HOUSE OF COMMONS

Housing, Communities and Local Government Committee

Oral evidence: Leasehold reform, HC 1468

Monday 14 January 2019

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Watch the meeting

Members present: Clive Betts (Chair); Bob Blackman; Tanmanjeet Singh Dhesi; Helen Hayes; Liz Twist; Matt Western.

Questions 374 - 464

Witnesses

I: Matthew Jupp, Principal, Mortgages, UK Finance.

II: Guy Fetherstonhaugh QC, Falcon Chambers; Amanda Gourlay, Barrister, Tanfield Chambers; Giles Peaker, Partner, Anthony Gold Solicitors.

III: Professor Nicholas Hopkins, Commissioner, Law Commission.

Examination of Witness

Witness: Matthew Jupp.

Chair: Good afternoon and welcome, everyone, to our fourth evidence session in the inquiry into leasehold reform. Thank you for coming this afternoon. Before we begin, I ask members of the Committee to put on record any interests they have that may be relevant to this inquiry. I am a vice-president of the Local Government Association.

Helen Hayes: I am a leaseholder. I am also a vice-president of the Local Government Association and I employ a councillor in my staff.

Mr Dhesi: I am a councillor as per the Register of Members' Interests.

Bob Blackman: I am a vice-president of the LGA. I have a small property interest and I have just completed a purchase of a leasehold.

Q374 **Chair:** It has obviously not deterred you, Bob. Thank you very much for coming. If you could introduce yourself and say the organisation you are representing, that would be helpful.

Matthew Jupp: My name is Matthew Jupp. I am the principal for mortgage policy at UK Finance. I look after our work relating to most

aspects of the home buying and selling process, including leasehold reform. UK Finance is a trade association. It represents the banking and financial services industry. It has about 250 members in total, about 150 of which do some sort of mortgage.

Q375 **Chair:** Thank you for coming this afternoon. The issue of whether it is as easy to buy a property with leasehold as it is with freehold is quite important for people trying to buy a home. You said in your evidence to us that lending on leasehold presents additional risks when compared to ending on freehold. Could you explain what they are from the lender's perspective?

Matthew Jupp: Yes, sure. Generally speaking, it is worth starting by saying that we feel the leasehold market, as a whole, works fairly well. There are well over 4 million leasehold properties in the UK. A lot of those are sold each year and, generally speaking, that works fine. However, yes, there are additional risks related to leasehold properties.

There are three main ones that I want to talk about. First, there are the additional risks related to the security of the property and whether, by breaching some aspects of the leasehold contract, somebody may lose that property back to the freeholder under the laws of forfeiture.

There are the risks associated with the additional costs of leasehold and whether they affect the ability of the leaseholder to afford those properties. All mortgage lenders have to assess somebody's affordability before they are allowed to provide them with a mortgage. With leasehold properties there are additional costs. Ground rent is the most obvious one. There are service charges also. There are other costs as well that may not be immediately apparent. There are charges for different sorts of works and the prospect of big costs from works involving the building. For example, if it needed a new roof, that would eventually fall on the leaseholder and a lender needs to assess that and make sure it is affordable for the leaseholder themselves.

Finally, there is the question of valuation and whether the leasehold terms affect how attractive the property is for a future buyer. That is important because lenders cannot provide mortgages that go beyond the value of the property. Also, if they have to take control of the property if somebody is unable to meet their mortgage payments, they need to make sure they are able to sell the property and get their money back.

Q376 **Chair:** For the most part, is it not that lenders will refuse to lend on leasehold properties, but that they may well, depending on the type of leasehold, the nature of the agreement, increase the rate at which they lend or alter the valuation at which they are prepared to lend?

Matthew Jupp: There are additional risks. You are asking whether lending on leasehold means that somebody pays more in a mortgage. That is not quite the case. It is the additional risk posed for lenders themselves. In particular cases where a lease term has an effect on one

of the three things I mentioned, in particular the affordability or the valuation of the property, it may reduce a lender's likelihood of lending on that particularly property. It does not have an effect on the leaseholder in the sense of paying more money for the mortgage.

Q377 **Chair:** So it does not put up the rate at which the prospective homeowner has to pay. It is more likely that they simply will not get a mortgage because of the concerns of the lender about the risks involved.

Matthew Jupp: In extreme cases, if you are talking about something like a ground rent that doubles every 10 years, which we are all very aware of, yes, you are likely to find a restricted market for mortgages. It may well be in more marginal cases that there are one or two lenders that would not lend on you and, as a result, your choice of mortgages is slightly less. It is a matter of risk for lenders rather than the ultimate costs that leaseholders themselves have to pay.

Q378 **Chair:** It could well be that the valuation a lender uses is reduced because of the leasehold terms. Is that possible?

Matthew Jupp: Yes. All lenders have to make an independent valuation of a property before they provide a mortgage on that property. Leasehold terms and conditions are one thing that a valuer will take into consideration when deciding how much that property should be valued at. Yes, there are examples of where leasehold terms will affect the value of that property. If you go back to the 10-year doubling ground rent situation, that would affect the value of the property, so would have a knock-on effect.

Q379 **Bob Blackman:** Can I raise an issue about length of lease and what effect it has on the ability of the lender to lend to someone who is applying for a mortgage?

Matthew Jupp: In the UK Finance lenders' handbook, which is a set of instructions that most lenders use for their conveyancers, there is an option for lenders to set out what they will accept in terms of leasehold length. It is up to the risk appetite of individual lenders and it varies. It is usually around 55 to 85 years, depending on the lender. Some are less. Generally speaking, a lender will want it to be double the length of their mortgage term and a little bit, depending on their risk appetite. If it starts to get lower than that and if it starts to get into a few decades left rather than a considerable length of time, many lenders will not lend on those particular properties.

Q380 **Bob Blackman:** No doubt we can explore that further but I will leave it there. Can you talk us through the definition of an onerous ground rent in the handbook?

Matthew Jupp: Yes. The UK Finance lenders' handbook sets out lots of different aspects of leasehold that lenders will want their conveyancers to check before they agree to provide a mortgage on a property. One of those is around ground rent. It asks for the ground rent to be predictable,

to be understood as to what the level is going to be, to be set out quite clearly, and to allow that to increase periodically by a reasonable amount. It does not talk about "onerous" as such.

Q381 **Bob Blackman:** We have been told in evidence that has been presented to us that, if onerous ground rents are included, lenders will not lend on the property.

Matthew Jupp: Within what we call part 2 of the handbook—there are certain sections within the general instructions in which lenders can put their own specific instructions—some have set out the more specific terms of what they see as acceptable levels of ground rent. A couple of them use the term "onerous". Most talk about "reasonable". There is not a set level for them, but there are some general similarities between what lenders say. It tends to be a fairly low starting rate. Some use a percentage of the property value, so 0.1% of the property value. Some use a particular figure up to £250.

Q382 **Bob Blackman:** Would 0.1% be onerous or reasonable? What would be the position there?

Matthew Jupp: For some lenders, above that would start to be unreasonable.

Q383 **Bob Blackman:** You say "some lenders". One of the problems here is that some lenders will say, "Unless it is absolutely crystal clear, we will not lend". But others will lend. Can you give us an order of percentage of lenders that will apply these rules?

Matthew Jupp: Most set out some form of acceptability within that. As I say, there are slightly different levels in terms of what they use.

Q384 **Bob Blackman:** Someone applying for a mortgage on one of these properties may find that a lender will lend whereas another lender would not. Is there any guidance for someone applying for a mortgage and saying, "I have these terms" on whether they are wasting their time applying for a mortgage and maybe they should be applying somewhere else? Is there somewhere that someone out there who wants to buy a leasehold property could look and say, "Ah, right, in these terms, that is what I could get a mortgage on and I know this lender will not"?

Matthew Jupp: No, there is not at the moment. It is worth dividing this up slightly between new build properties and existing leasehold properties. Most lenders set out criteria around new build properties and it tends to be that starting level, how often it can increase and roughly how much it can increase by. We are going to look at whether we can tighten those up as UK Finance and explain a little more readily for everybody who wants to buy a leasehold property or is involved in that process exactly what lenders are saying.

If you are talking about existing current leasehold properties, it is trickier. We will look to see what we can do in that area as well. A lot of it comes

down to the different risk appetites of lenders but also how much you can assess it on a case-by-case basis. You do not particularly want a situation where lenders are becoming the complete arbiter of what is acceptable, in terms of leasehold terms and conditions and ground rent.

Q385 **Bob Blackman:** Effectively they are doing that already by saying that they will not lend except on these criteria. If those criteria are being applied to either new build or existing houses, effectively, they are because then they limit the market as to who a potential borrower can go to, in order to get a mortgage.

Matthew Jupp: For new build, lenders have had a real impact in that particular market and developers have reacted to what lenders have said they will accept in terms of ground rent and other leasehold terms. For existing leasehold, it is slightly different.

