 6.164

Consultation Question 38.

17.69 We provisionally propose to replace the language of “houses” and “flats” with the new concept of a “residential unit”.

Do consultees agree?

17.70 Do consultees think that our proposed definition of a “residential unit”, set out at paragraphs 8.37 to 8.56, will work successfully in practice?

17.71 We provisionally propose to exclude business leases from enfranchisement rights. Do consultees agree? If so, do consultees agree that the best method of achieving this exclusion is by restricting enfranchisement rights to leases which permit residential use?

Paragraph 8.57

Consultation Question 39.

17.72 We provisionally propose to maintain the requirement that, in general, a leaseholder must have a lease which exceeds 21 years in order to qualify for any enfranchisement rights.

Do consultees agree?

Paragraph 8.67

Consultation Question 40.

17.73 We provisionally propose maintaining the current legal position that separate, concurrent long leases between the same landlord and leaseholder may be treated as if they were a single long lease.

Do consultees agree?

17.74 We provisionally propose maintaining the current legal position that renewals or statutory continuations of long leases are also to be treated as long leases. Further, we propose adopting (across the board) the 1967 Act’s approach to consecutive long leases, in treating them as a single long lease.

Do consultees agree?

Paragraph 8.71

Consultation Question 41.

17.75 We provisionally propose that all qualifying criteria for enfranchisement rights based on financial limits (both the low rent test and rateable values) be removed.

Do consultees agree?

Paragraph 8.74

Consultation Question 42.

17.76 We provisionally propose that the requirement to own premises for two years before exercising enfranchisement rights in respect of those premises be abolished.

Do consultees agree?

Paragraph 8.77

Consultation Question 43.

17.77 We provisionally propose 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 units does not exceed 25% of the floor space of all the units combined.

Do consultees agree?

Paragraph 8.95

Consultation Question 44.

17.78 We provisionally propose 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 definitions of "self-contained building" and "self-contained part of a building".

Do consultees agree?

17.79 We provisionally propose that, otherwise, the "building" in which a unit is contained can be defined simply as a built structure with a significant degree of permanence which can be said to change the physical character of the land.

Do consultees agree?

Paragraph 8.104

Consultation Question 45.

17.80 We invite consultees' views on the desirability and workability of creating a discretion for the Tribunal to authorise, in limited circumstances, a freehold acquisition (whether individual or collective) where this would not otherwise be possible because the building or part of building concerned is not, or might not be, self-contained.

Paragraph 8.109

Consultation Question 46.

17.81 We provisionally propose that it is appropriate to apply a maximum percentage limit on non-residential use to individual freehold acquisition claims concerning premises containing multiple units.

Do consultees agree?

17.82 We provisionally propose that that limit should be the same as that which applies to collective freehold acquisition claims.

Do consultees agree?

17.83 We provisionally propose that the limit should be set at 25% of the internal floor space (excluding common parts).

Do consultees agree?

Paragraph 8.119

Consultation Question 47.

17.84 We provisionally propose to maintain an equivalent of the current requirement that, for a collective enfranchisement, there must be a minimum of two or more flats held by qualifying tenants in the premises to be acquired.

Do consultees agree?

Paragraph 8.134

Consultation Question 48.

17.85 We provisionally propose to maintain an equivalent of the current requirement that, for a collective enfranchisement, at least two-thirds of the flats in the premises to be acquired must be let on long leases.

Do consultees agree?

Paragraph 8.142

Consultation Question 49.

17.86 We provisionally propose 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.

Do consultees agree?

Paragraph 8.144

Consultation Question 50.

17.87 We provisionally propose to remove the requirement that, in the case of a building containing only two residential units, both leaseholders must participate in a collective freehold acquisition claim.

Do consultees agree?

Paragraph 8.147

Consultation Question 51.

17.88 We provisionally propose to remove the current prohibition on leaseholders of three or more flats in a building being qualifying tenants for the purposes of a collective enfranchisement claim.

Do consultees agree?

Paragraph 8.149

Consultation Question 52.

17.89 We provisionally propose the continuation of the 25% limit on non-residential use in collective freehold acquisition claims.

Do consultees agree?

Paragraph 8.153

Consultation Question 53.

17.90 We provisionally propose the continuation of the exceptions from collective freehold acquisition claims for resident landlords and operational railway tracks.

Do consultees agree?

Paragraph 8.155

Consultation Question 54.

17.91 We provisionally propose 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.

Do consultees agree?

Paragraph 8.157

Consultation Question 55.

17.92 We invite the views of consultees as to whether there should be an exception to the two-or-more flats requirement and the two-thirds condition in the case of buildings consisting of two residential units, so as to enable a “collective” freehold acquisition by the leaseholder of one unit where the other is retained by the landlord of the building.

Paragraph 8.166

Consultation Question 56.

17.93 We provisionally propose that the 25% limit on non-residential use should apply to two-unit buildings as it does to any other multi-unit building. Do consultees agree?

17.94 If consultees disagree, how should two-unit buildings be treated differently? Do consultees favour:

- (1) a proviso to the effect that a non-residential unit can be treated as residential where its use is “ancillary” or “complementary” to residential use of another unit;
- (2) a higher percentage limit; or
- (3) a sunset clause?

Alternatively, is there another potential approach we should consider?

Paragraph 8.180

Consultation Question 57.

17.95 Do consultees think that the ability of a head lessee of a block of flats to acquire the freehold of that block individually is a significant problem with our proposed scheme, compared with the reality under the current law?

Paragraph 8.184

Consultation Question 58.

17.96 Do consultees consider it desirable to attempt to restrict the enfranchisement rights of commercial investors further than the current law does?

17.97 If so, do consultees consider that it might be possible successfully to restrict the enfranchisement rights of commercial investors:

- (1) by means of a residence test; or
- (2) by the adoption of a reduced definition of a residential unit, to exclude units which are let on short residential tenancies?

Are there any other options we should consider?

Paragraph 8.192

Consultation Question 59.

