

Christopher Howarth: Submission to the Common's select Committee on Leasehold Reform

Background:

Prior to 1993, the owners of flats had virtually no rights. They could not extend their leases, nor could they collectively buy out their landlord: they had an asset with an expiry date and one they had little control over. John Major took the first step to rebalance this system, introducing rights to lease extensions and collective enfranchisement, now if 50% leaseholders in a block could agree to buy out the landlord, they can.

Nearly a quarter of a century later, leasehold is in rude health. There are perhaps [four million leasehold properties](#) in the UK. 70% of them are flats, and 57% are owner-occupied. In large areas of the country, for those lucky enough to afford it, owning a leasehold flat is the closest they can come to owning their own property.

Some flats are in blocks which now come with a share of freehold, many are not. For these "homeowners", being a leaseholder is little more than being a glorified tenant, with little influence over their property's management or with any legal redress against spiralling costs and bad, or even corrupt, landowners and managing agents.

Yet while in the UK the idea of leaseholders and freeholders are as ubiquitous as flat owner's complaints about their managing agents, it is worth considering that most of the world, including other common-law jurisdictions, either have never had leasehold property, or have since got rid of it. Yet in the UK leasehold is expanding. [Ninety per cent of all new properties in London are leasehold](#), and 40% in England and Wales). 43% of new properties sole are leasehold.¹ These new "owners" form a miserable third tier in terms of property rights, below that of freeholder and Social Housing Tenants, but above renters, who as a consolation can at least move without paying both their estate agents and the landlords agents fees and taxes.

Preventing service charge disputes.

At present a determined landlord can manage leaseholders properties as they feel fit, releasing little information, paying no regards to costs, keeping all moneys from multiple properties in one bank account while not providing statements or even accounts. They can do all this either within the law or because they have no fear from the residential property tribunal or any other regulatory body.

Nobody wishes to see leaseholders in dispute with Landlords. The way to prevent disputes is to improve the standard of management. This requires two factors. Firstly transparency of information regarding charges and services and secondly real enforcement mechanisms so that Landlords are forced to improve their practices and thus prevent disputes.

¹ <https://www.ft.com/content/0107b0c6-e5a2-11e7-8b99-0191e45377ec>

Transparency of information:

- **Service charge transparency.** There is no reason why a leaseholder should not see key documents relating to the management of their property – for instance, those relating to tendering of services, the management contract and other contracts, so they can provide alternative quotes. Without transparency regarding accounts, bank statements and individual statements and contracts lessees have no idea what their money has been spent on, what services have been contracted and the ability to go to the Residential Tribunal is practically worthless.

Lessees' ability to gain redress against a fraudulent landlord is severely hampered by the ability of the Landlord to withhold information and use their control of information in the Residential Property Tribunal. With complex and partial information disclosed, a leaseholder will never be able to prove a case – a fact landlords are well aware of.

In order for Lessees to understand what they are being charged for they require some basic information that currently it is almost impossible to compel a Landlord to produce. The basic information that should be available should include:

- **Timely accounts.** On large estates where agents pool expenditure items this will require disclosure of accounts of all related units to ensure there is no double charging.
- **Receipts for expenditure.** These should be easily available for inspection and be timely.
- **The % split of expenditure.** To ensure that lessees are not being charge collectively more than 100% of the service charge. If the landlord has their own properties on the freehold title they should also pay service charge and this payment should be transparently available in the accounts.

At present none of these items of basic pieces of information are possible to come by in the face of a determined landlord. This would severely hamper any lessee seeking redress.

The case for a 'Leaseholders House' to hold key account details.

Companies House hold accounts of all UK companies. There is no equivalent for service charge accounts. If a body were created that could hold all yearly service charge accounts in the form prescribed by law it would provide automatic enforcement of timely accounts.

In addition to holding audited accounts the Leaseholders House should make the following information publicly available:

- Bank statements of Leaseholders service charge and sinking fund accounts.
- All LEP1 information, accounts major works. This would reduce the cost of conveyancing as sellers would not need to apply to the Landlord and pay a fee.
- All contracts so Leaseholders know what they are paying for.
- Tender documentation so Leaseholders can provide alternative quotes.

