

The Crown: Consultation Response 7 January 2019

Consultation Return Code: [ANON-9JJ9-MCJ2-J]

Consultation Question 65.

9.66 “We would like to hear from any consultees who have made lease extension or freehold acquisition claims against the Crown (whether pursuant to the Crown’s undertaking to Parliament or its voluntary policy). What has been your experience? Have you encountered any difficulties?”

Background

1. 9.63 (4) states:

where the property, or the area in which it is situated, has a long historic or particular association with the Crown. Does such a phrase have any legal significance?

2. What is “*particular association with the Crown*”? It is such a loose statement that it could be anything. Why was such a loose, undefined statement used and still is being proposed?

3. The Crown under 9.63 (4) applies to the Duchy of Lancaster and the Duchy of Cornwall.

4. An excerpt from a recent correspondence from T Crow, LLB, The Solicitor for the Affairs of the Duchy of Lancaster, illustrates that the Duchy of Lancaster has no interest in this clause.

“The Duchy (Lancaster) now has very few properties which could be subject to leasehold enfranchisement and they are not in any specific geographical area. On the rare occasions when an application to enfranchise is received, the Duchy would only claim exemption if the property is of historical significance. In my experience over the last ten years the Duchy has received three applications to enfranchise, two were residential properties in Greater London and enfranchisement was agreed to and the other was within the curtilage of one of the Duchy’s historic buildings and the exemption was therefore claimed.”

5. This response is very different from the attitude of the Duchy of Cornwall who continue to deny enfranchisement in some geographical areas irrespective of the

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nature of the property and hence the clause 9.63 (4) therefore pertains only to the Duchy of Cornwall.

6. The Duchy of Cornwall claim that the Isles of Scilly has been part of the Duchy since the 13th Century. All recent requests to establish whether the Duchy do really have a long association with Scilly i.e. since the formation of the Duchy, have shown that the Duchy has no evidence to support its claim. It is what the Duchy wish us to believe, but without providing any documentation for its claim. With regards to the Garrison, this was an Elizabethan MOD facility and not a Duchy facility. How the Duchy came to “own it” is also not clear. The records, if any exist are not in the public domain.
7. The Law Officers of the Crown in the 19th Century examined the position of the Isles of Scilly on three occasions and in two out of the three occasions did not find in favour of the Duchy and only grudgingly did on the 3rd occasions find in favour of the Duchy but only after bemoaning the lack of documentary evidence. The claim of the Duchy to the Islands has never been tested in Court or discussed in Parliament. The Duchy has been asked about any records which substantiate their claim to the Islands and have stated clearly, they have none. What can be stated that the claim that the Islands has been part of the Duchy since the 13th century simply cannot, in the opinion of the Law Officers be substantiated.
8. Please also see the book published by Dr John Kirkhope.
https://www.amazon.co.uk/Isles-Scilly-Miniature-Commentary-historical-ebook/dp/B00ILUQR6C/ref=nav_ya_signin?s=books&ie=UTF8&qid=1509727880&sr=1-3&keywords=duchy+of+cornwall+john+kirkhope&
9. Perhaps the Law Commission will have greater success in obtaining this evidence? This is important, as it is part of the Duchy’s reasoning for its claim for the exempted areas.

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The Properties in the Exempted Areas

10. What is important about the land and property protection of the Duchy of Cornwall in the excluded areas of the Isles of Scilly when **NO** Royal residences (Palaces and/or Royal Parks) or security issues are involved? The houses in the exempted areas have no significant historic interest and most are modern houses with no architectural merit. The actual number of houses with leases greater than 21 years that fall under the Leasehold Reform Act is not known but believed to be less than 100 in all of the exempted areas. As the Duchy of Cornwall is also exempt from FOI requests, this number will remain unknown.

11. The Isles of Scilly including the exempted areas are protected by Historic England, Planning Law, AONB, as a Special Area of Conservation, a Heritage Coast etc and therefore the room for any individual or body to “damage” the exempted areas does not exist, hence the Duchy of Cornwall does not offer any additional protection to the land or property.

12. The cost of maintaining the untenanted land in the Isles of Scilly exempted areas has been devolved to the Isles of Scilly Wildlife Trust who rely upon public donations, grants and not monies provided by the Duchy to maintain the land.

13. The maintenance of the protected historic features in the exempted areas, such as the Garrison Walls and Powder House is carried out by Historic England at their expense and not funds provided by the Duchy. I.e. the tax payer.

