

Commentary

This is a typical question that invites you to show your knowledge base in the form of an email memorandum passing between you and your training partner. The question is inviting you to set out your detailed knowledge of this recent change in the law and procedure for domestic conveyancing in England and Wales as it relates to the creation of Commonhold titles.

You need to show that you understand the changes brought in by the introduction of Commonhold and you will need to be able to analyse the structure of Commonhold and show what areas might be of interest to developer clients of your firm

Suggested answer

EMAIL MEMO

To: The Training Partner
From: Alice Munore

Re: Commonhold

Introduction

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 and *Rhone v Stephens* [1994] 2 AC 310. This problem was addressed by the Commonhold and Leasehold Reform Act 2002 (CLRA). The CLRA created Commonhold which is in effect the name for the special way freehold land will be held by a community of freeholders entitled to participate in the Commonhold association and by which positive covenants can be enforced. This is the main benefit of Commonhold property, that is freehold land with enforceable positive covenants. However you should be aware of the provisions of Schedule 2 of the CLRA as this lists the types of registered freehold that cannot be Commonhold. These include flying freeholds (for example, you cannot have Commonhold flats above a shop not forming part of the Commonhold) and agricultural land.

The Commonhold structure

Each separate flat or 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 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.

Commonhold association

This is a private company limited by guarantee. Therefore it will have articles of association setting out the constitution of the company. Under s.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 normally £1. Once created the Commonhold association will also adopt a Commonhold community statement (CCS).

This CCS serves 2 purposes:

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

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 s.31.

They include:

- to pay money
- to carry out works
- to grant access
- controlling the use of the unit, for example residential only
- not to cause nuisance or annoyance to neighbours

Another element of the CLRA (s. 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 s.52 LPA 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.

Benefits of Commonhold

Because the units are freehold they are not wasting assets and will, therefore, continue to hold their value. This compares well with leases in that leases will lose their value as time passes as they are wasting assets. So, a ninety nine year lease that has only nine years left to run will have a diminished value as a result of the limited amount of time left to run on the lease. This diminution can happen with a Commonhold unit. This would be of particular value when a developer wishes to sell off newly built units being residential or commercial as this inbuilt value support should prove to be an excellent marketing tool for our developer clients

Furthermore, positive covenants can be enforced whoever owns the property even though it is freehold in nature. The Commonhold approach to property ownership avoids the difficulties other freehold properties encounter when trying to address the problem of the enforcement of positive obligations such as repairing covenants, boundary maintenance, or fencing covenants.

Another benefit, perhaps of a more technical nature, is that s. 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. The effect of this is that the duties are binding even though they are not contained in a deed. Similarly the **rights** do not require to be granted by deed. Simply read the CCS to establish what rights and duties exist.