17.98 How and to what extent has the exercise of enfranchisement rights been slowed down, prevented, or made more costly by:

- (1) the qualifying criteria based on financial limits (the low rent test and rateable values) under the 1967 Act;
- (2) the difficulty in categorising premises as either flats or houses;
- (3) the uncertainty surrounding the definition of a “house” under the 1967 Act and the definition of a “self-contained building” under the 1993 Act;
- (4) the two-year ownership rule under the 1967 Act and (in respect of lease extensions) the 1993 Act; and
- (5) the general complexity and inaccessibility of the qualifying criteria for enfranchisement rights?

17.99 To what extent would our proposed reforms to qualifying criteria reduce:

- (1) the duration and cost of the enfranchisement process; and
- (2) the number of disputes arising under the enfranchisement regime?

Paragraph 8.194

Consultation Question 60.

17.100 We welcome evidence as to the likely effect of further restrictions on the ability of commercial leaseholders to enfranchise (whether at all, or at a higher premium than other leaseholders) on:

- (1) the leasehold market;
- (2) the wider housing market; and
- (3) the economy more broadly.

Paragraph 8.196

Consultation Question 61.

17.101 We provisionally propose:

- (1) that shared ownership leaseholders should be entitled to a lease extension which is of the same length as that available to any other leaseholder; and
- (2) that the terms of the lease extension must replicate any terms of the existing lease which relate to its shared ownership nature.

Do consultees agree?

17.102 We invite the views of consultees as to:

- (1) the calculation of the premium payable by a shared ownership leaseholder for a lease extension;
- (2) any issues of valuation and procedure which arise where the provider of the shared ownership lease is itself a leaseholder; and
- (3) any other issues which may arise on the exercise of the right to a lease extension by a shared ownership leaseholder.

Paragraph 9.37

Consultation Question 62.

17.103 We invite the views of consultees as to whether the proposed requirements for a collective freehold acquisition claim that:

- (1) two-thirds of the residential units in a building or on an estate must be let on long leases; and
- (2) leaseholders of at least half of the residential units in the building or on the estate must participate in the claim;

should be relaxed where a building or estate includes residential units let on shared ownership leases.

17.104 If consultees think that the requirements should be relaxed, then how should this be done?

- (1) Should shared ownership properties be ignored altogether when determining the number of residential units in a building or on an estate, and whether the necessary percentage requirements are met?
- (2) Alternatively, should shared ownership leaseholders be treated as long leaseholders for these purposes, even though they cannot themselves participate in the collective freehold acquisition?
- (3) Is there another approach which could be used?

Paragraph 9.42

Consultation Question 63.

17.105 We provisionally propose that:

- (1) shared ownership leases should be required to comply with particular statutory criteria in order to be exempt from rights of freehold acquisition; and
- (2) those criteria should be the same regardless of the type of landlord.

Do consultees agree?

17.106 We provisionally propose that those statutory criteria should require that the shared ownership lease:

- (1) entitles the leaseholder to acquire additional shares in the house 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 provide 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.

Do consultees agree? We also invite the views of consultees as to any other criteria which they consider shared ownership leases should be required to satisfy in order to be exempt from rights of freehold acquisition.

Paragraph 9.48

Consultation Question 64.

17.107 We invite the views of consultees as to the treatment of long leases of National Trust properties within our new enfranchisement regime. Should National Trust property let on long residential leases:

- (1) be excluded altogether from statutory enfranchisement rights;
- (2) be subject to enfranchisement claims in the same way as any other property; or
- (3) be subject to more limited enfranchisement rights than other property?

17.108 If National Trust properties are to enjoy more limited enfranchisement rights than other property, how should this limitation be achieved?

Paragraph 9.60

Consultation Question 65.

17.109 We would like to hear from any consultees who have made lease extension or freehold acquisition claims against the Crown (whether pursuant to the Crown's undertaking to Parliament or its voluntary policy). What has been your experience? Have you encountered any difficulties?

Paragraph 9.66

Consultation Question 66.

17.110 We invite consultees' views as to whether there should be a new exemption from enfranchisement rights for community land trusts and other forms of community-led housing.

17.111 If so, we invite the views of consultees as to:

- (1) the housing models to which the exemption should apply;
- (2) the way in which the exemption should work, and the circumstances in which it should apply;
- (3) the enfranchisement rights which should fall within the exemption; and
- (4) any other issues which consultees consider relevant to such an exemption.

Paragraph 9.74

Consultation Question 67.

17.112 We invite consultees to share their experiences of the existing exemptions and qualifications to enfranchisement rights. We also invite consultees' views as to whether these exemptions and qualifications should be retained in any new enfranchisement regime.

Paragraph 9.96

Consultation Question 68.

17.113 If you have experience of the grant of lease extensions to shared ownership leaseholders (either under the 1993 Act or on a voluntary basis), please tell us about the terms on which these lease extensions have been granted.

Paragraph 9.97

Consultation Question 69.

17.114 We welcome evidence as to how Government's policy decision to give shared ownership leaseholders a statutory right to a lease extension would affect:

- (1) the willingness of landlords and developers to offer shared ownership leases; and
- (2) the market value of shared ownership leases.

Paragraph 9.98

Consultation Question 70.

17.115 We provisionally propose that a single procedure should apply to all enfranchisement rights.

Do consultees agree?

Paragraph 11.13

Consultation Question 71.

17.116 We provisionally propose that a single set of prescribed forms be introduced for bringing and responding to enfranchisement claims, namely an Information Notice, a Claim Notice and a Response Notice.

Do consultees agree?

Paragraph 11.17

Consultation Question 72.

17.117 Do consultees consider that a party who is giving an enfranchisement notice should be required to sign that notice?

17.118 Do consultees consider that an enfranchisement notice should only be challengeable for validity if it has not been signed by or on behalf of the minimum number of leaseholders required to bring the claim? If not, what do consultees believe the minimum requirement should be for such a notice to remain valid?

17.119 Do consultees consider that a Claim Notice should include a statement of truth confirming that specified checks (if required) have been carried out?

Paragraph 11.24

Consultation Question 73.

