Response of the Law Society of England and Wales to the Law Commission on Leasehold home ownership: extending your lease and buying your freehold- Public Consultation

07/01/19

Introduction

1. The Law Society of England and Wales ('the Society') is the independent professional body that works globally to support and represent 180,000 solicitors, promoting the highest professional standards and the rule of law. The Society represents the profession to Parliament, government and regulatory bodies, and in the public interest undertakes work in areas such as the improvement of practice standards, pro bono work, law reform, promotion of human rights, and development of practice rights internationally.

2. Leasehold reform is a complex and important task. There are different interests at stake. The Law Society recognises the scale of the problem, and we are keen to work with the Law Commission and the government to identify solutions.

3. The Society represents a wide range of property practitioners, including members acting for buyers and sellers of new build properties, buyers and sellers in the second-hand market, lessors, lessees, developers, investors and lenders. The Society also has a role in supporting law reform in the public interest.

4. The Society welcomes this consultation[1]. It makes provisional proposals for reform designed to enhance and improve enfranchisement rights and provide a new unified procedure for all claims designed to benefit leaseholders of both houses and flats. The proposed reforms will focus on buying a freehold and extending a lease. The Commission has also set out options for reducing the price payable by leaseholders to exercise their enfranchisement rights, whilst ensuring sufficient compensation is paid to landlords to reflect their legitimate property interests. A summary of the consultation can be found here[2].

5. This consultation constitutes part of the Law Commission's wider review of residential leasehold and commonhold under its 13th programme of law reform.

6. The Ministry of Housing, Communities and Local Government issued a consultation recently on leasehold generally and the Society responded[3].

7. The Society will be responding to the Law Commission consultation on reinvigorating commonhold[4].

8. The Society has not responded to all 135 questions, for example, we have not responded to those under Part V, Chapters 14 and 15, as they are matters that require valuation expertise.

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[1] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/07/Leasehold-home-ownershi-buying-your-freehold-or-extending-your-lease.pdf

[2] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/07/Consultation-Paper-Summary.pdf

[3] https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/implementing-reforms-to-leasehold-system-2018-consultation-response/

[4] https://www.lawcom.gov.uk/project/commonhold/

9. The proposed reforms focus on buying a freehold and extending a lease. They are reviewed by the Commission under the policy objectives set out by government which include:

- to promote transparency and fairness
- to provide a better deal for leaseholders as consumers
- to simplify enfranchisement legislation
- to make enfranchisement easier quicker and more cost effective.

We have responded on the basis of these objectives and have not expressed concerns on the possible social-economic impact they may have, except where the question raised is directed at the impact of the relevant reform. The Executive Summary below makes reference to them.

Executive Summary

10. The Society supports increased transparency and the reduction of high ground rents and enfranchisement costs, for example by using a government mandated low value ground rent structure or by producing a standard form of material information and service charges to be distributed at an early stage in the conveyancing process. The Society agrees with the provisional proposal of the Law Commission to assimilate the treatment of houses and flats so far as possible to be entitled to extensions at a nominal ground rent on payment of a premium.

11. The Society, nonetheless, has some reservations and concerns about the impact of the provisional proposals in three key areas as put forward by the Law Commission:

11.1 The Government policy of reducing the cost to long leaseholders' acquisition of their homes, proposed by the Law Commission to be dealt on a formulaic basis which eliminates "marriage value", may act as a disincentive to investment in the residential market sector, and the lowering of reversionary and security value may have some detrimental aspects. For example, it may lead to the widening of loan to value margins of mortgage lenders; the introduction of fresh capital into the residential market sector may be curtailed and the beneficial activities of "white knights" made more difficult.

11.2 Many post-war flats' developments, that are badly designed, constructed and comprised inadequate materials, are in poor condition and are, or will soon be, in need of replacement or substantial refurbishment. The same is true of other aged blocks of flats reaching the end of their useful lives. The heavy increase in home ownership now intended will almost certainly be, at best a hindrance, and at worst, an obstacle, to replacement or renewal that is, or will soon be, clearly needed. The experience of collective enfranchisement under the current regime, where there are chronic levels of unpaid service charge and rent recovery, and flat-owners' obstructive behaviour to improvements on cost or other personal grounds, gives forewarning and a call for further consideration.

11.3 While the Society does in principle support the standardisation of procedures as provisionally proposed by the Law Commission in the search for reduced costs

and delays, it fears the extent of the application of prescribed procedures, where varying circumstances likely to be encountered cannot be adequately predicted or catered for in advance. The provisional proposals may give rise to unwelcome restriction on freedom of the parties to find a negotiated, balanced, solution. Finding the correct level by prescribed provisions may be too ambitious, but balance is needed if unfairness, either to landlords or leaseholders, is to be avoided.

12. The Society realises that voluntary lease extensions can give rise to the problems which the Law Commission is at pains to prevent. The Society is aware that there are circumstances where voluntary lease extensions are helpful; for example, they are sometimes carried out where a leaseholder finds that the residue of the term of the lease is too short to be marketable but is anxious to negotiate a sale. Resort to voluntary lease extensions in those or similar circumstances can be beneficial. Prohibition of voluntary lease extensions might be too severe a restraint; restrictions in specific, fundamental, areas of concern might be more appropriate.

13. The Society is of the view that, where the landlord retains land over which the enfranchisee had rights and obligations of both parties governing the relationship between the house and the retained land under his/her lease, those rights and obligations in the existing lease should be reflected in the terms which relate to the retained land of the landlord rather than other prescribed terms. They should, however, be subject to variation where they are, or would in the changing circumstances be, demonstrably unfair or unreasonable. Where they are held to be unreasonable, there should be an implied statutory provision that such rights as are exercisable, and any such restrictive covenants should be enforceable, only to the extent that would be reasonable in the circumstances and only in a reasonable manner.

    In offering this view, the Society has followed the approach in the s.19, Landlord and Tenant Act 1927 in importing reasonable tests in the case of covenants against assignments, underlettings and parting with possession, and alterations to leasehold premises, requiring consent of the landlord. Those implications of reasonableness, however, give way where covenants against those actions by the tenant are prohibited. It is suggested that a statutory importation of reasonableness tests in the context raised by this Question should override the effects of additional covenants to the extent that they would operate unfairly or unreasonably upon enfranchisees in this connection.

14. The Society agrees that a landlord should be able to recover non-litigation costs when a claim is withdrawn or struck out but sees difficulty with the suggestion of “a percentage” recovery. The Society also agrees with the provisional proposal of the Law Commission that a landlord should have a right to seek security for his or her non-litigation costs. It will bring the position in relation to collective enfranchisement claims into line with lease extension procedures.

15. The Society is of the opinion the landlord entitlement to terminate the lease for redevelopment of the building (if the Law Commission’s suggestion were to be adopted) should commence on the date of the expiry under the subsisting lease,

and then periodically at the expiry of each period of 60 years of the extended term. It is submitted that this basis of termination for redevelopment would produce less interference with the right of leaseholders to retain value in their respective flats without the threat of termination too frequently.

Consultation questions:

Q1. 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

16. The Wales Act 2017 amended the Government of Wales Act 2006 by providing for a new devolution settlement for Wales. The Reserved Powers Model established by the 2017 Act allows the Assembly to legislate on matters that are not reserved to the UK Parliament.

    There are still a number of legal tests that must be passed under the Reserved Powers Model, for example, Acts of the Assembly must not relate to any reserved matter set out in the new Schedule 7A of the 2006 Act (such as modern slavery, electricity, road and rail transport, medicines). Also, Assembly Acts must not breach any of the restrictions set out in the new Schedule 7B of the 2006 Act, for example - that Assembly Acts must not modify private law (such as contract, tort, property) unless it is for a devolved purpose, or modify certain criminal offences (such as serious offences against the person and any sexual offences).

    The Society knows of no reason why there should be any different treatment of particular issues in a reformed enfranchisement regime as between England and Wales.

Q2. 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?

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:

17. The Society agrees with the provisional proposal of the Law Commission to assimilate the treatment of houses and flats so far as possible by the entitlement to extensions at a nominal ground rent on payment of a premium.

Paragraph 4.41:

18. As to the appropriate length of such a lease.

(1) The Society is of the opinion that, of the options suggested, leases of 250 years may be more expensive for many flat-dwellers to afford. The option appears to offer little additional benefit to leaseholders, and would be better excluded.

The length of an extension of 90 years under the present regime has been successful in practice but, frequently, a tenant will repeat the extension process soon after in order to obtain an even longer term. Rather than leaseholders of flats making repeated enfranchisement claims in order to obtain longer amalgamated lease terms, the Society suggests, instead, that there should be claims for a term of 125 years longer than the unexpired residue of the term of the leaseholders' subsisting long lease. Suggestions in this context of terms of 999 years in respect of flats appear to be excessive.

