



December 2018

Overview

Winckworth Sherwood continues to maintain an active dialogue with various interested stakeholders, in respect of the Government's ongoing programme of leasehold reform.

This Bulletin looks back on the ranges of activity in the past twelve months from the various bodies informing the Government's proposed reforms to the leasehold sector. This includes updates on the work of the Law Commission, Ministry for Housing Communities and Local Government (MHCLG), Housing, Communities and Local Government Select Committee as well as the work of this Forum to convene stakeholders and build a consensus around progressive reform.

Looking back at the past year, various organisations have sought views from industry and the public. Some of the key events included:

- **18 February** – MHCLG launched a [consultation](#), *Strengthening consumer redress in the housing market*, which sought views on improving redress in the housing sector, including exploring the option of a single housing ombudsman. This consultation ran until 16 April;
- **22 February** – The Law Commission [issued](#) *Commonhold: A call for Evidence*, an 8 week call for evidence to find out what's stopping commonhold becoming more popular. Submissions were invited from up to 19 April;
- **4 June** – Roundtable hosted by Claire Mathys, Senior Policy and Strategy Advisor at Ministry for Housing, Communities and Local Government (MHCLG), to discuss the Government's proposals for reforming the leasehold sector;
- **4 July** – Winckworth Sherwood LLP hosted the Leasehold Reform Seminar in association with the Leasehold Reform Group;
- **5 July** – Chair of HCLG Select Committee, Clive Betts MP sends a [letter](#) to the Secretary of State for HCLG, Rt Hon James Brokenshire MP, urging the Government to take action to introduce reforms to the leasehold sector before the end of 2018;
- **17 July** – Industry Roundtable with the Secretary of State for MHCLG, Rt Hon James Brokenshire MP, on solutions for remediating buildings with potentially unsafe cladding;
- **19 July** – The Law Commission [published](#) *Leasehold enfranchisement: a summary of proposed solutions for leaseholders of houses*;
- **23 July** – Rt Hon James Brokenshire MP [responds](#) to Clive Betts MP, outlining the Government's aims and proposals for reforming the leasehold sector;



- **24 July** – Leasehold Reform inquiry launched by HCLG Select Committee to examine progress made on leasehold reform, following the conclusion of the Government’s consultation in *tackling unfair practices in the leasehold market* in 2017;
- **22 August** – Winckworth Sherwood LLP hosted a roundtable to discuss the HCLG Select Committee inquiry;
- **20 September** – Law Commission opened a [consultation](#) on *Leasehold home ownership: buying your freehold or extending your lease*, which sought to address leasehold enfranchisement legislation;
- **14 October** – The Government issued a [press release](#), declaring that a number of new proposals will be put forward, including the £10 cap;
- **15 October** – MHCLG published another [consultation](#), *Implementing reforms to the leasehold system*, setting out how the Government intends to make changes and on how reforms should be implemented;
- **25 October** – MCHLG [published](#) *Estimating the number of leasehold dwellings in England, 2016-17*. The report estimated that there are around 4.3 million leasehold homes in England, of which 67% are flats and 33% are houses. Overall around 54% of flats are estimated to be leasehold, compared with 8% of houses;
- **5 November** – HCLG Select Committee [questioned](#) leaseholder representatives and MPs in an oral evidence session;
- **5 November** – Law Commission hosted a Symposium on Leasehold Enfranchisement;
- **8 November** – Industry Roundtable with the Secretary of State for MHCLG, Rt Hon James Brokenshire MP on providing support for existing leaseholders;
- **19 November** – HCLG Select Committee [questioned](#) freeholders, developers and managing agents in an oral evidence session;
- **5 December** – Law Commission hosted a live consultation event on Leasehold Enfranchisement;
- **10 December** – HCLG Select committee [questioned](#) representatives from housing associations, the Leasehold Advisory Service and the Conveyancing Association; and
- **10 December** – the Law Commission published its consultation paper, [Reinvigorating commonhold: the alternative to leasehold ownership](#).