17.120 We provisionally propose that:

- (1) leaseholders be permitted to serve an Information Notice on their immediate landlord or a superior landlord requiring the recipient to provide the name and address of his or her landlord and any other superior landlord of whom he or she is aware; and
- (2) the recipient of an Information Notice who fails to respond should be liable to pay any costs of leaseholders that are wasted as a result of the information not having been provided.

Do consultees agree?

Paragraph 11.30

Consultation Question 74.

17.121 We provisionally propose that Claim Notices should include full details about leaseholders' claims, and proof of the leaseholders' title.

Do consultees agree?

17.122 We invite the views of consultees as to whether a single prescribed Claim Notice should apply to all enfranchisement claims, or whether separate forms should be provided for different enfranchisement claims.

Paragraph 11.39

Consultation Question 75.

17.123 We provisionally propose that leaseholders seeking to bring a collective freehold acquisition claim should not be required to serve notices on other leaseholders inviting their participation in the proposed claim.

Do consultees agree?

Paragraph 11.43

Consultation Question 76.

17.124 We provisionally propose that the service of a Claim Notice upon a competent landlord should not create a statutory contract between the leaseholders and the landlord.

Do consultees agree?

17.125 We invite the views of consultees as to whether there are any other effects of a statutory contract that we would need to provide for in some other way.

Paragraph 11.46

Consultation Question 77.

17.126 We provisionally propose that Response Notices should:

- (1) state whether the leaseholder's right to enfranchise is admitted or denied, and the basis for any such admission or denial;
- (2) state whether the landlord accepts or rejects the leaseholder's proposals, and set out the landlord's own proposed terms;
- (3) attach a draft contract, lease or transfer;
- (4) contain an address within England and Wales at which the landlord can be served; and
- (5) be accompanied by proof of the landlord's title.

Do consultees agree?

Paragraph 11.52

Consultation Question 78.

17.127 We provisionally propose that:

- (1) leaseholders making an enfranchisement claim should serve their Claim Notice on their competent landlord (the first superior landlord who holds a sufficient interest in the premises to be able to grant the interest claimed); and
- (2) in the case of joint owners of a single freehold, or in the case of a split freehold or other reversion, leaseholders will only be required to serve the Claim Notice on one landlord, and it will be for that landlord to serve copies of that notice on other landlords.

Do consultees agree?

Paragraph 11.60

Consultation Question 79.

17.128 We provisionally propose that:

- (1) Claim Notices sent by post or delivered by hand to competent landlords at specified categories of address (falling within Group A or B, as set out at paragraphs 11.69 and 11.70) should be deemed served; and
- (2) where it is not possible to serve competent landlords in that way, leaseholders should be able to apply to the Tribunal for an order allowing them to proceed with their enfranchisement claim.

Do consultees agree?

Paragraph 11.82

Consultation Question 80.

17.129 We provisionally propose that:

- (1) before serving a Claim Notice, leaseholders should be required to check their competent landlord's address as shown at HM Land Registry;
- (2) before serving a Claim Notice using Service Route B leaseholders should be required to:
 - (a) search the Probate Register;
 - (b) search the Insolvency Register; and
 - (c) (in the case of a company landlord) check its status at Companies House;
- (3) if an individual landlord is dead, the designated address for service should be the address of any personal representatives at the address given in any grant of probate;
- (4) if an individual landlord is insolvent, the designated address for service should be the address for his or her trustee in bankruptcy as shown on the Insolvency Service website;
- (5) if a company landlord is insolvent, the designated address for service should be 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;
- (6) before serving a Claim Notice using the No Service Route, leaseholders should place an advertisement in the London Gazette inviting owners of the premises to contact the leaseholders within 28 days; and
- (7) where leaseholders know the identity of the landlord but do not have an address for him or her falling within Group A or B, they should carry out the checks referred to at (2) above, before placing an advertisement in the London Gazette.

Do consultees agree?

Paragraph 11.95

Consultation Question 81.

17.130 We provisionally propose that landlords who fail to serve a Response Notice within the prescribed period should no longer be required to transfer their freehold interest, or grant a lease extension, upon the terms set out in the Claim Notice.

Do consultees agree?

Paragraph 11.101

Consultation Question 82.

17.131 We provisionally propose that:

- (1) the competent landlord (rather than the leaseholder) should be responsible for serving copies of the Claim Notice upon intermediate leaseholders or third parties; and
- (2) where the competent landlord fails to serve a copy of a notice on an intermediate landlord, the intermediate landlord should be able to bring a claim against the competent landlord for any losses arising.

Do consultees agree?

Paragraph 11.106

Consultation Question 83.

17.132 We invite the views of consultees as to:

- (1) whether a landlord should be entitled to apply to the Tribunal for an order setting aside a determination of an enfranchisement claim that has been made in his or her absence; and
- (2) if so, the criteria which the landlord should be required to satisfy before any such order can be made.

Paragraph 11.132

Consultation Question 84.

17.133 We provisionally propose that detailed conveyancing regulations need not generally be made in relation to enfranchisement claims. Do consultees agree? Notwithstanding the general proposition, are there particular stages of the conveyancing process, or particular types of claim, in relation to which conveyancing regulations would still need to be made?

Paragraph 11.143

Consultation Question 85.

17.134 We provisionally propose that:

- (1) a landlord should serve a Response Notice no later than six weeks after the date on which the Claim Notice was sent by post or delivered by hand to the competent landlord;
- (2) a landlord who has received a Claim Notice should serve any intermediate landlords and third parties to the existing lease within 14 days; and
- (3) if a Response Notice has been served, either party should be entitled to apply to the Tribunal for a determination of the claim 21 days thereafter.

Do consultees agree?

Paragraph 11.146

Consultation Question 86.

17.135 We provisionally propose that:

- (1) an enfranchisement claim should not be deemed to have been withdrawn because procedural time limits have been missed by the leaseholder;
- (2) a landlord who has served a Response Notice should be able to apply to the Tribunal for an order striking out a Claim Notice if a procedural time limit has been missed by the leaseholder;
- (3) in a collective freehold acquisition claim, other groups of leaseholders should also be able to apply to the Tribunal for an order striking out the Claim Notice if the leaseholders bringing that claim have missed a procedural time limit; and
- (4) in either case (2) or case (3) above, the applicant for such an order should be required to give the leaseholder(s) bringing the claim 14 days' written notice of the intended application.