(2) the Society is of the opinion the landlord entitlement to terminate the lease for redevelopment of the building (if its suggestion in sub-paragraph (1) above were to be adopted) should commence on the date of the expiry under the subsisting lease, and then be available periodically at the expiry of each period of 60 years of the extended term. It is submitted that this basis of termination for redevelopment would produce less interference with the right of leaseholders to retain value in their respective flats without the threat of termination too frequently.

Q3. 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

19. The Society agrees with the provisional view of the Law Commission that the adoption of these additional choices would complicate matters and runs counter to the general aim of keeping these processes as simple as reasonably practicable.

Q4. 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

20. The Society agrees with the provisional proposals of the Law Commission in parts (1) and (3), but sees potential difficulty, however, with proposal (2). If the landlord can require other land to be included with a lease extension, presumably the additional parts in question would be identifiable at the time of negotiations and the reservation to require the right should be made. Additional land carries with it,

additional expense; the tenant should not unexpectedly have to undertake that responsibility without initial understanding of its potential imposition.

Q5. 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

21. The Society agrees.

Q6. 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?

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

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:

22. The Society agrees with the provisional proposal of the Law Commission in this paragraph.

Paragraph 4.92:

23. The Society makes the following suggestions: A landlord covenant of mutual enforceability should be included; modern wording/obligations to comply with the latest UK Finance Mortgage Lenders Handbook for Conveyancers, and in particular the requirements set out in paragraph 5.14 of the Hand Book relating to maintenance, repair and insurance. Landlords may wish to see included any increase in the registration fee to register notices of assignment and charge.

Paragraph 4.93:

24. *Aggio*-style leases each present their own individual problems which would make it virtually impossible to prescribe terms to cover each of them. There may be too many variables in *Aggio* situations; the leaseholder might just have two flats in the current lease, the whole building or just the residential section of a mixed use building; the lease may or may not include common parts that the leaseholder controls during the residue of the current lease, but which revert to his landlord after the current lease expires. The difficulty of prescribing a form of lease that is likely to be suitable for individual lease extensions in these varying situations is evident. Perhaps some parameters would be more practical. The Society puts forward the suggestion that where a leaseholder has more than one flat comprised in the same lease, and the flats are not occupied together as a single dwelling, he/she should

perhaps not have the right to individual lease extensions; either there should be no right to extend (since he/she is likely to be just an investor or management company) or he/she should have a right to extend for the whole premises comprised in the subsisting lease, as in LTA 1954, s 32(2). Landlords may wish to see an increase in the registration fee.

Q7. 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?

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:

25. The Society realises that voluntary lease extensions can give rise to the problems which the Law Commission is at pains to prevent. There are often issues, however, where a lease extension of a flat is granted outside the 1993 Act, particularly where a superior landlord grants the tenant a reversionary or concurrent lease which has the effect of leaving a few days' gap in the leaseholder's right to possession due to the intermediate landlord holding the few days' reversion, between the term date of the tenant's current lease and the term date of the intermediate lease. This gap is avoided under Schedule 11, para. 10 of the 1993 Act by the notional surrender and regrant of the intermediate lease. This measure should be adopted in these situations where voluntary lease extensions are negotiated, but it is often overlooked.

The Society is aware, however, that there are circumstances where voluntary lease extensions are helpful; for example, they are sometimes carried out where a leaseholder finds that the residue of the term of the lease is too short to be marketable, but is anxious to negotiate a sale. Resort to voluntary lease extensions in those or similar circumstances can be beneficial. Prohibition of voluntary lease extensions in any event might be too severe a restraint; restrictions in specific, fundamental, areas of concern might be more appropriate.

Paragraph 4.99:

26. The Law Commission has drawn attention to the imbalance of negotiating strengths of landlords in negotiations with tenant for lease extensions. Voluntary lease extensions would usually be for a shorter term than the statutory period, and also continue to include a ground rent subject to periodic rent reviews increasing the rent to be payable. Some checks on freedom of negotiations in voluntary negotiations may need to be considered.

If any restrictions are to be placed on voluntary lease extensions, perhaps these should be prescribed with a view to prohibiting or restricting the frequency of increases for ground rent and the level to which they can reach, subject to whatever new prohibitions are imposed as a result of MHCLG's October 2018 consultation on reducing future ground rents. Perhaps there should be minimum and maximum limits upon ground rent levels. Nevertheless, it would seem to be impracticable to invalidate a voluntary lease that infringed the limits, and other forms of appropriate sanction would need to be considered.

Paragraph 4.99:

27. The Law Commission has drawn attention to the imbalance of negotiating strengths of landlords in negotiations with tenant for lease extensions. Voluntary lease extensions would usually be for a shorter term than the statutory period, and also continue to include a ground rent subject to periodic rent reviews increasing the rent to be payable. Some checks on freedom of negotiations in voluntary negotiations may need to be considered.

If any restrictions are to be placed on voluntary lease extensions, perhaps these should be prescribed with a view to prohibiting or restricting the frequency of increases for ground rent and the level to which they can reach, subject to whatever new prohibitions are imposed as a result of MHCLG's October 2018 consultation on reducing future ground rents. Perhaps there should be minimum and maximum limits upon ground rent levels. Nevertheless, it would seem to be impracticable to invalidate a voluntary lease that infringed the limits, and other forms of appropriate sanction would need to be considered.

Q8. 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.

Do consultees consider that similar provision should be made under any new enfranchisement regime?

Paragraph 4.101:

28. The practice precluding further lease extensions is very prevalent. The Society considers that this situation is acceptable involving, as it does, court approval under the current regime.

Paragraph 4.102:

29. The Society considers that the present arrangements should be retained under the new regime, but that Court approval requires a substantive review of whether the implications of the arrangement are properly understood by leaseholders. It should not be tantamount to a mere "rubber stamp" procedure as parallel arrangements in relation to renewal of leases of business premises under s.38A, Landlord and Tenant Act 1954 has become over time.

Q9. 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

30. The Society is of the view that, depending on the availability of mortgage finance, the proposed uniform right to a lease extension at a nominal ground rent would lead to an increase of the likelihood of tenants seeking lease extensions under future enfranchisement legislation. While it is too soon to predict the attitude of mortgage lenders, there are some early signs of diffidence on their part, and their preference is likely to be for freehold acquisition.

Q10. 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

31. As stated, much depends on the availability of mortgage finance. Early signs show that lenders are making a distinction between leasehold flats and leasehold houses.

The Society has received comments from practitioners that a minority of lenders seek to profit from leaseholders by charging more than a nominal fee to agree to "allow" leaseholders to extend their lease and sometimes insist upon a fresh valuation of their security when it is self-evident that lease extensions will always improve the value/marketability of the flat. These practices could be countered by providing that lenders' consent would not be required to a voluntary extension of the mortgaged lease where the lender is given notice of the transaction.

Q11. 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

32. While in principle, a leaseholder's right (1) to extending his/her lease without changing the ground rent; or (2) extinguishing the ground rent without extending the term of the lease, might be regarded as attractive additional options to what would otherwise be on offer by way of enfranchisement, the general view of practitioners in this field is that, in practice, it would make the process too complex

Paragraph 4.106

33. The Society tends to agree with the Law Commission that restriction on parties' ability to introduce new terms to those in a prescribed list would potentially have the effects referred to in this question. The Society has some concern, however, that the lack of flexibility may have some negative market result. For example, will a landlord be entitled to change the method of collection if the service charge from "arrears recovery" to "advance collection" to secure funds for necessary expenditure? There is evidence that where recovery is in arrears, that creates practical difficulties for the landlord to ensure that the service charge account is properly funded to allow for works to be carried out. If a standard form of lease were available which, in comparison, revealed "defective" or unfair provisions in the existing lease, could there not be some procedure to replace those terms consistently with the appropriate provisions in a standard form, perhaps with the approval of the Tribunal?

Q12. 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?

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?

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

Paragraph 4.106 (1):

34. As the Consultation Paper itself reports of the evidence it has obtained on these issues, negotiations on terms of lease extensions are often protracted and result in heavier costs being incurred; the potential for disputes is increased and the imbalance of negotiating strengths of landlords over leaseholders is often encountered. In cases of immediate agreement, there may be evidence of the effect of imbalance of negotiating strengths.

Paragraph 4.107:

35. The Society tends to agree with the Law Commission that restriction on parties' ability to introduce new terms to those in a prescribed list would potentially have the effects referred to in this question. The Society has some concern, however, that the lack of flexibility may have some negative market result. For example, will a landlord be entitled to change the method of collection of service charge from "arrears recovery" to "advance collection" to secure funds for necessary expenditure? There is evidence that where recovery is in arrears, that creates practical difficulties for the landlord to ensure that the service charge account is properly funded to allow for works to be carried out. If a standard form of lease were available which, in comparison, revealed "defective" or unfair provisions in the existing lease, could there not be some procedure to replace those terms consistently with the appropriate provisions in a standard form, perhaps with the approval of the Tribunal?

