



**Law
Commission**
Reforming the law

Law Commission

Electronic execution of documents

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Background to the project

- Global Britain
- Some people already using electronic signatures with confidence
- Broad project covering different types of transactions - where there is a statutory requirement for "signed" or "signature"
- But does not include wills nor registered dispositions under the LRA 2002
- Validity versus evidential value

Electronic signatures

- "Electronic commerce: formal requirements in commercial transactions - Advice from the Law Commission" (2001)
- 2001 conclusion: electronic signatures would satisfy a statutory requirement for a signature if an authenticating intention was demonstrated.
- What has happened since 2001?

Electronic signatures

What has happened since 2001?

- eIDAS Regulation (EU) No 910/2014
- Electronic Communications Act 2000, s 7
- Case law (eg J Pereira Fernandes, WS Tankship, Golden Ocean (CA), Bassano)
- 2016 Law Society and CLLS note

Electronic signatures: provisional conclusions and proposals

Provisional conclusion: under the current law, an electronic signature is capable of satisfying a statutory requirement for a signature where there is an intention to authenticate the document. (para 3.86)

Electronic signatures: provisional conclusions and proposals

- Is legislation necessary?
- A set of industry standards?

Deeds

- What makes a valid deed under the current law?
- What is preventing the electronic execution of deeds?
- Provisional proposals - witnessing
- Deeds - do we really need them?

Deeds: the current law

Section 1 of the Law of Property (Miscellaneous Provisions) Act 1989

(1) Signed;

(2) "in the presence of a witness who attests the signature"; and

(3) "delivered".

Also section 44 of the Companies Act 2006

(1) Common seal; or

(2) Signature of two authorised signatories; or

(3) Signature of director, attested by a witness.

Deeds: what is preventing electronic execution?

- "signed ... in the presence of a witness who attests the signature"
- purpose of witnessing and attestation include evidential and protective functions
- "presence" probably means "physical presence"

Deeds: provisional conclusions and proposals

- Current law requires physical presence. Therefore, physical presence in the room when the signatory signs is sufficient.
- What about witnessing via video-link and a digital platform?
- Other options - digital signatures, electronic acknowledgement.

Next steps

- Consultation closes **23 November 2018**
- <https://www.lawcom.gov.uk>
- Report and recommendations: Spring 2019

Smart contracts

- smart-contracts@lawcommission.gov.uk



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CRELA Property Law Update
Monday 19 November 2018

Law Commission projects on leasehold and commonhold reform

Daniel Robinson, lawyer

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www.lawcom.gov.uk



- 13th Programme of Law Reform
 - Over 1,300 submissions – 150 concerned leasehold
 - 220 different topics
 - 14 projects selected, including residential leasehold and commonhold
 - In the first instance, project covers:
 1. Enfranchisement
 2. Right to manage
 3. Commonhold

- Problems with leasehold
 - Wasting asset
 - Lack of autonomy
- Commonhold and Leasehold Reform Act 2002
 - But few created
- Renewed interest
 - “Fixing our Broken Housing Market” (Feb 2017, White Paper)
 - “Tackling Unfair Practices in the Leasehold Market” (2017 Government Consultation)
 - “Implementing reforms to the leasehold system in England: a consultation” (2018 Government Consultation)



Residential leasehold and commonhold: Terms of Reference

General policy objectives identified by Government:

- promote transparency and fairness
- provide a better deal for leaseholders as consumers

(1) Enfranchisement: Terms of Reference

Policy objectives identified by Government:

- To simplify the legislation
- To consider the case to improve access to enfranchisement
- To examine the options to reduce the premium (price) payable, whilst ensuring sufficient compensation is paid to landlords
- To make enfranchisement easier, quicker and more cost effective (by reducing the legal and other associated costs)
- To prioritise solutions for existing leaseholders of houses

(1) Enfranchisement: Consultation Paper

Consultation period: 20 September to 7 January 2019

Four key questions:

- What should the enfranchisement rights be?
- Who should be entitled to exercise enfranchisement rights?
- How should enfranchisement rights be exercised?
- What should it cost to enfranchise?