MHCLG consultation

In October, the Ministry of Housing, Communities and Local Government published their technical consultation, '[Implementing reforms to the leasehold system in England](#)' to seek views on how to implement reforms to the leasehold system. It specifically sought views on:

- How to implement a ban on the unjustified use of leasehold for new houses;
- How to implement the reduction of future ground rents to a nominal value;
- How to implement measures to ensure that the charges that freeholders must pay towards the maintenance of communal areas are fairer and more transparent; and
- How to implement measures to improve how leasehold properties are sold.

One of the key proposals in the consultation was to reduce future ground rents to a nominal financial value of £10 per annum. This is a shift from the Government's original position a year ago that committed to legislating for all future ground rents to be a peppercorn, i.e. zero financial value.

As the proposals stand there remain notable concerns amongst freeholder investors, freeholder managers and managing agents. The consultation has flatly rejected the idea that a responsible and professional freeholder can deliver material benefit for leaseholders in return for collecting a reasonable ground rent. Instead, the Government have proposed a nominal cap of £10 for apartment buildings regardless of the number of tenants and the value of the property itself. The £10 cap, for which there appears to be no clear rationale, would act as a deterrent for large professional organisations for whom the £10 ground rent is too costly to invoice. As a result, they would inevitably disappear from the market.

This means that residents would lose the safety net of an experienced freeholder who is able to manage and oversee all concerns relating to insurance, maintenance, health & safety, fire risks, planning obligations, building regulations and anti-social behaviour. While the Government have acknowledged, and in fact welcomed, the role a responsible freeholder can play as a long term steward of a property, they have not accepted that this is coupled with a reasonable income stream from ground rents. Moreover, the Government has provided no indication of who they expect to oversee these issues in the absence of a professional freeholder.

MHCLG have also conflated the role of a managing agent and freeholder. There is a consensus that excessive fees need to be rooted out but a lack of understanding from Government officials has wrongly placed the blame on freeholders and managing agents rather than conveyancers and estate agents for the lack of transparency. Moreover, the proposals in this consultation ignore the required resources to gather the necessary information.

This consultation closed at the beginning of December and Heather Wheeler, the Parliamentary Under-Secretary of State, indicated her Ministry received almost 1,300 responses. It is unlikely they will publish their response to this until the end of the first quarter in 2019. Before then, industry participants are encouraged to continue to relay their concerns to the Government.



Housing Communities and Local Government Select Committee

In July, the Housing, Communities and Local Government Select Committee (HCLGC) announced their intentions to undertake a Parliamentary inquiry into the Government's proposed reforms to the leasehold sector. Almost a year since the then-Secretary of State, Sajid Javid MP, signalled the Government's ambitions to reform the sector, the corresponding House of Commons Departmental Select Committee is investigating:

- The adequacy of the Government's programme of work on residential leasehold reform, including (a) its application to existing leaseholders in both houses and flats and (b) whether further reforms should be introduced;
- What support and government intervention can be provided to existing leaseholders, in both houses and flats, affected by onerous leasehold terms; and
- What are the implications of providing such support and government intervention to these existing leaseholders.

Announcing the inquiry, Chair of HCLGC, Clive Betts MP, said:

"With around four million leasehold homes in England, they make up a significant part of the private home ownership sector. We've heard however that leaseholders often come up against significant issues which affect their rights, from high service charges with a lack of transparency through to excessive ground rents and barriers to buying freeholds. The Government has said it is committed to various reforms to tackle some of the troubling practices in the sector. As a Committee, we will want to examine the effectiveness of the existing proposals, find out what more needs to be done to boost confidence in the system and ensure fairness for both existing and future leaseholders."

The Committee received over [500 written submissions](#) from individual leaseholders, campaign groups, developers and freeholders amongst a host of interested parties. In November, the Committee begun hearing Oral Evidence from groups of relevant stakeholders.