Q386 **Bob Blackman:** We have had evidence from existing borrowers who are trying to sell their property. They say their properties are unsaleable because of these onerous conditions, because someone wanting to buy it cannot get a mortgage. That is exactly the problem that a number of people giving evidence to us have raised. I want to understand what the lenders' perspective is on this.

Matthew Jupp: By that you mean existing leaseholders rather than new build properties, perhaps.

Q387 **Bob Blackman:** Sorry, can I explain the circumstances? Someone buys a new property. It has been built, the developer sells it to them and there are these conditions attached. It is the first time someone has bought a property. They do not realise the impact of all these conditions. Then, some way down the line, maybe five years later or longer, they say, "I now want to sell the property and move on". People come to look at the property and say, "Right, I would like to buy the property". Then they apply for a mortgage on it and the lenders say, "Oh no, we are not touching this because of the onerous terms that apply". Basically, the first-time buyer—it is often a first-time buyer in these circumstances—is stymied. They cannot sell the property because no one will lend any money to the person who wants to buy the property because of the terms that already exist.

Matthew Jupp: Yes, that does happen in some cases. There is not a set definition of what lenders mean by "onerous" in those cases. Lenders ask their conveyancers that are involved in that transaction to tell them if they feel there are terms within the leasehold that are unusual and across certain thresholds. That will be for individual lenders on a case-by-case basis. In some cases, yes, individual lenders will make a commercial and risk decision not to lend in those particular cases. There are some very recognised cases where that is the case. For example, ground rents that double every 10 years are a very well-known case. We recognise that, and we want to see action taken to support those particular

leaseholders and see those very bad leasehold terms changed and brought to an end.

Q388 **Bob Blackman:** You have talked about ground rent doubling. Where there is an increase based on RPI, is that considered to be acceptable by most lenders?

Matthew Jupp: Yes, it is considered to be acceptable by most lenders. This comes down to the difficulty with lenders being asked to define what is onerous for the whole market. Lenders look at leasehold terms in terms of the affordability and the valuation of the property. If the ground rent terms do not have an effect on either of those, lenders are willing to lend on those properties. If you are an individual leaseholder, you may not think that that is actually the case. You may find it onerous. You may not like those particular terms and conditions. For a lender, actually, it does not have an effect on your affordability or the value of that property. For them, it is a reasonable ground rent. RPI is generally seen as a fairly acceptable way of raising ground rents.

Q389 **Bob Blackman:** Given this set of circumstances where lenders are taking a commercial decision on whether to lend, how many people have been turned down for a mortgage by lenders because of onerous terms or terms that are not reasonable, in your estimate?

Matthew Jupp: We are not sure. We do not collect that data.

Bob Blackman: Okay, so you do not keep that data?

Matthew Jupp: We do not collect that data.

Q390 **Bob Blackman:** Do you have a feel for it?

Matthew Jupp: No, not in terms of numbers, but, certainly for new build properties, lenders have put information out there on ground rent acceptability. All property developers have to provide what we call a disclosure form to mortgage lenders and valuers when they sell a new property for the first time. It includes information about ground rent and other leasehold conditions. That has certainly had an effect, from what our members are seeing. It is getting much rarer to have cases of onerous and unfair leasehold terms coming through.

Q391 **Bob Blackman:** You have said in your written evidence that you have seen changes take place in the market as a result of changes, basically, to the handbook and the view. What changes have actually taken place?

Matthew Jupp: We are seeing a lot fewer properties coming through that have onerous or unfair terms and conditions within them.

Q392 **Bob Blackman:** Sorry, just to be clear, when you say you have seen fewer properties, is that fewer complaints coming to you? How are you monitoring this?

Matthew Jupp: No, I mean, in terms of new build properties, we are not seeing people trying to get mortgages on new build properties that have poor terms.

Q393 **Bob Blackman:** How do you monitor that?

Matthew Jupp: We do not monitor it as such. That is anecdotal, but it is what my members tell me they are seeing.

Q394 **Helen Hayes:** I want to turn to the issue of commonhold titles. A survey in 2014 of mortgage lenders found that less than 40% stated that they would lend on commonhold titles. Is this due to a lack of demand and, therefore, lack of knowledge and suitable mortgage products for commonhold titles, or because of genuine industry concerns around the commonhold model of property ownership?

Matthew Jupp: If you look at the UK Finance lenders' handbook, there is a section where all our members that use the handbook can list whether they lend on commonhold properties. About 40 of them today say that they do. They range in size from big global banks to more regional building societies. By most measures, 40 different providers in the country lend on commonhold. It is a fairly reasonable, functioning market. If you are a commonholder today, you will be able to access mortgage finance.

Why it has not taken off is a slightly different question. It is perhaps harder to answer. There are concerns about commonhold as a concept and about the way it is written into English law. But a lot of lenders would be more willing to say they would be able to lend on commonhold if there were more properties coming through. Fewer than 20 commonhold properties have been created since 2002. That is what the Law Commission said in its last consultation on it, anyway. For most lenders, devising a policy around commonhold and finding a way to flag it in their systems is not necessary. It is an exercise that would probably never see any commonhold properties coming through. If more came through, more would probably take the time to do that.

Q395 **Helen Hayes:** Can you elaborate on the concerns about the concept?

Matthew Jupp: Yes. In terms of the concept, the main one is around making sure there are enough people within the residents to run the commonholds properly. That is a general concern. It is not a reason that lenders are particularly against it. It is just our members' hesitation in terms of commonhold.

Q396 **Helen Hayes:** Is there any evidence to support that concern? Is it based on a set of suppositions about the capabilities that groups of residents might have to run the financial aspects of their properties, or is there evidence that it is genuinely riskier?

Matthew Jupp: One of the biggest difficulties for lenders in assessing commonhold risk is that there is virtually no data out there for England

and the UK. There are examples of commonhold in other parts of the world. Assessing the risk within the UK is really, really difficult and that makes lenders cautious, so it is a theoretical concern. There are also aspects of the way that commonhold is written into our legislation that lenders have concerns about, in particular what happens when a commonhold winds up, whether that is voluntary or due to insolvency.

Q397 **Helen Hayes:** Is there anything that the Government could do to allay those concerns, which might, then, have the effect of opening up access to a greater range of lending possibilities for commonholders?

Matthew Jupp: There was a call for evidence in the summer and the Law Commission put forward some proposals just before Christmas. In that consultation, the Law Commission recognised the different concerns that lenders had raised during the call for evidence. It has picked up on all the points I have mentioned and come forward with suggestions about how they could be resolved. We are still working through the detail of those.

I am not certain that the suggestion that lenders no longer have a first charge over properties will completely allay their concerns. Most lenders like the fact that they have a first charge over the properties and that is an important part of their business model. Removing that for commonhold may well be problematic for them. I cannot say for definite until we have had more discussions during the consultation process.

Q398 **Helen Hayes:** Are there any advantages to the commonhold model that you would like to make the Committee aware of?

Matthew Jupp: Probably the biggest advantage is just a general point. Most of the concerns raised about leasehold are over the lack of transparency and lack of control over costs. With commonhold, that is not the case. Residents have control over those, which has an advantage for commonholders. For lenders, it is probably less clear. As long as the property is well maintained and looked after, and has all the necessary insurance and that kind of thing, it is just another way to hold property.

Q399 **Helen Hayes:** Do you think the Government and the Law Commission are right to promote it as an alternative model of ownership?

Matthew Jupp: Lenders have different views on commonhold. Generally speaking, it is a useful addition to the mix. If it is being looked at as a complete panacea for all the ills of leasehold, that is perhaps less helpful.

Q400 **Mr Dhesi:** In the evidence we have had from the likes of Redrow and Long Harbour, they have mentioned that one of the reasons commonhold has not really taken off is that lenders are not considering lending. One of the quotes was that almost half the lenders will not consider lending to a flat in a commonhold development. Do you not see that we have a problem there if lenders are not willing to lend?

Matthew Jupp: That is a result of the lack of properties that have come through since 2002. Hardly any commonholds have been created in this country. It is difficult for lenders to come up with the processes and policies that are necessary to enable them to lend on commonhold properties for what is essentially an academic exercise. If you are not going to see those coming through, they do not really need to be developed. It is easier for a lender to say that they will not lend on commonhold properties than to come up with processes and policies that will enable them to do so but probably never have to use them. If we started to see more being created by developers, more lenders would come through in terms of being willing to lend on them.

Q401 **Matt Western:** Given we are hearing from so many people with leasehold who find themselves in situations where they cannot sell their property, do you have any concern, representing 250 members, 99% or whatever it is of the whole industry, about some sort of debt bubble? Is there a real financial risk here in the UK of people not being able to sell properties and defaulting?

