The response of Boston Radford to the proposals for leasehold reform published by the Ministry of Housing, Communities & Local Government on 7th January 2021.

1.0 Introduction

Boston Radford is a firm of Chartered Valuation Surveyors based in central London, whose three members have a combined experience of almost 100 years specialising in leasehold enfranchisement claims.

We advised the Council of Mortgage Lenders during the formative stages of the Leasehold Reform, Housing and Urban Development Act 1993 and again during the formative stages of the Commonhold and Leasehold Reform Act 2002. We were also consulted by Nick Raynsford MP in 1997 to discuss leasehold reform shortly before the General Election of that year when he became the Housing Minister.

We have written explanatory articles in various publications including The Times Newspaper, The Financial Times and The Estate Gazette. We have also spoken at conferences arranged by all the most well-known conference organisers. Charles Boston FRICS is also the senior editor of the Handbook of Residential Tenancies published by Sweet & Maxwell.

Above all else, Boston Radford is a thriving practice which is widely respected amongst lawyers and members of the public and is very much at the sharp end of leasehold enfranchisement, acting for both leaseholders and freeholders.

2.0 Our overall response

The statement published by the Ministry of Housing, Communities & Local Government MHCLG on 7th January 2021 follows recommendations made by the Law Commission when they reported on 21 July 2020. Their recommendations were summarised with the introductory statement: "*We are recommending the retention of the existing enfranchisement rights, but in an improved, streamlined form."*

We welcome the opportunity to correct some of the faults and inequities in the existing legislation relating both to leasehold enfranchisement and to the creation of residential leasehold properties in general.

We support Professor Nick Hopkins, Commissioner for Property Law at the Law Commission in his stated objective *"to make enfranchisement cheaper and simpler".*
We also support the creation of a Commonhold Council, whose purpose will be to *"reinvigorate commonhold",* which has been so manifestly unsuccessful since its inception in 2002.
We feel that these proposals fall into the following categories:
Proposals for new leasehold properties
Proposals to improve tenants' rights
Proposals to modify the valuation provisions
We would wish to make the following comments:

3.0 Proposals for new leasehold properties

3.1 The abolition of ground rents

Ground rents on new properties are anachronistic, unnecessary and unjustifiable. In many cases they have been designed simply to commoditise a building for additional future profit, or onward sale to an investment company. It is evident that many development companies have abused the system by creating leases with ground rents that are quite frankly extortionate.

In the worst cases, landlords have incorporated ground rents into their leases that double every ten years or so during the term of the lease, giving rise to an annual charge which, in some cases, actually exceeds the value of the property. As a result, premiums for extending the lease are wildly disproportionate to the value of the properties. In some cases it makes it effectively impossible to secure mortgages against these properties, and renders them unsaleable. This has led to a raft of claims against solicitors, an unpleasant, frightening and potentially expensive prospect for lessees who thought they already owned their property.

This has to stop. We are therefore pleased to see that it is the Government's intention to abolish ground rents on all new leases.

3.2 The abolition of leasehold houses

On estates, such as the 300 acre Grosvenor Estate in Central London, it has been seen as beneficial to retain the leasehold system in order to facilitate the management of the estate. However, Estate Management Schemes have since been established for this purpose and there really is no justification now for creating a leasehold house.

We therefore support this move to abolish the creation of new leasehold houses.

4.0 Proposals to improve tenants' rights

4.1 New 990 year lease

The government is proposing to allow owners of both flats and houses to extend their lease to 990 years. When we were advising the Council of Mortgage Lenders in relation to the 1993 Act, the Green Paper initially provided for an 80 year extension.

We advised the CML that this was not appropriate. The stated aim of the legislation was to allow flat owners to have, as far as possible, the equivalent benefits enjoyed by house owners who, under the 1967 Act, could buy their freehold.

We therefore recommended that, instead of adding 80 years to the existing unexpired term, the new lease should be a "virtual freehold" of 999 years at a peppercorn.