Do consultees agree?

Paragraph 11.153

Consultation Question 87.

17.136 We provisionally propose that the benefit of a Claim Notice should be transferred automatically upon assignment of the leaseholder's lease, save where the assignment expressly states that the benefit of the Claim Notice will not be transferred.

Do consultees agree?

17.137 We provisionally propose that when a Claim Notice has been assigned, the landlord should continue to be able to serve documents on the assignor until he or she is given notice of the assignment of lease.

Do consultees agree?

Paragraph 11.157

Consultation Question 88.

17.138 We provisionally propose that a landlord who has been deemed served with a Claim Notice will be liable to pay the leaseholder's wasted costs if the landlord disposes of his or her interest between the date on which the Claim Notice was deemed served and the point at which the notice appeared on the register of title or is entered as a land charge, provided that the leaseholder's application to register was made not less than 14 days after the Claim Notice was posted or delivered by hand to the competent landlord.

Do consultees agree?

Paragraph 11.170

Consultation Question 89.

17.139 We provisionally propose that, in the case of a lease extension claim, where the landlord's interest is held subject to a mortgage:

- (1) a landlord should be under an obligation to:
 - (a) inform his or her mortgagee of the grant of a lease extension not less than 21 days before completion;
 - (b) 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 landlord's mortgagee requests; or
 - (b) the leaseholder has not received confirmation that the required notice has been given to the landlord's mortgagee.

Do consultees agree?

Paragraph 11.173

Consultation Question 90.

17.140 We provisionally propose that, in the case of a lease extension claim, where the leaseholder's interest is held subject to a mortgage:

- (1) the leaseholder should be under an obligation to give the lease extension to his or her mortgagee within one month of registration; and
- (2) if the leaseholder does not do so, he or she will be liable for any losses that occur as a result.

Do consultees agree?

17.141 We provisionally propose that, in the case of an individual freehold acquisition claim, where a leaseholder elects to merge his or her leasehold and freehold titles, a deed of substituted security will not be required if written notice has been given to the leaseholder's mortgagee and no objection has been raised.

Do consultees agree?

Paragraph 11.176

Consultation Question 91.

17.142 We provisionally propose that where the consent of a third party to any grant or transfer is required:

- (1) the grant or transfer may be registered without such consent being given; but
- (2) the landlord should be required to inform the beneficiary of the transaction not less than 21 days before completion, and also within 14 days of completion; and
- (3) if the landlord fails to inform the beneficiary as required, he or she will be liable for any losses that occur as a result.

Do consultees agree?

Paragraph 11.179

Consultation Question 92.

17.143 We provisionally propose the following.

- (1) 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.
- (2) HM Land Registry should:
 - (a) include a note on the relevant registered title(s) of any interest granted or transferred (or in the case of an intermediate lease, surrendered and re-granted) as part of an enfranchisement claim that the interest had been executed pursuant to the relevant statutory provisions;
 - (b) in the case of a collective freehold acquisition, include a note of any period during which a further such claim cannot be made without the permission of the Tribunal.

Do consultees agree?

Paragraph 11.182

Consultation Question 93.

17.144 How and to what extent has the exercise of enfranchisement rights been slowed down, prevented or made more costly by:

- (1) the existence of separate procedural regimes for different enfranchisement rights;
- (2) the current rules on missing and uncooperative landlords;
- (3) the time taken collecting up-to-date landlord contact details;
- (4) the time it takes to prepare enfranchisement notices;
- (5) the current law on the service and validity of notices;
- (6) the consequences of a landlord's failure to serve a counter-notice under the 1993 Act; and
- (7) the provisions for deemed withdrawal of a notice of claim set out in the 1993 Act?

Where possible, please provide figures to support your response.

17.145 To what extent would our proposals for a unified and consolidated enfranchisement procedure, with prescribed notices and forms, reduce:

- (1) the duration and cost of the enfranchisement process; and
- (2) the number of disputes arising under the enfranchisement regime?

17.146 To what extent would our proposals for dealing with missing or uncooperative landlords speed up the enfranchisement process and reduce the costs typically incurred by leaseholders in these cases?

Paragraph 11.183

Consultation Question 94.

17.147 We provisionally propose that the current division of responsibility for the resolution of enfranchisement disputes and issues between the county court and the Tribunal should end. All such matters should be determined by the Tribunal.

Do consultees agree?

Paragraph 12.60

Consultation Question 95.

17.148 We invite the views of consultees as to whether it would be desirable for certain valuation-only disputes to be determined by a single valuation expert rather than by the Tribunal at a full hearing. If so, we invite consultees' views as to:

- (1) the types of case in which such an alternative track for dispute resolution would be appropriate (in particular, whether it should operate only in respect of low value claims, or wherever the difference between the parties' positions is such that it would be disproportionate to proceed with a full hearing); and
- (2) the rules that should govern its operation.

Paragraph 12.68

Consultation Question 96.

17.149 We welcome evidence as to the typical cost and duration of an enfranchisement dispute:

- (1) in the county court; and
- (2) in the Tribunal.

17.150 How and to what extent has the exercise of enfranchisement rights been slowed down, prevented or made more costly by:

- (1) the threat of lengthy and potentially expensive litigation; and
- (2) the fact that some disputes arising during an enfranchisement claim may need to be resolved by the Tribunal, whilst others fall to be determined by the court?

17.151 To what extent would our proposal that all enfranchisement disputes be dealt with in a single forum save landlords and leaseholders time and money?

Paragraph 12.69

Consultation Question 97.

17.152 We welcome evidence as to the proportion of leases likely to be suitable for resolution by a single valuation expert. Do consultees consider that dealing with cases on this alternative track is likely to save landlords and leaseholders time and money?

Paragraph 12.72

Consultation Question 98.

17.153 We invite the views of consultees as to whether leaseholders should be required to make any contribution to their landlord's non-litigation costs.

Paragraph 13.55

Consultation Question 99.