Matthew Jupp: Generally speaking, the leasehold market works well. Lenders are concerned about policies, or indeed language being used, that may make those properties more widely seen as less attractive and, as a result, a two-tier market developing. We do not have that at the moment. There are some cases of people who find it difficult to access mortgages but the reason for that is that there are some very poor leasehold terms out there. The focus should be on rectifying those so that those leaseholders can access mortgage finance. There is not a much more widespread problem than that.

Q402 **Matt Western:** So you do not see a risk.

Matthew Jupp: I do not think so, no, not in terms of the market as a whole. There are at least 4 million leasehold properties in the country and the market generally works okay.

Q403 **Chair:** Coming back to the commonhold issue, I am a bit confused. You explained certain reasons why some lenders will not lend on commonhold properties and then said, "Actually, it would be all right if there were more of them". Those two statements seem a bit contradictory. Are you really saying that, if suddenly the Government's intentions took off and more commonhold properties were developed, everything that the lenders have concerns about now would disappear and they would all start lending?

Matthew Jupp: We would like to see aspects of the law and the way the legislation is at the moment changed, to make them better.

Q404 **Chair:** That is one thing to get on with doing. The two things, then, are together. It is not just about more properties, is it? It is a change to the nature of commonhold that you are after.

Matthew Jupp: Both are applicable. We would like to see some specific changes made to the legislation.

Q405 **Chair:** What specific changes would you want to see to make lenders more willing to lend?

Matthew Jupp: There are two aspects, particularly in terms of how commonholds are wound up, either when they are voluntarily wound up because the commonholders decide to do that or when they become insolvent. The Law Commission in its proposals has put forward some ideas that would help relieve concerns about those two things. Certainly, that would make it easier for lenders. There would be some that are not involved in commonhold simply because there are not any commonhold properties for them to lend on. It is both things.

Q406 **Chair:** You were talking about the first charge issue, but it only applies in certain circumstances, does it not, where there are arrears on the property? It only applies in very specific circumstances that those arrears will be covered by any sale as first charge, rather than the lenders having first charge. Is that not right?

Matthew Jupp: Do you mean in the new commonhold proposals?

Chair: In the new proposals from the Law Commission, yes.

Matthew Jupp: Yes, we need to look at the detail of the proposals.

Q407 **Chair:** So that situation is not really a major problem, is it, for most lenders? It is not a reason for rejecting the proposals, is it?

Matthew Jupp: We want to have a closer look and fully understand them.

Q408 **Chair:** How long have you had the proposals? Was it November that they came out? You do not have an initial view on this.

Matthew Jupp: My initial view is that we may well have some concerns about it, but we have not gone into massive detail in terms of exactly what.

Q409 **Chair:** When are you likely to have a full response, then?

Matthew Jupp: The consultation ends in March so we will put forward a response to that.

Chair: Thank you very much for coming to the Committee this afternoon.

Matthew Jupp: No problem.

Examination of Witnesses

Witnesses: Guy Fetherstonhaugh QC, Amanda Gourlay and Giles Peaker.

Q410 **Chair:** Good afternoon and thank you for coming to the Committee this

afternoon to give evidence to us. Could I ask you to go down the table and say who you are and the organisation you are representing today?

Giles Peaker: I am Giles Peaker. I am a partner at Anthony Gold Solicitors and a litigation specialist in landlord and tenant law.

Amanda Gourlay: I am Amanda Gourlay. I am a barrister in private practice. I specialise in residential landlord and tenant work, particularly service charges and property management. I act for both landlords and leaseholders. I am at Tanfield Chambers. At the moment, I also go into the Ministry of Housing, Communities and Local Government two days a week. I take my expertise in service charge law there and provide information to the Department about the practical application of service charge law and property management issues.

Guy Fetherstonhaugh: My name is Guy Fetherstonhaugh. I am a barrister in private practice as well. I have been doing it for 35 years. My speciality is landlord and tenant and real property law. I wrote a book on commonhold that accompanied the new Act. At one point I think there were more books about commonhold than there were commonholds.

Chair: Amanda Gourlay, you are doing some work, as you explained, in that capacity for the Department at present, but this afternoon you are speaking in a personal capacity.

Amanda Gourlay: I should emphasise that, yes.

Chair: You will not be constrained by the fact that you happen to work for the Department in a certain way for two days a week.

Amanda Gourlay: The evidence I propose to give today is entirely in my private professional capacity as a barrister at Tanfield Chambers.

Chair: Thank you for clarifying that.

Q411 **Matt Western:** Thank you for coming in. We are talking about leasehold law reform, and the Government have quite a few projects on the go looking at this. In your views, do you think the Government are doing enough? Do you think what they are looking at is adequate? Are they addressing the right areas? Do you think, as the Law Commission suggests, there should be wholesale systemic reform and consolidation?

Giles Peaker: I would have to plump for wholesale reform. Some of the areas of reform the Government are addressing are definitely ones that needed addressing, but there are quite a substantial number of areas around leasehold that still remain outside that and need attention. I have a little list. For example, the issue of the recovery of legal costs in tribunal is a substantial one in practice and is increasingly a major issue. There is the remaining issue around freeholders' remedies and the fact that, effectively, forfeiture is the only remedy that the freeholders have to try to enforce on breaches of lease. There is a whole set of issues around information to leaseholders and leaseholders' ability to access information about the details of the service charges, details of accounts

and so on. Those would be a few highlights. There are more issues. Beyond the current reform programme, there are sufficient problems in the operation around leasehold law in particular at the moment that would merit a far more overall and cohesive approach.

Amanda Gourlay: In my area of law there are a number of areas that need to be reformed, in terms of the way the law works. I agree with everything Giles has said. Like Giles, I have a list. I have forfeiture, charges made of leaseholders, in terms of whether charges themselves are actually regulated. There are some that are regulated, some that are not. There are problems with the receipt of and the timing of service charge demands when leaseholders are required to pay. There are issues around transparency of charges; in particular, insurance commissions is one issue that tends to recur. There are problems with enforceability of the rights that leaseholders, and potentially landlords, might have, whether that is in the tribunal or elsewhere. There are further issues about legal costs, but the submission I put into the Committee focuses entirely on legal costs, so you have the benefit of some 3,000-odd words from me on that already. Unless you wish me to rehearse it, and time is rather against us, I do not propose to go into that in great detail. In my area of law, yes, there are issues.

Guy Fetherstonhaugh: My view is that you either make commonholds so brilliant that people simply will not want long leasehold and it will wither on the vine, or you keep things as they are and do not bother with commonhold. That will continue withering, and you keep putting the sticking plasters on long leasehold law. I am not in favour of the latter. The trouble with leasehold is that it is essentially an antagonistic relationship. The interests of landlords and tenants will not coincide. It would be almost impossible for them to do so.

The great thing about commonhold, if it works, is that there are not really two parties. It is the commonhold owner and then the commonhold community, which is all the owners put together. It is not like one of those cobbled together leasehold management owning bodies that has representatives of leaseholders on it. They are still in a state of conflict towards each other. Commonhold is not like that.

If you are going to reform leasehold law, it will have to be holistic. When you look at the long history of leasehold reform in all its many guises, it is just a bunch of sticking plasters here and there. Leasehold reform, as in enfranchisement, is in a confused and difficult to interpret sense. I should disclose a disinterest. I do not advise on leasehold enfranchisement because it is too tricky for somebody who does not specialise in it. It is an area where a little learning is a very dangerous thing. I am a property lawyer and I do not advise on it. We have had enough of little bits of amending legislation here and there. If people are going to reform leasehold further, there needs to be a vast, holistic, collective attempt.

Q412 **Bob Blackman:** Can I go into some specifics that maybe we can discuss and explore? We have heard a lot of evidence from leaseholders about onerous terms. You may have heard our previous witness saying that lenders do not regard them as onerous. They regard some as reasonable and others as unreasonable. What could be done, legislatively, to remove these so-called onerous terms and potentially impose maximum ground rents, for example, on leaseholds? Is there something that could be done in legislation to do that? I will start with you, Guy, seeing as you concluded on the position of needing fundamental reform.

Guy Fetherstonhaugh: I would, effectively, do away with ground rents altogether. I have seen that some people are a bit uneasy about that. I wrote an article proposing exactly that in the *Estates Gazette* about six months ago. The only reply that came back that voiced any dissent with my proposal was from a housebuilder, which said it did not like the idea of not having the icing on the cake. They sell the cake and then the icing is the ability to collect ground rent for a long time. I cannot see any real point in ground rents, but I accept the possibility that ground rents might be a vital part of some statute that I have no knowledge of. To be safe, I would perhaps keep a peppercorn ground rent, but monetary ground rents I do not think are necessary. They are abused and I would get rid of them.

Q413 **Bob Blackman:** Could you do that retrospectively without impinging on landlords' rights?

