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# *Can a Consumerist Model of Law Reform Solve the Problems of Leasehold Tenure?*

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## I. INTRODUCTION

Despite more than 50 years of reform,[2] leasehold as a tenure remains in crisis[3] and the English and Welsh governments have been forced to intervene yet again. The current programme of reform has been described as 'seminal',[4] and builds upon extensive consultation.[5] What is claimed to be transformative[6] is its consumer focus. In this chapter we interrogate the potential of a consumerist model of leasehold reform in the context of the persistent failure of legislative interventions. We start by demonstrating the need for a shift in the legal framing of leasehold, recalling long-term problems with the tenure as well as recent leasehold scandals emphasising the contested nature of leasehold reform. In the second part of the chapter, we expand upon the case for reform by providing granular evidence of the contemporary experience of leaseholders drawing on qualitative data collected by the authors during research into the sale and use of leasehold in Wales commissioned by the Welsh

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[2] S Blandy and D Robinson, 'Reforming Leasehold: Discursive Events and Outcomes, 1984–2000' (2001) 28(3) *Journal of Law and Society* 384.

[3] Propertymark, 'Leasehold: A Life Sentence?' (Propertymark, 2018) www.propertymark.co.uk/resource/leasehold-a-life-sentence.html (accessed 5 September 2022).

[4] By Robert Jenrick MP, then Secretary of State for Housing, Communities and Local Government in a written ministerial statement in 2021. See HC Deb 11 January 2021, vol 687, col 10WS.

[5] See for instance: Department for Communities and Local Government, 'Tackling Unfair Practices in the Leasehold Market: A Consultation Paper' (DCLG, July 2017).

[6] As described in the Queen's Speech briefing pack May 2022. See Prime Minister's Office, 'The Queen's Speech 2022' (Prime Minister's Office, 2022).

Government.[7] Our analysis is framed by the consumer-oriented requirements of informed choice, transparency, and fairness for leasehold purchasers. In the third part we suggest we are sceptical as to whether a consumerist framing can build a sufficiently powerful consensus to make meaningful inroads on the status-quo of property rights. Our scepticism is informed by the paradox at the heart of leasehold reform and draws on the history of consumer protections in property relationships and successful challenges to leaseholder rights in the courts. In the concluding part of the chapter, we draw our thoughts together on the prospects of the current reform project succeeding in light of the history of leasehold law failure and then, putting our scepticism about consumerism to one side, we speculate on the unpredictable consequences of a consumer rights driven paradigm of leasehold law reform.

## II. WHY IS A 'SEMINAL' CHANGE IN LEASEHOLD LAW NECESSARY?

There are three reasons why a seminal change in leasehold law is necessary. First, not only has the extensive and longstanding dissatisfaction of leaseholders been inadequately addressed, but it has also recently intensified[8] and been effectively mobilised.[9] Second, leasehold homeownership is important, socially, economically, and politically. Third, numerous previous efforts at leasehold law reform have failed. More of the same does not appear to be a tenable political option particularly for a government seeking to revive commonhold *and* maintain leasehold as a viable option for homeownership.

### A. Longstanding Problems

Residential leasehold has long provoked complaints of unfairness. As Lord Stonham put it in 1959

> From the beginning, the leasehold system has been harsh to tenants. In theory, of course, while the lease endures, the holder should enjoy similar rights to the freeholder. In practice, the status of the leaseholder has always been inferior.[10]

Leasehold enfranchisement has been on the political agenda since the 1880s when it was first proposed in Parliament as a means of avoiding prohibitive rent rises when leases expired and to improve the housing conditions of the

[7] H Carr, C Hunter, G Owen, C Makin and A Wallace, *Research into the Sale and Use of Leaseholds in Wales* (GSR report number 16/2021, Welsh Government, 2021).

[8] See for instance the Westminster Government's consultation on *Tackling Unfair Practices in the Leasehold Market* which received more than 6,000 responses. See Department for Communities and Local Government, *Tackling Unfair Practices in the Leasehold Market: Summary of Consultation Responses and Government Response* (DCLG, December 2017).

[9] The Leasehold Knowledge Partnership has had a major influence on government.

[10] HL Deb 28 July 1959, vol 218, cols 646–60.

working classes.[11] Limited changes were made but concern intensified as flatted home ownership increased after the second world war and particularly following the residential property price boom of the 1970s. Blandy and Robinson demonstrated in 2001 that leaseholders have simultaneously complained of freeholder exploitation and freeholder neglect since at least the middle of the twentieth century[12]

Legislation targeted two overlapping aspects of leaseholder dissatisfaction. First the time-limited nature of the lease was tackled via individual rights to enfranchise for leaseholders of houses, granted by the Leasehold Reform Act of 1967,[13] rights of pre-emption granted by the Landlord and Tenant Act 1987[14] and the grant of collective rights to enfranchise and individual rights to lease extension in the Leasehold Reform Housing and Urban Development Act of 1993.[15,16] These attempts to rebalance the power dynamic between freeholder and leaseholder had limited success in part because of the complexity and technicalities of the law and in part because of the costs and uncertainties inherent in enfranchisement/extension processes.[17]

The second target for law reform was to improve the fairness and effectiveness of the management of leasehold property. Rights to challenge unreasonable service charges and rights to challenge overly expensive and/or unnecessary major works were introduced in the Landlord and Tenant Act 1985[18] and slowly enhanced. But Blandy and Robinson note that 'poor maintenance, excessive service charges, limited consultation over works, defective leases, inadequate insurance arrangements, and leaseholders not knowing the identity of their freeholder have persisted despite the legislative reforms'.[19]

The most dramatic changes were promised by the Commonhold and Leasehold Reform Act 2002.[20] In addition to enhancing already existing protections for leaseholds, it provided for commonhold – a radical and coherent alternative to leasehold tenure. Commonhold enables owners to own their flat outright thus avoiding the problems of the wasting asset characteristic of the lease and the connected expense of extending the lease or enfranchising. There is no landlord – instead, owners have a stake in the building that includes their flat and make decisions together with other owners about shared areas.

[11] The Leasehold (Facilities or Purchase of Fee Simple) Bill 1884 was the first parliamentary Bill introduced to enable leasehold enfranchisement.

[12] Blandy and Robinson (n 2) 387.

[13] Leasehold Reform Act of 1967.

[14] Landlord and Tenant Act 1987.

[15] Leasehold Reform Housing and Urban Development Act of 1993.

[16] A useful table of legislative reform is provided in Blandy and Robinson (n 2) 388.

[17] See I Cole and D Robinson, 'Owners yet Tenants: The Position of Leaseholders in Flats in England and Wales' (2000) 15(4) *Housing Studies* 595, 597. Law Commission, *Leasehold Home Ownership: Buying Your Freehold or Extending Your Lease* (Law Com CP No 238, 2018).

[18] Landlord and Tenant Act 1985.

[19] Blandy and Robinson (n 2) 389.

[20] Commonhold and Leasehold Reform Act 2002.

