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Property

Commonhold: A New Form of Tenure

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Introduction

The recent Paper (Cm 4843) presented to Parliament, by the Lord High Chancellor, in August 2000 resulted in the first reading of the Commonhold and Leasehold Reform Bill before the House of Lords, on the 20 December 2000. Part One of the Bill is intended to introduce a new form of tenure called commonhold. This will supplement the present legal estates in England and Wales, *ie*, freehold and leasehold.

It has been suggested (at p 101) that commonhold is a desirable alternative to leasehold, *ie*, a legal estate for a fixed term of years: a wasting asset. The current Labour Government considers the existing, residential, leasehold system to be flawed and in need of reform. The government believes the leasehold estate holding has led to an abuse due to the unequal positions of the parties, giving powers and privileges to landowners and causing distress and misery to leaseholders.¹ One of the main concerns, which has dominated the freehold and leasehold estate, is the enforcement of mutual covenants, particularly concerning common parts and services.

Covenants

When dealing with land law, real property, a covenant (promise) given by the covenantor to the covenantee, will be binding upon the original parties under the law of contract. However, once the land burdened by the covenant is sold it is a question of law whether or not the burden or benefit will run with the land, and bind future purchasers. When dealing with freehold land, rules have developed to deal with this question. The rules are historical, covenants were used by landowners to control the usage of land, when planning law was virtually non-existent, to give protection to neighbouring land and area.

Thus, landowners have attempted to use covenants as a private planning device, to regulate the land through either a negative or positive covenant. The former would restrict the covenantor from using his land in a particular manner, for example, not to run a business from the premises, whilst the latter would impose on the covenantor an obligation to do something, for example, to maintain a wall. This mechanism has proven to be a problem and the case of *Austerbury v Oldham Corporation*² held that burden of a positive covenant does not pass from the original owner of the land, who entered into the covenant, to a successor in title of the same property. This decision was reinforced by Lord Templeman in the case of

*Rhone v Stephens*³ who refused to overrule *Austerbury v Oldham Corporation* on the grounds that it would dilute the distinction between law and equitable rules relating to covenants; thus creating difficulties, anomalies and uncertainties. In his dictum he stated: "As between persons interested in land other than as landlord and tenant, the benefit of a covenant may run with the land at law but not the burden."⁴ Lord Templeman suggested⁵ any reform in this area of the law should be dealt with by Parliament and not the Judiciary and the current, practical, solution would be to use the leasehold system with a suitably drafted lease, which permits positive covenants, to be enforceable against successors in title.

Horizontally Divided Property and Covenants

This brings us to the usage of positive covenants when dealing with horizontally divided property (flats) and successive purchasers. There must be a legal guarantee in respect of individual properties within a block of flats to enforce mutual obligations, in particular, repair, maintenance and independent services by each independent property owner. The inconvenience of the freehold system, when attempting to enforce positive covenants, has been circumvented by the leasehold estate which permits both positive and negative covenants to run with the land. Thus, leases have been used to ensure positive covenants are enforceable against successors in title, to share, for example, the costs of communal areas in a block of flats. However, whilst the landlord is able to enforce these covenants against the lessee, this privilege is not given between individual lessees.⁶

Management Problems: Residential Flats

The relationship between Lessor (landlord) and Lessee (tenant) and management may lead to conflict. In 1982 the problems of residential leaseholders of flats was examined by the James Committee,⁷ governed by the Royal Institution of Chartered Surveyors, who noted the persistent problems complained of by the leaseholder, and states:

"Where the standard of management was poor and the [landlord's] agent fails to respond to the tenant's complaints or to supervise works and repairs

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¹ See Cm 4843, p 107.

² (1885) 29 Ch D 750.

³ [1994] AC 310.

⁴ P.317

⁵ P 321.

⁶ See D N Clarke, "Commonhold - A Prospect of Promise" (1995) 58 MLR 486-504.

⁷ Report of the Working Party on the Management of Blocks of Flats.

