A SUBMISSION TO THE LEASEHOLD AND FREEHOLD BILL COMMITTEE. BY HARRY SCOFFIN FOR FREE LEASEHOLDERS

Our campaign has spent the past year travelling the country filming leaseholders. We've met dozens of people whose lives are being wrecked by leasehold and they are only a tiny fraction of the thousands who are suffering. Women who've put off having families until it is too late, because they could not sell their flats. People whose mental and physical health has been damaged by the stress of living in buildings that are not maintained and paying service charges they cannot control. People forced to sell at huge losses just to be free. Bankrupts and those exhausted by court battles in a system stacked decisively against leaseholders. Leasehold is utterly unfair. And illogical. Attempts at reform have by now generated so much legislation that bits of one Act inevitably cancel out or contradict others. No one, not even those drafting these laws, is able to cope with the level of complexity. We all know that leasehold, which exists nowhere else in the world, has to go. Home ownership has to mean ownership for the buyers collectively, with no third party involvement that they do not control.

The biggest disappointment in a Bill with many inconsistencies and shortcomings is **the failure to legislate against leasehold for all future homes**. That is the line in the sand that needs to be drawn. It is the most urgent requirement. The excuse used for not abolishing future leaseholds in this Bill is that the wrinkles to Commonhold haven't been ironed out. This is in spite of three years of a Commonhold Council working group, a second generation tenure proposed by the Law Commission four years ago following extensive research and consultation, and an existing Commonhold Act passed over twenty years ago. We say abandon Commonhold for now. The imperative is to stop this corrupt asset class in ordinary people's homes going forward. That means no more rentier freeholders in new flatted developments. Flat owners need self-rule. And we already have the vehicle to permit this.

Share of Freehold is a well-established arrangement, which lenders and the courts understand and accept. Developers are familiar with the arrangement, too. No, it isn't perfect. While still technically leasehold, it crucially ensures that flat buyers have control over their buildings, costs and service providers from day one of moving in. In the future, Share of Freehold estates developed after this Bill comes into force would be able to very easily convert to Commonhold 2.0 since they would already collectively own the freehold and be without an troublesome corporate freeholder to navigate and buy out. Right now, what we need far more urgently is the public recognition that leasehold is on its way out. Only the abolition of leasehold for all future properties with mandatory share of freehold and leaseholder-operated resident management companies on all new flats can deliver this.

As well as believing that the Leasehold and Freehold Reform Bill must end leasehold for future developments, Free Leaseholders is also disappointed to note that the Bill falls well short of the full and integrated package of reforms proposed by the Law Commission in 2020. Indeed, one analysis has found that on Right to Manage reform, "of the Law Commission's 101 recommendations, fewer than five have been specifically adopted."[1] However, it is still very possible for the Government to bring forward a number of targeted amendments that would not only end the role of expensive middle-men freeholders for new flats, but hand more flat

[1] Mark Loveday, 'Legislation Brief No.2 – The Right to Manage', Tanfield Chambers, 21 December 2023 https://www.tanfieldchambers.co.uk/2023/12/21/legislation-brief-no-2-the-right-to-manage/

leaseholders rightful control of their homes, money and, ultimately, lives. Such policies would still go with the grain of the Bill and also echo some unadopted recommendations of the Law Commission. It has been 22 years since Parliament last attempted to defang leasehold. Please, let's make full use of this once-in-a-generation opportunity.