Guy Fetherstonhaugh: No, you would have to impinge on landlords' rights. I do not know in which way you would do that. That is a big topic outside my terms of reference, but it is the way I would go.

Amanda Gourlay: There are undoubtedly difficulties with legislating retrospectively. I think they have been quite widely canvassed already. The main issue is to with interfering with a contractual right. There are article 1, protocol 1—what we call A1P1—rights that need to be considered on both sides. It is, as Guy has pointed out, an extremely large challenge. It is not something that I think any of us could solve right now, sitting here in front of you.

Q414 **Bob Blackman:** Could we do it from the point of legislation going forward so it would be quite clear that that was the position?

Amanda Gourlay: For the grant of new leases, that certainly appears to be something that would not be objectionable to law.

Giles Peaker: I would agree with Amanda. In terms of future leases, it would be relatively unproblematic. Dealing with the situation for past leases could be done legally. It would undoubtedly, I think, face quite a serious article 1, protocol 1 challenge if you scrapped ground rents altogether, and probably, looking at the Strasbourg case law, successfully. That said, the legal mechanics of it are one thing. It is a policy decision in the end, rather than a legal one. It would be technically possible to do it.

Q415 **Bob Blackman:** The Government are proposing to cap ground rents at £10 a year. Is there any legal significance, from any of our colleagues here, in why it is £10, not £100? Why £10?

Amanda Gourlay: I believe £10 is the amount fixed in right-to-buy leases, if I am correct in understanding that. Beyond that, it is the figure that is being proposed in the consultation document.

Q416 **Bob Blackman:** There is no particular legal reason, from any of your perspectives, that it is £10.

Amanda Gourlay: Not as far as I can see, no.

Giles Peaker: It is actually a mistake.

Q417 **Bob Blackman:** Why do you think it is a mistake?

Giles Peaker: In terms of value, it might seem to be little more than nil or a peppercorn, but one of the issues preventing the adoption of commonhold, as Guy has pointed out, is, frankly, the existence of ground rents full stop. As long as they exist, even at a relatively minor level, it will be a major impediment to the adoption of commonhold.

Amanda Gourlay: There is a further issue as well. Insofar as one has a ground rent that is at a monetary value, that money will be worth something, and therefore it would be worth collecting a large number of those ground rents if one was an investor. While you smile, it is possible to bring forfeiture proceedings if you have a ground rent of £10 in arrears for more than three years, with all the associated stress and cost that can incur. There is a difference. As long as one has a monetary value there is, in law, action that a landlord can take against a leaseholder, providing the ground rent is in arrears for more than three years.

Guy Fetherstonhaugh: But not for a peppercorn.

Q418 **Bob Blackman:** Right, so that would be the legal significance.

Amanda Gourlay: Yes.

Q419 **Matt Western:** Looking at the service charges, and what could be deemed to be reasonable and what is not reasonable, we are talking about forfeiture. Should the law concerning forfeiture be reformed so that its all-or-nothing nature cannot be used as leverage when it comes to challenging service charges?

Amanda Gourlay: The point about forfeiture is that it, effectively, gives a windfall to the person who benefits from it, and that will generally be the landlord. If you forfeit the lease, the lease comes to an end. There is no obligation to account to the leaseholder for any proceeds of the grant of a new lease. Effectively, it is quite a draconian remedy.

The way one that might compare it, having just heard from Mr Jupp of UK Finance, is with mortgage possession proceedings. You would normally expect, if you are in arrears with your mortgage, that you would have a

possession order against you. If that were executed and the property was sold, the proceeds of sale would then be accounted to the borrower after the costs of sale and so on had been taken into account. The same applies if you have a charging order registered against a property. You still account for the proceeds of sale. Forfeiture is quite an unusual remedy, in that it gives a windfall, which is something that the law does not like to see. That is problematic.

One issue that arises increasingly, certainly from my experience in practice, is that it is being used as a remedy of first port of call, as opposed to a last port of call, if there are service charge arrears. The reason for that is a case that came out in 2011 from the Court of Appeal, which has highlighted a landlord's ability to recover its legal costs relating to forfeiture from a leaseholder in full. You end up in really quite a difficult situation with it. It has come across my radar and across my desk increasingly in the last few years.

Q420 **Matt Western:** Do either of you also have views on that?

Giles Peaker: I would agree. There is now, in effect, this pressure to use forfeiture as a first resort in order to recover the costs of doing so. It most certainly is a draconian remedy and it most certainly provides the landlord with a windfall when forfeiture happens. It has to be said it is very rare for them to actually achieve forfeiture, but it is the threat. The flip side is that there are really no other mechanisms for landlords to address breaches of lease. It is the one they reach for because there is basically nothing else for them to do, apart from the odd threatening letter. I raised it as one of the things that would hopefully be included in a wholesale reform. One of the things from both the landlord's perspective and the leaseholder's perspective is to reform forfeiture and to bring in proportionate remedies, and hopefully cheaper and quicker ones, for freeholders, but also ones that do not have such a draconian effect on the leaseholder.

Q421 **Matt Western:** Anything else?

Guy Fetherstonhaugh: Yes. There are things the landlord can do. As you would in any other area of the law, you can sue for a money judgment. If that is not paid and it is substantial, you have other remedies available to you. Forfeiture is fantastically draconian. The Law Commission consulted on its reform, along with other methods of leasehold termination, a few years back now. Its report was an outstanding piece of work and I think it is in the long grass now, so this is a well-travelled road, getting rid of forfeiture.

Q422 **Matt Western:** With the service charges, I recall personally being in a situation where you do not challenge the management companies, the freeholders, because it is prohibitively expensive to do it and you just know you are on a hiding to nothing. Ultimately, those charges are going to be put back against you in an increased management charge. What do you think needs to be changed in that way?

Guy Fetherstonhaugh: You mean apart from getting rid of forfeiture.

Q423 **Matt Western:** Yes.

Guy Fetherstonhaugh: An awful lot has been done. This goes back to the sticking plasters I referred to earlier. Landlords' abilities now to ride roughshod over their tenants have been hedged about to a huge extent. They have to go to the tribunal and so forth. It is not straightforward. The bad old days of the landlord just sending a section 146 notice and saying, "I win every single way I choose to go from here, so you had better pay me lots of money" have gone, I think. It is a long time since I did a residential forfeiture, but I think they have gone almost completely. I am not sure a lot needs to be done now about that, but I would get rid of forfeiture altogether as well.

Amanda Gourlay: I feel there is a certain amount of hesitation on this side of the desk. In the way that the law on forfeiture has evolved, there are a number of stages you have to go through before you can actually take possession of a property and sell it. One of the issues is about the amount of money that it costs to get to that stage, over a dispute that may be for quite a low amount of money. Generally, landlords will not allow a service charge to reach a prohibitively high amount unless, for example, it is major works, at which point you might have figures in the 20,000s, 30,000s or 40,000s of pounds.

You may have a small amount of money with a landlord pursuing, say, £5,000 of what they say are service charge arrears. Potentially, if you challenged it in the tribunal, only £3,000 of those service charges may be payable, but it would have cost you more than that, if you are properly represented, in order to get that figure down. Yet, you are still facing forfeiture because there is, nonetheless, £3,000 of arrears. Protections have been put in place, but because of the way the law has evolved they have been quite expensive, due to the legal costs of enforcing them. Of course, because protections have been put in place, there are more stages to go through. Therefore, the law becomes more complicated, so one needs legal advice in order to properly access and enforce one's rights.

Giles Peaker: This goes back to the issue of the costs in the tribunal that I raised at the start. The First-tier Tribunal was originally, and still is in some ways, supposed to be effectively a cost-free jurisdiction. Because of the way the case law has gone, particularly on lease clauses, on recovery of costs in contemplation of a section 146 notice, the forfeiture process, freeholders are routinely now recovering their costs of a tribunal, either under the service charge or under an administration charge, even where the tenant has been reasonably successful in the tribunal and has reduced the service charge.

It is possible for a section 20C order, as it is known, to be applied for by the leaseholder, stopping the landlord recovering tribunal costs under the service charge. In my personal view, that should be the default position.

The freeholder should have to show why that should not be the case, rather than the leaseholder, again usually without legal representation—there is an imbalance there—having to make that application and the tribunal coming to a view on its discretion. That would go some way towards alleviating the risks to leaseholders in bringing service charge or major works charge challenges in the tribunal.

Q424 **Matt Western:** On the major works, it is one of those things that you find. As a leaseholder, there are these major projects that come along, whether it be a roof job or the external decoration of these blocks. Suddenly, you as a group are presented with exorbitant or very high costs for this. How do you think law could be changed to ensure leaseholders are not faced with those shock demands?