No ground rent is payable. There is no risk of forfeiture (the right of a landlord to repossess the property following a breach of covenant by the lessee). A standard set of rules and regulations apply – avoiding the complexity of leases and giving owners greater clarity on rights and responsibilities. But 20 years from its enactment, its promise has not materialised. Only 20 commonhold schemes have been created to date,[21] 'a living testament to its failure in the marketplace'.[22] Drawing on earlier work of Baker[23] and Clarke,[24] James Brown suggests that a widespread ignorance of commonhold, the risk-averse nature of mortgage lending decisions and the complete lack of incentives for developers have all played roles in its failure.[25] For Xu, commonhold quickly became a 'laughingstock' and exists as 'one of the worst examples of carefully considered legislation having done more harm than good'.[26] For the purposes of the argument in this chapter, commonhold provides a further, and particularly prominent, example of legislative failure.

### B. Recent Scandals

More recently an increase in the sale of leasehold houses has re-energised leaseholder dissatisfaction. Described by campaigners as 'fleecehold',[27] purchasers of leasehold houses have faced high and accelerated ground rents, making enfranchisement and lease extensions unaffordable, and excessive fees for permissions, for instance to erect conservatories. These practices have placed onerous financial barriers on the exercise of what should be normal practices of home ownership. It might have been expected that good legal advice would have protected purchasers from one-sided bargains. However, the National Leasehold Campaign (NLC) Conveyancing Satisfaction Survey, carried out in 2019, revealed that leaseholders had experienced poor conveyancing services.[28]

It is perhaps the 'cladding' or 'building safety' 'crisis' or 'scandal' that has generated the greatest collapse in leaseholder confidence. Fire safety and other inspections carried out following the Grenfell Tower fire of 14 June 2017 revealed that large numbers of residential and other buildings had been clad in

[21] L Xu, 'Commonhold Developments in Practice' in W Barr (ed), *Modern Studies in Property Law: Volume 8* (Oxford, Hart Publishing, 2015) 332.

[22] J Brown, 'English Commonhold: A Failed Experiment?' (2013) 3(2) *Property Law Review* 85.

[23] C Baker, 'First Major Commonhold Project – Lessons in Application' (2006) 10(3) *Landlord and Tenant Review* 70.

[24] D Clarke, 'Long Residential Leases: Future Directions' in S Bright (ed), *Landlord and Tenant Law: Past, Present and Future* (Oxford, Hart Publishing, 2006).

[25] Brown (n 22).

[26] Xu (n 21) 349.

[27] 'Fleecehold' refers to the practice of including onerous terms in the leases of leasehold property as well as onerous conditions being imposed on freehold property.

[28] The National Leaseholder Campaign (2019) Conveyancing Satisfaction Survey, available at nationalleaseholdcampaign.org/tag/survey/ (accessed 17 January 2023).

combustible materials which required remediation. Moreover, there was evidence of large-scale failure to comply with other building safety requirements.[29]

This has had profound consequences; home ownership, which generates (according to neoliberal social norms) a sense of achievement, autonomy, and security[30] became, for those leaseholders caught up in the cladding crisis, dysfunctional.[31]

Financial consequences were particularly severe. There was a real risk of very high bills for the costs of remediation, placing leaseholders' homes, livelihoods, and futures at risk.[32] This was compounded by increases in building insurance for affected buildings and the insistence of some mortgage lenders on external wall fire reviews (EWS1) for all buildings of whatever height. Not only are these costly for residents, the lack of available experts to carry out these reviews has effectively trapped leaseholders in their property.[33]

There is an important caveat here; we are not arguing that only leaseholders are impacted by these recent scandals. 'Fleecehold' is an issue for freeholders as well as leaseholders and freeholders have a particular problem as they lack the service charge protections enjoyed by leaseholders. Nor is the building safety crisis only experienced by leaseholders. It is also a crisis for those with enfranchised blocks and would be a problem in the unlikely event that one of the few commonhold blocks had building safety defects. However, leaseholders greatly outnumber others affected by the crisis and leasehold campaigners have effectively mobilised the scandals to demonstrate the unfairness of the tenure. In addition, the position of leaseholders is made more complex and more expensive because of the number of actors and relationships that are potentially involved – developers, freeholders, superior lessees etc. Our point is that these scandals have intensified leaseholder dissatisfaction to the extent that government has promised seminal change.

### C. Why Leasehold Reform Matters

Seminal change would not be promised if leasehold did not matter, but it does. A significant proportion of residential property is leasehold. In 2019–2020 government statistics suggested that there were 4.6 million leasehold dwellings in England, 68 per cent of which were flats. This equates to 19 per cent of the

[29] J Preece, 'Living through the building safety crisis' (UK Collaborative Centre for Housing Evidence, 2021) housingevidence.ac.uk/publications/living-through-the-building-safety-crisis/ (accessed 5 September 2022).

[30] LF O'Mahony, *Conceptualising Home: Theories, Laws and Policies* (Oxford, Hart Publishing, 2007).

[31] See Preece (n 29).

[32] Many leaseholders also faced significant (and controversial) costs for interim first safety measures whilst awaiting remediation, such as waking watches.

[33] HCLG Select Committee, *Cladding: Progress of Remediation* (HC 2019–21, 172).

English housing stock.[34] In Wales leasehold ownership is estimated at around 16 per cent of all stock, approximately 235,000 properties.[35] UK Property Transaction statistics show there has been a generally rising year-on-year trend for residential leasehold transactions over the five years before 2019, with 99,420 transactions in the year ending April 2019.[36] While the figures are contested,[37] there is no doubt that a significant amount of wealth is invested in and generated by residential leasehold and that ensuring the integrity of the tenure is of critical importance economically.

Leasehold also contributes to the long-standing project of extending home-ownership. Home ownership has huge social, political, and economic significance. It matters to government because according to neoliberal rationalities it encourages independence, self-reliance, and freedom from the state.[38] Leasehold is pivotal here. Because leasehold property is often cheaper than freehold, it can provide more accessible home ownership. In addition, the leasehold form is critical to shared ownership, currently the primary means of widening access to home ownership.

Responsible property ownership has long been a significant motivation for leasehold reform. For Pointing and Bulos, the Leasehold (Facilities or Purchase of Fee Simple) Bill of 1884,[39] drafted in response to the housing crisis of the 1880s, was the product of

> A reforming consensus produced from a common belief that reform of the relations of property ownership and the encouragement by the state of responsible forms of ownership would solve the housing problem, and hence the political problem of 'outcast London'.[40]

Cole and Robinson's review of leasehold reform prior to 2000 notes how the 'rhetoric of property ownership [became] incorporated into the case to change the leasehold sector'.[41] A contemporary manifestation is found in Robert Jenrick's (then Housing Minister) statement to the House of Commons in January 2021, which highlighted the bureaucracy and expense associated with leasehold ownership.[42]

[34] MHCLG, 'Official Statistics: Leasehold dwellings, 2019 to 2020' (MHCLG, 8 July 2021) www.gov.uk/government/statistics/leasehold-dwellings-2019-to-2020/leasehold-dwellings-2019-to-2020 (accessed 5 September 2022).

[35] Carr, Hunter, Owen, Makin and Wallace (n 7) para 2.29.

[36] HMRC, 'UK Property Transaction Statistics – April 2019' (HMRC, April 2019) www.gov.uk/government/collections/property-transactions-in-the-uk (accessed 5 September 2022).

[37] Leasehold Knowledge Partnership suggests that there are far more leasehold properties than the data indicates. See Leasehold Knowledge Partnership, 'What's the probability that government leasehold statistics are still useless?' (LKP, 28 September 2017) www.leaseholdknowledge.com/probability-government-leasehold-statistics-still-useless/ (accessed 5 September 2022).