- The % payable by each leaseholder and the freeholder's flats so leaseholders know that they are paying 100% and the Landlord is contributing.
- Leaseholders' addresses so that leaseholders can contact other leaseholders for the purpose of enfranchisement and challenging service charges without paying large sums to the Land Registry.

Timely accounts: Section 21 of the Landlord and Tenant Act 1985.

S.21 governs what information a Landlord should provide to the Lessees. Unfortunately it has three versions that give Lessees differing rights and it is not clear which one is current.

1. As last amended by Schedule 1 of the Housing Grants, Construction and Regeneration Act 1996
2. As proposed by Section 152 of the Commonhold and Leasehold Reform Act 2002
3. As proposed in Schedule 12 of the Housing and Regeneration Act 2008

Putting that on one side Lessees are probably entitled within 6 months of the end of the 12 month accounting period a summary of the costs incurred for the last service charge account period of 12 months. Or if not forthcoming following service of written request under S. 21 within 1 month.

In addition a qualified account is required to certify that the summary represents a fair representation of the required information and that the summary is sufficiently supported by the accounts, bank account statements and receipts and other documents presented to the accountant.² Currently it can be argued by Landlords that they need not disclose bank statements (of their collective accounts).

Problems with enforcement of accounts

While there are many ways a Landlord can seek to avoid disclosing information while complying with s.21 the real disadvantage to Lessees come with enforcement. This is covered by s.22 of the Landlord and Tenant Act 1985. Under section 22 the lessee is entitled to see all the documents and receipts to back up the accounts and s.25 of the Landlord and Tenant Act 1985 makes failure to comply a summary offence theoretically subject to a £2,500 fine.³

Unfortunately this sanction does not work in practice. **The only authority able to bring prosecutions are local authorities** who have no interests or resources to bring actions against landlords and since the Act specifies a sanction the Courts have barred tenants from going to Court to seek their own redress under s.21-23. The reasoning for this was set out in *Morshhead Mansions Ltd v Di Marco* where the Court of Appeal specifically ruled that the Lessee could not go to Court to compel the Lessee to disclose accounts.

² Service Charge dispute Guide <http://www.servicechargedisputeguide.info/section-21-service-charge-information/>

³ S.25 <https://www.legislation.gov.uk/ukpga/1985/70/section/25>

And without accounts and receipts the Lessee has no chance of bringing a successful action for service charge.⁴

A lessee that suspects a Landlord is not accounting for funds have few legal remedies to gain information and a motivated Landlord can frustrate even a determined Lessee. Parliament under the Commonhold and Leasehold Reform Act 2002, Section 153 did propose to give tenants the right to withhold service charge if accounts etc. were not forthcoming, but alas never brought that provision into force.

Proposals:

- 1. Lessees (in addition to the local authorities) are given a right to go to Court to seek audited accounts and the receipts (not invoices) that underlies the accounts.**
 - 2. S. 153 of the Commonhold and Leasehold Reform Act 2002 regarding non-payment of service charge if no accounts are produced is brought into force.**
 - 3. Landlords must lodge all service charge accounts with a Landlords' equivalent of Companies House that automatically places them on line for all to see and automatically fines them if they are not produced.**
 - 4. Accounts must include every flats % payment and include the payments made by the Landlord from any freehold flats they own in the block. (They should be legally liable to pay their fair share).**
 - 5. Lessees should be given receipts not invoices.**
- **Service Charge Accounts and supporting documentation.** Service charge accounts, sinking funds and reserve accounts often lack key information and do not set out a true picture of what Lessees are being billed. Problems include:
 - Accounts for a block do not set out who is contributing allowing the Landlord to obscure the fact that the % charged to leaseholders adds up to more than 100%. This is often the case where new flats are created in a block pushing the % contributed over 100%. In schemes running to 100s or even 1000s of properties downloading the leases from the Land Registry at £7 a property is prohibitive.
 - Landlords often justify expenditure with invoices, often from their own subsidiaries or their agents firms. Invoices are not proof of actual payment.
 - Landlords often come back months later and after the accounts have been delivered with new charges necessitating 'balancing charges'. This obscures what is actually been spent.
 - Service charge accounts are prepared for the benefit of the Landlord relying on the Landlord's (or agent's) documentation. They usually include wide disclaimers reducing their value.
 - Landlords with multiple overlapping management areas and schemes need only provide small snapshots to Lessees. Landlords have no duty to explain if they