Amanda Gourlay: The reason we have this situation at the moment is that often leases do not provide, or buildings are not being run with, reserve funds. Particularly in the social arena, you have major works programmes that are undertaken, for example, under the Decent Homes initiative or something like that, so you have a really large project. There is no reserve fund held because right-to-buy leases, as I understand it, do not normally provide for a reserve fund to be operated. Therefore, the leaseholder finds themselves in a situation where they may have moved in three years ago and, perfectly legitimately, been told when they moved in, "There are no major works in the planning". Certainly, in the private sector you would find that might be the case. The works are carried out, and suddenly you find yourself with a £30,000 or £40,000 bill and there has been no provision for it.

It is perhaps understandable in those circumstances that people feel aggrieved: "I have only been here three years and people who lived here for 20 years before me have not contributed towards it". The way I was thinking about this before I came along was that it is almost like a sort of pass the parcel but in a bad way. Who is holding the parcel? Who has the lease at the time that the demand happens to be made?

In the social arena, I have tended to see local authorities say, "It is okay. Do not worry. We will take a charge against your property", or "You can have an interest-free loan", or a loan at a very low rate of interest. That does not take away from the fact that, plainly, one is still required, contractually, to pay a bill that is £30,000 or £40,000 and there is nothing one can do about it. The same thing applies in the private sector. It is just an incident of leases not having reserve funds in them and, even if they do, not always being operated. There is case law where we can see that the reserve fund may not have been collected in the way that was intended under the lease.

Q425 **Matt Western:** Is it not standard in those leases to have provisions set out so that you would have every five years, or every 10 years—those sorts of reparations?

Amanda Gourlay: No. Some of it relates to management. In order to operate a proper reserve fund, you need to set up some form of planned maintenance programme. You need to set up a capex plan. You need to sit and cost out these figures, so that, when you are demanding a figure in advance in a budget from a leaseholder, the leaseholder is not challenging that budgeted figure, saying, "This is complete pie in the sky. You have not justified this, however large a contribution it is to the reserve fund each year that I am here". It all comes back to the management of the property and looking at the longer-term goals. It all feeds together, does it not? You then have transparency, accountability. You have comfort in terms of the even spread of the service charge cost, as opposed to peaks and troughs, which simply happen to land on somebody's lap because unfortunately they are there at the time.

Q426 **Chair:** On the First-tier Tribunal, it is getting very expensive now and very difficult for an unrepresented leaseholder to go there. The Government are currently consulting on the idea of a housing court, which we have looked at before on the private sector side, with an inquiry. Could a simplified process through a housing court alleviate some of these problems?

Amanda Gourlay: Can I just say one thing? It is not just leaseholders who are unrepresented in the tribunal. It is also landlords and management companies, which have the same struggles. If you have a represented party against an unrepresented party, that is where the imbalance lies. That said, I will hand over to Giles. I am sorry for taking up the time.

Giles Peaker: Any proposals for a housing court seem to be still at a very early stage. The early mutterings were to effectively adopt the tribunal as a model, which would not resolve that particular problem.

Chair: It could change its name, perhaps.

Giles Peaker: No, quite. I think it would replicate some of these issues, in terms of inequality of arms, in terms of tenants as well as leaseholders struggling to obtain legal representation and so on. I do not know of—and I could well be wrong; we are still waiting for consultation to complete—any proposals that would significantly reform the way the First-tier Tribunal operates.

Q427 **Chair:** It is something we have to be careful about, that we do not get a housing court with a different name but no change to the process.

Giles Peaker: Quite, yes.

Q428 **Helen Hayes:** Is commonhold the answer to the problem of leasehold flats?

Guy Fetherstonhaugh: You know my views. Yes. Here we are. We have just been discussing the antagonism that comes with a long leasehold relationship. I suspect you will not get that in commonhold. It will not be

a bed of roses. When we wrote our book in chambers 14 years ago, whenever it was, we looked at the Commonwealth experience. That is a very well-established jurisprudence. We looked at the cases that had been generated by the strata title legislation. You get neighbours who are at war with each other; one does not want to pay for the reroofing of the block and everybody else does, so that sort of thing will happen, but nothing like what goes on in leasehold. Commonhold is not a panacea for absolutely everything, but if it is amended slightly—I do not think there is much wrong with it—and gains traction with the mortgage lenders, I think it will take off and be much better.

Amanda Gourlay: I would defer to Guy with his knowledge.

Q429 **Helen Hayes:** Has the Law Commission missed anything in its consultation?

Guy Fetherstonhaugh: No. At four hundred and whatever it is pages, it is a wonderful document.

Giles Peaker: I do not think you are going to get developers interested in commonhold unless there is a level playing field. That is, effectively, removing ground rents and enfranchisement costs, or lease extension costs, as an income stream.

Q430 **Helen Hayes:** Of the proposed thresholds for consent to conversion set out in the consultation document, which do you think is the most appropriate?

Guy Fetherstonhaugh: I have very mixed feelings about that. For commonhold to succeed, you have to make people want it. Making them have it is a really bad idea. I just do not think it is what the Government ought to be doing. That is that. I agree with what the Law Commission suggests, but I certainly do not think there ought to be compulsory conversion to commonhold. There will be some people who think leasehold is fab and who will not want to change. I do not think they should be ordered to, frankly.

Q431 **Helen Hayes:** In those circumstances, what is the best route through a situation where 50% of leaseholders want to convert, but 50% are resistant to that idea?

Guy Fetherstonhaugh: I would wait for the 50% to get up to 80%, and it might take 30 years for them to see the benefits of commonhold, but they will eventually.

Q432 **Helen Hayes:** In all your practice, you presumably encounter tenant-run management organisations. If your experience of that is anything like the experience of my constituents, you will have encountered TMOs that are excellent and TMOs that are the exact opposite of that. We have had evidence of criticisms of TMOs more widely. Do you get the impression that commonhold would face some of those challenges, in terms of the relative lottery in any given building as to whether the residents have the

range of skills, the compatibility of personalities, the knowledge of governance and all the things you need to run and manage a property successfully? I suppose the question is if the same risks apply.

Guy Fetherstonhaugh: It is hard to explain why commonhold would be any better than a TMO. The answer lies in commonhold having a real community of interest. Everybody is much more directly affected, whereas with TMOs, typically, you will get a block with an accountant, a surveyor, a solicitor, who is much more interested, and they spearhead the thing. It tends to be quite professionally led. They will want to do things that quite a lot of the existing leaseholders will find antithetical. They will want to improve the block, for example. That is usually a big bone of contention.

With commonhold, normally everybody is in on it right from the beginning. They all want the same thing. Some may not, but it is quite unlike the long leasehold relationship, where you are much more likely to get a conflict of interest.

Amanda Gourlay: I can speak from my experience of leasehold. I also deal with litigation, so when people are happy I do not hear about them. Thinking back over my cases for the last year or so, I have had disputes that involved residents' management companies. I have also had disputes between third-party landlords, whether they are corporate bodies or individuals. In all but one of the eight or so cases that I have dealt with residents' management companies, they appointed a professional managing agent. That would be a managing agent who was relatively well known. Some of them were ARMA members, for example. They already had put in place a professional managing agent to look after the building when there had been a collective enfranchisement, there was a tripartite lease, with a residents' management company, or the right to manage had been acquired.

The management was run by a managing agent and the RMC, the TMO or the landlord was directing the managing agent. Yes, there were disputes with tenant-run management organisations. I am sort of second guessing, which I know one should never do when one is giving evidence, that part of the question is whether a commonhold association would be able to run the building. Would there be enough interest in it? I have litigation that involves residents' management companies and landlords. One of the biggest cases I dealt with was a case where the landlord, who was a company, had appointed a managing agent that was not up to the job.

In my experience of litigation, it is more about the nature of the dispute—"Do I have to pay for the repainting of the windows? I do not think the gardening is being done properly"—than because every residents' management company does not have the resources, the wherewithal, the interest or the professionalism, whatever it is, to run a building.

Giles Peaker: I do not have anything to add.

Q433 **Mr Dhesi:** With your legal expertise, let us examine enfranchisement and the mis-selling of that. Our Select Committee has heard evidence of what sounds like blatant mis-selling, with developers telling purchasers they will be able to purchase the freehold later for a fixed price, and then that does not actually transpire. Might they have any existing legal or equitable remedy against the developer, or any subsequent freeholder?

Guy Fetherstonhaugh: In strictly legal terms, they may well have a contract. The difficulty is that it is oral. A contract to acquire an interest in land, which is what this would be, has to be in writing, et cetera. There are lots of requirements. They may have some sort of mere equity that has arisen as a result of what they were told and what they agreed to, and their actual occupation of the house or the flat they buy will protect that interest, such as it is, to bind the next landlord in line. I must say it is pretty flimsy. The law is very strict about requirements for transactions of interest in land. I would be quite surprised if an action based upon that succeeded.

