IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

BETWEEN:

Case Nos:
AC-2024-LON-002806
AC-2024-LON-002817
AC-2024-LON-002830
AC-2024-LON-002865
AC-2024-LON-002875
AC-2024-LON-002904
AC-2024-LON-002913

THE KING (ON THE APPLICATION OF)

(1) ARC TIME FREEHOLD INCOME AUTHORISED FUND, A SUB-FUND OF ARC TIME: FUNDS, ACTING THROUGH ITS AUTHORISED CORPORATE DIRECTOR, ALPHA REAL CAPITAL LLP & OTHERS
~~(2) ANNINGTON PROPERTY LIMITED & OTHERS~~
(3) CADOGAN GROUP LIMITED & GROSVENOR LIMITED & OTHERS
(4) ABACUS LAND 1 (HOLDCO 1) LIMITED & OTHERS
(5) WALLACE PARTNERSHIP GROUP LIMITED & OTHERS
(6) JOHN LYON'S CHARITY
(7) TRUSTEES OF THE PORTAL TRUST

Claimants

– AND –

SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

Defendant

- AND –

LEASEHOLD KNOWLEDGE PARTNERSHIP LIMITED
(a company limited by guarantee incorporated in England with registered number 08999652 and a registered charity with number 1162584)

Intervenor

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENOR

TABLE OF CONTENTS

A. INTRODUCTION

1. The Claimants seek a declaration under s.4 of the Human Rights Act 1998 that the Leasehold and Freehold Reform Act 2024 ("**LFRA 2024**") is incompatible with Article 1 of Protocol No.1 to the European Convention on Human Rights ("**A1P1**") and, in the case of certain Claimants, A1P1 read with Article 14 of the Convention.

2. The Claimants challenge one or more of the following reforms (collectively referred to below as the "**impugned measures**"):

   2.1. The removal of the freeholders' statutory entitlement to a share of "*marriage value*" when calculating an enfranchisement or lease extension premium (s.37 and para.17(3) of Schedule 4 of the LFRA 2024) (the "**marriage value measure**").

   2.2. The cap on onerous ground rent above 0.1% of the market value of premises when calculating an enfranchisement or lease extension premium (s.37 and para.26(4) of Schedule 4 of the LFRA 2024) (the "**onerous ground rent measure**").

   2.3. The provisions removing the ability of freeholders to recover certain non-litigation costs on enfranchisement from leaseholders (ss.38-39 of the LFRA 2024) (the "**costs measure**").

3. Leasehold Knowledge Partnership Limited ("**LKP**") is a charity registered with the Charities Commission **(O'Kelly-1 §§5-12).** LKP considers that the challenges are misconceived and argues that the three impugned measures satisfy the fair balance under A1P1. If there is any flaw, it is that Parliament could and should have gone further with its reforms. Even after these reforms eventually come into force, the fundamental flaws which characterise residential leasehold property will remain, and leaseholders will continue to be under-protected and disempowered.

4. LKP brings a unique perspective to this case. It can speak to the lived experience of the estimated 4.7 million leaseholders in England and Wales who would otherwise lack direct representation in this claim. In essence, its submission is that the residential leasehold system is inherently flawed; it contains power imbalances which work to the detriment of leaseholders. The system enables third party landlords and other connected parties to profit from ordinary people seeking nothing more than the full enjoyment of their homes. The LFRA 2024 will help to rebalance matters, but the only way ultimately to solve the problems of leasehold is to abolish it and replace it with commonhold.

5. LKP is also conscious that the LFRA 2024 – even when eventually brought fully into force – is not the end of the Government's proposed reforms to the leasehold system. Such further reforms, and the eventual abolition of residential leasehold, will be necessary to fully realise the creation of a modern system of home ownership.

6. At the date of preparing these submissions, the Court has not made a decision on the application to intervene. By filing these submissions, LKP does not seek to pre-empt that decision. Rather, LKP files these submissions in accordance with the timetable which it previously proposed and which it understands to be consistent with the timetable applicable between the Claimants and the Defendant. LKP does so to try to assist with the proper management of the case.

7. LKP has adduced the Witness Statement of Sir Peter Bottomley of 7 April 2025 ("**Bottomley-1**"), the First Witness Statement of Sebastian O'Kelly of 25 February 2025 ("**O'Kelly-1**"), and the Second Witness Statement of Sebastian O'Kelly of 7 April 2025 ("**O'Kelly-2**"). Other sources of publicly available evidence are also relied upon below.

B. SUMMARY

8. In understanding and assessing the proportionality of the impugned measures, context is everything. In that regard, LKP highlights the following points:

8.1. **First**, regard must be had to the inherently flawed and exploitative leasehold system, and the nature of the claims advanced.

8.2. **Second**, given that the Claimants have brought an *ab ante* challenge to primary legislation before the consultation process for certain relevant secondary legislation has been completed, they face the "*high hurdle*" (*R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 118 at [25]-[27]; *Christian Institute v Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29 at [87]-[88]) of showing that the impugned measures are *"incapable of being applied in a way which is compatible with Convention rights, whatever the facts may be*" (*Ramoon v Cayman Islands* [2023] UKPC 9 at [66]).

8.3. **Third**, the Court should not be drawn into disputes about primary facts (*R (F) v Surrey County Council* [2023] EWHC 980 (Admin), [2023] 4 WLR 45 at [46]), if and to the extent the Claimants choose to produce a large amount of supplementary and expert material.

9. Once that context and the reasons set out below are considered, it will be apparent that all of the impugned measures satisfy the fair balance under A1P1 of the Convention. In summary:

9.1. **First,** when considering the fair balance under A1P1, the Court's assessment should start from the clearly established position that the existing system is inherently flawed and demoralising for ordinary leaseholders as reflected in the experiences of those who regularly contact LKP and their local MPs (**Bottomley-1** and **O'Kelly-2**).[1] It is not simply that there are bad actors who seek to exploit leaseholders: the exploitation inheres in a system that the LFRA 2024 seeks to

[1] See also Sebastian O'Kelly, "NLC recommissions leaseholders' mental health survey' *LKP* (5 December 2024) < https://www.leaseholdknowledge.com/nlc-recommissions-leaseholders-mental-health-survey/>

partially rebalance.[2] As such, the rights of ordinary leaseholders must be central to the question of balance.

9.2. **Second,** when considering the fair balance, the impugned measures must be considered against the mischief they seek to remedy:

9.2.1. The onerous ground rent measure only applies to onerous ground rents (see paragraph 63.3below).

9.2.2. Marriage value is a creature of statute. There is no basis on which the Claimants can characterise this as earned, and it adds an unnecessary burden on leaseholders by increasing the enfranchisement premium (paragraphs 60 to 62 below)**.**

9.2.3. The Claimants have failed to produce any compelling basis for why they are entitled to extract costs from leaseholders and continue to use the spectre of such costs to inflate enfranchisement premiums (paragraphs 33 and 66 below).

9.3. **Third,** all three measures fall well within the bounds of Parliament's legislative discretion in responding to the unique and critical social and economic issues posed by the leasehold system. As noted in **Bottomley-1 §50,** commenting on the experience of constituency MPs across the House of Commons and across time, the LFRA 2024 "*is a democratic response from Parliament to a pressing social issue prompted by decades of pressure*."