At the first hearing on [5 November](#), the Committee heard evidence from leaseholders and representatives from leaseholders, including the APPG on Leasehold and Commonhold Reform and Leasehold Knowledge Partnership. In these sessions the speakers argued firmly against the role and function of ground rents calling on the Government to legislate to fix them at a peppercorn. They were very critical of the private sector's approach to the industry with Jim Fitzpatrick MP describing it is a "cash cow" for developers. With regards to support for existing leaseholders, many speakers deferred to the ongoing work of the Law Commission.

On [19 November](#), the Committee heard evidence from developers, freeholders and managing agents. Both of these explored the broad range of technical issues with each heavily focusing on onerous leases. Where the first session focused specifically on miss-selling and ground rent compensation schemes, the second discussed commonhold and service charges more thoroughly. The majority of speakers, with some notable exceptions, stated that they thought the £10 cap was a misinformed policy that would disincentivise professional freeholders. There was a consensus amongst the freeholders on the panel that the UK should not adopt the commonhold system as an alternative to leasehold.



On [10 December](#), the Committee heard from representatives from local housing associations, the Leasehold Advisory Service (LEASE), Law Society and the Conveyancing Association. The representations from local housing associations and social housing groups pointed to the level of redress available to those tenants in social housing compared to standard leaseholders. They went onto discuss the conflict of interest between tenants and leaseholders, and how maintenance charges could be brought down.

Anthony Essien, Chief Executive of LEASE, noted his surprise at the Government's proposed £10 cap on ground rents. He went onto say he considered ground rents to be onerous if they were above 0.1% of the value of the property. Lastly, when answering questions from the Committee, Beth Rudolph, Director of Delivery at the Conveyancing Association, stated that onerous leases did not come about by accident and were put in place by whoever wrote the lease to start with and then the managing agent. Rudolph went onto suggest permission fees should be capped at £25.

There are two remaining Oral Evidence sessions in the New Year. First, representatives from the legal industry will appear before the Committee, included a representative from the Law Commission, and the final session will see Committee members question the Minister of State, Kit Malthouse MP.

After this the Committee will review written and oral evidence in full and begin to draft their report. Within the final report will be a set of key recommendations for Government to inform their legislative agenda. The Government will then usually reply within two months of the publication of the report, when possible, but may seek the Committee's agreement to allow a longer period.



Leasehold and Commonhold Code of Practice

Participants in this Forum have convened throughout the year to identify ways in which the role of a freeholder can be enshrined in law. Freeholders play a critical role as long term stewards of complex properties. As illustrated below, the freeholder has an important role to play acting as an independent arbiter to hold the managing agent to account and provide the ultimate safety net for consumers, be it leaseholders or tenants.

The industry still believes that a regulated and responsible freeholder is imperative in large multi-tenant properties. A proposed Code of Practice is intended to clarify the role a freeholder plays, voluntarily codify their responsibilities and avoid supposed abuses that may have left some leaseholders vulnerable. This can only be achieved if they can collect a reasonable ground rent which is in proportion to the value of the property as recompense for the liabilities taken on as a professional freeholder.

The introduction of a such formal Code of Practice has been suggested by way of adoption by the Secretary of State under S.87 of the Leasehold Reform Housing and Urban Development Act 1993. A Code of Practice has now been drafted to regulate the activity in the leasehold sector and address industry abuses and poor practices in line with the Ministry of Housing, Communities and Local Government's proposed reforms.

