

## **LBL response to Lewis Silkin Comment**

Lewis Silkin, solicitors with expertise in all aspects of social housing, were asked by the Independent Advisors to carry out a review the draft Shared Ownership Lease tenancy being developed for use by HfL for existing leaseholders who decide to take the Shared Ownership option. This is our response to those comments.

The main change is the creation of a separate zero rent shared ownership lease and re-drafting of the clauses relating to how rent is set. The draft sent to Lewis Silkin was based on the standard HCA model with regard to rent increases, which would have been inconsistent with the provisions in the key guarantees. The clauses have been altered and removed accordingly.

We are adopting the vast majority of the comments, and have found the process to have been a very useful one.

## **Overview.**

Lewis Silkin encourage the use of the model HCA shared ownership lease. Our approach has been to base the lease on the current Right to Buy lease of LBL, adding in relevant sections from the model HCA lease as appropriate.

## **With rent shared ownership**

Lewis Silkin questioned how the draft of the lease provided met the commitment within the key guarantees that rent would be set based on the costs of borrowing to HfL. This has now been changed – rent costs will be set at the cost of borrowing or 2.75% of the amount when purchase takes place. The rent will be fixed when purchase takes place. Rent will only change in the event that the leaseholder staircases (buys additional proportions of the flat) in which case the rent will reduce proportionately.

## **Without rent shared ownership**

Lewis Silkin noted that they had not seen a zero rent shared ownership lease, and that they raised the point that if created that this would be excluded from the protection of the Housing Act 1988 as no rent is payable.

We have produced a zero rent lease, which excludes the requirement to pay rent on the proportion not owned. In order to afford zero rent shared owners with the required protection an additional clause has been added: *"Notwithstanding that zero rent is passing in respect of the Unacquired Percentage, the Leaseholder is afforded the same protections as exist under section 5 of the Housing Act 1988 as if they were paying rent and an assured tenant as defined under the Housing Act 1988"*

## Security of tenure

Lewis Silkin pointed out that the key guarantees to secure tenants means that HfL will not be able to rely on Ground 8 and 11 but that similar guarantees had not been made for shared ownership leaseholders where the same legislation applies. Without a similar exclusion within the s/o lease HfL would have a mandatory claim for possession where rent is in arrears of 8 weeks. We have added in the required protections: see clause 5.3 *"For the avoidance of doubt, the landlord will not re-enter the flat on the basis that... rent remains unpaid at least 8 weeks..."*

## Lease Handbook

All references to the Leasehold Handbook have been removed.

## Other changes

Lambeth have been further considering the content of the lease, and have now included a small number of other changes developing the lease, since the draft was sent to Lewis Silkin for review. These changes are minor in nature and as listed below:-

Clause	Change / Explanation
Clause 2.1	Added the words 'and service charge' to clarify that it is a requirement to pay the service charge
4.1.3 e)	Clarifying that repairs relating to ventilation are the landlords responsibility
3.1.39	Change sub-lessee to assignee (this was incorrect in the original lease)
3.1.40	Reduction in minimum fee from £50 to £35
3.1.46	The clause on passing on the shared ownership lease has been expanded, reflecting previous commitments made, limiting it to family members living in the property for at least a year.
DELETED	This has been deleted because it is relevant to the old stamp duty regime rather than the new Stamp Duty Land Tax regime so is no longer required.
Schedule 4, 4	Reference to insurance being determined by the number of bedrooms in the building. This reflects the way the insurance companies apportion costs. The existing LBL lease does not allow this.

**Deleted: IT IS HEREBY CERTIFIED** that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds One Hundred and Twenty Five Thousand Pounds (£125,000)

Clause No	Lewis Silkin Comment	Lambeth response. Clauses referred to relate to the s/o lease although apply to long lease where applicable
<b>General comments</b>	There is no contents/index page which would be helpful to tenants navigating the Shared Ownership Lease;	Changed
	LR3 should include HfL's registered office and status of RP and the registration with HCA number;	Now included in LR3
	The draft does not include a general obligation that where an obligation requires a party to do any act to procure that it is done;	Included (1.17)
	Restrictions on the tenant do not include a restriction on the tenant not to permit or allow the infringement of the restriction by any other person	Included (1.18)
	There is no general provision that references to liability include, where the context allow, claims, demands, proceedings, damages losses, costs and expenses;	Included (1.19)
	There is no wide ranging ability for HfL to recover costs from tenants for any breach of covenant which is often seen and considered to be unfair;	Noted – we are not including this.
	There does not appear to be any restriction on tenants making alterations to internal structural parts of the Flat;	Amended see 3.1.25 Also added that to do so without permission considered a breach and that necessary enforcement action will be taken, and that alterations can only be carried out Monday – Friday 9:00- 17:00
	There is no requirement on the tenant to do any works and actions as directed by the Local or National Authority say where an Abatement notice has been served, nor is there any requirement on the tenant to provide HfL with copies of any such notices	Included 3.1.18