[38] See the explanation provided by D Cowan and M McDermont, *Regulating Social Housing: Governing Decline* (London, Routledge, 2006) 165.

[39] Leasehold (Facilities or Purchase of Fee Simple) Bill of 1884.

[40] JE Ponting and MA Bulos, 'Some Implications of Failed Issues of Social Reform: The Case of Leasehold Enfranchisement' (1984) 8(4) *International Journal of Urban and Regional Research* 467, 477.

[41] Cole and Robinson (n 17) 601.

[42] MHCLG, 'Government reforms make it easier and cheaper for leaseholders to buy their homes' (MHCLG, 7 January 2021) www.gov.uk/government/news/government-reforms-make-it-easier-and-cheaper-for-leaseholders-to-buy-their-homes (accessed 5 September 2022).

In each of these three examples the purpose of law reform is to enhance the quality of the property stake held by the leaseholder at the expense of the freeholder for significant social purposes.

### D. The Failure of Previous Law Reform

The final reason that a 'seminal' change in leasehold law is required is because leasehold law reform is a catalogue of failure or at the very best constrained success. There are several reasons for this. Leasehold law reform has been largely reactive, responding to emergent scandals and effective campaigns. This has led to piecemeal reform leaving the law fragmented, complex and properly understood by only a very limited number of specialist lawyers.[43] This is most clearly seen in the context of enfranchisement. The Law Commission points out that the current enfranchisement regime 'is the product of over 50 Acts of Parliament, totalling over 450 pages. There are numerous anomalies and unintended consequences resulting from piecemeal changes over time. Certain terms in the legislation create much uncertainty, and scope for litigation'.[44]

Perhaps more significantly for the long-term stability of the tenure, leasehold law reform is highly contested. The interests of leaseholders and freeholders appear diametrically opposed and strong, often moral, arguments are mounted on each side. Pointing and Bulos suggest the origins of this fierce dualism lie in the emergence and subsequent failure of the Leasehold (Facilities or Purchase of Fee Simple) Bill of 1884. The Bill was designed to alleviate the scandalous high rents, overcrowding, insanitary conditions, jerry-building and exploitative landlordism that characterised the housing crisis of the 1880s and was 'based on the fear that a failure to solve the problem of working-class housing would threaten the political and social status quo'.[45] But the threat it posed to the landownership provoked a powerful response,

> Various propertied interests rallied round aristocratic landownership, and this process has been described as constituting a conservative consensus, or a reaction to the demand to reform the system of property ownership.[46]

For Pointing and Bulos the emergence of a conservative consensus had long-term consequences,

> which not only served to severely restrict the scope of prospective reform, but also crystallized the social forces opposed to reform, and in a sharper form as compared to the situation prevailing before the period of political crisis.[47]

[43] The fragmented provisions are contained for instance in the Landlord and Tenant Act 1985, the Landlord and Tenant Act 1987, the Commonhold and Leasehold Reform Act 2002 amongst others.

[44] Law Commission, *Leasehold Home Ownership: Buying Your Freehold or Extending Your Lease* (Law Com No 392, 2020) para 2.20.

[45] Pointing and Bulos (n 40) 477.

[46] ibid.

[47] ibid.

The dualism, and its moral overtones are visible in subsequent leasehold reform attempts. For instance, in parliamentary debates about the Landlord and Tenant Act 1954,[48] one of the earliest successful legislative interventions to protect leaseholders, Frank Soskice, the Labour MP for Sheffield Neepsend, articulated his party's view that lessees, particularly those from the working classes were vulnerable in the market.

> A house is not a thing which you can do without. If you have a family you have to have a house. To apply the expression "sanctity of contract" to a contract which, in effect, the landlord could impose upon the working man is a mere perversion of language. That is the problem.[49]

His purpose, to persuade the Conservative Government to extend the remit of the Act beyond security of tenure for lessees whose lease had expired, and include leasehold enfranchisement, failed and sanctity of contract prevailed. However, enfranchisement was again on the political agenda in 1967.[50] At that time there was a clear social problem that had to be addressed. Many long leases of working-class homes, particularly in the minefields of South Wales, were expiring and would revert to freeholders without compensation. Something needed to be done to avoid widespread injustice.[51] The government drew on notions of fairness and morality when they justified giving long leaseholders of houses a discounted right either to enfranchise or to a lease extension.[52]

For enfranchisement to succeed the government had to compromise. Rights applied only to owner-occupied, lower value houses. The justification was the need to minimise interference with freedom of contract. Nonetheless significant opposition remained. For instance, Lord Brook of Cumnor, for the opposition, argued that the Bill legalised theft.[53]

Cole and Robinson draw attention to similar contestations in their description of the bitterly fought battle between leaseholders and landowners during the passage of the 1993 Leasehold Reform, Housing and Urban Development Act,[54] even though it was a Conservative Government promoting reform.[55] They suggest that the amendments forced on the government by the House of Lords virtually emasculated the Act, increasing the costs and the complexities of enfranchisement.

If leasehold reform is to be viable and sustainable the dualism at its heart needs to be overcome. A consensus around reform needs to emerge which can counter the status quo of property ownership. The English and Welsh governments appear to have chosen to build a consensus around consumerism. This is

[48] Landlord and Tenant Act 1954.
[49] Speech of Frank Soskice MP. HC Deb 27 January 1954, vol 522, col 1775.
[50] This came in the form of the Leasehold Reform Act 1967.
[51] HL Deb 26 June 1967, vol 284, col 15.
[52] HC Deb 7 March 1967, vol 742, cols 1272–73.
[53] HL Deb 26 June 1967, vol 284, col 28.
[54] 1993 Act (n 15).
[55] Cole and Robinson (n 17) 600.

consistent with other governmental responses to the 'broken housing market'[56] including the Law Commission's projects on law reform, which it describes as making leasehold home ownership 'fit for purpose'.[57] We can glean something of what government means by consumerism from policy documentation. Promises of fairness and transparency have, in the last ten years, been repeatedly made to leaseholders. We see them in the White Paper *Fixing our Broken Housing Market* which indicated that action would be taken 'to promote transparency and fairness for the growing number of leaseholders'.[58] They appeared in the policy objectives given by the Westminster Government to the Law Commission – the promotion of transparency and fairness in the residential leasehold sector and the provision of a better deal for leaseholders as consumers. These objectives were repeated in 2021 by the then Secretary of State, who committed to 'fairness and transparency' to protect 'consumers … from abuse and poor service'.[59] The first piece of legislation delivered as part of the promised tranche of reforms, the Leasehold Reform (Ground Rent) Act 2022, caps rents on new long leaseholds to 'an annual rent of one peppercorn' provides a further example.[60] During the Report Stage of that Bill, Eddie Hughes MP (Minister for Housing) stated that providing a clear-cut date after which if a regulated lease is sold, there can be no monetary ground rent, makes things more transparent and easier for leaseholders.[61]

One of the most significant indicators of the consumer trajectory is the U-turn of the Competition and Markets Authority which, after some reluctance, agreed in 2019 to investigate the mis-selling of leasehold houses and potential unfair and/or onerous terms in leasehold property.[62] In its initial report published 28 February 2020,[63] it identified problems with high and accelerating ground rents, poor sales practices and high fees being charged for permissions, especially when there is no contractual basis for charging such a fee. In addition, the CMA expressed concerns that the checks and balances that ought to have protected homeowners from potentially harmful terms and practices, such as independent legal advice, had been ineffective. In September 2020 the CMA announced that it had opened cases in relation to possible breaches of consumer protection law in the residential leasehold sector. From that date onwards it has announced formal commitments from significant freeholders, including Taylor Wimpey, Aviva, and Persimmon as well as several housing associations to making changes to punitive ground rent terms and paying compensation to affected leaseholders.