Paragraph 4(108):

36. The restriction, on additions to prescribed clauses only, has the benefit of certainty; so, there would be at least potential to encourage otherwise diffident leaseholders to exercise their rights to a lease extension. The absence of some mechanism to prevent perpetuation of unfair or defective provisions might lead leaseholders to decline to enfranchise. For example, the Society suggests that provisions should be made to invalidate forfeiture on grounds of insolvency in leases that are extended. In circumstances such as these, the burden of proof should be on the respondent to the claim to show why the changes should not be made.

Q13. 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 5.30.1:

37. The Society agrees with the provisional proposal of the Law Commission that the leaseholder should be entitled to a transfer of (a) the whole of the building in which his/her residential unit is situated, even if parts of that building are not included within his/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.

    It is observed, however, that in paragraph 5.25 of the Consultation Paper, from which this proposal emanates, it is suggested that the leaseholder should be able to acquire the leases of parts of the house that are not included in his/her lease. That proposition appears to require qualification so as not to be understood to allow one leaseholder compulsorily to acquire another's lease of parts capable of occupation, which surely could not have been intended.

Paragraph 5.30.2:

38. The Society has distinct concern as to the proposal in paragraph 5.30(2). It is understandable that the landlord should not be compelled to accept responsibility for part of the premises that were originally let to the leaseholder, which has then been assigned, once the lease of the assigned part terminates and it is not convenient for the landlord to re-let it as being part of a leasehold parcel where the remainder has been enfranchised. The concern of the Society rests on the proposal that there should be no statutory deadline or time limit for the landlord to offload the remainder of the parcel upon the enfranchised leaseholder; if that position were to have been reserved by the landlord originally, it might have been an influencing factor in the decision of the leaseholder to enfranchise. The Society suggests that the leaseholder's claim notice should make clear that the claim does not include some of the premises let by the current lease, but the landlord should not have the right to require that the leaseholder take a lease back of the relevant part of the premises at a later time unless it has reserved that position at the time when the leaseholder would otherwise intend to embark on enfranchisement.

Q14. 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?

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:

39. The Society agrees with the provisional proposal of the Law Commission in this paragraph, but with an element of misgiving. The proposal accepts the position as it has operated under the 1967 Act. It may be that the premium payable will be at least as much as would be required to discharge the landlord's mortgage on the freehold, but the prescriptive nature of the methods of valuation and calculation of the premium put forward in the Consultation Paper could lead to more cases of the premium leaving an element of unsecured debt due to the mortgagee. Under the 1967 Act, the premium would more closely reflect the market value of the reversion so that the mortgage debt would be likely to be more securely covered.

The attention of the Society has been drawn, however, to the practical difficulty of how a leaseholder would be able to obtain the relevant account number for the landlord in order to pay over monies to the lender? Data Protection legislation prohibits the lender from giving out details of the relevant mortgage account number to the leaseholder.

Paragraph 5.35:

40. The Society does not agree with the provisional proposal of the Law Commission in this paragraph (the exception of estate rentcharges to secure positive covenants is agreed, although it is hoped that positive covenants touching and concerning freehold land will become enforceable under the reforms put forward in Law Com.no. 327). The valuation of the reversion under the proposed legislation will be less than applies under the 1967 Act. The leaseholder should, in the opinion of the Society, take the land as it is encumbered by rentcharges as a matter of title. It is submitted that the landlord should be under no greater obligation than to cooperate with a leaseholder who wishes to redeem a subsisting rentcharge

Q15. 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.

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?

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:

41. The Society is of the opinion that the leaseholder should acquire the freehold subject to the obligations and encumbrances on which the freehold title is currently held that would not be discharged on completion of a conventional sale and purchase; the freeholders should not otherwise have residual title obligations.

Paragraph 5.49:

42. The Society agrees, on balance, with the proposal in this paragraph as being consistent with the aims of the Consultation Paper to restrict changes to a prescribed list. While in most instances, the proposal would be unlikely to cause difficulty, the Society has concerns over situations where "circumstances make cases". In the view of the Society, there should be some right to make changes in appropriate circumstances with the approval of the Tribunal. Inability to do so could work unfairly upon the landlord.

For example, some such an issue arose in *Aldwych Club v Copthall,* (1962) 185 EG 219, on the terms to be included in the renewal of a lease of business premises under the Landlord and Tenant Act 1954. In that case, the court held it to be unfair to allow the tenant on a business lease renewal to take on narrow use restrictions at his own choice in order to reduce the rent. If it were considered fair in circumstances merely to defer the payment of the extra value until such time as the leaseholder or buyer decided to operate a wider use, it would be appropriate to ensure that the new covenants should remain enforceable by the covenantee (as proposed in parallel circumstances in question 17 below). The Society suggests the Tribunal should have discretionary powers to make nuanced determinations in such instances.

Paragraph 5.50:

46. The Society has canvassed opinions among practitioners as to what types of additional terms that should be included within such a prescribed list. As indicated in the replies to the questions in paragraphs 5.48 and 5.49, there are many situations in which additional covenants and restrictions would be needed to offer protection to the landlord, the leaseholder or third parties, as the case might be, and a prescribed list could only be expected to include conventional terms. Attempts to prescribe terms for more remote situations would, according to the views expressed to the Society, amount to guesswork. To assist the parties, conventional terms could be given as useful precedents in applicable circumstances. The Society is of the opinion that the additional terms can only be settled by agreement between the parties and their respective advisers; where dispute or difference cannot be resolved in that way, the Tribunal should have the powers to determine the relevant issues. It is acknowledged that this would involve time, expense and delay, but a prescribed list does not appear to have the flexibility that is likely to provide a universal standard offering; there is no confidence that it could be expected to do so.

Q16. 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.

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

Paragraph 5.56

47. The Society is of the view that, where the landlord retains land over which the enfranchisee had rights and obligations of both parties governing the relationship between the house and the retained land under his/her lease, those rights and obligations in the existing lease should be reflected in the terms which relate to the retained land of the landlord rather than other prescribed terms. They should, however, be subject to variation where they are, or would in the changing circumstances be, demonstrably unfair or unreasonable. To avoid either party exercising its rights or enforcing its covenants capriciously, there might be an overriding implied statutory provision that such rights as are exercisable, and any such covenants should be enforceable, only to the extent that would be reasonable in the circumstances and only in a reasonable manner.

In offering this view, the Society has followed the approach in the s.19, Landlord and Tenant Act 1927 in importing reasonable tests in the case of covenants against assignments, underlettings and parting with possession, and alterations to leasehold premises, requiring consent of the landlord. Those implications of reasonableness, however, give way where prohibitions against those actions by the tenant are expressed or implied. It is suggested therefore that a statutory importation of reasonableness tests in the context raised by this Question should override the effects of such prohibitions to the extent that they could operate unfairly or unreasonably upon enfranchisees.

Q17. 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 the landlord has retained land that benefits from that obligation.

Do consultees agree?

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:

48. The Society agrees with the provisional proposal of the Law Commission in this paragraph.

Paragraph 5.63:

49. The Society shares the view of the Law Commission. Unpaid debts to the landlord of an estate should be capable of being charged against the freehold and enforceable by the landlord as if he/she were a mortgagee of the property, but there is some concern that the powers of sale or appointing a receiver could operate too harshly in the case of small sums. However, these rights are imposed under the regime in, Leasehold Reform and Urban Development Act 1993, s.69(3). They should perhaps be mitigated; the Society suggests that they might be exercisable subject to a qualifying threshold of unpaid debt, or that any power of sale should require a court order (as in the case of equitable charges).

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Q18. 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?

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

Paragraph 5.66:

50. The Society agrees with the provisional proposals of the Law Commission as keeping negotiations to a minimum.

Paragraph 5.67:

51. The Society suggests that the prescribed list of covenants should follow the relevant provisions of Leasehold Reform and Urban Development Act 1993, s.69(3).

Q19. Do consultees believe that the ability of parties to enter a transfer of the freehold of a house outside the 1967 Act creates significant problems in practice?

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

Paragraphs 5.70 and **5.71**:

52. So far as the Society has been able to ascertain, the majority of voluntary transfers proceed without major problems arising, particularly where leaseholders are represented in negotiations. Where leaseholders are not legally represented, legal traps may be overlooked, such as the insertion verbatim into the freehold transfer of a covenant from the lease requiring consent for alterations; it may not be appreciated then that the reasonableness test imposed by the Landlord and Tenant Act 1927, s.19(2) does not apply to freehold transfers but only to leases. This and other situations can allow the imbalance of negotiating strengths of landlords and leaseholders to give rise to unfairly weighted terms. Nevertheless, it is observed that market conditions can have an influence; in strong property market conditions, leaseholders have in many cases been satisfied with their acquisition on the basis that it would be gaining in value. That would not necessarily be the case in a falling market.

Q20. 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?

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?

Would this reform result in a higher proportion of leaseholders seeking to exercise their right of individual freehold acquisition?

Paragraph 5.72:

53. The Society believes that probably:

(1) the duration and cost of the enfranchisement process would be increased;
(2) the potential for disputes would be increased; and
(3) the inclusion of unusual terms within the freehold transfer, resulting in
(4) additional future costs to former leaseholders.

