

# Law Commission consultation on leasehold reform (Revised)

## Response by Lord Berkeley 7 January 2019

### Introduction

1. I have spoken and asked many questions in the House of Lords on issues around the Duchy of Cornwall's interests and property holdings on Scilly and elsewhere, as well as introducing some private members bills about the Duchy. I declare an interest in living part time in The Boathouse, Bryher, owned by my wife, Lady Marian Berkeley, which is leased from the Duchy. She will be responding separately on this.
2. I last raised the issue during the Second Reading debate on my Duchy of Cornwall Bill on 26 October 2018, and received a response from the minister, Lord Young of Cookham, dated 12 November 2018, attached. I note the comment on paragraphs 3 and 4 of his letter '*Crown Authorities have voluntarily committed...to abide by the same terms as private landlords in most circumstances*'. He goes on to say 'there are exceptions where the Duchy will not abide by the terms of the law'. I question why this is thought to be acceptable, especially as the Duchy affirms that it is a private estate when it suits it. How many other private estates can chose '*not to abide by the terms of the law*' and be confident of avoiding any prosecution, even at the expense of adversely affecting many of its tenants?
3. My views are set out below and I am grateful for the support from Alan Davis, a leaseholder at the Garrison on St Mary's who has been seeking the right to buy his lease, and Dr John Kirkhope, the well-known expert and campaigner on Duchy history and issues.
4. It is clear that the policies of the Duchy in respect of their leasehold properties do not conform to the spirit of the current legislation; I and others argue that none of the Duchy leasehold properties on the Isles of Scilly are held 'inalienably' by the Duchy, and are not in the curteleges of Royal Palaces or parks. It may be that the Duchy considers these properties are held inalienably and that the Garrison is a Royal Palace, but we have seen no evidence to support these assertions.
5. Secondly, even if one accepted (which I do not) that these properties should not be sold as freeholds, the leasing terms made by the Duchy on such properties are not in line with what would be required under legislation in other parts of the country with other landlords; the results can be that leases are often for under 21 years and that, in at least one case, the Duchy allowed someone to fund and build a house on an off-

island, but then required the leaseholder to sign up to a short lease on which the property reverted to the Duchy on the death of the leaseholder and his wife. In other words, he had funded the building of a new house, whose value reduced to zero on the death of himself and his wife.

6. Finally, I urge the Law Commission, in considering the optimum way forward, to take into consideration that residents find that dealing with the Duchy on these and other issues can be very expensive and time consuming. It is exempt from FoI. The Duchy frequently ignores and fails to answer letters. The Duchy received free legal advice from the Treasury Solicitor and make full use of this. There is no appeal mechanism and there is therefore concern and uncertainty among many tenants about tackling the Duchy on such issues, for fear of being evicted or otherwise treated unfairly.
7. I believe that the Duchy should therefore accept on a voluntary basis the changes proposed below and by others – to comply in spirit and in detail with the terms of the legislation as has the Crown Estates and the Duchy of Lancaster.

#### **Further comments on the Consultation Question 65.**

##### **Consultation Question 65.**

- a. *“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**

8. Paragraph 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’*. I question whether such a phrase has any legal significance?
9. The phrase *“particular association with the Crown”* is such a loose statement that it could be anything. Why was such a loose, undefined statement used and still is being proposed?
10. *‘The Crown’* under 9.63 (4) applies to the Duchy of Lancaster and the Duchy of Cornwall.
11. 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."*

12. 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 nature of the property. Hence Clause 9.63 (4) should therefore pertain only to the Duchy of Cornwall.

13. The Law Officers of the Crown in the 19<sup>th</sup> 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 3<sup>rd</sup> 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 13<sup>th</sup> century simply cannot, in the opinion of the Law Officers be substantiated.

14. 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&](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&)

15. I urge the Law Commission to seek necessary evidence and wish them every success. This is important, as it is part of the Duchy's claim for the exempted areas and it is important that any such evidence should be in the public domain.

### **The Properties in the Exempted Areas**

16. 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 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.

17. The Isles of Scilly including the exempted areas are already 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.

18. 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.
19. 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 taxpayers’ expense and not with funds provided by the Duchy.
20. Royal visits to the islands are welcomed, as it means pot holes in the Duchy roads are repaired!

### **History of the Application of Leasehold Law**

21. 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. (my bold emphasis).*

22. 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"*.

23. It should be noted that the above statement/undertaking made **no** specific reference to the Isles of Scilly.
24. 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 *'where the house is of special architectural or historic interest or adjoins such houses and is important in safeguarding them and their surroundings.'*
25. 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 the minister, Sir George Young MP. It was materially different from the 1967 Statement. He stated that, regardless of its exemptions under the Acts, the Crown authorities would, subject to specified conditions and exemptions, agree to the enfranchisement or extensions 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.
26. The relevant exception affecting the Isles of Scilly reads:
- a. *(iii) where properties, or the areas in which they are situated, have a long historic or particular association. with the Crown.*
  - b. *the areas referred to in paragraph 3(iii) include the Off Islands within the Isles of Scilly (St Agnes, Bryher, St Martin's and Tresco), the Garrison on St Marys and parts of central Dartmoor....*
27. 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 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.
28. 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.