[56] DCLG, *Fixing our Broken Housing Market* (Cm 9352, 2017) para 1.7.

[57] Law Commission, *Leasehold Home Ownership: Exercising the Right to Manage* (Law Com No 393, 2020).

[58] DCLG (n 56) para 4.36.

[59] Robert Jenrick MP, then Secretary of State. HC WS 11 January 2021, HCWS695.

[60] The programme of reform will be analysed by the authors in a separate article.

[61] HC Deb 24 January 2022, vol 707, col 807.

[62] The Competition and Markets Authority is an independent non-ministerial UK government department.

[63] Competition and Markets Authority, *Leasehold Housing: Update Report* (CMA, 2020).

Whilst the CMA is a powerful tool to mobilise on the side of leaseholders, we pay more careful attention to the form of consumerism proposed by the government and whether it is sufficiently robust a reform tool in the fourth section of this chapter. At this point and noting that the 2022 Queen's Speech included explicit reference to 'transforming the experience of leaseholders',[64] we turn to empirical evidence of the leaseholder experience in the contemporary property market.

## III. A CONSUMERIST LENS ON LEASEHOLDER EXPERIENCE

In this section we draw on qualitative data collected by the authors during a project on the sale and use of leasehold in Wales supported by the Welsh Government. We provide a consumerist framing to our analysis as we discuss two aspects of the relationship between the landlord and the leaseholder which form the basis of the current regulatory logic affecting leasehold law: bargaining power and choice. We then discuss experiences of poor practice before concluding that these are indicative of a dysfunctional market which has eroded the confidence of leasehold purchasers.

### A. Data Collection and Methodology

Data was collected between the end of 2019 and late spring 2020. The project design included a multi-method qualitative study consisting of an online qualitative questionnaire which received 129 responses, 27 in-depth qualitative interviews with leaseholders across Wales as well as two focus groups with 'professional' stakeholders, including solicitors involved in leasehold conveyancing and disputes and property agents. We draw primarily from our survey and qualitative leaseholder interview datasets.

### B. Bargaining Power and Information Asymmetries

The modern freeholder-leaseholder relationship is characterised by an inequality of arms. On the one hand sits well-resourced, legally savvy, often multi-national developers and professional or institutional freeholders. For example, on 29 July 2017, the *Guardian* reported that one organisation, E&J Estates, was the freehold company collecting ground rents on over 40,000 properties from large-scale developments across the country.[65] Other developer-freeholder

[64] Queen's Speech 2022, see Prime Minister's Office (n 6).

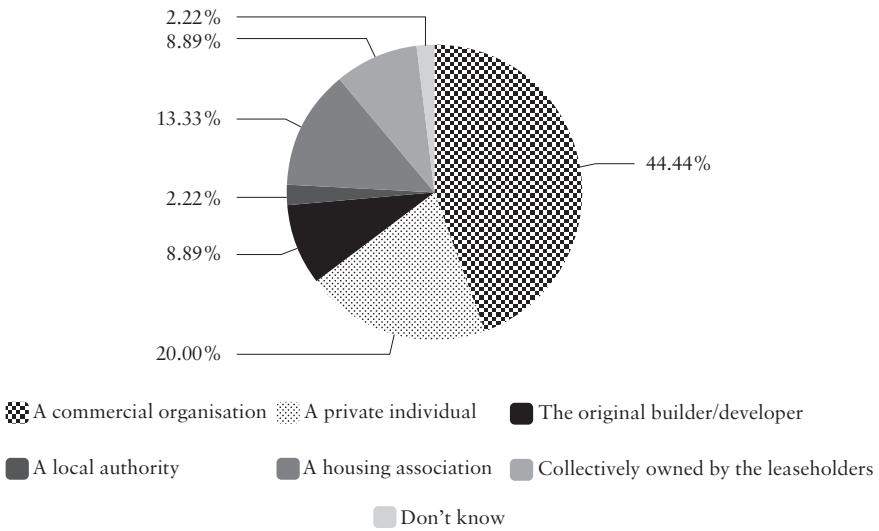
[65] P Collinson, 'Leasehold tycoon: man whose firms control 40,000 UK homes' *The Guardian* (29 July 2017); www.theguardian.com/money/2017/jul/29/leasehold-tycoon-man-whose-firms-control-40000-uk-homes (accessed 24 January 2023).

companies such as Bellway, Taylor Wimpey and Barratt Developments have annual turnovers that stretch into the hundreds of millions of pounds. On the other hand, leaseholders are likely to be individual purchasers and will often be purchasing the property as their main residence. This complicates the seller-purchaser relationship and exposes leasehold purchasers to malpractice.[66]

Blandy reminds us that as leasehold provides people with homes, it is critical to individual feelings of ontological security. The legal abstractions of leasehold and freehold tenure forms often mask the immense psychological, cultural, and emotional importance of these structures to those who reside in leasehold properties.[67]

The prevalence of institutional or professional freeholders was clear within our dataset, where over 40 per cent of survey participants reported that their freeholder was a commercial organisation, and a further 13 per cent reported that their freeholder was a housing association.

**Figure 1** Freeholder type – flat leaseholds




Inequality of bargaining power extends beyond financial resources and includes significant legal and informational asymmetries between leaseholders and freeholders at the point of purchase, particularly where the property is a new-build, and the freeholder is also the developer. The complicated pscyho-social implications

[66] S Blandy, 'Precarious Homes: The Sharing Continuum' in H Carr, B Edgworth and C Hunter (eds), *Law and the Precarious Home: Socio Legal Perspectives on the Home in Insecure Times* (Oxford, Hart Publishing, 2018).

[67] See L Fox, 'The Meaning of Home: a Chimerical Concept or a Legal Challenge?' (2002) 29 *Journal of law and Society* 580; and L Fox, *Conceptualising Home: Theories, Laws and Policies* (Oxford, Hart Publishing, 2007).

of informational imbalances are illustrated by the experience of a house leaseholder who purchased his home from a large national developer-freeholder:

> … my ongoing complaint to them is why, when I put the reservation fee down why didn't they tell me at that stage or give me a document to say it was leasehold at that stage […] that's when you've paid the £500 or £1000 […]. They didn't supply that information to my solicitor until about ten days before exchange and by that time we were committed to buying the house because we'd obviously bought carpets and made other arrangements, including our kitchen and there was no way for us to pull out at that stage, so we went ahead.
>
> ***House leaseholder, Neath Port Talbot.***

Around half of the leaseholders (n=13) we interviewed raised concerns about the level of information and detail they were provided with at the outset. However, a more concerning finding was that although most leaseholders understood the fact that they were purchasing a leasehold interest in the property at the time of purchase, the majority did not understand what that would mean in terms of the day-to-day management and occupation of their property. As one leaseholder explained, the difference between the asset-based welfare ideal and the implications of leasehold interests can be unclear for purchasers:

> … this again comes back to what did we know versus what did we not know. So we knew it was leasehold because it's an apartment and we were told most apartments are leasehold, it's not a big deal and it's just because it's a communal building, so this is like a terminology that's associated with it, but we didn't know what that actually meant.
>
> I thought that it was an asset just like my, my house was an asset that would rise in value all the time, that I would find security, I didn't know that that wasn't the case and [it] depreciates rather than appreciates, and so a leasehold property is something that you would buy because you can't afford a freehold, and that has shocked me tremendously.
>
> ***Flat leaseholder, Neath Port Talbot.***

Concerns relating to the knowledge and experience of consumers within the leasehold market were also expressed by the Competitions and Markets Authority in their 2020 update report. The CMA drew specific attention to the significance of the leasehold purchase within a consumer's life course, noting that for most consumers 'buying a house or flat will be their largest purchase and investment' and that because 'it is a relatively infrequent purchase consumers are unlikely to accumulate significant knowledge of the process or the salient characteristics of different forms of property ownership'.[68]

[68] CMA (n 63) para 33.