Amendments to improve the position for future flats

Recommendation 1: Mandate freehold-owning resident management companies under leaseholder control

Please consider accepting or bringing forward amendments that require all future flats sold as private sector leases to come with a share of freehold and a resident management company (RMC) under leaseholder control. While Labour's Matthew Pennycook, the shadow housing minister and a member of your Committee, has already proposed amendments to the Bill mandating a resident management company on all new flatted developments, at the time of writing there is no requirement on developers to hand over the freehold to leaseholders, too. Mandating an RMC without also handing over the freehold gives leaseholders the *responsibility* for managing their blocks without also giving them the *power* of decision-making that should come with that. In some respects, it leaves them worse off. A leaseholder on our group's steering committee is stuck in just this situation. His freeholder still controls his insurance costs, which have risen year by year well above inflation and are now more than double those paid by identical blocks with a different freeholder. Commissions are also being pocketed by that freeholder. With an RMC in place, he was originally told by First-tier Tribunal that he could not even take legal action to change this. The FTT determined that he, as leaseholder, would have to sue himself as management, even if he and his fellow RMC directors are compelled by their lease terms to go with the freeholder's nominated insurance broker. This same ridiculous situation left another leaseholder we filmed unable to get redress, when her billionaire pension fund freeholder refused to fix her leaking roof for seven years. Again, she would have had to sue herself as part of her RMC.

By contrast, the "RMC plus freehold" arrangement we are proposing and which already exists at many sites would completely remove any space for an outside freeholder landlord and ensure that all the leaseholders would have full control of their homes, block management and service charges. The freehold could not be leveraged against or monetised by an external investor.

Given that Parliament has already ended monetary ground rents on new leases with the Leasehold Reform (Ground Rent) Act 2022, freeholds to new blocks of flats should be largely valueless now. There is no longer any legitimate reason why developers should be hogging the freeholds, or flogging them to investors. By ridding leasehold of its sole signature income stream, monetary ground rents, the Act was designed to incentivise developers to consider building their new sites as commonholds, or at least with the freehold vested in an RMC to be handed over to all the leaseholders. The logical next step from the 2022 Act would be to use the Leasehold and Freehold Reform Bill to mandate that future flats come with a share of the freehold and an RMC, with the outgoing developer handing the freehold-owning RMC over to the leaseholders, once a certain percentage of units on a site have been sold. Compelling the freehold to be handed over on new flatted developments through share of freehold, would transform leasehold as it currently exists by giving all leaseholders a stake in the freehold and access to collective decision-making via a freehold-owning RMC that they are members of. This is vital now, because of the omission of a second generation Commonhold tenure in this Bill. The answer to the problem of the current exploitative leasehold tenure is not to allow more of it to be created.

It's not just leaseholders and their campaigners arguing for this policy. Professor David Clarke, of the University of Bristol, wrote in 2006 that "this proposal is not as radical as it sounds. We already have legislation permitting a collective enfranchisement, and providing for the grant of a new lease for any number of further terms of 90 years at a peppercorn rent, and granting a right to manage to leaseholders without any payment to the reversioner. So why not go to

the obvious conclusion and require developers to transfer the 'whole value' of the land and buildings to the new leaseholder/owner at the outset? There is no justification for permitting a developer to retain at the start what Parliament has indicated can be taken away at any time in the future. The developer cannot complain. The full capital value of the freehold, or of the lease for 999 years at a peppercorn rent, will be paid at the first sale. Theoretically, the buyer of the new home might pay a little more by way of initial purchase price, but in practice, any extra sum will be small".[2]Professor Clarke noted that requiring developers to hand over the freehold to flat buyers from the outset crucially avoids leaseholders later having "to negotiate the tortuous process of enfranchisement, a process now notoriously complicated, and, more importantly, will not have to pay a second capital sum to secure the home" (ibid). He wryly concluded that his recommendation "sounds a bit like aiming to achieve the benefits of commonhold, but under the guise of a leasehold" (ibid). Not a bad thing given that this government won't be using this Bill to make commonhold common and mandate its usage on new-build flats.