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properly, ... tenants felt genuine frustrations and the interest of both landlords and tenants in the property suffered as a result.” (Para. 14.6)

The structure of such a relationship has led to management problems, and in February 1984 the Nugee Committee examined the problems caused through bad management⁸ and highlighted various issues, such as: delay in complying with maintenance obligations; the level of service charges; the quality of service provided; unexpected bills and difficulty when trying to enforce the lessor’s obligations.⁹ The Nugee Committee found that 56 per cent of tenants complained of excessive delay on the part of the landlords/agents when requests were made to carry out maintenance. When information was requested, forty-nine percent were denied or delayed this information, and found it difficult to enforce their landlord’s leasehold obligations. When the issue of service charges were examined, it was found that forty-eight per cent found such charges excessive, and the quality of the service provided was poor.¹⁰ The Committee found that these problems were exacerbated when landlords changed, especially if the landlord was based overseas.¹¹

Commonhold: Future Ownership and Management of Flats

The Government’s Bill is in response to the consultation paper: Residential Leasehold Reform in England and Wales, which was issued in November 1998, and supports the current proposals. Commonhold will give equal rights to all commonholders and there will be no superior interest. Unlike the current leasehold system, where the freeholder maintains a superior title (freehold reversion) in relation to the leasehold. This relationship has been criticised (Cm 4843 at p 101), in respect of the behaviour of the landlord (freeholder), who receives payment in relation to service charges, and does not use this payment for the relevant usage or hold any consultation for expenditure with the leaseholder. Commonhold will give control over the management to the commonholder and as a member of the Commonhold Association (CA) he will have the power to set budgets and increase, when necessary, funds to meet the requirements of the building. In effect the commonholders will have control/ownership of the whole development through their interest in the unit (flat) and their membership of the CA.

Multiple Occupation

Part one of the Bill reflects the Labour Government’s manifesto commitment to introduce a new type of land holding: commonhold. This will enable developers to produce multiple occupation, blocks of flats, on a proposed scheme which will give the commonholder the right to individual ownership, similar to a

freeholder, over his flat (unit), whilst being a member of a Commonhold Association.

The Bill, in its current form, should provide an improved system for future home ownership and management. Commonhold will be available for new developments and provisions have been included in the Bill to allow existing leaseholders to covert their long leases into commonhold. However, as will be discussed, conversion from leasehold to commonhold may only be possible in theory and not in practice: it will require all the leaseholders to agree and participate in the conversion.

The Creation of the Commonhold Development: the Proposed Solution

Each individual property in the commonhold will be called a unit and the owner a unit-holder. The management of the common parts and facilities will be governed by an artificial body (limited company) the CA. The CA will be limited by guarantee, which will be exclusive to unit holders within the development, who will own and manage the common parts, for example, hallways, stairs, lifts, corridors, entrance hallways, refuse areas, *etc.* As with any other company the CA must be registered at Companies House in the usual way, with its constitutional document, memorandum and articles, in a form prescribed by the Lord Chancellor. The CA will be registered at HM Land Registry along with the CA’s memorandum, articles and a Commonhold Community Statement (CCS). Allowances for a degree of flexibility to provide for unique features of a particular development should be included in the CCS, this will ensure they are registered and form part of the documentation held by HM Land Registry.

Commonhold Community Statement

The CCS will contain rules and regulations for the particular development and this will allow for uniformity of documentation. Usually leases are subject to particular variations in one block, due to drafting practices or peculiarities of the property. It is suggested (Cm 4843 at p 101) the CCS and company structure will give security to those buying and selling and this should keep conveyancing costs down. A certificate confirming that the memorandum, articles and the CCS comply with relevant regulations (under the proposed legislation) should be produced to the HM Land Registry to allow for registration.

⁸ Report of the Committee of Inquiry on the Management of Privately Owned Blocks of Flats (Department of Environment, Nov 1985).

⁹ Para 5.6.

¹⁰ Para 5.6. Table A.

¹¹ 44%, para 5.8.