This advice was relayed to government and their response was to increase the extended period to 90 years. Clearly this was not the answer and we have had clients who have had to acquire a second 90 year extension just to keep their leases up to a mortgageable length term. We are therefore pleased to see that at last the government is looking at enacting what we originally recommended.

We would have no objection to this option being extended to house owners, but we feel it is unlikely that many house owners would prefer a 990 year lease to simply owning their freehold.

4.2 No ground rent in extended leases

Section 56(1) of the Leasehold Reform, Housing and Urban Development Act 1993 already provides that a new lease claimed under section 42 should be: *"a new lease of the flat at a peppercorn rent for a term expiring 90 years after the term date of the existing lease"*.

This proposals therefore merely accords with the existing provisions applying to claims made under section 42 of the 1993 Act and we support it.

4.3 To abolish or modify the notice periods applying to claims

With collective enfranchisement claims there is no initial period required before a claim can be made and there is no reason why there should be an initial period applying to individual lease extensions or 1967 Act claims. We would add that this provision often serves only to penalise new buyers who were either unaware of this provision, or had inadvertently served invalid notices on purchasing a property, and are then forced to wait for two years until they can serve a fresh notice. We would therefore support the abolition of an initial period in all cases.

There is also a twelve month period after withdrawing a claim before a tenant can serve a fresh notice. Given that they will be liable for legal and valuation costs incurred as a consequence of serving the first notice, we cannot see why this twelve month period should be imposed either and we would support its abolition.

4.4 The Right to Manage.

There is a proposal to make it easier to establish this important right which was introduced in Part II, Chapter I of the Commonhold and Leasehold Reform Act 2002. We would welcome any measures that would facilitate this.

5.0 Proposals to modify the valuation provisions

"The government is abolishing prohibitive costs like 'marriage value' and set the calculation rates to ensure this is fairer, cheaper and more transparent.".

5.1 General view

On the face of it this may seem to be a step towards "*an improved, streamlined form"* but it is essential that any new legislation is equitable to all parties. Much of the press coverage appears to demonise landlords as "fat cats" and tenants as victims. The truth is that many landlords are in fact pension trusts or charities, such as the Wellcome Trust, who perform an important function in seeking to protect their beneficiaries. Equally there are thousands of individuals who have bought reversionary leases as a perfectly valid family investment. Others have simply operated within the existing legislation, and have behaved responsibly in the exercise of their role.

It is nevertheless true that some significant landlords in Central London and elsewhere have pushed the envelope too far. There have been continuous efforts to devalue short leases, thereby increasing the marriage value, often supported by graphs that are only loosely based on subjective evidence. Indeed, along with the onerous ground rent provisions on new properties, it is this sort of action which has given rise to the Law Commission feeling the need to review this legislation.

But it is essential that we do not swing too far in the other direction and create a new inequity. There have been more than a dozen Acts of parliament since the Leasehold Reform Act of 1967. Each time parliament has tried to improve on the existing provisions and each time it has fallen short of that objective. This is an opportunity to get it right once and for all.

As regards the specific proposals, we would comment as follows:

5.2 Marriage value

There is considerable misunderstanding about the term "marriage value". It simply means profit. It is the profit that is obtained when a tenant acquires the freehold reversionary interest at its market value. It is only released when the two interests are merged.

In the original Leasehold Reform Act 1967, houses that met the qualification were only required to pay for the land on which the house stood and, if they made a profit, which they were bound to do, they were allowed to keep it all. This was seen, and has proved to be, highly inequitable.

31 years later when another Labour administration was passing the Commonhold and Leasehold Reform Act 2002, rather than abolishing the need for tenants to share the marriage value, they introduced a provision whereby it had to be shared equally as a matter of law. That was, conversely, widely received as a logical and sensible provision.

At the moment tenants are not required to pay any marriage value if the term of their lease is in excess of 80 years. That was considered rough justice by some, but to abolish the need for tenants to share the marriage value entirely, would be a largely regressive and inequitable step.

