Cambridge Law Journal, page 1 of 28 © The Author(s), 2025. Published by Cambridge University Press on behalf of The Faculty of Law, University of Cambridge. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (https://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.
doi:10.1017/S0008197325000030

ESCALATING GROUND RENTS IN RESIDENTIAL LEASES AND CONSUMER PROTECTION

SUSAN BRIGHT*

ABSTRACT. *Escalating ground rents in long residential leases (rents that double or are adjusted by reference to an index at regular intervals) have been described as onerous and can prevent property sales. This article considers whether they are legally enforceable under consumer protection legislation. Although litigation would be needed both to clarify the application of key provisions in the Consumer Rights Act 2015 to ground rent terms, and to take account of the individual lease terms, the article concludes that escalating ground rent provisions may not be binding where the leaseholder is a consumer. Further, if the rent provisions are held to be unfair it would mean that the leaseholder does not have to pay and can recover sums already paid. This conclusion would therefore also weaken the human rights arguments made against the government's plans to tackle problematic ground rents.*

KEYWORDS: *residential leases*, *ground rents*, *consumer protection*, *restitution*, *human rights*.

I. INTRODUCTION

The current UK Government is committed to tackling unregulated and unaffordable ground rents in existing leases.[1] Parliamentarians have referred to the "abusive practices"[2] of "rip-off" escalating ground rents as the "PPI of the house building industry".[3] It is a scandal that involves the creation of a new asset class "as ground rents rise and rise, and properties are … treated as a marketable commodity over the heads of

*Professor of Land Law, University of Oxford, New College, Holywell St, Oxford, OX1 3BN, UK. I have discussed these ideas with numerous stakeholders and experts across the academic and professional legal spectrum. My thanks to all of them and in particular: Fabiana Bettini, Martin Boyd, Rawdon Crozier, Merit Flügler (for general research, and particularly the restitution section), Nick Hopkins, Douglas Maxwell, Ben McFarlane, Liam Spender, Marie Jull Sørensen and William Swadling. As usual, all opinions (and errors) are mine. Address for Correspondence: Email: susan.bright@new.ox.ac.uk.

[1] M. Pennycook, "Leasehold and Commonhold Reform" (21 November 2024), Statement UIN HCWS244, available at https://questions-statements.parliament.uk/written-statements/detail/2024-11-21/hcws244 (last accessed 4 January 2025).

[2] HC Deb. vol. 707 col. 795 (24 January 2022).

[3] S. O'Kelly, "Justin Madders MP Tells Chester Chronicle Leasehold Is 'the PPI of Housing Sector'", available at https://www.leaseholdknowledge.com/justin-madders-mp-tells-chester-chronicle-leasehold-ppi-housing-sector/ (last accessed 4 January 2025).

the owner-occupiers".[4] As Secretary of State for Levelling Up, Housing and Communities in the previous Conservative Government, Michael Gove made known his preference for a ground rent cap set at a peppercorn. The legislative amendment anticipated was for a £250 cap being phased out to a peppercorn over a 20-year period,[5] but the general election in July 2024 was called before the legislative plans were laid. We await proposals from the Labour Government elected in 2024. This article steps back from the reform plans and examines whether escalating ground rents in residential long leases are in any event legally enforceable.

What then is an escalating ground rent, and what is the problem? When a long residential lease is bought for a premium, there will also be a rent payable. This is the ground rent, but despite the nomenclature it is not a rent for the ground itself and is therefore quite different from a "site rent" payable under a building lease[6] or a pitch fee used, for example, in caravan parks.[7] There are historical reasons for ground rents,[8] but these rents were nominal, sometimes a peppercorn.[9] Since the early 2000s the use of ground rents has changed significantly. "Modern long leases"[10] typically have higher initial ground rents (often in the low hundreds) and may also provide for the rent to increase at regular intervals. The most prevalent type of escalating clause is adjustment at stated intervals by reference to the Retail Prices Index (RPI). Others may provide for the rent to double at intervals. Referring to one example, Justin Madders M.P. said: "£350 a year for ground rent does not sound too bad, but in 50 years' time it will be over £11,000, … and in 200 years' time … it will be a staggering £367 million a year."[11] The move to escalating clauses may simply be because developers recognised, and then exploited, the opportunity to create a significant new revenue stream, itself a tradable asset, but it has also been suggested that changes to Stamp Duty introduced by the Finance Act 2003 provided the

[4] HC Deb. vol. 618 (20 December 2016).
[5] H. Yorke, "Leaseholders 'to Pay Ground Rent for 20 More Years' After Reforms Diluted", *The Times*, available at https://www.thetimes.com/uk/article/more-gloom-for-leaseholders-as-treasury-weakens-gove-proposals-d9m7c9707 (last accessed 4 January 2025).
[6] Discussed in M. Davey, "Long Residential Leases: Past and Present" in S. Bright (ed.) *Landlord and Tenant Law: Past, Present and Future* (Oxford and Portland 2006), ch. 8, 147.
[7] As in *Du Plessis v Fontgary Leisure Parks Ltd.* [2012] EWCA Civ 409.
[8] See P. Rainey, "Leasehold Reform Briefing Note" (12 November 2018), available at https://www.leaseholdknowledge.com/wp-content/uploads/2019/01/PhilipRaineyWhatispeppercorn.pdf (last accessed 4 January 2025).
[9] Competition and Markets Authority (CMA), *Leasehold Housing: Update Report* (28 February 2020), [66], available at https://assets.publishing.service.gov.uk/media/5e57e4ea86650c53b74fe6e0/Leasehold_update_report_pdf_-.-._.pdf (last accessed 4 January 2025); HC Deb. vol. 618 col. 415 (20 December 2016).
[10] Terminology used by the CMA: ibid.
[11] HC Deb. vol. 618 col. 481 (20 December 2016).

opportunity to adopt this model without the cost to leaseholders being spotted.[12]

Escalating ground rents affect the housing market: many lenders have policies that prevent lending where they are above a certain level (often £250 or 0.1 per cent of the freehold value) and property agents state that a leasehold property with an escalating ground rent will struggle to sell.[13] A high ground rent also significantly increases the purchase price for leaseholders seeking to enfranchise or extend their lease, sometimes making it prohibitively expensive.[14] For leaseholders the rising cost of rent, the inability to sell, and higher enfranchisement costs have negative impacts on well-being, mental health and the ability to make life decisions about moving and starting a family.[15]

Even if reform stops future escalations, the legal arguments discussed here remain significant. It is argued that escalating ground rents may be unenforceable under section 62 of the Consumer Rights Act 2015 (CRA 2015) and may also be struck down under the doctrines of non-derogation from grant and repugnancy. This has various implications. First, and obviously, leaseholders do not have to pay. This may also mean that landlords are liable to refund rents already received. Additionally, it considerably weakens the claims of lobbyists that any reform by capping (or removing) ground rents would be an unjustified interference with a landlord's human rights. The analysis also provides a case study on the application of section 62 to long-term contracts which are regularly assigned. There is very little discussion or authority on this. In its investigation into event fees in retirement properties – fees payable on certain events such as sale – the Law Commission noted the challenges of applying the CRA 2015 to residential leases.[16]

[12] Prior to those changes, the calculation of stamp duty payable was based on rent across the whole life of the lease (including increases). After 2003, the rent component of stamp duty even after the fifth year was based on the highest rent payable in the first five years, and thus the economic impact across the whole leasehold term was hidden. I am grateful to Juliet Brook for flagging the stamp duty changes, and to Russell Hewitson for explaining Stamp Duty Land Tax.

[13] Department for Levelling Up, Housing and Communities (DLUHC), "Modern Leasehold: Restricting Ground Rent for Existing Leases" (2023), [1.27], [1.28], available at https://www.gov.uk/government/consultations/modern-leasehold-restricting-ground-rent-for-existing-leases/modern-leasehold-restricting-ground-rent-for-existing-leases (last accessed 4 January 2025).

[14] 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), especially [2.22]–[2.24], [3.52]–[3.58].

[15] DLUHC, "Modern Leasehold"; CMA, "'Modern Leasehold: Restricting Ground Rent for Existing Leases' – Response of the Competition and Markets Authority" (January 2024), [35], available at https://assets.publishing.service.gov.uk/media/65f09708ff11700019615a5a/Full_text_of_the_CMA_s_response_pdfa.pdf (last accessed 4 January 2025).

[16] Law Commission, "Residential Leases: Fees on Transfer of Title, Change of Occupancy and Other Events: A Consultation Paper" (Law Com. No. 226, 2015), especially ch. 6. On sale of the lease a payment to the landlord may be required based on a percentage of the sale price, perhaps "only" 1 per cent but sometimes as high as 30 per cent. In its thirteenth programme the Law Commission intended to consider how the unfair terms legislation applies to leases, but has yet to commence work on it: Law Commission, *Thirteenth Programme of Law Reform* (Law Com. No. 377, 2017), [2.46], [2.47].

