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Solicitors Journal

Published: 05/09/2021

Peer reviewed version

[Cyswllt i'r cyhoeddiad / Link to publication](#)

Dyfyniad o'r fersiwn a gyhoeddwyd / Citation for published version (APA):

Carr, H., & Owen, G. (2021). A different approach to leasehold reform. *Solicitors Journal*.
<https://www.solicitorsjournal.com/sjarticle/A%20different%20approach%20to%20leasehold%20reform>

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A different approach to leasehold reform

Historically, leasehold reform proposals have been reactive. In this article we argue that a new proactive approach is needed to restore confidence in this vitally important form of land tenure. The authors were part of a research team commissioned by the Welsh Government to research leasehold experience in Wales which reported last March, (full Research Report: Carr, H., Hunter, C., Owen, G., Makin, C., and Wallace, A.; (2021). *Research into the Sale and Use of Leaseholds in Wales*. Cardiff: Welsh Government, GSR report number 16/2021, available at: <https://gov.wales/research-sale-and-use-leaseholds-wales>). The report was commissioned because housing policy in Wales is devolved, and the Welsh Government considered that more Welsh specific data was needed. The conclusions which are set out in chapter 7 of the report, and which drew on an extensive literature search and empirical data, will be of interest to practitioners in both England and Wales. Current proposals are dominated by a consumerist approach to leasehold reform. In our opinion whilst understanding lessees as consumers will eliminate some exploitative practices it will not break the reactive reform cycle. Instead we suggest that a more logistic and sustainable approach to law reform is needed, one which focuses on the life cycle of multi-owned buildings and their contribution to urban and housing agendas.

The demand for leasehold reform and the emergence of a consumerist approach.

There are signs that a more consumerist approach is at play in England and Wales. By way of example, in England one can point to The UK Government's Housing White Paper, *Fixing our broken housing market* (Department for Communities and Local Government, 2017a), to 'improve consumer choice and fairness in leasehold' and the report entitled, *Tackling Unfair Practices in the Leasehold Market* (DCLG, 2017b). In Wales, examples include the Welsh Government's accredited conveyancing scheme and the *Report of the Task and Finish group* (2019) which made recommendations concerning the sale of leasehold properties.

This is not surprising. First the public are very engaged with the problems of leasehold law and practice – the *Tackling Unfair Practices Report* elicited 6,000 answers and there have been high response rates from other reports including the *National Leasehold Campaign Conveyancing Satisfaction Survey*, concentrating on the conveyancing process undertaken in 2019, which received 1,496 responses with respondents reporting high levels of dissatisfaction. There were some criticisms that the samples in the survey were biased but the authors of the report gave a robust defence of their findings. Also, the report's findings resonate with levels of dissatisfaction which we found in our empirical work in connection with our report for Welsh Government.

Second the reports indicated that the public were getting a very poor service from the professionals involved. The *National Leasehold Campaign Satisfaction Survey* reported that 89% of respondents said that their solicitors had not explained to them the difference between leasehold and freehold, 91.4% were not provided with sufficient information about estate rent charges and maintenance fees, 84.3% did not know that their freehold could be sold to third party investors, 89.5% were not told about their rights to enfranchise, 82% could not remember getting a client care letter from their solicitor, and 91.6% reported that they would not buy their leasehold again with the same legal conditions. For the public to regain trust in leasehold tenure, it is imperative that the profession should respond to these concerns raised by the public.

In our report to Welsh Government, we approached collating empirical evidence from the consumer perspective in two ways, namely by asking leaseholders about their experiences of the conveyancing process, and then about their experiences of living in leasehold property. As for the conveyancing process, we noted that the language used in the samples of leases sent to us was generally difficult to understand, and that participants did not fully understand the legal context. However, the survey showed that, although most leaseholders understood that there is a difference between leasehold and freehold, there was a lack of understanding of what it means to be a leaseholder. For instance, concerns were raised about different levels of ground rents, service charges, sinking funds, and permission fees, and whether they represented good value for money. One conclusion was that owning a leasehold property did not give leaseholders the autonomy they expected from owner occupation. Our concern is that improving consumer protections and tightening up regulation of the professions will not resolve this, and it will only be a matter of time before new exploitative practices emerge. It is for this reason we suggest a different approach to leasehold reform.

The life cycle of the building

In our Welsh Government report we drew attention to academic work advocating more of a sustainable approach to leasehold reform. For example, Easthope, in *The Politics and Practices of Apartment Living* (2019) considers matters by way of a comparative analysis between the USA, Canada, Australia, England, Singapore, Hong Kong and South Africa. Easthope states in respect of buildings that one needs 'to be aware of how it was built and how its governance structures were set up. It is also important to consider how the politics and practices of apartment living can change over time as people come and go and the building ages' (Easthope, 2019:11).

Easthope identifies four stages in the life cycle of a building which are relevant to this discussion, namely the development stage, handover, and the early and later years in the life of a building. In the development stage, she points to the experience in Germany where residents are consulted at the very outset so that the developer can gain input into design matters to reduce the risk of future disputes relating to noise for example. Their views are also sought on issues concerning energy efficiency and the maintenance of common areas. At the handover stage Easthope advocates dialogue concerning matters such as budgets and governance. In the next stage, the early years, Easthope refers to the need to educate and encourage leaseholders to take an active interest in the management of their building. In the later years, she identifies that these years commonly concern disputes about repairs and leaseholders' behaviour. It is at this point that managers must be proactive. As we say in our report to the Welsh Government: '[t]his approach moves beyond the binary relationship of leaseholder and freeholder and understands the economic and social role played by leaseholds in multi-owned properties, particularly in urban environments and areas of high housing demand' (3.138).

Conclusions

We consider that more radical leasehold reforms are needed beyond what has been currently considered by the Law Commission. There is more a consumerist approach could do. In our report to the Welsh Government, we suggested, *inter alia*, that lease terms should be simplified and modernised, that leases should include diagrams of management structures, and introducing a title report like reports currently available in Australia. We believe that reforms along these lines would go a long way in addressing the problems raised in this article concerning the consumerist approach (7.52).

But we also consider that the limitations of the consumerist approach need to be acknowledged. Leasehold plays an important part in urban agendas and in the extension of affordable housing. Reform should take this on board and understand dense living in multi-owned buildings needs something different. We suggest the life cycle of the building approach to respond 'to the different regulatory needs that arise at different stages in the life cycle of a building' and should take 'into account the social, economic and environmental concerns of those living in and around multi-owned buildings and that these will change during the lifetime of a building' (7.54). Whilst this takes leasehold reform on a quite different reform trajectory, we consider that it is important to move away from seeing leasehold as simply a lesser version of freehold and instead to understand its distinct and important contribution to contemporary life.