9.4. **Fourth,** the Claimants regurgitate A1P1 submissions that have been consistently rejected by the ECtHR and domestic courts. *James v United Kingdom* (1986) 8 EHRR 123 (as interpreted and applied by the domestic courts as the scope of enfranchisement has broadened) represents, as Lord Walker held in *Pitts v Earl*

[2] For example *4VV Ltd and others v Nicholas Spence and others* [2024] EWHC 2434 (Comm) at [7] per Foxton J "*...no signs of having a moral compass, or at least not one capable of deflecting him from the path of his own self-interest*."; James Hurley, "Leaseholders 'ripped off by secret commission on insurance'" *The Times* (London, 3 March 2025); **O'Kelly-2 §§50-51.**

Cadogan [2008] UKHL 71 at [48], *"an insuperable obstacle"* to the Claimants' arguments that enfranchisement is not compatible with A1P1.[3]

C. CONTEXT

INHERENTLY FLAWED SYSTEM

10. **Residential leasehold, as a model of home ownership, is archaic and fundamentally flawed.** Whilst the origin of leasehold is not strictly feudal, "*the language of "feudalism" reflects the power imbalance experienced by leaseholders, and concerns that the tenure has too readily facilitated the extraction of excessive monetary payments from those leaseholders*."[4]

11. Central to leasehold is a demoralising inequality. This is reflected in the substantial resources of landlords being used before the Court. As noted in **Bottomley-1 §49**, "*residential leaseholders have not had well-funded organisations to fight for them",* and, as the Law Commission has concluded, "*there is a systemic inequality between leaseholders (as a whole) and landlords (as a whole)*".[5]

12. The power imbalance in the leaseholder-freeholder relationship extends beyond litigation to other areas. As the Housing, Communities and Local Government Committee noted, "*too often leaseholders, particularly in new-build properties, have been treated by developers, freeholders and managing agents, not as homeowners or customers, but as*

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[3] *Alice Ellen Cooper-Dean Charitable Foundation Trustees v Greensleeves Owners Ltd* [2015] UKUT 320 (LC) at [89]; *Howard De Walden Estates Ltd v Accordway Ltd* [2016] EWCA Civ 1176; [2017] 1 WLR 1761 at [47]; *Portman Estate Nominees Ltd (One) v Starlight Headlease Ltd* [2016] UKUT 467 (LC); [2017] L&TR 11 at [65]-[66]; and *R (Annington Limited) Limited v Secretary of State for Defence* [2023] EWHC 1154 (Admin); [2024] 1 WLR 365 at [579]-[603]).

[4] Law Commission, *Leasehold home ownership: buying your freehold or extending your lease* (Law Com No 392, 2020) § 1.24; N Hopkins and J Mellor, "A Change is Gonna Come": Reforming Residential Leasehold and Commonhold" (2019) 83(4) Conveyancer and Property Lawyer 321, 331-32.

[5] Law Commission, *Leasehold home ownership: buying your freehold or extending your lease* (Law Com No 392, 2020) § 2.42 and § 2.43 "*Various organisations exist to try to coordinate and campaign for the interests of leaseholders, but they are unable to match the resources that some landlords are able and willing to spend*." Law Commission, *Leasehold home ownership: buying your freehold or extending your lease: Report on options to reduce the price payable* (Law Com No 387, 2020) §§ 1.71-1.73. § 1.72 "*We are very conscious, though, that leaseholders who are not lawyers were not necessarily able to provide equivalent responses setting out their best arguments. Individual leaseholders do not, in general, have the same in-house expertise as many landlords and they do not have the funds to pay professionals for assistance in preparing a consultation response. Their knowledge of the law is often drawn only from their individual, personal experience. Nor did leaseholders, as a group, pool their resources in order to pay for such assistance. Various organisations exist to try to coordinate and campaign for the interests of leaseholders but they are unable to match the resources that some landlords are able and willing to spend*."; **O'Kelly-2 Exhibits/85, 92, 312-318, 323, 443, and 446-452}.**

a source of steady profit. The balance of power in existing leases, legislation and public policy is too heavily weighted against leaseholders, and this must change."[6]

13. Parliament has sought to regulate and reform residential leasehold over time. Parliament created rights of enfranchisement by enacting the Leasehold and Freehold Reform Act 1967 ("**LFRA 1967**") and the Leasehold Reform Housing and Urban Development Act 1993 ("**LRHUDA 1993**"). Parliament has sought to regulate service charges on multiple occasions since the early 1970s (see now the Landlord and Tenant Act 1985 ("**LTA 1985**")). And Parliament created alternative management regimes under which the role of freeholders was reduced (see, for example, *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Co Ltd* [2024] UKSC 27, [2024] 3 WLR 601).

14. But welcome as those reforms have been – and welcome as the wider body of reforms in the LFRA 2024 are – the problems with leasehold have not been cured. Indeed, they cannot. The unfairness of leasehold is inherent to the tenure. As the Law Commission noted:

> *"Leasehold is a time-limited asset and does not provide the full extent of autonomy and control (in practical terms, the management powers) that people expect to enjoy as homeowners. It would be wrong to characterise those who purchase leasehold [properties] as doing so on an entirely voluntary basis. Almost all flats and maisonettes are only available on a leasehold basis, and the early 21st century has seen an historically high proportion of new-build houses being offered for sale on long leases rather than freehold.*[7]

15. The only solution is to develop the commonhold system **(O'Kelly-2 Exhibits/47-66).** LKP strongly welcomes the Government's commitment to this in the March 2025 Commonhold White Paper.[8] But – ideally as part of a step towards commonhold – greater rights of enfranchisement are simply another example of the long-standing Parliamentary recognition of the flaws and unfairness in the leasehold relationship.

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6 Housing, Communities and Local Government Committee report on Leasehold Reform (HC 1468, 2019) §25.
7 Law Commission, *Leasehold home ownership: buying your freehold or extending your lease* (Law Com No 392, 2020) § 2.19.
8 Ministry of Housing, Communities & Local Government, "*Commonhold White Paper: The proposed new commonhold model for homeownership in England and Wales*" (March 2025 CP 1270); See, Sebastian O'Kelly, "Path is set to tell off leasehold and replace it with commonhold" *LKP* (10 March 2025) https://www.leaseholdknowledge.com/path-is-set-to-kill-off-leasehold-and-replace-it-with-commonhold/.

INADEQUACY OF PREVIOUS REFORMS

16. As noted above, Parliament has repeatedly tinkered with the leasehold system. But this has not rendered the system fair. A few examples will suffice.

Regulation of Service Charges

17. The LTA 1985 provides for the regulation of residential service charges payable by long leaseholders. Among other provisions, s.20 limits to £250 the service charges that a leaseholder can be required to pay in respect, *inter alia*, of *"qualifying works"* (*i.e*. works to a building or other premises where a leaseholder may have to pay £250 or more towards the costs: s.20ZA(2)) unless the landlord has either:

    17.1. Consulted the tenant in the prescribed manner (see the Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987 - "**the consultation regulations**"); or

    17.2. Obtained dispensation from some or all of the consultation regulations from the First Tier Tribunal (Property Chamber).

18. Similar provision is made in respect of *"qualifying long term agreements"* (*i.e.* agreements for more than 12 months under which a leaseholder may have to pay £100 or more during any 12-month period).