The nature of the property, a stand-alone or, say a semi-detached house on an estate with estate charge provisions, would require carefully worded provisions to allow the estate landlord to recover the relevant service charges. Settling those provisions usually involves a higher cost to initial enfranchisee; subsequent enfranchisees normally utilise the format agreed in the original transfer.

Paragraph 5.73:

54. The Society believes that the limitations suggested in this paragraph would be likely to achieve the reductions intended to be sought.

Paragraph 5.74:

55. The Society believes that the suggested reforms might well result in a higher proportion of leaseholders seeking to exercise their right of individual freehold acquisition.

Q21. 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?

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:

56. The Society agrees with the provisional proposals of the Law Commission that, in general, a collective freehold acquisition claim should be carried out by a nominee purchaser company. The Society has been informed that the mandatory use of a

company for four or fewer leaseholders would be likely to discourage them from enfranchising; the Society considers that they should have the right to choose whether or not to do so.

Paragraph 6.68:

57. The Society considers it prudent to relax some requirements of company law in relation to nominee companies. They would probably be unduly onerous and be more likely to be overlooked. In particular, a nominee company should not be struck off the register for failure to file returns with the Registrar of Companies, and the Registrar should be requested to produce practice guides specifically directed to members of enfranchisement companies.

It is more important that service charge accounts are produced in accordance with the RICS Service Charge Residential Management Code, and perhaps that the Company law provisions for resolving deadlock between members might be retained.

Q22. 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

58. The Society considers it prudent to relax some requirements of company law in relation to nominee companies. They would probably be unduly onerous and be more likely to be overlooked. In particular, a nominee company should not be struck off the register for failure to file returns with the Registrar of Companies, and the Registrar should be requested to produce practice guides specifically directed to members of enfranchisement companies.

It is more important that service charge accounts are produced in accordance with the RICS Service Charge Residential Management Code, and perhaps that the Company law provisions for resolving deadlock between members might be retained.

Q23. 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?

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:

59. The Society agrees with the approach of the provisional proposals of the Law Commission for prescribed articles of association but considers that unanimity is not necessary, and a 75% majority would suffice.

Paragraph 6.87:

60. The provisions of Schedule 3, Commonhold and Leasehold Reform Act 2002 and in Schedule 2, Commonhold Regulations 2004 (SI 2400/1829) provide a good basic framework

As the articles of association of a company, whether limited by shares or by guarantee, would establish a contractual framework between members and the company, the articles should require the company to provide services to common parts and the structure and exterior the property (or to appoint a managing agent to do so) and set the rights and obligations of each long leaseholder with respect to those services, resembling those matters as were contained in the enfranchised long leases; as each new long leasehold becomes a member, he/she would become entitled to, and bound by, those rights and duties in the articles. The method of apportionment to each unit should be specified; liability between members would be apportioned by an appropriate formula. In addition, there should be obligations of members as to neighbourly behaviour in the use and occupation of their units.

Q24. 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?

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:

61. The Society agrees with the approach to the provisional proposals of the Law Commission. but considers that unanimity is inflexible. A 75% majority is considered sufficient.

Paragraph 6.92:

62. The Society considers that, where there are strong grounds in the interest generally of members but unanimous agreement cannot be obtained, the Tribunal should have discretion to order the disposition to be made, subject to a high majority of members (say, 75%) being in favour and failure to proceed would be detrimental

to the overall interests of members. It would be a necessary curb on obstructive and difficult behaviour which is prevalent in these situations. The Society is aware that the Tribunal should not have a role beyond determining whether the disposition would be in the general interests of the members according to the evidence.

The Society suggests that a Tribunal should be empowered to permit the proposed disposition of premises acquired collectively by the purchaser company where a substantial majority {say, 75%} of the members of the company agree that the disposition should be made. If after hearing the arguments and evidence, the Tribunal considered that it would clearly be in the interests of the members, it should then make an order for the disposition to proceed.

Q25. 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?

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:

63. The Society considers that the Law Commission has approached the question of the right of collective freehold acquisition in accordance with sound principle. As such, it should be supported. The problems, however, associated with estate ownership that is now under the control of private owners, are manifold, particularly where the estate in question is extensive. Disagreements and disputes between the occupiers are commonplace, particularly where they involve significant expenditure. There needs to be some overarching method of resolving these difficulties, particularly where the estate would deteriorate if no improvements or changes could be made because of unduly obstructive opposition.

Paragraph 6.97:

64. The Society has reservations about this provisional proposal of the Law Commission. In practice, very difficult problems arise, particularly where the estate buildings are not exclusively in residential use or nearly so. The apportionment of estate management charges is a major issue, particularly when other uses involve heavier traffic usage of roads and service facilities. Also, the scale of the estate is an important factor; the more widespread, the more the problems of getting agreement and of dealing with grievances between neighbouring block owners. The Society is not persuaded that multiple mixed-use estates are suitable candidates for collective enfranchisement; large residential estates produce intractable problems as to differentiation of estate common parts use and allocation of estate service charges. The proposals appear to be over-ambitious. They would have a better outlook on a limited scale

Q26. 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?

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?

65. The Society agrees with the provisional proposals of the Law Commission in each of paragraphs 6.103 and 6.104.

Q27. 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?

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

66. The Society reiterates its answers to the questions in both paragraphs raised in Question 14 above. The issues raised there are parallel with those to which this Question refers.

Q28. 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?

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:

67. The Society agrees with the provisional proposal of the Law Commission in this paragraph. The landlord should not be left with a fragmented land holding. The proposed result could be achieved quite simply by provision in the enabling statute or by subordinate legislation under it.

Paragraph 6.118:

68. The Society agrees in principle with the provisional proposal of the Law Commission. The process should be kept as simple as possible, particularly where numerous parties are involved. The Society understands that negotiations with estate owners of large landed estates are often protracted and costly.

Again, the Society considers that attempts to limit covenants to those in a prescribed list do not meet the requirements of the varying circumstances encountered, and are too limited. Practitioners report that standardisation is impractical, particularly when there are in some instances so many different estate facilities. The need for reserve funds and the volume of unpaid contributions exacerbate the problems.

Q29. 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.

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

Paragraph 6.124:

69. The Society favours a prescribed pro forma estate management scheme.

Paragraph 6.125:

70. The Society offers no additional view on this question.

Q30. 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?

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

Paragraph 6.127

71. See answers to question 29.

Q31. 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

72. The Society notes the provisional proposals of the Law Commission and the arguments supporting them. It is probably true that the right of leaseholders to require the freeholder to take a leaseback of all parts of the premises (other than common parts) which are not let to participating leaseholders is unlikely to cause significant disadvantage to the freeholder for the reasons given in paragraph 6.131. Even so, the Society is concerned that that may not universally be so. Should not the freeholder be allowed by appropriate exemption to decline where it can demonstrate clear disadvantage in the relevant prevailing circumstances by being compelled to do so?

Concern has been expressed to the Society as to what the terms of the lease-back and what areas would be subject to such a claim when comparison is made with the current provisions for mandatory and optional lease-backs.

In a mixed use building, there may be flats, shops or offices let to occupational tenants. In such cases, requiring the flat-owners to acquire the freehold with the benefit of these might often mean that they would have to pay an unaffordable price, much higher than the price for just the reversion of the qualifying leaseholders' flats. It is suggested that the fair approach, with a view to reducing the freehold price, is to allow leaseholders to require these units to be leased back to the landlord, subject to the qualification set out below.

Since a leasehold investment may be less attractive in the market than a freehold, the calculation of the price of the freehold payable to the landlord should take into account by way of compensation to the landlord an additional amount equal to any difference in value of (1) the leased back units of part of the landlord's freehold and (2) the value of those units as if they were to be held on 999 year leases at peppercorn rents.

Q32. 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?

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

Do consultees agree?

Paragraph 6.138

73. The Society agrees with the provisional proposals of the Law Commission in both paragraphs 6.138 and 139. The period of five years suggested would seem sufficient to protect the freeholder from too frequent claims.

Q33. 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?

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 6.141:

74. The Society believes that the majority of voluntary transfers proceed without major problems arising, particularly where leaseholders are represented in

negotiations. Nevertheless, these are situations where imbalance of negotiating strengths of landlords and leaseholders can give rise to unfairly weighted transaction.

Paragraph 6.142:

75. The Society does believe that the ability to enter into a transfer of the freehold of a block of flats opens up the possibility that the imbalance of negotiating skills of leaseholders in arrangements outside the 1993 Act could lead to significant problems in practice. While limits on that liability are prescriptive, the Society takes the view, on balance, that it would be preferable to keep changes within a prescribed list of allowable additional provisions, but contrary views have been expressed to it. It would be inappropriate, however, to invalidate a transfer made in breach of any prescribed restrictions; there should be other forms of milder sanction.

Q34. 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?

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?