14. Royal visits to the islands are welcomed, as it means pot holes in the Duchy roads are repaired!

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History of the Application of Leasehold Law

15. The Crown was exempt from the 1967 Leasehold Reform Act. However, a "voluntary" undertaking was given to Parliament through a ministerial statement from Mr Fred Willey (Secretary of State for Land and Resources) on 31 May 1967:

*"The various Crown authorities will agree to enfranchisement and extension of leases for qualified leaseholders holding from the Crown on the terms provided for in the Leasehold Reform Bill, **except that enfranchisement will be refused** where the house is of special architectural or historic interest or adjoins such houses and is important in safeguarding them and their surroundings, or where a house is important to the preservation of amenities in such areas as Windsor Great Park. By analogy with local authorities, a Crown authority may refuse enfranchisement or extension of the lease where the property will shortly be needed by them for redevelopment for public purposes, but the Crown Estate Commissioners know of no such cases in which they would wish to do this. (our bold emphasis).*

16. It seems improbable that anyone could claim that any housing on the Off Islands or on St Mary's, including The Garrison, could have been deemed to fall within the exclusion contained in the Crown undertaking. There is also no evidence that the Duchy sought to claim that this was the case. It also seems implicit that The Duchy was to comply from a reference located in National Archive 1966 Cabinet Papers indicates in 6(vi) *"Royal Duchies to be excluded from the statute, but to allow enfranchisement voluntarily on the terms applied to freeholders"*.

17. It should be noted that the above statement/undertaking made **no** specific reference to the Isles of Scilly.

18. Accordingly, following the enactment of the Leasehold Reform Act 1967, the position for The Isles of Scilly was that, although the Crown was exempt from the enfranchisement legislation, the Crown had agreed to abide by the legislation except

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"where the house is of special architectural or historic interest or adjoins such houses and is important in safeguarding them and their surrounding".

19. On 2 November 1992, during the passage of the Bill that became the 1993 Act, a further statement was made to Parliament, this time by **Sir George Young**. It was materially different to the 1967 Statement. He stated that, regardless of its

exemption under the Acts, the Crown authorities would, subject to specified conditions and exceptions, agree to the enfranchisement or extension of residential long leases under the same qualifications and terms which applied by virtue of the Leasehold Reform Act 1967 and the Leasehold Reform, Housing and Urban Development Act 1993 to lessees held from other landlords.

20. The relevant exception affecting the Isles of Scilly reads:

(3) (iii) where properties, or the areas in which they are situated, have a long historic or particular association. with the Crown.

(4) the areas referred to in paragraph 3(iii) include the Off Islands within the Isles of Scilly (Si Agnes, Bryher, St Martin's and Tresco), the Garrison on St Marys and parts of central Dartmoor....

21. The 1967 test of "where the house is of special architectural or historic interest or adjoins such houses and is important in safeguarding them and their surrounding" had been **very materially changed**. There appears to have been no consultation about this and there was no debate in Parliament about the change. It is not even clear whether, when voting on the Bill, MPs were aware that there had been a material variation to the Crown undertakings. This appears not to have been drawn to their attention by **Sir George Young**. For the Crown to claim that it was entitled to refuse enfranchisement, the Crown no longer had to show that the property was of special architectural or historic merit — it now had to show that it or the area in which it was situated had *"a long, historic or particular association with the Crown"*. Moreover, by

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virtue of paragraph (4) in the case of Isles of Scilly, merely the property's location on St Agnes, Bryher, St Martin's or The Garrison meant that it was deemed to have a long, historic or particular association with the Crown, regardless of whether it, or the area in which it is situated had, as a matter of fact any such association.

22. Thus, by virtue of **Sir George Young's** statement to Parliament in 1992, all qualifying residents of the relevant parts of Scilly were deprived of and excluded from the protection and benefit that they previously enjoyed by virtue of the 1967 statement to Parliament. There was no consultation, debate or discussion. The "right" that they had previously enjoyed by virtue of the 1967 agreement of the Crown to abide by the enfranchisement legislation except where the house was "of special architectural or historic interest or adjoins such houses and is important in safeguarding them and their surrounding" had been summarily removed. It may be that no one on the islands was even aware that a fundamental change was being made.

23. An immediate question arises. Were the specific areas of Scilly now included because they indeed had a "long historic and particular association with the Crown" or was it because the Duchy desperately wanted Scilly to be excluded and there were doubts as to whether they would otherwise come within the definition in (3) (iii), irrespective of the rights or wrongs of it?

