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A.1 INTRODUCTION

It has been the law for many years that positive obligations cannot be enforced in freehold land. In essence a burden of a positive covenant does not run with the land; see *Austerberry v Oldham Corporation* (1885) 29 Ch D 750. This was reiterated in the more recent case of *Rhone v Stephens* [1994] 2 AC 310. In that case the court made it very clear that the only way the law was to change was if Parliament took steps towards reform. The response was the promotion of the new concept of commonhold land. This is defined in the Commonhold and Leasehold Reform Act 2002 (CLRA 2002) as the land specified in the memorandum of association in relation to which a commonhold association exercises functions (see section 1(1)). It is in effect the name for the special way freehold land will be held by a community of freeholders entitled to participate in the association.

Commonhold has been slow to catch on with solicitors and their clients. In effect it is not very popular at present. This is probably due to a lack of education about the topic in the legal profession along with not enough confidence yet in the product. As you will see in this chapter on commonhold it can be used for both residential and commercial property. As such it probably deserves to succeed notwithstanding the current slow uptake. If you want to learn more about the full details of commonhold ownership we recommend you consult *Commonhold: The New Law* by Clarke (Jordans Publishing) as being an excellent guide to this relatively new area of Land Law and Property Law and Practice. By June 2008 there had been only 14 commonhold developments registered at the Land Registry. Moreover, 11 of those were registered without unit-holders (see A.5.1 below), suggesting that the applicants for the registration were developers; the remaining three had unit-holders and were therefore probably conversions to commonhold by existing owners (see <<http://www.commonhold.com/2010.html>>).

A.2 COMMONHOLD—A BRIEF OVERVIEW

Each separate property in a commonhold development will be termed a unit. A unit can be either residential or commercial and the owner will be the unit-holder. There will be a commonhold association that will own and manage the common parts. It will be a company

limited by guarantee where all the members will be the unit-holders. Thus unit owners will have a duality of ownership. First they will own their units and, secondly, they will own a share of the commonhold association and thus indirectly the common parts.

All commonhold will be registrable at the Land Registry that will require on registration a Commonhold Community Statement (CCS) and the memorandum and articles of association. The CCS will contain the rules and regulations for the commonhold. It will be possible for owners of existing non-commonhold property to seek to convert their title to a commonhold arrangement, but 100 per cent of all owners will have to agree to the conversion. The freeholder must consent to the conversion, without which conversion cannot proceed.

In summary the unit-holder will in effect own, freehold-style, his or her flat or property instead of being a leaseholder. The unit-holder will share in the running of the commonhold-held common parts and be required to pay a management or service charge. Unlike leaseholds, the units will not be wasting assets; neither will they be at the whim of a freeholder and/or the freeholder's management policies.

A.3 IMPORTANT DEFINITIONS FOR COMMONHOLD

A.3.1 UNIT-HOLDER

A unit-holder is the person registered as proprietor, or entitled to be registered as proprietor, of a freehold estate in the unit (CLRA 2002, section 12). A sole unit-holder is a member of the commonhold association. You can also have joint unit-holders (section 13). In the case of joint unit-holders, they decide which of them is to be the member of the commonhold association. If they don't decide, then the unit-holder who is named first in the proprietorship register is the member. (Why can't they all be members? Presumably because it's fairer to have one vote per unit.) A commonhold unit is that part of the commonhold which is owned exclusively by the unit-holder on a freehold basis.

A.3.2 COMMONHOLD ASSOCIATION

The commonhold association is the legal entity which owns and manages the common parts of the building or estate, and to which all unit-holders belong. It is a company limited by guarantee which means that its members, the unit-holders, are limited in their personal financial liability should the company collapse or be wound up; there are no shares or share capital. This is a private company limited by guarantee incorporated under the Companies Act 1985. Therefore it must have a memorandum of association setting out the objects of the company. Under section 34 of the CLRA 2002 one of the objects of the company must be to exercise the functions of a commonhold association. The commonhold land must be specified. The memorandum must fix the amount each member guarantees to contribute if the company is wound up—this is £1.

A.3.3 COMMONHOLD COMMUNITY STATEMENT

The Commonhold Community Statement (CCS) serves two purposes:

- it describes the development, the units, and the common parts; and
- it sets out the rules under which it will be managed.

The CCS provides the framework to manage the building or estate and to regulate the rights and duties of the commonhold community, through one single, common document. The CCS will set out the rights and duties of the unit-holders and the commonhold association

and how management decisions are to be taken. Examples of duties are contained in section 31. They include:

- to pay money;
- to carry out works;
- to grant access;
- controlling the use of the unit e.g. residential only;
- not to cause nuisance or annoyance to neighbours.