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:

76. The Society does believe that the ability to enter into a transfer of the freehold of a block of flats opens up the possibility that the imbalance of negotiating skills of leaseholders in arrangements outside the 1993 Act could lead to significant problems in practice. While limits on that liability are prescriptive, the Society takes the view, on balance, that it would be preferable to keep changes within a prescribed list of allowable additional provisions, but contrary views have been expressed to it. It would be inappropriate, however, to invalidate a transfer made in breach of any prescribed restrictions; there should be other forms of milder sanction.

Paragraph 6.158:

77. The Society considers that the right to participate should be available only in respect of collective freehold acquisition claims completed in the future.

Paragraph 6.159:

78. If this right is introduced, the Society thinks it would be difficult to create an incentive scheme that does not prejudice the leaseholders who originally participated in the claim. In particular, if there is a considerable period between the original claim and when new leaseholders ask to participate, how will this be valued? Should the original participants be rewarded for their efforts in having established the scheme? If original participants have sold their flats in the meantime; would the new participants be required to pay their compensation direct to the original participant or

to the current owner of the relevant original participant's flat who might then receive a windfall? What difficulty would there be in tracing the original participants if they have moved? Would capital gains tax liability be incurred in all these arrangements? Answers to these questions are hard to find.

Q35. 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

79. Please refer to the answers given to Question 22. There appear to be few difficulties drafting prescribed articles of association. Concern has been expressed any exclusion of certain aspects of company law – for example, a director's fiduciary duty

Q36. 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?

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?

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

Paragraph 6.161:

80. The Society considers that the freedom to negotiate terms could lead to the consequences that the Law Commission mentions. The Society is aware of the prevalence of disputes, particularly over the attempted imposition of restrictive covenants, or the retention of existing restrictions, prevalent where landed estates are involved.

Paragraph 6.162:

81. So much must depend on the relevant circumstances. In some cases, restrictions on the imposition of new terms would be apposite but, in others, the inability to make changes might well be a handicap and an inappropriate constraint. An absolute view on this question would seem to be impossible

Paragraph 6.163:

82. The views reported to the Society on this question are that these difficulties arise in the course of negotiations, but do not generally govern the decision of leaseholders as to whether to claim enfranchisement. In effect, they may lead to dissatisfaction, but they do not appear to restrain the motivation of leaseholders to enfranchise. Again, an absolute view on this would seem to be impossible.

Q37. 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

83. The imposition of leasebacks will make the freehold price on a collective freehold acquisition more affordable for leaseholders, but it is possible that the costs of the participants will be greater as the terms of the lease-back will need to be negotiated. As the existing regime allows for mandatory and optional leasebacks, it is unlikely that the proposed reform will give greater encouragement to claims.

Q38. We provisionally propose to replace the language of "houses" and "flats" with the new concept of a "residential unit".

Do consultees agree?

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?

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:

84. The Society agrees with the provisional proposal of the Law Commission; it would achieve a welcome simplification of the current situation.

Paragraph 8.58:

85. The Society thinks that the definition of "residential unit" addresses all the ascertained difficulties that have been encountered with the current definitions of "house" and "flat" in the 1967 and 1993 Acts respectively and that the proposals for their replacement have been carefully crafted.

Paragraph 8.59

86. The Society agrees with the provisional proposal of the Law Commission to exclude business premises from enfranchisement rights. The Society also agrees that the restriction of enfranchisement rights to leases which permit residential use is likely to be an effective measure to achieve that aim as applying generally and moving away from considerations of the character of the relevant premises.

Nevertheless, the Society suggests that odd exceptions to the principle should be made permissible. An example would be the position under the 1967 Act where *l*easeholders who own a corner shop or public house are now able to acquire their freehold if it is their only or main residence. The proposed new definition of "residential unit" would remove their rights. Perhaps a qualification for the right to enfranchise might be that the floor area used exclusively for residential use in such a situation should exceed, say, more than 50% of the total floor area.

Q39. We provisionally propose to maintain the requirement that, in general, leaseholder must have a lease which exceeds 21 years in order to qualify for any enfranchisement rights.

Do consultees agree?

Paragraph 8.67

87. The Society agrees with the provisional proposal of the Law Commission. The qualification of term of more than 21 years is an established benchmark and should not be changed.

Q40. 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?

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?

88. The Society agrees with the provisional proposals of the Law Commission in each of paragraphs 8.71 and 8.72. There seem to be no reason to change the position as it operates under the 1967 Act.

Q41. 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

89. The Society agrees with the proposal to remove the financial limits under the existing regimes.

Q42. 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

90. The Society has some reserve over the absence of some such qualification, but is persuaded to agree with the provisional proposal of the Law Commission. It has borne in mind that the statutory device of a requirement of at least two years' ownership has not been effective and a replacement of it of a similar kind would be unlikely to be successful in practice. Its removal will aid the sale of long leases that

have only a short unexpired residue of the original term without the buyer requiring a seller to serve an enfranchisement notice.

Q43. 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

91. The Society agrees with the provisional proposals of the Law Commission as to each of the requirements for qualification for the right of individual freehold acquisition. The review by the Law Commission of current legislation and its complexities demonstrates the need for simplification. The provisional proposals clarify the position in each case while retaining the structure of the existing law. The legislation will need to address how a designation applies to one unit that has dual use, for example - a live/work unit.

Q44. 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?

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

92. The Society agrees with the provisional proposal of the Law Commission. The definitions in the 1993 Act definitions of "self-contained building" and "self-contained part of a building" are clear, and applying them in practice usually presents little difficulty. It is recognised that the complete avoidance of determining these issues is never possible, but there is no reason not to adopt the current definition in the 1993 Act. Perhaps attention is needed in respect of what is included in the curtilage, and garden/amenity space.

Paragraph 8.105:

93. The Society agrees with the provisional proposal of the Law Commission. It reduces the task of assessment to two tests which, while they each involve a subjective element, should produce little difficulty in reaching an appropriate conclusion. The general nature of the tests largely removes the problems associated with the current tests.

Q45. 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

94. The Society considers that, in those cases where the tests for assessing whether a building, or part of a building, is self-contained have not resolved the question, a discretionary power of the Tribunal to determine the issue is a sensible suggestion. Backed by professional expert assistance, a reasoned decision could be made. It is to be hoped that resort to that procedure and the costs involved would be comparatively rare and an incentive to the parties to come to a sensible decision of their own.

Q46. 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?

We provisionally propose that that limit should be the same as that which applies to collective freehold acquisition claims.

Do consultees agree?

We provisionally propose that the limit should be set at 25% of the internal floor space (excluding common parts).

Do consultees agree?

95. The Society agrees with each of the provisional proposals of the Law Commission in paragraphs 8.119-8.121 respectively. While the designation of a maximum limit is an arbitrary exercise, 25% seems to allow sufficient non-residential use without dominating the residential character of the premises overall. As it is the current limit that applies to collective freehold acquisition claims, there appears to be no call for a different limit in this context. Whatever limit is imposed, there will always be cases of marginal excess that are considered by the victims as unfair, but that should not be a reason for making exceptions.

Q47. 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

96. The Society agrees with the provisional proposal of the Law Commission. For a collective enfranchisement, there should be a minimum of two or more flats held by qualifying tenants in the premises to be acquired.

Q48. 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

97. The Society agrees with the provisional proposal of the Law Commission. There appears to be no reason to depart in the proposed scheme from the current requirement.

Q49. 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

98. The Society agrees with the provisional proposal of the Law Commission. The Society considers that it is right that the leaseholders of at least one half of the total number of residential units in the premises to be the minimum requirement for participation in freehold acquisition. For a lower limit to be set would probably be regarded as oppressive to the majority of leaseholders and there seems to be no pressing reason for departing from the threshold limit in the 1993 Act.

Q50. 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

99. The Society does not agree that with the provisions proposal of the Law Commission where there are only two residential units in the premises. The concern of the Society is based on the often difficult relationship of neighbours, particularly in one small building. A “collective” claim of one leaseholder to acquire the freehold might very well pour salt on the wounds of the other. That would not necessarily be alleviated by the non-participant having the right to participate later.

Q51. 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

100. The Society does not agree that with the provisions proposal of the Law Commission where there are only two residential units in the premises. The concern of the Society is based on the often difficult relationship of neighbours, particularly in one small building. A “collective” claim of one leaseholder to acquire the freehold might very well pour salt on the wounds of the other. That would not necessarily be alleviated by the non-participant having the right to participate later.

Q52. We provisionally propose the continuation of the 25% limit on non-residential use in collective freehold acquisition claims.

Do consultees agree?

Paragraph 8.153

101. The Society agrees with the provisional proposal of the Law Commission.

Q53. 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

102. The Society agrees with the provisional proposal of the Law Commission.

Q54. 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

103. The Society agrees with the provisional proposal of the Law Commission.

Q55. 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

104. The Society does not agree with the provisional proposal of the Law Commission for an exception to be made 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. Many such cases would involve freehold buildings owned by one leaseholder. Why should the non-freehold owning parties be able to compel a sale to them? A "ping-pong" situation could arise, especially if the other flat owner could then immediately buy it back".

Q56. 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?