Before examining the relevant law, Section II explains how escalating ground rents have been tackled to date. The meat of the argument is in Section III which examines the application of section 62 to escalating ground rent clauses. Section 62 provides that unfair terms in consumer contracts are not binding on a consumer, but some contract terms are excluded from an assessment for fairness. Section III(A) considers these exemptions but argues that they do not preclude an evaluation of the fairness of ground rent terms. Section III(B) considers how the fairness test applies to escalating ground rents clauses and concludes that many are likely to be found unfair. This benefits not only the original consumer leaseholder but also later owners as shown in Section III(C). Section III(D) provides a recap of how section 62 applies to escalating ground rents, and notes that the arguments made may go further and also apply to non-nominal initial rents. Section IV discusses an alternative argument that (some) ground rents may not be enforceable because of the separate, but closely related, concepts of derogation from grant and repugnancy. The following Section V then discusses the practical implications in relation to payment and refunds (Section V(A)) and what this means for the human rights objections to reform (Section V(B)). A conclusion follows.

II. Tackling Ground Rents

Ground rent investment became big business following the introduction of modern long leases. Escalating rents are seen as providing secure inflation-linked income with a low credit risk. Media stories report ground rent investors hoovering up portfolios from developers, with the developers sometimes retaining management of the housing.[17] A survey of institutional investors found that the value of residential ground rents held by 10 respondents in 2012 was £139 million; only three years later in 2015 the value of investments held by eight respondents was £1.9 billion.[18]

Concern about onerous ground rents was first raised in Parliament in 2016,[19] noting an outcry in a number of media reports that 10-year "doublers" can make resale difficult.[20] In 2017 the National Leasehold

[17] E.g. R. Whang, "Oxley Sells Rights to Rents in Royal Wharf Project in London for £34.5m", *The Straits Times*, available at https://www.straitstimes.com/business/companies-markets/oxley-sells-rights-to-rents-in-royal-wharf-project-in-london-for-ps345m (last accessed 4 January 2025); News, "Maturing Oak // Money grows on trees // From acorns to oak //", *Estates Gazette*, London, 20 February 2016.

[18] DLUHC, "Modern Leasehold", [1.19].

[19] HC Deb. vol. 618 (20 December 2016). Most contributions in this debate focused on leasehold houses (as against flats).

[20] E.g. P. Collinson, "The Ground Rent Scandal That Is Engulfing New Home Buyers", *The Guardian*, available at https://www.theguardian.com/money/2016/nov/05/ground-rent-scandal-engulfing-new-home-buyers-leasehold (last accessed 4 January 2025); R. Jones, "Beware the Small Print That Could Hike One-Bed Flat's Ground Rent to £8m-a-Year", *The Guardian*, available at https://www.theguardian.com/money/2016/oct/22/small-print-ground-rent-property-millions-leasehold-flat (last accessed

Campaign (NLC) was founded and its campaigning work built on that of the Leasehold Knowledge Partnership. Also in 2017, the Government consulted on "restricting ground rents on new leases to a 'peppercorn'" and "how to tackle existing onerous ground rents".[21] The first goal, removing ground rents on (most) new leases became law in 2022 with the Leasehold Reform (Ground Rent) Act 2022.

Following calls from campaigning groups such as the Leasehold Knowledge Partnership and the NLC, the Competition and Markets Authority (CMA) in 2019 – with seeming reluctance – launched an investigation into the potential mis-selling of leasehold homes and the potential use of unfair terms.[22] The early CMA focus was on doublers as "they posed the most significant problems for consumers" and were seen as "egregious". In June 2019, the CMA secured voluntary pledges from more than 60 freeholders and developers to replace clauses that double more frequently than every 20 years with clauses that link escalation to RPI.[23] The 2020 report from the CMA investigation found evidence of mis-selling by developers as well as concern about the use of escalating ground rent terms.[24] This also, for the first time, expressed concern about RPI linked increases as well as doublers. As the CMA considered that the mis-selling and ground rent terms could break consumer protection law,[25] it used its powers under the Enterprise Act 2002 to secure undertakings from several large developers to remove ground rent clauses that double more frequently than every 20 years.[26] Some undertakings also include a commitment to refund payments received. Similar undertakings have been obtained from 26 landlords who purchased from these developers, with the original developer making a financial contribution to the landlord for the cost of removing these

4 January 2025); P. Collinson, "Leasehold 'Nightmare' Will Cost Homebuyers Billions, Report Warns", *The Guardian*, available at https://www.theguardian.com/money/2017/apr/05/leasehold-nightmare-cost-homebuyers-billions-report-warns (last accessed 4 January 2025); R. Dyson, "Leasehold Scandal: Ground Rent That Starts at £250, Then Rockets to … £69 Trillion", *The Telegraph*, available at https://www.telegraph.co.uk/money/property/house-prices/leasehold-scandal-ground-rent-that-starts-at-250-then-rockets-to/ (last accessed 4 January 2025).

[21] Department for Communities and Local Government, *Tackling Unfair Practices in the Leasehold Market: A Consultation Paper* (July 2017), 4.

[22] H. Scoffin, "Better Late than Never for the CMA?", available at https://www.leaseholdknowledge.com/competition-and-markets-authority-leasehold-mis-selling/ (last accessed 4 January 2025).

[23] Ministry of Housing, Communities and Local Government, "Public Pledge for Leaseholders", available at https://www.gov.uk/government/publications/leaseholder-pledge/public-pledge-for-leaseholders (last accessed 4 January 2025). Not altogether successfully: see DLUHC, "Modern Leasehold", [1.34].

[24] CMA, *Leasehold Housing*.

[25] Referring to the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, and Part 2 of the Consumer Rights Act 2015.

[26] E.g. CMA, "Aviva Undertakings" (23 June 2021), available at https://assets.publishing.service.gov.uk/media/60d2066e8fa8f57ce4615144/Aviva_Undertakings_.pdf (last accessed 4 January 2025); CMA, "Countryside Undertakings" (15 September 2021), available at https://assets.publishing.service.gov.uk/media/61407b09d3bf7f05b3fbd83e/210915_-_Countryside_undertakings__redacted_for_publication_15.pdf (last accessed 4 January 2025); CMA, "Taylor Wimpey Undertakings" (22 December 2021), available at https://assets.publishing.service.gov.uk/media/61c1ef57d3bf7f1f7036fad1/Taylor_Wimpey_Undertakings.pdf (last accessed 4 January 2025).

leasehold clauses. Although the doublers were considered more egregious, RPI rises since then mean that indexed clauses may now be worse than 20 year doublers.[27]

A further government consultation, specifically on ground rents, was launched in December 2023. This outlined five options for reform: from capping ground rents at a peppercorn, through to freezing ground rent at current levels. The impact assessment estimated that a reduction to peppercorn would mean over £5 billion in lost ground rent in the first 10 years and more than a £27 billion devaluation in asset value.[28] Unsurprisingly, investors have lobbied hard and claimed that this would be unfair and a breach of their human rights. Of course, capping should not be a surprise to them; at least since 2016 investors should have been aware that action was likely. Any investments purchased since then were a risk.

The Government's claim in the consultation that ground rent is "something for nothing"[29] is supported by the CMA's response. It states that they found no convincing justification for ground rent and that they had seen no persuasive evidence that it is commercially necessary or that consumers receive anything in return.[30] Nor was there evidence to support claims that the premium payable was significantly reduced to reflect ground rent.[31] The government response to the ground rent consultation was not published and the talk of a £250 cap (coupled with a phasing out to peppercorn) was no more than a rumour.

Before discussing the consumer protection legislation, the significance of a £250 cap should be explained. If the ground rent exceeds £250 per year (or £1,000 per year in Greater London), a leaseholder living in the property as his principal home will be an assured tenant within the Housing Act 1988. This means that the lease can be ended by court order on the mandatory grounds in Part 1 of Schedule 2 to the 1988 Act, including Ground 8 which applies if two months' rent is unpaid. Unlike forfeiture, there is no possibility of relief or of the court ordering sale in preference and it is not possible to argue that the long leasehold interest persists even if the assured tenancy is ended.[32] The outcome will be an unjust windfall for the landlord.[33] In practice, the lease is unlikely to be lost if there is an

[27] CMA, "Response of the Competition and Markets Authority", 19, 36, 58.
[28] DLUHC, "Consultation Impact Assessment – Modern Leasehold: Restricting Ground Rent for Existing Leases" (6 December 2023), 4, available at https://assets.publishing.service.gov.uk/media/65708041739135000db03bff/Consultation_Impact_Assessment_-_Modern_Leasehold_Restricting_Ground_Rents_for_existing_leases.pdf (last accessed 4 January 2025).
[29] DLUHC, "Modern Leasehold", [1.58].
[30] CMA, "Response of the Competition and Markets Authority", [13], [43].
[31] Ibid., at [42].
[32] *Richardson v Midland Heart Ltd.* [2008] L. & T.R. 31, at [12]–[13] (Jonathan Gaunt Q.C.).
[33] As in ibid.; see S. Bright, N. Hopkins and N. Macklam, "Owning Part but Losing All: Using Human Rights to Protect Home Ownership" in N. Hopkins (ed.), *Modern Studies in Property Law*, vol. 7 (Oxford and Portland 2013).

outstanding mortgage as the lender will step in, but the "Housing Act trap" is anecdotally known to cause problems. Legislation is now proposed that will remove this trap by excluding leases of seven years or more from the assured tenancy system.[34]

As well as noting concerns about the financial impact of escalating ground rents the CMA found that many clauses were "obscure and hard to understand". In addition, there were "very serious allegations of mis-selling", which included a failure to disclose escalating ground rent provisions to purchasers and a failure to explain the Housing Act trap. This mix of procedural and substantive concerns is important in relation to the legislation concerned with unfair terms, discussed next.

