# WHATEVER HAPPENED TO COMMONHOLD?

## James Driscoll, 7 July 2016

## Introduction

My pleasure in speaking on the subject of Commonhold is tempered by the fact that although it has been available for new developments since September 2004, to date hardly any commonholds have been created. I understand that between 2005 and 2015 that sixteen commonholds were developed in various parts of the country which together created one hundred and sixty one commonhold units (I am grateful to Giacomo Mastantuono, a graduate student at Queens' College, Cambridge, for this information). During these years developers have continued to build blocks of flats for sale on a leasehold basis.

So, I've been asked why I think this is so. I will do this after first (and very briefly) summarising the background to the legislation and what commonhold is.

## Background

For those who are interested in the problems of owning and managing such buildings such as blocks of flats, the introduction of Commonhold aroused much interest. I remember the introduction of the legislation which became the *Commonhold and Leasehold Reform Act 2002* very well. It was preceded by a statement that Government did not consider the leasehold system suitable for owner-occupation (see for example, *Consultation paper on commonhold and leasehold reform (*ODPM, LCD August 2000).

For future developments, it proposed that Commonhold would be available. This would be on a voluntary basis and there is no provision that in future would forbid the creation of new property developments on a leasehold basis (the so-called 'sunset clause').

Recognising that the current leasehold system was not working satisfactorily, the Government also proposed major reforms to the system for regulating residential leasehold properties.

So, we had an Act in two parts; Part 1 introduced Commonhold, whilst Part 2 made substantial amendments to existing legislation (that is the enfranchisement and leasehold management legislation). It also introduced such innovations as the statutory right to manage.

## What is Commonhold?

What does it provide? Well two major things: first, freehold ownership of commonhold units, such as a flat or an office; second membership of a commonhold association which owns and manages the development.

Commonhold is available for all new developments, be they residential flats or houses, or both, or for purely commercial developments such as an office block. It is also be used for mixed-use developments.

Just a few more words on Commonhold: it allows for a new system of ownership for interdependent buildings such as blocks of flats, buildings in mixed commercial and residential use, or a purely commercial building such as an office block. By any standards it is a major piece of property legislation and one of the most significant for decades.

One of most striking aspects of this was its relative brevity (by property law standards at any rate). Part 1 of the Act consists of just 70 sections. There is a simple explanation for this. The goal was to set out the basic principles in the Act with much of the technical detail to be left to secondary legislation. After all, secondary legislation is easier to amend, in terms of Parliamentary time, than substantive provisions in an Act of Parliament.

For example, the 2002 Act provides that no commonhold can be created without the incorporation of a Commonhold Association, a company limited by guarantee with a prescribed constitution. One has to look at the regulations which set out the standard memorandum and articles of association.Similarly,every commonhold must have a commonhold community statement ('CCS') which describes the commonhold and sets out its rules. Again, the actual details are set out in regulations made under the Act (in particular the *Commonhold Regulations 2004*) .

These comments also serve to remind one of another important characteristic of commonhold - that is the standardisation of the documentation for commonholds. Whether the development consists of four units or 400, whether it is built in London or Liverpool, the basic documentation is broadly speaking the same. Of course the CCS allows for the local rules of the particular commonhold to be included as they have to be. Just compare this to the complexities of a large new residential development with individual leases, and in many cases a third party to the individual leases, which might be a management company.

**Why hasn't commonhold taken off?**
There are several factors. What is clear is that over the past 14 years since Commonhold came into force that developers have - despite the relative attractions of Commonhold - ignored commonhold and have continued developing on a leasehold basis. Flats continue to be sold on long leases with or without a share in the freehold or the freehold is sold off (with its ground rent entitlement and the expectation that in future there could be valuable receipts if the flat leaseholders join together to buy the freehold).

***Will a Commonhold unit sell at a premium?***
A developer will probably tell you that if they build and sell on a commonhold basis they do not retain the freehold and they would lose this additional profit. It is simply not economic, they may say, to develop a commonhold rather than a standard leasehold development. As against that one might suggest that a commonhold flat, for example, will sell at a premium as it is sold freehold.