Recommendation 2: Default 990-year leases

Please consider accepting or bringing forward amendments that require all future flats come with 990-year leases. 990-year leases would therefore be mandatory on all new flatted developments. This is already the policy for shared ownership leases via the New Model Lease, Homes England (it was previously a minimum 99-year lease term but changed following the fallout from the brilliant BBC Panorama documentary, *The Home I Can't Afford*, which exposed housing associations preying on hard up buyers of shared ownership homes by ensnaring them in short leases).[3]

It would be absurd and immoral to allow developers to profiteer from unsuspecting flat buyers by selling them 99-year and 125-year leases that will need topping up at considerable cost to them. Failure to require 990-year leases on all new flats also jars with the principle of one of the Bill's signature policies, a new right to a 990-year lease extension. Imagine moving into a new-build flat and being incentivised to pay a second capital sum just to improve the saleability of your home against older ones where their leaseholders have availed themselves of a 990-year lease extension! Surely it should have been a 990-year lease from the outset, especially when the homebuyer made a considerable financial investment in the first place? Why should they have to buy their home twice? This would be laughed at by citizens in other jurisdictions, and indeed is.

Amendments to improve the position of existing flat leaseholders

Recommendation 3: End forfeiture

Please consider accepting or bringing forward amendments that abolish forfeiture. Forfeiture has no place in a modern housing market and is arguably the most feudal element of leasehold, giving the freeholder landlord complete whip hand over his 'tenant'. It is a fantastically draconian remedy. Unlike mortgage foreclosure, where there is a balancing payment at the end of it, you lose all equity in the home. That means you can lose a £500,000 flat because of non-payment of a £5,000 bill. The freeholder seizes your flat, takes back the lease, and makes a windfall, irrespective of the size of the contested charge. Worst still, forfeiture kicks in at just £350. If the freeholder wants to recover a debt, he can sue for a money judgment in the usual way. If a lease term has not been complied with, he can sue for an injunction. He does not need forfeiture and the windfall that that entails for good block management.

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[2] David Clarke, 'Long Residential Leases: Future Directions', in *Landlord and Tenant Law: Past, Present and Future* ed. by Susan Bright (Oxford: Hart Publishing, 2006), pp. 171-190 (pp. 186-189)

[3] Consultation outcome: New Model for Shared Ownership, Ministry of Housing, Communities and Local Government, 1 April 2021 https://www.gov.uk/government/consultations/new-model-for-shared-ownership-technical-consultation/outcome/new-model-for-shared-ownership-technical-consultation-summary-of-responses

In 2019, the Commons housing select committee concluded that "the threat of forfeiture puts freeholders in a near unassailable position of strength in disputes with their leaseholders" and recommended that "the Government should immediately take up the Law Commission's 2006 proposals to reform forfeiture, to give leaseholders greater confidence in disputing large bills by reducing the threat of losing a substantial asset to the freeholder."[4]

While the incidence of successful forfeitures is relatively rare, with an estimated 80 to 90 cases every year (so 80 to 90 potential homeless families every year), it is the *threat of forfeiture* which hangs over leaseholders every time they face an excessive service charge demand. It disincentivises them from challenging any bill levied by the freeholder, however apparently unreasonable. Forfeiture and the ability to threaten it to force payment gives freeholders the coercive power to extort from these households. If we're to successfully defang leasehold, to make it a harmless "homeopathic drop" in the property market, as Secretary of State Michael Gove has suggested he wants to see happen with his reforms, it is critical that we end forfeiture.

As an insurance policy against the Government keeping draconian forfeiture as a mechanism, please authorise amendments that at least ban the windfall to the freeholder so he must account for the equity less the debt, as appears to be reflected in a live Private Member's Bill by Lord Young of Cookham. Further, please consider authorising amendments that increase the £350 limit to something more sensible, like £5,000, in line with personal bankruptcy applications. Please note, however, that we do not consider these compromises a satisfactory solution to the problem.