19. It might be assumed that these provisions, like public law consultation duties, safeguard transparency and the rights of the paying parties, *i.e.* leaseholders. But that would be wrong. As the majority held in *Daejan Investments Ltd v Benson* [2013] UKSC 14, [2013] 1 WLR 854 at [52], ss.20 and 20ZA were not enacted *"for the purpose of 'transparency and accountability"*: *"the sections are not concerned with public law issues or public duties, so there is no justification for treating consultation or transparency as appropriate ends in themselves."*

20. In reality, these provisions provide little substantive protection for leaseholders. They can relatively easily be circumvented, whether by a developer entering into relevant

contracts before any lease is granted (*BDW Trading Ltd v South Anglia Housing Ltd* [2013] EWHC 2169 (Ch), [2014] 1 WLR 920), or by splitting works contracts into small packages (*Phillips v Francis* [2014] EWCA Civ 1395, [2015] 1 WLR 741; *Martin v Maryland Estates Ltd* (2000) 32 HLR 116) or by ensuring that the initial term of any contract does not exceed 12 months, even if, in practice, it lasts for much longer (*Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, [2018] HLR 36).

21. Nor do they provide no protection against enormous sums of money being demanded on account (*23 Dollis Avenue (1998) Ltd v Vejdani* [2016] UKUT 365 (LC)).[9]

22. The consultation regulations only require the landlord to *"have regard"* to the views of leaseholders. They do not give the leaseholders a right to require a particular specification of works or contractor, even though they will be the ones who ultimately pay for these costs via their service charge. Thus, as Lord Neuberger held in *Daejan Investments Ltd v Benson* [2013] UKSC 14, [2013] 1 WLR 854 at [46], the regulations *"leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid for them"*.

Inadequate Remedies for Poor Management

23. Part 2, Landlord and Tenant Act 1987 provides that the First-Tier Tribunal (Property Chamber) may appoint a manager (including in place of an existing manager) in respect of any premises containing two or more flats. Such a manager can be given management powers and functions which go beyond the terms of the leases in order to create a coherent and practical scheme of management (*Maunder Taylor v Blaquiere* [2002] EWCA Civ 1633, [2002] HLR 43).

24. Once appointed, the manager is not accountable to leaseholders in any meaningful way. Leaseholders cannot participate in the exercise of the manager's powers and functions.

[9] See also *Avon Ground Rents Ltd v Cowley* [2019] EWCA Civ 1827, [2020] 1 WLR 1337 at [31], where Nicola Davies LJ (with whom McCombe LJ and Coulson LJ agreed) noted that "whether an amount is reasonable as a payment in advance is not generally to be determined by the application of rigid rules but must be assessed in the light of the specific facts of the case", and that "a number of considerations ought or may properly have to be taken into account in determining the question of reasonableness under section 19(2) which would include the time at which the landlord would, or would be likely to, become liable for the costs, and how certain the amount of those costs is."

25. Furthermore, this remedy is of little use to a leaseholder in a modern block of flats, since the manager cannot be an Accountable Person under the Building Safety Act 2022 (*Unsdorfer v Octagon Overseas Ltd* [2024] UKUT 59 (LC), [2024] L&TR 22) and so cannot discharge the full range of fire safety obligations owed in respect of higher risk buildings.

Limited Right to Self-Management

26. Under Part 2, Chapter 1, Commonhold and Leasehold Reform Act 2002, qualifying long leaseholders of flats are entitled to establish and join a *"Right to Manage Company"* ("**RTM Company**") through which they may take over the management of "*Premises*" containing their flats.

27. This is flawed:

    27.1. **First**, it can only apply to a single block of flats/maisonette. This means that modern estates require multiple RTM companies even though they are designed to be operated and managed as a single estate of several buildings (*Triplerose Ltd v Ninety Broomfield Road RTM Co Ltd* [2015] EWCA Civ 282, [2016] 1 WLR 275).

    27.2. **Second**, the right does not extend to any property shared with the leaseholders of another block, *e.g.* a car park. This means that the freeholder cannot be removed from the management of these parts (*FirstPort Property Services Ltd v Settlers Court RTM Co Ltd* [2022] UKSC 1, [2022] 1 WLR 519 at [42]).

    27.3. **Third,** the provisions for the transfer of accounting information and money from managing agents to RTM companies are also lacking, often complicating the already difficult set up of RTM Companies.

Common Problem with all these Remedies

28. None of the above measures have addressed the fundamental problem with leasehold; *i.e.* that it prevents leaseholders – whether individually or collectively – from exercising

full control over their homes. Enfranchisement is, however, one way to empower leaseholders and grants them greater control.

ENFRANCHISEMENT

29. The existing enfranchisement system neither confers upon leaseholders any meaningful rights, nor encourages leaseholders to exercise these rights.

30. **First**, a decision to enfranchise is not one over which a leaseholder has any real choice: it is a necessity in order to preserve the capital value of the property, or for continued access to mortgage finance. As the Law Commission has correctly noted:

> "*[t]he need to make an enfranchisement claim arises not because they voluntarily decide that they want to improve the value of their asset, but because they are compelled to engage with a process to avoid the loss, or de-valuation, of their home*."[10]

31. Thus, whilst property lawyers may think of enfranchisement as an acquisition of a property interest, leaseholders do not experience it that way. As the Law Commission has again correctly noted, leaseholders see it as a charge imposed because they own a particular kind of home:

> "*whilst the traditional view – and property lawyers' and valuers' view – of an enfranchisement claim is the acquisition by the leaseholder of a property right belonging to the landlord, in fact an enfranchisement claim could equally – as a matter of housing and social policy – be seen as akin to an administrative charge which comes with owning a particular type of home, and that the fee is too high when compared to the service that the leaseholder receives*."[11]

32. **Second**, because leaseholders are effectively compelled to proceed with enfranchisement (if they are to avoid the loss identified by the Law Commission), they have very weak bargaining power when negotiating enfranchisement claims (a problem that is compounded by the fact that leases are deteriorating assets).

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[10] Law Commission, *Leasehold home ownership: buying your freehold or extending your lease: Report on options to reduce the price payable* (Law Com No 387, 2020) § 3.89.
[11] Law Commission, *Leasehold home ownership: buying your freehold or extending your lease: Report on options to reduce the price payable* (Law Com No 387, 2020) § 3.90.

33. The power imbalance between leaseholders and freeholders is made worse by the statutory regime, which requires leaseholders seeking enfranchisement to commence tribunal proceedings within six months following a positive counter-notice and pay the professional costs of freeholders in the meantime (*i.e.* if the leaseholder is put to this by unsuccessful negotiations). The coercive spectre of being liable for significant costs is routinely utilised by freeholders to inflate premiums beyond their known value. As the editors of *Emmet & Ferrand on Title (vol.2)* note at §28.076:

> "*the price of enfranchisement even under this basic provision of the 1967 Act (s.9(1)) has inevitably become largely a matter of valuation evidence. However, unlike much valuation, this seems not necessarily to involve any straightforward reference to comparable transactions as evidencing market value. Indeed it has been indicated that evidence of "out of court" settlements under the Act should be treated with caution, because of tenants' anxiety to settle and lack of advice and because the prices agreed would include the tenant's bid as an element (Delaforce v Evans (1970) 215 E.G. 315; O'Connor v Treffrey Estate Trustees (1981) 259 E.G. 165; cf. Larkcroft Properties Ltd v Adkins (1981) 259 E.G. 257).*"

34. **Third,** even though leaseholders are compelled to engage in the enfranchisement process and lack any meaningful bargaining power during this process, the regime positively penalises them for bringing enfranchisement claims. As the Law Commission has noted:

> "*Very many leaseholders have said to us that enfranchisement premiums are too high. In our Leaseholder Survey, for example, we asked leaseholders who had considered exercising enfranchisement rights but then decided not to do so (or were unable to do so) why that was the case. Nearly 1,000 leaseholders responded, and the most common reason given for their decision not to (or inability to) exercise their enfranchisement rights was the price. There are clearly many leaseholders in England and Wales who would like to exercise their enfranchisement rights but the likely premiums are too expensive for them to be able to do so*."[12]

35. If enfranchisement is to remain, it must therefore provide leaseholders with more meaningful protection.

36. Although LKP does not accept that there needs to be any more than minimal payments by leaseholders when enfranchising – since, by this stage, a leaseholder will have invariably paid all of the running costs of the building *via* the service charge, as well as

[12] Law Commission, *Leasehold home ownership: buying your freehold or extending your lease: Report on options to reduce the price payable* (Law Com No 387, 2020) § 3.80.

ground rent and numerous other charges under the terms of their leases (in addition to the many hundreds of thousands of pounds which will have been paid initially for the first grant of the lease of their flat) – LKP does accept that one way of encouraging enfranchisement, and addressing the *"systemic problem with leasehold ownership"* whereby leaseholders are made *"to 'pay twice' for their home",*[13] is to reduce the premium which leaseholders must pay.[14]

37. As explained in greater detail below and in **O'Kelly-2 §§22-47**, this is why the Impugned Measures are a necessary minimum, albeit they are not sufficient to overcome the flaws in leasehold nor to protect leaseholders from the power imbalance inherent in leasehold property.

D. SUBMISSIONS

ARTICLE 1 OF PROTOCOL NO.1

38. In essence, the arguments for the Claimants all amount to the same thing: the impugned measures are incompatible with A1P1. A1P1 provides:

> "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

39. A1P1 provides for a highly qualified general right to the peaceful enjoyment of possessions. The Court is required to consider: (i) whether the Claimants' rights under A1P1 are engaged, (ii) if those rights are engaged what type of interference has occurred (*Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 at [61]), (iii) if an interference

[13] Law Commission, *Leasehold home ownership: buying your freehold or extending your lease: Report on options to reduce the price payable* (Law Com No 387, 2020) § 3.91.
[14] LKP remains committed to more robust and interventionist legislative measures in this sphere.

has occurred whether it was lawful and in the public interest, and (iv) whether the interference was proportionate (*Hutten-Czapska v Poland* (2007) 45 EHRR 4 at [167]).

40. The ECtHR has interpreted "*possession*" as having an autonomous meaning (*Broniowski v Poland* (2005) 40 EHRR 21 at [129]). It is accepted that the Claimants have a "*possession*". While LKP does not dispute that when enfranchisement occurs it constitutes a deprivation under A1P1, it is not accepted that any relevant deprivation has occurred in circumstances where the challenged measures are not yet in force. The Claimants' rights have not been extinguished, and they remain free to *inter alia* (i) recover certain other costs via the service charge, (ii) exercise their rights to receive ground rent, (iii) enforce their rights under the terms of the relevant lease including the enforcement of Covenants and in certain instances forfeiture,[15] and (iv) sell their interests on the open market (from *R (British American Tobacco) v Secretary of State for Health* [2016] EWCA Civ 1182 at [96]). In any event, as Lord Carnwath observed in *R (Mott) v Environment Agency* [2018] UKSC 10; [2018] 1 WLR 1022 at [32], "*The Strasbourg cases show that the distinction between expropriation and control is neither clear-cut, nor crucial to the analysis*" as it is "*still necessary to consider whether the effect on the particular claimant was excessive and disproportionate*." LKP therefore limits itself to the final stage, proportionality.

PROPORTIONALITY AND THE CORRECT MARGIN OF JUDGMENT

41. The four-stage approach to proportionality is well-established (*Bank Mellat v HM Treasury* [2013] UKSC 39; [2014] AC 700 at [20] (per Lord Sumption) and [74] (per Lord Reed). The principles were summarised by Singh LJ (with whom Sir Geoffrey Vos MR and Whipple LJ agreed) in *Dalston Projects Ltd v Secretary of State for Transport* [2024] EWCA Civ 172; [2024] 1 WLR 3327 at [9] as follows:

> *"9. The question whether or not an act of a public authority is incompatible with a Convention right will often depend on whether it complies with the principle of proportionality. That principle has been explained in the authorities as having four limbs, as set out by Lord Reed JSC in Bank Mellat v HM Treasury (No 2) [2013] UKSC 39; [2014] AC 700 ("Bank Mellat") , at para 74. It is necessary to*

[15] See, **O'Kelly-2 §§ 57-60**; **O'Kelly-2 Exhibits p. 38, p.42**; Andrew Ellson, Leaseholder Forfeits £600k flat over home improvements, *The Times* (London, 15 September 2018) "*A leaseholder has had a £600,000 flat confiscated by his freeholder after "redecorating" it in what campaigners say is the most extreme case of forfeiture they have seen*."

determine: (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (2) whether the measure is rationally connected to the objective; (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (4) whether the measure's contribution to the objective outweighs the effects on the rights of those to whom it applies. The fourth limb is sometimes referred to as the "fair balance" issue or "proportionality stricto sensu", i.e. in the strict sense."

42. As Lord Reed said in *Bank Mellat* at [71]:

> *"71. An assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon. The principle does not however entitle the courts simply to substitute their own assessment for that of the decision-maker. As I have noted, the intensity of review under EU law and the Convention varies according to the nature of the right at stake and the context in which the interference occurs. Those are not however the only relevant factors. One important factor in relation to the Convention is that the Strasbourg court recognises that it may be less well placed than a national court to decide whether an appropriate balance has been struck in the particular national context. For that reason, in the Convention case law the principle of proportionality is indissolubly linked to the concept of the margin of appreciation. That concept does not apply in the same way at the national level, where the degree of restraint practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker, will depend on the context, and will in part reflect national traditions and institutional culture. For these reasons, the approach adopted to proportionality at the national level cannot simply mirror that of the Strasbourg court."*

43. The intensity with which this proportionality test is applied "*depends on the context*" and "*the intensity of review … varies according to the nature of the right at stake and the context in which the interference occurs*" (*Bank Mellat*, [69]-[71]). The domestic courts cannot act as primary decision makers, and principles of institutional competence and respect indicate that they must attach appropriate weight to informed legislative choices at each stage in the Convention analysis (see too *Recovery of Medical Costs for Asbestos Disease (Wales) Bill, re* [2015] UKSC 3; [2015] AC 1016 at [54] (per Lord Mance)).

44. A low intensity of review is generally appropriate in cases concerning judgment of social and economic policy so that the judgment of the legislature will generally be respected unless it is "*manifestly without reasonable foundation*" ("**MWRF**") (*R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223 at [158] (per Lord Reed); *James v United Kingdom* (1986) 8 EHRR 123 at [46]). MWRF is an expression

used to emphasise that a wide margin of judgment is appropriate in light of the circumstances of the case.