The trouble with this argument is that developers are not convinced that this will be the case. What evidence is there that a commonhold flat has a higher market value than a comparable flat sold on a long lease? I have not come across a valuer who is prepared to state that commonhold flats will definitely sell at a premium.

***Converting to Commonhold?***
This reminds me that we could have some evidence of this difference in value (if there is such a difference) if there were more cases of blocks of flats converting to commonhold. At present such a fundamental change requires unanimity on the part of the leaseholders concerned which is not very practical. But this could be changed. Why not allow a qualifying majority of leaseholders to vote to convert? There is a precedent for this - under section 37 of the *Landlord and Tenant Act 1987* an application can be made to the First-tier Tribunal (Property Chamber) to vary the terms of the leases provided this is supported by a qualifying majority of the leaseholders. In other words, in some cases all the leases could be varied over the objections of a minority of the leaseholders. Could we not adopt a parallel provision in the Commonhold legislation?

***Lack of Government support for Commonhold***
But the main factor for the unpopularity of commonhold, I think, was the failure by Government to actively promote it. It could have been promoted possibly with some financial or other incentives. Just compare the publicity that the leasehold reforms generated. Many of us will remember that it became apparent very quickly, that it had become easier for groups of flat leaseholders to enfranchise and to acquire the freehold. Another notable change was an entirely new right for flat leaseholders to take over

management of their block under the right to manage. In other reforms in Part 2 of the 2002 Act, the system for allowing leaseholders to challenge service charges were greatly improved. Putting this another way, Government and Parliament seems to have succeeded in making the leasehold system more workable than it was before. This may have overshadowed the new commonhold system and and to the arguments that it is superior to the residential leasehold system.

***Does the legislation need to be amended?***

Doubts have been expressed about some of the technical features of the legislation. There is not sufficient time to explore all of these. Two issues are, to my mind, particularly noteworthy.

First, the restrictions over the granting of long leases of a residential commonhold unit. A lease cannot be granted for a premium for a lease longer than 7 years. Why have such a restriction? Well, the answer is obvious - it is to prevent the reintroduction of residential long leases into the commonhold system. However, it ignores the importance of shared ownership leases which are often a key component of new housing developments. Besides, there are other ways of promoting shared ownership, such as the co-ownership trust. But given the importance of promoting low-cost housing, via shared ownership type initiatives, could we not repeal this provision, or at the very least exempt shared ownership leases from this restriction? It could mean a less 'pure' form of commonhold, but this might be a price worth paying. (No such leasing restrictions exist over non-residential commonhold units).

The second issue relates to dispute settlement. When I first studied commonhold, one of its great attractions to me was the use of mediation to solve disputes along with the standardisation of commonhold rules. With certain important exceptions (unlawful use of the commonhold unit or non-payment of the commonhold assessments, to take two examples) disputes must be referred to mediation. Who will mediate? I know that there are lots of qualified mediators, but would a mediation scheme have to be established if commonhold became popular? The Act provides for the appointment of a Commonhold Ombudsman which not surprisingly has not been commenced as there are so few commonholds. Presumably, one of the functions of such a service is the provision of mediation services?

On a related issue, do common-holders have sufficient protections under the general rules. When I first looked at the procedures for agreeing on commonhold assessments (that is the way for raising contributions from unit owners) I was attracted by their simplicity particularly by comparison to blocks of leasehold flats. But are there sufficient safeguards for a minority of unit holders who might, for example, baulk at expenditure proposed by a majority of their neighbours? Remember that this is all different to residential

leases where there is access to the First-tier Tribunal (Property Chamber) in the event of disputes. Do we need to re-think this aspect of Commonhold?

## Conclusion

Most lawyers and other property professionals I have spoken to over the years have been sceptical about commonhold. But I have yet to meet anyone who thinks that the idea of commonhold is misconceived, or that it is a bad idea in principle. We know from the experience of other countries,where commonhold or strata title systems have existed for decades, that it does work.

The technical issues could quite easily be resolved. But there has to be a surge of interest in using commonhold if anything is to change. Such a surge in interest will only happen if it is supported and encouraged by Government so that commonhold could become established in this country.

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*Annexed to these notes are two appendices containing copies of two of the articles I have written on Commonhold.*