⁴ <https://www.fsp-law.com/articles/getting-information-on-service-charges-not-so-easy>

contribute for their own flats or the % charged to other lessees. Landlords can make it practically impossible to inspect receipts. Landlords have no fear of being taken to Court by local authorities and the fines may not be a deterrent in the case of large landlords. Landlords may then place fines on the service charge!

- Even if Leaseholder's moneys spent is receipted it is often difficult to tell what has been commissioned without disclosure of the actual underlying contracts. For instance a management contract between the Landlord and his agent may include clauses relating to management of the Landlord's remaining freehold properties in the block. These could include the obligation of the agent to manage them at reduced rates and to use the service charges collected for the maintenance of these flats. The Landlord is under no obligation to disclose this management agreement and in many cases may redact the controversial parts.

Proposal:

- 1. Service charge accounts should include the name of all flats contributing to the charge, the % of each property and the name and address of the owner.**
- 1. All expenditure must be covered by receipts and not invoices.**
- 2. Landlords should not be able to 'find' invoices after the end of the accounting year and add balancing charges.**
- 3. Service Charge accounts should be for the benefit of the Lessees and Landlords and liability should not be excluded. Accountants should therefore have a contractual relationship with the Lessees under which Lessees can sue for inaccuracies. (Relying on third party rights is too high a bar).**
- 4. All tender documents and actual contracts, in particular management contracts should be disclosed. These documents could also be available on the internet.**

- **Major works transparency (s.20 consultations).**

Landlords have different priorities than their leaseholders with regards to major contracts and will not select on price alone. Under current legislation Leaseholders may nominate a contractor, but without disclosure of the exact specifications the Landlord is contracting for the lessees' contractor has no chance of success. Even if Leaseholders were given the specification and so could quote on the identical grounds the Landlord could narrow the terms to suit their candidate (i.e levels of insurance, ability to manage their whole estate etc). Even if the Leaseholder had the specification, found a contractor that did not think it was a waste of time quoting and came up best. The Landlord can still dismiss it with little or no reasoning.

Lessees under s.20 Landlord and Tenant Act 1985 are supposed to be consulted if a work undertaken will exceed £250 for any one leaseholder. The process for consultations were laid down in the Service Charges (Consultation Requirements) (England) Regulations 2003 (schedules 2&4).⁵

⁵ <http://www.legislation.gov.uk/ukxi/2003/1987/contents/made>

Under Schedule 4 the Landlord in some circumstances should invite Lessees to nominate a proposed contractor in competition to the Landlords. If they do they should ask that contractor for a quote and under Schedule 4 (6) “state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected”. In practice like many consultations these are mere formalities.

Proposal:

1. **The Landlord should disclose the tender documents so Leaseholders can find comparable quotes.**
 2. **The choice should be made on price and not by the Landlord or the Landlord’s s.20 surveyor.**
- **Separate Trust bank accounts.** Leaseholders should to have the money for their sinking fund and expenses kept in a separate bank account to which they are allowed to see the statements. This would reduce the scope for money moving between properties, cross-subsidising a landlord’s properties or simply disappearing. This was passed by Parliament in 2002 (Leasehold Reform Act 2002 Section 156) [but for some reason was never brought into force](#)

