



# Contents

Please click on any heading to go straight to that page

## Commonhold

Chris Baker

Author Biography	03
The Basics	04
Creating a Commonhold	20
Commonhold Documentation	42
The Commonhold Association	73
Meetings and Directors	88
Commonhold Units	117
Common Parts	134
Disputes and Enforcement	141
Termination	149
Third Parties	156

## KEY

**Links** to Practical Conveyancing.co.uk pages and other sections of this document

**Links** to external websites

**Practice Points** occur throughout the text and are displayed in separate boxes. Their position in the text may be indicated where necessary by numbering (eg **1, 2, 3**).

**Notes** are displayed in separate boxes at the end of each chapter. Their position in the text is indicated by numbering (eg **1, 2, 3**).

© Practical Conveyancing.co.uk

# COMMONHOLD

## Index

The Basics	03
Creating a Commonhold	20
Commonhold Documentation	42
The Commonhold Association	73
Meetings and Directors	88
Commonhold Units	117
Common Parts	134
Disputes and Enforcement	141
Termination	149
Third Parties	156
<hr/>	
Main Index	02

## Chris Baker of Davies Arnold Cooper



Chris is an Associate Partner at Davies Arnold Cooper, and has experience in a wide variety of commercial, retail and residential property transactions, in particular development projects.

Prior to coming to the UK Chris practised law in Australia for a number of years, where he advised on strata title development projects. He regularly advises on complex development agreements and overage arrangements, and management structures.

Chris has recently been heavily involved with the advising of commercial and residential developers and investors in relation to the introduction of commonhold and has lectured and written numerous articles and papers on the topic.

# The Basics

Outline	4
The Issues	4
The Response	5
The Purpose	6
Comparison with leasehold structures	7
Recent leasehold reform	9
Other jurisdictions	10
Implementation of commonhold	11
Application of commonhold	11
The legislative framework	11
Key terms and concepts	13
Not a new form of tenure	14
Potential application	14
Limitations of application	15
Layered Schemes	17
Notes	18

## Outline

Commonhold is the implementation of the long-awaited new form of freehold land ownership.

It has been introduced by the passing of the Commonhold and Leasehold Reform Act 2002 (referred to as 'the Act') and the initial regulations made under the Act namely the Commonhold Regulations 2004 (referred to as 'the Regulations').

The Act introduces a system of land ownership under which land is subdivided into freehold units, with common property managed by a company limited by guarantee of which the unit-holders are members. A commonhold scheme may involve the division of land horizontally into separate plots or the division of a building, such as a block of flats or an office building into separate freehold titles.

Commonhold is a system unique to England and Wales, but is similar in principle and generally in practice to the strata title systems of Australia, New Zealand and Singapore. It has also borrowed on the condominium system of land ownership of North America. Many civil jurisdictions also have systems along similar lines to commonhold. Scotland for example has the tenement system and France has the concept of copropriété.

These systems of land ownership have principally arisen as a result of higher density living with greater numbers of interdependent residential buildings.<sup>1</sup> As a consequence there has been a call for greater flexibility in ownership structures.

## The Issues

Multiple ownership buildings create unique problems regarding repair and maintenance. Ownership of a unit involves physical, financial and social interdependency with the other units, owners and occupiers of the building.

In Britain different legal arrangements have been created north and south of the Scottish border to deal with these issues. In England and Wales, flats are owned and managed under leasehold structures with

# The Basics

property management generally falling to the landlord although in recent years changes in leasehold legislation have enabled tenants to take over responsibility for management in some cases. In Scotland, flat ownership is governed by the common law or more commonly by the provisions of the title deeds for the property.

## The Response

In England and Wales the traditional response to the demands for more integrated residential communities (ie. higher density living) has until recently been remedial legislation to reform leasehold law. In other jurisdictions the answer has been the introduction and subsequent reform of community title systems.

Under these community title systems management of properties with communal facilities is dealt with through collective organisations, known as bodies corporate or owners corporations. These organisations together with the scheme documents (known by different terms in each jurisdiction but commonly known as by-laws, community statements or building management statements) regulate the management of property and decisions. In each case, the key considerations are the need to come collectively to decisions, to act upon those decisions, and to ensure that owners contribute to the associated costs.<sup>2</sup>

While the legislation differs in structure and operation in each jurisdiction, in each it generally provides a framework under which the purchase of a unit involves:

- the purchase of an individual (freehold) title;
- a share in the common property of the development; and
- membership of an association, which has a statutory responsibility to manage the common parts of the development.<sup>3</sup>

The Act introduces this framework of freehold ownership into England and Wales.

# The Basics

The regulatory impact assessment that accompanied the Commonhold and Leasehold Reform Bill introduced in 2000, described Commonhold as the name given in England and Wales:

'... to a scheme widely used throughout the rest of the world with greater or lesser degrees of variation. It provides for multiple occupation of developments such as blocks of flats, or mixed flats and shops, or business parks in which unit owners have an interest in their unit of occupation, whatever that may be, which is closely analogous to a freehold interest. A body corporate, the commonhold association, made up exclusively of unit holders, owns and manages the common parts of the development, which may be no more than hallways and stairs, but might run to parks, sports halls, lakes etc.'<sup>4</sup>

## The Purpose

The Act was principally brought in to 'relieve the plight of residential long leaseholders by reforming the existing leasehold system and to offer a robust and well-tried alternative scheme in commonhold'.<sup>5</sup> It represented a significant policy move away from leasehold tenure but at the same time leasehold reform continues. Of course commonhold does not represent the end of leasehold development. At the time of writing the Act has been in place for almost twelve months and there have only been a handful of commonhold registrations. Leasehold schemes therefore remain the predominant form of structure for multiple ownership developments. As a result the government thought that 'stopping leasehold in its tracks [would not be] the most prudent way to proceed'.<sup>6</sup>

There is no requirement for existing schemes to be converted into commonhold ownership, and a number of obstacles will exist for those wishing to convert existing schemes (particularly residential schemes) into the new regime. The principal hurdle is the requirement that all long leaseholders consent to the conversion.<sup>7</sup>

It is therefore likely that the initial application of commonhold will be to new developments or to smaller existing leasehold schemes as obtaining unanimous agreement to conversion may be difficult to obtain in many cases.

# The Basics

## Comparison with leasehold structures

The common law of England and Wales has long provided that the burden of a positive covenant does not bind successors in title of the original covenantor. This rule is derived from the decision in *Austerberry v Oldham Corporation*,<sup>8</sup> and more recently confirmed by the House of Lords in the 1994 decision of *Rhone v Stephens*,<sup>9</sup> In *Rhone v Stephens*, Lord Templeman stated:

'... For over 100 years it has been clear and accepted law that equity will enforce negative covenants against freehold land but has no power to enforce positive covenants against successors in title of the land. To enforce a positive covenant would be to enforce a positive obligation against a person who has not covenanted. To enforce negative covenants is only to treat the land as subject to a restriction.'<sup>10</sup>

The Act overcomes this problem by permitting the enforceability of mutually dependent obligations in a freehold environment.<sup>11</sup>

### PRACTICE POINT

While the Act allows for the enforcement of positive covenants within the commonhold, the rule in *Austerberry* will still apply in relation to situations involving the commonhold and third parties - eg neighbouring properties not within the commonhold.

The obligations arise either under the Act, the Regulations or through the documentation put in place for a particular scheme, most notably the commonhold community statement.

To date, the way of overcoming the problems caused by the rule of equity laid down in *Austerberry* has been through the use of leases or through contract by chains of covenants.<sup>12</sup>

By comparison to freehold, leasehold law permits the enforcement of positive covenants through leases against successors in title. In the case of leases granted prior to 1996, covenants which touch and concern the land are enforceable by the landlord against successors

# The Basics

in title. In the case of leases granted since the end of 1995, all landlord covenants and tenant covenants (save for some statutory exceptions)<sup>13</sup> are enforceable by and against successors in title.<sup>14</sup> This applies whether or not the covenant has reference to the subject matter of the lease or whether the covenant is express, implied or imposed by law.<sup>15</sup>

For this reason leasehold structures have traditionally used for blocks of flats, and other buildings with multiple occupation, in order to ensure that covenants relating to repair and similar necessary covenants are enforceable against successors in title.

Freehold ownership is still commonly adopted for in England and Wales for schemes such as retail, industrial or office park developments where there are separate structures with common parts. For such schemes the issue of enforcing positive covenants is usually dealt with by way of rent charges or chains of covenants. The need for deeds of covenants however becomes problematic in the case of a scheme consisting of a large number of units, where changes of ownership may be frequent.

While the use of leasehold structures has solved the problem of enforcement of covenants against successors in title it has created other problems. Part of the rationale for the introduction of commonhold was that many tenants have experienced 'serious difficulties with their landlords, ranging from neglect of their obligations under the lease to outright exploitation'.<sup>16</sup>

Some of the perceived problems of leasehold structures are:

- leases are a wasting asset - the value of the investment reduces over time;<sup>17</sup>
- the relationship of landlord and tenant is often confrontational as a result of the different economic interests that landlord and tenant have;
- tenants may have problems enforcing the covenants/obligations of other tenants in the same scheme; <sup>18</sup> and
- leases are subject to archaic rules such as forfeiture.

# The Basics

Leasehold systems are also predominantly document driven, and in some cases leases contain inadequate covenants which can result in problems such as gaps in repair obligations. Where a property consists of a number of units, (for example a typical flat building), an additional problem is that purchasers have little certainty that the obligations imposed in respect of each unit are identical.

By comparison, a commonhold unit is a freehold unit. There is no landlord and tenant relationship (although commonhold units can be leased, subject to some limitations (see [Letting of a Commonhold Unit](#)).

Under commonhold a single document, the Commonhold Community Statement ('CCS'), will apply to each unit. Unit-holders will have certainty that the same rules and regulations will apply to each unit-holder subject only to variations set out in the CCS itself.

## Recent leasehold reform

Many of the abuses made possible under leasehold legislation and some of the defects in the leasehold system have been corrected by changes in recent years to leasehold legislation. Part 2 of the Act contains yet more changes to leasehold legislation.

Developers of leasehold schemes now have to run the gauntlet of the myriad of rights granted to tenants under leasehold legislation, including:

- The first right of refusal to purchase the freehold reversion under the Landlord and Tenant Act 1987 (as amended);
- The right to take over management of common areas under Part 2 of the Act;
- The right to collectively enfranchise under the Leasehold Reform, Housing and Urban Development Act 2003 as amended by Part 2 of the Act;
- The right to apply to vary the terms of a lease under Part IV of the Landlord and Tenant Act 1987; and
- The right to challenge the reasonableness of service charges under the Landlord and Tenant Act 1985.

# The Basics

There are also consultation requirements in relation to service charges and the terms of management contracts.<sup>19</sup>

These changes have resulted in a very complex system which very few lawyers let alone property owners fully understand. The changes have also resulted in a split in jurisdiction between the courts and the Leasehold Valuation Tribunal.

In some cases, such rights and restrictions also make sustainable management structures difficult for example the outlawing of long-term management contracts and the consultation provisions regarding service charge expenditure can make long term financial planning difficult. With sustainable communities becoming an increasingly popular concept in political circles, it is important that developers have a management structure available which can support such concepts.

## Other jurisdictions

Freehold systems of property ownership similar to commonhold have existed in other jurisdictions for some time. New South Wales, Australia for example has had a system of strata title ownership since 1961. As these forms of ownership became more popular, the legislation in most jurisdictions was reformed to build in more flexibility and complexity. The legislation in most Australian states has been revised several times and at the time of publication New Zealand was undertaking a review of its own legislation introduced in 1972.

By comparison to other jurisdictions the commonhold system introduced by the Act is fairly basic. It certainly does not have the level of complexity or flexibility of the Australian strata title systems for example.<sup>20</sup>

While many in the industry have expressed deep concern that this complexity and flexibility has not been built into the Act despite lengthy debate of the proposals, it is likely that the commonhold system will develop and grow over time.

# The Basics

## Implementation of commonhold

The Act received Royal Assent on 1 May 2002, but did not come into force until 27 September 2004. **21**

Sections 21(4) and (5) of the Act which deal with the extinguishment of certain part unit interests on registration of a commonhold have not yet come into force. See [Letting of a Commonhold Unit](#).

## Application of commonhold

Commonhold relates to land in England and Wales. **22** The Act binds the Crown. **23** While traditionally the Crown was not able to own a freehold estate, since the Land Registration Act 2002, Her Majesty has had the power to grant herself a freehold estate. **24** Therefore the Crown will be able to create commonholds.

## The legislative framework

### The Act

The Act is primarily enabling in nature, with most of the detail left to regulations made (or to be made) under the Act. The commonhold provisions are contained in Part 1 of the Act. Part 2 of the Act deals with leasehold reform issues.

Part 1 of the Act sets out the framework for the following:

- € Registration of commonholds;
- € Commonhold units and rules regarding dealings in commonhold units;
- € Common parts, dealings in common parts and responsibility for maintenance;
- € The key commonhold documents, namely the CCS, memorandum of association and articles of association;
- € The role of the Commonhold Association;
- € Operation of the commonhold; and
- € Termination.

# The Basics

Part 1 also includes other miscellaneous provisions.

## Regulations

The more detailed aspects of the commonhold system are dealt with by the Regulations. A guidance paper on the Regulations is available from the Department of Constitutional Affairs.<sup>25</sup>

The Regulations cover such issues as:

- The application of the Act to joint unit-holders;
- The consents required prior to the creation of a commonhold;
- Multiple site commonholds;
- How commonhold units and common parts are defined;
- Restrictions on letting commonhold units;
- Permitted amendments to the CCS, articles of association and memorandum of association;
- Prescribed forms;
- Enforcement;
- Development rights; and
- Termination provisions.

The Department of Constitutional Affairs has indicated that further regulations relating to changes to statutory rules relating to leases and shared ownership structures may be introduced in the near future.

## Land Registration Rules

The detailed rules relating to the registration of land as commonhold land are set out in the Commonhold (Land Registration) Rules 2004.<sup>26</sup>

These detail:

- The documents required to be lodged with various applications and their form;
- The Registrar's powers in respect of commonhold specific issues;

# The Basics

- The Registrar's duties relating to service of notices;
- Rules relating to transfers of part of commonhold units or common parts and charges over commonhold units and common parts;
- Rules relating to the alteration of the extent of commonhold units or common parts and charges;
- Rules relating to applications to add land to commonhold schemes;
- Termination of commonholds and registration of successor commonhold associations;
- Surrender of development rights; and
- Miscellaneous provisions.

## Key terms and concepts

The term commonhold was chosen by the Aldridge Committee (appointed in 1986 to consider the problems raised by combined ownership of land) over the terms used in other jurisdictions.<sup>27</sup>

The term commonhold was adopted because it conveyed both the notion of land ownership and of the element of community of interests and co-operation in management which is necessary in such a scheme.<sup>28</sup>

Commonhold creates a community of freehold interests which is borne out of registration of the land as commonhold land at the Land Registry. The community consists of owners (called unit-holders) of separate commonhold units. There must be at least two units. The Commonhold Association is the owner of the remainder of the commonhold ('the common parts'). The Commonhold Association is a private company limited by guarantee and has responsibility for the maintenance and insurance of common parts. The unit-holders pay for the upkeep and insurance of the common parts and the other cost of running the commonhold through a commonhold assessment which is levied by the directors of the Commonhold Association.



# The Basics

Commonhold opens up a new form of direct freehold property investment that was not previously available. Occupiers of offices in a multi-storey office building can acquire their office space (though their pension fund for example) rather than having to lease it. Similarly any form of mixed-use development can be established as a commonhold.

In some other jurisdictions commonhold hotel developments have become popular with individual rooms sold to investors. The units are leased or licensed to a hotel manager and the owners share in the profits from the use of the rooms through a letting pool.

## Limitations of application

Not all land may be commonhold land. A commonhold can only be created from registered freehold land with title absolute. Unlike the position in New South Wales for example, a commonhold cannot be created out of a leasehold title.

The Act also imposes limitations on certain classes of land, which cannot be the subject of an application for registration as commonhold land.<sup>32</sup>

The classes of land excluded are:

- certain agricultural land (namely agricultural land within the meaning of the Agriculture Act 1947, land comprised in a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986, or land comprised in a farm business tenancy for the purposes of the Agricultural Tenancies Act 1995);
- flying freeholds (except where it is to be added to land which is already registered as commonhold); and
- land which is a contingent estate (ie. land which is liable to revert to or vest in someone other than the present registered proprietor on the occurrence or non-occurrence of a particular event) including reversion occurring by operation of law under particular statutes.<sup>33</sup> Regulations may add or remove statutes from the list of relevant statutes.<sup>34</sup>

# The Basics

Further an application for registration as commonhold cannot relate to land which is already registered as commonhold.<sup>35</sup> A commonhold itself cannot consist of a flying freehold. This will preclude multiple commonholds within one vertical property (save for the exception referred to below).<sup>36</sup> By comparison, some other jurisdictions allow for layered schemes (see [Layered Schemes](#)).<sup>37</sup>

## PRACTICE POINT

### Land above and below a commonhold

The Act provides:

'An application may not be made [to register land as commonhold land] wholly or partly in relation to land above ground level ('raised land') unless all the land between the ground and the raised land is the subject of the same application'<sup>38</sup>

The exception is adding land to a commonhold if the land between the ground and the raised land forms part of the commonhold which the raised land is to be added.

Therefore a commonhold does not have to include any of the land below the area which the commonhold covers at ground level. This will permit commonholds to be created where a building sits over underground pipes or railways or even perhaps for a separate basement commonhold to be created.

What is unclear is whether the whole of a building above ground level has to form part of the commonhold. There seems some doubt as to whether all of the land above the ground floor has to be included in the application or whether it is simply only all of the land that forms the application (e.g. include the land above ground floor to a given level) and leave out the land above that from the commonhold. It is submitted that the better view is that all of the land above ground level must be included, although the issue does not seem beyond doubt.

# The Basics

## Layered Schemes

Layered arrangements, are particularly useful for mixed-use schemes. Layering involves the creation of a commonhold association for the scheme as a whole (the principal scheme) and subsidiary schemes. In the case of a scheme consisting of a mix of residential and retail units, the subsidiary schemes may consist of separate commonhold associations for the residential and retail elements.

The principal commonhold association would be responsible for the parts of the scheme common to all parts, for example the external structure of the building. The subsidiary schemes would be responsible for the common parts relating to their particular parts. For example, the residential scheme might be responsible for the maintenance of a lift that services the flats.

The members of the principal scheme would be the commonhold associations of the subsidiary schemes. The members of the subsidiary schemes would be the unit-holders of the individual units. Layered schemes can also be used for the subdivision of complexes such as resorts or similar schemes where there may be a mixture of uses and common property which is to be used (and maintained) exclusively by particular areas of the community.<sup>39</sup>

Unfortunately layered schemes are not possible under the Act although it is hoped that they may be introduced through future legislation.

## THE BASICS - NOTES

- 1 Bannister, Nigel 'A Bill of Frights' House builder, June 2002
- 2 Joseph Rowntree Foundation, Findings of Report 'Managing individual home-ownership within multi-owned property', October 2001, p1
- 3 Joseph Rowntree Foundation, Findings of Report 'Repair and maintenance of flats in multiple ownership', Housing Research 226, October 1997, p2
- 4 Lord Chancellor's Department, Regulatory Impact Assessment for Parts 1 and 2 of the Commonhold and Leasehold Reform Bill, 25 June 2001, p1
- 5 HL 2R, 5 July 2001, col 885
- 6 HL 2R, 5 July 2001, col 889, per the Lord Chancellor Lord Irvine
- 7 see **Consents required**
- 8 (1885) 29 Ch D 750
- 9 [1994] 2 All ER 65
- 10 *ibid*, at p71
- 11 while the Act allows for the enforcement of positive covenants within the commonhold, the rule in *Austerberry* will still apply in relation to situations involving the commonhold and third parties - eg neighbouring properties not within the commonhold.
- 12 *Halsall v Brizell* [1957] Ch 169
- 13 Landlord and Tenant (Covenants) Act 1985 s.5 (2) namely Section 35 or 155 of the Housing Act 1985 (Covenants for repayment of discounts on early disposals); Paragraph 1 of Schedule 6A of the Housing Act, 1985 (Covenants requiring redemption of landlord's share); or Section 11 or 13 of the Housing Act 1996 or paragraph 1 or 3 of Schedule 2 to the Housing Association Act 1985 (Covenants for repayment of discount on early disposals or for restricting disposals)
- 14 Landlord and Tenant (Covenants) Act 1995 s.3 (1)
- 15 *ibid*, s.2(2)
- 16 Department of Environment Transport & Regions 'Commonhold and Leasehold Reform, Draft Bill and Consultation Paper', August 2000, p 5
- 17 An indefinite term is invalid *Charles Clay & Sons Ltd v British Railways Board* [1971] Ch 725 at 731 per Russell LJ
- 18 Unless a letting scheme can be demonstrated, see *Williams v Kiley* [2003] 1 EGLR 46,
- 19 Under the Landlord and Tenant Act 1985
- 20 For a comparison see the report of Peter Haler, Chief Executive of the Leasehold Advisory Service, March 2001 available at [www.lease-advice.org](http://www.lease-advice.org)
- 21 Commonhold and Leasehold Reform Act 2002 (Commencement No 4) Order 2004 - CLRA section 21(4) and (5)

**22** CLRA 2002, s.182

**23** CLRA 2002, s.63

**24** Land Registration Act 2002, s.79(1)

**25** See Non-Statutory Guidance on the Commonhold Regulations 2004; [www.dca.gov.uk](http://www.dca.gov.uk)

**26** [www.opsi.gov.uk](http://www.opsi.gov.uk)

**27** Commonhold: Freehold Flat and Freehold Ownership of other Interdependent Buildings: Report of a Working Group (Cm 179)

**28** *ibid*, preface, page v, para 3.

**29** Namely, the Law of Property Act 1922 (c. 16), Law of Property Act 1925 (c. 20), Housing Act 1985 (c. 68), Insolvency Act 1986 (c. 45), Law of Property (Miscellaneous Provisions) Act 1994 (c. 36), Trusts of Land and Appointment of Trustees Act 1996 (c. 47); see CLRA Schedule 5

**30** CLRA s.19(4)

**31** Such as the inability to have layered schemes and only being able to have a single commonhold assessment; see 1.15 and 3.4.14

**32** CLRA Schedule 2 Paragraphs 1 and 2

**33** Currently the School Sites Act 1841 (c38) (conveyance for use as school), the Land Clauses Act (compulsory purchase), the Literary and Scientific Institutions Act 1854 (c112) (sites for institutions) and the Places of Worship Sites Act 1873 (c50) (sites for places of worship) as specified by CLRA Schedule 2, paragraph 3(3)

**34** CLRA Schedule 2 paragraph 3(4)

**35** CLRA s.2(1)(b)

**36** The exception is where land below ground level is omitted from the commonhold. The basement of a building which excludes land below ground level could be created as a separate commonhold. Necessary rights of access and support would need to be put in place to deal with the relationship between the two parts.

**37** For example Queensland, Australia

**38** CLRA, Schedule 2, para 1

**39** Baker, and Fenn 'Commonhold a new system of Land Ownership', PLC January/February 2005, p18

# Creating a Commonhold

The Land	20
The Methods	20
The Steps	20
Creating a Commonhold Association	21
Applying for registration at the Land Registry	22
Multiple sites	31
Types of Registration	32
Effect on existing dealings	34
Compensation - Extinguished Leases	35
Title Restriction	36
Deregistration	37
Example Schemes	38
Notes	39

## The Land

In order for land to be registered as commonhold, it must be registered freehold land with title absolute, and not be one of the types referred to in [Limitations of application](#).

The land must also be specified in the memorandum of association of the relevant commonhold association as the land in relation to which the association is to exercise functions.[40](#)

An application for registration as commonhold land may be made in relation to multiple sites,[41](#) and the sites do not have to be contiguous.[42](#)

The existence of leases of the land does not preclude the registration of the land as commonhold land although in most cases the consent of the leaseholder is required.[43](#) The issue of consents is covered in more detail at [Consents required](#).

## The Methods

There are two methods of creating a commonhold - registration with unit-holders and registration without unit holders (see [Types of registration](#)). The stages involved depend upon whether the commonhold is created as a new development or out of an established development. The key difference is a transitional period which applies between registration of the land as commonhold land and the rights and obligations in the CCS taking effect.

## The Steps

The key steps in creation of a commonhold (either as a new development or out of an established development) are:

- creation of the Commonhold Association;
- the application for registration of the land as commonhold land; and
- registration of the land as commonhold land.

# Creating a Commonhold

## Creating a Commonhold Association

No special procedures apply to the creation of a Commonhold Association. It is formed in the same manner as any company limited by guarantee.

The constitution of the Commonhold Association consists of the memorandum and articles of association. The form of these must comply with the requirements of the Act and regulations made under the Act. [Commonhold Documentation](#) details the requirements relating to the form of the memorandum and articles of association.

The Commonhold Association must have a unique name and the name must end with 'Commonhold Association Limited' or the Welsh equivalent.<sup>44</sup> Companies which are not Commonhold Associations are precluded from having a name which ends in 'Commonhold Association Limited' or the Welsh equivalent. <sup>45</sup>

In addition to payment of the registration fee,<sup>49</sup> in order to incorporate the company the following documents must be provided to Companies House:<sup>50</sup>

- A statutory declaration that the requirements of the Companies Act 1985 have been complied with regard to registration;<sup>51</sup>
- The memorandum and articles of association; and
- A completed Form 10 <sup>52</sup> - this sets out the details of the first directors and secretary and the registered office of the Commonhold Association.

The subscribers' names and addresses must be specified on the memorandum and articles. The subscribers must also sign the memorandum and articles and their signatures must be witnessed.

# Creating a Commonhold

## PRACTICE POINT

### Creating a Commonhold Association - Pre-incorporation checklist

- Identify the registered office. The Commonhold Association must have a registered office in either England or Wales although it seems possible to have a registered office in Scotland if the company is incorporated in Scotland - although commonhold does not apply to land in Scotland.
- Who are to be the subscribers? The subscribers will become the first members<sup>46</sup> and must be entered in the particular of members within 14 days of the date of incorporation.<sup>47</sup>
- What land is to fall within the scope of the commonhold? The memorandum of association must specify the land in respect of which the association is to exercise functions.<sup>48</sup> The land specified should incorporate any land which may be brought into the commonhold under phased development, through the exercise of development rights.
- Identify the initial directors and company secretary. There must be at least two directors and a company secretary. Ideally the initial directors should be associated with the Commonhold Association.
- Ensure that the memorandum of association and articles of association are in accordance with the requirements of the Act - see [Commonhold Documentation](#)

## Applying for registration at the Land Registry

### Form of Application

Once the Commonhold Association is incorporated, the next step is to apply to the Land Registry for registration of the land as commonhold land.

# Creating a Commonhold

The Land Registry application (in form CM1 **53**) must be accompanied by:

- A certified copy of the certificate of incorporation of the Commonhold Association, and any altered certificate of incorporation; **54**
- The prescribed consents, order dispensing with required consents or evidence of deemed consent (see [Consents required to Dispensing with consent](#)); **55**
- Two certified copies of the CCS with plans (see [Requirements relating to documents to be provided](#)); **56**
- A certified copy of the memorandum and articles of association of the Commonhold Association; **57**
- A certificate **58** from the directors of the Commonhold Association that:
  - the memorandum and articles of association comply with regulations made under paragraph 2(1) of Schedule 3 of the Act; **59**
  - the CCS satisfies the requirements of Part 1 of the Act;
  - the application is not in respect of land which may not be commonhold land; **60** and
  - the Commonhold Association has not traded and has not incurred any liability which has not been discharged.