As the Law Commission points out, there is, at the heart of the relationship between landlord (freeholder or superior lessee) and leaseholder, a conflict of interests:

> The landlord may see leasehold solely as an investment opportunity or a way of generating income, while for leaseholders the property may be their home, as well as a capital investment.[69]

An additional point may be made here; there may be a conflict of interests between leaseholders who are owner occupiers of their leasehold properties and those who have bought leasehold properties as buy-to-let investments. Leaseholders who are resident in their properties may be more prepared to pay for improvements than those who do not live there.

These conflicts create substantial issues for the effective regulation of information asymmetries. Information requirements are often a hallmark of consumer empowerment regimes and involve imposing requirements on the commercial party with a stronger bargaining position to disclose information to the consumer (for example, emissions levels or energy ratings) to inform purchasing decisions. Such requirements have trickled into the regulation of leasehold, for example in the case of service charge demands,[70] and form part of the government's roadmap of reforms.[71] However, the potential for information requirements to remedy the issues experienced by leaseholders, particularly in terms of escalating costs, could be dampened by difficulty in accurately predicting the extent of future liability. Some leaseholders we interviewed had been provided with service charge projections in the case of new build leasehold developments that bore no correlation with the eventual charges. One participant described their experience of this process:

> I visited the marketing suite and they provided me with all kinds of glossy brochures on the interior, the equipment, listings of the properties still available, the price, the size, and they also provided me with something that I refer to as a work of fiction […]. The document was titled the […] Service Charge Proposal and it contained a very detailed description of the extent of services and their cost. […] The document contained a statement that declared it was only an estimate, but the associated language was of a nature that injected a great deal of confidence into the proposal, because they said things like 'we have used our expertise in compiling this document' and 'we have considered the cost of other properties that we manage' and they manage tens of thousands of units in England and Wales.
>
> ***Flat leaseholder, Cardiff.***

[69] Law Commission (n 17) para 1.3.

[70] Under s 47 of the Landlord and Tenant Act 1987, service charges must be in writing. Furthermore, s 21B of the Landlord and Tenant Act 1985 provides that service charge demands must include the prescribed content.

[71] Queen's Speech 2022, see Prime Minister's Office (n 6).

The data highlights the difficulties in regulating information asymmetries in a market that has been historically premised on the principle of caveat emptor and within which there exists no obvious mechanism to obtain independent verification of estimates, and where there are broader doubts as to whether it is in fact possible to project costs with any reasonable degree of certainty. Building on the arguments made by Ann Stewart, the assumption that forms the basis of property law's reluctance to intervene in these delicate and complex relationships – 'two equal parties who know what they are doing' – is often simply false.[72] Leasehold purchasers find themselves in the middle of what Madden and Marcuse characterise as an arena of contestation where there is 'a conflict between housing as home and as real estate' and where 'housing is the subject of contestation between different ideologies, economic interests and political projects'.[73]

### C. Choice

Market complexity coupled with information asymmetries has significant implications for consumer choice. This was recognised as early as the mid-1960s by the Molony Committee, commissioned by the Board of Trade to consider consumer protection. The committee concluded that in complex markets the consumer finds it beyond their power to make a wise and informed choice and is vulnerable to exploitation and deception.[74]

In the context of leasehold, the notion that even price is not a sufficient indicator of quality, and that consumers may be overwhelmed by the 'maze' of the purchase process was highlighted by the CMA in their investigation update report. They argued that the size of a leaseholder's investment is such that 'purchasers are capable of being blinded by the sums involved'.[75] Indeed, in the case of leasehold, the situation is complicated by the question of whether, even with the relevant information, the decision to purchase a leasehold interest amounts to a 'choice'. The notion of choice here is questioned on two primary grounds. The first is the centrality of 'ownership' as a symbol of security, success, and self-sufficiency in our neo-liberal society. As Carr pointed out in 2011:

> Private property – despite the financial crisis – remains the principal mechanism for delivering the wealth, self-reliance, and individual freedom that governments who have embraced neo-liberal rationalities promise their citizens.[76]

[72] A Stewart, 'Rethinking Housing Law: A Contribution to the Debate on Tenure' (1994) 9(2) *Housing Studies* 263.

[73] D Madden and P Marcuse, *In Defense of Housing: The Politics of Crisis* (London, Verso, 2016) 4.

[74] Board of Trade, *Final Report of the Committee on Consumer Protection* (Cmnd 1781, 1962) paras 42–43.

[75] CMA (n 63) para 34.

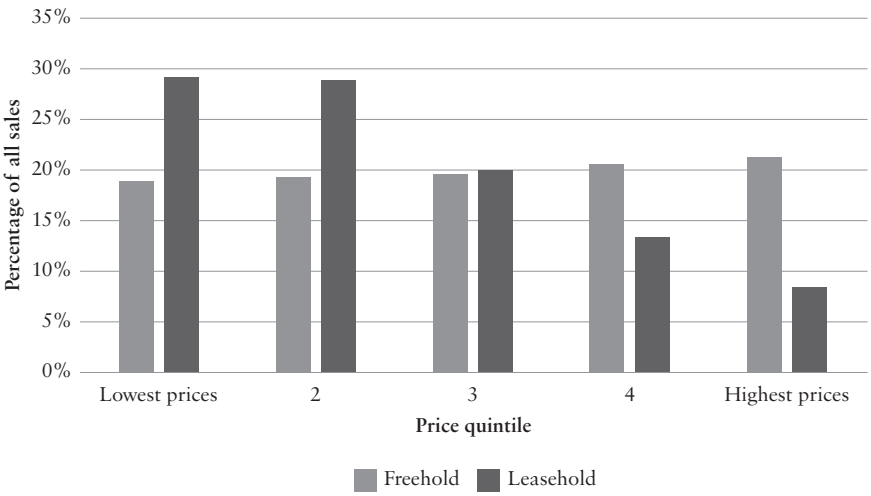
[76] H Carr, 'The Right to Buy, the Leaseholder and the Impoverishment of Ownership' (2011) 38 *Journal of Law and Society* 519, 519.

For Carr, a by-product of the Right to Buy and its extension of home ownership was that those who fail to chart a route through to home ownership are viewed as ineffective consumers potentially subject to processes of social exclusion such that 'the injustice of their position makes the stark realities of the neo-liberal/neo-conservative order patent'.[77]

Beyond the structural question of whether the potentially overwhelming nature of government driven property-owning hegemony acts to vitiate real choice for potential leaseholders, there is a broader question of whether there is truly scope for choice in the housing market.[78] Do leaseholders actively *choose* to purchase a leasehold interest, or is the nature of that interest either unavoidable or simply ancillary to the choice being made? The interviews we conducted asked each participant why they purchased that particular property, and whether they were specifically looking for a leasehold property at the time. Somewhat unsurprisingly, all 27 participants made clear that they were not specifically looking for a leasehold property.