Really, they should not be in that position to begin with. Their solicitor, who should be doing a proper job, will have told them, "You cannot rely upon this if it is oral. We need to get it properly documented". Perhaps the solicitor was not told, but I would find that fantastic, or perhaps the solicitor is not doing a proper job. That is where the first line of redress would be.

Amanda Gourlay: I have nothing to add to what Guy has said.

Giles Peaker: I do not think so.

Q434 **Mr Dhesi:** Do you think that some sort of new statutory remedy for mis-selling of leaseholds, perhaps funded by developers, would be workable?

Guy Fetherstonhaugh: It is another sticking plaster. You have plainly been told this happens a lot, for you to raise it as a question. I have not come across it, but then I would be unlikely to have done. I do not know how big a problem it is. If it is not that big a problem, legislation just to deal with that particular point would be a bit of a sledgehammer. There are existing remedies already.

Q435 **Mr Dhesi:** We have, as I said, a fair amount of evidence, in which they have highlighted that on numerous occasions. Do you think the Government should close the legal loopholes that allow developers to bypass the right of first refusal legislation, by passing the freehold and then selling it on to a subsidiary company?

Giles Peaker: Quite simply, yes.

Amanda Gourlay: One word.

Giles Peaker: Right of first refusal probably needs revisiting a bit anyway. The exclusion of leasehold houses from the right of first refusal,

which is how things currently stand, is the big problem. There are various other ways in which the right of first refusal can be avoided—I was tempted to say "evaded", but I will say "avoided"—which may also need attention. The simplest one is that the company owning the freehold effectively just transfers its shares to another company. It would be relatively simple to end the anomaly that right of first refusal does not apply to leasehold houses.

Guy Fetherstonhaugh: The Landlord and Tenant Act 1987 is routinely panned in court. It is probably the judges' least favourite piece of parliamentary drafting. The trouble with trying to fix bits of it is that ingenious developers, freehold reversion owners, will find another loophole. There is a big industry out there looking at this. You would be quite unlikely to find a solution that absolutely hits it on the head forever. There are other ways round. I am not sure it is worth the time, really. I would focus on getting commonhold sorted.

I sat on the commonhold consultative working group, which I think was chaired by somebody from the Ministry of Justice in those days. We were told then, in 2004, that it would take three years for legislation to fix the problems we had identified and that we would be there by now.

Q436 **Liz Twist:** The Law Commission is consulting on reform to leasehold enfranchisement. It has been suggested it has been set an impossible task, reducing premiums but providing freehold reversions with sufficient compensation. Does this run into the same human rights issues as would legislation to amend existing leases?

Amanda Gourlay: As far as I understand it, the Law Commission has been asked to provide proposals in relation to the premiums. That is where it is working, in terms of the amount of money that is payable. I have to say that, like Guy, I am not someone who does a lot of enfranchisement work, and I am not really in a position to comment on it from a practical perspective.

Giles Peaker: I am also a litigator and not an enfranchiser. My suspicion is that there would potentially be A1P1 challenges should the return to the freeholder change significantly on existing leases.

Q437 **Liz Twist:** That is the human rights legislation?

Giles Peaker: Yes.

Liz Twist: The A1P1, yes.

Giles Peaker: Yes, article 1, protocol 1. Sorry, we shorthand it. That said, in the end the legal mechanisms to do this would be entirely possible. It is a policy decision as to what is done and, really, who ends up paying for it.

Q438 **Liz Twist:** Are there no further comments? One suggestion has been to set the purchase price at five times or eight times the ground rent. Would

that be proportionate enough under the human rights legislation? Does anyone care to venture an opinion on that?

Giles Peaker: I do not think it would work, to be honest. We are already in the situation where you have a huge variation in ground rents from literally a peppercorn through to several hundred, and indeed in some instances several thousand pounds. Any valuation based on a multiplier of the ground rent then produces a huge disparity between leaseholders, simply on the happenstance of whatever the ground rent set in their lease was.

It also produces a huge disparity between different types of property. For instance, if you are a leaseholder in a block with terribly valuable airspace rights, where somebody can put up a couple of penthouses on the top and you can enfranchise for basically the same rate as somebody in a two-flat converted house, somebody is getting a huge windfall out of that. A set rate is not operable.

Guy Fetherstonhaugh: I completely agree with that. I have no particular researched basis for thinking this, apart from my own children. When people in the market go and buy a flat, they are buying bricks and mortar. They are not thinking, "This is 125 years with a £200 per year ground rent". That is lofty detail that they never get immersed in. I should think most people do not even read their lease. It is just complicated and that is what lawyers do. Saying it should be eight peppercorns, eight times £200 or whatever it is would be grotesquely unfair, potentially, because most people do not focus on the ground rent. That is just stuff in the lease, which is of no particular concern to them.

Q439 **Liz Twist:** Yet we have heard that, down the line, it is a huge concern to them. That is the evidence we have had. How do we move forward on this? Are there any suggestions for the Law Commission to look at?

Guy Fetherstonhaugh: I would start by saying peppercorns only for new leases. That would take a huge amount of heat out of the market. What you do about existing leases is either let them run into the ground or be more ambitious, but we talked about that.

Q440 **Liz Twist:** If statutory enfranchisement can be simplified, should non-statutory methods be barred or made subject to judicial approval to reduce exploitation? This is presumably where people agree between themselves.

Amanda Gourlay: There is a precedent for that in the Landlord and Tenant Act 1954 with business tenancies, where there has been a prevention of excluding business tenancy from the protection of the Act. I have tended to think that if I am advising a leaseholder—and I can think of one case where I was told by a leaseholder, "The landlord has offered to extend the lease outside the Act"—my response has been, "As a matter of instinct, if Parliament has seen fit to legislate to protect the consumer in this area, my inclination is to suggest that you go with the process that Parliament has suggested, rather than go with something

outside the Act". Whether or not it is a good idea to prohibit, my advice would generally be that there is a statutory process here, and it would be sensible to follow it.

Guy Fetherstonhaugh: I agree with that, but what if the transaction happens anyway? You have created an estate in land. What do you do with it? It is a prohibited estate in land. I am very wary about laying down the law in that way, because of the consequences.

Amanda Gourlay: The consequences tend to be visited on the consumer or the leaseholder, because it will be the consumer or the leaseholder who would end up with a potentially void lease. What would it be, a void lease, a voidable lease? What would you do with it? It would not necessarily be registerable either.

Guy Fetherstonhaugh: I agree with Amanda. Some of the most intractable problems under all the Rent Acts I remember were when premiums were banned. They were made unlawful. There were many cases where premiums had been charged, the flat in question had been sold on and a premium had been taken then. The question was whether the penalty should fall on the chaps three transactions down the line. It was great work for us because some of the problems were intractable, but I remember thinking, "What a stupid law to impose in the first place", given its obvious consequences, which would have been foreseeable at the time of drafting.

Liz Twist: Would you like to add anything to that?

Giles Peaker: I do not have anything to add to that.

Q441 **Liz Twist:** Okay, so there are no obvious solutions from the Law Commission for all those people trapped in leasehold properties who are finding it really difficult.

Giles Peaker: There are certainly no easy solutions.

Guy Fetherstonhaugh: No, but staunch the flow now by stopping ground rents for the future. That will help enormously.

Q442 **Chair:** I can see the problems about saying that something can only be done if it either follows the statutory method or is subject to judicial approval. There is a problem here, particularly with people in lower-value properties, who do not instinctively go to a lawyer. I have seen examples of this where the landlord says, "You can buy the freehold off me" and tries to charge an amount that is far in excess of what would be agreed through the statutory process. They almost try to bully the leaseholder into it; then they create very great difficulty, and will not respond to letters and will not do things, if the leaseholder starts to ask, "Is there a proper process to go through or is there not?" I wonder whether there should be more protection for people in that situation.

Guy Fetherstonhaugh: I agree with you, but it is very difficult protecting people against the consequences of their own lack of familiarity with the law. Say a transaction goes ahead, so the landlord bullies the tenant, or it might not even be bullying. It might be fortuitous for both of them.

Q443 **Chair:** They might be frustrating them.

Guy Fetherstonhaugh: Exactly, yes. It goes ahead, and then maybe some time in the future it is all discovered and it should not have happened. What do you do about it then? How do you unwind it? It might be 30 years away.

Q444 **Chair:** Thank you very much for coming to give evidence to the Committee this afternoon. It has been very helpful to us. Thank you.

Examination of Witness

Witness: Professor Nicholas Hopkins.

Q445 **Chair:** Thank you very much for coming to the Committee this afternoon. If you could say your name and the organisation you are representing, that would be helpful as a start.

Professor Hopkins: I am Professor Nick Hopkins. I am the law commissioner for England and Wales for property, family and trust law. I am the commissioner leading our work on enfranchisement and commonhold.

Q446 **Mr Dhesi:** Professor Hopkins, the Law Commission has recently described leasehold legislation as "lengthy, complex and confusing" and "inaccessible". It causes "conflict, uncertainty, costs and delay". Is it actually fit for purpose?

