

Commonhold—not so much flawed, but different

Richard Frost enters the debate on whether US-style condominiums should be introduced in the UK

- comparison of leasehold and commonhold ownership
- enforcing service charge demands and the availability of forfeiture

In response to Adrian Jack's five reasons why it is unlikely commonhold would gain any degree of popularity in the UK ("Commonhold: the fatal flaw", *NLJ*, 19 December 2004, p 1907), the following arguments are put forward. It should be noted, however, that until the commonhold regulations are made later this year, it is not possible to come to an overall assessment.

1. Is conversion to commonhold likely?

An existing leasehold development can only be converted into commonhold if everyone agrees. The bigger the development, the less likely that is to happen.

However, this is not something which will affect the viability of a commonhold development, merely the likelihood whether a commonhold will be created at all. The alternatives to unanimity are either to compel a minority to accept the desire of the majority to convert, or to allow partial conversion. The first alternative is surely fundamentally unacceptable. The second would mean that some flats in a block would be owned freehold by commonholders, and others would be owned freehold by, presumably, the landlord and let on long leases. In terms of the legal relationships between the commonhold freeholders and the non-commonhold freeholders, and between the commonhold freeholders and the leaseholders, that arrangement seems unsatisfactory.

Flaws in the system of landlord and tenant:

- A lease, unlike a freehold, is a wasting asset.
- It is often difficult, if not impossible, for lessees to enforce one another's obligations.
- Lessees, though they typically have under long leases all the responsibility of full ownership, do not collectively have a corresponding degree of power.
- A lease is vulnerable to forfeiture for breaches by and the lessee and by previous lessees.
- Leasehold documentation is non-standard, and is not always well-drafted.

2. Compulsory commonhold?

Commonhold will not be compulsory, nor should it be. Its advantages are not such that commonhold will invariably be a better choice than leasehold in all circumstances.

3. Fixed-term tenancies

Some unit-holders can only grant leases of their flats of a limited length—the limit will probably be between seven and 21 years. This is not a substantial drawback in practice. First, this restriction will not apply to non-residential commonholds. Second, it is rare for flat-owners to grant leases for a term of more than seven years. They either want to sell outright, or to let their flat on periodic tenancies at a market rent. Nothing in the legislation stops them doing either of those things, and it seems likely that the regulations will not do so either; it also seems that the regulations will not seek to restrict how long a periodic tenancy can last.

4. Are lodgers allowed?

A rule that commonholders could only take lodgers with the consent of the directors of the commonhold association has been mooted. Such a rule did indeed appear in the consultation draft rules issued by the Lord Chancellor's Department (as it then was) in October 2002, although even then it was not clear if the rule was intended to be compulsory rather than optional. Since October 2002, the department has been engaged in a lengthy consultation process, and the revised drafts that have appeared as part of that process do not contain any such requirement.

5. Service charge demands

Mr Jack compares the commonhold system unfavourably with leaseholds, in view of the inability of the commonhold association to forfeit the freehold of commonhold units for non-payment of service charge. He points out that the availability of forfeiture in effect gives a landlord priority for unpaid service charge

over amounts outstanding on mortgage, as lenders have to pay off service charge arrears to avoid losing their security. He believes that the enforcement remedies in the case of commonholds may well not meet the requirements of the Council of Mortgage Lenders.

The availability of forfeiture in the case of leaseholds is seen by many as a notable disadvantage, and has been given as one of the reasons why commonhold is to be preferred. A lease may be forfeited both in the event of breach of covenant by the current lessee and in the event of breach of covenant by a former lessee—even though the current lessee is not personally liable on the covenant (*Parry v Robinson-Wyllie Ltd* 1987 2 EGLR 133 CA; *Kataria v Safeland plc* 1998 1 EGLR 39).

It is certainly important that there is an effective way for enforcing payment of arrears of service charge, for the benefit of unit-holders and their mortgagees. It seems that the commonhold regulations will make an incoming purchaser of a commonhold unit responsible for all outstanding service charges unpaid by former owners. Those rules will bind the unit-holders for the time being, and the benefit and burden of them (to borrow the language of leaseholds) will pass to their successors (s 16, Commonhold and Leasehold Reform Act 2002).

The practical effect of such a provision will be that a commonhold unit cannot be sold (whether by a mortgagee or the unit-holder) unless any arrears of service charge are paid off.

Neither is free from flaw

The introduction of commonhold was prompted by perceived shortcomings in the system of landlord and tenant (see box). These issues are met by the commonhold legislation. But it certainly cannot be said of commonhold, as Gilbert's Lord Chancellor said of the law, that it has "no kind of fault or flaw". There will be circumstances where leasehold is to be preferred to commonhold, and circumstances where commonhold will be found better than leasehold. The "flaws" of commonhold are no more fatal than the "flaws" of leasehold.

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