Enforcement

- **The Problem: Lack of legal redress to leaseholders.** If a landlord or his managing agents take liberties with their leaseholders, a leaseholder has no practical recourse to law. This may sound like an odd statement, given there is a [whole Residential Property Tribunal](#) dedicated to solving these disputes, but in practice the tribunal should be avoided like the plague, for a number of reasons:
 1. **The Tribunal is not a Court.** It does not have the time or interest for long and complex cases, does not take evidence on oath and is easily swayed by the legal firepower at the disposal of large landlords. It’s a small legal world, and the money and careers (of tribunal judges) are made defending landlords, not small leaseholders.
 2. **If a leaseholders wins (or loses), he may have to pay the landlord’s costs.** This may seem odd, considering that if the leaseholder wins the tribunal has no power to award costs in his favour, but it stems from the fact that the majority of leases stipulate the leaseholder will pay all legal costs. This is a very serious and real danger to a leaseholder. There are cases where leaseholders collectively [have had to pay £300,000](#) in costs but, if an individual takes a case to the Tribunal, they may get hit with the whole whack – £76,000 in one case, [allowing the Landlord to take possession of the flat](#). In another particularly bad case notified to MPs, the Wellcome Trust (a large London Landlord) [charged a Leaseholder £94,905](#) for having partially won a case relating to a few thousand pounds of spiralling annual service charge bill – again threatening to force the leaseholder out of her flat (The landlord had argued it was reasonable to spend £1/4 million a year for a 5 acre garden). And of course if you challenge the legal cost as unreasonable you, will get another bill. That leaves

the only alternative as paying up, something case law has held is acceptance of the charge.

3. **Leaseholders are trapped.** If you cannot challenge an extortionate service charge, a wrongly calculated charge or shoddy management in the Tribunal, what happens if you refuse to pay the Bill? This, again, is a road to nowhere. A landlord can be assured of getting paid. They can threaten to take the property back (forfeiture) or – a common practice if the leaseholder has a mortgage – tell the leaseholder’s bank, who will then pay them directly and add it to their mortgage. With of course another legal fee added.
4. **Existing rights do not work.** While opportunities for abuse are legion, leaseholders current rights are not sufficient. A leaseholder acting with half of his neighbours can go to a court and buy the landlord out. They can also apply to take on the management. However, this is often not possible. Tracking leaseholders who are often not resident and gaining approval is often impossible, especially when commercial landlords decide to use the law to obstruct it, or indeed own leasehold flats (and votes) themselves.

S.131 Housing and Planning Act 2016: “Limitation of administration charges: costs of proceedings”

S.131 of the Housing and Planning Act⁶ will not provide any effective redress for leaseholders facing attempts by freeholders to recover the costs of their legal fees at the residential tribunal nor will it motivate freeholder’s or their agents to improve the standard of their management or solve leaseholders’ complaints before they come to the tribunal or at all. The only solution is for the Tribunal to go back to what was originally intended and be No Costs.

It remains an unequal system.

Under the current system the freeholder can in most cases claim back his legal costs from a Leaseholder by way of the service charge or an administrative charge. However a Leaseholder will not be able to claim their expenses from the Landlord. This will lead to a huge miss-match in legal firepower this means the Leaseholder will always be at a disadvantage.

The Tribunal has a poor record in preventing Landlords free spending on legal costs

S.131 places the question of costs back with the Tribunal stating “*The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.*” This would seem to be little improved from the previous system, where a Leaseholder could challenge an unreasonable charge by way of another application. As with s.131 an application for “unreasonableness” would create another potential cost from the Landlord and so another bill for the Leaseholder. There is a large amount of case law on “reasonableness” in service charges and “administrative charges” which invariably allow for their recovery, placing the question with the Tribunal will simply copy existing practice.

⁶ <http://www.legislation.gov.uk/ukpga/2016/22/section/131/enacted>

To give a real and recent example (regarding The Wellcome Trust) a c.£94,000 legal cost incurred by a landlord in defending a service charge bill of c.£6,000 might still be judged to be “just and equitable” by the Tribunal if evidence of expenditure was forthcoming. Perhaps it might be reduced by 10% even 50% but that would still be enough to force the Leaseholder out of their flat and dissuade any other Leaseholder from challenging a service charge or its administration. With bills of this kind it is highly likely the remainder will be written off by the law firm making it very unlikely the freeholder will be left paying the difference.