The requirement for this certificate will generally mean that the directors and secretary at the time of registration will have to be persons actively involved with the commonhold, as nominee directors involved simply for the purpose of incorporating the commonhold association are unlikely to give such a certificate.

- Unless the Registrar otherwise directs, a statutory declaration by the applicant (see [Requirements relating to documents to be provided](#)) **61**
- Where the application is an application with unit-holders a

# Creating a Commonhold

statement that section 9 is to apply (see [Registration under Section 9](#)). This statement must be in Form COV.62

The Section 9 statement states the names of the proposed unit-holders, their address for service, the unit number of each unit and the postal address of each unit if available.

If the freehold is not already registered a form FR1 will also be required.

It is not possible to designate the CCS or memorandum and articles of association as exempt information documents.

## Requirements relating to documents to be provided

### The Commonhold Community Statement

The requirements relating to the form of the Commonhold Community Statement are outlined in [Commonhold Documentation](#).

The Commonhold Community Statement must be accompanied by plans which identify the commonhold units. These plans must meet the Land Registry's technical requirements.<sup>64</sup>

The requirements for the plans are as follows:

- The plans must be on paper no larger than A0 size.
- The plans must clearly show the scale and orientation and be drawn to the scale quoted thereon. The preferred scale is 1/500 although 1/1250 may be satisfactory if details of the layout including individual plot boundaries can be shown clearly. However, where the boundaries are intricate or complex, such as a boundary within a building, a larger scale may be necessary.
- Plans marked 'for identification only' or 'not scale from this drawing' or any similar phrase are not acceptable. Plans which bear a statement of disclaimer intended to comply with the Property Misdescriptions Act 1991 are similarly not acceptable.
- The plans must be based on an accurate survey, plotted to the chosen scale. The accuracy must be within the plottable limits of the scale, i.e. distances scaled from the plan between well

# Creating a Commonhold

defined points of detail should be accurate to within 0.3mm at map scale plus one part in one thousand of the distance measured.

- The plans must show the boundaries of the commonhold land in relation to the boundaries of the registered freehold title and the boundaries of the commonhold units in relation to the boundaries of the commonhold land.
- The plans must define the extents of the commonhold units using a colour and number reference.
- The plans must define the extent of the commonhold land using a colour reference distinct from the colour used to define the commonhold units.
- The plans must show any access drives and pathways which form unit boundaries.
- If two or more floors of a block of units are co-extensive and the layout and extents of the units are identical, it will usually suffice if a plan of a single floor is supplied. The plan must show the number distinguishing each unit and state the floor level of each unit.
- The CCS may contain additional plans to those that define the extent of the commonhold and units. The CCS must make clear which plan defines the extent of the commonhold and units and which are for another purpose.

The Registrar may reject an application for registration if the plans are insufficiently clear or accurate.<sup>65</sup>

Currently the Land Registry offers a service to have plans approved prior to formal registration. The whole CCS must be lodged but only the plans will be approved. No fee is currently charged for this service. If the plans are approved the Land Registry will supply a letter, which should be submitted with the application to register in order to expedite approval of the application.

## **Statutory declaration**

There is no prescribed form for the statutory declaration that is required to be produced, but the Commonhold (Land Registration)

# Creating a Commonhold

Rules 2004 set out certain requirements for such a declaration. The requirements are:

- it must list the consent or orders of court dispensing with consent that have been obtained (see [Consents required](#)); **66**
- where there is a restriction on the register to any part of the property, then it must confirm that either restriction does not protect an interest in respect of which the consent of the holder is required or, if it does that the appropriate consent has been obtained;**67**
- it must confirm that no other consents are required under or by virtue of section 3 of the Act, that no consent has lapsed or been withdrawn, and that if a consent is subject to conditions, all the conditions have been satisfied; **68** and
- where the application extinguishes a charge, the declaration must identify the charge, identify the owner of the charge, give the name and address of the chargee and confirm that the consent of the owner of the charge has been obtained.**69**

A precedent statutory declaration is included in the Precedent section.

## Consents Required

The Act provides that an application for registration be accompanied by the consent of:

- (a) The registered proprietor of the freehold of the land;**70**

### PRACTICE POINT

#### Consent of the Freeholder

Although the Act requires the consent of registered proprietor of the freehold of the property, the Regulations deems such consent to be given by the person making the application for registration.**71** In practice therefore no consent will be required as the freeholder will consent by being the applicant.

# Creating a Commonhold

- (b) The registered proprietor of a leasehold estate granted for a term of more than 21 years;**72**
- (c) The registered proprietor of a charge over the whole or any part of the land; **73** and
- (d) Any other prescribed class of persons.**74**

The Regulations prescribe that consent must be obtained from:

- (a) The estate owner of any unregistered freehold interest in the whole or part of the land; **75**
- (b) The estate owner of an unregistered lease of the whole or part of the property granted for a term of more than 21 years; **76**
- (c) The owner of any mortgage, charge or lien for securing money or money's worth over the whole or part of any unregistered land in the application; **77**
- (d) The holder of a lease granted **80** for a term of not more than 21 years which will be extinguished by section 7(3)(d) or 9(3)(f) . The relevant tenant need not be in possession.

## PRACTICE POINT

### Consent of Mortgagees / Chargees

Consent will be required from the holder of a charge over any unregistered freehold or leasehold land which is capable of registration.

This will consist of charges over an unregistered freehold **78** and charges over leases with at least 7 years to run.**79**

In the case of unregistered freehold, this should be fairly straightforward to ascertain as the freeholder applicant should be aware of whether the freehold is subject to a charge. Land charge searches will reveal this in any event. In the case of unregistered leases appropriate enquiries should be made of the tenant.

# Creating a Commonhold

However, consent is not required from such a tenant if the applicant gives the tenant a replacement lease:

- of the same premises;
- on the same terms (save as to the extent necessary to comply with the Act and regulations);
- at the same rent and containing the same provisions for rent review;
- for a term equivalent to the unexpired term of the extinguished lease; and
- to take effect immediately after the lease is extinguished.<sup>81</sup>

It is also necessary to protect this entitlement by a notice in the land register/land charges register before the registration application is made.<sup>82</sup> This is to ensure that successors in title are bound.

Consent is not required from the holders of easements or rent charges as these interests will continue to bind the land on registration as commonhold land.<sup>83</sup> Similarly other entries such as cautions and notices will be carried forward unless discharged cancelled or withdrawn.<sup>84</sup>

## PRACTICE POINT

### Dealing with tenants

Regulation 3(2) ensures that the holders of leases of less than 21 years cannot prevent the conversion of a property into a commonhold, but protects their position by ensuring that they are granted a replacement lease. It is of course open for the parties to negotiate an alternative arrangement, such as the tenant purchasing a unit in the scheme in lieu of taking a replacement lease.

### Stamp Duty Land Tax Issues

A tenant of a lease which is extinguished by virtue of the tenant being granted a replacement lease may as the law stands suffer adverse Stamp Duty Land Tax consequences.

# Creating a Commonhold

Under paragraph 16 of Schedule 17A of the Finance Act 2003, relief against Stamp Duty Land Tax is available in circumstances where a lease is granted in consideration of the surrender of another lease where the new lease is of substantially the same premises.

The paragraph provides that in calculating the net present value of the new lease any rent payable under the new lease for any period falling within the overlap period is reduced by the rent which would have been payable for that period under the old lease.

However, this relief is only available where the old lease was subject to Stamp Duty Land Tax. If the old lease was subject to Stamp Duty then the Inland Revenue takes the view that all rent payable under the new lease is to be included,<sup>85</sup> for the purpose of calculating the Stamp Duty Land Tax

## Consents - Deregistration

The registered proprietor may apply to deregister the property as a commonhold (ie. convert it back to ordinary freehold) during the transitional period.<sup>86</sup> The same consents as are required to register the land as commonhold land are required to deregister the land as commonhold.<sup>87</sup>

## Consent - other relevant issues

Consent to registration of land as commonhold land is required to be provided in a prescribed form. Form CON1 <sup>88</sup> is to be used for the initial registration (under section 2 of the Act). Form CON2 <sup>89</sup> is to be used for an application during the transitional period for deregistration as a commonhold.

Subject to any condition imposing a shorter period, consents will lapse if no application is made within 12 months of the giving of consent.<sup>90</sup> Consent (or deemed consent, as the case may be) is binding on successors in title <sup>91</sup> and is deemed to be given by any person deriving title from a person who has given consent.<sup>92</sup>

Consent may be withdrawn at any time before the date on which an application has been submitted to the Registrar.<sup>93</sup> The Act however does not prohibit a person covenanting by contract not to revoke consent.

# Creating a Commonhold

Consent may also be given subject to conditions.<sup>94</sup> Conditions may be appropriate where for example a tenant is prepared to give consent subject to the landlord or acquiring developer (as the case may be) entering into an agreement to acquire a unit in a converted or new built scheme or perhaps more commonly conditional on payment of an agreed sum for surrender of the lease.

## PRACTICE POINT

### Consents - Time Limit

It might be appropriate in an option agreement for example to include a provision requiring the owner of the property to consent to the registration of the land as commonhold land, and not to revoke that consent for a specified period. Of course, the statutory longstop date of 12 months will apply. Where the option period is longer than 12 months it would be appropriate to require consent to be given on exercise of the option.

Where consent is conditional, the statutory declaration accompanying the application to register the land as commonhold land must make it clear that all conditions have been fully satisfied.<sup>95</sup>

Consents can be used for a subsequent registration application (eg. if the original application is withdrawn, rejected or cancelled) but this is subject to the consents otherwise remaining valid. For example, the consents will lapse after 12 months (or any shorter period if applicable) if the subsequent application is not made within that period.<sup>96</sup>

### Dispensing with consent

One issue which was of considerable interest to those looking to convert existing buildings into commonhold schemes was the extent to which there would be scope to dispense with consent. Some had suggested that the need for consent should be able to be dispensed with if a person whose consent was required were unreasonably withholding consent; thereby meaning that someone could not unreasonably 'ransom' the conversion of a building into a

# Creating a Commonhold

commonhold. There is however no test of reasonableness in the Act or Regulations in relation to the withholding of consent.

Consent may only be dispensed with by the court in very limited circumstances, namely where:

- a person cannot be identified after all reasonable efforts have been made to ascertain the identity of the person required to give consent;
- a person cannot be traced after all reasonable efforts have been made to trace him; or
- a person has been sent the request for consent and all reasonable efforts have been made to obtain a response but the person has not responded.<sup>97</sup>

Importantly if a person whose consent is required does respond and refuses consent, there is no right to challenge the reasonableness of this decision.

If a court order has been made it must be lodged with the application to register the land as commonhold.<sup>98</sup> If the court order is made subject to conditions, the order must be accompanied by evidence that the conditions have been complied with.<sup>99</sup>

## Multiple sites

The Act permits registration of a commonhold over two or more non-contiguous sites. A commonhold could therefore consist of properties on either side of a public highway. If the application relates to multiple sites and the application is made by two or more persons, each of whom is a registered proprietor of part, in defining each commonhold unit the Commonhold Community Statement must provide for the extent of each unit to be situated wholly upon one part site, and not partly on one or more sites.<sup>100</sup> That is, an individual unit cannot straddle more than one title.

## Types of Registration

There are two types of commonhold registration possible.

# Creating a Commonhold

Registration without unit-holders under section 7 of the Act and registration with unit-holders under section 9 of the Act.

The difference is between a registration where all of the units will be vested in one person following registration (without unit-holders) and where they are vested in multiple owners following registration (with unit-holders).

## **Registration under Section 7 - Registration without unit holders**

A registration with unit-holders is appropriate where a commonhold is set up by a developer for a new development and sales are to be completed following registration of the commonhold. It is also appropriate for the conversion of a property to commonhold where the land is owned by a single person.

Following registration of the land as commonhold land the applicant will continue to be the registered proprietor of the whole of the freehold estate in the commonhold land.<sup>101</sup> On registration the commonhold enters what is described as a 'transitional period'.

A separate title will be created for the common parts on registration but will remain vested in the applicant during the transitional period.<sup>102</sup>

During the transitional period the rights and duties conferred and imposed by the Commonhold Community Statement do not come into force.<sup>103</sup>

Once one (but not all) of the units is vested in a person other than the applicant (ie. on transfer of a unit) the transitional period will come to an end and the common parts will vest in the commonhold association.<sup>104</sup> No application is required to procure this. The Land Registry will do this automatically.<sup>105</sup>

The rules and rights conferred and imposed by the Commonhold Community Statement will come into force immediately at the end of the transitional period.<sup>106</sup> At the same time any lease of the whole or part of the commonhold land will be extinguished.<sup>107</sup>

## **Registration under Section 9 - Registration with Unit-Holders**

A registration with unit-holders is appropriate where a property is

# Creating a Commonhold

already owned or occupied by separate parties and following registration each of those parties are to own one or more units. It may also be appropriate in a joint venture situation where one party owns the land but the intention is that the property will be subdivided into separate ownership immediately upon registration.

The application to register the land as commonhold land in this case must be accompanied by a statement that section 9 is to apply - in Form COV.**108** The form COV sets out a list of the units and a full name and address for service of the relevant unit-holders for entry in the register.

In the case of a registration with unit holders there is no transitional period and immediately on registration:

- the commonhold association will be registered as the proprietor of the common parts;**109**
- the persons specified in the Form COV will be registered as the proprietors of the units;**110**
- the rights and duties conferred and imposed by the CCS will come into force;**111** and
- any lease of the whole or part of the commonhold land will be extinguished.**112**

## PRACTICE POINT

### Checklist - Application for registration - Form CM1

- Ensure the application is made by the registered proprietor.
- Ensure the registered proprietor(s) has a freehold title registered with absolute title**113**
- Is this application 'with unit-holders'? If so, a Form COV must accompany the application.
- Application fee.**114**
- Documents to accompany the application

# Creating a Commonhold

## Enfranchisement

Tenants who wish to convert to a commonhold scheme will have to first enfranchise and subsequently register the land as commonhold land. The tenants would register the land under section 9 (i.e. with unit-holders). Of course, this will require unanimity among the unit-holders and the tenants being able to satisfy the normal enfranchisement rules.

## Effect on existing dealings

Registration of land as commonhold land creates additional rights and duties in respect of ownership of the land that may affect the property in question. For this reason it was necessary for the Act to deal with the impact of registration on existing dealings affecting a property.

## Charges

### Charges over common parts

Any charge over the common parts will be extinguished (to the extent that it relates to the common parts) once the commonhold association is registered as proprietor of the common parts.<sup>115</sup> In the case of a registration without unit-holders, this will occur at the end of the transitional period. In the case of a registration with unit-holders, this will occur automatically on registration.

The consent of the registered proprietor of a charge or any mortgage, charge or lien for securing money or money's worth over any part of any unregistered land in the application is required.<sup>116</sup>

Where subsequently additional property is added to the commonhold as part of the common parts, any charge will be extinguished to the extent that it relates to that land.<sup>117</sup> Again, the consent of the chargee is required in order to add the land to the commonhold.

### Charges over units

Any charge which relates to part of a commonhold unit, will be extinguished on registration to the extent that it relates to that part of the unit.<sup>118</sup> Any charge over the whole of a commonhold unit will survive registration of the commonhold in so far as it relates to that unit.

# Creating a Commonhold

Again the consent of the chargee will be required on registration of the land.<sup>119</sup>

## Leases

On activation of the commonhold (ie. at the end of the transitional period in the case of a registration without unit-holders and on registration in the case of registration with unit-holders) any lease of the whole or part of the commonhold land (whether or common parts or units) will be extinguished.<sup>120</sup> This will include any lease granted during the transitional period.

## Other Dealings

Other entries noted on the register of the property such as notices, cautions, or easements will continue on registration.

## Part Unit Interests

Section 21(4) and (5) of the Act provide for the extinguishment of interests in part of a commonhold unit on registration. The purpose of the section is to provide for the extinguishments of those existing interests which are not permitted to be created in respect of part only of a commonhold unit.

These provisions did not come into force with the rest of Part 1 of the Act, predominantly as a result of the fact that the Act did not incorporate compensation provisions relating to the extinguishment of such interests.

## Compensation - Extinguished Leases

Compensation is payable to a tenant where a lease is extinguished without the consent of the holder of the lease.<sup>121</sup> The liability for paying compensation rests with the person whose interest is most proximate to the extinguished lease.<sup>122</sup> In the case of an underlease the liability will rest on the part of the immediate landlord.<sup>123</sup> If there is no superior lease, the obligation will rest with the freeholder.

As consent is required from most leaseholders under the Regulations, the right to compensation is fairly limited.

The types of leases for which compensation will be payable are:

- leases created during the transitional period (as consent from

# Creating a Commonhold

such leaseholders is not required as registration will pre date the lease);

- equitable leases; and
- leases which do not comply with the requirements of section 54 of the Law of Property Act 1925.

The compensation provisions in the Act are very simple, and there is no statutory formula to determine how the compensation is calculated. The relevant section provides that the relevant person is 'liable for loss suffered by the holder of the extinguished lease'.<sup>124</sup>

Importantly there are no provisions requiring security to be offered for the compensation that will fall due to the leaseholder whose lease is extinguished. The tenant will therefore have to rely on the capacity of the party to pay such compensation without the tenant having any right to secure the entitlement to compensation against the property.

## Title Restriction

On registration of the commonhold, the Registrar will record a restriction in the register of the common parts title in the following terms:

'No charge by the proprietor of the registered estate is to be registered other than a legal mortgage which is accompanied by a certificate by the conveyancer or a director or secretary of the commonhold association that the creation of the mortgage was approved by a resolution complying with section 29(2) of the Commonhold and Leasehold Reform Act 2002.

A restriction will also be registered on each title unit as follows:

'No charge by the proprietor of the registered estate (other than a transfer or charge of the whole of the land in the title) is to be registered without a certificate by a conveyancer or a director or secretary of the commonhold association that the disposition is authorised by and made in accordance with the provisions of the Commonhold and Leasehold Reform Act 2002.

# Creating a Commonhold

## Deregistration

### Mistakes

There are a number of circumstances in which land may be improperly registered as commonhold land. These are:

- where an application for registration was not made in accordance with the requirements of section 2 of the Act;
- where the certificate of the directors under paragraph 7 of Schedule 1 was inaccurate; or
- where the registration contravened a provision made by or by virtue of Part 1 of the Act<sup>125</sup>.

On the application of a person who claims to be adversely affected by the registration, the court may make a declaration that land should not have been registered as commonhold land.<sup>126</sup> The court may also make any orders it considers appropriate including the following:

- that the registration be treated as valid;
- that the register be altered;
- that land cease to be commonhold land;
- requiring a director or other specified officer of a commonhold to take steps to alter a document or take other specified steps;
- to make an award of compensation to be paid by one person to another; or
- to apply, disapply or modify a provision of Schedule 8 to the Land Registration Act 2002 (indemnity).<sup>127</sup>

The Registrar has no power to amend the registration under Schedule 4 of the Land Registration Act 2002 and may only amend the register to remedy a mistake if ordered by the court.<sup>128</sup>

### Deregistration during transitional period

Land which is registered as commonhold land can also be deregistered as such during the transitional period, without having

# Creating a Commonhold

to go through the termination provisions referred to in [Termination](#).

On application by the registered proprietor to deregister the land as commonhold land during the transitional period, the Registrar will arrange for the land to cease to be registered as commonhold land.<sup>129</sup> The application is to be made in Form CM2.<sup>130</sup>

The land will revert to ordinary freehold land, although it will not revert back to a single title unless the applicant requests this (in item 3 on the Form CM2).

Unless the Registrar otherwise directs, the application to deregister the land as commonhold land must be accompanied by a statutory declaration by the applicant in accordance with Rule 6 (see [Requirements relating to docs to be provided](#)) and the consent of any party that would be required to consent to register the land as commonhold in Form CON2.<sup>131</sup>

## Example Schemes

### Conversion of a vacant building

X Limited has purchased an existing vacant building which it intends to convert into a commonhold scheme. In order to create the commonhold, it will have to register the commonhold association with Companies House, and register the land as commonhold land at the Land Registry. As the property is vacant, the developer will only have to obtain the consent of any chargee over the property. The developer can pre-sell units in the scheme off the plan. On registration (without unit-holders) the developer will become the registered proprietor of each of the units in the scheme and will remain the registered proprietor of the common parts until the end of the transitional period. The transitional period will end when another party (ie. the buyer of one of the units) becomes entitled to be registered as the registered proprietor of one (but not all) of the units in the scheme. This will occur on completion of the sale. Following completion the rules in the CCS will take effect and the commonhold association will be registered as the proprietor of the common parts in the scheme.

### Conversion of a building which is partly let

X Limited has purchased a building which is partly let to Y Limited

# Creating a Commonhold

for a term of 15 years. In this case, X Limited does not require the consent of Y Limited to registration if it offers Y Limited a replacement lease **132**. Alternatively Y Limited might agree with X Limited to purchase the freehold in the property that it occupies in which case Y Limited may consent to the conversion (presumably subject to entering into a contract with X Limited to acquire a unit). Again X Limited would register the commonhold without unit holders and transfer the unit to Y Limited following registration or completion of the new unit.

## NOTES

**40** CLRA s.1(1)(b)

**41** CLRA s.57(1)

**42** *ibid*

**43** CLRA s.2(1)(b)

**44** Regulation 12(1) The Welsh equivalent 'Cymedeithas Cydradd-Ddaliad Cyfyn-geidig' may be used if the registered office is situated in Wales

**45** Regulation 12(2)

**46** CLRA 2002, Schedule 3, para 5

**47** Article 4(a) of the model articles of association

**48** CLRA s.34(1)

**49** currently £20 (£80 for same day service)

**50** in accordance with the requirements of Section 10 of the Companies Act 1985

**51** The statutory declaration may be given by a solicitor incorporating the company, a director or secretary named in the application - Companies Act 1985 s.12

**52** [www.companieshouse.gov.uk](http://www.companieshouse.gov.uk)

**53** [www.landregistry.gov.uk](http://www.landregistry.gov.uk)

**54** CLRA Schedule 1 paragraph 1, and Commonhold (Land Registration) Rules rule 4(2)

**55** CLRA Schedule 1 paragraph 5, and CLRA s3(2)

**56** CLRA Schedule 1 paragraph 1, and Commonhold (Land Registration) Rules rule 4(2)

**57** CLRA Schedule 1 paragraph 4, and Commonhold (Land Registration) Rules rule 4(2)118. CLRA s.22

**58** CLRA Schedule 1, paragraph 7

## NOTES (continued)

- 59** namely Regulations 13 and 14 - that the memorandum and articles of association are in the same form as set out in Schedules 1 and 2 to the Regulations respectively or a form to the same effect
- 60** namely the land referred to in the CLRA Schedule 2; see 1.14
- 61** Commonhold (Land Registration) Rules rule 6(1)
- 62** [www.landregistry.gov.uk](http://www.landregistry.gov.uk)
- 63** Rule 3(3)(c) Commonhold (Land Registration) Rules 2004, disapplying rules 136 to 138 of the Land Registration Rules 2003
- 64** These requirements are set out in section 4.3.1 of the Land Registry Practice Guide No 60, see [www.landreg.gov.uk](http://www.landreg.gov.uk)
- 65** Commonhold (Land Registration) Rules, Rule 8
- 66** Commonhold (Land Registration) Rules 2004, Rule 6(2)
- 67** *ibid* Rule 6(3)
- 68** *ibid* Rule 6(4)
- 69** *ibid* Rule 6(5)
- 70** CLRA section 3(1)(a)
- 71** Regulation 4(5)(a)
- 72** CLRA section 3(1)(b)
- 73** CLRA section 3(1)(c)
- 74** CLRA section 3(1)(d)
- 75** Regulation 3(1)(a) - this is intended to cover the situation where the property is not registered at the time that the application is made - although specific consent is not required in practice as the Regulations deem consent by the applicant in any event
- 76** Regulation 3(1)(b) - in practice these leases are unlikely to occur but may do so where there has not been a trigger for first registration
- 77** Regulation 3(1)(c) - this will extend to leasehold titles
- 78** as opposed to unregistered charges over registered freehold; Land Registration Act 2002 s.4(2)(a)
- 79** Land Registration Act 2002 ss.3(3) and 4(2)(b)
- 80** *ie.* not an equitable lease
- 81** Regulation 3(2)(a)
- 82** Regulation 3(2)(b)
- 83** Land Registry Practice Guide 60, para 6.1.1
- 84** *ibid*
- 85** Stamp Duty Land Tax Manual section SDLTM13510a
- 86** see [Registration under Section 9](#)
- 87** CLRA section 8(4)
- 88** [www.landregistry.gov.uk](http://www.landregistry.gov.uk)
- 89** [www.landregistry.gov.uk](http://www.landregistry.gov.uk)
- 90** Regulation 4(4)
- 91** Regulation 4(5)
- 92** Regulation 4(5)(b)
- 93** Regulation 4(7)

- 94 Regulation 4(4)
- 95 Commonhold (Land Registration) Rules, rule 6(4); Practice Guide 60, para 4.5;
- 96 Regulation 4(6)
- 97 Regulation 5
- 98 CLRA Schedule 1 para 6 (1)
- 99 CLRA Schedule 1 para 6 (2)
- 100 Regulation 7
- 101 CLRA s.7 (2)(a)
- 102 Land Registry Practice Guide 60, paragraph 4.6
- 103 CLRA s.7 (2), although Regulations may provide that during a transitional period a relevant provision shall not have effect or shall have effect with specified modifications. CLRA s.8(2)
- 104 CLRA s.7 (3)(a)
- 105 CLRA s.7 (3)(b)
- 106 CLRA s.7 (3)(c)
- 107 CLRA s.7 (4)
- 108 [www.landregistry.gov.uk](http://www.landregistry.gov.uk)
- 109 CLRA s.9(3)(a) - without need for further application for registration s.9(3)(c)
- 110 CLRA s.9(3)(b) - without need for further application for registration s.9(3)(c)
- 111 CLRA s.9(3)(e)
- 112 CLRA s.9(3)(f)
- 113 Required by CLRA 2002, s.2(3)
- 114 At the time of publication the fee for a registration without unit-holders is £40 per unit for the first 20 units and £10 for every . Where the registration is with unit-holders, the fee is £40 per unit.
- 115 CLRA s.28(3)
- 116 See [Consents required](#)
- 117 CLRA s.28(4)
- 118 CLRA s.22
- 119 See [Consents required](#)
- 120 Under CLRA s.7(3)(d) or s.9(3)(f)
- 121 CLRA s.10(2)
- 122 *ibid*
- 123 CLRA s.10(3)
- 124 CLRA s.10(1)(a)
- 125 CLRA s.6 (1)
- 126 CLRA ss.6 (3) and(4)
- 127 CLRA s.6
- 128 CLRA s.6 (2)
- 129 CLRA s.8(4)
- 130 [www.landregistry.gov.uk](http://www.landregistry.gov.uk)
- 131 CLRA s.8(5); Commonhold (Land Registration) Rules rule 14(3)
- 132 See [Consents required](#)

# Commonhold Documentation

What is required	42
The Memorandum of Association	42
Articles of Association	44
Commonhold Community Statement	47
Management Contracts	65
Facilities Sharing Contracts/Easements	66
Forms	67
Notes	70

## What is required

In setting up a commonhold, various documents will need to be drafted. In addition to the various forms required to be produced to Companies House and the Land Registry the following documents will need to be drafted:

- The memorandum of association of the Commonhold Association;
- The articles of association of the Commonhold Association; and
- The CCS.