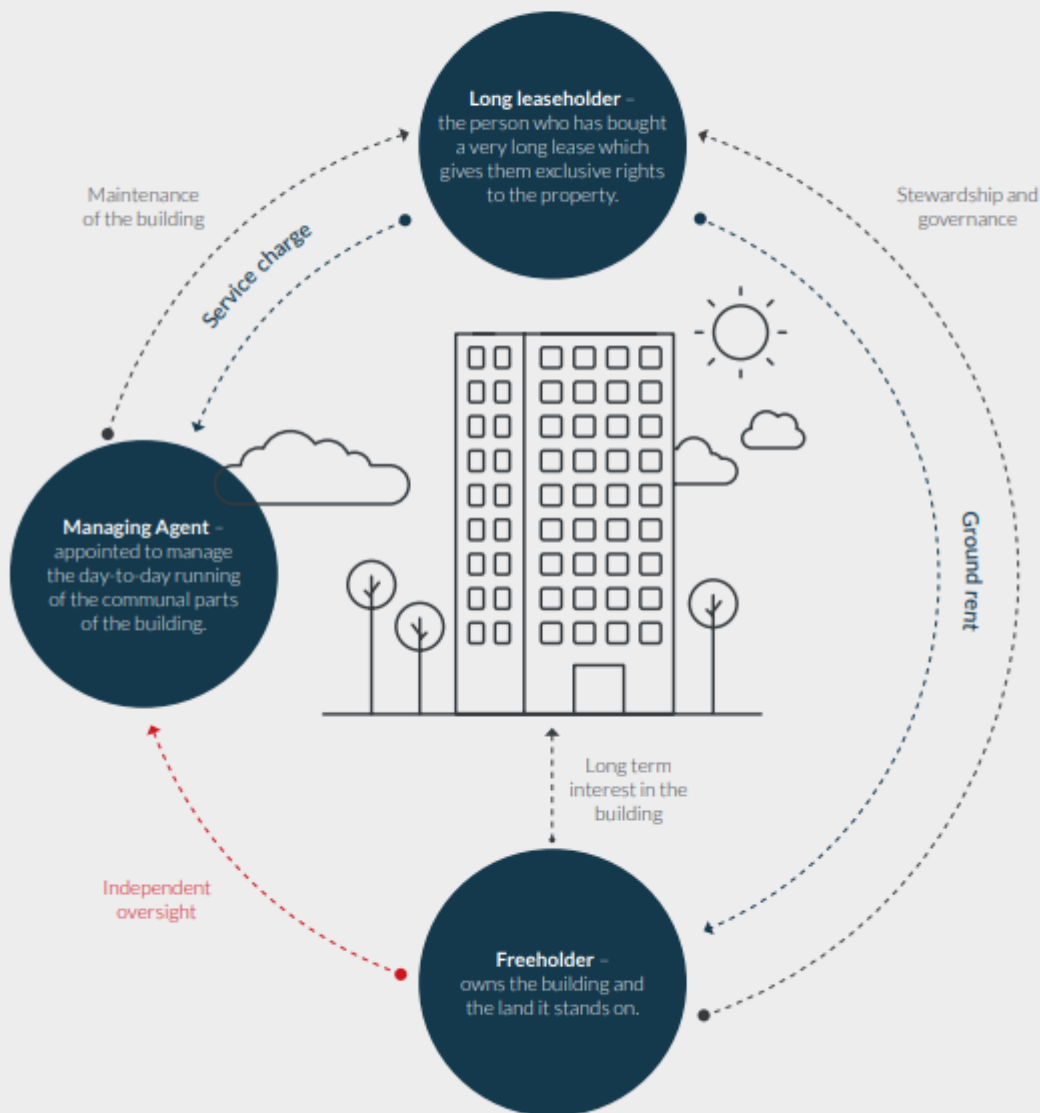
The Code will inform the broader elements of the Government's proposals to reform the residential property sector and protect consumers. Specifically, the Code should be recognised in tandem with the existing work by MHCLG to regulate managing agents, and the call for evidence undertaken by the Ministry in October 2017 – "*Improving the home buying and selling process*".

The Code is informed by two principal objectives:

1. Establish clear parameters for investment into the residential freehold market, which by default will regulate the terms and conditions outlined in new leaseholds offered for sale by the development community.
2. The management and maintenance of the property interest after acquisition, enshrining in law the role of a freeholder as a long-term steward of a property.