As the chart below indicates, leasehold sales in Wales are skewed heavily towards the lower price quintiles. These figures were produced using Land Registry price paid data during our Welsh Government project.[79]

**Figure 2** Proportion of all sales (%) by price and tenure




*Source*: Land Registry Price Paid Data (2018).

During the qualitative interviews, however, affordability did not appear to be the main reason for 'choosing' the tenure amongst many leaseholders.

[77] ibid 520.

[78] For a more detailed exploration of the problematic nature of choice in complex property law relationships, see L Whitehouse, 'The Home Owner: Citizen Or Consumer?' in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (Oxford, OUP, 2008).

[79] Carr et al (n 7) 42.

For 44.4 per cent (n=12) of those leaseholders interviewed, the location of the property was key. Participants often cited proximity to family or friends, their workplace, or geographical features, such as beaches or a national park. Price was a primary or secondary reason for around 26 per cent (n=7) of participants and was commonly associated with factors forcing leaseholders to downsize, such as health or accessibility needs.

This data illustrates that the messiness of life leads individuals to opt for leasehold. A significant number of leaseholders moved into their property due to the location, sometimes where freehold tenure was not an option due to the concentration of apartments in the relevant area – for example, in dense urban areas such as Cardiff, or coastal areas where leasehold developments often constitute most of the new build stock. Other participants downsized after their children had left, and this was often coupled with retirement and the associated financial constraints that come with a reduction in income. One participant's story was a case in point of the messiness of circumstances that may lead to a decision to purchase a leasehold property. The participant was going through a relationship breakdown and wanted to maintain contact with his children. The only property that was affordable in the vicinity of the previous family home was a leasehold apartment. Here, the potential purchaser is balancing a plethora of personal, geographical, and fiscal factors when making a decision. The tenure form of the property is completely backgrounded, or entirely absent it would seem, from the 'choice' made by leaseholders.

It is notable that the government's response to its consultation on tackling unfair practices in the leasehold market supports our contention that leasehold is not a choice tenure, especially in the case of houses sold on leasehold.[80] This is to be contrasted with the government's position in relation to abolishing leasehold in favour of commonhold, where the notion of choice has been invoked as a reason to maintain a dual tenure system.[81] As noted by the Law Commission, the failure of commonhold in providing an alternative tenure form compounds the lack of choice faced by potential leaseholders.[82]

The data illustrates the complexity of decisions made by potential leaseholders during the purchase process. Not only are they having to navigate a maze of complex legal structures and processes, but the circumstances surrounding this decision and the socio-political context in which it takes place may be such that it is difficult to conceptualise that decision as a rational economic decision of an individual consumer engaging in a market activity. Whilst there is acknowledgment of the lack of choice within government, the answer appears to be a

[80] DCLG (n 8) para 35.

[81] Secretary of State for Housing, Communities and Local Government, *Government Response to the Housing, Communities and Local Government Select Committee Report on Leasehold Reform* (Cm 99, 2019) para 23.

[82] Law Commission, *Reinvigorating Commonhold: The Alternative to Leasehold Ownership* (Law Com No 394, 2020) para 1.30.

'reinvigoration' of commonhold, which seems optimistic given two decades of failed legislation and 60 years of failed endeavours. Behind this veil, it appears that the default policy position remains ambivalent on the issue of choice. Lord Shakleton's observation in 1967 remains apposite; it is reasonable to infer that a lot of people buy leasehold because they cannot find anything suitable on freehold terms.[83]

## D. Poor Practices and Market Dysfunction

As this chapter has made clear, confidence in leasehold as a tenure has collapsed in recent years. The CMA noted several 'very serious' allegations of mis-selling made by leaseholders about the conduct of developers and sales staff.[84] The specific issues raised by the CMA were also present within our dataset. Several leaseholders who purchased new-build houses paid a reservation fee of between £500 and £1,000 only to later discover that the property was leasehold. Some leaseholders, such as our house leaseholder from Neath Port Talbot, only found out when it was practically impossible to withdraw from the process.

When leaseholders realised that the property was being sold on a leasehold basis, their concerns were often pacified by reassurances that their title was 'as good as freehold' or that they could easily and cheaply acquire the freehold later. As one leaseholder told us:

> When I first realised they said 'Oh don't worry about leasehold, it's the normal practice, you can buy it in a couple of years' time, it's X amount, it's not much money.' But since [the freehold] got sold to an overseas company, they're just pulling figures out of the sky … coming up with silly figures.
>
> ***House leaseholder, Bridgend.***

Poor practices were not limited to the sales process. As well as service charge issues covered above, leaseholders were concerned with permission fees and the impact that poor practices were having on their experience. Again, our findings align with the CMA investigation,[85] with some charges levied without basis in the lease document, or costs that seemed completely disproportionate to the permission being sought. One leaseholder told us about their experience as a member of a right to manage company where residents were having issues with fees levied by the freeholder in relation to pets:

> So you have to have permission to have a dog and they charge £250 for that. But it's not used to control the number of dogs on the site or anything, it's just to make money. We've discovered if you just ask for permission [the freeholder] charge[s] you £250 and that permission is only for two weeks […] they say we thought you had a

[83] HL Deb 26 June 1967, vol 284, col 17.
[84] CMA (n 63) para 44.
[85] CMA (n 63).

> visitor. You can have permission for the rest of the pet's life, but you're going to have to pay another £250.
>
> ***Flat leaseholder, Vale of Glamorgan***.

Several leaseholders mentioned regular fees levied for subletting, with examples of biannual renewal fees (eg, £40) on top of more substantial sums for new tenants (eg, £200). Leaseholders are entitled to challenge the reasonableness of a permission fees (administration charges) at the First Tier Tribunal (Property Chamber) under Schedule 11 of the Commonhold and Leasehold Reform Act 2002.[86] In *Proxima*, the Upper Tribunal stated, in obiter, that such costs ought to cover the reasonable administrative expenses of a landlord but should not be used as a source of profit.[87] Although many leaseholders queried or challenged the fees charged, particularly where provision for such charges was not made in the lease, it is notable that none of the participants intended to challenge fees at the Tribunal.

The data paints a picture of a dysfunctional tenure and a market within which consumer confidence has been utterly undermined. This complicates the use of traditional consumer mechanisms, such as information requirements or unfair terms regulation. The property law approach to specific issue dispute resolution fails to account for the relational nature of the tenure and the potentially life-limiting consequences that dysfunctionality within the market can have on leaseholders. As the house leaseholder from Bridgend who was told that leasehold was 'normal practice' noted:

> I had a report from the solicitor, the report on title said it was a perfectly good house, perfectly sellable, mortgageable; five years down the line it's not mortgageable and it's certainly not sellable.
>
> ***House leaseholder, Bridgend***.