Other documents might be required to be prepared for the operation of the commonhold, such as management contracts or agreements dealing with the sharing of facilities between Commonhold Associations, where a development consists of a number of commonholds. There are also numerous forms prescribed as set out in Schedule 4 of the Regulations which have to be used in the operation of commonholds.

## The Memorandum of Association

### Effect

The memorandum of association governs the relationship of a company with the outside world. The memorandum binds the Commonhold Association and each of the members as if they had been executed as a deed by each and contained covenants to observe the provisions of them.<sup>133</sup>

### Form

The Regulations require the memorandum of association for a Commonhold Association be in the form set out at Schedule 1 of the Regulations, or a form to the same effect.<sup>134</sup>

The memorandum must contain all of the provisions set out in the prescribed form and these provisions will have effect whether or not adopted by the Commonhold Association.<sup>135</sup>

Each Commonhold Association must state as one of its objects the

# Commonhold Documentation

exercise of the functions of a commonhold association in respect of specified commonhold land.<sup>136</sup> This means that in practice, Commonhold Associations are unlikely to be set up as shelf companies as the memorandum must identify specified commonhold land.

The functions of a Commonhold Association extend to doing all such things incidental or conducive to the principal object of exercising the functions of the Commonhold Association in respect of the land specified in the memorandum.<sup>137</sup>

The memorandum of association must:

- Include the name of the Commonhold Association on the front page and in paragraph 1;<sup>138</sup>
- Omit 'England and Wales' or 'Wales' from paragraph 2;<sup>139</sup> and
- Include the name of the commonhold in paragraph 3.<sup>140</sup>

Additional provisions may be added but these must be preceded by a heading including 'additional provision specific to this Commonhold Association' and must appear after paragraph 5.<sup>141</sup>

The liability of members to contribute to the assets of the commonhold association on winding up or the costs and expenses of winding up is capped at £1 and this liability applies while a member or within one year after the person ceases to be a member, in respect of liabilities contracted before the person ceased to be a member.<sup>142</sup>

The memorandum must be signed by the subscribers, dated and witnessed.<sup>143</sup>

## **Are amendments to the memorandum of association necessary?**

It is unlikely that the draftsman will need to make any amendments to the memorandum of association when setting up a Commonhold Association. The subsidiary purposes of the Commonhold Association will be covered by the principal object of carrying out the functions of the commonhold association and matters incidental thereto. Additional purposes are unlikely to be necessary.

# Commonhold Documentation

The memorandum will need to comply with the requirements of the Act at the time that the application to register the land as commonhold land is made. If the Commonhold Association is set up as a shelf company, without reference for example to specified commonhold land, then alterations will need to be made, prior to registration at the Land Registry to ensure that the memorandum is in line with the requirements.

## Amending the Memorandum

Alterations to the memorandum must be made in accordance with the provisions of the Companies Act 1985. The memorandum may be amended by passing a special resolution<sup>144</sup>.

The altered version must be registered at the Land Registry using form CM3.<sup>145</sup> and Registrar is to note the register in a manner that distinguishes the latest version from the previous versions.<sup>146</sup>

Section 5 (1) of the Companies Act entitles an application to be made to the Court by not less than 15 per cent of the members of a Company to have an amendment to the memorandum to be cancelled. The application to the Land Registry cannot therefore be made until the period allowed for such application (i.e. within 21 days of the resolution being passed) has expired without such application or until the Court application is withdrawn or the amendment upheld by the Court.

## Articles of Association

### Effect

The articles of association regulate the internal operations of a company, including the powers of the directors. Like the memorandum the articles are binding on the Commonhold Association and each of its members.<sup>147</sup>

### Form

Like the memorandum of association, the articles of association for a Commonhold Association must be in a prescribed form (set out in Schedule 2 to the Regulations) or a form to the same effect.<sup>148</sup> Again they must contain all of the provisions set out in the prescribed form and such provisions will have effect whether or not adopted by the Commonhold Association.<sup>149</sup>

# Commonhold Documentation

Certain parts of the articles of association are capable of variation. The time periods in certain articles may be extended,<sup>150</sup> and in other cases, various numbers and other minor provisions may be amended or omitted.<sup>151</sup> Where the articles contain provision for the appointment of alternate directors, the articles specifying the number of permitted directors is deemed to exclude alternate directors.<sup>152</sup>

The articles must be signed by the subscribers to the memorandum of association, dated and witnessed.<sup>153</sup>

## Permitted Amendments to Prescribed Form of Articles of Association

The amendments specifically permitted by the Regulations are as follows:

ARTICLE	AMENDMENTS
Article 7 (Period of Notice),18 (Adjournment) 48(f) (Disqualification and removal of directors)	The time period referred to in these articles may be amended but may not be reduced below the periods specified
Article 48(f) (Disqualification and removal of directors)	Any number of meetings may be specified but the number may not be reduced below three
Article 13 (Quorum)	Other figures may be specified but may not be reduced below the figures mentioned and different provision may be made for different purposes
Article 36 (Notice of Proxy)	A time or date may be substituted for 'at any time'
Article 36 (Notice of Proxy)	The words 'failing that it may be delivered at the meeting to the chairman, secretary or to any director' may be deleted
Article 38 (Number of directors)	If provision is made for the appointment of alternate directors, this article will have effect with '(other than alternate directors)' inserted after 'the number of directors'

Where the Commonhold Community Statement gives the developer the right to appoint and remove directors, the provisions contained in Regulation 14(8) <sup>154</sup> are deemed to take effect, whether or not adopted by the Commonhold Association.

Additional provisions may be added to the articles but these amendments must be identified by a heading which includes 'additional provision specific to this commonhold association' and must be identified with the number of the preceding article followed by the next capital letter.<sup>155</sup>

# Commonhold Documentation

## Likely amendments to articles of association

Consideration should be given to incorporating variations to the articles of association where appropriate.

Where the Commonhold Community Statement is to allow for the appointment of developer's directors (see [Developer's directors](#)), it would be appropriate to incorporate the provisions contained in Regulations 14(8) or (9) as these will be deemed to apply in any event. It is suggested that these are incorporated as Article 81.

Although for most schemes, amendments will not be necessary, amendments might be appropriate to deal with such matters as:

- allowing for the appointment of alternate directors; or
- providing for specific quorums for specific topics; (see [Procedure at meetings](#));

## Procedure to Vary the Articles of Association

Alterations may be made to the articles of association, by special resolution.<sup>156</sup> The power of alteration may not be modified by the articles<sup>157</sup> nor contracted out of.<sup>158</sup>

Following amendment, the Association must provide the amended articles to Companies House and apply to the Registrar to update the register. <sup>159</sup> The application must be in Form CM3 and must be accompanied by a certified copy of the amended articles. The alteration will not have effect until it is registered. <sup>160</sup>

The application for registration of amended articles be accompanied by a certificate from the directors that the altered articles comply with the Regulations.<sup>161</sup>

Alterations to the articles of association must be made in good faith for the benefit of the company as a whole, however the court will not interfere with an alteration unless it of such a character that no reasonable person could have regarded it as made for the benefit of the company.<sup>162</sup>

# Commonhold Documentation

## Commonhold Community Statement

### Purpose

The Commonhold Community Statement (CCS) is the principal document which regulates the rights and duties of the Commonhold Association and the unit-holders. In the event of a conflict between the CCS and the memorandum and articles of association, the memorandum and articles will prevail.<sup>163</sup> The CCS will apply to all of the units and the common parts for the commonhold and will bind each of the unit holders and the Commonhold Association.

The CCS may impose duties on the Commonhold Association or unit-holders and may regulate the taking of decisions in respect of the management of the commonhold.<sup>164</sup>

The CCS is not entirely comprehensive in relation to the rights and duties of unit-holders and the matters affecting the commonhold property. The CCS will have to be read in conjunction with the memorandum and articles of association and the title to the unit and common parts, in order to ascertain the full extent of the rights and restrictions affecting a commonhold unit or the common property.

### What the CCS Contains

The model CCS which is set out in Schedule 3 to the Regulations is made up of a number of parts. Parts 1 through 4 consist of the mandatory rules.

Part 1 deals with introductory matters such as:

- Interpretation matters; and
- An overview of the CCS.

Part 2 deals with the identity of the commonhold land the commonhold units and rights over and rights which benefit commonhold units.

Part 3 deals with the allocation of commonhold assessments, reserve fund contributions and votes.

# Commonhold Documentation

Part 4 consists of the rules of the commonhold.

Each part is broken down into sections.

The model CCS also contains four annexures:

- Annexure 1: This contains the name of the commonhold, the name of the Commonhold Association and the company number of the Commonhold Association.
- Annexure 2: This contains a list of plans, the description of the location and extent of the commonhold land, the number of units in the commonhold, the description and extent of each of these units, the rights given to commonhold units and rights reserved over commonhold units.
- Annexure 3: This sets out the allocation of the commonhold assessment, the allocation of reserve fund levies and the allocation of votes.
- Annexure 4: This sets out the prescribed rate of interest, a description of the permitted use of each commonhold unit, the permitted use of common parts, limited use areas, the insured risks for the common parts and duties imposed on unit holders in relation to the insurance, repair and maintenance of commonhold units.

## The Rules of the Commonhold

Many of the rules contained in the CCS will be similar to covenants commonly contained in leases for similar properties, such as restrictions on the use of units and general day to day 'neighbourly' covenants such as restrictions on noise, keeping of pets, refuse collection, as well as regulations relating to the use of common property.

However, unlike a lease which relates specifically to a particular property, the CCS will operate universally for the scheme. Accordingly there will be no risk that the provisions will differ for each property, albeit that particular rights might attach to individual units. For example a unit-holder may be granted the exclusive right to use a particular part of the common property such as a car park. These rights (referred to as limited use areas) will be identified in the CCS.

# Commonhold Documentation

The duties that the Act and Regulations allow to be imposed under the CCS are fairly extensive. They extend to obligations to pay money, undertake works, grant access, to refrain from entering into transactions of a specified kind, to refrain from carrying out works of a particular kind, and to refrain from a specified behaviour.<sup>165</sup>

## Limitations on what a CCS may contain

The ability of the CCS to regulate behaviour is subject to certain limitations contained in the Act, the Regulations and the memorandum and articles of association of the Commonhold Association.

For example, regulations made may prohibit (as well as permit or require) the inclusion in a CCS specified provisions or dealing with specific matters.<sup>166</sup>

A provision in a CCS will be invalid to the extent that it is prohibited or inconsistent with the Act, the Regulations or the memorandum or articles of association of the Commonhold Association.<sup>167</sup>

## Requirements of the Act

The Act requires that the CCS imposes duties in respect of the insurance, repair and maintenance of each commonhold unit<sup>168</sup> and make provision regulating the use of commonhold units.<sup>169</sup> It must also make provision regulating the use of the common parts, and require the Commonhold Association to insure, repair and maintain the common parts.<sup>170</sup>

The Act provides that a CCS may include provision for the payment of interest in the case of late payment,<sup>171</sup> but that a CCS may not provide for the transfer or loss of an interest in land on the occurrence or non-occurrence of a specified event (eg. non-payment of levies).<sup>172</sup> This is in part intended to ensure that nothing equivalent to forfeiture of a lease can be inserted into the CCS.

A CCS may not prevent or restrict the transfer of any part of the common parts or the creation of any interest in the common parts.<sup>173</sup> The definition of interest in this respect excludes a charge. The Act itself however precludes the grant of a charge over common parts<sup>174</sup> other than by way of a legal mortgage approved by resolution of the Commonhold Association.<sup>175</sup>

# Commonhold Documentation

Therefore a commonhold association is free to deal with its interest in the common parts (and the CCS may not provide to the contrary) save that no charge may be given over the common parts save by way of a legal mortgage which has been approved by a resolution of the association.

## Form and Contents

A CCS must be in the form set out in Schedule 3 to the Regulations or a form to the same effect.<sup>176</sup> It must contain all the provisions contained in Schedule 3 and the CCS will be deemed to include those provisions.<sup>177</sup> The format of the prescribed parts of the Annexures may not be amended.<sup>178</sup>

The CCS must:

- Include the name of the commonhold on the front page and signature page and must include the information relevant to the commonhold in the relevant paragraphs in the Annexes;
- Be signed at the end in the following form:

- (a) on application for registration under section 2 - ie. on first registration

'Signed [by] [on behalf of] the applicant:

.....

Name: (please print).....

- (b) where an amended CCS is registered under section 33

'Signed [by] [on behalf of] [the commonhold association] [the developer]:

.....

Name: (please print).....

- include information relevant to the commonhold in:

Paragraph 2 of Annex 3

This sets out the reserve fund assessments to be allocated to each unit. This is relevant if the directors have established reserve funds to finance the repair and maintenance of the common parts or commonhold units.

# Commonhold Documentation

Paragraph 5 of Annex 4

This details the insured risks - if there are other risks to be insured in addition to fire.

The CCS is deemed to specify interest at 0% unless different provision is made in paragraph 1 of Annex 4.**179**

## Adding Provisions to the CCS

The prescribed parts of the CCS may not be amended.**180** Other parts of the CCS, consisting of variable sections, and the local rules may be amended.

The sections which can be changed consist of the following:

- The material to be included in the boxes in Annexures 1 to 4 of the CCS;
- The miscellaneous local rules (which are added on a case by case basis for each commonhold);
- Any additional provisions which are added to the end of a part or section of the model CCS or in an additional annex; and
- The developer's rights, (if any) which must be set out in the last annex.

Further definitions may be added to the CCS and these must be inserted in alphabetical order into paragraph 1.3.4 of the CCS. **181**

Additional provisions may also be added at the end of a Part, Section or Annex.

## Adding Provisions to a Part or Section

Where provisions are added in a Part or Section:

- The additional provision must be inserted in numerical order, containing the numbers within the relevant Part or Section;**182**
- The additional provision must be immediately preceded by a heading which must include 'additional provision specific to this commonhold' in the relevant part or section;**183** and

# Commonhold Documentation

- A reference to the heading must be included in the table of contents in the CCS.**184**

## Adding Provisions in an Annex

Where provisions are added in an Annex:

- A heading including the words 'ADDITIONAL PROVISIONS SPECIFIC TO THIS COMMONHOLD' must be inserted at the end of Part 4 following by a numbered paragraph which reads 'Additional provisions are set out in Annex' followed by the number given to the Annex;**185**
- A paragraph must be inserted in Section 1.3 in the CCS giving the number of the Annex and details of its contents;**186**
- A reference to its heading must be included in the table of contents in the CCS.**187**

## Affecting an Amendment

Except where the CCS provides otherwise an amendment to a CCS may only be made where approved by ordinary resolution of the Commonhold Association.**188** Certain amendments require the consent of specific parties or special resolutions.**189**

An amendment to a CCS will only take effect when registered.**190** The application for registration of the amended CCS (in Form CM3)**191** must be accompanied by any other additional documents required (eg. the consent of chargees where the change is to the size of a unit), and a certificate by the directors of the Commonhold Association that the statutory requirements have been satisfied.**192**

## Restrictions on Provisions in a CCS

A provision in a CCS will have no effect if it is inconsistent with the Act, anything treated to be included in the CCS by regulations, the memorandum or articles of association, or if it is prohibited by regulations.**193**

The Act specifies certain matters that a CCS may not do. A CCS may not:

- Prevent or restrict the transfer of a commonhold unit;**194**

# Commonhold Documentation

- Prevent or restrict the creation, grant or transfer by a unit-holder of an interest in the whole or part of his unit or a charge over his unit **195**- but this is subject to Regulations 17 to 19 which impose restrictions about leases;**196**
- Prevent or restrict the transfer by the Commonhold Association of its freehold estate in any part of the common parts, or the creation by the Commonhold Association of an interest in any part of the common parts**197** save for a charge or any interest which arises by virtue of a charge;**198** or
- Provide for the transfer or loss of an interest in land on the occurrence or non-occurrence of a specified event;**199** or
- Impose a duty or grant rights in respect of the period after a unit-holder transfers his interest in a unit. Similarly nothing added to a CCS will affect the former unit-holder's liability or rights incurred or acquired before the transfer.**200**

## Mandatory Provisions

The Act imposes the following additional requirements in relation to a CCS:

- The CCS must make provision regulating the use of commonhold units and the common parts; make provision imposing duties in respect of the insurance, repair and maintenance of each commonhold unit; and require the commonhold association to insure, repair and maintain the common parts **201** - these are satisfied by the mandatory provisions of the model CCS;
- The CCS must specify at least two parcels of land as commonhold units and define the extent of those units;**202**
- In defining a commonhold unit, the CCS must refer to a plan which complies with the prescribed requirements and which is included in the statement;**203** and
- The CCS must also make provisions relating to commonhold assessments as set out in Section 38 of the Act - again these are covered by the model CCS.

# Commonhold Documentation

## Restrictions on Amendments

Parts 1 to 4 and the Annexes in the specimen CCS may not be amended save for additions of additional sections (as local rules) in the manner referred to in [Adding provisions to the CSS](#) to [Adding provisions in an Annex 204](#).

Certain changes require special resolutions or the consent of specific persons. These are set out in the table below:-

AMENDMENT	CONSENT REQUIRED
Amendments to rights for, or over a commonhold unit (as specified in paragraphs 6 or 7 of Annex 2)	Prior written consent of unit-holder and registered proprietor of any charge over the unit <b>205</b>
Amendments to remove reference to a unit holder from 'authorised user' of a limited use area (in paragraph 4 of Annex 4)	Prior written consent of unit-holder and registered proprietor of any charge over the unit <b>206</b>
Amendment to the permitted use of a commonhold unit (in paragraph 2 of Annex 4)	Special resolution and prior written consent of unit-holder <b>207</b>
Redefining the extent of a commonhold unit	Prior written consent of unit-holder and registered proprietor of any charge over the unit <b>208</b>
Adding land which forms part of a commonhold unit to the common parts	Prior written consent of unit-holder and registered proprietor of any charge over that land <b>209</b>
Changing the boundaries of the commonhold, a commonhold unit or common parts consequent on a transfer	Special resolution (in addition to consent of unit-holder / chargee referred to above) <b>210</b>
Changing the percentage of commonhold assessment or levy allocated to a commonhold unit (paragraphs 1 and 2 of Annex 3)	Special resolution <b>211</b> - a unit holder is entitled not to have the percentage of commonhold assessment or levy allocated to his unit or any other unit altered if the effect (taking into account all the circumstances) would be to allocate a significantly disproportionate percentage of the commonhold assessment or levy to his commonhold unit <b>212</b>
Changing the number of votes allocated to a commonhold unit	Special resolution <b>213</b> - a unit holder is entitled not to have the number of votes allocated to him or to another member changed if the effect (taking into account all the circumstances) would be to allocate a significantly disproportionate number of votes to him <b>214</b>
Change removing land from the commonhold through the exercise of development rights Prior written consent of the relevant unit-holder. <sup>199</sup>	Prior written consent of the relevant unit-holder. <b>215</b>

Following amendment the directors must apply as soon as practicable for registration of the amended CCS at the Land Registry.**216** Any amendment will not take effect until the amended CCS is registered.**217**

The directors may amend a CCS without a resolution to include a provision required by the Act and regulations or to delete a provision which is invalid due to inconsistency with the Act, regulations, the memorandum or articles or which is prohibited by regulations.**218**

# Commonhold Documentation

## Drafting the CCS

Many of the matters relating to the operation of a commonhold are contained in the model CCS. The principal role of the draftsman will be to add the specific details relating to the particular commonhold in question and add the rules which will govern the day to day use of the commonhold units and common property. What is appropriate will depend on the nature of the commonhold scheme. The Department of Constitutional Affairs has produced a set of model provisions for inclusion to assist practitioners and to encourage standardisation where possible.<sup>219</sup>

## Main Body of the CCS

The only detail that has to be included in the first parts of the CCS is the name of the commonhold association on the first page. It might be appropriate to add additional definitions, or additional rules in Part 4.

## Annex 1 - Identity of the Commonhold and the Commonhold Association

This annex is very simple. The name of the commonhold, name of the Commonhold Association and company number of the Commonhold Association will have to be completed.

## Annex 2 - Definition of the Properties within the Commonhold

Paragraph 1 of this annex requires a list of the plans that are annexed to the CCS, including plan number, the plan reference (if different) and the date of the plan. The plans must satisfy the Land Registry's requirements <sup>220</sup> which are summarised at [Requirements relating to documents to be provided](#).

Paragraph 2 of this annex requires a description of the location and extent of the commonhold land. This can simply be the full post code address for the property or a written description.

Paragraph 3 requires the total number of commonhold units in the scheme to be completed. This should be the number at the point of registration. Where additional units are to be added through the exercise of development rights, this paragraph will need to be amended prior to the lodgement of the revised CCS.

Paragraph 4 contains a description of the location and extent of the

# Commonhold Documentation

commonhold units. The paragraph will set out the description of each unit by reference to the plans annexed to the CCS.

Paragraph 5 allows for further written description of the commonhold units. It would be appropriate to include in this paragraph reference to whether the structure and services which would otherwise be within the boundaries of a commonhold unit are included in the unit. In the case of a building such as a block of flats where there are two or more units, the structural elements and common services will be excluded by virtue of the Act.<sup>221</sup>

Paragraph 6 provides for the listing of the rights for commonhold units. This would relate to rights over the common parts. Examples would include rights of support, rights to use services, rights to use common parts, rights of light and rights of escape. They may be similar in form to rights granted under a lease in connection with the demise.

Similarly paragraph 7 provides for the listing of rights over commonhold units. This would include rights of other unit-holders and of the Commonhold Association. Again, they would be similar to rights reserved for the benefit of the landlord, and those persons authorised by the landlord in a typical lease.

The benefit of commonhold over leasehold in this respect is that each unit-holder will be able to tell at a glance what rights have been granted and reserved for the benefit of each unit-holder and the Commonhold Association for a particular scheme.

## **Annex 3 - Commonhold Allocations**

This annex deals with the allocation of assessments, levies and voting rights between each unit in the commonhold.

Paragraph 1 deals with the allocation of the commonhold assessment. It is possible to allocate zero percent to a particular unit. The percentages must total 100.

# Commonhold Documentation

## PRACTICE POINT

### Commonhold Assessments

One issue which has been of considerable interest to developers is the extent to which it is possible to have different classes of commonhold assessment.

There was some doubt when the legislation was introduced as to whether it would be possible to have different commonhold assessments some of which might be paid by certain but not all of the units-holders. For example, is it possible in a mixed-use scheme to have a separate commonhold assessment for the residential units, one for the commercial units and a separate assessment for the scheme as a whole? The generally accepted position is that it is not possible to do this and that a Commonhold Association may only have one commonhold assessment.

The reason is that Section 38 of the Act requires the directors of the commonhold to make an annual estimate of the income required to be raised from unit-holders. Each unit holder will then pay the appropriate percentage allocated to his or her unit. It is suggested that the Act only permits one assessment (although emergency assessments may be made) and the CCS only one percentage for each unit. The model CCS prohibits any changes to the format of the prescribed parts of the annexes to the CCS, which includes paragraph 1 of Annex 3.<sup>222</sup> Whether this interpretation is correct will ultimately be a matter for the courts, but in interim, it is submitted that the better view is that the assessment must be allocated on the basis of one percentage allocation.

Paragraph 2 contains the allocation of reserve fund levies between each unit. Again the allocation is by way of percentage and the percentage must add up to 100%. Unlike the position with commonhold assessments, the Act contemplates that there may be more than one reserve fund. Where there are multiple reserve funds it is not necessary that the percentages are allocated in the same proportions for each fund.

# Commonhold Documentation

## PRACTICE POINT

### Reserve Funds

A commonhold scheme might consist of a number of retail units at ground floor and flats above. The flats are serviced by a lift. The retail units benefit from a service area. The cost of maintaining the lift could be allocated among the residential unit holders and the cost of maintaining the retail service area could be allocated among the retail unit-holders through separate reserve funds. It might also be appropriate to restrict the use of the service area to the owners and occupiers (and those authorised by them) of the retail units. This would be done by specifying the area as a limited use area.

Paragraph 3 sets out the allocation of votes to each member on a poll. The number of votes which each unit-holder will have on a poll will be the number of votes allocated to his or her unit in this part of the CCS.<sup>223</sup> During the pre-commonhold or transitional period every member will have one vote.<sup>224</sup>

## PRACTICE POINT

### Setting Apportionment of Voting Rights and Assessments

Unlike the position under some strata title legislation in Australia, there is no requirement that the allocation of voting rights is the same proportion of the allocation of assessments. That is, a unit holder may have a higher or lower proportion of voting rights than his or her proportionate liability for commonhold assessments. It will be important for developers to strike the right balance in the allocation of assessments and voting rights to ensure that units are saleable and to achieve a sufficient level of fairness to avoid future disputes. While the CCS provides that a unit-holder is entitled not to have the percentage (for assessments or levies) or votes for a unit (including his own) changed in a manner which would allocate a significantly disproportionate percentage/number of votes to him this does not apply to the initial allocation - only subsequent changes.<sup>225</sup>

# Commonhold Documentation

## Annex 4 - Local Rules

Paragraph 1 of this Annex sets out the prescribed rate of interest that will apply for late payment of commonhold assessments, reserve fund levies and late payment of rent required to be diverted to the Commonhold Association to discharge outstanding payments from the relevant unit-holder. It is important to specify a percentage as if no percentage is specified a zero rate will be deemed to apply, which will obviously be a disincentive to people paying their assessments on time. **226**

Paragraph 2 will specify the permitted use for each commonhold unit. If a unit is specified as residential or for residential and incidental purposes, then the letting restrictions referred to at [Letting of a commonhold unit](#) will apply to that unit. If it is intended that the use be limited to residential uses then the words 'residential' or 'residential and incidental purposes' should be specifically adopted.

In the case of non-residential units, it might be appropriate to impose specific use restrictions, so as to limit the type of use in the case of a commercial, retail or industrial unit. Developers of commonholds will need to ensure that the permitted use is not too restrictive as to impact on value, while at the same time ensuring that the units are used for appropriate purposes. Ultimately, developers might decide to leave such matters to planning control, with usual exclusions for offensive, or immoral uses.

Paragraph 3 deals with the permitted use of common parts. What restrictions are appropriate will very much depend upon the nature of the commonhold scheme and the nature of the common parts. For most schemes a variety of rules dealing with different parts of the common parts will be appropriate. For example, there may be specific rules relating to refuse areas, facilities such as play areas or tennis courts, rules relating to communal car parks and the like. Many of these use clauses will be similar in substance to typical use provisions contained in leases.

Paragraph 4 identifies the limited use areas of the common parts. Specific areas of the common parts, as identified on plans annexed to the CCS, can be allocated for the use of certain authorised users and/or for certain authorised purposes. An example is the allocation of particular car parks to certain unit-holders of particular units, or the use of a storeroom by the manager of the scheme.

# Commonhold Documentation

Paragraph 5 sets out the risks against which the common parts must be insured. The only insured risk prescribed by the Act is fire so it will be necessary to include other normal risks. A suggested clause is:

Fire, lightning, aircraft, explosion, earthquake, storm, flood, escape of water or oil, riot, malicious damage, theft or attempted theft, falling trees and branches and aerials, subsidence, heave landslip, collision, accidental damage to underground services, professional fees, demolition and site clearance costs and public liability to anyone else.