17.154 We invite the views of consultees as to how any contribution that is to be made by leaseholders to their landlord's non-litigation costs should be calculated. Should the contribution be based on:

- (1) fixed costs;
- (2) capped costs;
- (3) fixed costs subject to a cap on the total costs payable;
- (4) the price paid for the interest in land acquired by the leaseholder;
- (5) 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) fewer categories of recoverable costs than currently set out in the 1967 and 1993 Acts;
- (7) the same categories of recoverable costs set out in the Acts, but with a reformed assessment procedure; or
- (8) wider categories of recoverable costs than currently set out in the Acts?

17.155 We also invite consultees' views as to whether, if a fixed costs regime were to be adopted:

- (1) such a regime should apply to collective freehold acquisition claims as well as individual enfranchisement claims; and
- (2) if a fixed costs regime were to apply to collective freehold acquisition claims:
 - (a) what additional features might justify the recovery of additional sums; and
 - (b) whether landlords should be able to recover all their reasonably incurred costs in respect of those additional features (subject to assessment), or only further fixed sums.

17.156 We provisionally propose 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.

Do consultees agree?

Paragraph 13.89

Consultation Question 100.

17.157 We provisionally propose that where an enfranchisement claim fails or is withdrawn, or the Claim Notice is struck out, leaseholders should be liable to pay a percentage of the fixed non-litigation costs that would have been payable had the claim completed.

Do consultees agree?

17.158 We also provisionally propose that the percentage of the fixed non-litigation costs that should be payable in those circumstances should vary depending on the stage that the claim has reached.

Do consultees agree? If so, what percentages should apply at particular stages of the claim?

Paragraph 13.94

Consultation Question 101.

17.159 We provisionally propose that a landlord should have a right to seek security for his or her non-litigation costs. Do consultees agree?

Paragraph 13.98

Consultation Question 102.

17.160 We provisionally propose that a landlord should have a right to apply to the Tribunal for an order prohibiting named leaseholders from serving any further Claim Notice without the permission of the Tribunal.

Do consultees agree?

Paragraph 13.101

Consultation Question 103.

17.161 We provisionally propose that the existing 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 (except in respect of orders made under the No Service Route, orders permitting a landlord to participate in a claim or to set aside a determination, and orders striking out a Claim Notice).

Do consultees agree? If not, what types of disputes and/or issues should be excluded from such restrictions and why? What powers to make orders in respect of litigation costs should apply in such excluded cases? Should parties be able to agree that costs shifting will apply to all or part of a claim?

Paragraph 13.110

Consultation Question 104.

17.162 We provisionally propose that the scope of the Tribunal's existing power to order one party to pay any of the litigation costs of another party should not be extended.

Do consultees agree?

Paragraph 13.114

Consultation Question 105.

17.163 We welcome evidence as to:

- (1) the typical costs incurred by landlords in dealing with enfranchisement claims;
and
- (2) the proportion of those costs which can be recovered from leaseholders.

17.164 To what extent does the obligation on leaseholders to pay their landlords' reasonable costs arising from the enfranchisement process have an impact on leaseholders' willingness to bring or pursue enfranchisement claims?

17.165 Do consultees consider that any of the options we have set out at paragraphs 13.56 to 13.77 for reforming non-litigation costs would make leaseholders more willing to bring and pursue enfranchisement claims?

17.166 What would be the impact on landlords of removing, or capping, their entitlement to recover their non-litigation costs from leaseholders (other than the fact that they would have to meet those costs themselves)?

Paragraph 13.115

Consultation Question 106.

17.167 How and to what extent do the different powers of the Tribunal and the county court to award litigation costs in enfranchisement disputes have an impact on the behaviour of both landlords and leaseholders with respect to such disputes?

Paragraph 13.119

Consultation Question 107.

17.168 We invite the views of consultees as to:

- (1) whether the section 9(1) valuation methodology should be retained indefinitely or temporarily, and if so for how long; or
- (2) whether the section 9(1) valuation methodology should be replaced with a fixed proportion of a “term and reversion” valuation or another simplified methodology; and
- (3) whether the test for whether section 9(1) (or a simplified methodology) applies should be determined:
 - (a) by reference to capital value;
 - (b) by reference to council tax banding;
 - (c) by reference to the location of the property;
 - (d) by reference to an amended version of the current test for leases granted after 1 April 1990 (in other words, calculating “R” under section 1(1)(a)(ii) of the 1967 Act); or
 - (e) by some other means.

Paragraph 15.25

Consultation Question 108.

17.169 We invite the views of consultees as to:

- (1) whether a separate, simplified valuation regime should be created for low value and/or straightforward enfranchisement claims; and
- (2) how such low value and/or straightforward claims should be identified.

Paragraph 15.29

Consultation Question 109.

17.170 Do consultees consider it desirable to seek to treat commercial investors differently from owner-occupier leaseholders in respect of the premium payable for the exercise of enfranchisement rights?

17.171 If so:

- (1) do consultees consider that it might be possible to distinguish between such leaseholders:
 - (a) by reference to whether the leaseholder is exercising enfranchisement rights for the first time;
 - (b) by reference to whether the leaseholder is exercising enfranchisement rights in respect of his or her only or main home; or
 - (c) by some other means?
- (2) how might the valuation methodology be varied so as to produce different premiums for different types of leaseholder?

Paragraph 15.37

Consultation Question 110.

17.172 We invite the views of consultees as to whether the treatment of ground rent reviews in any valuation methodology should be restricted in any of the ways set out at paragraphs 15.59 to 15.66.

Paragraph 15.67

Consultation Question 111.

17.173 We invite the views of consultees as to whether capitalisation rates for enfranchisement valuations should be prescribed and, if so:

- (1) how;
- (2) by whom;
- (3) how often; and
- (4) in respect of what different types of interest.

Paragraph 15.71

Consultation Question 112.

17.174 We invite the views of consultees as to whether deferment rates for enfranchisement valuations should be prescribed and, if so:

- (1) how;
- (2) by whom;
- (3) how often; and
- (4) in respect of which geographical areas.

Paragraph 15.75

Consultation Question 113.