III. Ground Rent Clauses as Unfair Terms

Section 62 of the CRA 2015 applies to leases entered into on or after 1 October 2015 between a "trader" (which would include landlords running a business) and a consumer.[35] Subsection (1) states: "An unfair term of a consumer contract is not binding on the consumer."[36] Similar provisions, the Unfair Terms in Consumer Contracts Regulations 1999, apply to leases entered between 1 October 1999 and 1 October 2015.[37]

Although there is no doubt that Part 2 of the CRA 2015 applies to long leases,[38] the wording is ill suited to them. It is crucial to remember that its origin is in a European Directive, the Council Directive 93/13/EEC on unfair terms in consumer contracts (UTD), which is intended to offer a high level of consumer protection.[39] This means that the application of the 2015 Act (and earlier Regulations) must therefore be guided by European law, even post-Brexit: case law before the end of 2020 remains binding, and the UK courts may have regard to later cases where relevant.[40]

A. Are Ground Rent Terms Excluded from Assessment for Fairness?

Under section 64 some contract terms are excluded from the section 62 assessment for fairness. This will be the case if the term meets two

[34] Renters' Rights Bill [HC] 127 (2024–25), [127].

[35] Defined in section 2 of the Consumer Rights Act 2015 as an individual acting for purposes that are wholly or mainly outside the individual's trade, business, craft or profession. Some leaseholders buying as investors may not be consumers.

[36] Note that if for some reason a consumer leaseholder needs to rely on a rent clause that is unfair, section 62(3) of the Consumer Rights Act 2015 provides that they may do so.

[37] Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083. For leases entered into between 1 July 1995 and 1 October 1999 the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, apply. Notwithstanding the lack of clarity in the 1994 Regulations, it is argued that they also apply to leases: S. Bright and C. Bright, "Unfair Terms in Land Contracts: Copy Out or Cop Out?" (1995) 111 L.Q.R. 655.

[38] E.g. *Roundlistic Ltd. v Jones and another* [2018] EWCA Civ 2284, [2019] 1 W.L.R. 4461 (the 1999 Regulations applied to a 125 year residential lease).

[39] Judgment of 30 April 2014, *Kásler v OTP Jelzálogbank Zrt.*, C-26/13, EU:C:2014:282.

[40] Subject to the ability of the Supreme Court and the Court of Appeal (and certain other listed appellate) courts to depart from it: see European Union (Withdrawal) Act 2018, s. 6; H.G. Beale (ed.), *Chitty on Contracts*, 35th ed., vol. 2 (London 2023), [41-004], [41-411].

conditions. Condition 1 is that the term either (a) "specifies the main subject matter of the contract" or (b) involves "the assessment … of the appropriateness of the price payable under the contract by comparison with the … services supplied under it".[41] As a term relating to price may come within either (a) or (b), both need to be considered in the context of ground rent clauses. Condition 2 is that the term is excluded only if it is "transparent and prominent". Unless both conditions are met the term must be assessed for fairness.

European case law makes clear that, in relation to Condition 1, exclusion should be strictly interpreted given the consumer protection goal of the UTD.[42] Further, the European Court of Justice (ECJ) has clearly stated that "exclusion cannot apply to a term relating to a mechanism for amending the prices of the services provided to the consumer".[43] In relation to escalating ground rent clauses there is, therefore, no doubt that they should be assessed for fairness. Squaring this with the wording in Condition 1(a) and (b) is, however, not entirely straightforward.

1. Condition 1(a) – the term specifies the main subject matter of the contract

The test is whether the term lays down "the essential obligations of the contract and, as such, characterise it".[44] As it is for the national court to determine whether a term does this, there is little guidance as to how it would be applied in particular contexts. There are several European cases involving credit agreements, but nothing closely analogous to the English long lease. When lobbying against reform, landlords have pointed to the importance of ground rents to their investment models and how this impacts the leasehold market, but economic significance is not relevant to whether it defines the main subject matter.[45] Absent authority we are left with the open question: what are the essential obligations of a contract for the sale of a residential lease? The answer suggested is that it involves the grant of a leasehold estate in return for a premium.[46] Ground rent does not characterise the contract. This is consistent with the view taken by the Office of Fair Trading (OFT) in its investigation of event fees.[47] The numerous other obligations in leases undertaken by

[41] (b) also includes "digital content" and "goods". Neither is applicable to leases as "goods" are defined as "tangible moveable items".

[42] *Kásler v OTP Jelzálogbank*, C-26/13.

[43] Judgment of 26 April 2012, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt.*, C-472/10, EU:C:2012:242, at [23].

[44] *Kásler v OTP Jelzálogbank*, C-26/13, at [49]–[50].

[45] Judgment of 26 February 2015, *Matei v SC Volksbank România S.A.*, C-143/13, EU:C:2015:127, at [68].

[46] Even this is too technical. Most would see it as the sale of a flat for a premium.

[47] "In our view the main subject matter of the contract is the provision of a leasehold interest in the land": Office of Fair Trading (OFT), "OFT Investigation into Retirement Home Transfer Fee Terms: A Report on the OFT's Findings" (February 2013), [3.18], available at https://assets.publishing.service.gov.uk/media/

landlords and leaseholders, including the escalating rent provisions, are ancillary.

2. Condition 1(b) – the appropriateness of the price by comparison with the services supplied

Recital 19 in the UTD refers to this as the "quality/price ratio", but it is surprisingly complex to apply. Does "price" refer to *only* the capital sum paid or is it the premium *plus* the initial ground rent (or even the premium plus the initial and escalating ground rents)? In *Office of Fair Trading v Abbey National Plc and others* the Supreme Court approached "price or remuneration" (a case under the 1999 Regulations) globally and held that terms relating to contingently payable sums (bank charges) were within this and therefore excluded from review.[48] This global approach suggests that both the "appropriateness" of the premium *and* the ground rent could be excluded. Unsurprisingly, landlords argue that ground rents are part of the price: "In the absence of a ground rent, the upfront premium sought to be achieved by the developer would be set at a higher level than the upfront premium for an identical property with a ground rent."[49] As the CMA found, however, there is no persuasive evidence to support this.[50]

But even if ground rents are treated as part of the "price", it is still necessary to look at the other wording in 1(b), the idea of comparing the price with a "service". Here European case law has taken a narrower approach than the Supreme Court in *Abbey National*. In particular, it was emphasised in *Kásler v OTP Jelzálogbank Zrt.* that there must be an element of exchange for a particular service (the price for a service), albeit that the nature of the services in exchange may be understood from the contract as a whole.[51] Thus, in *Matei v SC Volksbank România S.A.*, it was noted that if an alteration in interest rates is not "against any consideration that may have been supplied in exchange" this may mean that it can be assessed for fairness; likewise with the risk charge in *Matei* where it was suggested "that the lender does not provide any actual

55828310e5274a1576000001/OFT_investigation_into_retirement_home_transfer_fee_terms.pdf (last accessed 4 January 2025).

[48] *Office of Fair Trading v Abbey National Plc and others* [2009] UKSC 6, [2010] 1 A.C. 696.

[49] HC, Public Bill Committee, Leasehold and Freehold Reform Bill: Written Evidence Submitted by the Residential Freehold Association (RFA) to the Leasehold and Freehold Reform Bill Public Bill Committee (LFRB38), 2023–24, [1.9].

[50] CMA, *Leasehold Housing*, [77]. For an example of the opposite with an RPI lease, see S. O'Kelly, "Persimmon Sold Leasehold Houses for £50,000 More than Same-Size Freehold Houses at Harrow View West", available at https://www.leaseholdknowledge.com/persimmon-sold-leasehold-houses-50000-size-freehold-houses-harrow-view-west/ (last accessed 4 January 2025).

[51] *Kásler v OTP Jelzálogbank*, C-26/13, at [58]; Judgment of 3 October 2019, *Gyula Kiss and CIB Bank Zrt. v Emil Kiss and Gyuláné Kiss*, C-621/17, EU:C:2019:820, at [43].

service which could constitute consideration for that charge".[52] Is there any service in exchange for a ground rent? The Residential Freehold Association claims that ground rent is part of the consideration for the "property".[53] Even if this claim is correct (which is not accepted), the "property" exchanged is a leasehold estate and not a service. Although service is not defined in the CRA 2015, the Court of Appeal has held that, even when the landlord is undertaking to insure, it is "unrealistic to describe the arrangement as 'the supply of services'".[54] Of course, services are provided by the landlord more generally, but these are contracted for in exchange for a *service charge*, not ground rent. The Residential Freehold Association also states that ground rent provides "the benefit of access to a freeholder".[55] This again is not a service, nor is it provided in exchange for the ground rent. The reality is, as is well known, that nothing is given in return and there is no element of exchange as required by *Kásler*. As the CMA reported, "ground rent is simply an income stream"[56] or, as per the government consultation, "something for nothing".[57] Therefore, escalating rent clauses are not excluded from review.

There are further arguments that show that escalating clauses are not excluded. Justification for excluding the "adequacy" (UTD) or "appropriateness" (CRA) of the price is that there is no objective legal scale or criterion that can provide a framework for and guide a review of that balance.[58] Whether the amount of the price itself is adequate cannot therefore be tested for fairness and is a matter for party autonomy, but price variation clauses are different. Numerous European cases indicate that terms *relating to* the consideration owed or *affecting* the actual price payable can be reviewed.[59] The fact that the law is so clear on this also strengthens the argument that escalating clauses should not be seen as the "main subject matter of the contract" under Condition 1(a).