Paragraphs 6 and 7 set out the obligations on unit holders in respect of the insurance, repair and maintenance of commonhold units. There is no obligation imposed on unit holders under the Act in relation to such matters so if it is intended to impose such obligations then these will need to be specifically included. Where a scheme consists of a series of stand alone units, it might be appropriate to impose obligations on each unit holder to insure his or her own unit. Where not stand alone, the structure will form part of the common parts and therefore will be insured by the Commonhold Association.

## Development rights

### Purpose

Development rights are certain rights reserved to the developer of a commonhold which apply once the provisions of the CCS become operative. Development rights are designed to enable the orderly completion of a commonhold development by giving a developer appropriate powers and rights from registration of the commonhold until the development is completed.

They will be particularly important with staged developments where parts of a development will be completed following completion of the sale of one or more units.

The Act attempts to strike a balance between the need of the developer to be able to complete the development against the need for protection for unit-holders against alterations of the facilities of a commonhold from the development presented to them when they purchased.

# Commonhold Documentation

## Form

The development rights (if any) will be set out in the CCS. As the CCS will have to be filed when the commonhold is registered, the development rights will be fixed on the sale of the first unit.

Development rights may be retained by a 'developer' in connection with 'development business'.<sup>227</sup> The developer is the person who makes the application for registration. <sup>228</sup>

It is therefore open to any applicant to retain development rights. It is not limited, for example, to the developer of a new building. In practice, however, it is unlikely that such rights would be reserved unless necessary. For example a freeholder company controlled by long leaseholders is unlikely to reserve development rights when it converts to commonhold unless there is some redevelopment taking place.

## What development rights may cover

Development rights may involve:

- The completion or execution of works on:
  - a commonhold;
  - land which is or may be added to a commonhold; or
  - land which has been removed from a commonhold.
- Transactions in commonhold units;
- Advertising and other activities designed to promote transactions in commonhold units;
- The addition of land to a commonhold;
- The removal of land from a commonhold;
- Amendment of a CCS (including amendment to redefine the extent of a commonhold unit); and
- Appointment and removal of directors of a commonhold association.

A CCS may include provision:

- requiring the Commonhold Association or a unit-holder to co-

# Commonhold Documentation

operate with the developer for a specified purpose connected with development business;

- making the exercise of a development right subject to terms or conditions;
- making provision about the effect of a breach of a requirement (on a Commonhold Association or unit-holder) or a term or condition attaching to the right; and
- disapplying the provision, which requires a resolution of the Commonhold Association for the addition of land to a commonhold.**229**

## Limitations on exercise of Development Rights

The Regulations regulate and restrict the exercise of development rights.

The developer must not exercise development rights in a manner as to:

- unreasonably interfere with a unit-holder's enjoyment of the freehold estate in a commonhold unit;**230** or
- unreasonably interfere with the exercise by any unit-holder or tenant of his rights under the CCS.**231**

A developer may not remove land from a commonhold that has been transferred to a unit-holder without the prior written consent of the unit-holder.**232**

The developer is required to make good any damage to the common parts or a commonhold unit caused in the course of undertaking development business, as soon as reasonably practicable. In doing so the developer may take into account the future works required to complete the development and the degree of interference caused by the damage.**233**

Development rights may not be exercised if the works for which the rights were conferred have been completed. The exception is that rights permitting or facilitating the marketing of the development may be exercised for such further period as the developer continues to undertake that activity in relation to the commonhold.**234**

# Commonhold Documentation

## Transfer of Development Rights

The extent to which development rights may be passed to successors in title depends upon when the transfer occurs.

The situation is set out the table below:

TIME OF TRANSFER	LAND TRANSFERRED	EFFECT
During transitional period	Whole of commonhold Part of commonhold	Successor treated as the developer <b>235</b> Successor treated as developer for any matter which arises after transfer which affects the property transferred <b>236</b>
After transitional Period or no transitional period	Whole or Part (other than a single unit) transferred expressed to be subject to development rights	Successor treated as developer for any matter which arises after the transfer which affects the property transferred <b>237</b>

Importantly where a developer wishes to pass on development rights after the end of the transitional period then transfer will need to be expressed to be with the benefit of development rights **238**.

A person who does not hold a freehold estate in any part of the commonhold can never exercise development rights, **239** although in practice such rights could be exercised through agents, contractors or others appointed by the developer. **240**

## Amending rights

There is no mechanism in the Act for amending development rights but they may be amended by resolution of the Commonhold Association to amend the CCS. There is no provision requiring the consent of the developer to such an amendment. Such a provision did appear in an earlier version of the proposed regulations but was left out of the final Regulations.

Also, it is important to note that development rights can only be conferred on the developer (i.e. the applicant when the commonhold was registered) or the successor in title to whom the property is transferred.

What is not clear is whether the development rights can be altered after the end of the transitional period, if the land has been transferred. The rights transferred will be those in the CCS at the time of the transfer. It is not clear whether further rights can be

# Commonhold Documentation

granted to the transferee after that time, as the transferee was never the applicant. The safer view is that the development rights cannot be amended to grant further rights at that stage. It is therefore very important that sufficient rights are reserved on establishment of the scheme.

## Termination

There are a number of ways in which development rights may terminate.

### (a) Effluxion of time/completion of works

Development rights cannot be exercised if the works for which the rights were conferred have been completed.<sup>241</sup> The exception (as referred to above) is that rights permitting or facilitating the marketing of the development can continue so long as the developer is engaged in doing this.<sup>242</sup>

### (b) Surrender

The Act contemplates that development rights may be surrendered by a developer although this is unlikely to occur until the development is completed.<sup>243</sup> The developer may give notice to the Registrar surrendering the development rights. The application is to be in Form SR1.<sup>244</sup> On receipt the Registrar will arrange for the termination to be recorded in the register. The rights surrendered will cease to be exercisable when the notice is registered.<sup>245</sup>

Following registration the Registrar is to give notice of the registration to the Commonhold Association.<sup>246</sup>

## Comparison with leasehold arrangements

For commonhold to succeed, developers will need to feel that the commonhold system does not unreasonably affect their development business. The issue of development rights is one which could sway developer's views on commonhold as a whole.

Currently if a developer carries out a development under a leasehold system, he or she can retain control over the estate and future development subject to and with reservations made under the terms of the lease and other contract documentation. There is no specific

# Commonhold Documentation

statutory intervention. By comparison, development rights are less certain at this stage, as there has not been any judicial interpretation of the relevant provisions of the Act. The areas of uncertainty referred to above and the fact that the provision requiring the developer's consent to the alteration of development rights may give some developers concern about their use. Where staged development is proposed, it may be appropriate in some cases to create separate Commonhold Associations, unless the developer is able to maintain a majority control over the Commonhold Association, in order to facilitate the development proposed.

## Management Contracts

In some other jurisdictions, where similar structures have been in place for some time, there has traditionally been a split between property management and management of the administrative aspects of the bodies equivalent of Commonhold Associations. The imposition of Companies Act requirements on Commonhold Associations is likely to result in many Commonhold Associations engaging professionals to deal with the administration and regulatory aspects of management.

## Property Management Contracts

Property management contracts for commonholds will generally be similar in form to management agreements for leasehold properties. Some issues that will need to be considered in drafting management contracts are as follows.

- The term of the contract - the consultation/termination provisions which apply in respect of leasehold properties do not apply to commonhold schemes. Developers are therefore free to put in place long term management contracts.
- The scope of the services to be provided - regard will have to be had to the obligations of the Commonhold Association in relation to insurance of the commonhold units and provisions dealing with limited use areas.
- The extent of delegation of powers of the board of the Commonhold Association and who the manager may take instructions from. Consideration should also be given to those matters (such as alterations to the common parts) which require resolutions of the Commonhold Association.

# Commonhold Documentation

- Termination for breach and events of insolvency.
- Dispute Resolution - Unlike the position in some other jurisdictions, the dispute resolution system introduced by the Act (through the provisions of the CCS) does not apply to disputes between the commonhold association and its managers. Accordingly, any disputes will need to be dealt with through traditional dispute resolution mechanisms.
- Management fees
- Reimbursement of expenses incurred in providing the services

## Administration Management Contracts

As commonholds will need to comply with the administrative requirements of the Act, and those parts of the Companies Act which apply to Commonhold Associations, it may be appropriate for associations to engage the services of a professional administration manager to deal with these issues.

Alternatively, a Commonhold Association may wish to appoint a professional management company as the company secretary and have the administrative functions performed by the secretary.

## Facilities Sharing Contracts/Easements

For larger commonhold schemes, it may be desirable to create a number of separate commonholds rather than having a single commonhold. There are a number of reasons why this could be the case. First, having a very large commonhold may make management difficult due to the number of unit holders involved. Secondly, there may be a mix of uses may achieve a fairer apportionment of the cost of running the common parts. Thirdly, for a phased development, a developer might consider it easier to set up separate commonholds than to have to add land on a phase by phase basis and amend the CCS for the scheme each time.

There may also be situations where there are multiple commonholds where there are facilities or services which form part of the common property for a particular commonhold but which are intended to be used by other commonholds.

# Commonhold Documentation

Where the common facilities consist of roads or utility services then easements may be appropriate.

## Forms

Schedule 4 of the Regulations sets out a series of prescribed forms to be used in the operation of a commonhold.

The forms are quite self explanatory and can be broken down into a number of main groups:

- Forms dealing with commonhold assessments, and reserve fund levies
- Notices relating to the diversion of rent;
- The commonhold unit information certificate;
- Notices regarding dealing in units;
- Forms relating to disputes

The forms that have so far been prescribed **247** by the Regulations are set out in the table on the following pages.

# Commonhold Documentation

FORM	USE
Form 1 - Notice of proposed commonhold assessment	This is to be used by the directors to give notice to the unit-holders of the proposed commonhold assessment.
Form 2 - Request for payment of commonhold assessment	This is the form to be used to give notice of the actual assessment raised and requiring the unit-holder to pay the assessment
Form 3 - Request for payment of emergency commonhold assessment	This serves the same purpose as the Form 2 but for emergency assessments
Form 4 - Notice of proposed reserve fund levy	This serves the same purpose as Form 1 but for reserve fund levies
Form 5 - Request for payment of reserve fund levy	This serves the same purpose as Form 2 but for reserve fund levies
Form 6 - Notice to tenant of diversion of rent	This is the form to be used to divert rent due from a tenant to a unit-holder, in order to discharge outstanding assessments and levies due from the unit-holder
Form 7 - Notice to sub-tenant of diversion of rent	This form may be used if the property is sub-let, in order to divert rent from a sub-tenant in circumstances where the tenant has defaulted in paying the rent to the commonhold association (where a notice of diversion has been served on the tenant)
Form 8 - Notice requesting further details about a tenancy	This form is to be used to obtain details of the length of a tenancy and the rent payable in order to facilitate service of a notice of diversion of rent
Form 9 - Commonhold unit information certificate	This form is required to be completed by a commonhold association on request by a unit-holder in order to provide a proposed purchaser with details of arrears
Form 10 - Notice of transfer of a commonhold unit	This notice must be completed and sent to the commonhold association within 14 days of the date on which the transferee is entitled to be registered as the owner of the unit at the Land Registry
Form 11 - Notice of transfer of part of a commonhold unit	This notice must be completed and sent to the commonhold association within 14 days of the date on which the transferee is entitled to be registered as the owner at the Land Registry
Form 12 - Notice of vesting of a commonhold unit by operation of law	This notice must be completed and sent to the commonhold association within 14 days of the date on which the new unit-holder becomes aware of his entitlement to be registered as the owner of the unit at the Land Registry Form
Form 13 - Notice to a prospective tenant	A landlord must give this notice to a prospective tenant with a copy of the commonhold community statement together with any plans relevant to the unit or part of the unit to be let, prior to granting the tenancy
Form 14 - Notice of grant of a tenancy in a commonhold unit	This notice must be completed by the landlord and sent to the commonhold association within 14 days of the date on which the tenancy is granted.
Form 15 - Notice to a prospective assignee	Before assigning a tenancy of the whole or part of a commonhold unit, the tenant must give this notice to the prospective assignee together with a copy of the commonhold community statement, together with any plans relevant to the unit or part of the unit to be let.
Form 16 - Notice of assignment of a tenancy in a commonhold unit	his notice must be completed by the landlord and sent to the commonhold association within 14 days of the date on which the tenancy is assigned.
Form 17 - Complaint notice against commonhold association	This notice is to be used by a tenant or unit-holder in making a complaint against the commonhold association. Before giving the notice the complainant must consider whether the problem might be resolved by negotiation or the use of arbitration, mediation, conciliation or any other form of dispute resolution procedure involving a third party other than legal proceedings.
Form 18 - Reply to complaint notice against commonhold	The form is to be used by the commonhold association in response to a Form 17 complaint notice from a unit-holder or tenant.
Form 19 - Default notice	This form is to be used by a commonhold association in giving notice of a default to a unit-holder or tenant. The form is to give details of the complaint and the action requested.

# Commonhold Documentation

## FORM

Form 20 - Reply to default notice

---

Form 21 - Request for action

---

Form 22 - Reply to request for action

---

Form 23 - Complaint notice against unit-holder or tenant

---

Form 24 - Reply to complaint notice against unit-holder or tenant

## USE

This form is to be used in reply to a notice of default. The respondent is to give notice of whether the complaint is accepted as valid or disputed or whether the respondent requires further information before he or she is able to reach a conclusion on the matter.

---

This form is to be used by a unit-holder or tenant in seeking to enforce a right or duty against another unit-holder or tenant. Before giving the notice the complainant must consider whether the problem might be resolved by negotiation or the use of arbitration, mediation, conciliation or any other form of dispute resolution procedure involving a third party other than legal proceedings.

---

This form is to be used by a commonhold association in responding to a Form 21. In the form the commonhold association is to indicate whether it requires further information before it is able to reach a conclusion on the matter, whether it accepts the validity of the complaint and will serve a default notice on the alleged defaulter. The commonhold association may alternatively indicate that it will not serve a default notice on the alleged defaulter and whether the commonhold will permit the complainant to take action directly against the defaulter.

---

This form is to be used if a complainant has been given the right by the commonhold association to enforce a right or duty directly against an alleged defaulter. Before giving the notice the complainant must consider whether the problem might be resolved by negotiation or the use of arbitration, mediation, conciliation or any other form of dispute resolution procedure involving a third party other than legal proceedings.

---

This form is to be used in reply to a Form 23

## COMMONHOLD DOCUMENTATION NOTES

- 133** Companies Act 1985, s.14(1)
- 134** Regulation 13(1)
- 135** Regulation 13(2) and CLRA Schedule 3 para 2(2)
- 136** This is a requirement of the prescribed form of memorandum; paragraph 3 of the model memorandum.
- 137** Paragraph 3 of the model memorandum at Schedule 1 of the Regulations
- 138** Regulation 13(3)(a)
- 139** Regulation 13(3)(b)
- 140** Regulation 13(3)(c)
- 141** Regulation 13
- 142** Model memorandum paragraph 5
- 143** Regulations, Schedule 1
- 144** Companies Act 1985, section 4 (1)
- 145** Commonhold (Land Registration) Rules 2004, rule 19(1)
- 146** Commonhold (Land Registration) Rules 2004, rule 19(3)
- 147** Companies Act s.14(1)
- 148** Regulation 14(1)
- 149** Regulation 14(2) and CLRA Schedule 3 para 2(2)
- 150** namely articles 7, 18 and 48(f)
- 151** Namely amendments to article 48(f), 13 and 36
- 152** Regulation 14(7)
- 153** Regulations, Schedule 1
- 154** see the summary under 'Developer's Directors'
- 155** Regulation 14(6)
- 156** Companies Act 1985 s.9(1)
- 157** *Ayre v Skelsey's Adamant Cement Co Ltd* (1904) 20 TLR 587; affd (1905) 21 TLT 464, CA
- 158** *Malleson v National Insurance and Guarantee Corp* [1894] 1 Ch 200; *Andrews v Gas Meter Co* [1897] 1 Ch 361
- 159** CLRA, Sch 3 para 3(2)
- 160** CLRA, Sch 3 para 3(1)
- 161** CLRA, Sch 3 para 3(3)
- 162** *Shuttleworth v Cox Bros & Co (Maidenhead) Ltd* [1927] 2 KB 9
- 163** CLRA s.31(9)
- 164** CLRA s.31(3)
- 165** CLRA s.31(5)
- 166** CLRA s 32(2)
- 167** CLRA s.31(9)
- 168** CLRA s.14(2)
- 169** CLRA s.14(1)
- 170** CLRA s.26
- 171** CLRA s.31(6)
- 172** CLRA s.31(8)

- 173 CLRA s.27
- 174 CLRA s.28
- 175 CLRA s.29
- 176 Regulation 15(1)
- 177 Regulation 15(1)
- 178 Model CCS para 4.8.4
- 179 Regulation 15(6)
- 180 Paragraph 4.8.4 of the model CCS
- 181 Regulation 15(8) & (9)
- 182 Regulation 15(11)(a)
- 183 Regulation 15(11)(b)
- 184 Regulation 15(11)(c)
- 185 Regulation 15(12)(a)
- 186 Regulation 15(12)(b)
- 187 Regulation 15(12)(c)
- 188 para 4.8.4 of the model CS
- 189 See Restrictions on amendments
- 190 CLRA s 33(3)
- 191 [www.landregistry.gov.uk](http://www.landregistry.gov.uk)
- 192 CLRA s 33(5)
- 193 CLRA s31(9); model CCS paragraph 1.1.5
- 194 CLRA s15(2)
- 195 CLRA s.20(1)
- 196 CLRA s.20(2); see 6.2.2
- 197 CLRA s.27(1)
- 198 CLRA s.27(2)
- 199 CLRA s.31(8)
- 200 CLRA s.16
- 201 CLRA s.14(1) and (2) and s.26
- 202 CLRA s.11(2)
- 203 CLRA s.11(3); see 2.5.2
- 204 Model CCS para 4.8.2
- 205 Model CCS, para 4.8.5
- 206 Model CCS, para 4.8.6
- 207 Model CCS, para 4.8.7
- 208 CLRA s. 23(1) and s.24(2)
- 209 CLRA s.30(2)
- 210 model CCS, para 4.8.10
- 211 model CCS, para 4.8.11(a)
- 212 model CCS, para 4.8.13
- 213 model CCS, para 4.8.11(b)
- 214 model CCS, para 4.8.13
- 215 Regulation 18(3)
- 216 model CCS, para 4.8.15

- 217** CLRA s.33(3); model CCS, para 4.8.16
- 218** model CCS, para 4.8.14
- 219** [www.dca.gov.uk](http://www.dca.gov.uk)
- 220** see Land Registry Practice Guide 60
- 221** see [The commonhold unit](#)
- 222** model CCS para 4.8.4
- 223** Article 28 (b); model CCS para 3.4.1
- 224** Article 28 (b)
- 225** see model CCS para 4.8.12 and 4.8.13
- 226** Regulation 15(6)
- 227** CLRA s 58(2)
- 228** CLRA s.58(1)
- 229** CLRA s 38(3)
- 230** Regulation 18(2)(a)
- 231** Regulation 18(2)(b)
- 232** Regulation18(3)
- 233** Regulation18(4)
- 234** Regulation 5
- 235** CLRA s.59(1)
- 236** CLRA s.59 (2)
- 237** CLRA s.59(3)
- 238** *ibid*
- 239** CLRA 2002 s 59(4)
- 240** Regulation 18(6)
- 241** Regulation 18(5)
- 242** *ibid*
- 243** ELRA s.25(6)
- 244** [www.landregistry.gov.uk](http://www.landregistry.gov.uk)
- 245** CLRA s 58(6)(a)
- 246** CLRA s 58(6)(b) and (c)
- 247** [www.dca.gov.uk](http://www.dca.gov.uk)

# The Commonhold Association

Nature of the Commonhold Association	73
Application of the Companies Act and Insolvency Act	73
Membership of the Commonhold Association	74
Management of the association	75
Property management	76
Financial management	77
Administration Management	83
Notes	86

## Nature of the Commonhold Association

The Commonhold Association is a company limited by guarantee and is subject to legislation affecting such companies save as disapplied by the Act. The members of the Commonhold Association are the unit-holders of the units which form the commonhold. The members liability to contribute on winding up is capped at £1. **248**

In some other jurisdictions, unique forms of corporate bodies, which are not subject to companies legislation have been set up. These bodies have their own legal status and are capable of contracting and suing in their own name. Members do not have unlimited liability but as a consequence, the spectre of insolvency does not arise.

## Application of the Companies Act and Insolvency Act

The Act disapplies the following provisions of the Companies Act 1985:

- sections 2(7) and (3) (memorandum of association) and section 8 (articles of association);**249** and
- sections 22(2) and 23 (members: new members and holding company).**250**

Section 22(1) of the Companies Act 1985 which deals with initial members will apply to a Commonhold Association subject to the provisions of the Act dealing with membership as referred to below.**251**

The Act provides that no application for the registration of a memorandum altered by special resolution (in accordance with section 4 of the Companies Act) may be made unless the period during which an application for cancellation of the alteration may be made under section 5(1) of that Act has expired without an application being made any application under that section has been withdrawn, or the alteration is confirmed by the court under that section.**252**

The Act also introduces special rules relating to termination of commonhold associations which supplement the provisions of the Insolvency Act.**253** These rules are covered in [Termination](#).

# The Commonhold Association

## Membership of the Commonhold Association

### Before the commonhold is registered

The members of the Commonhold Association prior to registration of the commonhold at the Land Registry will be the subscriber or subscribers to the memorandum of association.**254**

### Following registration of the commonhold

During the transitional period, the members of the Commonhold Association will be:

- the subscriber or subscribers to the memorandum of association; and
- the developer (if the developer so elects);**255**

On the completion of the sale of a unit, or where there is a registration with unit-holders under section 9, each person who becomes the unit holder of a commonhold unit will be entitled to be entered in the register of members.**256**

On the transfer of a commonhold unit, the purchaser will be entitled to be entered in the register of members. Membership is not possible other than under the above provisions.**257**

Although it is possible for a Commonhold Association to own a unit, a Commonhold Association may not be a member of itself.**258**

### Joint Unit Holders

Where two or more persons become joint unit-holders of a commonhold unit, only one of them is entitled to be registered as a member of the Commonhold Association.

The joint unit-holders may nominate one of themselves by notice in writing to the Commonhold Association given within 7 days from the date of their acquisition.**259** If no nomination is made by such date the person whose name first appears in the proprietorship register is entitled to be registered as the member.**260**

# The Commonhold Association

The joint unit-holders may subsequently nominate one of themselves to be registered as the member.<sup>261</sup> Further a joint unit-holder may apply to the court for an order that the person is entitled to be registered in place of a person who is or would be entitled to be registered by default of nomination.<sup>262</sup>

## Termination of Membership

Once a member ceases to be a unit-holder or joint unit-holder of a commonhold unit, he will cease to be a member of the Commonhold Association.<sup>263</sup> Cessation of membership will not affect any right or liability which was already acquired or incurred in respect of a matter during the time when he/she was a unit-holder or joint unit holder.<sup>264</sup> Therefore an outgoing unit-holder will remain liable for outstanding commonhold assessments which accrued prior to transfer. The incoming unit-holder will also become liable for these arrears.

A member may not resign membership except by written notice and only in circumstances where he is a member by virtue of being a subscriber or the developer pursuant to paragraph 5 of Schedule 3 of the Act.<sup>265</sup>

## Management of the association

The commonhold will be managed through the Commonhold Association, the members of whom will be the unit-holders.

### First general meeting

Before registration of the commonhold land the Commonhold Association will effectively be dormant.

One of the first steps likely to occur following registration is the first annual general meeting of the company. Membership of the company at that stage will consist of at least one buyer of a unit which has been completed and sold, although it is likely that a number of buyers will have completed purchases at or around the same time.

### On-going management

Following the resignation of the subscribing members and the original directors as members, the control of the Commonhold Association will revert to the unit-holders.

# The Commonhold Association

## Property management

### **Management of the common parts**

A Commonhold Association will have a duty to manage the common parts of its commonhold to an appropriate standard.

The CCS is required to include provision regulating the use of the common parts, and requiring the Commonhold Association to repair, maintain and insure them. The duty to insure extends to an obligation to use the proceeds of insurance for the purposes of rebuilding and reinstating.

The CCS requires the association to keep the common parts in good repair.<sup>266</sup> This includes decorating them and putting them into sound condition.<sup>267</sup>

### **Enlargement of the commonhold**

A commonhold may be enlarged through a resolution without dissent of the Commonhold Association or through the addition of property by the developer through the application of development rights.<sup>268</sup>

Different rules apply depending upon whether the addition consists of additional units, units and common parts or merely common parts.

### **Dealings with the common parts**

A Commonhold Association is free to sell or deal with its interest in the common parts. It can grant easements or leases over common parts.

Importantly, unlike the position in some other jurisdictions, such decisions will not require unanimity of the members.

Special rules apply to the grant of a charge or interest arising by virtue of a charge. Charges over common parts are not permitted save for legal mortgages approved by unanimous resolution (effectively a resolution without dissent) prior to the grant of the mortgage.

# The Commonhold Association

## Alterations of common parts

A Commonhold Association may not make or permit any alterations to the common parts unless the alteration is approved by ordinary resolution.<sup>269</sup> A provision in a CCS to the contrary will be invalid.

## Insurance

The Commonhold Association must insure the common parts to their full rebuilding and reinstatement costs against loss or damage by fire and such other risks as are specified in paragraph 5 of Annex 4 of the CCS. There is no prescribed list of insured risks so these will need to be specified on a development-by-development basis. A unit-holder is entitled to inspect the insurance policy for the common parts and can also require the Commonhold Association to provide a copy on payment of reasonable charges.<sup>270</sup> The CCS may impose obligations in respect of commonhold units. If it does these are to be set out in paragraph 7 of Annex 4.

## Use of the common parts

A unit-holder or tenant may not use common parts other than in accordance with the use specified in paragraph 3 or 4 of Annex 4 of the CCS and other than in accordance with rights specified in paragraph 6 of Annex 2 of the CCS.

## Financial management

### Overview

The financial administration of the commonhold will be one of the key duties of the directors. The directors will need to ensure that the commonhold has sufficient funds with which to meet its liabilities.

The commonhold association will raise income in the form of the commonhold assessment and reserve fund levies. The commonhold association may also receive income from other sources such as from rental derived from the letting of common property.

The Act requires each commonhold community statement to include provision:

- requiring the directors to make an annual assessment of income required to meet the expenses of the Association; <sup>271</sup>

# The Commonhold Association

- enabling the directors to make estimates from time to time of the income required in addition to the annual estimate; **272**
- specifying the percentage of the estimates to be allocated to each unit; **273**
- requiring each unit-holder to pay the assessments allocated to his unit; **274** and
- requiring directors to serve assessment notices on unit-holders setting out the payments required and the amounts due. **275**

The provisions are in section 4.2 of Part 4 of the CCS. These provisions are designed to ensure that commonholds do not address their financial needs on an ad hoc basis and to ensure that advanced planning of expenditure in advance.

## Raising assessments

Before raising a commonhold assessment, the directors must give unit-holders a notice of the proposed commonhold assessment in Form 1 **276**. This requires the directors to prepare a budget of anticipated expenditure for the year.

