

Chapter 24

Question 1: Why is it difficult to achieve freehold ownership of flats?

The legal challenge facing a successful ownership structure for flats is to provide a mechanism whereby positive, as well as negative, duties can successfully be imposed upon the flat owners.

Flats are interdependent. Whilst a flat owner will require exclusive possession of their flat, they will also require rights over both the other flats within the block and over the common parts of the development. Easements, being rights over the land of another, can serve this purpose. In addition there needs to be a mechanism by which the block as a whole, including the individual flats and the common parts, is maintained and kept in repair. Covenants, as agreements binding on the flat owners, can serve this function but only if positive, as well as negative covenants, are enforceable between the flat owners.

This problem is explained in section 1.

Question 2: How successful do you think the long leasehold system of flat ownership has been?

The problem outlined in question 1 has been addressed in this country by employing the long lease in which positive leasehold covenants are enforceable between those bound by privity of estate. A flat owner is granted a long lease of their flat by the developer in which the flat owner is granted exclusive possession of their flat and easements of support from the flat below and protection from the flat above as well as rights to use the common parts, services and facilities. The lease will also contain negative covenants to be performed by the flat-owner to govern their use of their flat and positive covenants to pay the ground rent and service charge as well as for the flat owner to keep in repair the interior of their flat. The obligation to repair the structure and common parts is imposed upon the landlord through covenants given by the landlord in the lease and funded by flat owners through the payment of their service charge.

The weaknesses of this long leasehold system and the steps that have been taken to address these weaknesses are explored in section 2. They revolve around the limited duration of the long leasehold term and the risk that the term may be brought to a premature end by forfeiture, problems of the repair and maintenance of flat developments and excessive levels of service charge, the difficulty of varying the lease where the terms are defective and the general difficulties of communal living. These problems are generally less acute where the freehold of the block is transferred by the developer to a management company which is collectively owned by the flat owners. The flat owners are then the masters of their own fate so that, provided they are able to work together, they can overcome these issues.

Where this is not the case and the freehold continues to be held by the developer or another party as an investment, a conflict of interest can arise. Piecemeal legislative reform has sought to address the problems outlined. For instance the flat owners have been granted rights to extend their leasehold term or to collectively acquire the freehold through a process known as enfranchisement, whilst forfeiture of residential long leases is more strictly controlled than where the lease is of commercial premises. Poor management problems have been addressed by granting flat owners a right to take over the management of their block, to question the levels of service charge and to call for the variation of their leases where the problem arises from a defective lease. However, these remedial measures are complex and cannot address the fundamental challenges of communal living.

Commonhold has been enacted to provide an alternative to the flat ownership regime but it too faces similar challenges.

Question 3: What are the current deficiencies in commonhold, as it has been enacted under the Commonhold and Leasehold Reform Act 2002?

We explain commonhold and its deficiencies in section 3. Commonhold is structured to provide for freehold ownership of a flat owner's individual flat and communal ownership of the common parts and facilities of the block through a commonhold association in which all flat owners within a development are members. A commonhold community statement provides for necessary reciprocal rights and duties for the use, maintenance and repair of the development.

The initial promise of commonhold as a more effective successor to the long leasehold system of flat ownership has failed to materialise, with very few developments choosing to adopt the commonhold structure. The reason for this lies not only in a natural conservatism to stay with a tried and tested system, but in a number of perceived deficiencies of commonhold which has led financiers, and thus developers, to be less than enthusiastic about embracing commonhold.

First, commonhold is only a realistic option for new developments as it is difficult to convert an existing long leasehold development to commonhold. Secondly, commonhold and leasehold do not mix. Thus whilst a commonhold may sell or mortgage their flat they are not free to let it for more than a seven year term and to deal with part only of their flat. These restrictions reflect the purity of commonhold but also limit its attraction to investors in the buy to let market. Thirdly the balance of power between the commonhold association and the flat owners has drawn criticism. The association's power to dispose of the common parts and to fix the level of service charge without the consent of the flat owners provide examples of powers that may be too favourable to the association. On the other hand the association's limited powers to recover unpaid management charges from the flat owners is a serious handicap. Fourthly, it was originally envisaged that the commonhold community association would be a tailor-made corporate body designed to suit its purpose. However, that has not been the result. Instead, the legislation has adapted an existing corporate structure, namely the company limited by guarantee, which rather falls short of the envisaged ideal. The rule of the majority which underlies the governance of companies is not felt to be suited to communal living arrangements and the requirement that all units should be entitled to equality of voting, regardless of their respective size or value, is considered too inflexible. Last, but by no means least, real concern also surrounds the position of the association in the event of its insolvency which might be precipitated, or at least aggravated, by its limited powers to recover unpaid management charges.

Question 4: Is there a pressing need for commonhold?

The short answer to that question must be no. Recent legislative reform has addressed, at least in some measure, some of the problems with the long leasehold system which in any event are less problematic where the flat owners themselves own the freehold through a management company. The urgency for an alternative system has thus diminished. The long lease has been adapted to provide a vehicle for flat ownership where positive obligations are mutually enforceable and as such it will always feel inferior to freehold by many flat owners. Commonhold is thus a logical development for any mature system of land holding. The experience of other jurisdictions has shown that commonhold can be a success but the present English model has been, as yet, unable to demonstrate its superiority to the long lease.