3. Transparency and prominence

The argument above means that escalating ground rents terms should be assessed for fairness as they do not meet Condition 1(a) or (b). Many are

[52] *Matei v SC Volksbank România*, C-143/13, at [63], [70]. It was for the referring court to see if this was the case.
[53] HC, Public Bill Committee, Leasehold and Freehold Reform Bill, [1.8].
[54] *Havenridge Ltd. v Boston Dyers Ltd.* [1994] 2 E.G.L.R. 73 (C.A.); M. Loveday (ed.), *Service Charges and Management*, 5th ed. (London 2022), [12.32], says that it is unlikely that "in the ordinary course the Supply of Goods and Services Act 1982 applies to a lease" (admittedly different legislation but hinging on whether a lease is a supply of services).
[55] HC, Public Bill Committee, Leasehold and Freehold Reform Bill, [1.9]–[10].
[56] CMA, *Leasehold Housing*, [76].
[57] DLUHC, "Modern Leasehold", [1.58].
[58] *Kásler v OTP Jelzálogbank*, C-26/13, at [55].
[59] See especially *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési*, C-472/10, at [23]; see also *Matei v SC Volksbank România*, C-143/13, at [56]; Judgment of 16 July 2020, *CY and Others v Caixabank S.A. and Banco Bilbao Vizcaya Argentaria S.A.*, C-224/19 and C-259/19, EU:C:2020:578, at [65].

unlikely to meet Condition 2 either: the term will be excluded only if it is transparent and prominent.

Transparency requires the term to be written in plain and intelligible language (section 64(3) of the CRA 2015). Although some escalating clauses are in plain and intelligible language,[60] many will fail these formal transparency requirements as they are grammatically complex. The CMA says that "lease provisions imposing ground rent and providing for its escalation can be obscure and hard to understand".[61] Further, transparency is not only about "formal transparency", that is whether terms are "formally and grammatically intelligible", but "substantive transparency" is also required.[62] For a term to be transparent the "average consumer, who is reasonably well informed and reasonably observant and circumspect, would … be able to assess the potentially significant economic consequences for him".[63] Further, it is the seller who has the burden of proving that the information supplied to the consumer enables them to "evaluate the risk of potentially significant adverse economic consequences of contractual terms on his or her financial obligations".[64] But the CMA found widespread evidence of mis-selling of leasehold homes, giving examples of purchasers not being told that rents would increase.[65]

For the term to be "prominent", it must be "brought to the consumer's attention in such a way that the average consumer would be aware of the term". Interestingly, since 19 June 2006 the Land Registration Rules 2003 have required leases to contain a standard set of clauses that must appear at the front of leases but, although premium is stated there, the rent is not. The escalating clauses are usually hidden several pages into leases; and often even the initial ground rent is not easy to find.

It may be that many escalating clauses do not meet the requirement to be transparent and prominent, but some will. However, given the earlier argument that Condition 1 is not met, they are in any event subject to an assessment for fairness. The next Subsection (B) explains how fairness is assessed in relation to ground rent clauses.

[60] The author has seen a doubling lease that clearly set out what the new rent would be on each review, albeit it was several pages into the lease and not "prominent".

[61] CMA, *Leasehold Housing*, [4]. The author has seen RPI leases that are difficult to understand.

[62] *Kásler v OTP Jelzálogbank*, C-26/13, at [71]. The phrases "formal" and "substantive transparency" are used in Judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, at [49].

[63] *Kásler v OTP Jelzálogbank*, C-26/13, at [74].

[64] Judgment of 10 June 2021, *VB and Others v BNP Paribas Personal Finance S.A.*, C-776/19 to C-782/19, EU:C:2021:470, at [79]–[89]. N.B. this decision is after the date for which Court of Justice decisions are binding on UK courts.

[65] CMA, *Leasehold Housing*, [44].

B. Are Ground Rent Clauses Fair?

Consumer protection in the UTD is based around the concepts of "good faith, balance and transparency".[66] According to section 62(4): "A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer." This incorporates both procedural and substantive concerns,[67] recognising that the "system of protection introduced by [the Directive] is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge".[68]

The procedural dimension supports consumer protection as it pays attention to whether the trader has dealt fairly and equitably with the consumer, taking account of their legitimate interests.[69] Further, the concept of transparency – both formal and substantive – is built into the fairness test (as well as being considered at the earlier stage of determining whether a term is excluded from review).[70] As Sergio Cámara Lapuente explains, the transparency requirement has become a "rule that demands (positive) duties of active information".[71] An emphasis is placed on how the trader behaved towards the consumer at the pre-contractual stage given that on the "basis of that information … the consumer decides whether he or she wishes to be bound by the terms"[72] and the trader should not take advantage of the consumer's weak bargaining position.[73] The question must be asked whether the seller "could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations".[74] As noted earlier, substantive transparency means that particular attention is paid to whether the consumer comprehends the economic impact of the term; it

[66] *Kiss v Kiss*, C-621/17, at [48].
[67] *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, [2002] 1 A.C. 481, at [17] (Lord Bingham).
[68] Judgment of 12 June 2012, *Banco Español de Crédito S.A. v Joaquín Calderón Camino*, C-618/10, EU:C:2012:349, at [39].
[69] Judgment of 13 October 2022, *FV v Nova Kreditna Banka Maribor*, C-405/21, EU:C:2022:793, at [24].
[70] *Kiss v Kiss*, C-621/17, at [49]; *VB v BNP Paribas Personal Finance*, C-776/19 to C-782/19, at [94]. For discussion of whether transparency is inherent in good faith, and whether its incorporation into the unfairness test involves overreaching by the ECJ, see S. Cámara Lapuente, "Control of Price Related Terms in Standard Form Contracts in the European Union: The Innovative Role of the CJEU's Case-Law" in Y.M. Atamer and P. Pichonnaz (eds.), *Control of Price Related Terms in Standard Form Contracts* (Cham 2020), 67, 92–94; M. Jull Sørensen, "The Unfairness Test: From Sleeping Beauty to Little Mermaid" (2024) 32 European Review of Private Law 387, 403–06.
[71] Cámara Lapuente, "Control of Price Related Terms", 67, 78.
[72] Judgment of 20 April 2023, *Ocidental – Companhia Portuguesa de Seguros de Vida S.A. v LP*, C-263/22, EU:C:2023:311, at [27].
[73] *Director General of Fair Trading v First National Bank* [2001] UKHL 52, at [17] (Lord Bingham).
[74] Judgment of 14 March 2013, *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, C-415/11, EU:C:2013:164, at [69].

is unlikely that the average leaseholder (and this author) will understand the economic significance of many escalating clauses.[75]

There has clearly been a widespread failure on the part of developers in relation to transparency demands, especially given how poorly pre-contractual information has been presented and explained to leaseholders. It is now common knowledge that there was a great deal of mis-selling and the CMA received evidence of developers failing to explain the existence and operation of ground rents to purchasers. The sales pitch is pivotal when it comes to consumer choice and decision-making; in other contexts, the courts have taken account of pre-commitment telesales pitches in the assessment of fairness.[76] Purchasers therefore need to be informed about ground rents, and their economic impact, at the outset of the process: it is too late for purchasers to discover them once they are emotionally committed to the purchase and may well have started incurring expenses. In her evidence to the Leasehold and Freehold Reform Bill Committee, one of the founders of the NLC explained that she had not even been told that the house she was buying was leasehold until late into her commitment journey.[77] Further, a survey by the NLC carried out in 2019 revealed that leaseholders had experienced poor conveyancing services.[78] Empirical research into the sale and use of leasehold in Wales by Helen Carr and others reinforces the findings of the CMA in relation to misleading sales practices and paints a picture of a dysfunctional market "within which consumer confidence has been utterly undermined", noting that this complicates the use of "traditional consumer mechanisms such as information requirements or unfair terms regulation".[79]

Nor will a term be treated as fair simply because the leaseholder has been advised by their own solicitor.[80] In *Evans v Cherry Tree Finance Ltd.* a mortgage term was held to be unfair even though the consumer had been advised by a solicitor.[81] Questions have also been raised about the independence of some conveyancers acting for purchasers given their close relationships with developers.[82]

[75] See e.g. the clause in *Arrassey Properties Ltd. v Nelsons Solicitors*, unreported, Central London County Court, 15 July 2022 (copy supplied to author) – a difficult read but nonetheless better written than many.
[76] *Financial Services Authority v Asset L.I. Inc. and others* [2013] EWHC 178 (Ch), [2013] 2 B.C.L.C. 480, at [134]–[137] (Andrew Smith J.). On appeal the Court of Appeal considered that the question of the unfairness of the terms was unnecessary for the issues before it, but it would have agreed with the court below: [2014] EWCA Civ 435, [2015] 1 All E.R. 1, at [96]–[99] (Gloster L.J.).
[77] Leasehold and Freehold Reform Bill, HC Deb. vol. 743 col. 18 (16 January 2024).
[78] Referred to in H. Carr, C. Hunter, C. Makin and G. Owen, "Can a Consumerist Model of Law Reform Solve the Problems of Leasehold Tenure?" in N. Mrockova, A. Nair and L. Rostill (eds.), *Modern Studies in Property Law*, vol. 12 (Oxford 2023), ch. 9, 182.
[79] Ibid., at 196.
[80] *Harrison and others v Shepherd Homes Ltd. and others* [2011] EWHC 1811 (TCC), at [77] (Ramsey J.).
[81] *Evans v Cherry Tree Finance Ltd.* [2007] EWHC 3523 (Ch), [2007] C.T.L.C. 220.
[82] Law Commission, *Reinvigorating Commonhold: The Alternative to Leasehold Ownership* (Law Com. No. 394, 2020), 11; CMA, "Response of the Competition and Markets Authority", 19.

