BY EMAIL AND POST

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Introduction

The Leasehold Forum is an established organisation which facilitates and promotes discussion among solicitors and chartered surveyors involved in the work of Leasehold Enfranchisement. Members of the Forum have serious concerns in relation to the Law Commissions proposals, being directly affected by many of the proposed changes.

The purpose of this letter is to provide the Law Commission with the Leasehold Forums response to those questions of greatest concern to the valuer members of the Forum. The letter has been circulated among all Leasehold Forum members for the purpose of establishing a broad consensus among the Forum in respect of this response.

The Forum is keen to embrace changes to the current law which will make the enfranchisement process, easier, quicker and cheaper for all parties involved. It is felt however that the impetus for reform has arisen out of the recent mis-selling scandal of new residential properties on leases subject to escalating ground rents. This was obviously something that needed to be stamped out and the Forum welcomes the restriction on selling new properties on leases and abolishing ground rents. The scandal however leaves the hangover of how to remedy the problem of escalating rents which are unaffordable for many leaseholders and can render their interest unsaleable. Forum members believe that leaseholders in such situations can be helped by reducing the premium payable on enfranchisement. This can be achieved by new legislation which provides for the valuer to disregard ground rent rises after a statutory imposed period of years (maximum 50 years but possibly less).

The Forum is otherwise less convinced that the existing system is in need of such major reform as suggested by the proposals contained in the consultation paper. It is felt that the Law Commission have placed undue emphasis on a few high value and high profile Tribunal cases in concluding that such radical reform is required. The general experience of the enfranchisement process by members of the Forum is that leaseholders claims are rarely taken to the Tribunal and, particularly outside central London, claims involve relatively modest premium payments which are settled quickly and at a reasonable cost. In the main the existing system has been working efficiently especially since the leasehold reform legalisation extended rights to leaseholders of flats some 25 years ago. The current role of the valuer is essential in properly assessing the correct compensation and negotiating a timely settlement on behalf of both leaseholders and landlords. This valuable skill, exercised with due care and responsibility is definitely not capable of being performed by an online calculator.

That said the Forum recognises that there is scope for sensible reform to remove some of the anomalies that have arisen out of some sections of the current legislation being up to 50 years old.

The focus of this response is on those chapters of the Consultation Paper affecting the valuers among the Forum being:-

Chapter 13 - Costs

Chapter 15 - Valuation (options for reform), and

Chapter 16 - Intermediate and other leasehold interests.

The questions contained in each chapter are taken in turn and set out under the Chapter headings below.

As regard to the remaining chapters this response is based on the consultation paper summary. In this regard the views of the Forum have been canvassed and the Forum is broadly in agreement to the following proposals:-

1. One single regime for houses and flats, reducing complexity and costs.

2. Prescribed forms for making and responding to any enfranchisement claim, making mistakes less likely to occur.

3. Limiting challenges to notices and removing deemed withdrawal, preventing unnecessary costs and landlords taking advantage of leaseholders mistakes.

4. In cases of missing landlords, leaseholders ability to apply to the Tribunal so the claim can continue and be finalised, saving costs.

5. The ability for both leaseholders and landlords to argue terms for a freehold transfer or lease extension to be restricted.

6. All disputes to be determined by the Tribunal and removal of the jurisdiction of the county court.

7. Removal of the two year minimum period of lease ownership before a leaseholder of a flat can bring a claim.

8. A new right to participate in an earlier collective freehold acquisition.

9. Leaseholders of houses able to extend their lease for a longer period at a nominal rent, with no limit on number of extensions.

10. Right for all leaseholders on an estate (whether they own a flat or a house) to join together to acquire the freehold of the whole estate.

11. A single procedure to apply to any enfranchisement claim, reducing complexity, confusion and costs.

12. Limiting the types of challenges to Notices that can be made.

13. 25% commercial use limit to apply to all freehold acquisition claims allowing landlords to retain buildings with substantial commercial use.

14. The terms to be determined by the Tribunal in cases where the landlord has failed to serve a valid counter notice on the leaseholder of a flat.

Chapter 13: Costs

By way of introduction the consultation paper provides the analogy of costs for buying the freehold or extending a lease with house or flat sales negotiated in the market. It is pointed out that the majority of residential house or flat sales are negotiated on the basis that each party will pay their own costs. However, this analogy is flawed since the consideration under a house or flat sale is usually for hundreds of thousands, if not millions of pounds. Freehold or lease extension claims are often in the thousands of pounds and at most in the tens of thousands of pounds. The costs in the market transaction for the seller are therefore not hugely significant in the context of the price negotiated. Focusing on valuation costs, these do not arise for the seller as the price is determined by the market. However, in the case of enfranchisement the sale of the landlord's interest is not a market transaction and therefore a valuation is required.