Recommendation 4: Restore Section 24 court-appointed manager scheme by fixing the Building Safety Act 2022 amendments

Please consider accepting or bringing forward amendments that overturn the harmful Building Safety Act 2022 (BSA) amendments to the Section 24 court-appointed manager scheme, of the Landlord and Tenant Act 1987. These amendments fell below the radar of Parliament when the Act, then a Bill, was being scrutinised and debated. Section 24 of the 1987 Act is not well known, but it is and will remain the only defence that many leaseholders have against freeholders who exploit them financially and/or fail to maintain their estates. This applies not just to the many mixed-use buildings that have mushroomed over the past 20 years, but to hundreds of other estates where leaseholders are unable either to buy their freehold or achieve Right to Manage. Section 24 of the 1987 Act allows a tribunal to appoint a suitably qualified and experienced manager to take over the estate management and finances, where they judge it "just and convenient". The S24 is empowered to manage as an Officer of the Court and has a Management Order that can provide a robust scheme of management against a recalcitrant freeholder and inadequate leases. The BSA has effectively destroyed this important lifeline by barring any Section 24 manager from taking on the new BSA regime dutyholder roles of Accountable Person (AP) and Principal Accountable Person (PAP), responsible for fire and structural safety. This policy means that a block of flats under Section 24 management would now have two managers, with the freeholder able to encroach more and more on the S24 manager's activities. After all, everything can be deemed fire or structural safety-related, from how concierge staff are trained to how flammable cleaning materials are stored. The BSA drafters naively envisaged freeholders and Section 24 managers "co-operating" in the management of such estates. But why would a freeholder who's been stripped of financial control by his leaseholders co-operate voluntarily with their pick of manager? And if he won't co-operate, who's going to make him? S24 managers can't go running back to court every time there's a disagreement. Estate management would grind to a halt.

[4] House of Commons Housing, Communities and Local Government Committee, *Leasehold Reform: Twelfth Report of Session 2017-19*, 19 March 2019
https://publications.parliament.uk/pa/cm201719/cmselect/cmcomloc/1468/1468.pdf

Because of split management and the resultingly high risk of an ungovernable building with competing power centres in the freeholder as AP and PAP on one side and the s24 manager on the other, naturally cautious tribunals will refuse to grant new Section 24 orders, even where leaseholders are able to evidence fault against their freeholder. Leaseholders could win on the 'just' of the 'just and convenient' test, but not be able to satisfy the *'and convenient'* element, to win a Section 24 application.

Beyond this, the policy is also illogical. It bans Section 24 managers from being the AP and PAP because they do not have "a legal estate in possession" while allowing non-freehold-owning resident management and Right to Manage companies to be the PAP and AP. Further, while a freeholder can appoint any company to be the AP, irrespective of their expertise of fire and structural safety matters or qualifications in the field, a specially vetted property manager interviewed and installed by Tribunal is somehow deemed not suitable to be the AP.

Canary Riverside on the Isle of Dogs in east London is a Section 24 estate. Only last month, the First-tier Tribunal determined, in the first test case on this matter, that the BSA precludes Section 24 managers, including theirs, from being the AP and PAP. The leaseholders' counsel submitted that "such an interpretation would be a most surprising result, as the purpose of the BSA 2022 was to confer additional statutory protection on leaseholders, not to remove or weaken their existing statutory rights". Ominously, the FTT observed that its "conclusion is likely to have significant practical consequences for [the manager] in carrying out his functions under the Management Order. We accept too that there is a risk of disagreement between him and the PAP as to how the cladding-removal works should be progressed." It's not just leaseholders' cash that needs S24 to ensure it is protected and properly managed. Canary Riverside is a cladding site with over £20 million of public money earmarked by the Building Safety Fund for remediation of its five residential towers. We have also spoken to UK Cladding Action Group who confirm there are dozens of cladding sites in a similar position to Canary Riverside, which puts millions of pounds of taxpayer money at risk of mismanagement.

Any amendments to the Leasehold and Freehold Reform Bill to help resolve this issue should allow a Manager appointed under Section 24 of the Landlord and Tenant Act 1987 to take on the Accountable Person (AP) and Principal Accountable Person (PAP) dutyholder roles where a tribunal deems it appropriate. Such amendments should also allow for a tribunal to create or vary a Section 24 Management Order to devolve all AP and PAP functions and liabilities to a Section 24 manager.