17.175 We invite the views of consultees as to whether relativity or a no Act deduction should be prescribed for enfranchisement valuations and, if so:

- (1) how;
- (2) by whom;
- (3) how often;
- (4) in respect of which geographical areas; and
- (5) whether the 80-year cut-off should be removed.

Paragraph 15.79

Consultation Question 114.

17.176 We invite the views of consultees as to whether the possible right to hold over at the end of a long lease should be disregarded on an enfranchisement valuation.

Paragraph 15.83

Consultation Question 115.

17.177 We invite the views of consultees as to whether a discount for leaseholder's improvements on an enfranchisement valuation should be retained.

Paragraph 15.86

Consultation Question 116.

17.178 We invite the views of consultees as to whether it should be possible for leaseholders to elect to accept a restriction on development to prevent development value from being payable as part of an enfranchisement valuation.

Paragraph 15.91

Consultation Question 117.

17.179 We invite the views of consultees as to which, if any, of the valuation options we have discussed (set out at Options 2A to C in Chapter 15) are preferable and, so far as any preferred option contains a range of possible reforms, which of those reforms should be adopted.

Paragraph 15.103

Consultation Question 118.

17.180 We invite the views of consultees as to the desirability of an online calculator for enfranchisement valuations and the types of claim for which it could be appropriate.

Paragraph 15.107

Consultation Question 119.

17.181 How and to what extent has the current methodology for calculating premiums payable on enfranchisement slowed down, prevented or made more costly the exercise of enfranchisement rights?

Paragraph 15.108

Consultation Question 120.

17.182 We have set out the following options for the reform of valuation:

- (1) the adoption of a simple formula; and
- (2) options based on current valuation methodology, involving different combinations of current valuation components and/or the prescription of certain rates.

To what extent would each of these options reduce the duration and cost of the enfranchisement process, and the number of disputes arising?

Paragraph 15.109

Consultation Question 121.

17.183 We welcome evidence as to the likely impact of the possible valuation methodologies set out in Chapter 15 on different sectors of the economy – in particular, the institutional investment sector, the charitable sector and the leasehold market (for both owner-occupiers and buy-to-let leaseholders).

Paragraph 15.110

Consultation Question 122.

17.184 We welcome evidence as to:

- (1) the proportion of existing leases which are currently eligible for section 9(1) valuations; and
- (2) the likely impact on landlords and leaseholders of (a) retaining the section 9(1) valuation methodology for a limited period, or (b) replacing it with a simplified valuation methodology.

Paragraph 15.111

Consultation Question 123.

17.185 We welcome evidence as to the likely impact on the leasehold market (and wider housing market) of differentiating between classes of enfranchising leaseholder (for example, those who occupy the property as a residence and those who do not) in respect of the premium payable.

Paragraph 15.112

Consultation Question 124.

17.186 We welcome evidence as to the costs, benefits and practicalities of constituting and maintaining a body whose function is to prescribe certain rates for a reformed valuation methodology.

Paragraph 15.113

Consultation Question 125.

17.187 We welcome evidence as to the costs, benefits and practicalities of setting up and maintaining an online valuation calculator.

Paragraph 15.114

Consultation Question 126.

17.188 We provisionally propose creating a statutory duty on the landlord who has conduct of an enfranchisement claim to act with reasonable care and skill, and to act in good faith, in respect of the interests of other landlords.

Do consultees agree?

Paragraph 16.118

Consultation Question 127.

17.189 We invite the views of consultees as to whether an intermediate lease created as part of a collective freehold acquisition claim should be acquired by a nominee purchaser on any subsequent collective freehold acquisition of the premises.

Paragraph 16.121

Consultation Question 128.

17.190 We provisionally propose that, where the leaseholder of a flat also holds an intermediate lease in respect of that flat, the intermediate lease of that flat should not be acquired on any collective freehold acquisition of the premises.

Do consultees agree?

Paragraph 16.123

Consultation Question 129.

17.191 We provisionally propose that, in a collective freehold acquisition claim, where there is an intermediate lease of the whole building, but not all the flats within the building are let on long sub-leases (so the intermediate leaseholder would be treated as the qualifying tenant of some of the flats), either:

- (1) the whole of the intermediate lease should not be acquired; or
- (2) the whole of the intermediate lease should be acquired, but there should be a leaseback to the intermediate leaseholder of flats of which he or she would be the qualifying tenant?

Do consultees agree with either of these alternative proposals? If so, which approach is preferred and why?

Paragraph 16.125

Consultation Question 130.

17.192 We provisionally propose that, as part of any collective freehold acquisition claim:

- (1) leases containing common parts together with other property should continue to be capable of being acquired by the nominee purchaser where it is reasonably necessary for the proper management or maintenance of those common parts; and
- (2) the Tribunal should have power to sever a lease containing common parts together with other property, or to introduce new or varied easements to ensure proper management or maintenance of those common parts, as an alternative to ordering that the whole of the lease be acquired by the nominee purchaser.

Do consultees agree?

Paragraph 16.129

Consultation Question 131.

17.193 We provisionally propose that a lease of common parts granted for development purposes should not be acquired by a nominee purchaser on a collective freehold acquisition claim unless:

- (1) the severance of any part of that lease; and/or
- (2) the introduction of new, or the variation of existing, easements;

would both permit the proper management of any common parts, and substantially preserve the intended development.

Do consultees agree?

Paragraph 16.133

Consultation Question 132.

17.194 We provisionally propose that leaseholders holding sub-leases granted out of leases that had previously been extended under the existing or any future statutory enfranchisement regime should be entitled to bring, or participate in, an enfranchisement claim.

Do consultees agree?

Paragraph 16.137

Consultation Question 133.

17.195 We provisionally propose 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.

Do consultees agree?

17.196 If not, do consultees agree that the thresholds in the formulae that apply to a Minor Superior Tenancy and/or a Minor Intermediate Leasehold Interest ought to be increased?

Paragraph 16.140

Consultation Question 134.

17.197 We provisionally propose 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*.

Do consultees agree?

Paragraph 16.142

Consultation Question 135.