(1) Enfranchisement: What rights?

Lease extensions:

- Universal right for leaseholders of houses and flats
- Same terms as existing lease (save for non-contentious modern terms from a prescribed list)
- Length of term?
- Redevelopment breaks?
- Choice to extend the lease only, or extinguish the ground rent only?



(1) Enfranchisement: What rights?

Individual freehold acquisition

- Simplifying what property is included

Collective freehold acquisition

- Nominee purchaser to be a company limited by guarantee (in most cases)
- Introduction of “estate enfranchisement”
- Leaseholders can require landlords to take leasebacks of all parts of the premises (other than common parts) not let to participating leaseholders
- No further claims within 5 years, and restriction on disposal of the freehold by nominee purchaser



(1) Enfranchisement: What rights?

Right to participate

- Ability to purchase a “share” of the freehold interest at a later date
- Raises many questions:
 - Availability of the right
 - Terms of participation
 - Calculation of the premium
 - Costs and incentives

(1) Enfranchisement: Who?

- Replacing ‘houses’ and ‘flats’ with the concept of a ‘residential unit’ – a single scheme of qualifying criteria
- Logical, two-stage approach:
 - lease extension?
 - freehold acquisition?
- Simplifying criteria – removing financial limits, 2-year ownership requirement, and 3-flat rule
- Freehold acquisition restricted to self-contained buildings or parts of a building – but with a Tribunal discretion
- 25% limit on non-residential use to apply to both individual and collective freehold acquisitions



(1) Enfranchisement: How?

- Single procedure for all enfranchisement rights
- Simpler procedure – remove inconsistencies, scope for mistakes, traps for the unwary, opportunities for tactical gaming
- Prescribed forms
- Deemed service of Claim Notices served on landlords at specified categories of address (the ‘Service Routes’)
- Alternative route where no deemed service address available (the ‘No Service Route’)
- Limit challenges to validity of notices
- No windfall for leaseholders if Response Notice not served
- Apply to Tribunal if disputes remain, or to enforce



(1) Enfranchisement: How?

Dispute resolution and costs:

- All disputes heard by Tribunal
- Potential alternative track for some valuation-only claims
- Asking whether leaseholders should be required to contribute to landlords non-litigation costs
- Options for contributions
- Fixed costs outline
- Existing costs powers of Tribunal should apply to all enfranchisement disputes (both costs-shifting and unreasonable conduct)



(1) Enfranchisement: How much?

General considerations

- A consistent valuation methodology whilst retaining section 9(1) or an equivalent provision
- A separate valuation regime for low-value claims?
- Differential pricing for different types of leaseholders?
- The adoption of a simple formula e.g.
 - A ground rent multiplier
 - A percentage of the capital value of the property

Or

- Options based on current valuation methodology
- Provision of an online tool to calculate the premium



(1) Enfranchisement: How much?

Components of current valuation methodology

- Ground rent
 - Take into account only one review;
 - Cap any reviewed rent at 0.1% of the freehold value
- Prescribe:
 - capitalisation rates
 - deferment rates
 - relativity or a “no-Act” deduction
- Provide a restriction on development in place of development value

(1) Enfranchisement: How much?

Options based on current methodology:

- Option 2A: term and reversion only, with or without prescribed rates
- Option 2B: term, reversion, marriage and hope value (but not any additional value), with or without prescribed rates
- Option 2C: current valuation methodology, but adopting any combination of possible reforms to valuation components

(1) Enfranchisement: How much?

Section 9(1):

Applicability

- capital value
- council tax banding
- the location of the property
- a version of the test for leases granted post-1 April 1990 test (i.e. find “R” under s 1(1)(a)(ii) of the 1967 Act)

Valuation

- a valuation based on term and reversion, e.g. term and reversion divided by three



(2) Right to manage: Terms of Reference

A broad review of the existing right to manage legislation with a view to improving it.

In particular, the Commission is asked to:

- consider the use currently made of the right to manage legislation and how far it meets the needs of users;
- consider the case to improve access to the right to manage, including by modifying or abolishing existing qualification criteria; and
- make recommendations to render the right to manage procedure simpler, quicker and more flexible, particularly for leaseholders.