	There is no requirement on the tenant to obtain necessary consents or permissions and/or pay the costs of doing so in respect of any use of the Flat	This reflects the current form of the Right to Buy Lease and whilst in principle this is not unreasonable, as it is not clear what uses are the demised premises to be put which will require additional consents, as such we aren't changing this.
	There is no Party Wall clause	Included, 5.21
	There is no declaration that sections 18 – 30 of the Landlord and Tenant Act 1985 and Part V of the Landlord and Tenant Act 1987 (which regulate service charges) apply	Included, 2.2
	There is no restriction on the use of Grounds 8 and 11 as there is in the Lifetime Assured Tenancy	Included, please see 5.3
Interpretation	<ul style="list-style-type: none"> <li>It should be made clearer whether the Flat includes windows frames, fittings and glass.</li> <li>2.23.7 excludes window frames from the Flat whereas 2.23.10 excludes external parts of windows and window frames.</li> </ul> <p>It is not clear who will be responsible for repairing broken glass and who would be responsible for maintaining the inside of window frames</p>	Responsibilities have been clarified, see in interpretation. Windows are a landlord responsibility in their entirety.
2.1	<ul style="list-style-type: none"> <li>The lease seeks to exclude the tenant's right to set-off, which may be considered unfair under Consumer Rights Act 2015 (CRA 2015).</li> </ul>	<p>The provisions referred to mirror provisions in the existing Right to Buy Lease</p> <p>In addition HCA model lease provides that the leaseholder will pay the rent '<i>at all times... and all other monies due without deduction</i>'.</p> <p>We have not therefore changed this clause.</p>

2.	May be unfair in treating service charge as "rent." Clauses which treat outstanding service charge as rent may be considered unfair, based on paragraph 4.21 of the 2005 Guidance on unfair terms in tenancy agreements. This guidance is not binding on the courts but provides a useful indicator in relation to potentially unfair terms.	This provision mirrors a similar provision in the existing lease and we do not intend to change this.
2.3	HCA by the model lease suggests 3% above the base rate.	Noted, but we have decided to keep this at 4% in line with the current lease.
2.7.1	The costs recoverable from the tenant are limited and the lease should include costs otherwise incurred by the landlord in respect of <b>any</b> breach of covenant by the tenant under the lease	Changed, see 3.1.9 (b)
2.8	Potentially unreasonable and Unenforceable to require the tenant to paint internal parts of the Flat every 5 years.	Changed – this requirement has been removed.
2.10	There should be clarity as to who is responsible for the repair or replacement of glass in the windows and the maintenance of the interior window frames.	As above, all window maintenance is landlord responsibility
2.15 "	<ul style="list-style-type: none"> <li>• Add: <b>Flat</b> before internal -5<sup>th</sup> line</li> <li>• Reference to handbook – handbook not seen</li> </ul>	<p>Changed (3.14)</p> <p>All references to the handbook have been removed</p>
2.17	Add: <b>Single occupation</b>	Changed, see 3.1.27, makes specific reference to not being HMO.
2.18	Potentially unfair clause. No election materials for example. The Lifetime Assured Tenancy permits temporary reasonable sized notices about elections and community events. Other notices can be displayed where permission is obtained.	Amended to bring in line with tenancy agreement, see 3.1.28.
2.19	A new clause should be added - not to or permit to be done any form of harassment or intimidation of any other person, including the Landlord's staff, contractors and agents or its tenants	Changed, see 3.1.29.

2.26	Clause should include provision that the tenant is not obliged to repair damage where caused by an insured risk unless money is irrecoverable by reason of act or default on the tenant	An existing clause 3.1.16 already carves out the tenant's liability to repair damage caused by an insured risk.
2.27b 2.27C	<p>Tenants may not sub-let the whole of the flat before final staircasing.</p> <p>It appears this clause is designed to prohibit a tenant from taking in a paying guest, lodger of Airbnb guest.</p> <p>A shared ownership lease should prohibit sub-letting by the tenant (as the draft does) to protect public funds and ensure applicants are not entering shared ownership for commercial gain. The landlord does not need to prohibit the leaseholder from taking in paying lodgers/ guests. In this regard, the clause goes much further than the model shared ownership lease and is potentially unfair</p>	To note that we are consulting more generally on sub-letting
2.31.3	Last line should read "Clause 2.31.2 and this Clause 2.31.3".	Changed
2.31.4	Replace Register with Registrar	Changed
2.31.5	The 2 clauses referred to do not exist. Change to <b>2.31.1</b> and <b>2.31.3</b> . The landlord's right of first refusal does not apply if the lease is transferred or	Changed
<i>Provided</i>	Replace: <b>chance</b> in circumstances with <b>change</b>	Changed
3.5.3A	Fair as suspends the rent until the Flat is again fit for use.	No response required