Unit-holders are entitled to make representations to the Commonhold Association regarding the amount of the assessment within one month of when the notice is given. **277**

The directors are required to consider any representations and give a further notice specifying the payment due and a date for payment (being not less than 14 days from the date on which notice is given). The Notice is to be in Form 2. **278**

## PRACTICE POINT

### Payment by Instalments

The Form 2 notice may provide for the commonhold assessment to be payable in a single payment or by instalments.

The relevant paragraph of the model CCS, provides for the notice to specify the 'payments required' and the date on which each is due. **279**

# The Commonhold Association

Importantly there is no statutory right to challenge the level of commonhold assessment on the grounds of reasonableness, nor is the commonhold association limited in the heads of expenditure which the commonhold assessment may be applied to.

In order to overcome disputes regarding the level of commonhold assessments, directors might find it appropriate to convene the annual general meeting before issuing the notices, in order to ascertain the views of unit-holders as to the level of commonhold assessment and the appropriate payment dates.

## PRACTICE POINT

### Failure to consider representations

There are no specific remedies for members if the directors fail to consider representations. The only remedies would appear to be for the members to requisition a meeting of the Commonhold Association before the directors issue the notice of assessment.

### Emergency Assessments

The directors may make emergency commonhold assessments, and do not have to seek representations from members before doing so.<sup>280</sup>

The model CCS permits emergency assessments where the commonhold association requires income to meet its expenses in an emergency.<sup>281</sup>

While there is no guide as to what would constitute an emergency, it is submitted that an emergency would properly exist where a commonhold was required to pay for an unbudgeted expense before the commonhold association could raise funds through a normal assessment.

Form 3 is to be used for emergency assessments. <sup>282</sup>

### Limitations

Subject to the qualification regarding reserve funds (see Reserve Funds), the Act only allows for a single assessment for the expenses of the commonhold association.

# The Commonhold Association

## PRACTICE POINT

### Emergency Assessments

Form 3 contains a box in which reasons for the emergency assessment may be given, although there is no obligation in the Act, Regulations or the CCS for a reason to be given.

Unlike normal commonhold assessments, the date for payment need not be at least 14 days from the date of the notice.

Therefore, unlike the position with leasehold schemes it will not be possible to create various 'pools' of expenditure. For example, in a mixed use scheme created with a leasehold structure, there may be several separate service charges, one for the residential units only, one for the retail units only and one for the building as a whole. Costs relating specifically to the retail units for example the cost of security may be split only across the retail units under the service charge provisions for the scheme. Costs which are common to the scheme as a whole, such as the insurance of the structure, may be split across all units. This type of charging structure is not possible under commonhold as the Act only permits one commonhold assessment.

This limitation may make commonhold less desirable for larger mixed use schemes, because of the difficulty in achieving fairness in the allocation of cost, where only one cost 'pool' is possible.

### Reserve funds

One limited way of overcoming the problem referred to in 5.7.4 is the use of reserve funds which can be used to finance the repair and maintenance of common parts or commonhold units.<sup>283</sup> The terms repair and maintenance are not defined in the Act or Regulations but **Management of the common parts** which obliges the commonhold association to keep the common parts repaired and maintained specifies that this includes 'decorating them and putting them into sound condition'.

In the example referred to in 5.7.4 it would be possible for the commonhold association to establish a reserve fund for the

# The Commonhold Association

maintenance of the lift which services the residential units, and have the contributions to the fund allocated only between the residential units. The Act does not limit the number of reserve funds which may be set up for such matters.<sup>284</sup>

## Reserve studies

During the first year after the commonhold is registered, the directors of are required to consider whether to commission a reserve study by an appropriately qualified person.<sup>285</sup> The CCS does not define what an 'appropriately qualified person' is.

Subsequently the directors must commission such a study by an appropriately qualified person once every 10 years.<sup>286</sup>

## PRACTICE POINT

### Reserve Fund Studies

Experience from other jurisdictions show that this is an important inclusion in order to ensure that buildings are not run down. The experience in jurisdictions where there was no similar provision was that unit-holders were not setting aside funds to deal with the replacement of capital items and for major repairs. As a result unit-holders who purchased units in schemes 10-20 years after the building was constructed often found they had to pay significant contributions to make up the shortfall.

The directors are also required to consider the results of the study to determine whether it is appropriate to establish a reserve fund and maintain any existing reserve fund and if appropriate then the directors must do so.<sup>287</sup> There is an additional obligation to decide 'at appropriate intervals' whether to establish a reserve fund or maintain a reserve fund.<sup>288</sup>

The members also, by ordinary resolution, may require the directors to establish a reserve fund.<sup>289</sup>

Once reserve funds are established the directors must set a levy from time to time; and in doing so must try to ensure that unnecessary reserves are not accumulated.<sup>290</sup>

# The Commonhold Association

The directors are required to give a notice of proposed reserve fund levies in Form 4 and the members have the opportunity to make representations within one month of the notice.<sup>291</sup> The directors are required to consider any representations made and are required to give a further notice (in Form 5) specifying the payments required to be made by the unit-holder and the date on which the payment is due. The payment date must be not less than 14 days from the date of the notice.<sup>292</sup>

The CCS must set out the percentages allocated to each unit holder, which must aggregate to 100, and it is permissible to allocate 0 per cent to a particular unit.<sup>293</sup> The percentages need not be the same as for the commonhold assessment and the percentages may differ between reserve funds.

Any assets in a reserve fund may not be used for the purpose of enforcement of any debt except a judgment debt (including interest thereon) referable to a reserve fund activity.<sup>294</sup>

## PRACTICE POINT

### Transfer of Funds

The Act is silent as to how surplus reserve funds are to be treated. While reserve funds are not available to enforce a debt other than judgment debt referable to a reserve fund activity, it is not clear whether directors may use these funds for another purpose. There may be circumstances in which funds have been set aside for an expense which is unlikely to accrue for a considerable period of time, and there is another part of the common parts which is in require of immediate repair. The Act is silent as to whether the directors may use the funds from the reserve fund for this purpose.

Reserve fund activity for this purpose means an activity which in accordance with the CCS can or may be financed by a reserve fund. Assets are used for the purposes of enforcement of a debt if they are taken in execution or are made the subject of a charging order.<sup>295</sup>

It is not clear as to whether the judgement debt need be in relation to the activity funded by the specific reserve fund, or whether any

# The Commonhold Association

reserve fund of the association may be used to enforce the debt.

Subsections 39(4) and (5) of the Act in part, provide:

(4) The assets of a fund established and maintained by virtue of this section shall not be used for the purpose of enforcement of any debt except a judgment debt referable to **a reserve fund activity**.

(5) For the purpose of subsection (4)-

(a) 'reserve fund activity' means an activity which in accordance with the commonhold community statement can or may be financed from **a fund** established and maintained by virtue of this section,

...

## Emphasis added

The Act neither refers to 'any' fund nor does it limit the enforcement to a fund relating to a specific activity. It remains to be seen as to how this section will be interpreted.

## Administration Management

### Records and Information

The Commonhold Association will be required to retain various records, including minutes of meetings, a register of members and other relevant administration documents. These include a register of the secretary and the directors, **296** a register of unit-holders and a register of tenants **297**. It may also be appropriate to retain a register of charges over commonhold units.

The Articles require that (subject to statutory requirements) records must be kept for a minimum of three years. **298**

Up-to-date copies of the CCS and memorandum and articles of association must be kept at the registered office of the Commonhold Association. **299**

### Financial Records

A commonhold association must maintain accounting records, and must prepare annual accounts, a balance sheet and profit and loss

# The Commonhold Association

statement in accordance with statutory requirements.**300**

The rules regarding the documents required to be produced to Companies House are relaxed for small to medium enterprises, which most commonholds will be.

To qualify as a small company, at least two of the following conditions must be met:

- the annual turnover must be £5.6 million or less;
- the balance sheet total must be £2.8 million or less; and
- the average number of employees must be 50 or fewer.

To be a medium sized company, at least two of the following conditions must be met:

- annual turnover must be £22.8 million or less;
- the balance sheet total must be £11.4 million or less;
- the average number of employees must be 250 or fewer.

## Auditing of accounts

In most cases commonhold associations will not have to have their accounts audited; this is because most commonhold associations will qualify as small companies. To qualify as a small company it must not have a turnover of more than £5.6 million or a balance sheet total of more than £2.8 million

The right of the directors to claim exemption from auditing requirements is subject to the right of members to have the accounts audited. To achieve this at least 10 per cent of the members must notify the commonhold association that they require the accounts to be audited. Such notice must be given to the association's registered office at least one month before the end of the relevant accounting year. **301**

# The Commonhold Association

## Returns to Companies House

Commonhold Associations are required to lodge annual returns to Companies House. **302** They must also lodge notices of any change to the directors or secretary or registered office of the Commonhold Association. **303**

The usual rules regarding notice of certain types of resolution will also apply. **304**

## PRACTICE POINT

### Compliance

The complexities involved may result in many lay directors avoiding appointment and result in association affairs being run through professional management companies.

## Notices

Notices given under the Articles must be in writing except as otherwise provided in the Articles. **305**

Notices may be given:

- personally; **306**
- by leaving it at an address given to the Commonhold Association as an address for correspondence; **307**
- by sending it by first class prepaid post properly addressed to the member at an address given to the Commonhold Association as an address for correspondence; **308** or
- where an electronic address has been provided as an address for service, by electronic communication to that address in accordance with any terms or conditions in connection with service by electronic communication as specified by the recipient. **309**

Proof that an envelope containing a notice was properly addressed, prepaid and posted by first class post is conclusive evidence that it was given. **310** Electronic confirmation of receipt is conclusive evidence that a notice was given to an address. **311**

# The Commonhold Association

Notices are deemed to be given:

- on the day it was handed to the recipient or left at the address for correspondence; **312**
- on the second day after posting to the recipient; **313** or
- on the day after transmitted by electronic communication. **314**

## NOTES

**248** Insolvency Act 1986 section 74; paragraph 5 of the model memorandum of association

**249** CLRA Schedule 3, para 4(1)

**250** CLRA, Schedule 3, para 15(2)

**251** CLRA Schedule 3, para 15(1)

**252** CLRA Schedule 3, para 4(2)

**253** CLRA sections 43-53

**254** CLRA Schedule 3, para 5

**255** The developer is entitled to be entered in the register of members of the commonhold association but need not be - CLRA schedule 3, para 8

**256** CLRA Schedule 3, para 7

**257** CLRA Schedule 3, para 10

**258** CLRA Schedule 3, para 9

**259** ie. within 7 days from the date of transfer; CLRA Schedule 3, para 7

**260** CLRA, Schedule 3, para 8(4)

**261** CLRA, Schedule 3, para 8(6)

**262** CLRA, Schedule 3, para 8(5)

**263** CLRA Schedule 3, para 12(a)

**264** CLRA Schedule 3 para 12(b)

**265** CLRA Schedule 3 para 13

**266** CCS paragraph 4.5.1

**267** CCS paragraph 4.5.1

**268** CLRA s 41 (3)

**269** CCS Paragraph 4.6.1

**270** CCS Paragraph 4.4.4

**271** CLRA s 38 (1) (a)

**272** CLRA s 38 (1) (b)

- 273** CLRA s 38 (1) (c)
- 274** CLRA s38 (1) (d)
- 275** CLRA s 38 (1) (e)
- 276** CCS paragraph 4.2.2
- 277** CCS paragraph 4.2.3
- 278** CCS paragraph 4.2.4
- 279** para 4.2.4 of the model CCS
- 280** Model CCS para 4.2.5.
- 281** ibid
- 282** CCS paragraph 4.2.5
- 283** definition of reserve fund in para 1.4.5 of the model CCS; right to establish reserve funds at para 4.2.9 of the model CCS
- 284** paragraph 4.2.9 refers to obligation on the directors to decide whether to establish one or more reserve funds
- 285** CCS paragraph 4.2.6
- 286** CCS paragraph 4.2.7
- 287** CCS paragraph 4.2.8
- 288** CCS paragraph 4.2.9
- 289** CCS paragraph 4.2.10
- 290** CCS paragraph 4.2.11
- 291** CCS paragraph 4.2.12
- 292** CCS paragraph 4.2.14
- 293** CLRA s39 (3)
- 294** CLRA s39 (4)
- 295** CLRA s39 (5)
- 296** Companies Act 1985, s.288
- 297** CCS, paragraph 4.10.2
- 298** Article 80
- 299** Article 81
- 300** Companies Act 1985, s.226
- 301** Companies Act 1985, s.249B(2)
- 302** Companies Act 1985, s.364
- 303** Companies Act 1985, ss.287 and 288
- 304** These include any elective resolution and special resolution.
- 305** Article 76
- 306** Article 77 (a)
- 307** Article 77 (b)
- 308** Article 77 (c)
- 309** Article 77 (d)
- 310** Article 78
- 311** Article 78
- 312** Article 79 (a)
- 313** Article 79 (b)
- 314** Article 79 (c)

# Meetings and Directors

The Commonhold Association in General Meeting	88
Directors and Company Secretary	100
Directors meetings	109
Other issues relating to officers	111
Notes	112

## The Commonhold Association in General Meeting

Commonholds will primarily be managed by the board and appointed agents of the Commonhold Association. Some issues however will fall to be dealt with by the Commonhold Association in general meeting as certain types of transaction and particular amendments to commonhold documents, require resolutions of the Commonhold Association.

### Organising meetings

#### The request for meetings

Each Commonhold Association must hold an annual general meeting unless it has elected to dispense with it under the Companies Act. **315** Not more than fifteen months may elapse between one annual general meeting and the next (save in respect of the first annual general meeting - see Practice Note: 'The First General Meeting' below).**316**

### PRACTICE POINT

#### Waiving the requirement for an Annual General Meeting

An election to waive the requirement for an annual general meeting must be passed at a meeting conveyed on at least 21 days' notice in writing. The notice must state that the resolution to elect to dispense with an annual general meeting is proposed and detail its terms.**317** The resolution must be agreed to by all the members entitled to attend and vote at the meeting.**318**

In practice it may be unwise to dispense with the requirement for the annual general meeting. The annual general meeting will enable directors to raise issues such as the level of the commonhold assessment and give members the opportunity to raise any concerns.

Other general meetings (commonly called extraordinary general meetings) may also be called.**319** These may be needed to deal with more urgent matters which require a resolution of the Commonhold

# Meetings and Directors

Association, such as a resolution to grant a mortgage over the common parts or to add land to the commonhold.

## PRACTICE POINT

### The First General Meeting

Provided the Commonhold Association holds its first annual general meeting within 18 months of incorporation it need not hold a general meeting in the first year of its incorporation or in the following year.<sup>321</sup>

### Calling of meetings

The directors may call general meetings and must do so on the requisition of members pursuant to the Companies Act. <sup>321</sup> Members representing at least one-tenth of the voting rights may requisition a general meeting.<sup>322</sup>

If there is not a quorum of directors in the UK to call a general meeting, any director or any member may call the meeting.<sup>323</sup> The meeting must be convened not later than 28 days after the date of the notice convening the meeting.<sup>324</sup>

There is no prescribed form of notice for the calling of meetings.

### Location of meetings

Meetings should take place on the commonhold or at a similarly convenient location. <sup>325</sup>

### Required Notice

Where a meeting is called to pass a special resolution, unanimous resolution, termination-statement resolution, winding-up resolution or to appoint a director - at least 21 clear days notice must be given.<sup>326</sup> For all other meetings at least 14 clear days' notice must be given. <sup>327</sup>

A meeting can be called on shorter notice (namely three clear days' notice) if there is sufficient agreement among the members. In the case of an annual general meeting all those entitled to attend and

# Meetings and Directors

vote must agree. In the case of any other meeting there must be agreement from at least 95 percent of those members. **328**

The notice must specify the time and place of the meeting and in the case of an annual general meeting specify the meeting as an annual general meeting. **329**

The notice must be accompanied by a statement of the agenda, the text of any resolutions proposed and a brief explanation of each resolution (save that the text of ordinary resolutions need not be given). **330**

Notice must be given to the members and the directors. **331**

The accidental omission to give notice of a meeting to, or non-receipt of a notice by any person entitled to receive notice shall not invalidate the meeting. **332**

## PRACTICE POINT

### Giving Notice of Meetings

Despite Article 10, it is important to ensure that notices are given to all members.

Where a provision within Part 1 of the Act requires a resolution of the Commonhold Association, the relevant provision is only satisfied if every member is given an opportunity to vote in accordance with any relevant provision of the memorandum or articles of association or the CCS. It is likely (although not clear) that this provision is intended to override Article 10 and therefore great care should be taken in sending out a notice dealing with such matters.

### Procedure at Meetings

#### Quorum

The articles of association provide for a quorum of one fifth of the

# Meetings and Directors

members of the Association or two members whichever is the greater to be present either in person or by proxy.<sup>333</sup> The Regulations allow for a different figure to be inserted but not below the one fifth or two members set out in the model articles.<sup>334</sup> The Regulations also allow for different provisions to be made for different purposes.<sup>335</sup>

For example the articles could provide for the following quorum:

RESOLUTION	PROVISION
Ordinary Resolution	20% of the members or two members (whichever is the greater) present in person or by proxy
Special Resolution	35% of the members or four members (whichever is the greater) present in person or by proxy
Unanimous Resolution	50% of the members or five members (whichever is the greater) present in person or by proxy

## PRACTICE POINT

### Quorum

When creating the Commonhold Association, thought will need to be given to setting the quorum to an appropriate level to ensure that the level is not too low so as to enable control of major decisions by a small minority but at the same time not making it too high as to prevent decisions being made and implemented

It might be appropriate to set a high quorum for particular issues, such as a resolution to terminate or renew a management contract. In that way a resolution to do such an act (which would only require an ordinary resolution) could only be acted upon if this higher quorum was achieved. That said, it is likely that there will be a certain level of apathy among unit-holders and decisions will need to be made notwithstanding.

If no quorum is reached within half an hour after the time set for the meeting, or if a quorum ceases to be present the meeting will be adjourned to the same day of the following week at the same time and

# Meetings and Directors

place or such other time and place as the directors determine.**336** At that adjourned meeting, no further business may be transacted other than business that could have been transacted at the original meeting.

No new notice of the adjourned meeting is required unless the meeting is adjourned for 14 days or more. If notice is required at least seven clear days' notice must be given. The notice must specify the time and place of the adjourned meeting and the general nature of the business to be transacted.**337**

## Procedure

No business is permitted at a general meeting unless details were included in the notice of meeting. **338**

However, proposals to amend ordinary resolutions (where the text was given with the notice) may be voted upon if the terms of the amendments were received by the Commonhold Association at its office or at an email address specified in the notice convening the meeting for the purpose of receiving electronic communications before the time appointed for the meeting. **339**

The chairman's decision whether to permit an amendment is final and conclusive and does not invalidate any proceedings on the substantive resolution. **340**

At any general meeting so far as practicable and subject to any contrary ordinary resolution of the meeting any business arising from a requisition of members will be transacted before any other business, and if there is more than one requisition the business arising will be transacted in the order in which the requisitions were received by the Commonhold Association. **341**

## Chairman

The chairman of the board of directors (if any) or in his absence a director nominated by the directors is to preside as the chairman of a general meeting. **342**

If no director is present or willing to act within 15 minutes of the time appointed for the holding of the meeting, the members present and entitled to vote may appoint one of themselves as chairman. **343** If there is only one director present he will be chairman.

# Meetings and Directors

## Methods of Voting

A Commonhold Association in general meeting will vote by either a show of hands or a poll.

The Articles provide for a resolution to be decided by a show of hands unless a poll is demanded before or on the declaration of the result of the show of hands. **344**

On a show of hands, every member who (being an individual) is present in person or (being a corporation) is present by an authorised representative, (not being himself a member entitled to vote) has one vote. **345**

On a poll, every member has the number of votes allocated to him in the commonhold community statement in respect of each commonhold unit of which he is a unit-holder. However, during the pre-commonhold period (i.e. before the land is registered as commonhold land) and during the transitional period each member has one vote. **346**

## Restriction on Developer Voting

Where the developer is entitled to exercise the power to appoint developer's directors then the developer is not entitled to vote on a resolution:

- fixing the number of directors of the Association;
- for the appointment or removal from office of any director not appointed by him;
- concerning the remuneration of any director not appointed by him; or
- upon a special resolution giving a direction to the directors. **347**

## Calling a Poll

A poll may be demanded by the chairman, at least two members having the right to vote at the meeting, or a member or members representing not less than 10 percent of the total voting rights of the members entitled to vote at the meeting. **348** The demand may be made by a proxy. **349**

# Meetings and Directors

Unless a poll is demanded a declaration by the chairman that a resolution has been carried or lost on a show of hands whether unanimously or by a particular majority. An entry to that effect in the minutes is conclusive evidence of the fact, without proof of the number or proportion of votes recorded in favour or against the resolution. **350**

The demand for a poll may be withdrawn before the poll is taken but only with the consent of the chairman. **351**

## **Taking a Poll**

A poll may be taken in such manner as the chairman directs having regard to the convenience of members. The chairman may appoint scrutineers (who need not be members).**352** The result of the poll is to be announced at the meeting. The poll need not however be taken at the meeting and may be held at a later time. It may be taken at such time as the chairman directs, having regard to the convenience of members but not more than 30 days after the poll is demanded.**353** Where however, the poll relates to the election of the chairman or adjournment of the meeting it must be taken immediately. **354**

If the poll is to be delayed, then no notice of the poll need be given provided the time and place at which the poll is to be taken are announced at the meeting at which it is demanded.**355** Otherwise seven clear days' notice is required. **356**

Any poll, whether taken immediately or deferred is deemed to be the resolution of the meeting at which the poll was demanded. **357**

## **Casting Vote**

The chairman has a casting vote in the case of an equality of votes on a show of hands or poll, in addition to any other vote he may have.**358**

## **Flying resolution**

A flying resolution can be made, without the need for a meeting.

Such a resolution must be in writing signed by or on behalf of each member who would have been entitled to vote on it if it had been proposed at a general meeting. It may consist of several instruments in similar form each signed by or on behalf of one or more members.**359**

# Meetings and Directors

## Resolutions

There are various types of resolution possible, namely:

- Ordinary resolutions: An ordinary resolution is one passed by a simple majority of the members who attend to vote by proxy or in person.
- Special resolutions: This is a resolution passed by a majority of not less than 75 per cent of the members who attend to vote by proxy or in person.
- Unanimous resolutions: This is a resolution passed by the assenting vote of all members who vote in person or by proxy. Subject to the need for a quorum to be present, there is no requirement for a minimum number of votes for such unanimity.
- Elective resolution: This is a special type of resolution required to dispense with the requirement to hold an annual general meeting for example. **360**
- A special majority (80%) is required to wind up a Commonhold Association voluntarily

The table on the next page sets out the level of resolution that is required for various matters under the Act.

## Qualification to vote

All members, will prima facie have the right to vote on resolutions. Developers are not entitled to vote on certain matters.**379** If an objection is to be made regarding someone's entitlement to vote then it must be raised at the meeting at which the vote is tendered.**380** Every vote not disallowed by the chairman is valid. The chairman's decision is final and conclusive.

Third parties may gain the right to vote on behalf of members in the following circumstances:

## Mental incapacity

A member in respect of whom an order has been made by a court in matters concerning mental disorder may vote, by his receiver or other person authorised in that behalf appointed by the court.

# Meetings and Directors

## RESOLUTION

Ordinary Resolution

Special Resolutions

Unanimous resolutions

Special majority

## USE

Changing the order of business at a meeting of the Commonhold Association.**361**

Specifying a maximum number of directors for the Commonhold Association.**362**

Appointing a director (either to fill a vacancy or as an additional director).**363**

Removal of a director (provided special notice was given under the Companies Act 1985).**364**

A resolution permitting the directors to delegate their powers to a committee, managing director, or managing agent **365** - the right to delegate is subject to the provisions of the CCS

A resolution to suspend provisions in the articles prohibiting a director from voting at a meeting of the directors / committee of directors.**366**

A resolution withdrawing the right of a member to inspect any book, minute, register, document, or accounting record of the Commonhold Association.**367**

A resolution requiring the directors to establish a reserve fund.**368**

A resolution to authorise the Commonhold Association to alter the common parts or authorise another party to do so.**369**

A resolution to amend the local rules of a CCS (where the CCS does not provide otherwise).**370**

A resolution limiting the powers of the directors of the Commonhold Association.**371**

A resolution to approve remuneration for directors who are members of the Commonhold Association.**372**

A resolution to approve the change to the permitted use of a commonhold unit specified in paragraph 2 of Annex 4 of the CCS.**373**

The approval of the creation of an interest of a prescribed kind in a commonhold unit.**374**

Changing the boundaries of the commonhold, a commonhold unit or the common parts following a transfer.**375**

Amending the percentage of commonhold assessment or reserve fund levies allocated to a commonhold unit, and the number of votes allocated to that unit.**376**

Application to add land to the commonhold.**377**

An application to grant a legal mortgage over the common parts.**378**

A resolution to wind up a Commonhold Association requires a resolution of at least 80% of the members of the association voting in favour.

Where 100% of the members vote in favour, the liquidator need not apply to the court for an order determining the terms and conditions on which a termination application may be made (see [Termination](#))

# Meetings and Directors

Such person may vote on a show of hands or on a poll, and such person and on a poll may vote by proxy. **382**

The directors must be satisfied of the authority of the person to vote. Evidence to this effect may be deposited at the registered office or place specified for the deposit of a proxy before the meeting or presented to the directors at the meeting. In default the right to vote is not exercisable. **383**

## **Receiver, administrator, trustee in bankruptcy etc.**

A receiver, administrator, trustee in bankruptcy, commissioner in sequestration or similar person may vote in place of a member whether on a show of hands or poll. **384**

Again the directors must be satisfied of the authority to so vote. Evidence to this effect may be deposited at the registered office or place specified for the deposit of a proxy before the meeting or presented to the directors at the meeting. In default the right to vote is not exercisable. **385**

## **Mortgagee in possession**

A mortgagee in possession of a unit may vote in place of a member on a show of hands or on a poll. **386** The mortgagee must provide a certificate confirming that possession has been taken of a commonhold unit and an official copy of the charges register showing it as the registered proprietor of the charge. **387**

Again the directors must be satisfied of the authority to so vote and evidence to this effect may be deposited at the registered office or place specified for the deposit of a proxy before the meeting or presented to the directors at the meeting. In default the right to vote is not exercisable. **388**

## **Proxies**

Members are able to appoint proxies to vote on their behalf on a poll.