45. In *SC*, Lord Reed observed:

> *"208. The assessment of proportionality, therefore, ultimately resolves itself into the question as to whether Parliament made the right judgment. That was at the time, and remains, a question of intense political controversy. It cannot be answered by any process of legal reasoning. There are no legal standards by which a court can decide where the balance should be struck between the interests of children and their parents in receiving support from the state, on the one hand, and the interests of the community as a whole in placing responsibility for the care of children upon their parents, on the other. The answer to such a question can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies.*
>
> *209. That is what happened in this case. The democratic credentials of the measure could not be stronger. It was introduced in Parliament following a General Election, in order to implement a manifesto commitment... It was approved by Parliament, subject to amendments, after a vigorous debate at which the issues raised in these proceedings were fully canvassed, and in which the body supporting the appellants was an active participant .... There is no basis, consistent with the separation of powers under our constitution, on which the courts could properly overturn Parliament's judgment that the measure was an appropriate means of achieving its aims."*

46. Leasehold enfranchisement and the three impugned measures fall well within the scope of an area of economic and social policy in which the judgment of Parliament should be respected unless it is MWRF. In particular:

46.1. **First,** the case law establishes that leasehold enfranchisement is an area where Parliament must be afforded a broad margin of discretion. As set out in **O'Kelly-2,** the impugned measures are measures of social importance representing the democratic actions of a sovereign Parliament (**O'Kelly-2 §12).** As Holgate J (as he then was) observed in *R (Annington Property Limited) v Secretary of State for Defence* [2023] EWHC 1154 (Admin); [2024] 1 WLR 365 at [610] "*A wide or "particularly broad" margin of appreciation is accorded to a state, and thus the Court, when deciding on socio-economic issues engaging A1P1. The notion of "public interest" is "necessarily extensive" and includes the protection of the public*

purse " (see also *Scottish Association of Landlords v Lord Advocate* [2023] CSOH 76 at [32]-[33]).

46.2. **Second,** the three impugned measures are general measures that satisfy the fair balance test required by A1P1, so no case-specific assessment under that provision is necessary (see *Annington Property Limited* at [585]).

46.3. **Third,** while it is assumed the Defendant will address the Court in detail in due course on the legislative background, LKP simply emphasises that the LFRA 2024 was passed following extensive consultation and with cross-party support.[16]

46.4. **Fourth,** while LKP accepts that the Convention is a living instrument, some of the Claimants seek to place unjustified reliance on the decision of *Lindheim v Norway* (2015) 61 EHRR 29. The attempt to draw a direct analogy between Norwegian law and the unique system in England and Wales is unjustified. Even if the court seeks to draw a comparison guidance should instead be taken from *Karibu Foundation v Norway* App No 2317/20 (ECtHR 10 November 2022). The alleged stronger protection has already been considered and rejected by domestic courts and tribunals in the context of enfranchisement (for example, *Trustees of Cooper-Dean Charitable Foundation v Greensleeves Owners Limited* [2013] UKUT 320 (LC) at [89] (per Sir Keith Lindblom)). Even if the Court considers the decision in *Lindheim* relevant the Court is not bound to follow every decision of the Strasbourg Court and should only follow clear and constant lines of decisions (*Manchester City Council v Pinnock (No.1)* [2010] UKSC 45; [2011] 2 AC 104 at [48]). The alleged stronger protection arising from *Lindheim* cannot be considered a "*clear and constant*" line of decisions and does not flow naturally from the existing Strasbourg case law in circumstances where *Lindheim* is a decision of the Chamber and the relevant paragraph does not cite any authorities for the alleged stronger protection (*Poshteh v Kensington and Chelsea RLBC* [2017] UKSC 36; [2017] AC 624 at [36]). To adopt the Claimants' approach would be to go beyond the

[16] The Conservative and Unionist Party Manifesto 2019 p.29 "*We will continue with our reforms to leasehold including implementing our ban on the sale of new leasehold homes, restricting ground rents to a peppercorn, and providing necessary mechanisms of redress for tenants*." The Labour Party Manifesto 2019 p.79 "*Labour will end the scandal of leasehold for the millions who have bought their home but don't feel like they own it. We will end the sale of new leasehold properties, abolish unfair fees and conditions, and give leaseholders the right to buy their freehold at a price they can afford. We will introduce equivalent rights for freeholders on privately owned estates*."

established case law of the ECtHR (*Ambrose v Harris* [2011] UKSC 43; [2011] 1 WLR 2435 at [19]).

Legitimate Aim

47. The impugned measures when considered in isolation or considered collectively as part of the package of reforms in the LFRA 2024 pursue a legitimate aim in the public interest. As Holgate J (as he then was) recently observed in *Annington Property Limited* a particularly broad margin of appreciation is accorded to a state, and thus this Court, when deciding on socio-economic issues such as enfranchisement that engage A1P1 (at [610]). The relevant aims were summarised in the ECHR Memorandum at §51, which states:

> *"[51]* [...] *Government considers that these measures are compliant as they reduce the premium by excluding from the value of the freehold the units that the freeholder will substantively retaining through receiving a leaseback. This is rationally connected to Government's aims of addressing the historic imbalance between freeholders and leaseholders and increasing access to collective enfranchisement and fairness for leaseholders, as well as reducing the complexity of the enfranchisement valuation process."*

48. Much the same can be said here. That Parliament would want to improve the experience of leaseholders is hardly surprising and is plainly a legitimate aim. The scale of leaseholder dissatisfaction is evident from the experience of LKP **(O'Kelly-2 § 5 and Bottomley-1 §§ 8-10, 18 and 27).** The only realistic means to advance these legitimate goals is to reduce the price payable on enfranchisement. Such questions are ultimately for Parliament to decide.[17]

49. Leaseholders also have private rights and human rights. In *J Paul Getty Trust v Italy* (2024) 79 EHRR 26, the ECtHR observed that when considering whether a measure pursued a legitimate aim the ECHR cannot be interpreted in a vacuum but instead in harmony with the general principles of international law. There is a right to adequate housing in Article 11 of the International Covenant on Economic, Social and Cultural Rights 1966. As set out in General Comment No.4 of the United Nations Committee on Economic, Social and Cultural Rights in 1991 at paragraph 7, "*the right to housing should*

[17] A proposition which is perhaps too obvious to require authority, but, by way of an example of particular relevance to this case, see *St Emmanuel House v St Emmanuel House (Freehold House (Freehold) Limited* CH1/21UC/OCE/2017/0025 at [95].

not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity."

50. LKP rejects the submission advanced by certain Claimants that capping ground rent at 0.1% when calculating the premium is not pursuing a legitimate aim. That submission appears to arise from the suggested panacea arising from the Public Pledge, the work of the Competition and Markets Authority ("**CMA**"), and the Leasehold Reform (Ground Rent) Act 2022. This characterisation is incorrect for the following reasons:

50.1. **First,** it is not job done.[18] The pledge was not signed by every freeholder and many onerous ground rents remain. For example, in July 2020 LKP reported that pensions in a former pit village faced an increase in ground rent from £10 per year to £1,100 per year after the initial demand of £2,450 per year was rejected (an increase of 24,100%).[19]

50.2. **Second,** the Claimants have been unable to advance any compelling utility or moral arguments regarding the legitimacy of ground rents: they require Leaseholders to pay money for nothing. As the CMA concluded in January 2024 "*ground rent was neither legally nor commercially necessary, and we saw no persuasive evidence that consumers receive anything in return... Nor did we think*, [...], *that there was good reason to believe that ground rent improved the standard of estate management*".[20] The CMA's conclusion reflects that of LKP **{O'Kelly-2 § 14, 17-21** and **Bottomley-1 § 29}**

[18] Melissa York, "Why the ground rent scandal isn't over" *The Times* (London, 11 September 2022); Melissa York and George Nixon, "The Ground rent debacle trapping homeowners" *The Times* (London 26 July 2024)

[19] LKP, Pensioners in former pit village fight ground rents rising from £10 a year to £1,100pa (after a demand for £2,450pa was rejected) *LKP* (15 July 2020) https://www.leaseholdknowledge.com/pensioners-in-former-pit-village-fight-ground-rents-rising-from-10-a-year-to-1100pa-after-a-demand-for-2450pa-was-rejected/; Law Commission, *Leasehold home ownership: buying your freehold or extending your lease: Report on options to reduce the price payable* (Law Com No 387, 2020) § 6.123; § 67 The Law Commission noted "*that the extent to which ground rents are taken into account in the valuation of enfranchisement premiums could be capped at 0.1% of the freehold value of the property at the valuation date. This measure would help leaseholders with onerous ground rents*."