Professor Hopkins: Looking at the landscape of leasehold legislation, I would have to say it is not fit for purpose as it is. That view reflects what we have been told my stakeholders in response to, particularly, our consultation on our 13th Programme of Law Reform. What we say in our consultation paper is a fair summary of the concerns that have been raised with us.

These are not new concerns. They have been raised with us on previous occasions when we have consulted on our programme. But this time those concerns have become much louder. The need for reform has become much more urgent. When we consulted on our programme of law reform this time around and asked in that context whether residential leasehold was an area in need of reform, we received one of the biggest postbags that we had in that consultation, with people raising with us a very wide range of issues with the current state of the law. I would say the legislation we have that governs residential leasehold as it stands is not fit for its purpose.

Q447 **Mr Dhesi:** You are right to point out that these concerns have been laid out to you before. If we go back to 1965, the commission described landlord and tenant law as "unduly complicated" and "anachronistic". You said the whole system is in need of reform, not just quick sticking plasters. If we look at the Government's activities, they have issued, once again, a flurry of papers in the last year on a variety of leasehold issues. Do you think we are, once again, going out for sticking plasters rather than actually solving the problem?

Professor Hopkins: At the moment, there is a lot happening, both in what the Government are doing and in the work we are doing. I hope that is the start of a process that will lead to a holistic, wholesale review of residential leasehold law. There is a difficulty here, because residential leasehold is a vast area to fix all at once, looking just at the issues that were raised with us in our programme. People who have leasehold homes are experiencing the real difficulties with those leases. We have heard from leaseholders who say their lives are on hold. They cannot make fundamental decisions because they cannot sell their houses et cetera. There is a need for the law to be fixed to help those people now. In a sense, we have to balance the need to do something holistic with the need to provide real solutions as soon as we can for those who are affected by the law as it is.

As we look at any particular areas—we are looking at enfranchisement, for example—we are not simply tinkering at the edges of that law. We are conducting a root and branch review of that section of law, and it is the first time that enfranchisement has been looked at as a whole. We hope that what we are doing in each particular project itself is comprehensive. We hope that, as those bits of law are sorted out, as the reform is got right, as the policy is determined, we can then stand back and look comprehensively at how to make sure everything is working together as a whole. We have the ambition that the dots will be joined between the work we are doing and the work the Government are doing, and there will be that holistic review.

Q448 **Mr Dhesi:** The Law Commission recommended a comprehensive review, but I understand that your budget has been halved. With that mind, Professor, is there any sign of funding? Where do we go from here? If there is funding, how long do you think the comprehensive review is likely to take?

Professor Hopkins: We are very well resourced for the projects we are doing on residential leasehold at the moment, because the Ministry of Housing, Communities and Local Government identified those areas as Government priorities for reform, so it is funding us specifically to do that work. That reflects how we are increasingly working at the Law Commission, in that we are being provided by the Government with funding to do work that the Government see as a priority. Our core budget, the money we are given by the Government that is not allocated to a particular project, has decreased significantly in recent years.

The stage we are at is that we have the resources to do the leasehold and commonhold projects that are on our books. Unless we have resources to do further work and to do that comprehensive reform, that is not work we will be able to fund from our core budget.

Q449 **Matt Western:** Thank you for coming in, Professor. It seems that the Government have plans to ensure that in future there is some cap on ground rents for long leases. They want to stop the selling of long leases on houses. In terms of what support they can give existing leaseholders, or those on onerous ground rents, what do you think they can best do to help them? Is it enfranchisement?

Professor Hopkins: It is difficult, for reasons that other witnesses today have explained, to retrospectively rewrite the terms of leases. The word "onerous" is quite a difficult one in legal terms, because the law does not usually enable you to challenge a term on the basis that it is onerous. You can challenge terms because they are unfair, for example. "Unfair" and "onerous" do not always mean the same thing. We have not really had test cases identifying how far the current law can resolve the real difficulties, the real concerns people have with their current terms. It is a bit difficult to say at this stage, in a vacuum, what could be done to help people, because we do not really know what the current law is capable of doing and where those gaps are.

Enfranchisement enables you to extend you lease or buy your freehold. If you are extending your lease, your ground rent goes to a peppercorn. If you have a lease with an onerous ground rent, enfranchisement can help you to buy out that ground rent, but you are placed in a double difficulty. The mere fact your ground rent is onerous means that the cost of enfranchisement is going to be more, because the ground rent is one of the things taken into account in calculating how much you have to pay to enfranchise.

We have been asked to provide options to reduce the price payable on enfranchisement. If the Government adopt options that limit the extent to which ground rent is taken into account in calculating the price, enfranchisement will be able to help those with those onerous ground rents to turn them into a peppercorn. It is only going to help those who are able to enfranchise.

Q450 **Matt Western:** Looking at the notion of what is described as fleecehold, this is where leaseholders clearly will not be better off, because they might acquire the freehold but they are still subject to high permission fees when they want to do major extension works or changes to the property. Is your planned work on consumer protection law going to address this, or do you think you should be reviewing that as a separate project? When might you be able to start looking at consumer protection?

Professor Hopkins: I will divide that and answer it in two ways. There are possibly two separate questions. First, fleecehold is a term that means different things to different people. Essentially, it is used to

describe a situation where somebody has what is supposedly a freehold, but that freehold contains terms that are either onerous or would more commonly be found in a lease than a freehold, including the permission fees you described. Sometimes, those terms are in something that is bought as a freehold from the outset. The work we are doing at the moment on enfranchisement is not going to help people there, because there is nothing to enfranchise.

Where the terms are in the lease and enfranchisement is then used to buy the freehold, in our enfranchisement project we look at how we can ensure that no new onerous terms are introduced and the terms on which a freehold should be acquired. To a very limited extent, there was work in our enfranchisement consultation paper that helps with the fleecehold problem, in some circumstances. That is the first part of my answer.

In terms of the unfair terms project we have in our programme, I need to explain that the project we envisage in the programme is quite a narrow project. It builds on work we did on event fees, which has been completed. It is aimed at addressing the fact that, at the moment, unfair terms legislation can only, generally, be invoked by the person who buys a flat new, the original leaseholder. If that person then sells the flat to a new buyer, it is thought that new buyer probably cannot challenge terms as being unfair, or, if they could, they would have to argue the terms were unfair at the point when the original buyer entered into the lease, not when they bought it.

Our unfair terms project is trying to solve those problems so that terms could be challenged as being unfair when a lease is bought by somebody who is not the original buyer. It is actually a very limited project, to that extent. It would not necessarily address the fleecehold concerns, unless the argument about the terms in the lease was made by the original buyer.

Since we published our 13th programme, there has been a Court of Appeal decision suggesting that, if the buyer is legally advised, and usually people buying flats will be, it will not be possible for them to argue that the term is unfair, because there is not an imbalance in their power there. Before we started to look at the unfair terms project, we would want to do a bit of a feasibility study to see, in the light of what has happened since we published our programme, how far it is in fact able to help people, including how far it might address those fleecehold concerns.

Q451 **Chair:** Where freeholders are freeholders from day one, but still have not just onerous terms for permissions but also service charges, either through an organisation set up by the developer or often sold on to a third party, they have very few rights over those. Is that an issue you are looking at? Sometimes fleecehold is referred to in this context as well.

Professor Hopkins: It is not part of our current work. If we are talking about terms included in the freehold at the time a freehold is purchased,

that is a very different project to what we are looking at on residential leasehold and commonhold. It does not really fall within what we are doing.

Q452 **Chair:** Right, so you may be aware of the problem but it is not one you are looking at.

Professor Hopkins: It is not something we have been asked to look at yet. If there is a desire on the part of the Government for that issue to be considered, we would be very happy to talk to the Minister about that.

Q453 **Helen Hayes:** You recently published a 500-page consultation paper on enfranchisement. How did you make sure that was widely known to leaseholders and there was wide participation in something that is so complex and lengthy?

Professor Hopkins: We are conscious that we published a very long consultation paper. We wish it could have been shorter. It could not be, because we are dealing with 50 statutes, 450 pages of legislation. We cannot set aside that complexity, because to come up with some robust proposals we have to show that we understand the law. We have to show that we have engaged with what the law currently says. We were fully aware that we were publishing a long consultation paper on an area that ordinary leaseholders who are not lawyers were going to be very interested in.

We supplemented the consultation paper by publishing a short summary paper alongside it. We also published some two-side pieces of paper that outlined, at a snapshot, what our proposals meant if you are the leaseholder of a house, the leaseholder of a flat or a freeholder. We then organised consultation events specifically directed at leaseholders. We told leaseholders in all our communications, if they wanted to tell us about only one thing in our consultation paper, we wanted to hear from them. We did a lot to communicate what we were doing to the leaseholders, who we knew were particularly interested in the work.