## **Appointment of Proxy**

Proxy votes may not be exercised on a show of hands. A member may appoint more than one proxy to attend on the same occasion. **389**

# Meetings and Directors

Proxies must be appointed in writing, signed by or on behalf of the appointer and must be in the following form (or a form to the same effect). **390**

'[Name of commonhold association]

I/We [ ], of [ ], being a member/members of the above-named commonhold association, appoint [ ] of [ ], or failing him, [ ] of [ ], as my/our proxy to vote in my/our name and on my/our belief at the (annual) general meeting of the commonhold association to be held on [ ], and at any adjournment of it

Signed on [ ]'

Where members are given the opportunity to instruct the proxy how to act, the appointment must be in following form (or a form to the same effect). **391**

'[Name of commonhold association]

I/We [ ], of [ ], being a member/members of the above-named commonhold association, appoint [ ] of [ ], or failing him, [ ] of [ ], as my/our proxy to vote in my/our name and on my/our belief at the (annual) general meeting of the commonhold association to be held on [ ], and at any adjournment of it

This form is to be used in respect of the resolutions mentioned below as follows:

Resolution No 1 for\* against\*

Resolution No 2 for\* against\*

\*Delete as appropriate

Unless instructed otherwise, the proxy may vote as he thinks fit or abstain from voting

Signed on [ ]'

The appointment of a proxy (and any authority under which it is signed or a copy of such authority properly certified notorally or approved in another way by the directors) may:

# Meetings and Directors

- If in writing, be deposited at the registered office of the Commonhold Association or such other place in the UK stated in the notice convening the meeting or in any form of proxy sent out by the Commonhold Association in relation to the meeting;
- if contained in an electronic communications, where an email address has been specified for the purpose of receiving electronic communications:
  - in the notice of meeting;
  - in any form of proxy sent out by the Commonhold Association in relation to the meeting; or
  - in any invitation in an electronic communication to appoint a proxy issued by the Commonhold Association in relation to the meeting,

be received at that address at any time\* before the meeting or adjourned meeting is held [\*the articles may provide for a different time or date]**392** Failing that it may be delivered at the meeting to the chairman, secretary or to any director\*.**393**  
[\*The Articles may omit this provision] **394**

The appointment of a proxy, which is not deposited, received or delivered in accordance with the above, is invalid. **395**

## Determination of proxy rights

A vote given or poll demanded by a proxy for a member (or by the authorised representative of a corporation) will remain valid despite the previous termination of the authority of the person voting or demanding a poll unless notice of the termination was received at:

- the registered office;
- at such other place at which the appointment of proxy was deposited; or
- where the appointment was contained in an electronic communication, at the email address at which the appointment was received.

before the start of the meeting at which the vote was given or the

# Meetings and Directors

poll demanded. In the case of a poll taken otherwise than on the same day as the meeting, the deadline is the time appointed for taking the poll.<sup>396</sup>

A member who has given a proxy is free to attend at the meeting and vote personally and where he has done this, the proxy may not vote in respect of such matter.<sup>397</sup>

## PRACTICE POINT

### Proxies

In Australia, a practice developed in some jurisdictions by which developers would require purchasers of strata title units, to grant them a proxy, to vote on behalf of unit holders for a period of time following completion. There would appear to be nothing preventing an arrangement under which (by contract) a member agreed to grant someone else the right to vote by proxy for a period of time.

As a result of abuses by developers of such voting rights, various governments in Australia found it necessary to impose restrictions on the use of proxies by developers. While developers may find it beneficial to obtain the right to vote by proxy on behalf of members, it is submitted more preferable to avoid this practice as it opens the door to potential abuse.

## Directors and Company Secretary

A Commonhold Association will have directors and a company secretary like any other company limited by guarantee.

### Company Secretary

A Commonhold Association is required to have a company secretary.<sup>398</sup>

The company secretary is the chief administrative officer of a company but does not have any powers.

The role of the secretary of a Commonhold Association is likely to

# Meetings and Directors

include:

- maintaining the statutory registers;
- filing annual returns and other returns with Companies House;
- keeping of minutes of directors' meetings and general meetings; and
- custody and use of the company seal (if any).

They need not have any formal qualifications,<sup>399</sup> and do not have to be a member of the Commonhold Association.

As an officer of the company, the company secretary may be criminally liable for defaults committed by the company.<sup>400</sup>

The secretary is appointed by the directors on such terms and on such remuneration as the directors think fit and may be removed by the directors.<sup>401</sup>

## Directors

The directors of the Commonhold Association will have the primary responsibility for running the affairs of the commonhold. The directors are officers of the company and will have fiduciary obligations to the Commonhold Association.

## Eligibility

The only relevant restrictions on the capacity of a person to be a company director of a Commonhold Association are:

- the person must not have been disqualified by a court from acting as a company director (unless given leave by a court to act as a director for a particular company);
- the person must not be an undischarged bankrupt (except with leave of the court).

It is not necessary that a director be a member of the Commonhold Association.<sup>402</sup>

# Meetings and Directors

## Duties

The directors of the Commonhold Association will be subject to duties arising under the Companies Act and at general law and in addition will be subject to additional duties imposed by the Act, namely:

- an obligation to permit or facilitate so far as possible the exercise by each unit-holder of his rights and the enjoyment by each unit-holder of the freehold estate in his unit; **403** and
- an obligation to use any right, power or procedure conferred by regulation for the purpose of preventing, remedying or curtailing a failure on the part a unit-holder to comply with a requirement or duty imposed on him by the CCS or the Act. **404**

The directors' obligations in relation to the second of the above are qualified in that the directors need not take action if they reasonably think it to be in the best interests of establishing or maintaining harmonious relationships between all unit-holders and that no significant loss or disadvantage will be caused to any unit-holder (other than the defaulter). **405**

## Powers

The directors are responsible for the management of the Commonhold Association.

The directors may exercise all of the powers of the Commonhold Association subject to:

- any directions given by special resolution of the Association;
- the provisions of the Companies Act; and
- the memorandum and Articles of Association. **406**

The directors' powers may be exercised at any meeting at which a quorum is present. **407**

The directors may appoint agents (by power of attorney or otherwise) to act for the Commonhold Association. These agents may be appointed for such purposes and on such conditions as the

# Meetings and Directors

directors may determine including permitting the agent to delegate any or all of his powers. **408**

The directors have the power to appoint and enter into contracts with managing agents on such terms as they think fit **409** although the directors are required to supervise any managing agent appointed. **410**

## Appointment

### Initial directors

The initial directors of the Commonhold Association will be the directors appointed by the original subscriber(s), as recorded in the documents lodged at Companies House when the company is incorporated.

### Developer's directors

A CCS may entitle a developer the right to appoint and remove directors. If it does so the following provisions will apply:

- During the transitional period the developer may appoint up to two directors in addition to the directors appointed by the original subscriber(s) and the developer may remove or replace any director so appointed at any time; **411** and
- Following the transitional period and for so long as the developer is a unit-holder of more than 25 percent of the total number of units, he will be entitled to appoint one-quarter (or the nearest whole number exceeding one-quarter) of the directors of the Commonhold Association. The developer shall be entitled to remove or replace any director so appointed. **412**

The Regulations include provisions dealing with the removal of developer's directors if the 25 percent condition ceases to apply or if the Commonhold Association resolves to reduce the maximum number of directors. **413**

The appointment of a developer's director must be by notice in writing and will be effective immediately it is received at the Commonhold Association or by the secretary or as and from the date specified in the notice (if later). **414**

# Meetings and Directors

A developer's director is entitled to provide information to the developer that he receives by virtue of being a director. **415**

At any time at which the developer is entitled to exercise the power to appoint and remove developer's directors, the developer is not entitled to vote on a resolution:

- fixing the number of directors;
- for the appointment or removal of a director not appointed by him; or
- concerning the remuneration of a director not appointed by him. **416**

The articles dealing with retirement by rotation and remuneration of directors do not apply to developer's directors. **417**

## **Appointment at meeting**

Following the end of the transitional period, the directors will be appointed by the directors **418** or at a general meeting. **419**

No person (other than a director retiring by rotation) may be appointed or reappointed as a director at general meeting unless:

- he or she is recommended by the directors; or
- notice was given (not more than 35 clear days and not less than 14 clear days) before the meeting by a member entitled to vote at the meeting of the intention to propose the person together with that person's written consent to act and details which would be required to be included in the Association's register of directors if appointed. **420**

At least seven and not more than 28 day's clear days before the date appointed for a general meeting, notice must be given (to all entitled to have notice of the meeting) of the persons proposed as directors, including those recommended by the directors for appointment or reappointment. **421**

# Meetings and Directors

Appointment of a director (other than a developer's director), either to fill a vacancy or as an additional director requires an ordinary resolution of the commonhold association. **422**

## **Appointment by directors**

The directors of a Commonhold Association may appoint a person who is willing to act as director (to fill a vacancy (other than in respect of a developer's director) or as an additional director), provided the appointment does not result in the number of directors exceeding the maximum number fixed under the articles of association. **423**

A director appointed by the directors will only hold office until the next annual general meeting and is not taken into account in determining the directors who are to retire by rotation at the meeting.**424** The director will cease to hold office unless reappointed at the general meeting at which he/she is required to retire.

## **Retirement**

All of the directors will be required to retire (other than any developer's directors) at the first general meeting of the company following the end of the transitional period. **425**

Subsequently one-third of the directors who are subject to retirement by rotation (or the number nearest one-third) shall retire at each subsequent general meeting.**426** If there is only one director subject to retirement by rotation he must retire.**427** The directors subject to retire next by rotation will be those who have been longest in office, but as between those who were last appointed on the same day, to be determined by lot unless the directors agree otherwise among themselves. **428**

Developer's directors are not subject to retirement by rotation.**429**

A director who retires at an annual general meeting may be reappointed.

If the Commonhold Association does not fill the vacancy created by a director retiring, then if willing to act, that director is deemed to have been reappointed unless at the meeting it is resolved not to fill the vacancy or unless a resolution for the re-appointment of the director is put to the meeting and lost. **430**

# Meetings and Directors

If the director is not re-appointed, he will retain office until the meeting appoints someone in his place or if it doesn't do so until the end of the meeting. **431**

The appointment of a director to an executive office will cease if that director ceases to be a director but this is without prejudice to any claim he/she may have for damages for breach of the contract of service. **432**

## Disqualification and vacation of office

The office of a director will be vacated if:

- an ordinary resolution is passed by the members in favour of removing a director (where special notice of the resolution has been given in accordance with the Companies Act); **433**
- the director ceases to be a director by virtue of any provision of the Companies Act or is prohibited by law from being a director (for example on grounds that the director has been disqualified by a court); **434**
- the director becomes bankrupt or makes any composition or arrangement with his creditors generally; **435**
- the director is or may be suffering from mental disorder and:
  - he is admitted to hospital in pursuance of an application for admission under specified mental health legislation; **436** or
  - an order is made by a court (in the United Kingdom or elsewhere) in matters concerning mental disorder for his detention or for the appointment of a receiver or other person to exercise powers with respect of his property or affairs; **437**
- the director resigns by notice to the Commonhold Association **438**;  
or
- the director is absent for more than three consecutive months or is absent for three consecutive meetings (whichever is the greater) without permission of the directors from meetings of directors held during that period and the directors resolve that his office be vacated. **439** The articles may specify a greater number of meetings and/or longer period to apply. **440**

# Meetings and Directors

If there is only one remaining director a new director must be appointed before the director vacates his office. **441**

## **Number**

A commonhold association must have at least two directors. The maximum number of directors will be as determined by ordinary resolution of the Commonhold Association. **442**

## **Delegation**

### *Committees*

The articles provide for the delegation of the directors powers to committees consisting of one or more directors, members of the Commonhold Association and others as they think fit, provided an ordinary resolution is passed in favour of such delegation . A majority of any committee must be members of the Commonhold Association. **443**

Subject to any conditions imposed by the directors the proceedings of a committee will be governed by the articles relating to the proceedings of directors so far as they are capable of applying. **444**

### *Managing director/agent*

Where an ordinary resolution is passed in favour, the directors may also delegate their powers to a managing director, another executive director or managing agent. **445**

The appointment of a director to an executive office must terminate if he ceases to be a director but without prejudice to any claim to damages for breach of contract of service. **446**

### *Effect of delegation*

Any delegation to a committee, managing director another director or managing agent will be subject to the provisions of the CCS and may be made subject to conditions. The delegation may be made collaterally with or to the exclusion of the directors' own powers and may be revoked or altered. **447**

A record must be kept giving details of any powers delegated. **448**

# Meetings and Directors

## Remuneration

Developer's directors are not entitled to remuneration from the Commonhold Association. **449**

Other directors are entitled to such remuneration as the Commonhold Association may determine by ordinary resolution where the directors are not members of the Commonhold Association and by special resolution where the directors are members of the Commonhold Association. **450**

## PRACTICE POINT

### Management

If professional directors are to be appointed, then resolutions will need to be obtained in order to ensure that the directors may be paid.

## Reimbursement of expense

Directors may be paid travelling, hotel and other expenses reasonably and properly incurred by them in connection with the discharge of their duties. **451**

## Disclosure of interests

Prima facie, directors will be subject to normal fiduciary obligations to the commonhold association.

Subject to the Companies Act and provided he has disclosed to the directors the nature and extent of any material interest of his, a director:

- may be a party to or otherwise interested in any transaction or arrangement with the Commonhold Association or in which the Commonhold Association is otherwise interested; **452** and
- may be a director, other officer of, or employed by any party to any transaction or arrangement with, or otherwise interested in, any body corporate promoted by the Commonhold Association or in which the Commonhold Association is otherwise interested; **453** and
- is not, by reason of his office, accountable to the Commonhold

# Meetings and Directors

Association for any benefit which he derives from such employment or arrangement or from any interest in such body corporate and no such transaction or arrangement is liable to be set-aside on the ground of such interest or benefit. **454**

A general notice to the directors that a director is to be regarded as having an interest of the nature and extent specified in the notice is deemed to be a disclosure of that interest.**455** An interest of which a director has no knowledge of and which it is unreasonable to expect him to have knowledge will not be treated as an interest of his. **456**

Each Commonhold Association is required to keep a register of directors' interests and to enter information received from directors in the register. **457**

## **Conduct of proceedings**

The directors may regulate their proceedings as they see fit subject to the terms of the articles of association. **458**

## **Directors meetings**

### **Calling of meetings**

A director may, and the secretary at the request of a director must, call a meeting of directors. **459**

### **Notice**

Notice of a directors meeting must be given to all of the directors, although no notice is required to be given to a director absent from the United Kingdom unless he has given the Commonhold Association an email address to which notices may be sent using electronic means. In such case the director is entitled to receive notices at that email address. **460**

In all other cases a notice calling a meeting of directors need not be in writing.

### **Quorum**

The directors may fix the quorum for a directors meeting and unless fixed at a higher number shall be the greater of two and 50 percent of the directors appointed.**461** At least one non-developer's director

# Meetings and Directors

must be present for there to be a valid meeting. **462**

The continuing directors or a sole continuing director may act despite any vacancies. If the number of directors does not constitute a quorum the continuing director or directors may only act for the purpose of filling vacancies or of calling a general meeting. **463**

A director will not be counted in the quorum on a resolution on which he is not entitled to vote (see [Restrictions on voting](#)). **464**

## Voting

Issues raised at a directors' meeting are decided by a majority of votes, with a casting vote to be made by the chairman in the case of a deadlock of votes. **465**

## Appointment of chairman

The directors may appoint a chairman and may remove him at any time. **466**

The chairman is to preside at meetings of directors unless unwilling to do so. **467** If no chairman has been appointed or if the director appointed as chairman is unwilling to preside or is not present within 15 minutes after the time appointed for the meeting, the directors present may appoint a chairman. **468**

## Validity of proceedings

All acts done by a meeting of directors or of a committee, or by a person acting as a director, are valid even if it is later discovered that there was a defect in the appointment of any director or that any of them were disqualified from holding office, had vacated office, or were not entitled to vote. **469**

## Written resolutions

A written resolution signed by all directors entitled to receive notice of a meeting (of directors or a committee) will be valid and effectual as if it had been passed at a meeting duly convened and may consist of several documents in similar form each signed by one or more directors. **470**

# Meetings and Directors

## Restrictions on voting

A director may not vote at a meeting (of directors or a committee) on a resolution concerning a matter in which he has, directly or indirectly, an interest or duty which is material and which conflicts or may conflict with the interest of the Commonhold Association. **471**

The interest of a person connected with a director (for any purpose of the Companies Act) will be treated as an interest of the director. **472** This does not apply to any changes to the Companies Act when the relevant article (Article 66 becomes binding on the association).

A director must not be counted in the quorum present at a meeting in relation to a resolution on which he is not entitled to vote. **473**

The Commonhold Association may by ordinary resolution relax or suspend to any extent, generally or in respect of a particular matter, any provision of the articles prohibiting a director from voting at a meeting or directors or committee set up by the directors. **474**

## Chairman's decision

If a question arises at a meeting (of directors or a committee set up by the directors) as to the right of a director to vote, the question may (before the conclusion of the meeting) be referred to the chairman and his ruling in relation to any director other than himself shall be final and conclusive. **475**

## Other issues relating to officers

### Indemnity

Subject to the provisions of the Companies Act each director and other officer of the Commonhold Association is entitled to be indemnified out of the assets of the association against any liability incurred in:

- defending proceedings (civil or criminal) in which judgment is given in his favour or in which he is acquitted; or
- in connection with any application in which the court grants relief to him from liability for negligence, default, breach of duty or breach of trust in relation to the affairs of the Commonhold Association. **476**

# Meetings and Directors

Such indemnity is given subject to the Companies Act and without prejudice to any other indemnity to which the officers are otherwise entitled. **477**

## Minutes

The directors must cause minutes to be made:

- of all appointments of officers made by the directors or the developer; and
- of all proceedings at meetings of the association, the directors and committees - the minutes must include the names of the persons present, the date and any action agreed. **478**

## NOTES

**315** Article 5, Companies Act 1985, s.366A(1)

**316** Section 366, Companies Act 1985

**317** Section 379A Companies Act 1985

**318** ibid

**319** Article 6

**320** Companies Act 1986, s366

**321** Article 6

**322** Companies Act 1985, s368

**323** Article 6

**324** Article 6

**325** Article 8

**326** Article 7

**327** Article 7

**328** Article 7

**329** Article 8

**330** Article 9

**331** Article 10

**332** Article 10

**333** Article 13

**334** Regulation 14(4)(c)

**335** Regulation 14(4)(c)

**336** Article 14

**337** Article 18

- 338 Article 11
- 339 Article 11
- 340 Article 11
- 341 Article 12
- 342 Article 15
- 343 Article 15
- 344 Article 19
- 345 Article 27
- 346 Article 28
- 347 Article 33
- 348 Article 19
- 349 Article 20
- 350 Article 20
- 351 Article 21
- 352 Article 22
- 353 Article 24
- 354 Article 24
- 355 Article 25
- 356 Article 25
- 357 Article 22
- 358 Article 23
- 359 Article 26
- 360 Companies Act 1985, s366A(1)
- 361 Article 12
- 362 Article 38
- 363 Article 45
- 364 Article 48
- 365 Article 53
- 366 Article 68
- 367 Article 83
- 368 model CCS, para 4.2.10
- 369 model CCS, para 4.6.1
- 370 model CCS, para 4.8.3
- 371 Article 50
- 372 Article 54
- 373 model CCS, para 4.8.7
- 374 Section 20 CLRA
- 375 model CCS, para 4.8.10
- 376 model CCS, para 4.8.11
- 377 Section 41 CLRA and para 4.7.10 of the model CCS
- 378 Section 29 CLRA
- 379 see [Restrictions on developer voting](#)
- 380 Article 32
- 381 ibid

- 382** Article 29
- 383** Article 29
- 384** Article 30
- 385** Article 30
- 386** Article 31
- 387** Article 31
- 388** Article 31
- 389** Article 33
- 390** Article 34
- 391** Article 35
- 392** Regulation 14 (3) (d) - NB: Another time may be specified
- 393** Article 36 - this may be deleted: see Regulation 14(4)
- 394** Regulation 14 (4)
- 395** Article 36
- 396** Article 37
- 397** Cousins v International Brick Company Limited [1931] 2 Ch 90
- 398** Companies Act 1985 s. 283(1); Article 60
- 399** By comparison, a company secretary of a public limited company needs to have qualifications - Companies Act s286
- 400** Companies Act s744
- 401** Article 60
- 402** Article 39
- 403** CLRA s35(1)
- 404** CLRA s35(2)
- 405** CLRA s35(3)(a)
- 406** Article 50
- 407** Article 50
- 408** Article 51
- 409** Article 52
- 410** Article 52
- 411** Regulation 14(8)
- 412** Regulation 14(8)
- 413** Regulation 14(8)(e) and (F)
- 414** Regulation 14(8)(d)
- 415** Article 64
- 416** Regulation 14(8)(h)
- 417** Regulation 14(8)(j)
- 418** Article 46
- 419** Article 43
- 420** Article 43
- 421** Article 44
- 422** Article 45 and Regulation 14(9)(a)
- 423** Article 46 and Regulation 14(9)(a)
- 424** Article 46

- 425 Article 40
- 426 Article 40
- 427 Article 40
- 428 Article 41
- 429 Article 41 and Regulation 14(8)(j)
- 430 Article 42
- 431 Article 54
- 432 Article 56
- 433 Article 48(a)
- 434 Article 48(b)
- 435 Article 48(c)
- 436 Mental Health Act 1983 or in Scotland under the Mental Health (Scotland) Act 1960
- 437 Article 48(d)
- 438 Article 48(e)
- 439 Article 48(f)
- 440 Regulation 14(4)
- 441 Article 49
- 442 Article 38
- 443 Article 53
- 444 Article 53
- 445 Article 53
- 446 Article 57
- 447 Article 53
- 448 Article 53
- 449 Regulation 14 (8) (j)
- 450 Article 54
- 451 Article 55
- 452 Article 57(a)
- 453 Article 57(b)
- 454 Article 57(c)
- 455 Article 58
- 456 Article 58(b)
- 457 Article 59
- 458 Article 60
- 459 Article 60
- 460 Article 60
- 461 Article 61
- 462 Regulation 14 (9) (b)
- 463 Article 62
- 464 Article 67
- 465 Article 60
- 466 Article 63
- 467 Article 63

## NOTES (continued)

**468** Article 63

**469** Article 64

**470** Article 65

**471** Article 66

**472** Article 66

**473** Article 67

**474** Article 68

**475** Article 69

**476** Article 80

**477** Article 80

**478** Article 71

# Commonhold Units

The Commonhold Unit	117
Dealings with the Commonhold Unit	118
Alterations to a Commonhold Unit	130
Changing the Size	130
Prescribed Interests	131
Part unit interests	131
Charges	132
Notes	132

## The Commonhold Unit

A commonhold must consist of at least two commonhold units **479**. The extent of each unit is defined by the CCS and the plans annexed to it. The definition of the commonhold units for a scheme is set out in Annex 2, at items 1, 4 and 5 of the CCS.

A unit may (but need not) consist of a building or part of a building.**480** It could consist of such things as a flat, a house, a shop, an industrial unit, a car park, a storage area, a garden or a golf course.

The CCS must define each of the commonhold units by reference to a written description and a plan which must comply with prescribed requirements set out in the Commonhold (Land Registration) Rules 2004.**481**

In defining a unit the CCS may refer to an area subject to the exclusion of specified structures, fittings, apparatus or appurtenances within the area.**482** For example, it might be appropriate in some cases to exclude fences, gardens, or service media such as air-conditioning or security equipment in order that these are maintained as common parts.

A commonhold unit can consist of two or more parts of the commonhold land which are not contiguous.**483** It is possible therefore for example to have a flat and a car park on separate levels as one unit. Where it is intended to define a car park (or an area such as a storage cupboard) as a unit rather than common parts, then it might be more appropriate to have the area as a separate unit. The reason is that the unit-holder may wish to dispose of the car park to another unit-holder and this is an easier process if the area consists of the whole rather than part of a unit as the transfer of part of a unit requires the consent of the commonhold association and an amendment to the CCS.**484**

While there is quite a bit of flexibility allowed in defining commonhold units, a CCS must exclude from the definition of a commonhold unit the structure and exterior of a building where a building contains all or part of more than one commonhold unit and

# Commonhold Units

may exclude the structure and exterior do so where the building contains only one commonhold unit or part of one commonhold unit.<sup>485</sup> The term structure and exterior for this purpose includes any relevant services within or to the building other than those exclusively serving a commonhold unit.<sup>486</sup> The consequence is that such items remain common parts.

**Example:** For a block of flats, the structure, exterior and common services of the block may not form part of a commonhold unit. However, for a scheme consisting of a series of stand alone industrial warehouses, the CCS may either provide that the structure, exterior or services of each building is part of the relevant commonhold unit, or remains part of the common parts.

Practitioners drafting commonhold documentation should give consideration to whether there are structural or external areas (such as an external balcony) which remain common parts over which limited use rights should be granted.

## Dealings with the commonhold unit

### Transfers of a commonhold unit

A CCS may not prevent a unit-holder from transferring his unit or place restrictions on such transfer.<sup>487</sup> A unit-holder is free to sell his unit on whatever terms he deems fit.

The process of buying and selling a commonhold unit will be similar to the process involved in the sale of any other freehold property. The sale will be subject to the usual conveyancing procedures and searches.

In addition to these, conveyancers will have to have regard to the commonhold documentation which relates to the title concerned.

### Acting for the seller

A conveyancer acting for a seller of a commonhold unit will be requested by the conveyancer acting for the buyer to provide a commonhold unit information certificate. The purpose and effect of such a certificate is covered below.

# Commonhold Units

In addition, the conveyancer should obtain sufficient information from his client to respond to pre-contract enquiries raised by the buyer's conveyancer.

## Acting for the buyer

A conveyancer acting for a buyer of a commonhold unit will have to review the commonhold documentation, namely the CCS and the memorandum and articles of association of the commonhold association. These details are held by the Land Registry. They are not permitted to be exempt information documents.<sup>488</sup>

Where the property is being purchased in joint names, the conveyancer will need to notify the proposed unit-holders that only one of them can be recorded as a member of the commonhold association.<sup>489</sup> It is important for the conveyancer to check the position with their client as if no nomination is made, the secretary of the commonhold association will enter as a member the person whose name first appears in the proprietorship register of the unit.<sup>490</sup>

The conveyancer will also need to give notice of the transfer to the commonhold association within 14 days of completion of the transfer.<sup>491</sup> Form 10 is to be used if a transfer of the whole of a unit, and Form 11 if the transfer is of part of a unit.<sup>492</sup>

Where the transfer of a unit occurs by operation of law, for example by way of succession or insolvency, a Form 12 must be used.<sup>493</sup>

## Reviewing the CCS

The Commonhold Community Statement will raise issues which are not dissimilar to those which arise in the context of a leasehold title. However, rather than having to advise on the terms of a lease the conveyancer will have to advise on the local law which is created by the CCS.

Relevant matters in the CCS are:

- any departures from the standard provisions;
- Identification of the commonhold unit (by reference to the plans at Annex 2);

# Commonhold Units

- the rights which benefit and/or burden the commonhold unit (set out in Annex 2);
- the proportion of commonhold assessment and reserve fund assessments allocated to the commonhold unit (Annex 3);
- the proportion of votes allocated to the commonhold unit (Annex 3);
- the permitted use for the commonhold unit and other units (Annex 4);
- rules applying to use of the common parts (Annex 4);
- limited use areas attaching to the unit (and/or other units) (Annex 4);
- the risks the common parts are insured against and insurance duties in respect of the units (Annex 4);
- duties in respect of the maintenance and repair of commonhold units (Annex 4); and
- any ongoing development rights.

## **The Commonhold Association**

A conveyancer acting for a buyer of a commonhold unit should make enquiries regarding the affairs of the commonhold association.

Enquiries should be made on such matters as:

- The financial position of the Commonhold Association -
  - Have assessments been paid in respect of the unit?
  - Are there any outstanding liabilities from unit-holders to the association, which may could cause a cash flow problem for the association?
  - Have there been any emergency assessments or unusually large or small assessments?
  - Have reserve funds been set up for major items of plant? If so, has the association levied assessments in respect of these funds? What is the balance of these funds?
- The conduct of the Commonhold Association

# Commonhold Units

Have meetings of the association been held as required by the Act?