Consultation Question 98 – *We invite the views of consultees as to whether leaseholders should be required to make any contribution to their landlord's non-litigation costs.*

The current regime requires leaseholders to pay the landlords reasonable non-litigation costs. From the valuers perspective this covers the landlord's costs for a valuer to provide a valuation of the premium for an extension or the price for enfranchisement in order that he may respond with the appropriate figures to insert in the counter notice. To carry out the valuation the valuer would in most cases be required to inspect the property, not only for the purpose of the valuation, but also to check whether or not the property physically complies with the statutory requirements for enfranchisement.

If the landlord were unable to recover the cost of this valuation (provided that it is reasonable) the position for the leaseholder can potentially be disastrous. With the legislation as it stands landlords are encouraged to engage the services of a professional valuer at an early stage in the process, mindful that for the cost to be recoverable the valuation must be carried out prior to the deadline for serving the counter notice. In a situation where the landlord is unable to recover his expenditure there is no encouragement for him to engage the services of a professional valuer and instead he may simply respond to the tenants claim with inflated figures in the counter notice. This reduces the prospect of a swift agreement of the premium following exchange of notices which currently occurs in many cases under the present system. Potentially many more disputes could arise over the premium with landlords possibly only instructing a valuer at the stage where the matter is referred to a Tribunal, at which point he is responsible for his own valuation costs even under the current system. Since the leaseholder would be required to make the application

to the Tribunal and instruct his representatives to deal with the proceedings this places a higher burden for costs on the leaseholder than simply meeting the cost of the landlords initial valuation expense. It also places a higher burden on the Tribunal service and a higher burden on the taxpayer at large who otherwise has no interest or anything to gain from the whole process.

The Consultation paper looks at a number of proposals to reduce costs including fixed costs, capped costs, a combination of both or related to the price paid for the interest. These ideas are considered in response to consultation question 99 as set out below, and relate to valuation costs only.

Consultation Question 99 – *13.89 We invite the views of consultees as to how any contribution that is to be made by leaseholders to their landlord's non-litigation costs should be calculated. Should the contribution be based on:*

(1) Fixed costs;

(2) Capped costs;

(3) Fixed Costs subject to a cap on the total costs payable;

(4) The price paid for the interest in the land acquired by the leaseholder;

(5) The landlords response to the Claim Notice, and/or whether the landlord succeeds in relation to any point raised in his or her Response Notice;

(6) Fewer categories of recoverable costs than currently set out in the 1967 and 1993 Acts;

(7) The same categories of recoverable costs set out in the Acts but with a reformed assessment procedure: or

(8) Wider categories of recoverable costs than currently set out in the Acts?

(1) The fixed costs option appears to be an extremely blunt instrument taking account that the interests under valuation can vary so considerably. A fixed cost could not possibly provide for the varying degree of work required in respect of each claim. A fixed price, at least for the valuation, would result in a cost saving for some leaseholders but in other cases an increased burden.

(2) Leaseholders should make a contribution to their landlords' non-litigation costs in so far of at least the cost of carrying out the required valuation. However the fee must be reasonable and properly relate only to the work undertaken, the time spent and the hourly rate charged. Capping the cost can have the effect of ensuring that

the fee meets the test of reasonableness by automatically eliminating the element of the fee that may be excessive. There is also merit to the proposal to cap costs as it provides leaseholders with a degree of certainty as to the maximum costs they may incur in respect of the landlords non-litigation costs. However, there will be difficulty choosing the level of the cap and how much to apply in claims for individual lease extensions and in freehold enfranchisement claims, where the scope of the work can be so varied. Due to this difficulty a better approach may be to retain the existing test of reasonableness but to make the procedure for raising a dispute over the landlords non-litigation costs simpler and quicker.

(3) This appears to be the worst of both *(1)* and *(2)* together.

(4) As far as the valuers costs are concerned, the price paid currently has some bearing on the level of fee charged since high level claims usually require more work and time. However it is not appropriate to gear the fee to the price paid as this is not the correct basis of charge or the test applied currently by Tribunals when assessing the reasonableness of valuation costs.

(5) These costs are likely to be more geared towards the legal costs than valuation costs. For the purpose of this response it appears that the aim would be to prevent the leaseholder from incurring the costs of the landlords unsuccessful points made in the response notice. This would appear to be fair.

(6) Again this is more a legal issue but if it is possible to reduce the categories, such as by providing evidence of title in the claim notice, this appears sensible.

(7) This response is concerned with the category of costs for the valuation. This category should be retained but with possibly a simpler process for assessing the reasonableness.