## IV. CONSUMERISM AND LEASEHOLD REFORM

Our data in section III demonstrates not only that leaseholders suffer significant problems, amplifying the case for reform, but also that notions of choice, transparency and fairness are complicated and elusive in the context of leasehold relationships. Whilst consumer-oriented reforms would improve the lot of leaseholders, our review of previous attempts at leasehold reform suggest they will be insufficient; the current relationship between leaseholders and freeholders offers too many opportunities for exploitation. Without something more substantial, the observation that Cole and Robinson made in the context of legislation in the 1990s will remain apposite and changes will offer 'some improvements to

[86] Commonhold and Leasehold Reform Act 2002, Sch 11.
[87] *Proxima GR Properties Ltd v McGhee* [2014] UKUT 59 (LC).

the situation of leaseholders but … not address fully the combination of factors responsible for their dissatisfaction'.[88]

In this section of the chapter our focus is not on whether being treated as consumers would be beneficial for leaseholders. Instead, we are concerned with something more fundamental. We argue that what is needed to stabilise leasehold as a tenure is more than conditional and contingent reforms. There needs to be a shift in the hierarchy of power between leaseholder and freeholder, a permanent change in the status quo of property rights. Drawing on Pointing and Bulos, we seek to answer an important question: can a sufficiently robust reforming consensus be built around a consumerist paradigm to achieve this necessary change in freeholder/leaseholder relationships? There are two features of the long history of leasehold reform that are pertinent here. The first is that the crystallisation of the social forces opposed to reform noted by Pointing and Bulos[89] has been strengthened by every subsequent reform effort. The second is the paradox at the heart of leasehold reform. Leasehold can only be reformed within the current property paradigm by increasing the property rights of leaseholders and decreasing the property rights of freeholders. This means that relying for instance on responsible property ownership as an argument for reform is problematic because responsible property ownership can also be deployed as a defence of the status quo. For example, Theresa Villiers MP criticised the abolition of ground rents in these terms,

> We are all united in wanting to stamp out abusive practices with ground rents, but is the defect of the hon. Gentleman's amendment not that it amounts effectively to a confiscation of existing property rights? That in itself has fairness issues, but it also deters future investment in our building stock. That future investment is needed, for example, if we are going to insulate against climate change and turn our buildings into more carbon neutral ones for the future.[90]

The powerful lobby for the status quo meant that whilst ground rents have been abolished for future leases, the reform has been constrained. The new legislation does nothing to remedy the problems of the recent spate of excessive and accelerating ground rents.

Taking these features of the current duality of the debate about leasehold reform into account, there are three reasons why we are sceptical of the potency of consumerism as a reforming consensus. The first is the very limited success of consumer interventions in property relationships, using as an example the limited effectiveness of the protections given to mortgagors. The second concerns the potency of property law as a tool for maintaining the status quo, supporting the conservative consensus, and constraining the impact of leasehold reform. Our third reason is less concerned with the power of the status quo.

[88] Cole and Robinson (n 17) 599.
[89] Pointing and Bulos (n 40).
[90] HC Deb 24 January 2022, vol 707, col 795.

It focuses on the problematic limitations of consumerism itself. Consumerism, which as Whitehouse notes, replaced citizenship as the conduit for rights as the role of the state shifted at the end of the twentieth century,[91] is not designed as a platform for radical reform of the status quo. Instead, it works within the market system seeking to address some of its more egregious harms. The question of whether consumerism packs a sufficiently powerful punch to disarm the powerful conservative forces of property is made more complex by the paradox at the heart of leasehold reform. What leasehold reform requires is that the importance of property rights is diminished for one form of property holder to strengthen the property rights of another.

### A. The Limitations of Consumer Interventions into Property Relationships

Despite more general trends in consumer protections, in the UK almost all transactions concerning land were excluded from earlier consumer-oriented protections. The exceptionalism of transactions relating to land is a consistent theme noted in the literature.[92] Instead, land transactions are subject to the regime set out in the Law of Property Act 1925[93] as altered by the Law of Property (Miscellaneous Provisions) Act 1989.[94] Rather than a protective regime, the approach aims for certainty in dealings between two notionally equal players and sets the rules for fair play.

Even in areas where overtly 'consumerist' agendas have been pursued, such as mortgages, the stubbornness of property law's 'strict logic' has watered down regulatory efforts or opted for more comfortable paths that avoid the need to consider anything beyond economic concerns.[95] For Whitehouse, this has meant that property law continues to prioritise the economic interests of mortgagees over the difficult-to-quantify non-economic interests of the mortgagor. Property law not only ignores the potentially destructive personal impacts of repossession on mortgagors but fails in its wider role of holding mortgagees to account for unethical business practices.[96] To disrupt the status quo, any so-called 'consumer' reforms to leasehold must, as Whitehouse argues in the case of mortgages, 'offer a more proportionate and appropriate response to the differing levels of risk and resilience experienced by' leaseholders and freeholders.[97]

[91] L Whitehouse, 'The Home Owner: Citizen or Consumer?' in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (Oxford, OUP, 2008).

[92] See, eg, L Whitehouse, 'The First Legal Mortgagor: A Consumer Without Adequate Protection?' (2015) 38 *Journal of Consumer Policy* 161.

[93] Law of Property Act 1925.

[94] Law of Property (Miscellaneous Provisions) Act 1989.

[95] L Whitehouse, 'Mortgage Possession at a Crossroads: Which Way Should We Turn?' [2019] *Conv* 227.

[96] ibid.

[97] ibid 249.

## B. The Court, the Conservative Consensus and Leaseholder Rights

We have considered the contestation in Parliament about leasehold reform and how that contestation has strengthened the conservative consensus. That contestation is also played out in the courts where property law norms such as certainty in dealings, equality of bargaining power and good order further buttress the conservative consensus and have been successfully deployed to curtail leaseholder rights.[98]

To further the point made in the previous section, even within leasehold there are numerous examples of the courts intervening to curtail statutory leaseholder rights in ways that appear to frustrate parliamentary intentions. For instance, whilst the Commonhold and Leasehold Reform Act 2002[99] included provisions requiring that freeholders consulted with leaseholders on major works,[100] addressing a persistent complaint, the requirements were seriously weakened by the Supreme Court in *Daejan Investments Ltd v Benson*.[101] It decided that the correct legal test for dispensation from consultation requirements was whether the flat owners would suffer any relevant prejudice, and if so, what relevant prejudice, as a result of the landlord's failure to comply with the requirements. This was despite a lack of reference to prejudice in the words of the statute. Prior to the decision, breaches of the consultation requirements limited the amount that a freeholder could claim for works to a nominal sum, an incursion of the property rights of the freeholder. Subsequently leaseholders have been required to prove prejudice as well as breach before costs are reduced, changing what was a freestanding right designed to address information asymmetries and promote transparency, to one that is rebuttable.

Constraints on the interpretation of statutory rights are also illustrated by the caselaw on section 35 of the Landlord and Tenant Act 1987. The section gives parties to a lease the right to apply to the FTT for variation of the lease in particular circumstances. These include defects in the lease with respect to repair and insurance as well as defects in the computation of service charges.[102] In *Morgan v Fletcher*[103] the Upper Tribunal set out the limits to the provisions. To the surprise of leaseholders, it found that the rights are not there to remedy unfairness in service charge provision. The Tribunal can

[98] Property law academics have also played a part in maintaining the status quo. Writing in the context of proprietary estoppel, Dixon for instance characterises the hallmarks of a conventional property law approach: To this author, estoppel runs the risk of becoming an unprincipled doctrine, an ad hoc response to perceived unfairness: neither a Titian, a Howard Hodgkin, but a Jackson Pollock. All are beautiful to some, but I would suggest that land law needs form and shape. See M Dixon, 'Painting Proprietary Estoppel: Howard Hodgkin, Titian or Jackson Pollock?' [2022] *Conv* 30, 45.