Do the minutes identify any disputes or problems?

Have any resolutions been passed which might affect the unit?

Have any amendments been made to the CCS which are yet unregistered?

Is there an upcoming commonhold association meeting at which amendments are being put? If so, what motions have been put?

- Management

What arrangements have been made in respect of the management of the common parts?

Have managing agents been appointed? If so, on what terms?

- The common parts

Do the minutes identify any defects or major items of repair?

Is insurance in place in respect of the common parts?

Does the insurance cover the insured risks required under the CCS?

Have any claims been made under the insurance policy?

A precedent set of pre-contract enquiries is contained at Precedent [ ]

In addition the buyer's conveyancer should request the seller's conveyancer to obtain a commonhold unit information certificate and ensure that any outstanding liabilities are dealt with in the contract and are promptly paid following completion.

The model CCS provides for a unit-holder to give notice to the commonhold association requiring the association to provide a commonhold unit information certificate in respect of the debts owed by any former unit-holder (including the Seller) in respect of

# Commonhold Units

commonhold assessment and reserve fund levies and interest thereon. The commonhold association is required to respond within 14 days by providing the certificate which is to be in Form 9.494

## PRACTICE POINT

### Commonhold Unit Information Certificate

The commonhold unit information certificate contains the following information:

- The name of the commonhold;
- The relevant unit number;
- The address of the commonhold unit;
- The name, address and registered company number of the commonhold association; and
- The amount outstanding from the unit-holder to the commonhold association and how such sum is calculated.

Where a commonhold unit information certificate has been provided the new unit-holder cannot be required to pay more than the amount specified in the certificate for the period up to and including the date of the certificate.<sup>495</sup> Therefore it is important that the person preparing the certificate gets the amount outstanding correct as otherwise the commonhold association will not be able to recover the excess from the new unit-holder.

### Off-Plan Sales

Where a sale is made 'off the plan' the buyer's conveyancer will need to give advice regarding the developer's obligations under the sale contract, any development rights reserved and on the process between contract and completion of the purchase.

It will also be appropriate to advise on the management arrangements proposed for the scheme and on what scope there is for the developer to make changes to the scheme documentation prior to registration.

# Commonhold Units

## CML Requirements

The Council of Mortgage Lenders requirements were updated on 6 May 2005, to include additional requirements in relation to commonhold units. Practitioners acting on behalf of mortgages for properties covered by the requirements will need to bear in mind the provisions dealing with commonhold.

Not all members of the CML have been prepared to lend on commonhold units at this stage. Part 2 of the CML handbook which sets out the requirements of individual lenders specifies whether a particular member will accept part of a commonhold as security.

Where part of a commonhold is accepted as security, then in addition to other requirements in the Lender's Handbook, practitioners will need to:

- Ensure that the commonhold association has obtained insurance in accordance with the lender's requirements;
- Obtain a commonhold unit information certificate and ensure that the commonhold assessment has been paid to the date of completion - although the Lender's Handbook does not refer to reserve fund levies, practitioners should ensure that these are paid to the date of completion as well;
- Ensure that the CCS does not include any material restrictions on occupation or use;
- Ensure that the CCS contains a provision requiring in the event of voluntary termination of the commonhold, the termination statement provides that the unit holders will ensure that any mortgage secured on the unit is repaid on termination - this requirement stems from a concern raised by the CML about the affect of termination on existing charges. The Act does not specify that such charges are extinguished on termination of registration of the land as commonhold land. This provision is not included in the model CCS so it will need to be specifically included in each CCS. Practitioners drafting a CCS for a residential scheme will need to ensure that such provision is included.
- Make a company search to verify the existence of the commonhold association and that it has not been wound up or

# Commonhold Units

that there is no registered indication that it is to be wound up;

- Send the notice of transfer of the commonhold unit and notice of the mortgage to the Commonhold Association within 14 days of completion.

## Letting of a Commonhold Unit

Unlike the position with regard to transfers, restrictions can apply in respect of the letting of a commonhold unit.

## Residential Commonhold Units

The Act permits Regulations to impose restrictions on leases of residential commonhold units.<sup>496</sup> A residential unit is one which the CCS requires to be used only for 'residential' or for 'residential and incidental purposes'.<sup>497</sup>

The Regulations provide that a lease of a residential unit for a term certain must not be granted:

- for a premium;
- for a term longer than seven years; or
- under an option or agreement if the person to take the lease has an existing term, which when added to the new term will be for more than seven years, and where the option was entered into at the same time or before the existing term.<sup>498</sup>

Also, a lease of a residential commonhold unit must not contain:

- an option or agreement which grants on the landlord or the tenant an option or agreement for a further term which, together for the original term, amounts to more than seven years;
- an option or agreement to extend the term beyond seven years; or
- a provision requiring the lessee to make payments to the Commonhold Association in discharge or payment which are due to be made by the unit-holder in accordance with the CCS.<sup>499</sup>

# Commonhold Units

**Example:** A Limited proposes to enter into a lease with B for the letting of a residential commonhold unit for a term of 4 years. It would not be possible for the lease to contain an option for the tenant to take a further lease of more than 4 years. However, it would be permissible for the lease to contain an option for the tenant to take a further term of 2 years as the total term would not exceed 7 years.

If a lease or agreement contravenes the above provisions then it will be of no effect but a party to the instrument can apply to the court for an order:

- (a) providing for the lease or agreement to have effect as if has a term which complies with the Act;
- (b) providing for the return or payment of money (such as the return of a premium or payment of mesne profits for the period of occupation); or
- (c) making such other provision as the court thinks appropriate.**500**

The Act refers to the grant of a 'term of years absolute'. This includes a lease granted without a rent, a reversionary lease, a sub-lease, a lease granted for less than a year and a lease terminable by notice or forfeiture.

The limitations that have been imposed in relation to residential units are driven by a fear to avoid a practice of unit-holders buying commonhold units and then letting them on a long lease for a premium and to ensure that the decision-making power rests with the person with the greatest economic interest in the property.

The only exception to these rules is that it is permissible to grant a lease of up to 21 years to the holder of a lease which has been extinguished on establishment of the scheme.**501** Any such lease, however must comply with the conditions set out in the following table:

# Commonhold Units

FEATURES	CONDITIONS
Premises	The same as the extinguished lease
Terms	The same (including rent review) as the extinguished lease except to the extent necessary to comply with the Act and the Regulations and except for any terms that are spent
Rent	The same as the rent payable under the extinguished lease
Term	The unexpired term of the expired lease (subject to a maximum of 21 years)
Commencement Date	Immediately after the lease was extinguished
Option	Must not contain an option or agreement which may create a term or extension which, together with the term would amount to more than 21 years or may result in the grant of a term of years absolute containing an option or agreement to extend the term

It is important to note that these restrictions only apply to parts of the scheme which are commonhold units. There may be circumstances for example where part of the common parts of the scheme is being used for residential purposes. An example might be the use of part of the common parts as a caretaker's flat. In this case the restrictions on term would not apply.

## Non-residential units

The Act does not impose any restrictions on lettings of non-residential units. However it is open for a CCS to impose restrictions.[502](#)

A CCS could contain restrictions as to such things as:

- the term (for example no leases of less than 6 months or for longer than 15 years);
- the permitted user (for example to maintain a mix of retail uses in a mixed use or commercial scheme); or
- the class of occupier (for example, a lease of a car park might first be required to be offered to an existing owner or occupier of another unit).

The right to impose restrictions will be subject to relevant legislation, such as that which prohibits discrimination.

Obviously developers will need to consider the effect of any such restrictions on the marketability of units when setting up schemes.

# Commonhold Units

It is important to note that the provision allowing a CCS to impose restrictions only applies in respect of commonhold units which are not residential within the meaning of section 17 of the Act (ie. not a unit which the CCS requires to be used only for residential purposes or for residential and other incidental purposes). There appears to be no scope to impose restrictions in the CCS for residential units.

For this reason, it might be appropriate to designate areas such as car parks as separate units rather than to include them as part of a residential unit, if it is intended that restrictions such as those referred to above are applied. The consequence of this however, is that there can be no restrictions imposed on the freehold transfer of the unit as the car park would constitute the whole of a unit.

## Diversion of Rent

A lease may not contain provisions requiring the tenant to make payments to the Commonhold Association in discharge of payments which are due to be made by the unit-holder in accordance with the CCS.<sup>503</sup> However, the model CCS contains provisions permitting the Commonhold Association to require the diversion of rent where an owner has failed to pay commonhold assessments or reserve fund assessments.

The procedure is as follows:

- The Commonhold Association serves a notice on the tenant in Form 6 requiring the tenant to divert rent until the Commonhold Association has recovered the amount due.<sup>504</sup>
- The Tenant must make the payments but is not required to pay more rent than is due under the tenancy agreement or any earlier than due under the tenancy agreement.<sup>505</sup>
- Unless the Commonhold Association specifies a later date in the notice, the tenant must make the first payment on the next date after the notice is given that rent is required to be paid under the tenancy agreement.<sup>506</sup>
- The Commonhold Association must notify the tenant and the unit-holder within 14 days of when all payments have been made, that the diversion of rent has ended.<sup>507</sup>

# Commonhold Units

If the tenant fails to pay the amount due, the tenant is liable for interest on the outstanding money.**508**

If the tenant fails to make payments as required, the Commonhold Association can require the diversion of rent payable by a sub-tenant to the tenant along similar lines.**509**

Any payments made to the Commonhold Association in accordance with these provisions will discharge the liability of the unit-holder to the Commonhold Association, and the tenant / subtenant to the unit-holder/tenant as the case may be.**510**

## **New Leases**

### (a) Considerations for Landlords

Before granting a lease in a commonhold unit, the prospective landlord must give the tenant:

- a copy of the CCS, including plans relevant to the commonhold unit; and
- a notice in Form 13 informing the tenant that he will be required to comply with provisions in the CCS on grant of the lease.**511**

If the landlord fails to comply with this provision, and the tenant suffers loss as a result of an obligation in the CCS being enforced against the tenant, the tenant may give the landlord a notice requiring the landlord to reimburse him for that notice, unless the obligation is reproduced in the tenancy agreement.**512** The landlord is then obliged to reimburse the tenant for the loss suffered within 14 days of the notice.**513**

It would therefore be prudent for a landlord to send a full copy of the CCS (including all plans) to the prospective tenant and to get an acknowledgement from the tenant that the tenant has received the CCS and Form 13 before the lease is entered into.

The CCS also requires the landlord to give notice of the lease to the commonhold association within 14 days of the date on which the lease is granted, in Form 14 [notice of grant of a tenancy in a

# Commonhold Units

commonhold unit] and provide a copy of any written lease agreement.<sup>514</sup>

## **(b) Considerations for Tenants**

Practitioners acting for tenants of commonhold units, should review the terms of a CCS to identify such matters as:

- whether the CCS imposes any conditions in respect of letting;
- any rights attaching to the commonhold unit which attach to the unit (for example limited use areas such as car parks);
- any rights granted in respect of the commonhold unit (for example rights of entry for repair or rights to connect to services);
- whether the CCS contains any restrictions on use of the commonhold unit which would interfere with the use permitted under the lease; and
- whether the CCS contain other provisions affecting the commonhold unit which could interfere with the beneficial use and occupation of the property (for example restrictions on signage or restrictions on alterations).

Any purported lease which contravenes a restriction in the CCS will be void from the outset. The jurisdiction to grant consequential relief does not apply in this situation.<sup>515</sup>

Practitioners acting for tenants should in particular bring to their client's attention the dispute resolution provisions of the CCS and the provisions dealing with diversion of rent.

## **Assignment of a Lease**

### **Outgoing Tenant**

Before assigning a tenancy in a commonhold unit, a tenant must give the prospective assignee:

- a copy of the CCS, including plans relevant to the commonhold unit; and

# Commonhold Units

- a notice in Form 15 [Notice to a prospective assignee] informing them that he will be required to comply with provisions in the CCS on assignment of the lease.**516**

If the outgoing tenant fails to comply with this provision, and the assignee suffers loss as a result of an obligation in the CCS being enforced against the assignee, the assignee may give the outgoing tenant a notice requiring the outgoing assignee to reimburse him for that loss, unless the obligation is reproduced in the tenancy agreement.**517** The outgoing tenant is then obliged to reimburse the tenant for the loss suffered within 14 days of the notice.**518**

It would therefore be prudent for a outgoing tenant to send a full copy of the CCS (including all plans) to the prospective assignee and to get an acknowledgement from the assignee that the assignee has received the CCS and Form 15 before the contract for the assignment is entered into.

## **Assignee (incoming tenant)**

The matters to consider are similar to those for a tenant under a new lease. The assignee must give notice of the assignment to the Commonhold Association

## Alterations to a Commonhold Unit

The model CCS provides that the Commonhold Association may not make alterations to the common parts without the approval of the members.**519**

While the model CCS does not contain any restrictions on alterations to commonhold units, it may be appropriate to set out some restrictions on alterations (particular for a multi-occupier building) as alterations may affect other occupiers and/or the common parts.

## Changing the Size

Any change to a CCS to redefine the extent of a commonhold unit requires the prior written consent of the unit-holder and any chargee **520**.

# Commonhold Units

Where land is removed from a commonhold unit, the charge is extinguished as it relates to the land removed.<sup>521</sup> Similarly where land is added to a commonhold unit, the charge is extended to apply to the land added.<sup>522</sup>

## Prescribed Interests

Under the Act, interests of a prescribed kind in respect of a commonhold unit (none yet prescribed) may not be granted without the Commonhold Association being a party to the interest or without the written consent of the Commonhold Association. <sup>523</sup> The Association may only enter into the transaction or give its consent if it passes a resolution to do so and at least 75 percent of those who vote on the resolutions vote in favour. <sup>524</sup> The prescribed interests will not include a charge or any interest which arises by virtue of a charge. <sup>525</sup>

## Part unit interests

It is not possible to create an interest in part only of a commonhold unit <sup>526</sup>. However, this does not prohibit:

- the grant of a lease over part of a unit for a term of years absolute (but subject to the other restrictions in respect of residential units), or
- the transfer of part of a commonhold unit, if the Commonhold Association consents in writing to the transfer <sup>527</sup>.

This prohibition does not apply to acquisition by compulsory purchase <sup>528</sup>.

Where part of a commonhold unit is transferred it either becomes another commonhold unit or if the request for consent states that paragraph 21(9)(b) of the Act is to apply it becomes part of another commonhold unit specified in that request. The consent must be by way of resolution of the association and at least 75% of those who vote on the resolution must vote in favour <sup>529</sup>.

On transfer of a CCS it will be necessary to change the CCS to deal with the reallocation of commonhold assessments and to amend the description of the units.

# Commonhold Units

**Example:** John has a car park which together with his flat forms a unit, which he no longer needs. His neighbour Peter wants to acquire the car park. In order to transfer the freehold in the car park John requires the consent of the Commonhold Association. If Peter wants the car park to be attached to his unit then he will have to state that paragraph 21(9)(b) of the Act is to apply when requesting the consent. If not, on transfer the car park will constitute a new separate commonhold unit.

## Charges

A CCS may not prevent or restrict the creation, grant or transfer by a unit-holder of a charge over his unit **530**. It is not possible, however to create a charge over part only of a commonhold unit **531**. Any instrument which purports to create a charge over part of a commonhold unit will be of no effect **532**. This applies not only to the freehold but also to a charge over a lease of part of a commonhold unit.

**Example:** A owns a unit in a commercial scheme. He no longer needs all of his space and wants to let part of its unit to B. B will not be able to offer a charge over its lease as the lease is of part of a unit.

## NOTES

**479** CLRA S.11(2)

**480** s.11(4) The earlier bills contained a rule known as the 'built rule' that all parts of a commonhold had to be structurally complete before units were transferred to buyers. Some other jurisdictions prohibit the completion of sales until units have been structurally completed.

**481** See [Requirements relating to documents to be provided](#)

**482** CLRA s.11(3)

**483** CLRA s.11(3)(d)

**484** see CLRA s.21(2)(c)

**485** Regulation 9(1)

**486** Regulation 9(2)

**487** CLRA s.15(2)

**488** Commonhold (Land Registration) Rules 2004, rule 3(3)(c)

**489** CLRA Schedule 3, para 8

- 490** ibid para 8(4)
- 491** model CCS para 4.7.8
- 492** ibid
- 493** Model CCS para 4.7.9
- 494** Model CCS para 4.7.2
- 495** Model CCS, paragraph 4.7.4
- 496** CLRA s.17(1)
- 497** CLRA s.17(5)
- 498** Regulation 11(1)(a)-(c)
- 499** ibid (d)-(f)
- 500** CLRA s.17 (4)
- 501** Regulation 11(2)
- 502** CLRA s.18
- 503** Regulation 11(1)(f)
- 504** model CCS para 4.2.18
- 505** model CCS para 4.2.19 and 4.2.20
- 506** model CCS para 4.2.2.1
- 507** model CCS para 4.2.22
- 508** model CCS para 4.2.20
- 509** model CCS para 4.2.27 - 4.2.38
- 510** model CCS para 4.2.24 & 4.2.34
- 511** model CCS para 4.7.12
- 512** Model CCS para 4.7.12
- 513** Model CCS para 4.7.14
- 514** Model CCS para 4.7.15
- 515** this consequential relief applies to a lease of a residential unit which is not in accordance with the prescribed requirements
- 516** Model CCS para 4.7.16
- 517** Model CCS para 4.7.17
- 518** Model CCS para 4.7.18
- 519** Model CCS para 4.6
- 520** CLRA s.23
- 521** CLRA s.24(4)
- 522** CLRA s.24(5)
- 523** CLRA s.20(3)
- 524** CLRA s.20(4)
- 525** CLRA s.20(6)
- 526** CLRA s.21(3)
- 527** CLRA s.24
- 528** CLRA s.60(3)
- 529** CLRA s.21(8) applying s.20(4)
- 530** CLRA s.210(1)(6)
- 531** CLRA s.22(1)
- 532** CLRA s.22(2)

# Common Parts

Defining the Common Parts	134
Managing the Common Parts	135
Dealing in Common Parts	136
Additions to Common Parts	137
Alterations of Common Parts	138
Notes	139

## Defining the Common Parts

The common parts of a commonhold scheme consist of those parts of the commonhold land that are not designated as part of a commonhold unit in the CCS. **533** The commonhold units are defined by reference to plans annexed to the CCS and written description in sections 2 and 3 of Annex 2 of the CCS.

Parts of the common parts may be designated as limited used areas in the CCS. **534**

The common parts must include the structure and exterior of a self-contained building which contains more than one unit. **535** In the case of a self-contained building or self-contained part of a building which only contains one commonhold unit or part of one commonhold unit, the CCS may include the structure and exterior as part of the common parts but need not do so. **536** Under the Act the term structure and exterior includes any relevant services within or to the building other than those exclusively serving a commonhold unit. **537** Relevant services are defined as 'services provided by the means of pipes, cables or other fixed installations'. **538**

**Example:** In a block of flats, the common parts will include the structure and exterior of the building. It would include any exterior balconies, which would need to be allocated as limited use areas for the benefit of the appropriate units. The common parts would also include any services which run through any units, to the extent that the services do not exclusively service a particular unit.

Where a commonhold consists of a number of stand alone units, then the structure and exterior of those units may constitute common parts but need not do so

Unlike the position in some other jurisdictions there is no requirement for there to be any common parts. In theory therefore a commonhold may consist entirely of commonhold units.

The common parts of the commonhold will be vested in the Commonhold Association at the end of the transitional period in the case of a registration without unit holders **539** and immediately on registration with unit holders **540**.

# Common Parts

## Managing the Common Parts

### Use

The use of the common parts of a commonhold will be regulated by the terms of the CCS. Most of the rules relating to the use of the common parts for a scheme will be contained in the local rules which will have to be added on a case by case basis.

In addition to the local rules created for the scheme, the model CCS contains the following relevant provisions:

- paragraph 3.23.2: this provides that a unit-holder or tenant must not use the common parts other than in accordance with their permitted use as specified in paragraphs 3 or 4 of Annex 4, or other than in accordance with the rights specified in paragraph 6 of Annex 2;
- paragraph 4.6: this provides that the Commonhold Association may not make or permit alterations to the common parts unless the alteration is approved by ordinary resolution.

While all unit holders will generally have the right to use the common parts, there may be certain parts which are identified as limited use areas. Use of such areas will be subject to the limitations imposed in paragraph 4 of Annex 4. Examples of limited use areas are contained in the precedent CCS.

### Management

A Commonhold Association has a duty to manage the common parts of its commonhold, namely to repair, maintain the common parts to an appropriate standard and to insure them.

#### (a) Repair Obligation

The Commonhold Association has an obligation to repair and maintain the common parts. **541** This includes decorating them and putting them into sound condition. **542** The CCS also obliges the commonhold association to use the proceeds of any insurance taken out in respect of the common parts for the purpose of rebuilding or reinstating the common parts.

# Common Parts

## (b) Insurance Obligation

The Act requires a CCS to make provision to requiring the Commonhold Association to insure the common parts **543**. The model CCS requires the Commonhold Association to insure the common parts to their full reinstatement value and reinstatement costs, against loss or damage by fire and the other risks specified in paragraph 5 of Annex 4 **544**.

In order to comply with CML requirements, insurance should be taken out in relation to the following:

Fire, lightning, aircraft, explosion, earthquake, storm, flood, escape of water or oil, riot, malicious damage, theft or attempted theft, falling trees and branches and aerials, subsidence, heave landslip, collision, accidental damage to underground services, professional fees, demolition and site clearance costs and public liability to anyone else.

The model CCS requires the Commonhold Association to keep details of the insurance and evidence of payment of the most recent premium at its registered office, or such other place as the directors think fit. **545** The CCS also requires the Commonhold Association to apply the proceeds of the insurance policy towards rebuilding or reinstating the common parts. **546**

Unit holders are entitled to inspect the insurance policy on giving reasonable notice and upon payment of the Commonhold Association's reasonable charges may require the Commonhold Association to provide a copy of the policy. **547**

In addition to insurance relating to the common parts, it may be appropriate to maintain other forms of insurance for the commonhold association, such as insurance for assets owned by the commonhold association, and directors liability insurance.

## Dealing in Common Parts

### Transfers / Leases / Easements

A Commonhold Association is free to sell or deal with its freehold interest in the common parts **548**. It can grant easements or leases

# Common Parts

over common parts. Nothing in a CCS may prevent or restrict the transfer by the Commonhold Association of its freehold estate in the common parts. **549**

Similarly a Commonhold Association is free to let part or the whole of the common parts and create other interests such as easements.

Importantly, unlike the position in some other jurisdictions, a decision to sell or lease part or all of the common parts will not require unanimity of the Commonhold Association.

An application to register a transfer of the whole or part of the common parts must be accompanied by an application to register an amended CCS. **550**

## Charges / Mortgages

Charges over common parts are not permitted save for legal mortgages approved by unanimous resolution of the Commonhold Association prior to the grant of the mortgage. **551** This would not only prohibit the grant of a charge by the Commonhold Association but also a charge over any part of the common parts which are let.

## Additions to Common Parts

There are a number of ways in which additional common parts may be added to the commonhold:

1. the addition of land to the commonhold through the exercise of development rights
2. addition of common parts by conversion of a unit into common parts; and
3. enlargement under section 41 of the Act.

## Enlargement through development rights

A developer may through the exercise of development rights add land to the commonhold. **552** Similarly a developer may remove land. **553** The addition of land will be effected by registration of a new commonhold community statement with a transfer of the relevant land.

# Common Parts

## Conversion of a unit into common parts

In some cases, a commonhold unit may be converted into part of the common parts. This may be done by way of an amendment to the CCS but the prior written consent of the registered proprietor and any chargee is required. **554** The amendment must specify the land which formed the unit and provide for that land to be added to the common parts. **555**

On registration of the amended CCS the Commonhold Association will be entitled to be registered as the registered proprietor of the freehold estate in the additional land. **556** The registrar will register the Commonhold Association as registered proprietor without a further application being made. **557**

## Enlargement under section 41

Enlargement to the commonhold may occur by the addition of units, common parts or both by adding to the commonhold through the adding of land through horizontal enlargement or through by building upwards .

An application for enlargement may not be made unless it is approved by a unanimous resolution of the Commonhold Association prior to the application to add the land is made. **558**

The application to add land must be accompanied by:

- the consent of any party required under section 3 or an order waiving consent, or evidence of deemed consent, **559**
- an application for registration of an amended CCS, in accordance with section 33 of the Act **560**; and
- a certificate from the directors of the Commonhold Association that the application to add the land does not relate to the land which may not be registered as commonhold land and that the necessary resolution of the Commonhold Association was obtained. **561**

Where the land added is to consist only of the common parts, then the application to register the land as commonhold land will not be subject to section 7. Once the application is registered the

# Common Parts

## PRACTICE POINT

### Enlargement

The process of enlargement cannot be used as a means of joining two separate commonholds without the termination procedure applying. The land which is added to the commonhold may not already be registered as commonhold land. Therefore if it is intended that an adjoining commonhold be added to a scheme, then the adjoining Commonhold Association would have to be wound up before the land could be added to the scheme.

Commonhold Association will be registered as the proprietor of the freehold estate in the added land and the rights and duties imposed by the CCS insofar as they relate to the added land will commence on registration.

### Alterations of common parts

A Commonhold Association may not make or permit any alterations to the common parts unless the alteration is approved by ordinary resolution. **562**

There is no provision permitting the amendment of common parts by unit-holders although it would seem possible that a commonhold association could authorise a unit-holder to make amendments provided that such alterations are approved by ordinary resolution of the Commonhold Association.

## COMMON PARTS NOTES

- 533** CLRA s.25(1)
- 534** as set out in Section 4 of Annex 4 of the CCS
- 535** Regulation 9(1)(b)
- 536** Regulation 9(1)(a)
- 537** Regulation 9(2)
- 538** Regulation 9(2)
- 539** under CLRA section 7
- 540** under CLRA section 9
- 541** model CCS, paragraph 4.5.1
- 542** ibid
- 543** CLRA s.26(b)
- 544** model CCS, paragraph 4.4.1
- 545** model CCS, paragraph 4.4.3
- 546** model CCS, paragraph 4.4.2
- 547** model CCS, paragraph 4.4.4
- 548** CLRA s.27(1)
- 549** CLRA s.27(1)(a)
- 550** Commonhold (Land Registration) Rules 2004, r 16(1); the application must be in Form CM3
- 551** CLRA s.29
- 552** CLRA, Schedule 4, paragraph 4
- 553** CLRA, Schedule 4, paragraph 5
- 554** CLRA s.30(2)
- 555** CLRA s.30(1)
- 556** CLRA s.30(4)(a)
- 557** CLRA s.30(4)(b)
- 558** CLRA s.41(3) and (4)
- 559** CLRA s.41(5)(a); CLRA Schedule 1 paragraph 6
- 560** CLRA s.41(5)(b)
- 561** CLRA s.41(5)(c)
- 562** CCS Paragraph 4.6.1

# Disputes and Enforcement

Disputes	141
The Act and Regulations	141
Disputes arising from the CCS or the Act	142
Other Disputes	146
Enforcement Issues	146
Notes	147

## Disputes

Adopting a commonhold structure for a scheme will not mean an end to disputes in the community. While there may not be the traditional landlord and tenant tension, other normal tensions between neighbours and tensions between unit-holders and the commonhold association may arise.