As transparency is highly relevant, the lack of transparency is a strong indication of unfairness,[83] but it is only one of the elements.[84] The other core component is a "significant imbalance". This will be found if the term tilts an obligation significantly in favour of the supplier by imposing a disadvantageous burden on the consumer.[85] Where the term relates to a payment the substantive component is concerned with proportionality between the price and the service. So, there may be a significant imbalance if a fee does not correspond to services provided and costs incurred,[86] or the payment is disproportionate.[87] The fact that ground rents are "something for nothing" must therefore mean that the term causes significant imbalance. Further, although the case law interweaves transparency and significant imbalance, there is some support for saying that significant imbalance alone may be sufficient to find a term unfair. Thus, in *Sebestyén v Zsolt Csaba Kővári and Others*, the ECJ said that: "even assuming that the general information the consumer receives before concluding a contract satisfies the requirement under Article 5 that it be plain and intelligible, that fact alone cannot rule out the unfairness of a clause such as that at issue in the main proceedings."[88]

There have been particular concerns about price variation clauses and several European cases state that to be fair the term must set out the reason for, and the method of, the variation, as well as giving the consumer a right to terminate the contract.[89] They are not, however, analogous to escalating rent clauses. For one thing, it is hard to envisage other contracts with anything approaching the same duration. Even in mortgage cases the duration will be much less; as, for example, in *Matei* where there were loan agreements of five and 25 years. Additionally, the alterations provisions operate differently. For example, in the leading case of *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt.* the term provided that a phone network operator could charge additional fees for subscribers who pay by money order, without specifying how they would be calculated. In contrast, escalating rent clauses *do* explain how the reviewed rents are calculated (albeit without an explanation of *why* the rent is being reviewed and the method is seldom in clear language).

[83] A. Wiewiórowska-Domagalska, "Lost in Information: The Transparency Dogma of the Unfair Contract Terms Directive" (2024) 32 European Review of Private Law 423, 450.
[84] Judgment of 12 January 2023, *D.V. v M.A.*, C-395/21, EU:C:2023:14, at [47]; *Kiss v Kiss*, C-621/17, at [49].
[85] *Director General of Fair Trading v First National Bank* [2001] UKHL 52, at [17] (Lord Bingham).
[86] *CY v Caixabank*, C-224/19 and C-259/19, at [79].
[87] Judgment of 3 September 2020, *Profi Credit Polska S.A. and Others v QJ and Others*, C-84/19, EU:C:2020:631, at [95]; see also Judgment of 10 June 2021, *BNP Paribas Personal Finance S.A. v VE*, C-609/19, EU:C:2021:469, at [69].
[88] *Sebestyén v Zsolt Csaba Kővári and Others*, C-342/13, EU:C:2014:1857, at [34] (re: a clause referring disputes under the contract to an arbitration tribunal).
[89] E.g. *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési*, C-472/10, at [24].

But this may not be sufficient to satisfy the concerns in the *Invitel* line of cases. Both the CRA 2015 and the UTD contain an annex with a list of terms that *may* be regarded as unfair. Although the annex lists as potentially unfair a term that permits a trader to increase the price without giving the consumer the right to cancel if the final price is too high, this does not apply to a "price-indexation clause … if the method by which the prices vary is explicitly described".[90] Of course, doubling rent clauses are not indexed, but (provided there is formal transparency) the method is clear. With RPI linked clauses, the requirement for an "explicit description" of how indexation works is demanding. In *Gómez del Moral Guasch v Bankia S.A.*, it was said that the need for transparency requires that the average consumer can understand the methods used in indexing, including that the information that goes into the calculation and the provision of data relating to past fluctuations.[91] The CMA update report expresses concern about RPI clauses: homeowners may well not understand how an RPI increase is calculated (a problem that may be compounded by the drafting), quantum is uncertain and it is unclear why RPI is a suitable index as ground rents do not have "much if anything to do with the value of property or land".[92]

It is also evident that many (perhaps most) conveyancers did not themselves understand the economic significance of escalating clauses until they received recent attention. In *Arrassey Properties Ltd. v Nelsons Solicitors*, a negligence claim was brought against solicitors acting for a leasehold purchase in 2006.[93] The relevant provisions provided for 10-year reviews to the greater of either a 150 per cent increase or RPI linked increase. The Law Society's Conveyancing Handbook at that time simply said: "In long residential leases, fixed increment reviews every 25 to 30 years are more usual" and there was no requirement to explain the exponential effect of the clauses or advice on the risks over time.[94] The solicitor said that he did not consider the provision to be unusual and was held not to be negligent because (then) a "reasonably prudent solicitor" was not required to do more. One also suspects the solicitor had little comprehension of the economic impact of the clause.

[90] See Consumer Rights Act 2015, sched. 2, paras. 15, 25.

[91] Judgment of 3 March 2020, *Gómez del Moral Guasch v Bankia S.A.*, C-125/18, EU:C:2020:138, at [51]–[56]. See also CMA, "Unfair Contract Terms Guidance: Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015" (31 July 2015), [5.23.3]–[5.23.7], available at https://assets.publishing.service.gov.uk/media/5a7f8b58ed915d74e33f716e/Unfair_Terms_Main_Guidance.pdf (last accessed 4 January 2025).

[92] CMA, *Leasehold Housing*, 27, fn. 23.

[93] Central London County Court, 15 July 2022 (copy supplied to author).

[94] Ibid., at [74]–[75]; see also *Frampton v MLP Law Ltd.*, unreported, Liverpool County Court, 2024 (undated copy sent to author): a high street conveyancer acting in 2017 was not negligent in failing to point out the Housing Act trap as she had relied on the "conveyancing bible" (the Law Society's Conveyancing Handbook) and this did not mention the problem.

The practices adopted by developers selling modern leases will often fail the transparency requirements; in itself this raises a strong indication of unfairness. But the fact that nothing is given in return for the ground rent means that it is disproportionate, causing a significant imbalance. Together this means that escalating rent clauses are likely to be unfair and not binding on consumers.

The application of the CRA 2015 to leases does, however, require consideration of two further issues: the assignment issue and the temporal dimension, which are discussed next.

C. Particular Challenges with Leases: Assignment and Length

Modern long leases are granted for decades or centuries which means that there will be multiple sales during the term. To ensure that consumer protection is effective, it has been held that there is no limitation period that applies to challenging the fairness of a contractual term.[95] However, both the assignment issue and the temporal dimension give rise to difficult legal issues when applying the CRA 2015. In outline, the challenges are:

(1) Although there is a contract between the original parties, there is no contractual relationship between an assignee and the other party to the lease. Does the CRA 2015 therefore cease to apply?
(2) Under section 62(5) whether a term is fair is to be determined by "reference to all the circumstances existing when the term was agreed". Given the effluxion of time this may be difficult to recall or evidence, even for the original parties to the lease. When the lease has been assigned, it is unlikely that the successor leaseholder will have information about the earlier bargaining process (which goes to good faith and transparency). What does this mean for leaseholder protection?

For ease these questions are discussed under separate headings, but the issues are interlinked.

1. The assignment issue

In its investigation of event fees the Law Commission recognised the difficulties, remarking that the lease ceases to be a contract on assignment. This lies behind the plan for the *Thirteenth Programme of Law Reform* to consider: "whether, each time a lease is assigned, this should be seen as creating a new contract between the landlord and

[95] Judgment of 10 June 2021, *VB and others v BNP Paribas Personal Finance S.A.; AV and others v BNP Paribas Personal Finance S.A. and another*, C-776/19 to C-782/19, EU:C:2021:470, at [33].

leaseholder for the purposes of unfair terms law."[96] Pending this, which would require legislative action, their tentative argument was that a European understanding of contract should be adopted and "under European principles, a lease would be regarded as constituting a contractual relationship between the landlord and any subsequent tenants" as the assignee may "step into the contractual relationship".[97] But even without this approach, it can be argued that the CRA 2015 continues to be relevant post-assignment. Prior to the Law Commission's work, the OFT had itself investigated retirement home transfer fees and accepted (without detailed explanation) that the consumer protection legislation applies post-assignment where the assignee is a consumer.[98]

It is strange to say, as the Law Commission does, that the contract ceases to exist. Admittedly the status post-assignment is peculiar but there is nothing to suggest that the original contract does not continue between the original parties. Indeed, the major reform to privity in the Landlord and Tenant (Covenants) Act 1995 was only necessary because the original lease parties continued to be contractually liable post-assignment. Hence the 1995 Act introduced changes that on assignment release the original tenant from liability on the covenants and provide a route for the original landlord to be released.[99] Further, I argue that it is this legislation that explains why the CRA 2015 continues to have teeth post-assignment. Although the successor leaseholder is not a contracting party, section 3(1) of the 1995 Act provides that the assignee is bound by the leasehold covenants. However, by section 3(2) this does not apply to tenant covenants that "immediately before the assignment ... did not bind the assignor". Conveniently, this mirrors the wording in section 62 which provides that an unfair term is not "binding" on a consumer. This means that, if the original leaseholder was not bound by an unfair ground rent term, nor will the assignee be, and this does not depend on the status of the assignee.