[99] 1987 Act (n 14).

[100] Inserting s 20ZA into the Landlord and Tenant Act 1985.

[101] *Daejan Investments Ltd v Benson* [2013] UKSC 14.

[102] 2002 Act (n 20) s 35.

[103] *Morgan v Fletcher* [2009] UKUT 186 (LC).

only re-calculate the apportionment of service charges when the aggregate of the charges does not add up to 100 per cent. If the service charges add up to 100 per cent then the Tribunal's jurisdiction is ousted. This is particularly iniquitous when the landlord adds a further unit to the block and does not alter the previously settled apportionment. This leaves existing leaseholders in a position where they are subsidising the services provided to the new units. Again, we see the judiciary adopting a conservative approach to leaseholders' rights justifying their position because of the need to protect the integrity of the original bargain. It is difficult to see how new reforms providing for fairness and transparency would be more effective in promoting leaseholder rights than the current provisions.

The failures of the Right to Manage (RTM) usefully illustrate the long-term consequences for leaseholders of the conservatism of property law. The RTM was designed to provide a no-fault procedure short of enfranchisement for blocks of flats which for instance were inadequately managed by freeholders. As management of property is not supposed to be a profit-making activity it might have been supposed that freeholders would be glad to be rid of the burden. This has not been the case and freeholders have strongly resisted applications.[104]

There are also costs problems. The RTM company must pay the landlord's reasonable costs of the claim and must also pay the landlord's litigation costs if the landlord successfully challenges the claim in the Tribunal. What should have been a low-risk standard procedure, because of the interventions of the courts has been made high-risk, complex, expensive, and time-consuming.

What these examples illustrate is that a new reform consensus built around consumerism is unlikely to overcome the conservatism of property law any more than previous iterations of leaseholder reform projects have done.

### C. The Limitations of Consumerism

In addition to the potency of property as a conservative consensus, there are practical limitations associated with the application of consumer logics to the leasehold relationship. Academic literature on consumerism for instance notes the problem of the information-saturated consumer,[105] and traditional consumer regulation mechanisms are more difficult to apply in the context of an on-going relationship like that of leaseholder and freeholder as opposed to the

[104] See Law Commission (n 44) para 214 for evidence of landlords' strict compliance with statutory procedures.

[105] L McShane and C Sabadoz, 'Rethinking the Concept of Consumer Empowerment: Recognizing Consumers as Citizens' (2015) 39(5) *International Journal of Consumer Studies* 544. T Harrison et al, 'The Internet, Information and Empowerment' (2006) 40(9) *European Journal of Marketing* 972.

more standard spot transaction. The programme of reform must take on board the fact that leasehold is not a homogenous tenure experienced in the same way by all lessees. The leaseholder/freeholder relationship is not as standard as most consumer/supplier relationships and power imbalances do not always follow predictable paths. Not infrequently, the tenant may be a corporate body and the freeholder a body of lessees. But our concern goes beyond these technical concerns.

As suggested earlier, consumerism, despite its progressive appearance, works within existing market frameworks. However, consumerist agendas also belie their potential to undermine due process and other key entitlements of citizenship.[106] Of particular concern is the potential for consumer agendas to lean towards and be captured by alternate forms of opaque self-regulation and potentially watered-down redress mechanisms. Although such moves are often accompanied by stern language and a flurry of activity, as Whitehouse explains in the case of the *Statement of Practice* published by the Council of Mortgage Lenders, they expose 'consumers' to unaccountable decision-making processes and lack teeth in the case of non-compliance.[107]

Consumerist agendas have often failed to live up to expectations. Without a significant disruption to the status quo of property law norms, it seems unlikely that the current reform package planned by central government will go far enough to unwind the dysfunctionality ingrained in leasehold.

## V. CONCLUSION

Leasehold cannot be allowed to fail. Leaseholders are electorally important, particularly in urban centres, and having quite literally bought into the ideology of home ownership, there would be significant political consequences if as a result they became poorer and more constrained. Just as important any collapse in value of leasehold property would have serious economic consequences not just for individual leaseholders but more generally, and the social harm of a failed tenure cannot be underestimated. Marc Schelhase points to the systemic social harms which emanate from the privileging of 'ownership …' when the risk-reward balance tips unfavourably against a property owner.[108]

Yet the history of leasehold law reform shows how difficult it is for interventions to address the dissatisfaction of leaseholders. A reforming consensus is beginning to be built around consumerism. It is clear that, at least in policy circles, the property law principle of caveat emptor is losing favour, and the notion that both parties are bargaining from positions of equal strength is being

[106] Whitehouse (n 91).
[107] ibid.
[108] M Schelhase, 'Bringing the Harm Home: The Quest for Home Ownership and the Amplification of Social Harm' (2021) 26 *New Political Economy* 439.

debunked. The problem is whether that reform consensus will be sufficient to overcome the conservative consensus which supports the status quo of property. Our conclusion is that it will not. The status quo is very powerful and has become increasingly powerful with each iteration of leasehold reform. The history of consumerist interventions into property relationships is not propitious and the instincts and traditions of property law which have been successfully deployed to constrain past reform programmes will continue to have significant effects. Moreover, we are sceptical that the market-fixing approach of the current government is anything more than a further iteration of reactive policymaking; firefighting the collapse in confidence in the tenure brought about by a perfect storm of the building safety crisis, strong activist campaigns powered by social media, and extensive work by the Competition and Markets Authority to highlight the widespread nature of poor practice. Government is undoubtedly wary of the potential ripple effects that any market collapse would have on financial institutions and the buoyancy of the property market, as well as the ideological implications of upending the stability of property ownership.

We have another concern. Even if we are wrong, and a reform programme based on consumerism is sufficient to overcome the potency of the property status quo, the consequences we suggest are unpredictable. This is because the free and fair market, which is the goal of consumerist approaches, is unattainable in leasehold properties, so government is pursuing a chimera. We see at least two significant barriers to the exercise of free consumer choice, neither of which can be overcome in the contemporary economic paradigm. The first is the inadequacy of supply of affordable home ownership which renders notions of choice illusory, and the second the incompatibility of individual freedom and the collective nature of living in leasehold property. Further, we suggest that there may be an unexpected consequence of a consumerist approach; it offers a new dynamism to leasehold activism which might accentuate dissatisfaction and further destabilise the tenure. Leaseholders may well 'weaponise' their new status as consumers. Recently Harry Scoffin of the Leasehold Knowledge Partnership tweeted, in response to a letter in the *Financial Times*,[109] 'We, the consumers, will kill the market for leasehold flats. Sales already down 60% in 3 years. Then we will get our commonhold.'[110] This suggests that even if consumerism provided a sufficiently robust challenge to the status quo of property, it is unlikely to provide stability to leasehold, the outcome that government seeks.

[109] D Konstantinidis, 'Letter: Tower Block Developers' problems are Self-Inflicted' *Financial Times* (London, 27 May 2022) www.ft.com/content/ba185c53-2873-4d49-9c33-7d2c09a67e5c (accessed 6 September 2022).

[110] H Scoffin, 'We, the Consumers, Will Kill the Market for Leasehold Flats' (Twitter, 27 May 2022) twitter.com/HarryScoffin/status/1530128590809051137 (accessed 6 September 2022).