[20] Competition & Markets Authority ""*Modern leasehold: restricting ground rent for existing leases" - response of the Competition and Markets Authority*" (January 2024) § 44.

Rational Means-End Connection

51. The impugned measures are evidently sufficient to be far more than marginal or *de minimis*, therefore satisfying the rationally connected standard.

Less Intrusive Measure

52. Guidance on the third limb of proportionality review can be taken from *R (Friends of Antique Cultural Treasures Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2020] EWHC Civ 649; [2020] 1 WLR 3876 at [80] where Sir Terrance Etherton MR, Singh LJ and Green LJ summarised the relevant principles:

> *"80. [...] (i) The decision-maker has a margin of appreciation or discretion which is highly fact and context specific [...]. The evaluation will take account of all relevant circumstances including the conditions prevailing in the relevant market, the circumstances leading up to adoption of the challenged measure, and the reasons given why less restrictive measures were rejected.*
> *(ii) A measure will be disproportionate if "it is clear that the desired level of protection could be attained equally well by measures which were less restrictive"*
> *(iii) The burden of proof lies with the decision-maker. It is not however to be applied mechanically. There is no duty on the decision-maker to prove positively that no other measure could be as effective: [...]*
> *(iv) The decision-maker is not required "to consider every possible alternative, including those that were never suggested by consultees" [...]*
> *(v) The mere assertion that some other measure is equivalent and less intrusive is not sufficient: [...] ; and equally the fact that some other measure can be envisaged is not enough: [...]*
> *(vi) It is relevant that a measure is "general, simple, easily understood and readily managed and supervised."*

53. Caution is necessary. As Lord Reed commented in *Bank Mellat* at [75]:

> *"75. In relation to the third of these criteria, Dickson CJ made clear in R v Edwards Books and Art Ltd [1986] 2 SCR 713 , 781–782 that the limitation of the protected right must be "one that it was reasonable for the legislature to impose", and that the courts were "not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line". This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (Illinois Elections Bd v Socialist Workers Party (1979) 440 US 173 , 188-189); especially, one might add, if he is unaware of the relevant practicalities and*

indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict application of a "least restrictive means" test would allow only one legislative response to an objective that involved limiting a protected right."

54. In *James v United Kingdom* (1986) 8 EHRR 123 the Strasbourg Court rejected any reading which amount to a test of strict necessity, observing:

> *"51.* [...] *The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a "fair balance". Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way***."**

55. The legitimate aims of the three impugned measures in isolation and when considered as part of the package of reforms in the LFRA 2024 are to (i) address historic imbalances, (ii) increase access to enfranchisement, and (iii) reduce the complexity of the enfranchisement valuation process. The impugned measures are rationally connected to these aims. Most importantly, when implemented, they will reduce the price payable on enfranchisement therefore furthering the legitimate aims

The Fair Balance

56. The question at the fourth limb of proportionality review is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure (*Bank Mellat v HM Treasury* [2013] UKSC 39; [2014] AC 700 at [74]). When considering the fair balance the authorities demonstrate that the Court is to consider (i) the importance of the right, (ii) the degree of interference, (iii) the extent to which the subject matter is one in which the courts are more or less well placed to adjudicate, both on grounds of institutional expertise and democratic accountability when it comes to social and economic policy (*Dalston Projects Ltd v Secretary of State for Transport* [2024] EWCA Civ 172; [2024] 1 WLR 3327 at [17]-[18]). Guidance on the standard applied by the Strasbourg Court can be taken from *Hutten-Czapska v Poland* (2007) 45 EHRR 4 at [167], where the Grand Chamber reiterated:

> *"167. Not only must an interference with the right of property pursue, on the facts as well as in principle, a "legitimate aim" in the "general interest", but there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the state, including measures designed to control the use of the individual's property. That requirement is expressed by the notion of a "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.*
>
> *The concern to achieve this balance is reflected in the structure of Art.1 of Protocol No.1 as a whole. In each case involving an alleged violation of that Article, the Court must, therefore, ascertain whether, by reason of the State's interference, the person concerned had to bear a disproportionate and excessive burden."*

57. The demands of the general interest of the community require the Court to consider (while giving Parliament a broad margin of discretion) the rights and interests of leaseholders (see *Bank Mellat v HM Treasury* at [71] quoted at paragraph 42 above).

58. When considering the fair balance it is respectfully submitted that it is for Parliament to consider where the requisite balance is to be struck between the rights of landlords and the community at large, which must include consideration of the rights and interests of around 4.7 million leaseholders in England and Wales.

59. None of these reforms should come as a surprise to the Claimants. As the Law Commission recognised in 2020 "[i]*mproving and facilitating home ownership is a priority for Government, and – as part of that – reform of residential leasehold and commonhold law has become an increasing priority*."[21] The importance of that underlying aim, and to help reset the "*inherent unfairness of leasehold tenure*"[22] mean that it would be inconsistent with those aims to fossilise freeholders existing rights to obtain high premiums on enfranchisement.

The fair balance and the marriage value measure

60. Marriage value serves to create an artificial cliff edge once a lease has less than 80 years remaining.[23] Where a lease has more than 80 years still to run, no marriage value is

[21] Law Commission, *Leasehold home ownership: buying your freehold or extending your lease* (Law Com No 392, 2020) § 1.61 "
[22] Law Commission, *Leasehold home ownership: buying your freehold or extending your lease* (Law Com No 392, 2020) § 2.19
[23] Law Commission, *Leasehold home ownership: buying your freehold or extending your lease: Report on options to reduce the price payable* (Law Com No 387, 2020).

payable. Where a lease has less than 80 years to run, the existing regime forces leaseholder to pay 50% of the marriage value to freeholder as part of the premium. This significantly increases the price payable to freeholders in circumstances where the marriage value does not compensate the landlord for anything they have lost or could be considered to have earned **{O'Kelly-2 § 42}**.

61. It is estimated in **O'Kelly-2** that at least half of the complaints received by LKP concerning enfranchisement involve issues arising due to the existing rules relating to marriage value {**O'Kelly-2 § 41**}. The examples in **O'Kelly-2 §§ 43-47** demonstrate that marriage value can add an excessive and unjustified burden.