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

105. The Society agrees with the provisional proposal of the Law Commission. The proposal has the benefit of simplicity.

Q57. 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

106. The Society does not believe that the ability of a head lessee to acquire the freehold of the block individually is a significant problem.

Q58. Do consultees consider it desirable to attempt to restrict the enfranchisement rights of commercial investors further than the current law does?

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

107. The Society believes that commercial investors' ability to enfranchise does not need to be restricted further.

Q59. How and to what extent has the exercise of enfranchisement rights been slowed down, prevented, or made costlier 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?

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:

108. (1) The use of a low rent test and rateable values can often be both confusing and arbitrary. They add complexity, so either or both can slow down transactions and make them more expensive and uncertain. It is sometimes impossible to ascertain rateable values and there is confusion as to what is the "appropriate day".

(2) The Society is aware of instances where the distinction between whether a dwelling is a house or a flat is unclear and has led to complications and even litigation. It is often a real issue which makes even the choice of notice to extend a lease uncertain. Particular difficulties arise where a building has a substantial "overhang" or "underhang" with an adjoining building.

(3) The Society views this as an unnecessary complication due to piecemeal legislation rather than a distinct and coherent policy decision.

(4) The requirement for two years of ownership often has an effect of making sales more difficult, protracted, and costly sometimes leading to the transaction aborting. The Seller is required to serve a notice in order for the lease to be long enough for a sale to go ahead but does not have any personal interest in the terms for extending the lease. This situation was discussed in the answer to Question 42 above. The complexity would be avoided if the buyer were able to serve such a notice immediately on purchase.

(5) The general complexity means that such transactions are often difficult even for practitioners. This does not sit well with the current aim of simplifying and expediting conveyancing.

Paragraph 8.195:

109. (1) The reduction of relevant periods is likely to speed up the enfranchisement process. Even so, the Society fears that the overall costs may not be reduced, particularly for complicated collective claims where the issues to be considered and agreed abound.

(2) The Society is concerned that replacement of one regime with another, and introduction of new definitions and tests could initially lead to a greater number of disputes until the Tribunal has definitively determined them.

Q60. 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

109. The Society finds it difficult to see a rationale for further restrictions on the ability of commercial leaseholders to enfranchise. To do so would act as a disincentive for commercial investors to operate in this market area. The decline in the involvement of commercial investors would have a major impact on the housing market by reducing demand and, consequently, would diminish the flow of money into the economy. However, the view has been expressed to the Society that further restrictions on commercial leaseholders to enfranchise might provide a means for householders to have a longer-term interest in their properties rather than providing a commercial opportunity for others.

Q61. 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?

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:

> 110. (1) The Society agrees with the provisional proposal of the Law Commission. As a matter of principle, it appears to be a correct approach that shared ownership leaseholders should be entitled to a lease extension just as would be available to any other leaseholder.
>
> (2) The Society agrees that the terms of the lease extension should replicate any terms of the existing lease which relate to its shared ownership nature. To do otherwise would complicate an already very complex arrangement where the aim of the Law Commission is to simplify procedures and the negotiating process wherever, and to the extent, possible.
>
> The Law Society is concerned that shared ownership leases involve difficulties of determining relative benefits of an extension. If the social housing provider gains a benefit in respect of its share, it may make eventual staircasing to full ownership of the property yet more difficult.

Paragraph 9.38:

> 111. The Law Society offers no view on this question as one involving valuation expertise.

Q62. 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.

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:

> 112. The Society understands that expert counsel and academic opinion holds that shared ownership leaseholders currently do have the same rights as non-shared ownership leaseholders under the 1993 Act and proceed to advise accordingly. If that is so, the Society sees no reason why under the new regime any shared ownership leaseholder should be disenfranchised. It is acknowledged, however, that the Government has taken a policy decision to the contrary; but it is not clear whether that decision was taken on the assumption that the prevailing uncertainty on the subject should be removed, and that it would be appropriate to do so by excluding any such right of shared-ownership leaseholders.

Paragraph 9.43:

> 113. As stated above, the Society considers that shared ownership properties should be included in the calculation of the number of residential units in a building or on an estate.

Q63. 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?

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

114. See answers to Question 62.

Q64. 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?

If National Trust properties are to enjoy more limited enfranchisement rights than other property, how should this limitation be achieved?

Paragraph 9.60

115. The Law Society offers no view as to the treatment of long lease of National Trust properties.

Q65. 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

116. The Law Society offers no view as to the treatment of lease extensions or freehold acquisition claims against the Crown.

Q66. 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.

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

117. The Society does not see any reason for a new exemption to be granted to community land trusts or community-led housing

Q67. 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

118. The Society offers no view on the continuation of the current exemptions under a new regime.

Q68. 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

119. The Society understands from practitioners who have had experience of the grant of lease extensions to shared ownership leaseholders (either under the 1993 Act or on a voluntary basis) that housing associations may grant voluntary extensions without requiring final staircasing; they do not accept claims under the 1993 Act without the lease being fully staircased.

Q69. 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

120. The Law Society offers no view on this question as it relates to valuation issues and should be referred to the RICS and other such bodies with the relevant expertise.

Q70. We provisionally propose that a single procedure should apply to all enfranchisement rights.

Do consultees agree?

Paragraph 11.13:

121. The Society understands that expert counsel and academic opinion holds that shared ownership leaseholders currently do have the same rights as non-shared ownership leaseholders under the 1993 Act and proceed to advise accordingly. If that is so, the Society sees no reason why under the new regime any shared ownership leaseholder should be disenfranchised. It is acknowledged, however, that the Government has taken a policy decision to the contrary; but it is not clear whether that decision was taken on the assumption that the prevailing uncertainty on the subject should be removed, and that it would be appropriate to do so by excluding any such right of shared-ownership leaseholders.

Q71. 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?

122. The Society agrees with the provisional proposal of the Law Commission for a single set of prescribed forms. There should be different forms, rather than just one with many options to amend or delete; that is particularly so for collective claims involving an estate, which usually require far more detailed terms in relation to rights granted and reserved. A large estate will also be more likely to require leasebacks to the landlord; detailed terms for these arrangements need to be developed.

Q72. Do consultees consider that a party who is giving an enfranchisement notice should be required to sign that notice?

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?

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:

123. The Society considers that a party who is giving an enfranchisement notice should be required to sign that notice, but should be allowed to have its duly authorised agent to do so on its behalf.

Paragraph 11.25:

124. The Society considers that a party who is giving an enfranchisement notice should be required to sign that notice but should be allowed to have its duly authorised agent to do so on its behalf.

Paragraph 11.26:

125. The Society is of the opinion that a claim notice should include a statement of truth confirming that specified checks, if required, have been carried out. That requirement should bring to the attention of a claimant that it has carried out the necessary checks before proceeding further. It may also have the benefit of alerting to a claimant, where appropriate, that this is a highly complex process, even as simplified, and requires the attention of experienced agents or advisers. What is in contemplation is a transaction of gravity and the requirements for implementation cannot be skimped.

Q73. 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

126. The Society agrees with the provisional proposals of the Law Commission. It is often the position that the leaseholder is not aware of these details and the information should be made available by the recipient of the notice. It is only fair

that the sanction of liability for wasted costs should apply where the recipient of the notice fails to respond to it.

Q74. We provisionally propose that Claim Notices should include full details about leaseholders' claims, and proof of the leaseholders' title.

Do consultees agree?

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:

127. The Society agrees with the provisional proposal of the Law Commission.

Paragraph 11.40:

128. It is understandable that a single prescribed form for all enfranchisement claims may in practice lead to the wrong sections being completed. However, an inexperienced claimant could equally fail to select the correct dedicated claim form. In the absence of electronically selective mechanisms for streaming the relevant dedicated form for completion, the Society thinks there should be separate dedicated forms for completion. A single form procedure is more than likely to produce too many claim forms wrongly completed. Even so, advice from duly qualified professionals is needed if mistakes are to be avoided or kept to a minimum.

Q75. 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

129. The Society respectfully disagrees with the provisional proposal of the Law Commission. Some form of notification should be made to other leaseholders that a collective freehold acquisition claim is to be made and that they may, if qualified, participate. It is understood that this involves those intending to claim taking extra steps in pursuing their claim for collective enfranchisement, which complicates and perhaps delays the process. But the Society thinks it is better that the remaining long leaseholders should be aware of what is about to happen. Failure to notify could unnecessarily give rise to grievance. A prescribed form of notice might be considered appropriate and might exclude any terms of persuasion or invitation to the recipient to participate, which seems to trouble the Law Commission.

Q76. 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?

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:

130. The Society agrees with the Law Commission's provisional proposal that there should be no statutory contract.

Paragraph 11.47:

131. The creation of a statutory contract can cause problems, particularly if the leaseholder wishes to withdraw the claim within the statutory timeframe after the price has been agreed or determined, as sometimes happens under the 1967 Act statutory contract. In the opinion of the Society, that problem should be avoided.

