

A tale of two systems

Time for our current systems of holding shared property to be put on a proper footing?

As the old joke has it, when asked for directions to a particular place, the countryman replies, "Well, I wouldn't be starting from here". So too with methods of holding long-term interests in blocks of flats and other properties with shared common parts.

Let us suppose an event leading to selective amnesia, with the result that no-one has any idea how to hold such property, although everyone is generally aware of the rights and responsibilities (to maintain, insure, access, alienate and use properly) that need to be catered for. The government commissions two law students to compete to invent a cogent system for dealing with the problem.

System A

The first law student devises a system with the following elements. Each building has an overall owner ("L"). L sells a contractual right to occupy parts of the building for limited terms of years to people ("T1", "T2", etc). The contracts are long and complex, and may all be different. Typically, they will require all Ts to pay L a small sum each year, in addition to the premium on sale, and to pay L for maintaining and insuring the building. L will seek to make a profit on those services, and may quite lawfully reap a secret profit by arranging block policies and discounts which it does not pass on to Ts. L may also try to make it difficult for Ts to assign their properties. L will reserve the right to terminate the contracts (and thus take over T's property) if T is in breach – but Ts have no right to L's property if L is in breach. At the end of their contracts, Ts will have to purchase a fresh right to continue in occupation. Essentially, L's interest in the building is entirely financial: the reason for its ownership is to make money out of Ts.

The law student responsible for devising this first system knows that it will be open to abuse as a result of the conflict of interest between the positions of L and Ts – but he is sure that Parliament will provide an answer to that, in the shape of a series of laws of bewildering complexity that do nothing to resolve the conflict, make life difficult and expensive for all concerned, and profit only the lawyers and tribunals who administer the frequent disputes between L and Ts.

System B

The second law student devises a system with the following elements. Each unit of accommodation in the property is sold

VIEW FROM THE BAR

Guy Fetherstonhaugh QC



outright – in perpetuity – to a series of unit holders ("U"), who collectively also own a share, through an association ("A") of the common parts in the property. The rights and obligations between A and Us are regulated through a simple document, the terms of which are standardised, with additional clauses being added as necessary on a bespoke basis. A looks after the maintenance and insurance of the property, and Us contribute their requisite proportion. Since A is composed entirely and only of Us, there is less potential for conflict – and disputes are ironed out early through a cooperative resolution system.

The assessment

The government assessor gives two out of 10 to the first student. The system would work, but inefficiently, at the cost of deteriorating relationships between the holders of the various interests in the property, extensive and expensive administration, and a waste of parliamentary time in devising legislative fixers for the many problems that emerge.

The government assessor gives nine out of 10 to the second student. Her proposal is greatly admired – but she drops her one mark because she has not thought of a way to deal with certain problems such as insolvency of the association, shared ownership and dispute resolution.

The decision made is that the first system should be rejected, and the second should be accepted, with a recommendation that urgent steps be taken to resolve the few problems identified.

Memory regained

At this point, everyone regains their memories, and finds that, weirdly, system A – leasehold – is the property-owning vehicle of choice; while the far superior system B – commonhold – is available, but used by only a handful of people (about 150, at the last count). People buying flats

purchase long leases, because their solicitors are too cautious to recommend commonhold, which has been on the statute book for 12 years, but has not been adopted by the domestic market with any enthusiasm (although it is widely used overseas). If their clients are sophisticated enough to appreciate the defects with leasehold, the solicitors mention the possibility of enfranchisement or the right to manage, but counsel their clients that these are not perfect solutions.

Having gone to the trouble of commissioning the investigation, however, the government assessor is reluctant to allow the status quo to continue. All that is needed is for the second law student to craft legislative solutions to the problems that have been identified with commonhold (and there is a large measure of agreement as to what they are).

The government's attention to this issue over the last few years has been disappointing. In 2005, in answer to a question from the indefatigable Baroness Gardner of Parkes, the parliamentary under-secretary of state at the Ministry of Justice (which, curiously, rather than the Department for Communities and Local Government, supervises commonhold – and herein may lie a substantial part of the problem) said:

"The government are absolutely committed to commonhold. We shall investigate why progress is so slow and report back to the House early in the new year".

No such report was ever produced. A consultation was instead promised "to improve take-up of what... is a desirable option". That did not happen either.

An all-party meeting on commonhold organised by LKP/CARLEX (led by Martin Boyd) took place at Portcullis House last month, with a view to ascertaining why the market rejected commonhold, and what changes would be needed if the government were to consider updating or introducing relevant legislation. Those who spoke were largely dismissive of leasehold and supportive of commonhold, but alive to the difficulties of reawakening interest in this alternative system.

Those of us who believe commonhold is indeed "a very desirable option" will continue to press for its improvement and widescale implementation.