In this case the Tribunal decided that as the Leaseholder had lost the majority, but not all, of the points under s.20C it was “reasonable” to allow recovery before the Tribunal knew the scale of the costs. The £94,000 service charge bill arrived 4 months later, challenging that would risk a similar further bill and on and on ultimately leading to the landlord forfeiting the lease. It is worth remembering that as the Freeholder and its agents hold all the documents and can in a Tribunal, avoid disclosure and have overwhelming legal firepower, winning any part of a case for an individual leaseholder representing themselves is a surprising victory.

5. **Mediation:** Mediation, whether informal or imposed by the Tribunal should be the preferred way of resolving disputes. However, as long as a freeholder and its agents have a risk and cost free Tribunal there is no incentive to attempt settlement. In the Wellcome Trust case the Tribunal decided not to impose mediation as there was no chance of settlement as the freeholder saw litigation as beneficial.
6. **Time limits:** As there is no costs hearing in the Tribunal, the Landlord’s claim via the service charge will come many weeks or months later, it is unclear at what point the Leaseholder has to apply to reduce the claim, potentially before they have seen it. In the case of a claim spread over many leaseholders the £200 to the tribunal application may reduce any of the benefit of the application, especially as it may cascade new claims from the freeholder for the challenge to their costs.

Proposals

It should be recognised that the interests of the Freeholder and Leaseholder are not aligned. The Freeholder and its agents have little interest in cost effective management and if all legal costs can be recovered there is an incentive for the managing agents to use litigation to defend their management costs rather than seek mediation or solve complaints.

The current system is designed to encourage freeholders their agents and lawyers to rely on litigation as their complaints procedure of choice. For them it is penalty free for the Leaseholder there is the risk they may lose their home.

The tribunal claimed to be a low cost or cost free environment in which small claims and disputes could be settled without recourse to large law firms and barristers. The Tribunal

for this reason does not award its own costs – it should not allow freeholders to help themselves. S131 does nothing to prevent this.

1. **Reform the Tribunal costs system.** Landlords should not be able to recover their legal costs in the Tribunal by designating them as administrative costs, and adding them to the service charge of an individual or property. A reformed Tribunal should either be costs-neutral, or allow both sides to claim costs. This would change the behaviour of landlords, and increase the chances of settlements or the solving problems pre litigation
2. **No cost environment.** If the policy goal of the Tribunal is to encourage better standards of management by Freeholders and their agents there should be encouragement to improve standards, reduce Leaseholder complaints and deal with them pre litigation then the tribunal should be a no costs environment.

Proposals for the Future

1. **Stop the creation of new leaseholds.** While the existing leaseholds are a problem, there is no good reason to create more. Legislate that all flats should be 'share of freehold' from the off. The proliferation of Government schemes for shared ownership has if anything made matters worse: this should stop.
2. **End existing leaseholds.** While it would not be equitable to turn leaseholds into share of freeholds without compensating the landlords it would be possible to end this practice over time. The simplest would be to convert all 90 year statutory lease extensions into 999 year extensions therefore ending leasehold over c.20 to 30 years. The difference between a 90 year and a 999 year lease extension would be nominal.
3. **Enhance the chances of enfranchisement and the right to manage.** A lower threshold for enfranchisement should be adopted particularly in cases where the leaseholders in a block are difficult to trace, or are in fact the landlord.
4. **Place the [RICS code for managing agents](#) on a statutory footing.** While managing agents are supposed to follow best practice there is little to force them and no recourse if they don't. The RICS code has many sensible suggestions, separate bank accounts, fixed fees over % fees etc but no power to enforce it. Placing it into legislation would have a positive effect on managing agents and Landlords.
5. **Ending Landlords rights to manage property.** Along with turning all leaseholders into 999 year leaseholders legislation could require that once a % of a block are on 999 year leases they automatically gain a share of freehold and the right or obligation to manage the property. This would immediately improve the standard of management from agents hoping to retain the work from the new owners.
6. **Leaseholders should pay a fair amount to extend leases.** Another example of the way in which the Tribunal services the interests of landlords can be gleaned from the

recent "[Parthenia \(Mundy\) Case](#)". A calculation for the extension of the leases (favourable to landlords) was originally put forward by the Grosvenor estate in 1996 and was accepted by the Tribunal. A challenge to it in 2016 pitted three individual leaseholders and their new model against a range of property interests including the Wellcome Trust, relying (amusingly) on the evidence from Professor Colin Lizieri, Grosvenor Professor of Real Estate Finance. You may imagine the outcome: the cost of lease extensions has gone up.