Intention is to publish a consultation paper in early 2019.



(2) Right to manage: Key issues

- Should the right to manage be a “stepping stone” to enfranchisement, with the same qualifying criteria – or could it be more flexible? eg. 25% threshold for commercial premises.
- How can the legislation encourage earlier exchange of information, so landlords/leaseholders know how management responsibilities will be divided, avoiding litigation in the future?
- How can the RTM acquisition process be simplified so that it cannot be attacked for technical defects?
- Should the right to manage legislation allow for “estate-wide” enfranchisement covering two or more buildings?
- How can the long-term relationship between landlord/RTM company be improved?



(3) Commonhold: What is it?

- Freehold interest – not time-limited, and no ground rent
- No landlord; instead a “Commonhold Association” formed of the unit owners
- Common parts owned by the Commonhold Association
- No leases; instead a “Commonhold Community Statement”
- Decisions made by unit owners by majority vote (or by their elected directors)
- Based on condominium/strata title in other countries



(3) Commonhold: Comparison with leasehold

- Benefits of commonhold over leasehold
- Need for an external landlord?
- A culture change?
- Continuation of service charges – but regulation potentially different



(3) Commonhold: Terms of Reference

Policy objectives identified by Government:

- To re-invigorate commonhold as a workable alternative to leasehold, for both existing and new homes



- Distinction between:
 - Legal issues with commonhold → for the Law Commission
 - Non-legal issues with commonhold → for Government, e.g.:
 - Consumer and sector awareness
 - Mortgage-lending
 - Influencing behaviour:
 - Incentives / compulsion to use commonhold
 - Disincentives / prohibition on using leasehold

- Call for evidence – February 2018
 - Questions on legal issues and non-legal issues
- Consultation paper – December 2018
 - Proposals for reform on legal issues only



Two key issues:

- Complex / mixed-use developments
- Conversion of existing leasehold blocks

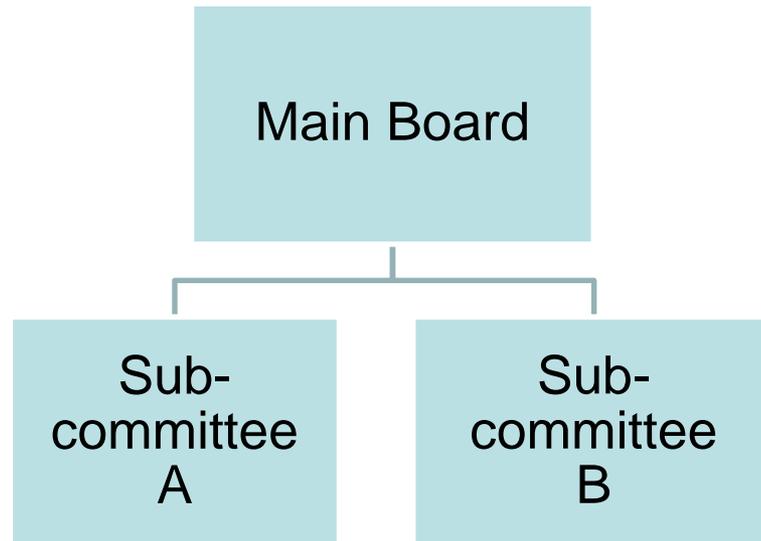
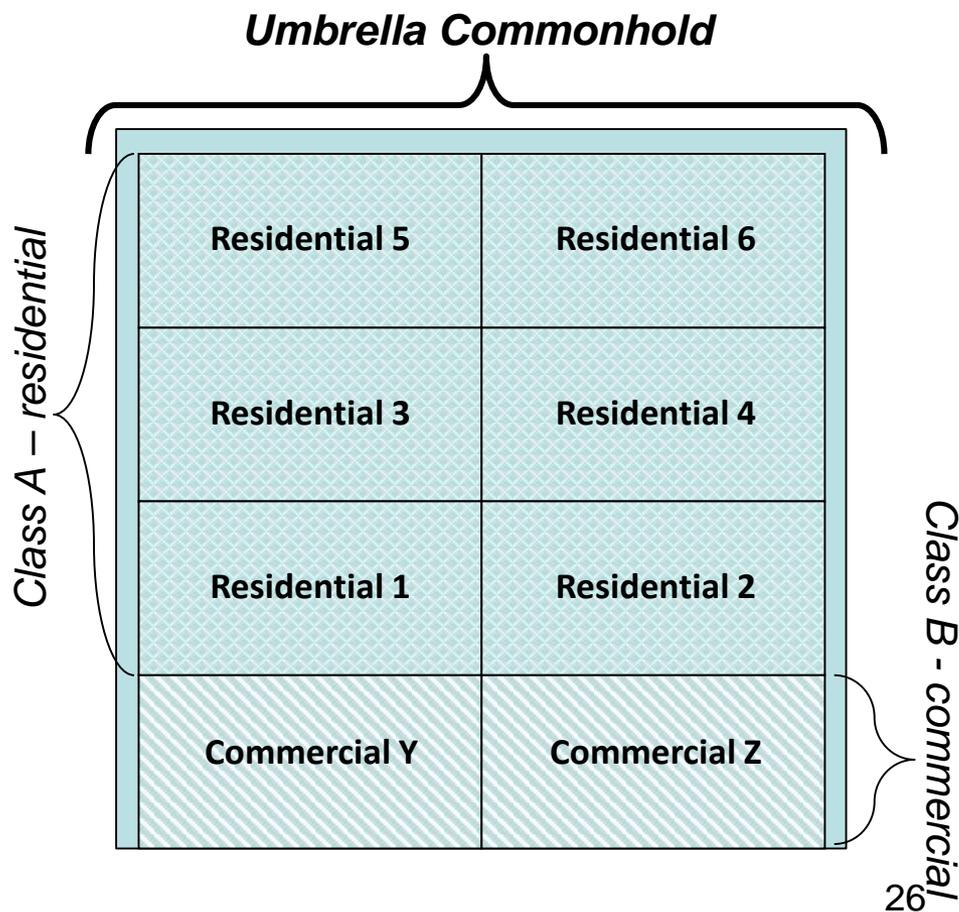


- Most other jurisdictions seem to offer two main alternatives
 - Flying commonholds
 - Layered commonholds
- Both present difficulties in England and Wales
- A ‘third way’ – commonholds with ‘sections’ or ‘classes’?



Using classes or sections

Eg: A block with six residential flats above two commercial units.



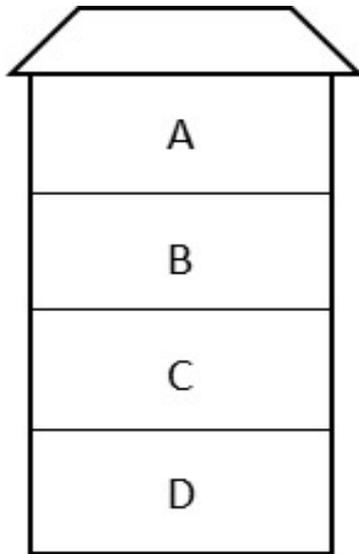


- Under 2002 Act, conversion to commonhold requires consent of:
 - freeholder (so collective enfranchisement necessary)
 - all long leaseholders
 - all mortgagees of long leaseholders
- In practice, impossible in large blocks
- Should it be possible to convert without the consent of all leaseholders?