Recommendation 5: Lift the so-called 'structural dependency' rules barring leaseholders in mixed-use buildings from collectively enfranchising and Right to Manage, as recommended by the Law Commission

The government is to be applauded for recognising that the qualifying criteria surrounding collective enfranchisement and Right to Manage is unnecessarily restrictive and also outdated, especially with regards to mixed-use buildings. However, while mandatory leasebacks to the outgoing freeholder and liberalising the 25% limit on non-residential premises are welcome policies, they will unfortunately be cancelled out by failure to lift the so-called "structural dependency" rules, which will mean those who stood to take over management of their homes from a mismanaging freeholder will actually still be disqualified from attaining their freedom because of the way in which their block was originally designed. These regulations bar leaseholders with shared services or underground carpark from being able to claim collective enfranchisement and Right to Manage. This will be a problem for the majority of mixed-use buildings.

In its 2020 reports, the Law Commission made a series of sensible recommendations addressing this, including relaxing the currently strict "vertical division" rule for enfranchisement and RTM, while introducing a third test for RTM so that the RTM can be acquired in relation to a building or part of a building "which is reasonably capable of being

managed independently". The Law Commission identified that the current rules on physical scope of the premises sow confusion, serve to incentivise litigation and can be used as a technicality by freeholders to successfully frustrate leaseholder RTM claims. It recommended that the "self-contained" test be relaxed around the issue of "vertical division" (in line with its proposals to reform enfranchisement) and that, crucially, the focus should turn on whether "management functions could be divided between the relevant parties responsible for them", i.e. if premises can be autonomously managed. Under this approach, then, the key question would be: Can a building, or at least parts of it, be managed independently by a RTM company and its appointed managing agent? If Yes, the RTM can be claimed by the leaseholders. This should be the position in the Right to Manage reforms in the Bill we are deliberating over today.

We urge the Bill Committee to consider moving amendments to resolve this situation in the Leasehold Reform, Housing and Urban Development Act 1993 and Commonhold and Leasehold Reform Act 2002, which were devised and passed before high-rise and mixed-use development gained prominence in this country. The amendments can bring into force Recommendation 5 and Recommendation 6 of the Law Commission's final Right to Manage report, while actualising Recommendation 33 of the Law Commission's final enfranchisement report.

Recommendation 6: Introduce a Right to Participate for flat leaseholders who were not involved in the original enfranchisement claim, but want to buy their share of the freehold and be part of the collective decision-making

We urge the Bill Committee to consider moving amendments to introduce a new Right to Participate with retrospectivity in any collective enfranchisement / collective freehold acquisition.

Currently, leaseholders who cannot afford to join their neighbours in pursuit of freehold purchase (or were unable for personal reasons at the time to get involved) have no right to buy their share of the freehold later on from those who participated in the original claim. This means that there are, and will continue to be, leaseholders with blighted homes in perpetuity because while they may be living on "an enfranchised site", they have no statutory right to upgrade their property interest to acquire a share of the freehold and enjoy the transparency and control that that provides. The result is to shut them out of the collective decision-making of the leaseholders who did participate at the time and who, through their freehold-owning RMC, appoint the managing agent and set block management priorities etc. Further, as leasehold continues to be toxic in the mind of buyers, there must be a Right to Participate mechanism so that leaseholders who, for whatever reason, did not participate in the original claim have a means to make their homes more sellable.

Right to Participate was strongly supported by the vast majority of consultees to the Law Commission's consultation on enfranchisement reform.

