Call for Evidence: Joint Ownership

April 2024

https://www.gov.uk/government/calls-for-evidence/jointly-owned-leasehold-properties/call-for-evidence-jointly-owned-properties

Q1. Name

End Our Cladding Scandal, a national resident-led organisation and campaign group, representing leaseholders and residents affected by the building safety crisis.

Q2. Email address

endourcladdingscandal@gmail.com

Q3. Are you responding as a leaseholder or landlord?

Leaseholders / Leaseholder representation group

Q4. Have you, as a leaseholder or a landlord, been affected by the current joint ownership provisions as set out in the Building Safety Act 2022? If so, please explain how.

Q5. If the joint ownership provisions were kept the same (that is so that the protections apply where any leaseholder owns, or has a joint or partial interest in no more than 2 additional dwellings, in addition to the lease in question) , would this affect you? If so, how?

Q6. If the joint ownership provisions were changed (for example, to allow joint owners to own up to 4 dwellings, in addition to the lease in question in the UK, which could benefit from the protections), would this affect you? If so, how?

EOCS supports and represents many thousands of leaseholders across the country, both qualifying and non-qualifying, as well as residents who do not have an ownership interest. Our sister group, Non-Qualifying Leaseholders, provides targeted support to 800+ leaseholders who do not qualify for the leaseholder protections in the Building Safety Act. More than 600+ members are non-qualifying on the basis of the number of properties owned.

In the very short window of time available during this Call for Evidence, we assisted the group to conduct a poll of their members which indicates that (at the time of writing) 50% of leaseholders who are non-qualifying on the basis of number of properties owned would benefit, i.e. become qualifying leaseholders, if the threshold was changed as indicated in Q6. The poll had a high participation rate and has reached a relatively steady result.

It is very clear from a wide range of case studies that beyond the "vanilla" scenario of a couple jointly owning all their properties, there is an infinite range of circumstances amongst non-qualifying leaseholders who jointly or co-own one or more property. It is very common to have a mix of sole and joint ownership between a couple, or a mix of joint and co-ownership with partners, parents, siblings, children or ex-partners. It would be incorrect to assume that all jointly owned properties are between the same two people, or that every property owned would have the same type of ownership (i.e. that leaseholders either jointly own all or none of their properties).

However, the most common scenario appears to be joint ownership between a couple, where the principal home is technically entitled to benefit from the leaseholder protections by law, but that point is moot as it is most frequently a freehold house. In such a scenario, 0 properties currently 'benefit' financially from the leaseholder protections.

We would caution against any impact assessment simplistically assuming that in the 'average' scenario the transfer of benefit to leaseholders would be the full cost of non-cladding remediation for 4-5 properties. In many cases, despite the joint owners being deemed non-qualifying due to their portfolio size, they may own a mix of freehold houses and leasehold flats and only one (or a small number of) leasehold flat(s) may be affected by non-cladding defects. For those with a greater number of leasehold flats (4-5), it is often the case that part of their portfolio is expected to benefit from the developer self-remediation contract (however in such cases, there remains a concern that developers will try to limit the scope of work and leave non-qualifying leaseholders liable for some works). Finally, in some cases, there are no defects requiring remediation at all. In this latter scenario, there may appear to be no transfer of financial benefit should the proposed change be implemented – however the non-qualifying status is still having a significant negative impact on such leaseholders by (frequently) preventing remortgage or sale of their property, and so there would be a significant positive impact if the change is implemented, both financially and in terms of life choices (such as the freedom to move for personal, health or other reasons). More widely this would benefit the market for buying and selling flats.

Q7. If the joint ownership provisions were reduced (for example, to allow joint owners to only own one dwelling, in addition to the lease in question to benefit from the protections), would this affect you? If so, how?

The non-qualifying status is undeserved and unjust for any and all blameless leaseholders – yet this proposal would increase the ranks of non-qualifying leaseholders.

This change would impact qualifying leaseholders who have an ownership interest in three properties; they would lose their qualifying status and leaseholder protections, and therefore potentially face additional uncapped costs for the remediation of non-cladding defects for up to three properties on which they currently enjoy protection – and therefore this would not be an insignificant change. (Note, it is possible for a leaseholder to have an ownership interest in three properties that do not include a principal home, for example if their principal home is rented or owned by a partner or family member or another person).