If any readers of this Bulletin, or any other industry participants, are interested in the details of this Code they are encouraged to liaise with Winckworth Sherwood LLP.

How does the leasehold structure work?





Management vs. Stewardship

Managing agent	Freeholder
Maintenance of the building funded by the service charge.	Stewardship and governance in exchange for an annual ground rent.
On average £1,800 – £2,000 per year*	On average £200 per year*
<p>Managing agent responsibilities:</p> <ul style="list-style-type: none"> • Drawing up and agreeing a budget with the freeholder and leaseholders • Maintenance of the building including repairs to shared areas and the outside of the building, such as the roof, external pipes, drains and building insurance • Coordination of property inspections and necessary checks • Collection of service charge and management of finances • First point of contact for leaseholders 	<p>Freeholder responsibilities:</p> <ul style="list-style-type: none"> • Long term stewardship of land and property in perpetuity • Enforcement of covenants in the lease for the benefit of all leaseholders • Holding the managing agent to account • Independent resolution of resident disputes (e.g. short-term letting, noise, anti-social behaviour) • Governance of resident community, protecting varied interests • Oversight of critical safety measures and safety net for residents
*Estimated by the Association of Residential Managing Agents (ARMA)	*Combined average from industry figures

Timeline of various parties interests in a building



The freeholder is the only party with such a long term view, preserving the long term value of the building for all parties.



Law Commission

Within its 13th Programme of Law Reform, the Law Commission stated its intention to review legislation pertaining to the residential leasehold sector. Then, when Sajid Javid MP first outlined the basis for wholesale reform to the leasehold sector, the Secretary of State formally mandated the Law Commission to review:

- **Commonhold as an alternative form of ownership to residential leasehold;**
- **The right to manage; and**
- **Leasehold enfranchisement.**

Commonhold

Commonhold was introduced in 2004 (when a law passed in 2002 came into force) as a new way to own property. However, in well over a decade fewer than twenty commonhold developments have been created. The Law Commission are reviewing why commonhold has failed to gain popularity, and what changes can be made to the current law to make it an attractive and workable alternative to residential leasehold.

On 22 February 2018, the Law Commission launched an eight week call for evidence. The consultation paper sought views on: what the difficulties in creating or converting to commonhold are; what issues make commonhold unattractive to homeowners; and what issues make commonhold unattractive in the wider property sector.

In the experience of residential management companies in this Forum, commonhold can create dysfunctional resident controlled management boards that often lead to properties being dominated by a small cabal of self-interested residents. This can create ill feeling amongst residents and internal disputes over exceptionally minor issues (often aesthetic) with very little materially achieved. The knock-on effect is that serious decision making is often avoided or missed. This can also pose particular problems in the case of outsourcing when appointed or elected members of management boards employ service providers on a non-competitive basis.

Commonhold, as it stands, would not work and is not appropriate for larger complex schemes or apartment buildings. Residents, who are not qualified managers and can often have limited experience, will have to take collective decisions to maintain the property. For example, where there is large heat, electricity and water plants residents are responsible for its installation and maintenance. Similarly, when disputes occur, the communal management board will have to resolve resident-to-resident disagreements. Without an independent arbiter this can often pose complex challenges to the harmony of the building.

On 10 December, the Law Commission published its consultation paper – [*Reinvigorating commonhold: the alternative to leasehold ownership*](#). Proposals within this paper include:

- Making commonhold more usable for mixed-use and mixed-tenure developments;
- Making it easier to convert from leasehold to commonhold;
- Measures to increase confidence from lenders so as to increase the choice of mortgage lenders available for purchasers; and
- Replacing service charges set by a landlord with commonhold contributions which have to be approved by a majority of those paying them.



The Law Commission is inviting responses through to 10 March 2019 and participants of this Forum are encouraged to make representations and submit their views.