4.1	<p>The clause is a proviso for re-entry. However, it should be made clear that the landlord must seek a court order to recover possession of the Flat if the tenant remains in occupation. The clause does not refer to the need for court proceedings.</p> <p>There is no reference to the grounds for possession in the Housing Act 1988 and which Grounds HfL would or would not rely on. This is potentially unclear and unfair, particularly when compared with the Lifetime Assured tenancy which prevents the use of Grounds 8 and 11.</p>	Included, see 5.1.2 and 5.1.3
4.3.1	<p>Disclaimer covering problems caused by landlord's agents or sub-contractors may be unfair as the tenant has no contractual rights against them.</p> <p>There is no exception where any such liability is covered by HfL's insurance</p>	Changed, please see 5.5.1. – <i>“except to the extent that such matters are covered by insurance that may be maintained by the Landlord from time to time”</i>
4.5	<p>This clause which seeks to provide a contractual basis that certain acts of waiver, will not constitute waiver, will be unenforceable and is likely to be considered unfair.</p>	<p>This provision details that if the landlord is aware that the leaseholder has breached any of the lease's covenants and demands or accepts rent this does not mean that the landlord has waived the breach and the landlord may still exercise any of its rights set out in the lease. This clause reflects wording included in the existing Right to Buy Lease. We are not proposing to amend this.</p>
4.7	<p>The clause seeks to allow HfL to unilaterally take itself outside the normal rules of law so that disputes relating to any part of the Building can only be determined by HfL. The clause is likely to be unfair as it gives HfL the exclusive right to interpret the contract. The clause should be amended so that a tenant unhappy with HfL's interpretation may refer the matter to an independent expert, ombudsman or arbitrator. Compulsory arbitration clauses are however unfair, so care needs to be taken when redrafting this.</p>	<p>This clause reflects wording included in the existing Right to Buy Lease which provides for a dispute to be referred to the Council's Director of Housing Services and that the Decision of the Borough Valuer shall be final and binding.</p> <p>Independent arbitration can be expensive and drawn out. As such we are minded to leave the clause as it stands.</p>
4.8	<p>The clause should include a provision as to proper service on the Tenant e.g. if left at the property, posted by pre-paid and first class post.</p>	Changed, see 5.9
7.2c	<p>Incorrectly refers to Clause 8.2(c) change to 7.2(c)</p>	Changed

<i>Second Schedule para 4</i>	There should be an easement for telephone communications	Reference added for 'communications' see second schedule para 4.
<i>Second Schedule Para 6</i>	<ul style="list-style-type: none"> <li>add a right for persons authorised by the tenant to enter any other flat.</li> </ul>	We've added right for leaseholder's surveyors and workers to enter, see second schedule, paragraph 6.
<i>Third Schedule Para 1</i>	Add a right for HfL's surveyors, agents and contractors to enter the Flat	Added, see third schedule para 1.
<i>Fourth Schedule Part 1</i>	Landlord is a defined term so should have a capital L.	Landlord has been capitalised
<i>Fourth Schedule Para 4</i>	Unlikely that communal passages will be carpeted and/or re-carpeted	Changed to refer to floor coverings rather than carpet, see fourth schedule part 6.
<i>Fifth Schedule, Terms and provisions</i>	There is no obligation on HfL to make a contribution to the reserve fund in respect of void properties	Added, see fifth schedule part 9.
<i>Fifth Schedule Para 1</i>	Certificate is a defined term so should have a capital C	Certificate has been capitalised
<i>Fourth Schedule, Part 1</i>	Building Element missing opening quote	Changed
<i>Fifth Schedule, Para 6</i>	<ul style="list-style-type: none"> <li>Certificate is a defined term so should have a capital C</li> <li>Clause could be clearer in how overpaid service charge is to be treated/repaid to the tenant</li> </ul>	Overpaid service charge is generally offset against future payments.
<i>Sixth Schedule Para 2</i>	Assured Lifetime tenants have a right subject to prior consent to park commercial vehicles and caravans on HfL's land and their garden. This clause is therefore unfair in comparison with other residents' rights and generally.	Changed for consistency, see sixth schedule para 2.
<i>Seventh Schedule</i>	Rent Review provisions are in accordance with the HCA model rent review clause/procedure, but note earlier comments concerning rent and increases. Incorrectly refers to Clause 10. Change to Clause 9	Schedule deleted
<i>Eighth Schedule</i>	Staircasing provisions are in accordance with the HCA model staircasing provisions	Just to note

<i>Ninth Schedule</i>	Assignment to nominated purchasers provisions are in accordance with HCA model clause Incorrectly refers to Clause 2.31.2(a) change to 2.31.2 (i)	To note. Changed
<i>Tenth Schedule</i>	Surrender by Tenant provisions are in accordance with HCA model clause the reference should be 2.31(2)(ii)	To note Changed
<i>Appendix 1</i>	Draft memorandum of staircasing is in accordance with HCA model memorandum	Just to note
<i>Appendix 2</i>	Draft example of Notice of Rent Increase is in accordance with HCA model rent increase notice, but note earlier comments concerning rent and increases.	Deleted
<i>Appendix 3</i>	Draft Key Information is in accordance with HCA model key information, but this also refers to rent and increases and may not be consistent with the intended approach of HfL.	Deleted