Q77. 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

132. The Society agrees with the provisional proposals of the Law Commission. Consideration should be given, in its opinion, to a form of lease back being attached to a response notice in the relevant circumstances.

Q78. 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

133. The Society agrees with these provisional proposals of the Law Commission for service of Claim Notices.

Q79. 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

134. The Society agrees with the provisional proposals of the Law Commission. In practice, it can prove very difficult to serve the competent landlord and intermediate landlords. The Society has had reported to it of cases where the competent landlords have deliberately changed addresses on a regular basis to evade proper service.

Q80. 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

135. The Society agrees with all the provisional proposals of the Law Commission. They address the practical problems of effecting service and the ways in which the intended recipient may be reached.

Q81. 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

136. The Society agrees with the provisional proposals of the Law Commission for relieving landlords from the severe effects operating under the current regime if they do not serve a response notice within the time allowed. Liability for wasted costs is a sufficient penalty.

Q82. 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

137. (1) The Law Commission seems to have assumed that it would be easier for the competent landlord to serve intermediate leaseholders than for the leaseholders to do so. This is not always the case; if this proposal is agreed, it will disadvantage the competent landlord who will have to bear his/her own costs in dealing with service. The Society has been made aware of complaints on the subject from landlords. The Society takes the view that competent landlords who are justifiably aggrieved at the wasted costs they would be required to bear should have some right of redress against those who have been at fault. It is suggested that, if the leaseholder has the relevant information as to whom upon which the competent landlord should serve the relevant notice, that information should be disclosed on or with the claim form.

(2) The Society agrees with the provisional proposal of the Law Commission. It reflects the position under the current regime and is appropriate.

Q83. 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

138. The Society has difficulty in attempting an answer to this Question. It depends upon the criteria that will be required to be satisfied before any such order can be made, and what time would be the allowed the landlord to overturn the order. Presumably, if no action on the order has been taken and the freehold has not been transferred, the landlord should be entitled to set aside an order subject to being liable for any costs.

Q84. 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

139. At present, the detailed regulations that apply are occasionally enforced between the respective parties. The Society believes that some form of regulation here should continue; if not, there would be no incentive on either the landlord or the leaseholders' advisers to return documents promptly.

Q85. 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

140. (1) The Society doubts that a reduction of the response time to the notice by two weeks from the current eight weeks is appropriate. Claims frequently involve complicated issues, particular in the case of collective enfranchisement; six weeks may simply not be enough time. While individual enfranchisement may be less problematic, the Society would prefer to see the retention of a uniform time limit of eight weeks.

(2) The Society agrees with this provisional proposal of the Law Commission.

(3) The Society agrees with this provisional proposal of the Law Commission. The time limit suggested should do much to speed up negotiations.

Q86. 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

141. (1) The Society agrees with this provisional proposal of the Law Commission. The removal of "traps" would reduce the number of claims for negligence against hapless advisers.

(2) The Society agrees with this provisional proposal of the Law Commission. It would bring abandoned claims to an end and provide a suitable inducement for leaseholders to continue promptly with their claims.

(3) The Society agrees with this provisional proposal of the Law Commission.

(4) The Society agrees that applications to the Tribunal should be on notice rather than *ex-parte*.

Q87. 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?

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:

142. The Society agrees with this provisional proposal of the Law Commission. It will stop disputes which currently occur because the leaseholders' form of assignment is in some way defective.

Paragraph 11.158:

143. The Society agrees with this provisional proposal of the Law Commission that, when a Claim Notice has been assigned, the landlord should continue to be able to serve documents on the assignor until he/she is given notice of the assignment of lease, as is the general legal position in law in relation to the giving of notices to the third party following assignments of debts, leases, etc.

Q88. 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

144. The Society agrees with this provisional proposal of the Law Commission (it is assumed that the position discussed in paragraph 11.169 and repeated in Question 88 contains an error; the expression "…provided that the leaseholder's application to register was made <u>not less</u> than 14 days after the Claim Notice was posted or delivered by hand to the competent landlord" should correctly read as "… provided that the leaseholder's application to register was made <u>not more</u> than 14 days after the Claim Notice was posted or delivered by hand to the competent landlord")

The proposal, amended as above, should help reduce to the possibility of a disposal occurring between service of a Claim Notice and registration of that notice – a situation which causes landlords to complain bitterly of unfairness.

Q89. 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

145. The Society agrees with this provisional proposal of the Law Commission for the provisional proposal of the Law Commission for procedural requirements of discharging a mortgage on the landlord's interest.

Q90. 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?

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:

146. The Society agrees with this provisional proposal of the Law Commission for a time limit in giving the lease extension to the leaseholder's mortgagee.

Paragraph 11.177:

147. The Society agrees with this provisional proposal of the Law Commission. The liability for losses for failure to comply should provide an inducement to the leaseholder to carry out necessary steps.

Q91. 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 or 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

148. The Society agrees with this provisional proposal of the Law Commission. It removes the causes of delays and the potential for unnecessary costs to be incurred.

The question has been asked as to what would happen if a mortgagee refused to give consent. It is not clear that the implications of such a situation have been explored. How would the effects of that position be dealt with in the legislation? Would the implications of adverse treatment by mortgagees against the borrower be simply overridden?

In a parallel situation, the Society is aware that practitioners often experienced difficulty in obtaining consent in order to comply with restrictions on the title register entered by third parties, such as a management company.

Q92. 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

149. The Society agrees with these provisional proposals of the Law Commission. Both proposals suggest sensible procedures to provide information to all who are, or would become, concerned.

Q93. 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.

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?

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:

150. The Society has been unable to collate a spread of views from practitioners relevant to the questions raised. There are reports of delays and costs incurred.

Paragraph 11.184:

151. The Society endorses the aims of the Law Commission in these respects but has no settled view on the outcome of their implementation. In principle, the process should be quicker and, if so, more cost-efficient.

Paragraph 11.185:

152. There is a current procedure in place to deal with missing or unresponsive landlords, but the Society endorses the preliminary proposal of the Law Commission in the hope that it would reduce delays and be cost-efficient.

Q94. 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

153. The Society agrees with these provisional proposals of the Law Commission. There has been some concern voiced as to whether the Tribunal is sufficiently resourced to be able to discharge all the additional demands that would be made to it.

Q95. 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

154. The Society considers it sensible to have some cases dealt with by a single valuer rather than involve a full Tribunal hearing. It should be limited to those matters referred to in sub-paragraph (1). The Society offers no view as to how to the rules should apply to operation of the procedure.

Q96. We welcome evidence as to the typical cost and duration of an enfranchisement dispute:

(1) in the county court; and

(2) in the Tribunal.

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?

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:

155. The Society is not best placed to offer a view on the matters raised by this Question. In response to a request for information we have made, we received the following answer:

"There is no difference in costs whether the matter is heard in the County Court or in the Tribunal. There is no such thing as a "typical" cost; it all depends upon the nature of the dispute and whether experts are required. Some hearings have costs as low as £8,000 - £10,000, whereas in other cases legal costs have exceeded £100,000 due to the need to involve several experts and many conferences with counsel."

Paragraph 12.70:

156. The Society is aware that, undoubtedly, a minority of leaseholders are put off by the risk of litigation from making an enfranchisement claim. However, by the time solicitors are instructed by leaseholders, they are more or less determined to pursue their claim to conclusion, whether or not that involves litigation, even when they are advised on the areas of weakness and likely costs involved if the landlord challenges the claim.

Paragraph 12.71:

157. The Society is not best placed to offer a view on the matters raised by this Question. As stated above, so much depends on the circumstances of the case. We think there is potential for time-saving and a reduction of unnecessary costs. It would be consistent with the evidence that a large number of cases at the Tribunal settle before, or on the day of, the hearing.

Q97. 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

158. The Society considers that there is scope for resolution by a single valuation expert. This alternative fast-track procedure should save time and costs, but the Society is unable to give a more substantive answer to the question. It would certainly avoid in some cases the situation that arises where opposing valuers disagree, and the Tribunal has to make a determination.

Q98. 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

159. The Society is told that valuers assess market value on the assumption that each party will pay its own costs; so in theory, a tenant who pays any landlord's costs on top of the market value at enfranchisement would be over-paying. Even so, many consider that, since the landlord is not a willing seller, it would be unfair that landlords' non-litigation costs should not be met by the leaseholders. That would seem *a fortiori* to apply where less than the market value is being paid. The landlords' non-litigation costs are not thought to be a major deterrent factor when leaseholders are deciding whether or not to instigate a claim. Where, in a minority of cases, landlords' non-litigation costs are disproportionate to the value of the claim, the current regime allows for them to be challenged before the Tribunal. The Society is of the opinion that this system should be retained.

Q99. 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?

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.

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:

160. The Society has the following views on how any contribution that is to be made by leaseholders to their landlord's non-litigation costs should be calculated:

(1) Fixed costs would have to vary for each region of the country. The differentials would be pronounced. The Society does not favour such a proposal.

(2) For the same reason, capped levels are not considered to be practical.