(8) As this response is mainly by the Valuers the only category of recoverable costs that form the basis of our concern is that of any valuation carried out for the purpose of fixing the premium or enfranchisement price.

13.90 We also invite consultees' views as to whether, if a fixed cost regime were to be adopted

(1) such a regime should apply to collective freehold acquisition claims as well as individual enfranchisement claims; and

(2) if a fixed cost regime were to apply to collective freehold acquisition claims:

(a) what additional features might justify the recovery of additional sums; and

(b) whether landlords should be able to recover all of their reasonably incurred costs in respect of those additional features (subject to assessment), or only further fixed sums.

For reasons set out in 13.89 above a fixed cost regime is not considered appropriate in either collective freehold acquisition claims or individual enfranchisement claims.

13.91 – We provisionally propose that:

(1) no additional costs should be recoverable in the case of split freeholds or other reversions, or where there are intermediate landlords; and

(2) a small additional sum should be recoverable where a management company seeks advice in relation to an enfranchisement claim.

Do consultees agree?

(1) In the case of split freeholds or other reversions if there is a clear duplication of work in regard to the valuation then no additional costs should be recoverable. However in the case of intermediate landlords as far as their interests are concerned these may vary considerably. In many cases the intermediate landlord's lease may only be a few days longer than the claimant's interest, with only a small or even zero income. In such cases a small additional sum should be recoverable in respect of valuation costs to meet the cost of the intermediate landlords valuer checking the title structure and ensuring that only a small or nominal compensation amount is payable. However, in many claims the intermediate landlord may have a long reversion after the expiry of the underlease and own a more valuable interest than the competent landlord. In such cases the intermediate landlord is usually separately represented and should be entitled to recover all reasonable non-litigation valuation costs.

(2) It is accepted that a small additional sum should be recoverable where a management company seeks advice in relation to an enfranchisement claim.

However there is no reason why they should be treated any differently to any other intermediate landlord who may own a similar interest.

Consultation Question 100 - *13.9.4 We provisionally propose that where an enfranchisement claim fails or is withdrawn, or the Claim Notice is struck out, leaseholders should be liable to pay a percentage of the fixed non-litigation costs that would have been payable had the claim completed.*

Do consultees agree?

13.95 – We also provisionally propose that the percentage of the fixed non-litigation costs that should be payable in those circumstances should vary depending on the stage that the claim has reached.

Do consultees agree? If so what percentage should apply at particular stages of the claim?

In response this is a question of the amount non-litigation costs that have been incurred by the landlord. It seems illogical to adjust these costs in the event that the claim fails, is withdrawn, or the Claim Notice is struck out. Only those costs that have been incurred up to the date the claim is no longer in effect should be recoverable. In respect of the non-litigation costs relating to the valuation this is quite straight forward as the valuation has either been carried out or not.

Consultation Question 101 – *13.98 We provisionally propose that a landlord should have a right to seek security for his/her non litigation costs. Do consultees agree?*

Due to the unfairness of a fixed costs regime it appears that providing a right to seek security for non-litigation costs will be complicated by having to specify a figure which would need to be set by secondary legislation. The existing requirement for the payment of a deposit (based on 10% of the premium offered) in respect of lease extension claims has been working for many years and is adequate. An idea maybe to extend this provision to freehold enfranchisement claims.

Consultation Question 102 - *13.101 We provisionally propose that a landlord should have a right to apply to the Tribunal for an order prohibiting named leaseholders from serving any further Claim Notice without the permission of the Tribunal.*

Do Consultees Agree?

In the event that the 12 month prohibition on serving a fresh notice is withdrawn this appears to be a sensible and inevitable provision.

Consultation Question 103 – *13.110 We provisionally propose that the existing limited powers of the Tribunal to order one party to pay the litigation costs of another party in an enfranchisement claim should apply to all disputes and issues that it is to decide (except in respect of orders made under the No Service Route, orders permitting a landlord to participate in a claim or to set aside a determination, and striking out a Claim Notice).*

Do consultees agree? If not, what types of disputes and/or issues should be excluded from such restrictions and why? What powers to make orders in respect of litigation costs should apply in such excluded cases? Should parties be able to agree that costs shifting will apply to all or part of a claim?

The existing limited powers of the Tribunal to order litigation costs should apply to all disputes. This will remove the anomaly where at present some issues are determined by the County Court which has powers to order costs. If all matters concerning enfranchisement are to be transferred to the Tribunals jurisdiction the consequence must be that its limited powers to order costs are retained.

Consultation Question 104 – *13.114 We provisionally propose that the scope of the Tribunal's existing power to order one party to pay any of the litigation costs of another party should not be extended.*

Do consultees agree?