The rules of the commonhold will apply to all unit-holders. Disputes may arise regarding breaches of those rules, or arising from a failure of a unit-holder to meet his or her financial obligations to the commonhold association. The experience from other jurisdictions is that disputes regarding the misuse of common property, noise, and keeping of animals will be just as common in a commonhold scheme as they would be in a long leasehold scheme. The difference is that with a commonhold scheme, there will not be a landlord or landlord's surveyor to arbitrate.

Apart from disputes between unit holders, disputes in a commonhold may also arise between the commonhold members and the board as to the performance of the director's duties or the exercise of powers or between the commonhold association and third parties such as managing agents or neighbouring owners.

The experience from other jurisdictions where similar systems have been in place for many years is that there needs to be an efficient and fair system of resolving these types of disputes.

## The Act and Regulations

The Act permits regulations to make provision about the exercise or enforcement of rights and duties imposed or conferred by the Act, a CCS, and the memorandum or articles of a Commonhold Association. **563** So far the only regulation dealing with such issues is the regulation conferring jurisdiction on the county courts to deal with matters. **564**

The Act also permits regulations to require that a Commonhold Association be a member of an approved ombudsman scheme **565** but so far no such regulations have been made.

If the association fails to comply with such a regulation (when

# Disputes and Enforcement

passed) a unit-holder (which includes a tenant for this purpose) may apply to the High Court for an order requiring the directors to ensure that the Commonhold Association complies. **566**

## Disputes arising from the CCS or the Act

The model CCS sets out a dispute resolution procedure which must be adopted by each Commonhold Association for the enforcement of rights and duties arising from the CCS or the Act. It does not apply to disputes generally, only those arising from the CCS or the Act.

The procedure involved differs depending on who is making the complaint and against whom the complaint is being made.

### Enforcement by unit holder or tenant against the Commonhold Association

A unit-holder or tenant must use the following dispute resolution procedure when seeking to enforce against the Commonhold Association a right or duty contained in the CCS or a provision made by or by virtue of the Act:

(a) The unit-holder or tenant (the complainant) must first consider resolving the matter by:

- direct negotiation with the Commonhold Association; or
- alternative dispute resolution methods such as arbitration, mediation and the like other than legal proceedings **567**;

(b) If the matter is not resolved, then the complainant must, if he wishes to take further action, give a complaint notice to the Commonhold Association in Form 17; **568**

(c) The Commonhold Association may respond by giving a reply notice in Form 18; **569**

(d) Upon receipt of the reply notice or when 21 days have passed beginning on the date on which the complaint notice is given the complainant must first reconsider whether the matter could be resolved by:

- direct negotiation with the Commonhold Association; or

# Disputes and Enforcement

- alternative dispute resolution methods such as arbitration, mediation and the like other than legal proceedings **570**.

(e) If the matter is not resolved then if the complainant wishes to take further action, the complainant must refer the matter to the ombudsman if the Commonhold Association is a member of an approved scheme **571**. Legal proceedings may only be brought once the ombudsman has investigated and determined the matter and notified the parties of his decision **572**.

If the Commonhold Association is not a member of an approved ombudsman scheme then the complainant may bring proceedings after step (d) **573**.

Where a unit-holder or tenant is seeking to enforce a duty to pay money or a right or duty in an emergency, the complainant may use the dispute resolution procedure above, refer the matter directly to the ombudsman, or bring legal proceedings **574**.

## **Enforcement by Commonhold Association against a unit-holder or tenant**

A Commonhold Association must use the following dispute resolution procedure when seeking to enforce against a unit-holder or tenant a right or duty contained in the CCS or a provision made by or by virtue of the Act:

- (a) The Commonhold Association must first consider resolving the matter by:
- (i) direct negotiation with the unit-holder or tenant (alleged defaulter); or
  - (ii) alternative dispute resolution methods such as arbitration, mediation and the like other than legal proceedings; or
  - (iii) taking no action if it reasonably thinks that inaction is in the best interests of establishing or maintaining harmonious relationships between all the unit-holders and that it will not cause any unit-holder (other than the alleged defaulter) significant loss or significant disadvantage; **575**

# Disputes and Enforcement

(b) If the matter is not resolved, then the Commonhold Association must, if it wishes to take further action, give a default notice to the alleged defaulter in Form 19; **576**

(c) The alleged defaulter may respond by giving a reply notice in Form 20; **577**

(d) Upon receipt of the reply notice or when 21 days have passed beginning on the date on which the default notice is given the Commonhold Association must first reconsider whether the matter could be resolved by:

- direct negotiation with the alleged defaulter; or
- alternative dispute resolution methods such as arbitration, mediation and the like other than legal proceedings; **578**

(e) If the matter is not resolved then the Commonhold Association may either refer the matter to the ombudsman if the Commonhold Association is a member of an approved scheme, or it is satisfied that the interests of the commonhold require it, bring legal proceedings. **579**

Where a Commonhold Association is seeking to enforce a duty to pay money or a right or duty in an emergency, the association may as an alternative to the system above refer the matter directly to the ombudsman, or bring legal proceedings.

## **Enforcement by unit-holder or tenant against another unit-holder or tenant**

A unit-holder or tenant must use the following dispute resolution procedure when seeking to enforce against another unit-holder or tenant a right or duty contained in the CCS or a provision made by or by virtue of the Act:

(a) The unit-holder or tenant (the complainant) must first consider resolving the matter by:

- direct negotiation with the other unit-holder or tenant (the alleged defaulter); or
- alternative dispute resolution methods such as arbitration, mediation and the like other than legal proceedings **580**;

# Disputes and Enforcement

- (b) If the matter is not resolved, then the complainant must, if he wishes to take further action, give a notice to the Commonhold Association requesting that the Commonhold Association take action to enforce the right or duty against the alleged defaulter in Form 21; **581**
- (c) The Commonhold Association must consider the notice and decide whether to take action, and if it does so, then it must take action as soon as reasonably practicable using the dispute resolution procedure referred to above **582**;
- (d) If the Commonhold Association decides to take no action then it must decide whether to allow the complainant to enforce the right or duty against the alleged defaulter directly **583**;
- (e) The Commonhold Association may decide to take no action if it reasonably thinks that inaction is in the best interests of establishing or maintaining harmonious relationships between all the unit-holders and that it will not cause any unit-holder (other than the alleged defaulter) significant loss or significant disadvantage. The Commonhold Association may refuse the complainant the right to take further action if it reasonably thinks that the complaint does not amount to a breach or is vexatious, frivolous or trivial **584**;
- (f) Upon making a decision the Commonhold Association must inform the complainant of its decision in Form 22. **585** If the Commonhold Association fails to comply within 21 days of the date on which the complainant's notice is given, the complainant may enforce the right or duty against the alleged defaulter directly **586**;
- (g) If the complainant wishes to challenge the decision, it may use the dispute resolution procedure referred to above (with respect to a unit-holder or tenant enforcing against a Commonhold Association but the period before which the complainant can refer the matter to the ombudsman/take legal action is seven days rather than 21 days) **587**;
- (h) If the complainant has the right to enforce the right or duty directly, and if he wishes to take further action, he must give a complaint notice to the alleged defaulter in Form 23. **588**

# Disputes and Enforcement

(i) The alleged defaulter may respond by giving a reply notice in Form 24. **589**

(j) Upon receipt of the reply notice or when 21 days have passed beginning on the date on which the complaint notice is given the complainant must first reconsider whether the matter could be resolved by:

- direct negotiation with the alleged defaulter; or
- alternative dispute resolution methods such as arbitration, mediation and the like other than legal proceedings **590**;

(k) If the matter is not resolved then if the complainant wishes to take further action the complainant may bring legal proceedings **591**.

## Other Disputes

The above procedure only applies in respect of rights or duties 'contained in the CCS or a provision made by or by virtue of the Act'. These provisions do not affect the right of a unit-holder or the commonhold association to take proceeding for breach of common law duties or arising under other legislation.

A Commonhold Association is also free to pursue legal proceedings against third parties. By contrast to dispute provisions in some other jurisdictions, there is no requirement for the Commonhold Association to pursue alternative dispute resolution methods in disputes concerning managing agents or other contractors engaged by the Commonhold Association.

## Enforcement Issues

The Regulations confer jurisdiction on county courts to deal with the exercise or enforcement of a right or duty imposed by:

- a CCS;
- the Regulations; or
- Part 1 of the Act - the commonhold part of the Act **592**.

# Disputes and Enforcement

In some cases legal proceedings may be required in order to recover a payment of monies owed by a unit holder. There is no need for the commonhold association to adopt the alternative dispute resolution processes referred to above in such cases.

If legal action is taken against a unit-holder or the Commonhold Association for failure to comply with the terms of the CCS, the appropriate remedy would be an injunction or a mandatory injunction. A unit holder who fails to comply with such an injunction would be liable to imprisonment for contempt of Court.

It is hoped that the inclusion of internal dispute resolution procedures will result in the vast bulk of disputes being resolved without the need for legal proceedings.

## NOTES

- 563** CLRA s37
- 564** Regulation 17
- 565** CLRA s42 (1)
- 566** CLRA s42 (4) and (5)
- 567** model CCS para 4.11.4
- 568** [www.dca.gov.uk](http://www.dca.gov.uk); model CCS para 4.11.5
- 569** [www.dca.gov.uk](http://www.dca.gov.uk); model CCS para 4.11.6
- 570** model CCS para 4.11.7
- 571** model CCS para 4.11.8
- 572** model CCS para 4.11.9
- 573** ibid
- 574** model CCS para 4.11.3
- 575** model CCS para 4.11.12
- 576** [www.dca.gov.uk](http://www.dca.gov.uk); model CCS para 4.11.13
- 577** [www.dca.gov.uk](http://www.dca.gov.uk); model CCS para 4.11.14
- 578** model CCS para 4.11.15
- 579** model CCS para 4.11.16
- 580** model CCS para 4.11.19
- 581** [www.dca.gov.uk](http://www.dca.gov.uk); model CCS para 4.11.20
- 582** model CCS para 4.11.21
- 583** model CCS para 4.2.2(b) and 4.11.23

## NOTES (continued)

- 584** model CCS para 4.11.22
- 585** [www.dca.gov.uk](http://www.dca.gov.uk); model CCS para 4.11.24
- 586** model CCS para 4.11.26
- 587** model CCS para 4.11.22
- 588** [www.dca.gov.uk](http://www.dca.gov.uk); model CCS para 4.11.27
- 589** [www.dca.gov.uk](http://www.dca.gov.uk); model CCS para 4.11.28
- 590** model CCS para 4.11.29
- 591** model CCS para 4.11.30
- 592** Regulation 17

# Termination

The issues	149
Voluntary termination	149
Involuntary termination	152
Termination by Court Order - Other than through insolvency	154
Release of Reserve Fund	154
Notes	154

## The issues

Commonhold Associations like any other limited company can be wound up. While initially there will be very little need for the termination processes provided for in the Act, in due course there will be circumstances where commonholds will need to be terminated. The termination of a commonhold will result in the collapse of the individual titles into a single freehold title.

The imposition of a company structure means that in addition to voluntary termination, there may be circumstances where a commonhold association is wound up involuntarily - through insolvency.

By contrast, in other jurisdictions such as Australia, insolvency is not an issue as the equivalent bodies do not have limited liability. If a body corporate is unable to pay its debts, its members are required to contribute funds to discharge the relevant liabilities.

The early Commonhold Bills (namely those of 1990 and 1996) contained lengthy provisions dealing with insolvency although the number of provisions in the final Act dealing with insolvency was reduced substantially.

## Voluntary termination

### Reasons

There are various reasons why a commonhold may be terminated voluntarily. A building may be converted from one particular use to another, or completely demolished for redevelopment. A typical example would be where a developer offers to acquire all the Property comprising a commonhold in order to redevelop it.

### The Process

There are a number of steps involved in the voluntary winding-up of a Commonhold Association.

First, the directors of the Association must make a declaration of solvency, in accordance with section 89 of the Insolvency Act 1986. **593** This declaration (by way of statutory declaration) must be made by a majority of directors at a directors meeting.

# Termination

## PRACTICE POINT

### Declaration of solvency

A declaration of solvency is a declaration by the directors (or a majority of them) that they have made a full inquiry into the Company's affairs and that having done so they have formed the opinion that the Company will be able to pay its debts in full together with interest at the official rate within a period (not exceeding 12 months) specified in the declaration.

The declaration will be of no effect unless made:

- within 5 weeks immediately preceding the date of the passing of the resolution for winding up; or on that date but before the passing of the resolution; and
- it embodies a statement of the company's assets and liabilities as at the latest practicable date before the making of the declaration **594**.

A director who makes a declaration without reasonable grounds is liable to punishment by imprisonment or a fine or both **595**.

To the extent that the assets of the Association do not exceed its debts, then it will be necessary for the Association to make assessments from its members, before making such a declaration.

Secondly, the Commonhold Association must make a termination statement. **596** This document sets out the proposals for the transfer of the commonhold land, and how the assets of the Association will be distributed. **597**

The Act permits the CCS to provide for termination and the rights of unit-holders in a termination **598** and a CCS may require a termination statement to make such arrangements of a specified kind or determined in a specified manner although no such provisions are included in the model CCS **599**.

# Termination

Such an arrangement in a CCS might provide for the application of funds in accordance with the voting rights allocated to each unit or alternative on the basis of the market value of the respective properties as determined by a third party expert.

It is open for a court to disapply the provisions in a CCS on application by any member of the commonhold association. **600** This provision recognises that termination provisions in the CCS may have been added quite some time prior to the proposed termination and the provisions may be inappropriate in light of the practicalities of the termination.

The final step is for the Association to pass a resolution approving the terms of the termination statement. In order to proceed, at least 80 percent of the unit-holders must vote in favour of the statement. **601**

Following the winding-up resolution a liquidator will be appointed. If less than 100 percent consent was obtained, the liquidator must apply to the court for a winding-up order, **602** within three months of the of which the liquidator was appointed. **603** The purpose of this is to permit those who did not agree with the termination statement to seek different termination terms and conditions from the court.

Even if 100 percent consent is obtained, a liquidator is still permitted to apply to have the court determine the terms of a termination statement if he or she is not content with their terms. **604**

Once the order is made (or following 100% consent) the liquidator then applies to the Registrar (within three months of the court order - in the case of less than 100 percent consent; or six months of the winding-up resolution - in the case of 100 percent consent) for the land to cease to be commonhold land. **605**

The Registrar will proceed to record the Commonhold Association as the proprietor of the freehold estate in each unit and then de-register the commonhold. **606**

# Termination

## Involuntary termination

### Background

In addition to voluntary termination, termination can arise in an insolvency context.

In most other jurisdictions with similar legislation the entities akin to the Commonhold Association were established as new forms of corporate bodies. Here, while the previous attempts at commonhold bills (notably the 1990 and 1996 bills) provided for a new form of corporate body, the Act has not brought this about.

The experience in most other jurisdictions is that insolvency of the entities akin to Commonhold Associations rarely occurs. But this is primarily due to the fact that in most jurisdictions the unit-holders cannot rely on limited liability of the Association. If the Association fails to pay, the unit-holders are ultimately liable and will have to pay.

As Commonhold Associations will be limited companies, the spectre of insolvency will necessarily arise.

### The Process

The usual Insolvency Act rules will apply to the compulsory winding-up of a Commonhold Association by a court. A Commonhold Association may be wound up pursuant to a petition being presented under section 124 of the Insolvency Act 1986.

### Succession Order

An additional feature of the Act is the ability of the court to make a succession order that a successor Commonhold Association take over as registered proprietor of the common parts and to take over management of the commonhold **607**.

The purpose of such an order is to ensure that the common parts remain available to the freehold owners of the commonhold units.

The application for such an order may be made by one or more unit-holders, the insolvent association or a provisional liquidator if one has been appointed. **608** The Act creates a statutory presumption in favour of such an order, such that one should be granted unless the

# Termination

court 'thinks that the circumstances of the insolvent Commonhold Association make a succession order inappropriate'. **609**

A termination application must be accompanied by the certificate of incorporation of the successor association and any altered certificates of association. **610**

Following the making of a succession order the Registrar will be directed to make a change of registration to record the new association as the registered proprietor of the common parts. **611**

The succession order is to make provision as to the treatment of any charge over any part of the common parts. **612**

## No Succession Order

Where no succession order is made the liquidator is to notify the Registrar as soon as possible of the following:-

- (a) The fact that section 54 of the Act applies (by virtue of no succession order has been made)
- (b) Any directions given by the Court under section 168 of the Insolvency Act 1986;
- (c) Any notice given by the liquidator or provisional liquidator of removal of office after the final meeting of creditors under section 172 of the Insolvency Act 1986;
- (d) Any notice given by the liquidator to the secretary of state pursuant to section 174(3) of the Insolvency Act 1986;
- (e) Any application made to the registrar of companies for early dissolution under section 202(6) of the Insolvency Act 1986;
- (f) Any notice given to the registrar of companies under section 205(1)(b) of the Insolvency Act 1986; and
- (g) Any other matter which in the liquidator's opinion is relevant to the Registrar.

Copies of the relevant directions, notice or application are to be provided to the Registrar with the notification. **613**

# Termination

Following notification from the liquidator that no succession order has been made, the Registrar is to make such arrangements as appear to him to be appropriate to procure that the land ceases to be registered as commonhold land as soon as reasonably practicable and take such action as he considers appropriate to give effect to any determination made by the liquidator in exercising his functions. **614**

## Termination by Court Order - Other than through insolvency

Where a court orders land to cease to be registered as commonhold land, either as a result of a registration in error or in consequence of an order for rectification of documents, then the court has the same powers it would have in making a winding-up order. **615** A person appointed by liquidator by the court in such circumstances has the same powers and duties as a liquidator appointed following a winding-up order. The court may confer additional rights or duties on the liquidator, modify or remove a right of duty of the liquidator or require the liquidator to exercise his functions in a particular way.

## Release of Reserve Fund

Where a Commonhold Association is to be wound up, either pursuant to a winding-order by the court, the passing of a voluntary winding-up resolution, or as a result of a court order under section 6(6)(c) or 40(3)(d), then the proceeds of any release fund will be available to meet the debts of the association. **616** Clause 49(4) which prohibits such funds being used for the enforcement of a judgment debt referable to a reserve fund activity cease to have effect. **617**

### NOTES

**593** CLRA s43(1)

**594** Insolvency Act 1986 s.89(2)

**595** *ibid* s.89(4)

**596** CLRA s43(1)(b)

**597** CLRA s.47(1)

**598** CLRA s.47(2)

**599** CLRA s.47(2)

## NOTES (continued)

- 600 CLRA s47(4) and s47(5)
- 601 CLRA s43(1)(c)
- 602 CLRA s.45(2)
- 603 Regulation 19(1)
- 604 CLRA s49(3)
- 605 CLRA s44(2) and s45(3) respectively
- 606 CLRA s49(3)
- 607 CLRA s.51
- 608 CLRA s51(2)
- 609 CLRA s51(4)
- 610 Regulation 19 (2)
- 611 CLRA s52(3)
- 612 CLRA s52(4)
- 613 CLRA s.60(3)
- 614 CLRA s.54(4)
- 615 CLRA
- 616 CLRA s.56
- 617 ibid

# Third parties

Third parties	156
Notes	161

## Third parties

### Tenants and licensees

#### Obligations

In a leasehold context, subtenants (and in some cases licensees) are required to perform obligations which would otherwise fall to a superior landlord. Similar issues arise in a commonhold context. The question is to what degree will the local law which applies to a commonhold bind tenants and other parties with derivative interests, and what rights will they have.

The Act permits regulations to impose obligations on a tenant of a commonhold unit, or to enable a CCS to do so. To date no regulations have been made which specifically impose obligations on tenants of commonhold units, but the model CCS, contains compulsory provisions which impose such obligations.

The model CCS provides that

'The rules are for the benefit of, and bind, all unit-holders and the commonhold association. Where stated, rules also bind tenants.'

It is important to note that the Act refers only to regulations relating to tenants of commonhold units. There seems no scope for regulations to impose obligations on tenants of part of the common parts.

The relevant provisions of the CCS which impose obligations on tenants (defined for this purpose as tenants of commonhold units) are as follows:

- The provisions dealing with the diversion of rent in the event of default of payment by the relevant unit-holder; **618**
- The obligation to respond to a Form 8 'Notice requesting further details about a tenancy' received from the Commonhold Association **619**;
- The obligation not to use a commonhold unit other than in

## Third parties

accordance with its permitted use as specified in paragraph 2 of Annex 4 **620**.

- The obligation not to use the common parts other than in accordance with their permitted use as specified in paragraphs 3 or 4 of Annex 4, or other than in accordance with the rights specified in paragraph 6 of Annex 2 **621**.
- The obligation not to let a residential commonhold unit
  - For a premium;
  - For a term of more than 7 years unless regulation 11(2) of the Regulations applies;
  - Under an option or agreement if:
    - The person to take the new tenancy has an existing tenancy of the premises to be let;
    - The new term added to the existing term will be more than 7 years; and
    - The option or agreement was entered into before or at the same time as the existing tenancy;
  - Containing an option or agreement to renew which confers on either party to the tenancy an option or agreement for renewal for a further term which, together with the original term, amounts to more than 7 years;
  - Containing an option or agreement to extend the term beyond 7 years; or
  - Containing a provision requiring a tenant to make payments to the commonhold association in discharge of payments which are, due in accordance with the CCS, to be made by the unit-holder; **622**
- To give notice (in Form 14 [Notice of grant of a tenancy in a commonhold unit]) to the commonhold association of any tenancy granted by the tenant, within 14 days of the date on which the tenancy is granted and to give the commonhold association a copy of the tenancy agreement, or details of the terms of any oral tenancy. **623**
- The obligation to give a prospective assignee a copy of the CCS

## Third parties

(including relevant plans) and a notice in Form 15 [Notice to a prospective assignee] prior to entering into the assignment; **624**

- The obligation to reimburse an assignee for any loss as a result of an obligation in the CCS being enforced against him, where the tenant has failed to provide a copy of the CCS and the notice, unless the obligation is reproduced in the tenancy agreement ; **625**
- The obligation to give the Commonhold Association a notice specifying a full postal address in the United Kingdom including postcode within 14 days of becoming tenant; **626**
- Subject to paragraph 4.11.3 **627** the obligation to use the dispute resolution procedure contained in paragraphs 4.11.4 to 4.11.9 when seeking to enforce against the Commonhold Association a right or duty contained in the CCS or a provision made by or by virtue of the Act. **628**
- Subject to paragraph 4.11.18 **629**, a unit-holder or tenant must use the dispute resolution procedure contained in paragraphs 4.11.19 to 4.11.30 when seeking to enforce against another unit-holder or tenant a right or duty contained in the CCS or a provision made by or by virtue of the Act **630**

These duties are in addition to those imposed by general law. **631**

### Rights

In addition to any rights which arise under general law, tenants of commonhold units have the following rights, granted under the CCS:

- The right to inspect the CCS and memorandum and articles of association, and a right to require the commonhold association to provide a copy on payment of the commonhold association's reasonable charges. **632**
- The right (obligation save as referred to above) to use the dispute resolution procedure to resolve disputes in respect of rights or duties contained in the CCS or a provision made by or by virtue of the Act.

# Third parties

## Mortgagees / Chargees

### Commonhold Units

It is not possible to take a charge over part of a commonhold unit. However, nothing in the CCS may prevent a unit-holder granting a charge over the whole of a unit. **633** A unit-holder will therefore be free to grant a charge over the whole of a commonhold unit, without restriction. The issues relating to CML requirements are covered at [Transfers of a commonhold unit](#).

### Common Parts

The restrictions on the grant of charges over common property are covered at [Requirements of the Act](#)

### Due diligence

Financiers of commonhold units will need to investigate the CCS and what rights and obligations apply to the unit by virtue of the CCS.

- Consideration should be given to the following:
- That the commonhold unit has the necessary rights;
- That the CCS contains adequate provision regarding insurance and repair and that provision has been made for reserve funds where appropriate;
- That the CCS does not contain any material restrictions on use which would impact on value;
- The all commonhold assessment and reserve fund levies have been paid;

### Rights

A mortgagee in possession of a unit may vote in place of a member, **634** but before doing so, the mortgage must provide the Commonhold Association with a certificate confirming that possession has been taken of the unit and an official copy of the charges register showing it as the registered proprietor of the charge. **635**

The mortgagee must deposit this at the registered office, or at such other place as is specified in accordance with the articles for the

## Third parties

deposit of appointments of proxy, before the time appointed for the meeting at which the right to vote is to be exercised. Alternatively such evidence may be presented to the directors at the meeting. **636**

Certain matters also require the consent of chargees. These include consent to registration of land as commonhold land, addition of the land to a commonhold, and changes to the boundary of a commonhold unit or common parts (as the case may).

### Creditors

Creditors dealing with a Commonhold Association will be dealing with a limited company which is subject to the requirements of the Companies Acts and the Insolvency Act. Creditors will not be able to have direct recourse to the assets of the unit-holders or members for debts owing by the Commonhold Association.

A form of restricted liability was proposed in the 1996 Bill and the opposition proposed a similar arrangement for the current Act. This involved permitting a judgment creditor of a Commonhold Association to apply to the court for an order permitting enforcement of all or part of the judgment debt against one or more creditors. The liability of each unit-holder was to be allocated (and capped) at the percentage that each unit-holder is required to pay by way of commonhold assessment. This scheme did not find its way into the Act.

Creditors of commonhold associations should be aware of the restrictions relating to the use of reserve funds in discharging judgment debts (see section on Reserve Funds in The Commonhold Association chapter).

### Compulsory Purchase

The transfer of commonhold land to a compulsory purchaser will result in the land ceasing to be registered as commonhold land unless the Registrar is satisfied that the compulsory purchaser has indicated a desire that the land continue to be commonhold land. **637** The section requiring the consent of the registered proprietor of commonhold unit to land ceasing to form part of a commonhold is disapplied in the case of compulsory purchase. **638**

# Third parties

## NOTES

**618** model CCS paras 4.2.28 to 4.2.40

**619** model CCS, para 4.2.42

**620** model CCS, para 4.3.1

**621** model CCS, para 4.3.2

**622** model CCS, para 4.7.11

**623** model CCS, para 4.7.15

**624** model CCS, para 4.7.16

**625** model CCS, para 4.7.17

**626** model CCS, para 4.9.3

**627** which permits the tenant to bring proceedings to enforce against the commonhold association a duty to pay money or a right or duty in an emergency

**628** model CCS, para 4.11.2

**629** which permits the tenant to bring proceedings to enforce against another unit-holder or tenant a duty to pay money or a right or duty in an emergency

**630** model CCS, para 4.11.17

**631** CCS paragraphs 1.1.2 and 1.1.3

**632** model CCS, para 4.10.4

**633** CLRA s 20(1)

**634** Article 31

**635** Article 31

**636** ibid

**637** CLRA s.60(1) & (2)

**638** CLRA s.60(3)

**639** CLRA s.60(7)

**640** CLRA s.60(4)

Compulsory purchaser for the purposes of the relevant section in the Act means a person acquiring land in respect of which he is authorised to exercise a power of compulsory purchase by virtue of an enactment or acquiring land which is obliged to acquire by virtue of a prescribed enactment or in prescribed circumstances. **639**

Although regulations may make provision regarding compulsory purchase **640** no such regulations have been made at this stage.