Case law, commentary and regulatory action all add support to the CRA 2015 applying post-assignment. In *Roundlistic Ltd. v Jones and another* the Court of Appeal assessed a leasehold term for fairness under the 1999 Regulations even though the lease had been assigned.[100] Admittedly, the authority of this case may be weakened because there does not appear to have been any discussion of the assignment issue. The leading contract text, *Chitty on Contracts*, also argues that an assignee leaseholder is protected by section 62 if the original leaseholder was.[101] In support of

[96] Law Commission, *Thirteenth Programme*, [2.46]–[2.47].
[97] Law Commission, "Residential Leases", [6.91], [6.86].
[98] OFT, "OFT Investigation into Retirement Home Transfer Fee Terms", [3.3]. Restricting this to a consumer-assignee differs from my argument below.
[99] Landlord and Tenant (Covenants) Act 1995, ss. 5–8.
[100] *Roundlistic v Jones* [2018] EWCA Civ 2284.
[101] Beale (ed.), *Chitty on Contracts*, [41-444].

the argument from principle, *Chitty on Contracts* also relies on *Ryanair DAC v Delay Fix* which illustrates that, if a clause in a contract between a (consumer) passenger and an airline is unfair, the airline cannot enforce it against a collection agency which is the successor to the consumer's rights and obligations.[102]

The undertakings secured by the CMA not to enforce clauses doubling more frequently than every 20 years benefit assignees as well as original leaseholders, irrespective of whether the original leaseholder was a consumer (unlike the argument above based on the 1995 Act). At least one freeholder has, however, limited its undertaking to repay escalated rents to leaseholders who are not subletting or who own fewer than three residential properties for letting (referred to as Category One Leaseholders).[103] This narrowing of the scope of the undertaking presumably reflects negotiations between that landlord and the CMA that sought to distinguish between consumer and non-consumer leaseholders. And, akin to my 1995 Act argument above, the distinction flows through to successor leaseholders: they benefit only if they took the assignment from a Category One Leaseholder.

These various arguments all point to an assignee from an original consumer leaseholder being protected by the CRA 2015. With the exception of the Law Commission's argument about the adoption of the Euro-model of contracting, however, it would seem that an assignee consumer does not benefit if the original leaseholder was not a consumer but, for example, an investor. If correct, this appears to be a serious lacuna in the consumer protection.

2. The temporal dimension

The fairness test requires consideration of the circumstances at the time the term was agreed (section 62(5)), but the longevity of leases means that this may be difficult in practice. The evidential problems that may arise when terms are challenged many years after the contract was entered, and particularly post-assignment, do not appear to have been addressed in case law.[104] At face value, section 62(5) may therefore be problematic if there are no records of what happened when the lease was granted.

[102] *Ryanair DAC v DelayFix*, C-519/19, EU:C:2020:933, at [63].

[103] CMA, "Brigante Properties" (24 August 2022), [10], [13], available at https://assets.publishing.service.gov.uk/media/6304e798e90e0729e2c52145/Brigante_TW_Undertakings_24.8.22.pdf (last accessed 4 January 2025), announced on the CMA website on 22 August 2022, applicable to reversions they acquired from Taylor Wimpey. A separate undertaking by Brigante Properties in relation to leases acquired from Countryside Properties Plc does not contain the Category One reference.

[104] N.B. the Law Commission's concerns about section 62(5) were different: they considered it prevented the circumstances at the time of *assignment* being considered: Law Commission, *Thirteenth Programme*, [2.46]–[2.47]. As argued above, this is not the issue: the assignee inherits protection from the original leaseholder.

However, it is argued here that to adopt a strict approach would be inconsistent with the high level of consumer protection or the principle of *effet utile* (effectiveness) used by the ECJ to give effective protection to individual rights in the interpretation of directives.[105] The purpose of requiring consideration of circumstances at the time of agreement is, presumably, to discover whether the consumer has been dealt with fairly and equitably, and in particular whether the seller can prove that "its pre-contractual and contractual obligations, relating in particular to the requirement of transparency" have been fulfilled.[106] If there are no records this may disadvantage the seller, but the overall aim is to promote consumer protection. Even if the reversion has been assigned, this again should make no difference: the status of the rent clauses as binding/non-binding is set at the time of contracting.

In the absence of specific information, it is suggested that regard should be had to the standardised practices that were used for the sale of modern long leases. This is what happens in collective actions where the ECJ has regard, in relation to the types of contract concerned in the collective action, to standard contractual and pre-contractual practices, drafting, the position of terms within a contract and advertising that was employed.[107] Of course it is now common knowledge that developers had poor practices: the CMA repeatedly received "very serious allegations" of mis-selling "about the conduct of developers and their sales staff in the process leading to the reservation agreement".[108]

D. Summary of *Section III*

Several judgment calls have to be made when applying section 62 to ground rent clauses but there are strong reasons for arguing that they are not excluded from an assessment for fairness. They don't specify the main subject matter, nor is a service given in return. Many will also not be transparent or prominent. This means that escalating clauses should be assessed for fairness. Given the widespread mis-selling of modern long leases, landlords may struggle to prove that there was sufficient pre-contractual information to demonstrate that the leaseholder was dealt with fairly and equitably. There will also be a significant imbalance as

[105] M.E. Mendez-Pinedo, "The Principle of Effectiveness of EU Law: A Difficult Concept in Legal Scholarship" (2021) 11 Juridical Tribune 5; S. Mayr, "Putting a Leash on the Court of Justice? Preconceptions in National Methodology v *Effet Utile* as a Meta-Rule" (2012) 5 European Journal of Legal Studies 3.

[106] *VB v BNP Paribas Personal Finance*, C-776/19 to C-782/19, at [86].

[107] Judgment of 4 July 2024, *Caixabank S.A. and Others v Asociación de Usuarios de Bancos, Cajas de Ahorro y Seguros de España (Adicae) and Others*, C-450/22, EU:C:2024:577, at [39]–[41]. The court notes that the requirement in Article 4 of the UTD to consider the circumstances at the conclusion of the contract is "without prejudice" to Article 7, which requires that Member States provide for collective actions, and therefore "by its very nature" the examination of transparency must relate to standardised practices of sellers.

[108] CMA, *Leasehold Housing*, [44].

there is no proportionality between a price and a service: ground rents, as "something for nothing", are disproportionate. Escalating clauses, particularly RPI clauses, may also fail to meet the concerns of substantive transparency as the average leaseholder will not understand the economic impact. Some residential leases will be outside the scope of the CRA 2015 if the original leaseholder was not a consumer, and temporal distance from the date of contracting may also add complications, but for the majority the requirement to pay an escalating rent will not be enforceable.

Although not the focus of this article, the argument may extend even to initial ground rents. Analysis of the CRA 2015 points towards all non-nominal ground rent clauses being potentially unfair. It may be that the transparency test will draw some lines between initial and escalating rents: the wording will be more straightforward to comprehend and sales agents may be more likely to mention an initial ground rent than the escalating provisions, but this is speculative and anecdotal evidence suggests that this was often not the case. The significant imbalance does, however, appear problematic for both: the absence of any service in return for the payment applies equally to escalating and initial rents.

Apart from section 62, there is an alternative argument that may strike down rent clauses. This is discussed next.

IV. Derogation from Grant, and Repugnancy

The Housing Act trap (discussed above) provides alternative grounds for claiming that ground rent provisions are unenforceable if the rent is above the low-rent threshold, either initially or through the implementation of escalating rent clauses. The arguments are based on the separate, but closely related, concepts of derogation from grant (DFG),[109] and repugnancy. The kernel of the argument in both cases draws on the idea that, as the landlord has sold a fixed long-term lease which can only be ended by mutual consent or in accordance with the lease (forfeiture), it is inconsistent to include provisions that convert the long lease into an assured tenancy where the statutory grounds of possession can be used rather than forfeiture.[110]

The covenant not to derogate from grant is based on the "bedrock of basic fair dealing"[111] or "rule of common honesty"[112] that "a grantor having given

[109] I'm grateful to Rawdon Crozier for drawing this argument to my attention: R. Crozier, "Notes on a Scandal: Freeholders & Medieval Robber Barons" (2019) 169 New Law Journal 13; R. Crozier, "Notes on a Scandal: Freeholders & Medieval Robber Barons (Pt 2)" (2019) 169 New Law Journal 11.
[110] *Richardson v Midland Heart* [2008] L. & T.R. 31.
[111] *Chartered Trust Plc v Davies* [1997] 2 E.G.L.R. 83, 85 (C.A.) (Henry L.J.).
[112] *Harmer v Jumbil (Nigeria) Tin Areas Ltd.* [1921] 1 Ch. 200, 225 (C.A.) (Younger L.J.).

a thing with one hand is not to take away the means of enjoying it with the other".[113]

Repugnancy is based on a principle of construction by which courts may strike down contractual terms where one term "contradict[s] another term or [is] in conflict with it, such that effect cannot fairly be given to both clauses" or they "cannot sensibly be read together".[114] This principle also applies where words and clauses "are inconsistent with what one assumes to be the main purpose of the contract".[115]

The first step with both is to ask what the "main purpose" of the contract is (repugnancy)[116] or the "irreducible minimum implicit in the grant" (DFG).[117] It will be clear that a long lease is intended; this is the main purpose and core of the contract.