The current scope of the Tribunals powers has been working for many years and maintains a degree of certainty for the litigants in respect of the final outcome of any case referred to the Tribunal. This particularly assists leaseholders who may struggle to bear the litigation costs of the other party in the event the Tribunal does not decide in their favour. At present the leaseholders advisors are able to provide an estimate of the likely costs for referring a matter to the Tribunal on the basis that

the other parties costs will not be payable and the Tribunal service is free. This provides the lessee some certainty over the amount of costs he/she is likely to incur at the Tribunal. However it has been pointed out in consultation with forum members that there is *a Delaforce* effect which forces lessees to pay a higher premium to avoid the tribunal which may be reduced if landlords were at risk of having to meet the tenant's costs. Since in my view both arguments have merit I suggest to the Law Commissioners that the tenant should have the ability to elect whether or not the Tribunal should award costs in a given application. In other words the tribunal should be provided with the power to award costs at the tenant request by ticking a box on the application form.

Consultation Question 105 – *13.115 We welcome evidence as to:*

(1) the typical costs incurred by landlords in dealing with enfranchisement claims; and

(2) the proportion of those costs which can be recovered from leaseholders.

13.116 To what extent does the obligation on leaseholders to pay their landlords' reasonable costs arising from the enfranchisement process have an impact on leaseholders' willingness to bring or pursue enfranchisement claims?

13.117 Do consultees consider that any of the options we have set out at paragraphs 13.56 to 13.77 for reforming non-litigation costs would make leaseholders more willing to bring and pursue enfranchisement claims?

13.118 What would be the impact on landlords of removing, or capping, their entitlement to recover their non-litigation costs from leaseholders (other than the fact that they would have to meet those costs themselves)?

13.115

(1) Typical valuation costs incurred by a landlord dealing with a lease extension claim is approximately £750 plus VAT, there is no typical cost for an collective enfranchisement claim as these vary considerably depending on the number of flats, number of participants, length of leases, etc.

(2) The whole cost of the valuation should be recoverable provided that it is reasonable and that it forms the basis of the landlord's response to the tenant's claim.

13.116 – The obligation to pay the landlords reasonable costs does not impact on the leaseholders willingness to pursue a claim. They are most often keen to pursue a claim in order to obtain an interest that they can readily sell or mortgage as and when the need arises.

13.117 – No as leaseholders are primarily keen to pursue enfranchisement claims for reasons given above.

13.118 – The impact on landlords of removing their entitlement to recover non-litigation costs has been described earlier in this response. In respect of the valuation costs there would be no encouragement for a landlord to seek to have a valuation carried out at an early stage in the process which could potentially lead to many more cases being referred to the Tribunal at which point the landlord is likely to instruct a valuer at his own cost. The effect on the landlord of capping costs may not be too significant and may result in him seeking a valuer prepared to charge no more for the work than the amount of the cap.

Consultation Question 106 – *13.119 How and to what extent do the different powers of the Tribunal and the county court to award litigation costs in enfranchisement disputes have an impact on the behaviour of both landlords and leaseholders with respect to such disputes?*

The existing jurisdiction of the County Court relates mainly to procedural and legal aspects of enfranchisement claims and not really within the remit of this response. Valuers are more usually involved when the claim is referred to the Tribunal where valuation evidence is required. For reasons previously stated the existing system where the power of the Tribunal is limited in respect of costs is preferred.

Chapter 15: Valuation: options for reform

The Consultation Paper examines valuation methodology and begins with questions concerning section 9(1) valuations which have a methodology most different to other approaches. The aim is to simplify and incorporate enfranchisement of houses and flats under the same regime. The Commissioners rationale for simplification as far as section 9(1) is concerned is that it is difficult to work out when section 9(1) applies and the valuation methodology under section 9(1) is not readily understandable.

From the valuers perspective there is acceptance of the fact that it is difficult to work out when section 9(1) applies, particularly due to the reliance on domestic rateable values which are not easily obtainable. However it is not generally accepted among valuers that the valuation method under section 9(1) is not readily understandable.

Consultation Question 107 – *15.25 We invite the views of consultees as to:*

(1) whether the section 9(1) valuation methodology should be retained indefinitely or temporarily, and if so for how long; or

(2) whether the section 9(1) valuation methodology should be replaced with a fixed proportion of a "term and reversion" valuation or another simplified methodology; and

(3) whether the test for whether section 9(1) (or a simplified methodology) applies should be determined:

(a) by reference to capital value;

(b) by reference to council tax banding;

(c) by reference to the location of the property;

(d) by reference to an amended version of the current test for leases granted after 1 April 1990 (in other words, calculating "R" under section 1(1)(a)(ii) of the 1967 Act); or

(e) by some other means.