Section 31(7) provides that a duty conferred by a commonhold community statement on a commonhold association or a unit-holder shall not require any other formality. So the duties are binding even though they are not contained in a deed. As soon as a unit-holder acquires a unit he or she is bound by the duties; there is no need for any separate deed.

Similarly, the *rights* do not require to be granted by deed. They are not easements as such and do not need to satisfy the requirements of section 52 of the Law of Property Act 1925. The distinction between legal easements and equitable easements is not relevant in commonhold. Simply read the CCS to establish what rights and duties exist.

A.4 **HOW COMMONHOLD IS CREATED**

Land becomes commonhold land because it is registered as such.

The role of Land Registry is to ensure that:

- commonhold land is clearly defined;
- it is transferable under the general principles of land registration, subject to the variations specific to commonhold;
- all associated and necessary documents within the commonhold development are accessible to those who wish to view them.

A.5 **COMMONHOLD REGISTRATION**

A.5.1 **REGISTRATION WITHOUT UNIT-HOLDERS**

As an example, before occupation of the units a developer applies for the land to be registered as commonhold. He can do this at the same time as he applies to register a transfer of the land to him, or applies for first registration. Before he applies he must first incorporate the commonhold association and draft the CCS. Then he must lodge at Land Registry the documents set out in Schedule 1 of the CLRA 2002. These are:

- the commonhold association's certificate of incorporation as a company;
- its memorandum and articles of association;
- the CCS;
- a certificate of compliance signed by the directors of the commonhold association. This deals with such matters as confirming that the CCS complies with the Act and that the association has not traded;
- certain consents—consents are required from the registered proprietors of the freehold land, the registered proprietor of any lease for more than 21 years (not seven, interestingly) and the proprietor of any registered charge.

The registration procedure including the entries that will be made on registration are set out in rules made under section 65 of the CLRA 2002.

A.5.2 **REGISTRATION WITH UNIT-HOLDERS (I.E. CONVERSIONS)**

Where units are already occupied by long leaseholders an application can be made to convert the freehold reversion to commonhold (CLRA 2002, section 9). However all leaseholders and their mortgagees must consent. You cannot mix and match commonhold and long leases.

Typically a conversion will occur where long leaseholders own a management company that controls the freehold and they want to convert to commonhold. There is no transitional period. All leases are extinguished and registration of the commonhold common parts and units then occurs.

A.6 **DEALINGS WITH COMMONHOLD**

A.6.1 **DEALINGS BY THE UNIT-HOLDER**

The unit-holder's powers to deal with his unit are set out in sections 15 to 22 of the Act.

- He may transfer the whole of his freehold unit. The new unit-holder then notifies the commonhold association of the transfer and becomes a member of the association. The outgoing unit-holder remains liable for any arrears of service charge or other previously incurred liabilities. Transfers of part are not permitted unless the commonhold association consents in writing (very unlikely I would have thought—perhaps where you agree to sell a bit of your unit to your next door neighbour). If this occurs, the CCS will need to be amended because the CCS defines the extent of the units and the extent of one at least will have changed.
- He may charge the whole of his unit (but not part).
- If he grants a lease of a residential unit, the lease must comply with conditions to be prescribed by regulations, e.g. length of lease.

A.6.2 **DEALINGS BY THE COMMONHOLD ASSOCIATION**

Common parts

The commonhold association may transfer land in the common parts (i.e. adding or subtracting bits). In this event, as the extent of the common parts will be changed, an amendment to the CCS will be required.

The association may also create other interests in the common parts, e.g. an easement in favour of an adjoining development.

The association's power to create charges is restricted. Essentially it can create a legal mortgage but before doing so, it must pass a unanimous resolution to create the charge.

Units

The association may decide to change the size of the units (CLRA 2002, sections 23 and 24). In this event, the CCS must be amended to redefine the extent of the unit. However, not surprisingly, the unit-holder and any mortgagee must consent in writing before any change in size is made. There will be power for the court to dispense with the unit-holder's or chargee's consent in exceptional circumstances, e.g. if the unit-holder has disappeared.

A.7 TERMINATION OF COMMONHOLD

This is covered in sections 43 to 56 of the Act. As the commonhold association is a limited company, it may be wound up. However, do remember there can be no commonhold land without a commonhold association. There are two types of winding up—voluntary, and by the court.

A.7.1 VOLUNTARY WINDING UP

Here the unit-holders simply agree to end the commonhold, e.g. because they wish to sell to a developer for redevelopment.

The commonhold association must be solvent for a voluntary winding up.

The unit-holders must agree on a termination statement. This sets out how the commonhold association intends to deal with the common parts and the units, and how it will distribute the assets.