24. In 2001, during the passage of the Commonhold and Leasehold Reform Bill, the Crown authorities confirmed that they would apply the terms of the 1992 undertaking to the provisions of the 1967 Act and the 1993 Act as amended by the Commonhold and Leasehold Reform Bill. A further undertaking was thus given on 11 December 2001 and this superseded the one given on 2 November 1992. This was slightly different from the undertaking given in 1992 in that, as well as deeming houses on St Agnes, Bryher, St Martin's, Tresco and the Garrison on St Mary's in the Isles of Scilly as having "a long, historic or particular association with the Crown", houses in the village of

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Newton St Loe were also included. (*near Bath which houses the Duchy's eastern area HQ which they purchased in 1946*).

25. The undertaking also went on to say that in paragraph (5) "where enfranchisement is refused on the grounds set out in paragraphs (2) and (3) but the tenant would otherwise qualify for enfranchisement, lease extension or the grant of a new lease by analogy with the statutes, the Crown will be prepared to negotiate new leases" (5). However, no detail is provided as to the basis upon which such new leases are to be negotiated. This is particularly relevant in that some long leaseholds do not qualify to be able to extend their lease (compliance with the 'low rent test' from the 1967 Act

is still required) but would be able to enfranchise. When an extended lease is allowed, the statute is specific about its terms and the computation of the rent. It gives no guidance where enfranchisement would have been allowed. How long would the new lease be and on what terms? These are fundamental and important practical considerations for tenants, which the Duchy seems unwilling to clarify.

26. It is also understood that, at some point (1992?), there were moves at Duchy head office in Buckingham Gate to lobby friendly MPs and, through Farrer's, to persuade the Treasury to extend the bar on enfranchisement across the whole of Scilly. The Treasury seemingly indicated that "the horse had bolted" by virtue of the Duchy having spent the past 50 years and more selling off many such freeholds. It was, therefore decided, by way of compromise, that they might 'get away with' the exemption on The Garrison and Off Islands, as no freeholds had been released there.

27. Ian Fuell (now retired) (Department for Communities and Local Government) has featured in considerable correspondence on this matter over several years. In his letter of July 30, 2007, he refers to 'negotiations' between Whitehall and The Duchy; taking place in 2001 over the revised undertaking.

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28. During the passage of the 2002 Act, amendments were tabled by **Lord Kingsland** at the Third Reading in the Lords, where he suggested that exemption arrangements might '*violate the right to property under the European Convention on Human Rights (ECHR)*'. Lord Falconer gave a triumphantly ineffectual response but in the process he, did confirm that discussions had taken place with the Duchy. (*Are these negotiations the same as the discussions alluded to by Mr. Fuell and is it likely that no written record was taken?*) The full exchange is contained in Hansard Dec 19 November 2001 c 926.

The Position Today

29. Leaseholders who qualify under the existing legislation are still being denied enfranchisement.

The Duchy do offer lease extensions for 50 years. However, their website suggests 100 years, but it is understood that no leaseholders has been able to secure this term. *"The Duchy does not accept applications to enfranchise in certain specific geographic locations and these are recorded in a Ministerial statement as the off-islands and the Garrison area of the Isles of Scilly, parts of central Dartmoor and in the village of Newton St Loe, near Bath. In the wider Duchy estates, for example Kennington, properties are subjected to enfranchisement tests."*

<https://duchyofcornwall.org/leases-and-freeholds.html>

30. Lease extensions have been offered for 19 years, which were rejected by the leaseholder and the Duchy then offered 30 years. Why, when the undertaking suggests otherwise (50 years or more)?

31. The ground rents applied by the Duchy in many cases far exceed 0.1% of the property value. This 0.1% figure was suggested by the Chief Executive of LEASE, Anthony Essien, as not being onerous. (Housing, Communities and Local Government Committee 10 Dec. 2018). Our own ground rent is below this figure.

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Anecdotal evidence would suggest that Duchy of Cornwall ground rents are of the order of 1% and more rather than 0.1%. Responses to the Law Commission leaseholder survey should make this clearer.

32. For the evaluation of the unique Duchy of Cornwall exemption and whether it is indeed appropriate, it would be useful for the Duchy to provide details of ALL the leases they hold in the exemption areas. Attempts to obtain this information have been thwarted by the Duchy of Cornwall's FOI exemption.

33. We purchased our house in 1983 with 76 years lease to run. At the time we discussed with the solicitor (now deceased) the Crown and enfranchisement, but at the time we did not qualify as it was not our permanent home. Since 1996 we have been pursuing the Duchy on enfranchisement by correspondence, petitions, the media and tribunal, to obtain the right to enfranchise (Search the web and you will find items). We have been denied out right and with various reasons such *"as they did not want people coming to Scilly and buying holiday homes"* to a comparison where the Duchy said, *"they were like the National Trust"*.