5.3 Setting a fair price

We do not know precisely how the government would propose to deal with this, but it is essential that we do not forget that this is about fair compensation. It is one thing to want to make things easier, but there is a limit to how far we should go in a desire for an easy life.

If your land was about to be subject to a compulsory purchase order, perhaps to facilitate the HS2 development, you would want the compensation due to you to be considered very carefully and indeed it would be. The same must apply to these pension trusts, charities and other landlords who are effectively being made subject to a compulsory purchase order.

Valuation surveyors play an essential role in ensuring that the landlord receives a fair compensation, and equally the tenant does not pay more than they reasonably should. Transparency is of course desirable, but it is not the issue. Statutory claims are referable to a valuation tribunal when both landlords and tenants are required to show their valuation and support it with evidence. In this way these matters are always subject to complete transparency.

Of course most tenants have no desire to refer their claim to a tribunal, and indeed the vast majority of statutory claims never get near to a tribunal. They are resolved by agreement without any need for litigation, but it is important that claims can be referred to a tribunal to ensure fair play. However,

determining the compensation by reference to some "ready reckoner" would be taking rough justice to an absurd extreme.

One cannot simply determine the freehold value and then determine the enfranchisement price based on the length of the lease. Leases vary significantly in regard to their covenants. Some have particularly restrictive covenants relating to alterations, user or alienation, some even contain clauses that allow the landlord to forfeit the lease in the event of the tenant becoming bankrupt. All such covenants affect value.

But most commonly leases have varying ground rent obligations. You cannot arrive at the relative value of a lease without first valuing the ground rent provisions. These may already be a peppercorn, but where they are geared to capital or rental value, subject to predetermined increases or fixed for the term, it is necessary to apply the correct capitalisation yield to value the income stream.

We appreciate the concern relating to some of these modern leases for terms well in excess of 100 years containing ground rents that double every ten years or so. With that sort of lease, we would support the idea of a formula to enable tenants to buy out their ground rent easily. It has been suggested that this formula might be 10 times the current ground rent. That may be a sensible provision for such leases. But as a general rule, to disregard the provisions of a lease would be to violate the basic principles of English law.

5.4 Development value

The statement includes the following: *"Leaseholders will also be able to voluntarily agree to a restriction on future development of their property to avoid paying 'development value'."* This option already exists to the extent that, if there is development value and the tenant has no desire to carry out such development, the landlord can offer to accept a price that excludes that development value if the tenant accepts an absolute covenant restricting development.

With a lease extension this is not a problem, as leases are already full of restrictive covenants. With a freehold transfer, a restrictive covenant is enforceable, but it can be difficult to implement. Moreover, the tenant can apply to the Upper Tribunal (Lands Chamber) under section 84(1) of the Law of Property Act 1925 to have the covenant discharged.

It is not surprising that most landlords are reluctant, first of all, to be denied the full value of their property on an enfranchisement and secondly, to have that additional value not only postponed indefinitely, but possibly extinguished.

If the Government has in mind some radical new way of addressing this issue, that may be helpful. However, if the intention is that the landlord should receive less than the full market value of his property that would clearly be inequitable.

Summary

We feel that this proposed legislation represents an opportunity:

1. To remove the problems of leasehold for new build properties and to create a fairer, simpler and more streamlined system for leaseholders to extend their leases or buy their freehold, and

2. To reduce the legal and associated costs of statutory claims which are often disproportionate, particularly to owners of lower value properties.

However, whereas it is desirable to simplify and reduce costs, it is essential that the price payable by a tenant is fairly determined. There is already a well understood valuation approach that ensures that both landlord and tenant are treated fairly. To depart from this in favour of some broad brush approach would mean abandoning the tenets of fair compensation. This would be a deeply regressive step. Moreover, it could well lead to investment companies acquiring leasehold properties to exploit the new system. The purpose of this legislation must surely be to put an end to exploitation.

Contacts

If you have any queries about this, please write to our dedicated email address below and one of us will respond as soon as possible

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Alternatively, if you would like to discuss this with one of us, our main telephone number is 020 7584 3399.

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