Recommendation 7: Adopt Recommendation 41 of the Law Commission's Enfranchisement Report to remove the unfair ban on leaseholders with three or more flats from qualifying for collective enfranchisement

Please consider accepting or bringing forward amendments that bring into force Recommendation 41 of the Law Commission's final enfranchisement report. The current law disqualifies leaseholders with three or more flats from participating in a collective enfranchisement / collective freehold acquisition. This is unfair and only serves to deny leaseholders from gaining control of their homes and service charge monies. The Law Commission observed that the policy is not only hard to police but can easily be gamed by "sophisticated investors". It also concluded that the practical effect of the rule is to deny leaseholders from collectively enfranchising. "This restriction should be removed, in the interests of facilitating collective freehold acquisitions. We think that, given the ease with which this requirement can be and has been avoided, this change will have little impact on

freeholders; however, we consider that it may have a positive impact on leaseholders who may have been caught out by this exclusion, or whose buildings have been rendered ineligible for collective enfranchisement by the presence of a leaseholder who owns three or more flats." We know of developments where freeholders buy up leasehold flats but own via different SPVs to work around the restriction in order to vote against leaseholders, preventing them from attaining 50% to collectively enfranchise. Meanwhile, innocent buy-to-let leaseholders holding their three or more flats via one company and who want to join their neighbours to buy their freedom are instantly disqualified.

Recommendation 8: Liberalise 50% participation threshold for Right to Manage
Please consider accepting or bringing forward amendments that liberalise the onerous 50% participation threshold for Right to Manage. Currently, a single leaseholder can remove freeholder management by making a Section 24 application, which requires they prove fault against the landlord before tribunal. Yet Right to Manage, a "no-fault" scheme, is caveated by the need to secure the support of half of the entirety of the leaseholders. This makes no sense and is unfair. It can be impossible for leaseholders in large developments to mobilise half of a whole building, especially when some single high-rise towers are housing 400-500 units. High levels of buy-to-let leaseholders, many based overseas, makes it even more difficult to clinch the 50% participation threshold.

Given that RTM does not involve the forced sale of the freeholder's interest in the property and is merely regulating use of the property to provide democratic, resident control, an RTM claim should not need half of all leaseholders in a block to be valid. Indeed, in 2015 leading landlord and tenant barrister Philip Rainey KC came out in support for reducing the trigger, saying 50% could at least become 35% given the "no-fault" nature of the scheme.[5]In its 2012 review of leasehold, the London Assembly's Planning and Housing Committee recognised the 50% threshold as a "particular legislative barrier" to leaseholders achieving Right to Manage: "the existence of large numbers of absentee landlords that make achieving the 50 per cent of residents figure problematic".[6] Tweaking the Bill to reduce the 50% participation threshold for RTM, as laid out in the Commonhold and Leasehold Reform Act 2002, would not cost the Treasury a penny and allow many more leaseholders to avail themselves of the Right to Manage to take control of their buildings, charges and service providers.

We strongly reject the scaremongering suggestion that lowering the 50% participation threshold on RTM will lead to "tyranny of the minority". We already have tyranny of the minority. It is rule by one freeholder overlord whose interests are diametrically opposed to the leaseholders, as confirmed by the Law Commission work. Third-party freeholders see our homes as a perpetual income stream. We care about value for money, works done to a decent standard and a managing agent who works in our interests, the people ultimately paying the bills. Further, the beauty of the way Right to Manage has been designed, is that those who did not join the original RTM claim can still get involved later. No leaseholder is locked out just because they did not participate in the RTM bid. There is also a requirement on leaseholders setting up the RTM to serve a notice inviting participation to all leaseholders in a building, to notify them and raise awareness of the move to remove the freeholder's pick of managing agent and to gain control of the service charges. This means an RTM claim cannot be done by a handful of leaseholders in secret, another guard against tyranny of the minority. We have previously proposed the 50% threshold coming down as far as 15%, but would be prepared to accept 35% as an acceptable compromise at this time.

Thank you for pondering our proposals and we hope that these are reflected in the amendments you authorise and bring forward. Over 5 million households are counting on it.

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[5] Philip Rainey KC, *Further Leasehold Reform: Radical thinking?*, 29 January 2015 https://www.tanfieldchambers.co.uk/upload/files/PCR%20Leasehold%20reform%20Jan%202015.pdf
[6] London Assembly Planning and Housing Committee, *Highly charged: Residential leasehold service charges in London*, March 2012 https://www.london.gov.uk/media/52726/download