15.25 (1) The section 9(1) valuation methodology should be retained for so long as there remain leasehold houses that qualify under this basis of valuation.

(2) Replacing the current methodology with a fixed proportion of the term and reversion valuation would to some extent simplify the calculation but would not achieve the result intended by the definitions contained in the 1967 legislation. The proportion would have to be decided upon and carefully balanced so as not to disadvantage either party. In general and particularly from the valuers point of view the current methodology is not particularly complex and quite routine for the experienced valuer dealing with leasehold reform valuations.

(3) Of the options set out in question 107 the most sensible would be by reference to Council Tax Banding. This would reflect the original basis for qualification (rateable values) and in this respect it is suggested that any house within highest council tax banding in England and the highest council tax banding in Wales should be excluded from the section 9(1) valuation methodology.

Consultation Question 108 – *15.29 We invite the views of consultees as to:*

(1) whether a separate, simplified valuation regime should be created for low value and/or straight forward enfranchisement claims; and

(2) how such low value and/or straightforward claims should be identified.

(1) It is considered unnecessary for there to be a separate valuation regime for low value or straight forward enfranchisement claims. The report mentions that in many lease extension claims the freehold vacant possession value of the flat, length of the unexpired term of the lease and/or the level of ground rent are such that the premium payable for a lease extension is modest. In such cases it is stated that the professional costs incurred in enfranchisement may exceed the premium. However, if the characteristics of the claim are such that premium is indeed modest the professional costs, at least as far as the valuation costs are concerned, are never such that they exceed the premium. If the professional costs exceed the premium it is unlikely to be due to the valuation costs and therefore no amount of interference with the valuation approach will make the process any cheaper. The current method of valuation automatically takes into account that if the premium is low (particularly in cases of long leases with no marriage value) the valuation costs are correspondingly low. Attempting to provide a separate valuation regime is unnecessary and would complicate the process.

(2) For reasons given in (1) above low value and/or straight forward claims need not be identified. Further, in some cases a claim may appear from the documents to be low value or straight forward but in reality, and following an inspection of the property may prove to be a high value and/or more complicated claim.

Consultation Question 109 – *15.37 Do consultees consider it desirable to seek to treat commercial investors differently from owner-occupier leaseholders in respect of the premium payable for the exercise of enfranchisement rights?*

15.38 If so:

(1) do consultees consider that it might be possible to distinguish between such leaseholders:

(a) by reference to whether the leaseholder is exercising enfranchisement rights for the first time;

(b) by reference to whether the leaseholder is exercising enfranchisement rights in respect of his or her only or main home; or

(c) by some other means?

(2) how might the valuation methodology be varied so as to produce different premiums for different types of leaseholder?

15.37 – It may be considered desirable to treat commercial investors differently from owner/occupier leaseholders in respect of the premium payable. The original purpose of enfranchisement legislation was to benefit home owners and it is only subsequent legislation which removed the residents' tests that has provided commercial investors with the same rights. By distinguishing between such leaseholders the government may be able to meet its aim of reducing the premium payable for enfranchisement to the benefit of home owners and as pointed out in the consultation document ensuring continued compliance with human rights obligations.

15.38 – In respect of the options under paragraph (1) It is possible to distinguish between such leaseholders by (b) reference to whether the leaseholder is exercising enfranchisement rights in respect of his/her only main home.

(2) The variation to the valuation methodology is quite simple. In cases of leases with in excess of 80 years remaining there is no need for variation as the premium payable is relatively modest. In cases where marriage value applies, particularly on shorter leases the apportionment of marriage value payable to the landlord can be varied according to whether the leaseholder is the home owner or commercial investor. When the residents test was removed under the Commonhold and Leasehold Reform Act 2002 the proportion of marriage value payable to the landlord

was limited to 50% across the board. It may perhaps be sensible to provide a percentage payable to the landlord by home owners of 25% and a percentage payable by commercial investors of 75%.

Among the forum there were some who felt that differentiating between types of owners could complicate matters and distort the market. It has to be said that of those who expressed a view on this issue opinion was divided. However the majority who confirmed agreement to this response generally appeared to be in favour of the differential.

Consultation Question 110 – *15.67 We invite the views of consultees as to whether the treatment of ground rent reviews in any valuation methodology should be restricted in any of the ways set out at paragraphs 15.59 to 15.66.*

This question arises as a result of the mis-selling of houses on leaseholds with escalating ground rents. Hitherto the method of valuing ground rent income and any increases has generally not proved to be problematic. The example quoted in figure 22 of the Consultation paper sets out five different approaches to assessing a ground rent of £295 per annum doubling every 10 years over a fifty year period. This rent and review pattern is described as an onerous ground rent. Whether the valuation methodology should be restricted in the way suggested in the consultation document is a political decision rather than a valuation question. Valuation methods to assess the value of income streams is fairly well established among valuers as well as the other professions involved in valuing income streams derived from sources other than property.