We are still processing them, but we have had over 1,000 responses to the consultation paper. We have had over 1500 responses to a survey we put online for leaseholders to complete. I hope we have had a really good input on our provisional proposals by leaseholders.

Q454 **Helen Hayes:** It has been suggested to us that commonhold legislation has fairly fundamental flaws. Your consultation paper covers many issues, in particular making it easier to set up and allowing for sections of different types of unit with different rights and obligations. Why is commonhold not already more prevalent and why is your approach better than the approach currently taken in the existing legislation?

Professor Hopkins: We think there are a number of reasons that commonhold has not taken off. Some of those reasons have been addressed this afternoon. There are no incentives for developers. If it is a choice between selling commonhold with no income streams and selling

leasehold, which has them, there is an incentive for developers to build as leasehold. We think there are significant difficulties with the commonhold law we have, as it stands.

Looking back at that law, one thing that perhaps strikes you is that it was drawn up with fairly modest developments in mind, possibly single-use residential type developments, or single-use commercial developments. It was not designed for the very complex mixed-use developments that we see happening today. It assumes a complete community of interest throughout all owners of a commonhold unit within the same commonhold, and that is not necessarily going to be the case. To take a very simple example, if you have a hotel or a shop with residential flats built above it, the interests of the residential owners and the commercial owners are not necessarily always going to be the same.

At the moment in that situation, the residential owners could probably outvote the commercial owner on anything the commercial owner wanted to do. If, for example, the commercial owner wanted enhanced security, the residential owners would be asked to vote as to whether that security was put in place, knowing that they would have to fund it but it was not in their interests; it was only in the commercial owner's interest. We do not think the commonhold legislation we have is capable of dealing with the sort of mixed-use developments we see today.

The idea of sections is to enable that sort of development to be managed as a whole, but also to enable the residents to self-manage their bit and the commercial owner to self-manage their bit. If all that is in issue is additional security for commercial premises, the commercial unit owner or owners could agree to do that and would themselves bear the cost. Where there is something that affects the entire block, for example the roof or work on the sides of the building, that would be managed by a single body.

Q455 **Helen Hayes:** Are you in agreement with Giles Peaker, who spoke earlier about the need for ground rent and so forth to be abolished if commonhold is to take off? That financial incentive for developers needs to be taken out of the picture in order to enable a better form of tenure to exist.

Professor Hopkins: I would certainly say one of the reasons commonhold has not taken off at the moment is that those financial incentives are there for the developer. Whether you tackle that by taking away those incentives, by providing incentives to developers to build commonholds in other ways, or a combination of both, is not really a question for us at the Law Commission to answer.

Q456 **Helen Hayes:** Once commonhold is sorted out and reformed to make it fit for purpose, is there then a case for abolishing all new long leases on homes?

Professor Hopkins: I would certainly say that, once we have commonhold in a way that works for the needs we have for development today, we do not need long residential leases. Commonhold solves the two underlying concerns that we hear about leases. Those are, first, that they are wasting assets and, secondly, that you have that relationship of opposition between the freeholder and leaseholder. Once commonhold is there and it is working, if you want a system of ownership that removes those underlying concerns with leasehold, you can use commonhold.

Q457 **Helen Hayes:** Aside from your existing projects on leasehold enfranchisement, commonhold and right to manage, what would be your top priorities for leasehold reform?

Professor Hopkins: That is very difficult, because we had so many issues raised with us in the 13th programme. Before I tried to pick and choose those, I would want to go back and look again at the consultation responses to see which of them had the potential to help the greatest number of leaseholders and to make the most fundamental changes. I would not like to do that off the top of my head.

Q458 **Bob Blackman:** I do not know if you have followed the evidence we have received in these inquiries, but one of the issues we have had from leaseholders is that their leasehold has been sold out from under them by the developer, to either a third-party company or a wholly owned subsidiary, and then sold on, literally as blocks. In fact, some developers have said that was their historical practice. Some still do it, outrageously, without the leaseholder having the opportunity to buy the freehold. That exploits a current loophole in legislation on the right of first refusal. I think in evidence you have said that is of limited practical importance. Could you say whether this is worth preserving, or should it be fundamentally reformed?

Professor Hopkins: We have had competing views put to us by consultees or by stakeholders about the right of first refusal. Some say it is too limited and needs to be expanded, and some say it is too limited and therefore should be abolished. Where we are with it at the moment is thinking that the right of first refusal is a very defensive mechanism. It puts control with the landlord, with the freeholder, to say to the leaseholder, when the freeholder is going to sell, "You have the opportunity to buy it".

If you look at what we are doing with enfranchisement, we have provisionally proposed taking away the current requirement that means leaseholders have to wait two years before they exercise the right. There is a two-year period when they cannot buy the freehold. We are looking at options to reduce the cost. If those are followed through, there may be an argument for saying that the leaseholder can enfranchise at any time, and the cost of doing so has been limited. That cost is statutory and it would not matter whether that freehold is owned by the original developer or by a third party to whom it has been sold.

I would want to look at our final recommendations on enfranchisement, look at which of the options the Government go with, in terms of reducing price, and then go back to stakeholders and consult, to see whether there is still a need to reform the right of first refusal, or whether, with the reforms of enfranchisement as such, it is not needed any more, because you can exercise your enfranchisement right and the price is determined by statute regardless of who happens to own the freehold at that time.

Q459 **Bob Blackman:** One issue that has been raised by many leaseholders is that they did not understand the position at the time they bought their leasehold. Do you think any changes should be made in the information that legally should be supplied with this, particularly to first time buyers, who are not used to this, so they understand exactly what position they are in before they proceed with the purchase and know what their rights will be in the future?

Professor Hopkins: One of the frustrations of residential leasehold law at the moment is that it is an area of law that affects people on a very fundamental matter, which is how they own their home. That is something that should be accessible. It should be capable of being understood, as far as possible. People should be able to buy their homes safely and confidently. Part of the solution to that is simplifying the law as far as we can, and we have to acknowledge we are sometimes dealing with issues that are inherently quite complex, but we simplify the law as far as we can. Then, looking at the information provided to people when they buy, and how that information is presented, is also a very useful exercise.

Q460 **Bob Blackman:** Say a wholesale development is done of a series of blocks of flats, and then those are sold, lock, stock and barrel, as freeholds to another company, which then manages them. Is there any advantage in law to that happening, rather than having, effectively, properties sporadically being bought by individuals, either as a block completely, in commonhold, or alternatively some other arrangement, so at least the ownership is kept together for a particular purpose? Is there any advantage, legally, of that?

Professor Hopkins: If I have understood you correctly, you mean the advantage of having an external landlord, a party that owns the freehold of that particular block.

Bob Blackman: Yes, or an estate. You could have an estate of houses where this might be the case.

Professor Hopkins: If you look around the world, the rest of the world manages those sorts of developments without needing that external third party there. Part of the difficulty with having that third party there is that it immediately sets up that relationship of opposition. We have heard from stakeholders who think there is an advantage in having that

professional management, in having that stewardship of the block or of the estate.

We have been very clear, in terms of commonhold, that it requires a shift in thinking, not only on the part of freeholders but on the part of people who become commonholders. They have to be willing to take charge and to take over the stewardship of that block or of that estate. That happens elsewhere in the world. Of course, taking over that stewardship, particularly in large or complex developments, may mean essentially choosing who to appoint as your managing agent, so that you are in control of how your own block or your own estate is being managed.

Q461 **Chair:** Do you think this is as much about a cultural change as a legal change?

Professor Hopkins: Yes, the two go hand in hand. Yes, it is that change in legal relationship, but that requires a change in culture, a change in thinking about what it means to own a flat.

Q462 **Chair:** In terms of something that could probably be done more immediately, you seem to have one or two reports around that are still gathering dust on your shelves years after they have been completed. You must get very frustrated with this. One of them was about forfeiture, where, I think in 2006, you recommended changes that could be brought in. How frustrated are you that nothing happens to these generally well-received reports?

Professor Hopkins: We would certainly like to see our forfeiture recommendations taken up by the Government and implemented. It is probably fair to say, given the passage of time, that those recommendations would need to be looked at, not least because the draft Bill that we provided was written on the basis of other things in law that have since changed. It would need a bit of updating, but we would certainly like to see those recommendations taken up and acted on.

Q463 **Chair:** But the principle of the recommendations—

Professor Hopkins: Yes, that fundamental principle of avoiding the draconian result, whereby the landlord, through forfeiture, gets the windfall of all the money represented by that lease, is entirely unchanged from our recommendations.

Q464 **Chair:** This can be used as a threat to stop the leaseholder challenging unfair service charges, as they see it, or whatever.

Professor Hopkins: Yes.

Chair: Professor Hopkins, thank you very much indeed for coming to give evidence to the Committee this afternoon.