17.198 We welcome evidence as to the likely impact (financial and otherwise) on landlords of a new statutory duty requiring them to act with reasonable care and skill, and in good faith, in respect of the interests of other landlords.

Paragraph 16.143

Appendix 1: details required in notices of claim under the 1967 Act

DETAILS REQUIRED BY SCHEDULE 3 TO THE 1967 ACT

Paragraph 6 of schedule 3 to the 1967 Act requires a notice of claim under the 1967 Act to contain the following details:

- (1) the address of the house, and sufficient particulars of the house and premises to identify the property to which the claim extends;
- (2) such particulars of the lease and, in the case of a lease falling within section 4(1)(i) of the 1967 Act, of the rateable value of the house and premises as serve to identify the instrument creating the tenancy and show that (apart from the operation, if any, of the proviso to section 4(1) of the 1967 Act) the lease is and has at the material times been a long lease at a low rent;
- (3) the date on which the leaseholder acquired the tenancy;
- (4) in the case of a leaseholder falling within section 1(1)(a)(ii) of the 1967 Act, the premium payable as a condition of the grant of the lease.

DETAILS REQUIRED BY THE PRESCRIBED FORM

The details required by the schedule to the prescribed notice of claim, found in the Leasehold Reform (Notices) Regulations SI 1997 No 640, are, in brief, as follows:

- (1) the address of the house;
- (2) particulars of the house and premises sufficient to identify the property to which the claim extends;
- (3) particulars of the lease of the house and premises sufficient to identify the instrument creating the lease and to show that the lease is and has at the material times been a long lease or treated as a long lease;
- (4) particulars sufficient to show the date on which the leaseholder acquired the lease.
 - (a) Particulars of the lease of the house and premises sufficient to show that the lease is and has at the material times been a lease at a low rent or lease as a lease at a low rent.

OR

- (b) If the claim is based on section 1AA (the additional right to enfranchisement only in case of houses whose rent exceeds applicable limit under section 4), particulars of the lease sufficient to show that the

lease is one in relation to which section 1AA has effect to confer a right to acquire the freehold of the house and premises.

(5) particulars of any other long lease of the house or a flat forming part of the house held by any leaseholder;

(6) where either:

(a) a flat forming part of the house is let to a person who is a qualifying tenant of a flat for the purposes of Chapters 1 or 2 of Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993; or

(b) the leaseholder's lease is a business lease,

the following particulars:

(i) the periods for which in the last ten years, and since acquiring the lease, the leaseholder has and has not occupied the house as his or her residence; and

(ii) during those periods what parts (if any) of the house have not been in the leaseholder's own occupation and for what periods, and

(iii) what other residence (if any) the leaseholder has had and for what periods, and which was the leaseholder's main residence;

(7) additional particulars sufficient to show that the value of the house and premises does not exceed the applicable financial limit specified in section 1(1)(a)(i) or (ii), (5) or (6) of the 1993 Act;

(8) additional particulars sufficient to show whether the house and premises are to be valued in accordance with section 9(1) or section 9(1A) of the 1993 Act;

(9) additional particulars where the leaseholder relies on section 6 (rights of trustees), 6A (rights of personal representatives) or 7 (rights of members of family succeeding to tenancy on death) of the 1993 Act.

Appendix 2: details required in notices of claim under the 1993 Act

DETAILS REQUIRED IN A NOTICE OF CLAIM IN A LEASE EXTENSION CLAIM

A notice of claim, as set out in section 42(3) of the 1993 Act, must:

- (1) state the full name of the leaseholder and the address of the flat in respect of which he claims a new lease under this Chapter;
- (2) contain the following particulars, namely:
 - (a) sufficient particulars of that flat to identify the property to which the claim extends;
 - (b) such particulars of the tenant's lease as are sufficient to identify it, including the date on which the lease was entered into, the term for which it was granted and the date of the commencement of the term;
- (3) specify the premium which the tenant proposes to pay in respect of the grant of a new lease under Chapter I of the 1993 Act and, where any other amount will be payable by him in accordance with any provision of schedule 13, the amount which he proposes to pay in accordance with that provision;
- (4) specify the terms which the tenant proposes should be contained in any such lease;
- (5) state the name of the person (if any) appointed by the tenant to act for him in connection with his claim, and an address in England and Wales at which notices may be given to any such person under this Chapter; and
- (6) specify the date by which the landlord must respond to the notice by giving a counter-notice under section 45.

DETAILS REQUIRED IN A NOTICE OF CLAIM FOR A COLLECTIVE ENFRANCHISEMENT CLAIM

A notice of claim, as set out in section 13(3) of the 1993 Act, must:

- (1) specify and be accompanied by a plan showing:
 - (a) the premises of which the freehold is proposed to be acquired by virtue of section 1(1);
 - (b) any property of which the freehold is proposed to be acquired by virtue of section 1(2)(a); and
 - (c) any property over which it is proposed that rights (specified in the notice) should be granted in connection with the acquisition of the freehold of the

specified premises or of any such property so far as falling within section 1(3)(a);

- (2) contain a statement of the grounds on which it is claimed that the specified premises are, on the relevant date, premises to which this Chapter applies;
- (3) specify:
 - (a) any leasehold interest proposed to be acquired under or by virtue of section 2(1)(a) or (b); and
 - (b) any flats or other units contained in the specified premises in relation to which it is considered that any of the requirements in Part II of schedule 9 to the 1993 Act are applicable;
- (4) specify the proposed purchase price for each of the following, namely:
 - (a) the freehold interest in the specified premises or, if the freehold of the whole of the specified premises is not owned by the same person, each of the freehold interests in those premises;
 - (b) the freehold interest in any property specified under paragraph (a)(ii); and
 - (c) any leasehold interest specified under paragraph (c)(i);
- (5) state the full names of all the qualifying tenants of flats contained in the specified premises and the addresses of their flats, and contain in relation to each of those tenants such particulars of his lease as are sufficient to identify it, including the date on which the lease was entered into, the term for which it was granted and the date of the commencement of the term;
- (6) state the full name or names of the person or persons appointed as the nominee purchaser for the purposes of section 15, and an address in England and Wales at which notices may be given to that person or those persons under Chapter I of the 1993 Act; and
- (7) specify the date by which the reversioner must respond to the notice by giving a counter-notice under section 21.