Consultation Question 111– *15.71 We invite the views of consultees as to whether capitalisation rates for enfranchisement valuations should be prescribed and, if so:*

(1) how;

(2) by whom;

(3) how often; and

(4) in respect of what different types of interest.

The difficulty with prescribing capitalisation rates is that valuers apply different rates to different types of income streams. A lower capitalisation rate is applied if the income stream is “dynamic” such as having increases geared to retail prices index or

the capital value of the property. This is overlooked in the examples shown in figure 22 of the Consultation Paper where a constant rate of 4.5% is applied in each example. If rates are to be prescribed a body or committee would have to be set up to determine the prescribed rate, and convened to review that rate at given intervals. Given that there have been few disputes over capitalisation rates this appears to be a waste of public money and provides little or no benefit to a relatively small sector of society.

Consultation Question 112– *15.75 We invite the views of consultees as to whether deferment rates for enfranchisement valuations should be prescribed and, if so:*

(1) how;

(2) by whom;

(3) how often; and

(4) in respect of which geographical areas.

The consultation paper points out that deferment rates have effectively been prescribed since the decision in *Sportelli*. This is true and therefore prescribing a deferment rate would not do anything to simplify the valuation process as it stands. It would however restrict valuers from deviating from a given rate in a situation where there is a compelling reason to adjust the rate either upwards or downwards. Further, the generic deferment rate of 4.75% for houses and 5% for flats determined in the *Sportelli* case applies to leases with more than 20 years remaining, Prescribing a deferment rate has the disadvantage of restricting valuers in claims with reversions with less than 20 years remaining, where useful market evidence may be available to assist in assessing the present value of the reversion. The points made in this response in respect of capitalisation rates as regards to setting up a body or committee equally apply in respect of deferment rates.

The consultation paper goes on to consider relativity and no Act deduction. The example for relativity quoted in the paper at figure 24 gives the example in *Kosta* where the lease of the house had 52.45 years remaining. It must be said that this is not a typical example for enfranchisement claims as the freehold value of the house was £16,138,743. The effect on the premium in applying varying rates of relativity is vast in monetary terms. In most cases the differential in respect of relativity is not usually as much as the 10% difference in *Kosta* and the value of the property under review is rarely above £1,000,000. The application of *Kosta* as an example shows the current approach to choosing relativity rates as being a larger problem than is actually the case.

Consultation Question 113 – *15.79 We invite the views of consultees as to whether relativity or a no Act deduction should be prescribed for enfranchisement valuations and, if so:*

(1) how;

(2) by whom;

(3) how often; and

(4) in respect of which geographical areas; and

(5) whether the 80 year cut-off should be removed.

Relativity should not be prescribed as the valuation of the existing leasehold interest relative to the freehold value should be assessed by the valuer familiar with the actual property under consideration. In some cases percentage relativity is not even considered as market comparables may assist the valuer in determining the short lease value. By not prescribing relativity rates the problem of how, by whom and by how often they are prescribed need not arise. Further the local valuer dealing with the valuation would be aware of any geographical differences that may influence the value of the existing interest relative to the freehold value. Removing the 80 year cut off will have the effect of increasing premiums for leaseholders owning a leasehold interest of more than 80 years. This runs contrary to the Commissioners brief of reducing premiums.

It may be possible to prescribe a no Act deduction in percentage terms. Generally the deduction increases as the term of the lease decreases. Currently it is common to refer to previous decisions of the Tribunal to assess the deduction.

In Chapter 6 of the consultation paper a new power is proposed for leaseholders exercising the right of collective freehold acquisition to insist, if they chose, that the freeholder take a leaseback or leasebacks of any parts of the premises (other than the common parts) which are not let to participating leaseholders. This appears to make sense and complies with the brief of reducing the premium payable by the leaseholders. However, such a right should be a two way door and similarly to the freeholder being compelled to take a leaseback or leasebacks, landlords should also be provided with the right to elect to take a leaseback or leasebacks of the non-participating flats.

Consultation Question 114– *15.83 We invite the views of consultees as to whether the possible right to hold over at the end of a long lease should be disregarded on an enfranchisement valuation.*

Since there is in all cases a right for the tenant to hold over at the end of a long lease there seems no reason to disregard this right. If there is to be any effect of this right on the premium it would only be to reduce the premium and thereby falling within the policy objectives identified by Government.