Right to Manage

The Government has asked the Law Commission to review the existing Right to Manage legislation with a view to making the procedure simpler, quicker and more flexible, particularly for leaseholders. Leaseholders can set up a Right to Manage company, which can then acquire the landlord's management functions. Once the transfer occurs, the leaseholders become responsible for things such as collecting and managing the service charge and the upkeep of communal areas.

The Law Commission notes that there are flaws in the existing system. For example, difficulties with managing shared appurtenant property such as access roads and gardens used by other properties on the estate or uncertainty of the effect of acquiring the Right to Manage on existing management contracts and practical management difficulties after acquisition of the Right to Manage.

Nevertheless, no work has begun on this specific project. They expect to publish a consultation paper in January 2019. This Forum will alert interested parties to this at the appropriate time. This year, industry stakeholders have supported making the Right-to-manage process easier and agree that residents should have more control. However, it remains important to retain an independent responsible and regulated freeholder as the ultimate safety net to avoid the problems that would be ushered through under a commonhold tenure (see above).

Enfranchisement

The central tenet to the Law Commission's work is presenting recommendations to Government to reform the enfranchisement process. Supporting existing leaseholders who are affected by onerous lease terms – like those with 10-year doubling clauses – is critical to remedying some of the flaws in the sector. There is a clear consensus that the mis-selling and marketing of these leases has created systemic issues – freeholder and developers alike are committed to resolving this.

In July, the Law Commission began by issuing a paper on its 'direction of travel' in relation to making the enfranchisement process on leasehold houses "fairer, cheaper and simpler". Concerns have been raised in this Forum that the paper includes a number of significant inaccuracies in the analysis of the current approach to valuation, upon which the Commission has based its proposed solutions. It also presents a picture of the market that does not reflect the realities of the market. A key issue is the sample enfranchisement properties the Commission refers to throughout the paper, to demonstrate the effect that the various options for reform might have on the premium payable.

Following this in September, a comprehensive consultation paper was published examining leaseholders' rights 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.

In addition, and of particular note for this Forum, options were laid out for reducing the price payable by leaseholders to exercise those rights, whilst ensuring sufficient compensation for landlords to reflect their legitimate property interests.

As part of this consultation process, the Law Commission has held a series of symposiums and live consultation events to gather views from a host of stakeholders. The consultation remains open until 7th January 2019 and industry participants are strongly encouraged to submit their views.

Next Steps

The conclusion of this process will see the Law Commission present a series of detailed recommendations to the Government. [At a recent speech](#) at the Ministry of Justice, Professor Nicholas Hopkins who is overseeing this programme of work, said that the commission has “*undertaken a root-and-branch review of all aspects of enfranchisement law*”. Hopkins indicated the commission was working to an “accelerated timetable” and will publish its report next year. Though, it is just one of the many issues the Law Commission is looking at. Most tellingly, Hopkins said that due to the scale of the task and current parliamentary pressures, legislation is unlikely to complete its passage in Parliament until 2020.



Looking ahead to 2019

While 2018 has laid the foundations for wholesale reform, the year ahead will see a combination of recommendations put to Government to inform the legislation to be tabled in Parliament.

Due to a host of parliamentary pressures, particularly Brexit, we understand that a draft bill might not be presented until Q4. However, this is subject to a range of variables, including the Government's legislative agenda as revealed the Queen's Speech in June 2019.

Before then, a number of key events will be taking place that may influence and/or shape the Government's position on leasehold reform, such as:

- **March** – HCLG Select Committee publish full report and recommendations for Government.
- **March (31st)** – Article 50 negotiations expire.
- **April** – MHCLG publish consultation response on *Implementing reforms to the leasehold system*.
- **May – June** – Law Commission to publish combination of consultation papers and position papers.
- **June** – Queen's Speech; State Opening of Parliament and Government to present refreshed legislative agenda.
- **October – November** – Draft Leasehold Reform Bill to be tabled; First Reading estimated in November at the earliest.