The Secretary of State has always said that the intent of the legislation is to protect innocent leaseholders and ensure only those of "substantial means" contribute; this proposal would make a mockery of such a statement. A leaseholder jointly owning three properties effectively owns the equivalent of 1.5 properties (3 x 50%), or a leaseholder co-owning with three other owners may own the equivalent of 0.75 properties (3 x 25% share). It is absurd that such a leaseholder would be considered of "substantial means."

The proposal does not suggest that those with sole ownership of three properties would lose their qualifying status, therefore it seems entirely illogical and discriminatory that someone owning a lower quantity of

property would be penalised for the form in which they chose to purchase properties, i.e. with the assistance of another person.

It is also unclear how such a proposal could retrospectively be applied in practice where protections have already been claimed – or for example, where a lease that was previously qualifying, but would now be non-qualifying, has been sold in good faith since 14 February 2022.

In short, we believe if such a proposal were implemented it would lead to a complete standstill in the market for buying and selling any leasehold flat, as it would suggest to all stakeholders that qualifying status is impermanent and could be removed at any time.

Q8. Do you have any additional comments on these proposals?

After over 12 months of detailed meetings and written submissions, our position on this issue should already be well-known to DLUHC's Leaseholder Protections team. We have already expressed concerns, both in writing (on 22 March 2024) and in person with the Leaseholder Protections team (on 26 March 2024), regarding some of the drafting and question framing in the Call for Evidence (CfE).

We are grateful for the many changes that were made by close of play on 27 March 2024. However, we need to put on record that we have received many comments from leaseholders about the difficulty understanding some of the language and question framing and that the approach taken to this issue is unnecessarily confusing and complex; this should be taken into consideration when reviewing the volume and quality of responses.

There was also an extremely short window of time after the updated version of the CfE was published – only 11 days, including the Easter holiday period – which will also have affected the volume of evidence collected.

We strongly welcome the fact that the Government is considering taking this opportunity to *correct* this issue, *however it may wish to frame it*. The Department clearly stated in a press release on 27 November 2023 that L&FR Bill amendments "will include measures to amend the Building Safety Act 2022" to ensure "that the leaseholder protections are not unfairly weighted against those who own properties jointly." An expectation has already been signalled to all parties – some leaseholders even believe this change has happened already due to the statements made in November 2023 that this would be part of the Bill. Please, do not break another promise to leaseholders.

A couple each owning three properties individually would be assessed as qualifying leaseholders, but two people jointly owning four properties would be non-qualifying – in our view, this "interpretation" is both illogical and unfair. Joint owners would each pay tax on the rental income based on their 50% share of a property, so it is inexplicable that joint ownership is not treated in the same way for building safety purposes.

Such an "interpretation" has also never been made explicit (as we explain below) – to the extent that we regard it most likely that this is an error that has arisen due to poor drafting, or poor implementation, of the legislation.

A frequent defence of the non-qualifying threshold is that "*parliament has decided"* during the passage of the Building Safety Bill. However, as very close observers of the passage of the Bill, our campaign team can recall no occasion when there was any discussion or debate about the treatment of jointly owned or co-owned leases, so we do not accept that the treatment of jointly owned or co-owned leases was something that was ever "decided" by the will of parliament. We would be astonished if even a single MP understood that jointly owned leases would be counted as one full property per leaseholder towards the threshold.

We also point to the wording of s.119 (2), which defines a qualifying lease, where there is no reference whatsoever to jointly-owned or co-owned leases or their treatment under the Act.

The only reference at all to jointly owned properties that we can find in any government guidance is a worked example (example #8) in the guidance on Qualifying date, qualifying lease and extent, first published on 21 July 2022, i.e. after the Act became law. However, this was an example which did not exceed the qualifying threshold, it was therefore unable to provide a demonstration of the fact that the Department was interpreting jointly held leases as one full property for each leaseholder.

It was not until *very* recently – in February 2024, more than 18 months after the Act came into effect – that we first became aware of templated responses being sent to non-qualifying leaseholders from DLUHC's correspondence team which stated that if any one of the joint owners has an ownership interest in three or fewer UK properties, they could legitimately sign the Leaseholder Deed of Certificate as a qualifying leaseholder. In the preamble to this Call for Evidence, under the heading "How the protections currently work where a lease is jointly owned", the second paragraph states: *"Where the lease is jointly owned, then the protections apply where any leaseholder owns or has a joint or partial ownership interest in no more than 2 additional dwellings in the UK."* This is the very first time that this guidance has been publicly available.