An initial rent that invokes the Housing Act trap is likely to lead to repugnancy as the rent provisions are inconsistent with "the interest created by the contract",[118] a long lease. The doctrine of DFG appears, however, only to address situations in which there is a post-grant act or omission.[119] Whether a rent review that triggers the Housing Act trap would involve derogation is unclear. The puzzle turns on whether the grant is the entire bundle of rights and obligations in the lease, in which case there is no derogation as the landlord's exercise of the review clause is in accordance with the terms of the lease,[120] or whether the grant is the "minimum irreducible core" (possession for the long fixed term, as against the whole bundle of rights) so that a rent increase converting the long lease into an assured tenancy would be a derogation. Again, the idea of repugnancy may be a better fit as the operation of the review clause is inconsistent with the main purpose of the contract.

The Housing Act trap is likely to be removed when the Renters' Rights Bill receives Royal Assent.[121] But if repugnancy and DFG turn on the

[113] *Birmingham, Dudley and District Banking Co. v Ross* (1888) 38 Ch. D. 295, 313 (C.A.) (Bowen L.J.). Or "[t]o put it in more normal language … a landlord cannot take away with one hand that which he has given with the other": *Platt and others v London Underground Ltd.* [2001] 2 E.G.L.R. 121, at [1] (Neuberger J.).

[114] *Pagnan SpA v Tradax Ocean Transportation S.A.* [1987] 3 All E.R. 565, 575 (Bingham L.J.), 578 (Dillon L.J.)

[115] *Glynn and Others v Margetson & Co. and Others* [1893] A.C. 351, 357 (H.L.) (Lord Halsbury L.C.). For application in a leasehold context, see cases involving fetters on termination with periodic tenancies: *Doe on the demise of Warner v Browne* (1807) 103 E.R. 305 (K.B.); *Cheshire Lines Committee v Lewis & Co.* (1880) 45 J.P. 404 (C.A.); *Breams Property Investment Co. Ltd. v Stroulger and Others* [1948] 2 K.B. 1 (C.A.); *Centaploy Ltd. v Matlodge Ltd. and Another* [1974] Ch 1.

[116] *Glynn v Margetson* [1893] A.C. 351 (H.L.).

[117] *Petra Investments Ltd. v Jeffrey Rogers Plc* (2001) 81 P. & C.R. 21, at [44] (Hart J.).

[118] K. Lewison, *The Interpretation of Contracts*, 8th ed. (London 2024), [9.87].

[119] E.g. *Harmer v Jumbil* [1921] 1 Ch. 200 (C.A.) (the landlord breached the covenant by letting neighbouring land that would prevent the tenant using land for the intended purpose); *Chartered Trust v Davies* [1997] 2 E.G.L.R. 83, 88 (C.A.) (Henry L.J.) (there comes a point "where the landlord becomes legally obliged to take action to protect that which he has granted to his tenant").

[120] *Earl of Plymouth and others v Rees and another* [2020] EWCA Civ 816, [2020] 4 W.L.R. 105, at [21] (Lewison L.J.).

[121] Renters' Rights Bill (2024–25), [127].

situation at the outset of the contract, it is hard to see that legislative reform changes this argument.

V. Further Practical Implications

A. Refund of Escalated Rent Payments

The foregoing argument has significant implications where leaseholders have made payments under escalating clauses which are unfair. European case law is clear that where a term is found to be unfair it "must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer".[122] It follows from this that, subject to limitation periods, the consumer should be refunded:

> [a finding of unfairness] must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he would have been in if that term had not existed. It follows that the obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutory [*sic*] effect in respect of those same amounts.[123]

The question is whether this outcome can be achieved applying the current English law in relation to unjust enrichment.

Although the correct approach to cases of payment not due is contested in the literature, it is clear that as matter of principle leaseholders who have paid ground rent under a term held to be unfair should be able to recover. The first argument a consumer could rely on to obtain restitution is that the payment was mistaken. The second approach relies on the absence of basis for the payment or lack of entitlement for the payment. An alternative ground would be to realise the policy behind the CRA 2015.

Under the first approach, the consumer would argue that the rent payment was made in the mistaken belief that it was contractually due under the lease. As statute says the contractual term explaining the payment is not binding, the consumer acted on a mistaken belief and the landlord's receipt[124] of the payment is therefore unjust. This approach has previously been applied for payments made under an unfair term.[125] There is a potential complication which is that the consumer may have doubts about the law, perhaps wondering if the clause was unfair. However, slight doubts are not inconsistent with mistake. Lord Hoffmann said that the real question is whether the payer "took the risk that he might be wrong".[126] In any

[122] *Naranjo*, C-154/15, C-307/15 and C-308/15, at [61].
[123] Ibid., at [61]–[62].
[124] There is some debate about whether it is *retention*, rather than receipt, that must be unjust. But this is unimportant in relation to escalating rents.
[125] *Chesterton Global Ltd. v Finney*, unreported, 30 April 2010.
[126] *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners and another* [2006] UKHL 49, [2007] 1 A.C. 558, at [26].

event, given that the only public conversation about these provisions is the indirect references in the CMA work, consumers will not have had grounds to doubt the payability of escalating ground rents. Indeed, the focus on the need for legislative solutions suggests the very opposite.

Under the second approach, the consumer would argue that, because the clause that is unfair is not binding, there is no basis for, or entitlement to, the payment. This civilian approach has sometimes been adopted by English courts, most notably per Hobhouse J. in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,[127] where he held that: "The right to restitution arises from the fact that the payment made by the plaintiff to the defendant was made under a purported contract which, unknown to the plaintiff and the defendant, was ultra vires the defendant and wholly void."[128] Although this approach has not found favour with English courts,[129] a consumer could succeed if such an approach were to be adopted. Following section 62(1), the effect of a finding of unfairness is that the term is not binding on the consumer. As *Gutiérrez Naranjo and Others* says, this means that for the consumer it must be as if the "unfair term had not existed"[130] (as opposed to merely being unenforceable). Payments made by consumers when no obligation to pay ground rent ever existed would thus be recoverable.

An alternative to relying on mistake of law as an unjust factor is to say that restitution here would be based on policy-motivated unjust enrichment. Andrew Burrows gives a list of unjust factors within the umbrella of "policy-motivated restitution" but none capture this particular context.[131] However, as the category of unjust factors is not closed,[132] the argument could be made that the policy of the CRA 2015 would be frustrated if payments made under non-binding consumer terms could not be recovered.[133]

The CMA appear to have proceeded on the basis that restitution should, indeed, follow if the terms are unfair under consumer protection legislation. Some of the undertakings secured include agreements from current landlords to repay leaseholders (and former leaseholders) the difference between the initial ground rent and rents paid to them under a doubling ground rent clause.[134]

[127] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council; Kleinwort Benson Ltd. v Sandwell Borough Council* [1994] 4 All E.R. 890 (Q.B.)
[128] Ibid., at 924.
[129] *Deutsche Morgan Grenfell Group v IRC* [2006] UKHL 49, especially at [21).
[130] *Naranjo*, C-154/15, C-307/15 and C-308/15, at [66].
[131] A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford 2011), 86.
[132] *Dargamo Holdings Ltd. and another v Avonwick Holdings Ltd. and others* [2021] EWCA Civ 1149, [2022] 1 All E.R. (Comm) 1244, at [63] (Carr L.J.).
[133] I am grateful to Professor Swadling for this suggestion.
[134] See e.g. the undertakings given by Aviva: CMA, "Aviva Undertakings", [8], [12]; and by Brigante Property Holdings, where Brigante was not the original landlord: CMA, "Brigante Properties", [10], [13].

As reversionary interests change hands, it may be that rent has been paid not only to the current landlord (for recent payments) but also former landlords. In restitution the claim must be against the person "enriched" by the payment. The CMA appears, however, to take a different point of view. Its response to the government consultation argued that the original developer (presumably as original landlord) should "compensate freeholders … given that developers had created and then sold freeholds with the benefit of unlawful terms".[135] Further it suggested that, if the Government considers that less than 20-year doubling clauses are egregious, it could legislate to require repayment and also that the burden of this "reimbursement could be shared between those who have received the ground rent and those who have profited from the sale of freeholds".[136] What this means is that even if, for example, doubling rents have been paid only to a later landlord, the original developer landlord should bear some financial responsibility for the repayment to leaseholders. This approach of "following the money" into capital receipts from sale is a policy argument that goes beyond what is required under the law of unjust enrichment.