29. 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?
30. 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 Newton St Loe were also included. These are near Bath, purchased by the Duchy in 1946 and which now house its eastern area HQ.
31. 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 on 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.
32. 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 or 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.

33. 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.
34. 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. It is not clear whether these negotiations are the same as the discussions alluded to by Mr. Fuell and, if so, whether any written record was taken. The full parliamentary exchange is contained in Hansard 19 November 2001 Col 926.

### **The consequences of the present policies**

35. 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.
36. 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 permission fees to reflect the improved property.
37. 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.

38. 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>

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

40. 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).

## Conclusion

41. The question is posed in the Consultation document *“Have you encountered any difficulties?”* From the above evidence it is clear, very many difficulties; 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. From the minutes of the Princes Council in 1982, it is evident that the Duchy had a policy of micro managing the community such as requiring all window of their houses to be painted white. This continues with the Duchy’s involvement in the holiday letting business which can be seen as anti-competitive – giving the Duchy a commercial advantage over its tenants who are in the same business.

43. The privilege granted to the Duchy of Cornwall should be removed, as it has no place in the 21<sup>st</sup> century in a democratic society. As with Planning Law, the Crown should be bound by any new legislation.

44. From the minutes of the Princes Council in 1982 the Duchy had a policy of micro managing the community. This continues with the Duchy’s involvement in the holiday letting business.



45. I have given my views on these issues. I note that the consultation states:
- i. *“9.65 We will be discussing with Crown representatives whether the Crown’s position*
  - ii. *would remain the same in respect of a reformed enfranchisement scheme “*

46. Will we be able to hear the Duchy of Cornwall’s side of the story or will it fall under the Royal FOI exclusion? It is essential that there is full transparency on this issue of such importance to those affected.

### **A way forward**

47. I see no reason for preventing the right to buy on St Mary’s for the reasons stated above.

48. On the off islands, the Duchy in claiming ownership and, as such, considers that it has a role in ensuring a self-sustaining community. If all the residential buildings were freehold, there would be no control over who bought them and the extent, if any, of the buyer’s community involvement or presence on the island.

49. Therefore it may be preferable to retain on the Off Islands the ban on sale of leaseholds for freehold and continue with leaseholds exclusively. The problem at present is that the process and the charging of capital costs or rent is thoroughly non-transparent. One resident may have a 50 year lease, another a 19 year lease; ground rents vary significantly and, most important of all, is the Question: is the capital invested by the tenant in the property reflected in its value when either the tenant wishes to depart and surrender the lease, dies or wishes to leave it to someone else? In other words, does the value of the lease start at the cost of building the property and the cost of the site and, at the end of the lease period, revert to the Duchy at no value to the tenant (as generally happens in London), or is the value of the property retained as for a freehold with the lease being some kind of control by the Duchy to ensure that the community retains a wide range of skills and interests to be self-sufficient?

50. Whereas it may be sensible for the Duchy to have a role in influencing who takes over or moves in, for the above reasons, the consideration that the new occupant would have to pay, and the amount that the departing occupant might receive, is non-transparent and potentially very unfair on the tenants. This also affects the ability of residents to obtain a mortgage, since the terms of tenure from the Duchy generally preclude getting a mortgage. This is of course unfair.

51. The Duchy should therefore publish a policy document on off island property leasing which is consistent with the terms of the legislation and in conformity with the undertakings which says, 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".
52. The privilege granted to the Duchy of Cornwall should be removed, as it has no place in the 21<sup>st</sup> century in a democratic society.
53. This Law Commission consultation states:
- i. "9.65 We will be discussing with Crown representatives whether the Crown's position
  - ii. would remain the same in respect of a reformed enfranchisement scheme "
- I ask whether we will be able to hear the Duchy of Cornwall's side of the story or will it fall under the Royal FOI exclusion? It is essential that there is full transparency on these issues of such importance to those affected.

## Summary

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

*The undertaking would not apply in the following situations:*

*where the relevant property stands on land which is held inalienably; **AGREED***

*where particular security considerations apply (on the advice of the Royal and Diplomatic Protection Group of the Metropolitan Police or other security agencies);*

**AGREED**

*where the property is in, or intimately connected with, the curtilage of historic Royal Parks and Palaces; **AGREED***

~~*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).

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

Lord Berkeley

7 January 2019

Attached – letter from Lord Young of Cookham to Lord Berkeley 12 November 2018.