At least 80 per cent of the members of the association must vote in favour of the termination statement and the resolution to wind up the association. If *any* member does not vote in favour of winding up, the liquidator must apply to the court to decide how the termination should proceed. This protects the interests of those who did not vote in favour.

So if 100 per cent agree on the winding up there is no need to involve the court. The liquidator simply makes a termination application directly to Land Registry.

Ultimately, with the sanction of the court if necessary, the liquidator makes a termination application to Land Registry. The land will cease to be commonhold land and it will revert to normal freehold. The procedure for such applications will be governed by rules to be made under section 65 of the Act.

A.7.2 WINDING UP BY THE COURT

Under the Insolvency Act 1986 a creditor may petition for the commonhold association which is unable to pay its debts to be wound up by the court. Of course this would be very serious for unit-holders because there can be no commonhold land without a commonhold association. So the court is given power to make a succession order allowing a newly formed commonhold association to take over. Again, rules will prescribe the procedure to be followed on applications for a successor to be registered as proprietor of the common parts.

A.8 CRITICISMS OF COMMONHOLD

Some criticisms have been levelled at commonhold. One is the somewhat restrictive requirement for the consent of all leaseholders to a conversion to commonhold. In developments that are perhaps limited in size, then the current scheme will probably be satisfactory. However, if you have a larger development, (and here we mean where there are 20 leaseholders or more) then if just one acts unreasonably and refuses to agree to a commonhold conversion, or perhaps just cannot be bothered to agree, then clearly the remaining leaseholders will be greatly frustrated by this provision. The majority are trapped with their leases and there is nothing they can do about it. Furthermore, once leaseholders have acquired the freehold by enfranchisement (the right by statute to purchase the reversionary title) and granted themselves extended leases, the 'need' for commonhold all but disappears. Perhaps Parliament could have considered a provision requiring a small minority of leaseholders to surrender their leases and receive a freehold title in return or compensation if they prefer.

Other criticisms include not allowing the commonhold association to impose a statutory charge on a unit for arrears of service charge. There is no forfeiture allowed so the association is left with standard remedies for the recovery of debts. Money judgements and charging orders take time to obtain and will not give priority over prior mortgages and charges.

Do be aware also that commonhold is not the final answer to the problem of freehold covenants. Commonhold will solve the problem of positive obligations within a commonhold community but not in other situations. That awaits the introduction of something called land obligations, a proposed reform of covenants which has yet to receive the green light from Parliament.



Key Points Commonhold

- A commonhold is a freehold community.
- Within the boundaries of that community are separate freeholders with their own units.
- These freeholders are called unit-holders.
- The remainder of the commonhold comprises the common parts, which are vested in a commonhold association.
- This association is a private company limited by guarantee and its only members are the freehold registered proprietors of the units within the community.
- The community is then bound together by a 'local law', which is drafted when the community is established. This local law is known as the Commonhold Community Statement (or CCS).
- Sch 2 of the Act lists the types of registered freehold that cannot be commonhold. These are flying freeholds (e.g. no commonhold flats above a shop not forming part of the commonhold), agricultural land, and where the title is contingent i.e. where the estate is liable to revert by operation of law under a specified statute e.g. Places of Worship Sites Act 1873.

SELF TEST QUESTIONS

1. It is possible to change the size of a commonhold unit provided the unit-holder and any chargee consent. TRUE/FALSE. Please delete the incorrect choice.
2. To achieve a voluntary winding-up of a commonhold which of the following is NOT a requirement:
 - (a) the commonhold association must be solvent;
 - (b) the unit-holders must agree on a termination statement;
 - (c) at least 70 per cent of the members of the association must vote in favour of the termination statement; or
 - (d) if not all members of the association vote in favour of the termination statement the liquidator must apply to the court to decide how the termination application should be made?
3. Under the commonhold legislation a building is permitted to have commonhold flats above a shop not forming part of the commonhold. TRUE/FALSE. Please delete the incorrect choice.
4. CCS is:
 - (a) a statement of the rights and duties of a landlord and tenant in a commonhold;
 - (b) a statement produced by local estate agents;
 - (c) a statement of the objects of the commonhold association private limited company; or
 - (d) a statement describing the commonhold development, the units and common parts, and the rules under which the commonhold will be managed?

5. Before an application can be made to convert an existing development into commonhold, a majority of all leaseholders and their mortgages must consent. TRUE/FALSE. Please delete the incorrect choice.

SHORT REVISION QUESTIONS

COMMERCIAL PROPERTY

Question 1

Your firm acts for developers who have recently built a new small estate of eight light industrial workshop units on the edge of town. They want to dispose of them by sales to individual workshop owners in such a way that ensures that the maintenance of the common areas (the estate roads and pavements and surrounding garden areas) are kept to a high standard, but they do not want to get involved in making sure that this is what is done. Please advise the developers of their options.