(3) Again, the Society does not favour such a proposal for the same reason.

(4) The price level involved is not considered practicable for the higher value claims, both where the costs might be disproportionate and, also at the other end of the scale for the lower value claims where the recoverable costs might be insufficient.

(5) The Society has doubt as to whether the proposal would be practicable. What should happen if the landlord is only partially successful? Would the landlord recover all his costs or only a proportion, and what should that be? These questions would then require to be determined by the Tribunal.

(6) Landlords currently complain that the regime does not allow for full recovery of their non-litigation costs. If the categories of recoverable costs were reduced even more, the problem would be exacerbated. If the landlord is faced with inadequate, or no, recovery of costs, a number of possible consequences are foreseen: landlords could conceivably decline to obtain professional advice leading to the claim being extended, or seek to apply pressure on their professionals to reduce their costs; in turn that could result in substandard service/advice being given. If these fears are well-grounded, they would be counter-productive to quick conclusion of claims.

(7) On balance, the Society considers that the current regime should be retained. The parties, or their advisers, understand the present position.

Paragraph 13.90:

161. For the reasons stated in answer the question in paragraph 13.89, the Society does not favour such a step, and offers no view.

Paragraph 13.91:

162. (1) The Society disagrees with this provisional proposal of the Law Commission. Split reversions are often troublesome and the parties should seek legal representation. The same principle applies to intermediate landlords, particularly in London where many difficult issues arise.

(2) The Society agrees with the provisional proposal of Law Commission that management companies should be able to seek advice and recover their costs. At present they cannot.

Q100. 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?

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:

181. The Society agrees that a landlord should be able to recover non-litigation costs when a claim is withdrawn or struck out, but sees difficulty with the suggestion of "a percentage" recovery. Should it be a right of recovery of all, or some only, of those costs? In principle, should the landlord not be entitled to recover all of the wasted costs to which it has been put by the leaseholder? If it is to be only a percentage recovery, how is that to be quantified? If the landlord is blameless, what principle is to be applied to the scaling down of his/her recovery from 100% to a lower percentage? Is that reduction to be a fixed reduction? What element of percentage reduction should reflect the stage that proceedings have reached at the point of withdrawal of the leaseholder(s), as provisionally proposed in paragraph 13.95? Should the degree of obstinacy or obduracy, or other behavioural problems on the part of the leaseholder(s) be a factor affecting the scale of recovery of landlord's wasted costs' entitlement? These and other considerations are surely some of the issues which the Tribunal would take into account, on the assumption that the landlord should not in any event recover all of his/her wasted costs. A principled discretionary Tribunal award would seem to be appropriate.

Paragraph 13.95:

182. Please see the discussion of difficulties over "percentage recovery" of non-litigation costs in paragraph 13.94. It has been suggested to the Society that the proposals of the Law Commission will result in a landlord incurring significant costs in order to issue a Response Notice and that it is unjust that he/she should only be entitled to recover some, but not all, of those costs.

Q101. 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

183. The Society agrees with the provisional proposal of Law Commission. It will bring the position in relation to collective enfranchisement claims into line with lease extension procedures.

Q102. 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

182. The Society agrees with the provisional proposal of Law Commission. Landlords should have this protection from repeated claims.

Q103. 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

183. The Society agrees with the provisional proposal of Law Commission. The Tribunal should have these powers to award costs.

Q104. 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

184. The Society agrees with the provisional proposal of Law Commission.

Q105. 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.

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?

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?

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:

185. (1) The costs incurred by landlords can be significant, particularly in relation to collective enfranchisement claims. The Society is aware that these can result in claims for £5,000 - £10,000 plus VAT. In exceptional cases, costs can rise to far greater sums.

(2) It would appear that landlords are normally advised that they will be able to recover somewhere between 60% - 70% of their overall costs from leaseholders.

1**Paragraph 13.116**:

186. The Society is aware of landlords' discontent at the costs they have no alternative but to incur. Those sentiments are likely to be exacerbated by further restriction or prevention of recovery of non-litigation costs.

Paragraph 13.117:

187. If fixed costs are introduced, this would be likely to encourage uncommitted leaseholders to bring claims. Even so, such evidence, of which the Society is aware, is that the impact of that change would not be expected to produce a higher rate of new claims. At present, the impression is that the level of potential costs is a relatively minor factor at the point when leaseholders weigh up the cost factor to bring a claim against the perceived benefits of enfranchisement.

Paragraph 13.118:

188. If such restrictions were placed on landlord's rights of recovery of non-litigation costs, there is at least some experienced opinion that landlords will endeavour to require their advisers to reduce their charges or will not to engage the services of professionals at all. That might lead to more claims being delayed or referred to the Tribunal in the absence of professional advice. It is possible to surmise that professionals may in such circumstances discontinue practising unprofitably in this area of the law. If these potential problems do come about, the aims of making enfranchisement simpler and more available to leaseholders might be largely thwarted.

Q106. 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

191. The Society is not aware that there is any discernible impact of the different powers of the Tribunal and of the county courts upon landlords and leaseholders when they engage in negotiations. Other issues predominate.

Questions 107-125 inclusive

192. The Society offers no answers to the questions under Part V, Chapters 14 and 15. These matters are considered to require valuation expertise and would better be dealt with by members of the RICS and other such duly qualified entities.

Q126. 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

193. The Society welcomes the proposed clarification of the present doubts on this issue. We have heard of a number of cases where the competent landlord has failed to notify the intermediate landlord.

Q127. 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

194. The Society regrets that the complexities involved would seem to defeat the purpose of the proposal provisionally put forward by the Law Commission. The proposal is driven by giving rights to participate in a collective enfranchisement to later entrants who did not, or could not, participate in the original arrangements. If intermediate leases, particularly of "white knights", are to be acquired in the process, it would likely to make participation potentially prohibitively expensive. Even if those factors are not present, there are difficulties of changes of value in the intervening period between the original scheme and the intended later participation causing upset to some or other of the leaseholders.

It appears to the Society that the treatment of overriding leases this is one of the most difficult areas to be tackled in a scheme of overall reform. The proposal would seem to ride over it without a solution to it.

Q128. 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?

195. An anomalous situation has been raised. It is not uncommon, particularly in Central London for overriding leases for a term longer than the subsisting lease, to be granted over individual flats. These arrangements may be required for tax planning purposes or, where the building is subject to a head lease, the parties want to effect a voluntary lease extension. As the head lease is not deemed to be surrendered and regranted upon a voluntary grant, any overriding lease would remain in immediate reversion to the original subsisting lease. On a sale of the flat in such a situation, it would comprise both the short and the overriding lease. However, because the 1993 Act requires all superior leases to be acquired on a collective claim, the overriding lease would fall to be acquired. This would be an odd outcome if the overriding lease belonged to a participant in the collective claim.

If the provisional proposal of the Law Commission suggests (in reference to the scenario set out in paragraphs 16.119 and 16.120 (and referred to in Question 127) is to be implemented, the Society considers that it would be better for there to be exclusions to apply to overriding leases of individual apartments that are owned by the qualifying tenants. In this context, the Society agrees the provisional proposal suggested in question 128. The Society has received reports of sale transactions

aborting due to risk to the buyer of the overriding lease being acquired in a subsequent collective enfranchisement claim.

Q129. 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

196. The Society is of the opinion that this provisional proposal of the Law Commission produces an untidy situation. It has been suggested that a better arrangement would be for there to be leaseback to the intermediate leaseholder for a term of 999 years at a peppercorn rent, and the extinguishment of the intermediate lease.

Q130. 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

197. The Society agrees with these provisional proposals of the Law Commission. They simplify the structure of tenure and the treatment of management of building common parts.

Q131. 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

198. Although this provisional proposal of the Law Commission is a sensible attempt to deal with management issues in relation to common parts, it might be too all-embracing. The Society is aware of some collective claims being instigated where the leaseholders want to stop development (particularly roof-top development), or wish to carry out the development of the property themselves to ensure it is dealt with far more sympathetically than by the landlord. Provisions should be included in the relevant proposals to take into account such circumstances where it is appropriate to do so.

Q132. 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?

198. The Society agrees with the provisional proposal of the Law Commission. The right to participate in the enfranchisement regime should be made available to sub-lessees.

Q133. 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?

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:

199. The Society agrees with the provisional proposal of the Law Commission. The current designations of "Minor Superior Tenancy" and "Minor Intermediate Leasehold Interest" and the formulae relating to them should be removed.

Paragraph 16.141: The Society offers no view on this proposal.

Q134. 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

200. The Society welcomes this provisional proposal of the Law Commission. In practice, most experienced practitioners arrange for payments on a commuted basis between themselves on a voluntary basis, with Intermediate landlords taking their compensation by way of a pro-rata reduction in the head rent payable. But that arrangement still involves a deed of variation of the head lease to adjust rent review provisions.

Q135. 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

201. The provisional proposal of the Law Commission for 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 would make it easier to recover loss suffered by an intermediate landlord from a landlord who has failed to act with due care and skill.

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