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Conversion

Apart from new developments based on the proposed commonhold system, existing leaseholds will be eligible to convert to commonhold. However, it will be necessary to obtain the consent from all existing leaseholder in the block before conversion may take place. Further, consent will be required from the freeholder. The freeholder in this case may be a company, wholly owned by the leaseholders through enfranchisement¹², or some third (independent) party. If the latter is applicable it will not be possible to convert until the freeholder's consent has been evidenced at HM Land Registry, in accordance with the Department of the Environment, Transport and the Regions (DETR) scheme, proposed in the current Bill. If conversion takes place this will dissolve all leasehold interests and unit holders will be governed by the CA memorandum, articles and CCS.

Control and Management

Clause 35 of the Bill ensures each unit holder has a voting right and is able to participate in the passing of a resolution by the CA. Every member must be given the opportunity to vote in accordance with the memorandum and articles of association and/or the CCS. Clause 34 deals with the direct management, through the directors of the CA, who must exercise their powers to ensure each unit holder is given the opportunity to exercise his rights and curtail any unit holder not complying with any requirements imposed under the CCS.

Any disputes that may arise within the commonhold will be dealt with under guidelines set out in the CCS or alternatively under the memorandum or articles. A complaint should first be dealt with through an internal procedure and if this fails, the matter should then be dealt with by alternative dispute resolution (ADR). The internal complaints procedure and ADR will not oust the jurisdiction of the court(s) and access to tribunals will be available.

Insolvency: Winding up a Commonhold

Clause 33(1) states that: "A Commonhold association is a private company limited by guarantee ...". Therefore, the CA will be subject to the Insolvency Act 1986 and the Insolvency Rules 1986 (as amended). This is an unusual situation, as members of the CA will only be members through their home ownership within the commonhold development. Members will be liable for the sum of £1 under section 2(4) of the Companies Act 1985 (members' guarantee)¹³ on the winding up of the company. Therefore, an obligation on the association to ensure they have a reserve fund is vital to meet necessary expenditure.¹⁴

Clause 34 deals with the direct management of a CA through its directors and responsibility for avoiding insolvency will be with the directors and members.

This links with clauses 31 and 38 and gives the directors the power to set a levy from time to time, when necessary. This should prevent or avoid insolvency by meeting the demands of the CA. If a commonholder is not willing to contribute to the reserve fund, which has been legitimately demanded by the association, then the CA may treat this as an outstanding debt and seek judgment for the outstanding amount. Enforcement will be, ultimately, by means of a charging order¹⁵ against the unit holder's unit.

Clauses 47–54, in their current form, deal with termination: winding-up by the court and the application of the Insolvency Act 1986 will apply. The Bill deals with the presentation for a petition for winding up of the CA by the court under section 124 of the Insolvency Act 1986. The Regulations will be provided, under the proposed legislation, and they will require the CCS to set out rules dealing with any profits arising from a voluntary winding up. However, when dealing with an insolvent CA the proposed system to be used will be the standard insolvency rules, any deviation from current practices will be set out in the regulations. However, given the reasons outlined above the risks of an association becoming insolvent should be minimal.

Conclusion

The concept of commonhold would create a new land holding tenure in England and Wales which would give parties the ability, to all intents and purposes, to own a 'freehold' flat. This does appear to create a sound framework to cure the defects of the present leasehold system when dealing with the enforcement of mutual obligations and management. The Bill is currently before Parliament and we will have to wait and see what develops. In particular, the proposed scheme does attempt to deal with the perceived problems of leaseholders in multiple occupation. However, existing leaseholders will either have to obtain consent from the existing freeholder or achieve collective enfranchisement to convert to commonhold.

If the Bill succeeds, future development of multiple occupation housing may be completed where the concept of commonhold becomes a reality.

¹² The Leasehold Reform, Housing and Urban Development Act 1993 gave the right of collective enfranchisement to leaseholders of blocks of flats. For the purpose of this article the focus will remain with the new, proposed, scheme: Commonhold.

¹³ See Clause 33(1)(b).

¹⁴ Clause 38 deals with the regulations for a reserve fund and makes provisions for them to be inserted in the CCS under clause 31. Clause 38 gives full details of the proposed Regulations.

¹⁵ Further information and the procedure for a charging order will be found under the RSC Ord 50, CCR Ord 31 (note, enforcement will not be changed by the first instalment of the Civil Procedure Rules in April 1999).