There is a further issue to consider: limitation periods. The reasons for limitation periods are policy based; a defendant should not have the threat of being sued hanging over them forever and claimants should have an incentive to bring claims as soon as possible, but limitation periods must not "restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired".[137] In *Naranjo* it was noted, in the context of holding that restitutionary remedies should be provided where terms are unfair, that it is compatible with EU law to lay down reasonable time limits for bringing legal proceedings.[138]

In English law, claims in unjust enrichment must be brought within six years,[139] but when does the time start to run? The usual position is that this is when the payment is made (the landlord is enriched). Where, however, the claim is based on a mistake, time does not start to run until the mistake is discovered or could with reasonable diligence be discovered,[140] and this has been held to apply to mistakes of law as well as to mistakes of fact.[141] As Lord Hoffmann notes, this "tilt[s] the balance … against the public interest in the security of transactions"[142]

[135] CMA, "Response of the Competition and Markets Authority", [57], [58].
[136] Ibid.
[137] *Stubbings and Others v UK* (1996) 23 E.H.R.R. 213, at [50].
[138] *Naranjo*, C-154/15, C-307/15 and C-308/15, at [69].
[139] Limitation Act 1980, s. 5, as explained in C. Mitchell, P. Mitchell and S. Watterson (eds.), *Goff & Jones on Unjust Enrichment*, 10th ed. (London 2022), [33-07].
[140] Limitation Act 1980, s. 32(1)(c).
[141] *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47, [2022] A.C. 1.
[142] *Kleinwort Benson Ltd. v Lincoln City Council* [1999] 2 A.C. 349, 401 (H.L.).

but in our context it opens the possibility of restitutionary claims many years after the rent payment has been made. The mistake will be "reasonably discoverable" when they could "with reasonable diligence discover [their] mistake in the sense of recognising that a worthwhile claim arises", which is likely to be when they feel ready to take advice and begin the process of making a claim.[143] Identifying whether the discoverability threshold has been passed will, as the minority feared in *Test Claimants*, be evidentially difficult in practice.[144] As consumers are not legal experts, this may well not be until the potential for claim becomes very well known in the public sphere,[145] turning on the state of "inherently vague and intangible" professional opinion over a very long period.[146]

B. Undermining Human Rights Concerns[147]

If escalating rents are not binding on consumers, this weakens the claims of lobbyists using human rights concerns to argue against legislative reform. Unsurprisingly, given the huge economic impact of reform, landlords (particularly institutional landlords with large ground rent portfolios) have claimed that intervention would be incompatible with the right to peaceful enjoyment of possessions in Article 1 of Protocol No. 1 to the European Convention on Human Rights (A1P1).

A1P1 is given effect in the UK through the Human Rights Act 1988 and sets out that natural or legal persons are entitled to the peaceful enjoyment of possessions. As the Supreme Court noted in *Salvesen v Riddell*, "landlords, however unpopular, are as much entitled to the protection of the Convention rights as anyone else".[148]

The application of A1P1 involves several stages.

First, is there a possession? Both the landlord's reversion and an (enforceable) right to future income (rent) are, as objects of economic value,[149] possessions.[150]

Next, has there been an interference with that possession (and if so, how)? If the arguments above about the CRA 2015 are correct, the extent of the

[143] *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47, at [193] (Lord Reed and Lord Hodge).
[144] *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47.
[145] *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* said that the time it becomes "legally questionable" would take account of "developments in legal understanding within the relevant category of claimants": ibid., at [211].
[146] Ibid., at [298] (Lord Briggs and Lord Sales).
[147] This section draws on a talk given by the author and Douglas Maxwell, Henderson Chambers, to the APPG on Leasehold and Commonhold Reform in January 2024. The views are mine.
[148] *Salvesen v Riddell* [2013] UKSC 22, 2013 S.L.T. 863, at [38] (Lord Hope).
[149] *Broniowski v Poland* (2005) 40 E.H.R.R. 21.
[150] See for rent: *Hutten-Czapska v Poland* (2007) 45 E.H.R.R. 4, at [202]–[203]; and for ground rent: *The Karibu Foundation v Norway* (Application no. 2317/20), Judgment of 10 November 2022; *Fleri Soler and Camilleri v Malta* (2008) 47 E.H.R.R. 27, at [57].

interference will be limited where ground rent clauses are unfair. Although there will still be bite in relation to the initial ground rents (unless, under the argument floated in Section III(D), they may also be found unfair), there is only an illusory interference if escalating clauses are capped and the terms were unfair and never binding in the first place.

It is also necessary to ask if any interference is lawful and in the public interest. The wide margin of appreciation, often referred to as deference or weight in the domestic context, means that any challenge to the lawfulness or public interest of any interference with existing ground rents would have only limited prospects of success.

A key question in relation to A1P1 challenges will be whether the interference is proportionate. The question of incompatibility will depend both on the particular legislative measure (which could take the radical form of reducing ground rents to a peppercorn or introducing some form of capping)[151] and its application to the specific facts of any challenge.[152] Compatibility with A1P1 is nuanced and complex. Especially important is whether the intervention achieves a "fair balance" between the rights of the landlord and the interests of the community. Relevant to this, but not determinative, will be the amount that the cap is set at (a peppercorn cap is very different to one set at current rent levels) and whether there is any form of compensation to landlords. Even in the absence of compensation (as is likely), and notwithstanding the previous Government's impact assessment showing every possible cap producing an economic impact in the billions, capping can still be compatible with human rights. In *The Karibu Foundation v Norway*, the European Court of Human Rights found Norwegian legislation that capped rents under lease extensions, without the payment of compensation, compatible with A1P1.[153] This finding was reached after a careful balancing of the competing interests, consideration of the specific factual context and the position of the parties; and noting the careful legislative background to the measures.

The most important question in a challenge will be whether the interference is proportionate. But the important contribution of this article is that the extent of the interference is significantly reduced if any of the ground rent terms are unfair under consumer protection legislation. This undermines, perhaps fatally, any human rights challenge.

[151] DLUHC, "Modern Leasehold". Five options were set out in the consultation.

[152] For a challenge to the legislation to succeed without reference to particular facts there must be an unjustified interference with Convention rights "in all or almost all cases": *Christian Institute v Lord Advocate* [2016] UKSC 51, [2017] S.C. (U.K.S.C.) 29, at [88] (Baroness Hale, Lord Reed and Lord Hodge), following *R. (Bibi) v Secretary of State for the Home Department (Liberty intervening)* [2015] UKSC 68, [2015] 1 W.L.R. 5055, at [2], [60] (Baroness Hale), [69] (Lord Hodge), and *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, [2023] A.C. 505, at [19] (Lord Reed).

[153] *Karibu Foundation v Norway* (Application no. 2317/20); although the rents in *Karibu* are referred to as "ground rents" they function very differently from ground rents in the English leasehold system.

VI. Conclusion

The issues covered in this article cross rocky and uncertain terrain.

Applying section 62 to ground rent clauses is not straightforward and is largely uncharted. Long residential leases are conceptually hybrid, "part contract, part property",[154] and as they last for decades or centuries they will change hands on many occasions. This makes for difficult legal questions. What is the main subject matter of the contract? Is the ground rent in return for any "service"? Do only the most egregious ground rent clauses cause "significant imbalance"? There is no contractual relationship between the assignees to the lease and yet the contractual terms continue to bind them: does the CRA 2015 still apply? What if the current leaseholder is not a consumer but the original leaseholder was? How does the transparency test apply if the current leaseholder has no information about the bargaining process at the time of contracting? Answering these questions must be approached bearing in mind the high level of consumer protection underpinning the legislation and that consumers are in a position of weakness vis-à-vis sellers or suppliers, as regards both their bargaining power and their level of knowledge. The answers to these questions given in this article will, undoubtedly, be contested.

A summary of the conclusions reached is as follows. Escalating ground rent clauses are not exempted from the fairness assessment: the main subject matter is the sale of an estate in land in return for a premium, the "appropriateness of the price" exclusion does not apply as there is no service in exchange for the ground rent and European case law makes clear that price variation clauses are subject to review. Evaluating fairness requires consideration of both transparency, formal and substantive, and significant imbalance. Many clauses will fail the transparency test: consumers will not understand the economic significance of escalating clauses and the mis-selling of modern long leases means that many consumers were not made aware of ground rent provisions. As nothing is given in return for ground rent there will always be significant imbalance. The consequence is that escalating ground rent clauses are not binding on consumer leaseholders. This is also true for future leaseholders as they are bound only by terms that were binding on the assignor. In so far as the passage of time makes proof of the circumstances at the time of contracting difficult, this should not impact the application of the tests: the goal is to protect the consumer and it is for the trader to prove that the requirements of transparency were met and, in line with how this is dealt with in collective actions, the court should also be able to look at the standardised selling practices. For those leases within the Housing Act trap there are additional grounds for maintaining that high

[154] *Linden Gardens Trust Ltd. v Lenesta Sludge Disposals Ltd. and Others* [1994] 1 A.C. 85, 108 (H.L.) (Lord Browne-Wilkinson).

ground rent provisions are not enforceable through the doctrines of non-DFG and repugnancy.

This article shows that escalating ground rents may be found unfair and therefore not binding on consumer leaseholders and their assignees. The implications are clear. Where terms are found unfair, leaseholders do not have to pay and can recover past payments through restitution. This will have significant economic impact on institutional landlords. Turning these arguments into practical legal remedies for leaseholders would probably require some form of collective action with a willing litigation funder[155] as individual leaseholders may be unlikely to litigate. Legislative solutions may appear more attractive but it is unclear how strong an appetite the Labour Government has for reducing ground rents to a peppercorn as against imposing a cap and there has been no hint that landlords would be required to refund previously paid onerous rents to leaseholders. The arguments here could, however, have an immediate impact on valuation in enfranchisement claims. In addition, the wind is taken out of the A1P1 sails that have been raised by lobbyists arguing against reform given that the most egregious rent provisions – and therefore the most economically significant – are unenforceable.

[155] N.B. a class action is being pursued in relation to hidden leasehold insurance commissions: S. O'Kelly, "Freeholders Face Class Action over Insurance Commissions", available at https://www.leaseholdknowledge.com/freeholders-face-class-action-over-insurance-commissions/ (last accessed 4 January 2025).