Consultation Question 115 – *15.86 We invite the views of consultees as to whether a discount for leaseholder's improvements on an enfranchisement valuation should be retained.*

This is a further proposal that seems to run contrary to the objectives of enfranchisement reform. If the current discount for leaseholders improvements is not retained this will have the effect of increasing the premium payable by leaseholders. Few disputes over leaseholders improvements arise and therefore abolishing the discount simply to avoid the rare dispute is unfair on a majority of leaseholders. Many leaseholders are at pains to identify and list all the improvements carried out at their own cost so that they are not penalised by having to pay the landlord a higher premium due to an enhanced value brought about at their own expense.

Consultation Question 116 – *15.91 We invite the views of consultees as to whether it should be possible for leaseholders to elect to accept a restriction on development to prevent development value from being payable as part of an enfranchisement valuation.*

Providing a right for leaseholders to elect to accept a restriction on development would significantly reduce the cost of enfranchisement in cases where development value may arise. Often it is the leaseholders preference not to have the block extended or for any further development to be carried out, and so should not have to pay a price that reflects the value of a development that they have no intention of realising. Landlords would not lose development value if they investigated as to whether any development value exists prior to receiving a Notice of Claim. They would have the opportunity to realise any development value by selling on the open market rather than seeking to claim such value from the lessees at the time of an enfranchisement claim.

Consultation Question 117 – *15.103 We invite the views of consultees as to which, if any, of the valuation options we have discussed (set out at Options 2A to C in Chapter 15) are preferable and, so far as any preferred option contains a range of possible reforms, which of those reforms should be adopted.*

Options set out in 2A-C of chapter 15 are as follows:-

2(A) term and reversion only (with or without prescription of rates)

2(B) term and reversion plus marriage and hope value (with or without prescription of rates).

2(C) term and reversion plus marriage and hope value plus additional value.

Option 2(A) The term and reversion value would be the simplest to undertake but the shortcomings of such a simple approach are likely to have repercussions. This is due to the fact that the term and reversion method of calculation is never applied in real transactions in the market and produces a much lower value for the landlord's interest than its true market value. It therefore has to be carefully considered whether this approach provides adequate compensation for the landlord in terms of compliance with A1P1 to the ECHR. A significant proportion, possibly up to 50%, of claims are not made by home owners but rather commercial investors. The original purpose of leasehold reform legislation was to protect and benefit home owners of residential properties. It was never the intention of the legislators to transfer valuable assets from the pockets of one investor to another. Restricting the valuation to a term and reversion calculation in regard to claims made by commercial investors (many of whom are ground rent landlords as well) does precisely this. Therefore for a large number of claims the Government would be interfering with a landlords A1P1 rights without any social policy objective.

Option 2(B) Term and reversion, plus marriage and hope value provides a more accurate assessment and restricting the increase in value to the potential ability of participating tenants to have new leases granted to them avoids the complication of valuing other factors, such as development value. This approach has merit particularly if combined with applying the option of making a distinction between those participating tenants who are home owners and those who are commercial investors.

Option 2(C) Term and reversion plus marriage and hope value plus additional value. This option is basically as matters stand under the current legislation. However the proposals set out in the consultation paper suggest 8 reforms which further complicate the calculation and in many cases are likely to increase the premium these components are:-

(1) Limit the extent to which the ground rent on review is to be taken into account

(2) Prescribe a capitalisation rate

(3) Prescribe a deferment rate

(4) Prescribe relativity or non-act deduction

(5) Grant landlords lease backs of non-participating leaseholders flats

(6) Provide that no discount is to be made for the risk of holding over

(7) Remove the discount for leaseholders improvements and/or

(8) Provide a restriction on the development on enfranchised property.

Comments and criticisms of the above components are set out earlier in this response.

Consultation Question 118 – *15.107 We invite the views of consultees as to the desirability of an online calculator for enfranchisement valuations and the types of claims for which it could be appropriate.*

On line calculators rely on the person inputting the variables for their accuracy. They are only useful in the most basic cases and of no assistance for instance for a collective freehold acquisition as they provide for only the basic valuation components to be applied. Since they are therefore of only limited assistance for a basic lease extension calculation there is no merit in their use at all. For a basic lease extension calculation the valuers fee should be relatively modest hence the use of an online calculator would not produce any significant saving on costs.

Further in the absence of a professional valuer someone is still required to make the inputs to the calculator by choosing yield rates (if not prescribed) and capital values. Whoever carries out this work is likely to make a charge in any event. This then raises the question as to who is held accountable if mistakes are made in assessing premiums with an online calculator. Under the present system by engaging a professionally qualified valuer the client, whether landlord or tenant, has the usual protection and redress for errors and negligence.