Converting to commonhold: an example

High Tower, containing four leasehold residential flats



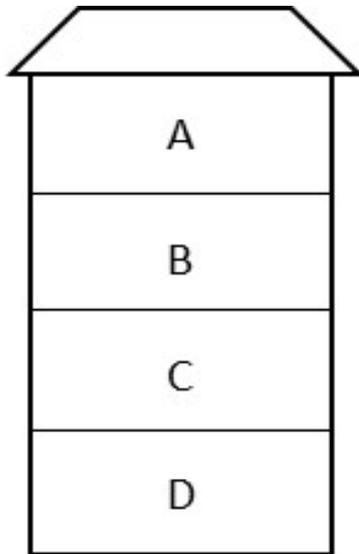
Z - Landlord

- A, B, C and D each have:
 - 90-year lease
 - £100 per annum ground rent
- A, B, C and D all consent to conversion to commonhold
- Current law:
 - Conversion is possible
 - May need collective enfranchisement first (if Z does not consent)



Converting to commonhold: an example

If they converted to commonhold:

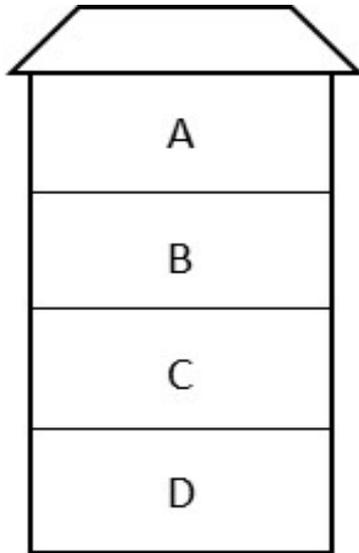


- Z would disappear
- leases would disappear – no longer a time-limited interest, and no ground rent
- A, B, C and D would each have a freehold interest in their flat
- decisions would be made by A, B, C and D by majority vote (or their elected directors)



Converting to commonhold: non-consenting leaseholders

High Tower, containing four leasehold residential flats

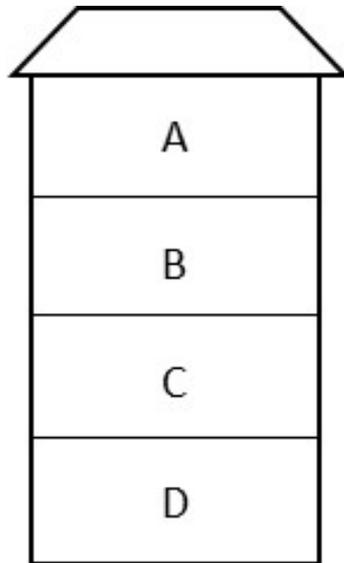


Z - Landlord

- A, B, C and D each have:
 - 90-year lease
 - £100 per annum ground rent
- A, B, C want to convert to commonhold
- D does not consent



Converting to commonhold: non-consenting leaseholders



T Co - Landlord

- If D does not consent, they cannot convert to commonhold
- But they can collectively enfranchise
- T Co (shareholders are A, B & C) acquires freehold
- D's premium for enfranchisement:
 - funded by A, B & C; or
 - by a “white knight”; or
 - leaseback to Z



Converting to commonhold without D's consent

D's concerns

- Being required to convert his or her existing leasehold interest into a commonhold interest – may not see it as an “upgrade”
- Being required to pay for the upgrade

A, B and C's concerns

- Being hamstrung by the obligations of the landlord under D's lease
- Having to pay to upgrade D's property right free of charge



Converting to commonhold without D's consent

- How should D be treated after conversion?

Option 1: D retains his or her lease

- D continues to pay ground rent and service charges to commonhold association
- Problems:
 - all commonholders, directly or indirectly, continue to be hampered by the leasehold structure, and precise terms of D's lease
 - perpetuating the leasehold problem within the system designed to get rid of it?

Option 2: D becomes a commonhold unit-holder

- Compel D to become commonholder
- D entitled (with A, B & C) to participate in joint decision-making
- Problems:
 - nature of D's rights will have changed
 - from A, B and C's point of view, the cost of buying out Z's interest, in so far as it is attributable to D's flat, ought to be met by D
 - impose charge on D's interest, to clawback capital outlay?
 - other solutions?