So dramatic was the reversal in leaseholders fortunes springing from this one judgement that Peter Bottomley argued in Parliament that "*I hope that the appeal succeeds, and that the Government will make sure that if it does not, the decision in the Mundy case will be reversed by statute.*"

A part of giving leaseholders security is to prevent vagaries in the Tribunal system leading to huge swings in the cost to extending their leases. **The Mundy case should be overridden by Parliament.**

- **Estate management schemes (EMS)** Leaseholders that have been able to enfranchise and buy their freeholds are not necessarily free from their historic Landlords due to the imposition of 'Estate Management Schemes' over a former estate as sanctioned by the Courts. This can involve the Leaseholder having to pay annual fees to landlords as well as additional fees and costs of their lawyers to undertake works that already have planning permission.⁷

These schemes were either made under Section 19 of the Leasehold Reform Act 1967, (or under Chapter 4 or S. 93 of the Leasehold Reform, Housing and Urban Development Act 1993).⁸

While it is possible to argue the pros and cons of EMS to enhance a local area they have in many instances become a way (by lawyers and landlords) to extract fees and costs over a far wider area than that owned by a landlord. In some cases enfranchised 'leaseholders' can be charged many thousands of pounds by historic estate owners for items such as painting a house.

Proposal

1. **All EMS should be converted into planning requirements as new 'conservation areas' with enforcement given to the local authority.**
- **Reducing the cost of selling a Leasehold property.** As a result of the complexity of Leasehold property and service charge accounting Landlords and agents can charge significant sums (c.£500 in some cases) for 'buyers packs' or the LEP1 form. These charges come despite the fact that information relating to accounts, the state of the building, impending repairs is information the Leaseholder is entitled to in any event.

⁷ For an example: [http://www.grosvenorlondon.com/getattachment/our-customers/Residential/BS-A-Guide-to-the-Mayfair-Estate-Management-Scheme-\(Updated-28-Sept-2015\).pdf](http://www.grosvenorlondon.com/getattachment/our-customers/Residential/BS-A-Guide-to-the-Mayfair-Estate-Management-Scheme-(Updated-28-Sept-2015).pdf)

⁸ <https://www.lease-advice.org/faq/estate-management-scheme-ems/>

Proposal

1. **All accounts should be uploaded to the website of an organisation similar to 'Companies House' that ensures that these accounts are in a suitable format.**
 2. **All LEP1 information should also be uploaded to the same website.**
 3. **Conveyancers and buyers can therefore access the information from the LEP1 without the costly and time consuming business of sellers requesting information from the Landlord.**
- **Communal gardens and other assets.** Many leases include rights to use communal assets – such as gardens, access roads, storage areas, garages etc – owned by the freeholder. Enfranchisement however only extends to the dwelling and not any communal assets leaving leaseholders in an ambiguous position as to their continued use of these assets – often on a licence. There is a question as to what happens when all leasehold property is enfranchised, can the freeholder cancel the licences and take back the communal gardens for development? There is also a question of management, the landlord costs for managing communal assets can be just as bad as that of a residential block and will be subject to even less oversight.

Proposal:

1. **The right to enfranchise is extended to 'communal gardens' or roadways.**
2. **The Kensington Improvement Act 1851, which allows residents committees to run gardens in Kensington via the council tax, is amended to extend it geographically to all of England and Wales and allow for cases where the majority of residents wish to take control even if the freeholder does not.⁹**

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⁹ <https://www.rbkc.gov.uk/council-tax/garden-squares/garden-square-legislation>