34. Since purchasing the property, we have spent considerable sums on maintaining and improving our home. The Duchy have not contributed one penny and to add insult to injury, in addition to applying for planning permission, we had to seek the Duchy's consent.

35. Other owners wish to rent their property to the holiday trade in the same way the Duchy do with their four properties on the Garrison (see their website). <https://www.duchyofcornwallholidaycottages.co.uk/destinations/isles-of-scilly>
Under the terms of the leases they require permission and the Duchy charge around £1600 pa for 14 weeks permission. The Duchy do not provide any thing whatsoever in return for their permissions.

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36. An unanswered question, is why does the Duchy wish to hold on the freeholds? Is it income generation from ground rents or just the fact the Duchy wish to maintain the medieval feudal system of leaseholds, whereby we are Prince Charles's subjects and under his control?
37. Houses do become available for sale in the exempted areas, but the Duchy do not purchase these, as presumably they prefer to wait until the property becomes theirs without any payment. A few years ago, there was a case where the lease expired, the house reverted to the Duchy and is now part of their holiday property portfolio in the exempted area.
38. A consequence of the Duchy of Cornwall exemption areas is that it has a negative and distorting effect on the local housing market, as those properties in the exempted areas are not able to obtain a mainstream mortgage, as most have leases of less than 80 years and/or ground rents greater than 0.1% of the capital value of the property. This means that houses can only be sold for cash, usually to mainland buyers, the very thing the Duchy claim would be the result of allowing enfranchisement. If mortgages were available, then the housing market would operate in the normal manner and allow local participation.
39. Another consequence of the exemption is the effect on the local tourist economy. Some properties are partly used for holiday letting and leaseholders are reluctant to make substantial improvements, as technically their home is not theirs and will ultimately be claimed by the Duchy. If improvements are made, the Duchy raise the permission fees to reflect the improved property.
- The Isles of Scilly is almost totally dependent upon tourism and as a niche destination, which is expensive to access, providing good accommodation and value for money is paramount. Hence the Duchy exemption is not in the best interests of the Island's economy.

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40. In the case of the off islands, the Duchy control 100% of each community. There is therefore no choice for the householder or consumer. Hence if you wish to live on an off island, you must accept the Duchy's regime and cannot run a business on the off islands, except on Duchy terms, which are often onerous and restrictive.

Conclusion

41. The question was posed "Have you encountered any difficulties?" From the above evidence it is clear, very many, including letters not answered, rejection of enfranchisement on spurious grounds and intransigence all hidden by the Duchy's exclusion from FOI requests.

42. The privilege Ministers granted to the Duchy of Cornwall is being misused to perpetuate the leasehold feudal system for the Duchy of Cornwall's own monetary benefit under the guise of a private estate, but the Duchy is a Crown entity.

43. The privilege granted to the Duchy of Cornwall should be rescinded, as it has no place in a 21st century democratic society.

44. The privilege granted to the Duchy of Cornwall distorts the local housing market and has a detrimental effect on the Island's economy.

45. From the minutes of the Princes Council in 1982 (provided in the previous consultation) the Duchy had a policy of micro managing the community. This continues with the Duchy's involvement in the holiday letting business and its 100% control of the off islands' communities.

46. You have now heard our side of the story.

In the consultation it says:

"9.65 We will be discussing with Crown representatives whether the Crown's position would remain the same in respect of a reformed enfranchisement scheme "

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Will we be able to hear the Duchy of Cornwall's side of the story or will it fall under the Royal FOI exclusion?

Summary

47. If the Crown is not to be bound by any new legislation, then an undertaking should be given to comply, except (Paragraph 9.63).

The undertaking would not apply in the following situations:

- (1) where the relevant property stands on land which is held inalienably; **AGREED**
- (2) where particular security considerations apply (on the advice of the Royal and Diplomatic Protection Group of the Metropolitan Police or other security agencies); **AGREED**
- (3) where the property is in, or intimately connected with, the curtilage of historic Royal Parks and Palaces; **AGREED**
- (4) ~~where the property, or the area in which it is situated, has a long historic or particular association with the Crown.~~ **DELETE** as it is only applicable to the Duchy of Cornwall and any individual historic property belonging to the Duchy of Cornwall would be covered by (3).

48. Any dispute as to whether a property should be excluded should be subject to an independent tribunal/arbitration.

OR alternatively

49. As with Planning Law, the Crown should be bound by any new legislation.

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