In our opinion, the communication on jointly held leases has been so poor to date as to appear to be the result of an error, probably caused by the rushed drafting of a Bill which did not consider the practical realities and vast range of circumstances by which leaseholders own properties, and a failure to consult those with lived experience (we do not believe any leaseholder representatives can have been consulted on this during the preparation or passage of the Bill).

Whilst we welcome the goal of removing the current unfairness for jointly held leases, we also cannot stress enough that we believe **this could be done in a much simpler and more straightforward way**. Setting a different threshold (a higher limit) for someone who owns jointly compared to someone with sole ownership is adding an additional layer of complexity to what should be a simple issue. Frankly, it appears to be an attempt to engineer a fanciful solution that will make it appear as if the treatment of jointly held leases was part of an intentional design to treat such leases uniquely (rather than admit it is the result of an unintended error).

The very simple – and in our opinion factually correct – route would be to count a jointly held lease as 0.5 of a lease per person, and to count a lease co-owned between 4 people as 0.25 of a lease per person. In that way, the cap or threshold would not need to be varied (increased or decreased) for certain categories of people and not others (which could be considered discrimination).

Amendments should be an opportunity to clarify leaseholder protections, leaving all stakeholders clear and confident about the extent to which a property is protected or exposed to uncapped non-cladding remediation costs – this is not a small matter, as this can be a life-changing sum of money. There is a risk that additional protections may not improve the position for some leaseholders in practice if conveyancers, mortgage lenders and future buyers do not understand the protections and therefore continue to avoid these properties. More unintended consequences.

It is also a crude attempt at achieving the principle of parity for joint owners, without actually hitting the mark. If a leaseholder jointly owns just one property and solely owns 4 more properties (effectively owning 4.5 properties), they would apparently qualify for protections under the proposed change. Yet if a couple jointly owns 6 properties (effectively owning 3.0 properties each), they would still be non-qualifying. While the intention has moved things in the right direction, it seems odd to "correct" for the issue of jointly held leases without doing it "correctly" (accurately) and therefore fairly.

Despite these reservations on the specifics of the proposal, we welcome the fact that the Government is relooking at the qualifying threshold – in this one very specific regard for jointly held leases. However, the proposals do not go far enough.

All leaseholders have suffered the same consequences from the building safety scandal and are equally blameless – and therefore it is inherently illogical and unfair that the non-qualifying leaseholder status exists at all. All leaseholders should have equal access to the "leaseholder protections" and it is fundamentally unfair to set any limit on the number of properties that are protected. Building safety issues are not the fault of a leaseholder, regardless of the number of properties held / how they are held.

However, if the Government continues to resist fair and equal treatment of all leaseholders, we have repeatedly highlighted steps they could take to reduce or minimise the unfairness to non-qualifying leaseholders, including:

• **Three For All: equally protect the first three properties of all leaseholders**. While DLUHC frequently repeats that *"parliament has decided"* and that it was *"necessary"* to set a qualifying threshold, we would strongly challenge whether MPs were aware that non-qualifying leaseholders would not be protected up to this threshold and therefore would lose all protections on properties 1-3 (unless their principal residence happened to be a leasehold flat, which is uncommon), resulting is less protection and a lack of parity with a qualifying leaseholder who enjoys protection on up to 3 properties.

• **Assess property value, not just an arbitrary number of properties, when determining a leaseholder's qualifying status**. It is unfair there is no "wealth threshold" test for leaseholders despite there being "affordability" metrics in place for building owners (£2m per relevant building) and developers (average £10m operating profit between 2017-2019).

• **Ensure that 'payment plans' cap building safety charges to a maximum per year** for all remaining non-qualifying leaseholders, so that payment can be spread.

• **Create a mechanism by which the non-qualifying status is removed after remediation is completed** (confirmed by a Qualifying Assessment) or for those buildings deemed not to require work (confirmed by a professional risk assessment).

• **Protect all leaseholders from their freeholder's legal costs** (currently only qualifying leaseholders are protected) – as this only serves to inhibit access to legal action.

We hope to see Government amendments to the Leasehold and Freehold Reform Bill on all of these areas but will otherwise ensure that they are brought forward by others.

All leaseholders should be fully protected – and we will not stop campaigning until they are.

9. Applying the Public Sector Equality Duty: If the number of qualifying leases is increased, or decreased, for those who own the lease jointly, do you anticipate that this will have any positive or negative impacts related to protected characteristics under the Equality Act? Please answer to the best of your knowledge, noting the explanatory information which will help you to assess the nature of protected characteristics and the public sector equality duty.