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## Leasehold revolution gathers momentum

By Scott Goldstein 18 January 2021

The government's announcement regarding leaseholds took many by surprise, and has caused some confusion about the intended ambit of the new rules. Although many important details remain unclear, the direction of travel is far easier to discern, and indeed has been for some time now.



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In 2017, the then communities secretary, Sajid Javid announced measures to root out unfair and abusive practices within the leasehold system, including banning leaseholds for almost all newbuild houses and setting ground rents for new leases at zero. Three years later, the Law Commission produced three substantial reports on leasehold enfranchisement, commonhold and the right to manage. The government's announcement on 7 January grew out of those earlier proposals.

One of the less contentious proposals is for leaseholders of flats and houses to be given the right to extend the term of their leases by 990 years with a zero ground rent. Abolishing ground rent on a lease extension represents no change for leaseholders of flats, but the very long term length sends out a clear message that the government wants leasehold to be a right enjoyed by tenants and their successors effectively in perpetuity.

The government's proposals build on Javid's commitment by promising to abolish ground rents for new retirement properties. Retirement housebuilders had argued this was unfair because retirement communities invariably had more communal

space requiring upkeep. These developers may try and pass the additional cost onto their leaseholders in the form of higher lease prices and/or service charges, but at least those measures will have the advantage of transparency over punitive ground rent clauses that are easily missed or misunderstood.

Perhaps the most eye-catching and radical of all of the government's recommendations is the abolition of marriage value. If enacted, this would transfer an asset pool from landlords to tenants, estimated at hundreds of millions of pounds. The property world is considering seriously the possibility that these measures might prima facie amount to a breach of Protocol 1 Article 1 of the European Convention on Human Rights, which guarantees the right to every natural or legal person to the peaceful right of their possessions. While this right is subject to a number of provisos, one can imagine that were the government's proposals to be enacted it would be in the interests of a number of central London landlords to seek a declaration that these provisions were incompatible with the Human Rights Act.

The threat to remove marriage value could reduce the number of lease extensions, as tenants who wish to extend their leases (and do not need to rush to do so) wait to see if the changes are enacted, thereby potentially saving themselves considerable sums. Conversely, those tenants will suffer a loss if they delay extending their leases and the government decides to retain marriage value.

Another way the government looks to achieve both greater certainty for leaseholders, and lower premia (and which may be just as radical as the abolition of marriage value), is the proposal to fix the rates valuers use to calculate lease extensions. These include the capitalisation rate (used to calculate a capital sum that reflects the value of the ground rent), the deferment rate (used to discount the value of the freehold interest reflecting the fact that the landlord will receive the benefit of vacant possession now), and relativity (used to calculate marriage value and hope value). The government has produced no detail whatsoever on this aspect of its plans. However, it is fair to say that these proposals could also be the subject of Human Rights Act litigation brought by landlords if (as seems quite likely) they result in a significant adverse effect on the value of their reversionary interests.

Another interesting feature of the government's proposals is the suggestion that tenants may be able to 'opt out' from having to pay development value on lease extensions or enfranchisement by undertaking not to carry out future developments (presumably for a set time period after the lease extension). The commission's report set out how this might work in practice but the government has not yet given any detail for its proposals in this regard.

The second of the commission's July 2020 reports concerned commonhold. This form of property ownership divides freehold land into units (such as flats) and common parts. Each unit has its own freehold title and can be transferred as such. A unit held as commonhold cannot be forfeited. The unit-holder must use the unit in line with the rules of the commonhold association, which also owns the freehold of the common parts to the building. Unit-holders are entitled to be members of the commonhold association.

Although it was introduced in 2004, the uptake of commonhold has been very low. Hence the government has proposed establishing a 'commonhold council', comprising stakeholders such as leasehold groups, industry and government, to prepare homeowners and the market for the widespread adoption of commonhold.

The government's announcement omitted any mention of the commission's proposals to facilitate collective enfranchisement, such as raising the threshold for commercial property space in a qualifying building from 25% to 50%. Discouraging (or not actively encouraging) collective enfranchisements may be a way for the government to steer the market towards commonhold. This might also be why the government's recommendations were silent on the third of the commission's 2020 reports relating to Right to Manage companies, which allow leaseholders to take over the landlord's management functions without having to buy the freehold or show fault on the part of the landlord.

In view of the recent widespread criticisms of leasehold, the time may now be ripe for commonhold although it remains to be seen whether these new measures are sufficient to lead landlords, tenants and lenders in that direction. However, the changes planned to the leasehold system are themselves far-reaching. We have been warned to expect major changes in property law between now and the next general election.

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