Question 2

Your firm acts for a local developer who has asked you for a brief overview of commonhold as he is acutely aware of the deficiencies in the leasehold arrangement where multi-occupied single sites are concerned. Your Principal has asked you to prepare some briefing notes for his use. Please provide such briefing notes.

RESIDENTIAL PROPERTY

Question 1

Your firm's marketing department are interested in developing new area of expertise. You have suggested commonhold and the marketing department want from you a view of the potential popularity of commonhold and where it is likely to be used. Please set out your thoughts on this area.

SUGGESTED ANSWERS TO SELF TEST QUESTIONS

1. The correct selection is true, although the court can dispense with consent in exceptional circumstances, e.g. if a unit-holder has vanished.
2. The correct answer is (c)—it is 80 per cent.
3. The correct selection is false.
4. The correct answer is (d).
5. The correct selection is false—it is all of them, not a majority.

SUGGESTED ANSWERS TO SHORT REVISION QUESTIONS

COMMERCIAL PROPERTY

Question 1

The developers wish to sell off their development to individual workshop owners while ensuring that there is a mechanism in place to maintain the common areas of the development. This can be achieved in one of two ways: first by granting leases and then vesting the freehold in a management company where the shareholders are the eight lessees; secondly by creating a commonhold that governs this estate.

COMMONHOLD

- (a) Leasehold solution. The developers will grant leases with three parties. The first will be themselves as lessors. The second will be the lessee/purchaser and the third will be a management company given the title to the common parts by a lease with the developers and with whom the lessee must covenant to pay a service charge levied by the company. They will control that company, as each owner will have a share in the company. In this way the management company will be obliged to maintain the common parts and the lessees will be obliged to pay for it.
- (b) Commonhold solution. Alternatively the developers can sell off commonhold units. Each separate property in a commonhold development will be termed a unit. A unit can be either residential or commercial and the owner will be the unit-holder. There will be a commonhold association that will own and manage the common parts. It will be a company limited by guarantee where all the members will be the unit-holders. Thus unit owners will have a duality of ownership. First they will own their units and, secondly, they will own a share of the commonhold association and thus indirectly the common parts. The unit-holder will share in the running of the commonhold-held common parts and be required to pay a management or service charge.

Question 2

A burden of a positive covenant does not run with the land; see *Austerberry v Oldham Corporation* (1885) 29 Ch D 750. This was reiterated in the more recent case of *Rhone v Stephens* [1994] 2 AC 310. In that case the court made it very clear that the only way the law was to change was if Parliament took steps towards reform. Their response was the concept of commonhold land. This is defined in the Commonhold and Leasehold Reform Act 2002 (CLRA) as the land specified in the memorandum of association in relation to which a commonhold association exercises functions (see section 1(1)). It is in effect the name for the special way freehold land will be held by a community of freeholders entitled to participate in the association. Each separate property in a commonhold development will be termed a unit. A unit can be either residential or commercial, and the owner will be the unit-holder. There will be a commonhold association that will own and manage the common parts. It will be a company limited by guarantee where all the members will be the unit-holders. Thus unit owners will have a duality of ownership. First they will own their units and, secondly, they will own a share of the commonhold association and thus indirectly the common parts.

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RESIDENTIAL PROPERTY

Question 1

How popular will commonhold become? It appears to be a flexible solution to many of the problems in the current freehold and leasehold system. It offers titles of indefinite duration that can be freely bought and sold and mortgaged in the same way as any other freehold estate in land. Having just the one CCS for the whole development is a particularly attractive feature. It gives the assurance that the rights and obligations in the CCS will affect all unit-holders in exactly the same way. This uniformity simply does not occur in many leasehold schemes where the terms of the different leases often vary.

And each time you buy a lease you are reliant on the skills of your solicitor to advise as to the adequacy of the lease drafting. So commonhold should find favour, and particularly in the following areas:

- residential flats;
- housing estates where estate rent charges would currently be employed;
- retirement villages and sheltered accommodation;
- holiday complexes offering communal facilities; and
- retail, industrial, and other commercial commonholds where there are shared facilities.

This is provided, of course, that the property market prefers the commonhold route. Commonhold will only succeed if developers can sell commonhold units for more than their leasehold counterparts. If this is not the case, developers may decide to stick with leaseholds. When you grant leases you retain a freehold interest, which has value, and once the last unit is let, you can sell your reversion to a property management company.

But if commonhold is perceived by the market to be successful for developer and occupier alike then ultimately there will be pressure from many thousands of existing leaseholders to convert.

As with any new product, its success or otherwise will depend on how the market responds. In the longer term it should become an essential feature of communal living in the 21st century.