Project webpage for residential leasehold and commonhold reform:

<https://www.lawcom.gov.uk/project/residential-leasehold-and-commonhold/>

or

www.lawcom.gov.uk

→ “Find a project”

→ Search “residential leasehold”



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Land Registration

Elizabeth Welch, Lawyer

Scope of the Land Registration project

- Update / review of LRA 2002
 - did not seek to reinvent the wheel, but to update the LRA 2002 in light of experience of its operation
- Wide range of issues / topics
 - Wide in scope but not fundamental in nature
 - Aim to improve specific aspects of the operation of the legislation within the existing legal framework
 - Focus on a range of discrete and often technical issues

The project

- Announced project in 2014 in the 12th Programme
- Commenced in early 2015
- Published the Consultation Paper on 31 March 2016 (Law Com No 227)
 - Formal consultation period closed on 30 June 2016
 - Received responses from over 70 consultees
 - Participated in a range of consultation events
- Published the final Report on 24 July 2018 (Law Com No 380)
 - Together with a draft Bill to amend the LRA 2002 and explanatory notes, and an Impact Assessment

Indemnity

Year	Total indemnity payments	Amount due to fraud	Proportion due to fraud	Amount recovered
2016 to 2017	£7 million	£4,941,426	71%	£308,388 (6.2%)
2015 to 2016	£8 million	£5,923,358	74%	£231,298 (3.9%)
2014 to 2015	£8.4 million	£5,914,673	71%	£126,237 (2.1%)

Indemnity recommendations

- Main recommendations:
 - Conveyancers and legal professionals should be under a statutory duty of care when making applications to HMLR to verify the identity of the relevant applicant.
 - The duty of care should be a duty to follow prescribed identity checks to be published by HM Land Registry.
 - HM Land Registry should be required to carry out a public consultation before publishing the prescribed identity checks.

Electronic conveyancing

- Electronic conveyancing was fundamental to the vision behind the LRA 2002
- Three essential provisions:
 - Electronic documents (LRA 2002, s 91 for deeds)
 - “Switching on” electronic conveyancing (LRA 2002, s 91)
 - “Switching off” paper-based conveyancing (LRA 2002, s 93)
- Concerns:
 - Delay in progress towards electronic conveyancing
 - Recession

Electronic conveyancing

- Focus: facilitate and support development of electronic conveyancing along more flexible lines
- Three recommendations:
 - Disentangling the ability to make electronic conveyancing mandatory from the requirement for simultaneous completion and registration
 - Giving HMLR the power to make electronic conveyancing mandatory by increments
 - Facilitating overreaching in electronic dispositions

Simultaneous completion and registration

- Section 93 contains the power to make electronic conveyancing mandatory (by rules made by the Secretary of State).
- Contains specific model of e-conveyancing, which requires that completion of the disposition and its registration are simultaneous (in s 93(2)):
 - “A disposition ... only has effect if ... when the document purports to take effect—
 - (a) it is electronically communicated to the registrar, and
 - (b) the relevant registration requirements are met”
- This requirement was fundamental to vision of e-conveyancing in the 2001 Report – it would eliminate the registration gap

Simultaneous completion and registration

- Recommendation: to create an interim step in the development of electronic conveyancing.
- Did not recommend repealing or amending section 93
- We recommended creating a new power in the LRA 2002 to make electronic conveyancing mandatory that does not require completion and registration to be simultaneous: a new section 92A.
 - Dispositions can operate in equity during the registration gap
 - Does not apply to contracts for dispositions, which can be in paper form

Electronic conveyancing: other recommendations

- Recommend an amendment to section 93 (which would be reflected in new section 92A) to delegate to the Chief Land Registrar the setting of the timetable for mandatory electronic conveyancing.
 - Secretary of State to make rule
 - Then HMLR will publish a notice to bring a type of disposition into the regime, but only after consultation with stakeholders
- Recommend amendment to section 91 to ensure that overreaching can take place, on delegation of execution to a single conveyancer either as an attorney or agent
 - With requirement that evidence of delegation be provided to HMLR in the form required

What's next?

- We published our Report on 24 July 2018
- Our recommendations are now being considered by Government
- According to our Protocol with Government, the Minister will:
 - Provide an interim response within 6 months (late Jan 2019)
 - Provide a final response within 1 year (late July 2019)
- Possibility of using the Law Commission special Parliamentary procedure to implement recommendations

Questions?