Appendix 3: 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; and
2. commonhold.

The Law Commission and Government have also agreed that the project will include consideration of reform to the right to manage. The Terms of Reference for that aspect of the project will be published shortly.

In relation to enfranchisement and commonhold reform, 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.

(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:
 - (1) the premises that qualify for enfranchisement;
 - (2) 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;
 - (3) the landlords to whom the enfranchisement legislation applies; and
 - (4) 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:
 - (1) the existing valuation assumptions;
 - (2) the extent to which the ground rent (including any rent review clause) should feature in the valuation;
 - (3) the role of yield and deferment rates and whether they could be standardised;
 - (4) the role of marriage value, hope value, and relativity, and the extent to which they should feature in the valuation;

- (5) whether to retain different valuation bases (as currently exist for enfranchisement of houses, depending on historic rateable values);
 - (6) 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:
- (1) introducing a simplified enfranchisement procedure which is, so far as possible, consistent across all enfranchisement claims;
 - (2) the form, content, effect, service, and assignment of notices by leaseholders and landlords in the enfranchisement process;
 - (3) how to reduce or remove the requirement for leaseholders to be responsible for landlords' costs of responding to enfranchisement claims;
 - (4) the nature and role of the nominee purchaser in collective enfranchisement claims;
 - (5) 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).
 - (6) the forum for, and facilitation of, the resolution of disputes and enforcement of the statutory rights;
 - (7) problems that arise where there are missing, incapacitated, recalcitrant, or insolvent landlords; and
 - (8) 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.

Appendix 4: Members of advisory group

LEGAL ADVISORY GROUP

- (1) Angus Andrew, Judge of the First-tier Tribunal (Property Chamber)
- (2) Dallas Banfield, Valuer Member of the First-tier Tribunal (Property Chamber)
- (3) Mark Chick, Bishop & Sewell
- (4) Jeremy Donegan, Bate & Albon
- (5) David Evans, former Legal Chair of the Residential Property Tribunal Wales
- (6) Thekla Fellas, Fladgate LLP
- (7) Phillip Freedman QC, Mishcon de Reya
- (8) Damian Greenish, Pemberton Greenish
- (9) Roger Hardwick, Brethertons
- (10) Christopher Heather QC, Tanfield Chambers
- (11) Lynn James, Trowers and Hamlins
- (12) Tom Jefferies, Landmark Chambers
- (13) Ceri Jones, Valuer Member, Residential Property Tribunal Wales
- (14) Mari Knowles, Leasehold Law LLP¹⁵³⁸
- (15) Chris Ledgerwood, Womble Bond Dickinson
- (16) Hefin Lewis, Valuer Member, Residential Property Tribunal Wales
- (17) Siobhan McGrath, President of the First-tier Tribunal (Property Chamber)
- (18) Eleanor Murray, CMS, Cameron McKenna, Nabarro, Olswang
- (19) Philip Rainey QC, Tanfield Chambers
- (20) Martin Rodger QC, Deputy President of the Upper Tribunal (Lands Chamber)
- (21) Jim Shepherd, Legal Chair, Residential Property Tribunal Wales

¹⁵³⁸ After our advisory group meeting, Mari Knowles joined the Law Commission's residential leasehold project team, so ceased to be a member of our advisory group.

- (22) Andrew Trott, Valuer Member of the Upper Tribunal (Lands Chamber)

VALUER ADVISORY GROUP

- (1) Sarah Abel, Lawrence Wightman
- (2) Andrew Balcombe, HNG Chartered Surveyors
- (3) Dallas Banfield, Valuer Member of the First-tier Tribunal (Property Chamber)
- (4) Louie Burns, Leasehold Solutions
- (5) Geraint Evans, Bureau Property Consultants
- (6) Ceri Jones, Valuer Member of the Residential Property Tribunal Wales
- (7) Hefin Lewis, Valuer Member of the Residential Property Tribunal Wales
- (8) Bruce Maunder Taylor, Maunder Taylor
- (9) Andrew Pridell, Andrew Pridell Associates
- (10) Andrew Trott, Valuer Member of the Upper Tribunal (Lands Chamber)

ADDITIONAL MEETING OF VALUERS

- (1) Ian Asbury, Strutt & Parker
- (2) Peter Beckett, Beckett & Kay LLP
- (3) Julian Briant, Cluttons
- (4) Julian Clark, Gerald Eve
- (5) Robert Orr-Ewing, Knight Frank
- (6) Jennifer Ellis, Langley-Taylor LLP
- (7) Angus Fanshawe, Fanshawe White
- (8) Ed Fielding, Savills
- (9) Alex Ingram-Hill, John D Wood
- (10) Tim Martin, Marr-Johnson & Stevens LLP
- (11) Eric Shapiro, Chestertons
- (12) Andrew Symington, Symington Elvery
- (13) Paul Winstanley, Allsop
- (14) James Wilson, JLL

(15) Mark Wilson, MyLeasehold

(16) Tom Power, CBRE

STAKEHOLDER ADVISORY GROUP

(1) Eyvind Andreson, Homeground

(2) Martin Boyd, Leasehold Knowledge Partnership

(3) John Bryant, National Housing Federation

(4) Jo Darbyshire, National Leasehold Campaign

(5) Kathleen Dunmore, Retirement Housing Group

(6) Tamara Hooper, RICS

(7) Dudley Joiner, The Leaseholder Association

(8) Matthew Jupp, UK Finance

(9) Diane Latter, Law Society

(10) Gareth Lyon, Associated Retirement Community Operators

(11) Stephanie Pollitt, British Property Federation

(12) Beth Rudolf, Conveyancing Association

(13) Ian Sands, Estate Business Group, and Howard de Walden

(14) Richard Silva, Long Harbour

(15) Debbie Turner, Estate Business Group, and Grosvenor Estate

(16) Richard Williams, Federation of Private Residents' Associations