62. The prospect of Leaseholders obtaining a "*windfall*" (if that is what it is, although LKP would not accept that analysis, for the reasons given above) arising due to the merging of two separate interests does not upset the fair balance (*JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 [83]), especially in circumstances where the current reforms merely remove the windfall currently received by the freeholder and the freeholder continues to retain its legal and beneficial interests in the building.

The fair balance and the onerous ground rent measure

63. LKP does not accept any of the arguments advanced by the Claimants regarding the alleged justifications for ground rent. Fundamentally, ground rents are money for nothing: once one understands that the case for reform is overwhelming.

63.1. **First, ground rent is money for nothing {O'Kelly-1 §§ 17-21}.** As Sir Peter Bottomley MP, then co-Chair of the APPG on Leasehold and Commonhold Reform, noted during oral evidence on Leasehold Reform in November 2018 "*A second major problem is when people start realising that ground rents have no purpose whatsoever Leaving aside the ones that double every 10 years or every 15 years, or even increase by retail price index, what is a ground rent for?* ***The answer is nothing***."[24] The Housing, Communities and Local Government

[24] Housing, Communities and Local Government Committee, Oral evidence: Leasehold Reform, HC 1468, 5 November 2018 (emphasis added).

Committee, *Leasehold Reform: Twelfth Report of Session 2017-19* (HC 1468, 2019) at paragraph 83 concluded that:

> "*The Minister was right to say that ground rent bears no relation to the level of maintenance or quality of service provided to leaseholders—indeed, that is the function of the service charge. Many buildings are well managed without any ground rent being paid. While monetary ground rents may provide an economic incentive for professional freeholders to participate in the market, we have already concluded that—other than in complex, mixed-use developments and retirement properties— most do not provide a significantly higher level of service than that which could be provided by leaseholders themselves. While developers told us that leasehold houses are routinely sold at a lower price than their freehold equivalents, it is concerning that several leaseholders provided evidence that this was not a consistent policy*."[25]

63.2. **Second, the LFRA 2024 does not address all ground rents {Bottomley-1 §§ 28-29 and 33-34}.** It is notable that the LFRA 2024 is much more limited than the 2019 Conservative Party Manifesto which promised to restrict all residential ground rents to a peppercorn.[26]

63.3. **Third, the reforms only apply to "*onerous*" ground rents.** As the Law Commission stated "*ground rents above 0.1% of the freehold value are now generally regarded as onerous. Capping them at this level in the enfranchisement calculation would help leaseholders to buy them out at a more reasonable price and would also simplify the calculation of premiums based on such ground rents. Of the consultees who supported a restriction in principle, over half favoured a cap in enfranchisement valuations at 0.1% of the freehold value at the valuation date*."[27] As noted above, ground rent is money for nothing, and onerous ground

[25] The Housing, Communities and Local Government Committee, *Leasehold Reform: Twelfth Report of Session 2017-19* (HC 1468, 2019) at paragraph 83; The Housing, Communities and Local Government Committee, *Leasehold Reform: Twelfth Report of Session 2017-19* (HC 1468, 2019) concluded: *Any ground rent is onerous if it becomes disproportionate to the value of a home, such that it materially affects a leaseholder's ability to sell their property or obtain a mortgage. In practical terms, it is increasingly clear that a ground rent in excess of 0.1% of the value of a property or £250—or likely to become so in future due to doubling, or other review mechanisms—is beginning to affect the saleability and mortgage-ability of leasehold properties. Ground rent bears no relation to the level of maintenance or quality of service provided to leaseholders—that is the function of the service charge. Many buildings are well managed without any ground rent being paid. It is unacceptable, therefore, that some leading developers have in the past sought to use their market dominance to exploit their customers through the imposition of terms leading to disproportionate ground rents. There is no excuse for such onerous terms, which are symptomatic of the imbalance of power in the leasehold market and are causing considerable distress to affected leaseholders.*

[26] The Conservative and Unionist Party Manifesto 2019 p.29; See also Steven Swinfold "Michael Gove vows to scrap 'feudal' leasehold system this year" *The Times* (London, 30 January 2023).

[27] Law Commission, *Leasehold home ownership: buying your freehold or extending your lease: Report on options to reduce the price payable* (Law Com No 387, 2020) § 6.138

rents are particularly objectionable. The examples given in **O'Kelly-2 §§ 23-35** are just two of the many examples of why capping ground rent at 0.1% when calculating the premium pursues a legitimate aim and satisfies the fair balance. It is not sufficient for the Claimants to merely allege that there is no accepted definition of "*onerous*" in circumstances where Parliament has already exercised its legitimate discretion in making that determination.

63.4. **Fourth, the system is not entirely voluntary.** It is not enough for the Claimants to state that Leaseholders voluntarily agree to onerous ground rents. As the Law Commission noted, "*[t]he impact of these ground rents is often simply not understood by purchasers when they buy their home*."[28] Leaseholders, particularly those in urban settings like those cited at Birmingham, Hampstead and Walthamstow, are often left with no choice as leasehold remains the predominant form of ownership structure in multiple occupancy buildings **O'Kelly-2 §§ 24-35**. LKP notes that with an ever-increasing population and the increase in high-rise buildings now is the time for Parliament to grasp the nettles and move to a system of commonhold.

64. When the matters identified above are considered, it should be apparent that the onerous ground rent measure plainly satisfies the fair balance test.

The fair balance and the legal costs measure

65. As noted in **O'Kelly-2 § 36** complaints to LKP usually include a complaint about legal costs and valuation fees. For leaseholders, the obligation to pay towards their landlord's non-litigation costs imposes an unfair burden on leaseholders whether or not a claim reached completion, leads to uncertainty surrounding the cost and timing of enfranchisement and can force leaseholders to accept otherwise unacceptable terms **{O'Kelly-2 §§ 36-40}.** The example cited in **O'Kelly-2 § 37** shows that these costs can be substantial amounting to £2,340 *per* flat together with valuation fees of £780 *per* flat. LKP's experience is that the significant costs are often difficult to justify in the circumstances. However, the central flaw in the existing system, as identified in

[28] Law Commission, *Leasehold home ownership: buying your freehold or extending your lease: Report on options to reduce the price payable* (Law Com No 387, 2020) § 6.122

O'Kelly-2, is that due to the automatic shifting of costs onto leaseholders, there is no incentive on freeholders to ensure that costs are proportionate **{O'Kelly-2 § 40}.**

66. As noted in paragraph 33 above, the existing system allows unscrupulous landlords to profit through *inter alia* the *Delaforce* effect. This was noted by the Law Commission, which highlighted the absurd reality that "*It may therefore be cheaper for a leaseholder to pay the landlord's inflated claim for non-litigation costs than to incur the costs of disputing that claim*."[29] Furthermore, under the existing system, the deemed withdrawal provisions in the LRHUDA 1993 mean that where a leasehold misses a procedural deadline their claim will be deemed to have been withdrawn. In those circumstances, they will still be liable to pay the landlord's incurred non-litigation costs. As the Law Commission noted "*This liability, together with the prohibition on bringing a fresh claim within a period of 12 months, can encourage some landlords to take a tactical, game-playing approach to enfranchisement claims. And the liability can discourage leaseholders from bringing a further claim after that time limit has expired*."[30]