Guy Fetherstonhaugh QC is a barrister at Falcon Chambers

CLIMB ON THE BANDWAGON

With more and more members of both houses of parliament taking a closer interest in leasehold reform than ever before, something of a bandwagon is building up in support of fundamental legislative changes that will help leaseholders. And when a bandwagon like this arrives, the best thing to do is to climb on it.

There is growing support to find ways of promoting commonhold tenure as an effective alternative to leasehold. Carlex and the Leasehold Knowledge Partnership recently organised a meeting at the House of Commons where detailed proposals were presented by leading lawyers to MPs and members of the House of Lords who were present. The meeting brought together all the principal groups with an interest in the leasehold system. Nigel Wilkins, the chair of CARL, was present and offered his full support for radical reform.

Encourage your own MP to get involved in this venture, as well as any members of the House of Lords of your acquaintance. When you write to them, send copies of CARL's latest newsletters. There is now less than a year to go before the next general election, and up to five million votes could depend on any commitments that politicians make to leaseholders.

On the other hand, perhaps we don't have to wait until the next general election for things to happen. We now have a 'zombie' parliament, with MPs doing just a three-day week – if that. This should give them plenty of time to address our concerns, and pass legislation that would help.

Abolishing forfeiture could be done and dusted within the hour. This move would limit the scope for landlords and managing agents to defraud leaseholders over service charges, since forfeiture enables them to take considerably more out of leaseholders' pockets than is actually owed. The next step – that of banning developers from selling new homes on leasehold tenure – could be handled in the course of just an afternoon.

Even after this had been achieved, parliament would still have enough time to go for the 'full monty'. It could scrap the costly and intimidating property tribunal

system, which is strongly biased against leaseholders, and also change the valuation rules so that leaseholders can acquire their freeholds at a price reflecting the respective contributions of the leaseholders and the freeholders to the construction and maintenance of the premises. The freeholder contributes nothing at all, while the leaseholders pay for everything.

The "industry" makes vast and unjustified profits out of leaseholders. By contrast most leaseholders get ripped off, with some having their lives ruined by it. One firm of managing agents, BlocNet, estimates that leaseholders are overcharged to the tune of £700 million a year – and still counting.

Towards the end of last year – in a dramatic speech recorded on the Calex website – Sir Peter Bottomley MP called for criminal prosecutions against those in the industry responsible for cheating leaseholders. Sadly, once again the police and local authorities demonstrated their usual complacency in dealing with leasehold fraud and abuse by failing to take action.

The press is taking an increasing interest in leasehold reform. The Sunday Times, the Mail on Sunday and the Independent are all looking for your stories.

Some recent prosecutions for property fraud could not proceed because barristers are unwilling to represent the defendants at current legal aid pay rates. Yet in leasehold valuation tribunals up and down the land, leaseholders were denied access to lawyers because legal aid is not available to them at all. While leaseholders are being treated as worse than criminals, landlords on the other hand can usually recover their costs from the leaseholders.

They come like robbers in the night, when you are tucked up safe in bed. Your doors and windows are shut tight, but still they enter and take your money, your security, even your home. Exposed to the evil but seductive attractions of monetising the few square metres of land your home sits on, they operate in a web of greed that leads to deceit.

CMA PROPERTY MANAGEMENT STUDY

CARL's verdict: tear it up and start again

The Competition and Markets Authority (previously the Office of Fair Trading) has produced a feeble and ill-informed report on residential property management proposing few changes to the present regime. Leaseholders' suspicions have been raised by the fact that the Association of Residential Managing Agents has chosen to welcome the report.

The report fails to recognise that many leaseholders experience costly and life damaging experiences at the hands of substandard and corrupt landlords and managing agents. Dealing with this pernicious problem requires the authorities to prosecute the offenders – as Sir Peter Bottomley MP has already proposed – and for all managing agents (and landlords) to be forced to join the Housing Ombudsman scheme, which would supersede the intimidating and costly tribunal system.

The CMA's view that the existing "checks and balances" work well is completely laughable. Leaseholders often face abusive and intimidating behaviour, and many have little choice but to pay service charge demands that they know are excessive and/or fraudulent. Taking a case to a tribunal is costly both in money and effort – and requires advanced legal knowledge. In any case the tribunals are biased since

their membership is dominated by managing agents.

The CMA chose not to meet with CARL during its preliminary work, despite our fifteen years of experience and campaigning on this very issue. Instead the CMA preferred to spend its time with representatives of the "industry". If anyone is looking for an example of regulatory capture by an industry, then this is it.

The poor quality of the work conducted in this market study – alarming in view of the high powered economists that it employs – raises grave doubts about whether the CMA has the necessary competence to undertake such market studies in the future. The survey techniques used by the CMA are seriously flawed since it had surveyed leaseholders whom it acknowledged would have been completely unaware how they were being ripped off over service charges.