Consultation Question 119 – *15.108 How and to what extent has the current methodology for calculating premiums payable on enfranchisement slowed down, prevented or made more costly the exercise of enfranchisement rights?*

In the majority of claims the current methodology for calculating premiums does not slow down prevent or make more costly the exercise of enfranchisement rights. Once a tenant or group of tenants decides to proceed with a claim the valuation is carried out alongside, and more than often within the same time frame as the necessary legal work. Once a Notice of Claim is submitted a statutory timetable

applies which requires the landlord to engage a valuer and respond within the required time frame (around two months but usually much sooner). In some cases the premium is settled at the stage of the receipt of the counter notice. In many cases there ensues some discussion between the respective parties' valuers and within a timely manner the valuation is agreed. Applying the current methodology gives rise to very few cases being heard in the Tribunal relative to the number of claims made.

Consultation Question 120 – *15.109 We have set out the following options for the reform of valuation:*

(1) the adoption of a simple formula; and

(2) options based on current valuation methodology, involving different combinations of current valuation components and/or the prescription of certain rates.

To what extent would each of these options reduce the duration and cost of the enfranchisement process, and the number of disputes arising?

For reasons given in the answer to question 119 as it is not our view that the current methodology increases the duration and cost of the enfranchisement process there is no merit in either option.

The chapter finishes with questions 121-125, where the commissioners are seeking evidence for their assistance in the consideration of some of the ideas proposed in the chapter.

The Consultation Paper makes reference to the current law whereby in cases where a building contains only two flats, the leaseholders of both flats must participate in a claim to acquire the freehold. However it is proposed under the reforms that the leaseholder of one of the two flats will be given the right to acquire the freehold.

This amendment is likely to create more problems for many leaseholders than it is intended to resolve. The benefit to the flat owner who has purchased the freehold may be outweighed by the flat owner who remains a leaseholder and who is likely to feel aggrieved at the prospect of his close neighbour becoming his landlord. This would certainly be the case if there is a history of dispute between the two

neighbours. There may well be a lessee within a pair of flats who has no interest in owning the freehold and in many situations having a third party freeholder assists in maintaining a more harmonious relationship between the two lessees. In this situation if the leases are short the lease extension option remains available to the individual lessee.

Chapter 16 – Intermediate and Other Leasehold Interests:

This chapter sets out in detail and very clearly the current arrangements for handling claims involving intermediate interests. The chapter identifies problems with the current regime for intermediate leases, some of these problems being solved by the proposals in other chapters of the consultation paper. There are 10 questions in the chapter but the main one which has a significant effect on valuation is the following:-

Consultation Question 134 – *16.142 We provisionally propose that, on any individual lease extension claim, the rent payable by an intermediate landlord should be commuted on a pro rata basis. Primarily this approach would avoid creating a negative value in an intermediate lease, which the leaseholders could use to their advantage in the way that was done in the case of Alice Ellen Cooper-Dean Charitable Foundation v Greensleeves Owners Limited.*

Do consultees agree?

This appears to be a sensible and long overdue amendment to the legislation. This will most definitely simplify the valuation process and have the effect of reducing the total premium payable by the tenant.

Summary

The Leasehold Forum views have been canvassed and the Forum is broadly in agreement to the following:-

1. Retain section 9(1) methodology but amend the test for its application by excluding houses within the highest Council Tax band for England and the highest Council Tax band for Wales.

2. Retain the existing regime for valuing all claims whether or not they can be identified as being “low value and/or straight forward”.

3. It is desirable to treat commercial investors differently to owner-occupier by increasing marriage value contribution to 75% for commercial investors and reducing marriage value contribution to 25% for owner-occupiers.

4. There is no need for capitalisation rates, deferment rates or relativity to be prescribed.

5. It is desirable to retain existing 80 year cut off for applying marriage value.

6. The proposed new right for leaseholders to require the landlord to take lease backs of non-participating flats is desirable. However there should also be a right for landlords to require leasebacks on non-participating flats obviating the need for leaseholders to exercise such a right when the landlord prefers to take leasebacks.

7. The current discount for leaseholders improvements on an enfranchisement valuation should be retained.

8. It is preferable to adopt valuation option 2C based on term and reversion plus marriage and hope value plus additional value.

9. The use of an online calculator is not appropriate or desirable for reasons set out in this response.

10. Where a building contains only two flats the current requirement for both to participate in the claim for the freehold should be retained.

11. In a lease extension claim involving an intermediate interest the rent payable by an intermediate landlord should be commuted on a pro-rata basis.

Please do not hesitate to contact me should you have any questions or require any further clarification in regard to this response which I trust will be duly taken into consideration by the Commission.

Yours faithfully,

Laurence Nesbitt BSc (Hons) FRICS MCIArb 4th January 2019

On behalf of the Leasehold Forum

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