67. Open market sales of residential property normally proceed on the basis that each party will pay their own non-litigation costs, and that both any valuations obtained, and the price ultimately agreed by the parties will reflect that advice. LKP agrees with the conclusion of the Law Commission that the fact that a landlord is forced to sell in an enfranchisement is not a sufficient justification to depart from the position adopted in normal open market transactions, where each party bears its costs. Enfranchisement is not a truly voluntary decision undertaken by leaseholders but an inevitable consequence of the fact (i) leases are time-limited, (ii) delaying on the part of leaseholders will increase the likely premium, (iii) when a leaseholder wishes to move or sell if the remaining term is too short this may preclude a prospective purchaser from obtaining a mortgage or a leaseholder from re-mortgaging the property. As the Law Commission concluded, and as reflected in the thousands of individuals who regularly contact LKP "*An enfranchising leaseholder is therefore acting with a degree of compulsion that is inherent in the nature of the leasehold interest that he or she holds.* [...] *under the current law, while in general the price increases gradually as the lease shortens, the price can also jump significantly*

[29] Law Commission, *Leasehold home ownership: buying your freehold or extending your lease* (Law Com No 392, 2020) § 12.9
[30] Law Commission, *Leasehold home ownership: buying your freehold or extending your lease* (Law Com No 392, 2020) § 12.10

when the remaining length of the lease falls below a specific point. Most notably, as soon as a lease has less than 80 years to run, a leaseholder is required to pay the landlord a 50% share of the marriage value."[31]

68. As set out in **O'Kelly-2** the existing system of shifting costs onto leaseholders imposes an unjustified and disproportionate burden on leaseholders. Freeholders use the existing system to manipulate the price payable, resulting in unjustified windfalls for freeholders. The LFRA 2024 seeks to overcome this underlying mischief, as identified by the Law Commission. When considered in this context the fair balance and costs measure satisfies the fair balance under A1P1, albeit it is respectfully submitted that such an assessment is ultimately for Parliament.

The impugned measures, compensation and the fair balance

69. It is accepted that where an interference occurs, the existence and level of compensation can be material to the question of whether the fair balance is satisfied. The ECtHR has on multiple occasions stressed that A1P1 does *not* "*guarantee a right to full compensation in all circumstances. Legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value*" *(*James v United Kingdom (1986) 8 EHRR 123 at [54]; *Former King of Greece v Greece* (2003) 36 EHRR CD43 at [78]; *Lithgow* v *United Kingdom* (1986) 8 EHRR 329 at [121]). The Strasbourg Court has observed on multiple occasions that "*where a measure controlling the use of property is in issue, the lack of compensation is a factor to be taken into consideration in determining whether a fair balance has been achieved but is not of itself sufficient to constitute a violation*" of A1P1 (*O'Sullivan McCarthy Mussel Development Ltd v Ireland* (2019) 68 EHRR 6 at [124]).

70. The Court of Appeal considered A1P1 in the context of the nationalisation of Northern Rock following the 2007-2008 financial crisis in *SRM Global Master Fund LP v Commissioners of Her Majesty's Treasury* [2009] EWCA Civ 788. At [56], Laws LJ stated:

[31] Ibid, § 12.31

> *"56. The paradigm case of a reasonable relationship between compensation and the property's value arises, no doubt, where full market value is paid. In that case the relationship between the two is one of identity. That or something not far off is likely to apply in what may be called a 'micro-economic' setting, where for example a single property is taken to achieve a specific and limited local objective. In such a case proportionality is likely to require market value or something close to it, and the margin of appreciation may offer little or no scope to justify the deprivation of property for less.* ***But there will be other cases in which the objective of the deprivation is much broader: perhaps a matter of high politics. In such instances the policy aim of the measure in question may be diminished or undermined or even contradicted by a requirement of full market value. The measure's intention may be to re-distribute wealth, or to achieve a necessary social reform, goals which are or may be perceived to be inconsistent with full compensation payable to the previous owner. In these cases, the margin of appreciation allows a flexible approach to the right protected by A1P1 which may give place to those aspects of the policy which override the case for payment of full value****." (emphasis added)*

71. As set out in **Bottomley-1 § 48** and **O'Kelly-2 § 12** the impugned measures in isolation and when considered as part of the LFRA 2024 can properly be considered a matter of high politics to achieve necessary social reforms which do not require the payment of what the Claimants would seek to characterise as full (or market value) compensation. That is especially so when the so-called market values extracted under the exiting regime are entirely a statutory construct.

72. As the Law Commission recognised in 2020, "[i]*mproving and facilitating home ownership is a priority for Government, and – as part of that – reform of residential leasehold and commonhold law has become an increasing priority*."[32] The importance of that underlying aim, and to help reset the "*inherent unfairness of leasehold tenure*"[33] mean that it would be inconsistent with those aims to fossilise Freeholders existing rights to obtain high premiums on enfranchisement. Further, any alleged reductions must be considered in the context of the mischief caused by onerous ground rents, marriage value, and the recovery of certain costs and the impact on leaseholders: this assessment is not (as certain Claimants have attempted) be reduced to an exercise in accounting.

[32] Law Commission, *Leasehold home ownership: buying your freehold or extending your lease* (Law Com No 392, 2020) § 1.61 "

[33] Law Commission, *Leasehold home ownership: buying your freehold or extending your lease* (Law Com No 392, 2020) § 2.19

73. The ECtHR has held that where a deprivation has occurred a total lack of compensation can only be considered justifiable under A1P1 in exceptional circumstances *(Holy Monasteries v Greece* (1995) 20 EHRR 1 at [71]). However, the Court does not need to make such an assessment in this context. The three impugned measures must be considered as part of the enfranchisement regime and the calculation of the premium. Even when the relevant Secondary Legislation is consulted on and brought into force, the Claimants will retain the right to compensation on enfranchisement.

74. LKP highlights the following:

74.1. **First,** the Claimants' interests and class of investment are not immune from fluctuations and changes in value caused by legal and general changes. As the Law Commission noted, "*there is no guarantee under the current law that the value of landlords' assets will always stay the same, or go up – the value of their assets can fluctuate. And there is no guarantee that the level of risk associated with holding a particular type of asset will always stay the same*".[34]

74.2. **Second,** as above, the causes of any potential reduction must be considered in the context of their *raison d'être* namely (i) the removal of onerous ground rents, (ii) the removal of the requirement to pay the freeholder 50% of the unearned "*marriage value*" and (iii) the ability of freeholders to force leaseholders to pay for certain costs and in doing so use the existing costs regime to extract unearned inflated premiums.

74.3. **Third,** the impugned measures are of a general nature. The possible existence of a windfall for certain leaseholders does not upset the fair balance. Rather it is an inevitable consequence of Parliament's legitimate rebalancing. In *James v United Kingdom* (1986) 8 EHRR 123 the possibility of "*undeserving*" tenants being able to make "*windfall profits"* did not affect the overall assessment of the proportionality of the legislation, and any windfall for the Grahams must be regarded in the same light in the present case (*JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 [83]). With respect, LKP notes that the Claimants

[34] Ibid, § 3.97

seek to mischaracterise those who will benefit from the impugned measures. When considering the fair balance, the court should direct itself to the challenges faced by ordinary leaseholders such as those examples provided in **O'Kelly-2** and the thousands of other distressed leaseholders who have contacted LKP as set out in the selected examples cited in **O'Kelly-2 Exhibits.**

E. CONCLUSION

75. For the reasons given above, the Court is invited to dismiss the claims.

JUSTIN BATES KC
BARNEY McCAY
Landmark Chambers

DOUGLAS MAXWELL
Henderson Chambers

6 May 2025