Any competent regulator would have imposed severe penalties against rogue landlords and managing agents a long, long time ago – and ordered substantial compensation payments to be paid to leaseholders. In the absence of such firm action by the authorities the abuses found in the sector have – hardly surprisingly – got progressively worse.

AgeUK (www.ageuk.org.uk) prepared an excellent and hard-hitting response to the CMA's report, as have our friends in Carlex (www.carlex.org.uk).

Letter by Nigel Wilkins reprinted from the 'Estates Gazette'.

Dear Sir

Although the Office of Fair Trading's announcement that it is to conduct an enquiry into the residential leasehold sector represents a step in the right direction, the horrendous problems faced by the country's five million leaseholders are already well known.

Legislative changes to help leaseholders are needed as matter of urgency.

Leasehold tenure now hardly exists outside of England and Wales, and it is well beyond the time that it was given a decent burial. Not only does it enable unscrupulous landlords and managing agents to exploit leaseholders over service charges and repairs, it also means that leasehold homes have a diminishing value as the length of the lease shortens.

Developers should no longer be permitted to build leasehold homes, and should instead be required to sell all new homes under different forms of tenure that give purchasers full ownership rights in perpetuity. We already have commonhold tenure on the statute books available for blocks of flats, while the development of cooperative ownership offers a further possibility.

Existing leaseholders should be able to transfer to commonhold or cooperative tenure at a fair price that reflects the fact that it is they who have paid in full for the land, the construction of the property, as well as its repair and maintenance. By contrast the landlord investors who own blocks of flats have contributed absolutely nothing to this process.

Finally the right of landlords to forfeit leases should be ended forthwith. This process enables landlords to confiscate the homes of leaseholders for relatively minor infringements of the lease. This is far more draconian than repossession, since the landlord is entitled to recover far more than they are actually owed by the leaseholder.

Nigel Wilkins

Chair, CARL

RENEW YOUR MEMBERSHIP

We need you more than ever before. It is vital that you join us now whilst our campaign is gaining the attention of more and more politicians, journalists and others who influence public opinion. Please send the enclosed membership form, together with your cheque, to the address shown on the form. If there is no form enclosed, this means that you are already fully paid up.

CARL ANNUAL CONFERENCE

The latest CARL annual conference proved to be a great success. We were very pleased to have as our principal speaker Cllr Ron Woodley from Southend-on-Sea. He is an Independent member of the local council, and has led a successful battle lasting more than eight years on the Burges Estate in Southend. This is a large estate of leasehold homes where the landlord, Thorpe Estates, charged fees of £30-50,000 to grant permission for leaseholders to make simple alterations to their homes. The leaseholders have now managed to break free from this tyranny.

Other speakers at the conference were Renuka Reins, who has produced a short documentary ('Not Fit for Purpose – Leasehold Valuation Tribunal') about the inadequacies of the property tribunal, and Lynn Zilka who campaigns for those living in the social housing sector.

Renuka's film illustrates that, instead of helping to solve relatively simple disputes, the leasehold valuation tribunal has in all too many cases ended up making matters far worse. Instead of providing low cost dispute resolution, as promised, the tribunal has become associated with unreasonable and excessive charges and legal fees.

Lynn highlighted the fact that the "cap" being placed on charges for major works programmes in social sector housing in practice only applies in very limited circumstances. At the same time leaseholders in the sector do not have the other rights that those in the private sector had available. She also commented on the obstacles that leaseholders faced when dealing with the leasehold valuation tribunal.

Despite their determined efforts, Julian Shersby and Harry Spillman failed to disrupt the proceedings. Neither are current paid up members of CARL, and such behaviour will not be tolerated again.

COUNCILS CRITICISE PALTRY FINES

The Local Government Association has called for an urgent overhaul of the system for prosecuting criminal landlords. And not before time we hear you say! The LGA says that the fines imposed on rogue landlords are too small, and represent a fraction of the profits to made from letting sub-standard accommodation.

The same is true in the case of landlords in the leasehold sector. The problem here is not just the minimal level of the fines imposed; it is also the reluctance of most local authorities to take breaches of landlord and tenant legislation seriously enough to prosecute through the courts. Another problem is that local authorities are landlords themselves and can hardly prosecute themselves when they break the law – not an infrequent occurrence. In addition to imposing bigger fines, there should be a national and independent prosecuting authority to pursue the many criminal landlords who operate uninterrupted across the country.

CALL TO ACTION

Once again we would encourage you to write to your MPs about the issues that you face with your landlords and managing agents. Press them to seek an end to forfeiture – a nasty weapon used by landlord bullies – and put forward any other reforms you feel are needed. Go to their surgeries and raise the issues that concern you.

A number of national newspapers are supporting the campaign against leasehold – and we also encourage you to tell them your stories. These are the email contact details:

money@sunday-times.co.uk

j.knight@independent.co.uk

jeff.prestridge@mailonsunday.co.uk